Law at a Critical Juncture: Retribution and Criminal Responsibility at the US Army War Crimes Trials in the Philippines, 1945–1947

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The National Archives and Record Administration (NARA) at College Park in Marylyand, USA must surely be one of the most remarkable archival institutions in the world. It must also be one of the most guarded archives in the English-speaking world. The daily routine of entering the archives via three armed checkpoints, manned by security personnel who were not always in the best mood and had rather large guns, was a little off-putting. That said, the archivists at NARA were extremely helpful and I would like to thank them for their assistance. Special thanks to Eric Van Slander, Sharon Culley and many others during my time at College Park. The archivists at the National Diet Library in Tokyo were also very helpful during my visits.

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STATEMENT OF CONTRIBUTION OF OTHERS

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ABBREVIATIONS

1st Lt	First Lieutenant
2nd Lt	Second Lieutenant
AAoW	American Articles of War
ABDACOM	American, British, Dutch, Australian Command
AFWESPAC	American Forces in the Western Pacific
AGLC	Australian Guide to Legal Citation
AWM	Australian War Memorial
CACWSAF	Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field
CILRP	Centre for International Law Research and Policy
CO	Commissioned Officer
Col	Colonel
Conventions II and IV	Convention (II) and (IV) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land
CR	Command Responsibility
CTPW	Convention relative to the Treatment of Prisoners of War
CWCR	Canadian War Crimes Regulations
FM27-10	US Field Manual 27-10
GC	Geneva Convention
GCRTPOW	Geneva Convention Relative to the Treatment of Prisoners of War
GHFEC	General Headquarters Far East Command
GHQSCAP	General Headquarters of the Supreme Commander for the Allies in the Pacific
HC	Hague Conventions
HCR	High Commissioner's Residence
HMSO	His (or Her) Majesty's Stationery Office UK
HoR	House of Representatives
HVO	Croatian Defence Council
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for Yugoslavia
IHL	International Humanitarian Law
IJA	Imperial Japanese Army
IJN	Imperial Japanese Navy
IMTFE	International Military Tribunal for the Far East
IMTN	International Military Tribunal for Nuremberg
JA	Judge Advocate
JAG	Judge Advocate General
LCP	Law Concerning the Punishment of Nazi Criminals, Traitors and their Accomplices (Czechoslovakia)
LoAC	Law of Armed Conflict
LPFWC	Law on the Punishment of Foreign War Criminals (Norway)

Lt	Lieutenant
Lt-Col	Lieutenant Colonel
Lt-General	Lieutenant General
MML	Manual of Military Law (UK)
MN	Military Necessity
MP	Military Police
NARA	National Archives and Records Administration – Maryland, USA
NCO	Non-Commissioned Officer
NLA	National Library of Australia
NVA	North Vietnamese Army
OSJA	Office of the Staff Judge Advocate
OSWC	Ordinance of the Suppression of War Crimes (France)
PLD	Penal Law Decree 1947 (Netherlands)
PO	Petty Officer
POW	Prisoner of War
Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts
QDLR	Qualitative doctrinal legal research
RG	Record Group
RLW	Rules of Land Warfare
SCAP	Supreme Commander for the Allies in the Pacific
SO	Superior Orders
SUVCW	Sons of Union, Veterans of the Civil War
UNSCOR	United Nations Security Council official records
UNTS	United Nations Treaty Service
UNWCC	United Nations War Crimes Commission
UNWCC LRTWC	United Nations War Crimes Commission Law Reports of Trials of War Criminals
USAAF	United States of America Air Force
USAFM	United States Army Field Manual
USAFWPWCC	United States Army Forces Western Pacific War Crimes Commission
USDS	United States Department of State
USGPO	United States Government Publishing Office
USSBS	United States Strategic Bombing Survey
USSC	United States Supreme Court
USWD	United States War Department
VA	Vice Admiral
VC	Viet Cong
WCA	War Crimes Act 1945 (Cth) (Australia)
WCNSM	Constitutional Law 1945 (War Crimes and other National Socialist Misdeeds) (Austria)
WCTD	War Crimes Trials Division (US Philippines Ryukyus Command)
Yamashita trial	Trial of General Tomoyuki Yamashita, Law Reports of Trials of War Criminals, United Nations War Crimes Commission, HMSO, vol IV, 1948, 1

STYLE NOTES

Japanese names are presented with the surname first, followed by the Christian name unless quoting from sources that have used an alternative method. Japanese names are not italicised unless referring to a case. Japanese names are not presented using macrons as it was not the practice at the time in official documents.

Archival sources obtained from the National Archive and Record Administration (NARA) in Maryland, USA, are referenced using NARA's catalogue system. In places, I have provided additional information in the footnotes such as headings, dates, names of authors of letters and other documents to help the reader identify as much information regarding that source as possible.

To the extent possible, all other referencing is in accordance with the Australian Guide to Legal Citation (AGLC4) which is the referencing method adopted by James Cook University, where this thesis is submitted.

Spelling, unless citing from external sources, is in accordance with British English.

ABSTRACT

From 1945 to 1947, the US Army prosecuted over 200 individuals from the Japanese military who were accused of committing war crimes against US and Philippine military and civilian personnel during the period of the Japanese occupation of the Philippines. At these trials, war crimes trials from WWI and earlier conflicts provided useful guidance for some points of law upon which the trials could rely. Legal edicts (usually from General Douglas MacArthur's office) provided further rules that the trials were obliged to follow. However, the trials also developed the law as they went and provide valuable jurisprudence that is, as yet, relatively undiscovered.

The US Army trials in Manila were among the first of the Allied trials conducted after the Pacific War and represent law-making at a critical juncture at a time when war crimes jurisprudence was in its formative stages. These trials represent more than just the machinations of a hastily thrown-together judicial body in the aftermath of war—these trials represent an epoch in law making where complex legal issues of criminal responsibility for war crimes were considered and crafted. The Manila trials provide a significant body of jurisprudence to add to the existing body of laws in regard to establishing the legal standards and relevant law for command responsibility, superior orders and military necessity.

The central question posed in this thesis is how did the jurisprudential approaches to criminal responsibility at Manila contribute to, or provide guidance for other war crimes trials? This question relates to the normative aspects associated with how the law *ought* to be as far as command responsibility, superior orders and military necessity are concerned.

This thesis posits that the Manila trials provide clarity of law in relation to the doctrine of command responsibility, superior orders and military necessity. The trials indicate that there are at least eight instances where commanders could be convicted for the unlawful acts of subordinates. In relation to the defence of superior orders, in most cases, the trials favoured the 'intermediate' test to determine the liability of subordinates for carrying out unlawful orders. In relation to attempts by defendants to use military necessity as a defence to war crimes, the Manila trials held firmly to the stance of not allowing the doctrine of military necessity to be a defence to war crimes.

As such, the law espoused from the Manila trials represents a form of justice that is consistent with the principles of 'just war' theory, specifically, *jus in bello* and *jus post bellum.* This is because the rationale underlying the judgments appears to align with the core principles of the 'just war' tradition that include 'proportionality', 'distinction', 'responsibility' and 'necessity'.

INTRODUCTION

I. Prelude to the Allied War Crimes Trials in the Asia–Pacific

On 26 July 1945, with only weeks to the end of the Pacific War, the United States of America, Great Britain, and the Republic of China declared in the Potsdam Declaration, 'stern justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners'.[1]

True to their word, at the conclusion of the war in the Pacific, the Allied Powers[2] established military tribunals to prosecute thousands of Japanese military personnel accused of committing war crimes against the Allies and the civilian populations of Asia and the Pacific.[3] These trials were conducted throughout the Asia–Pacific region on a scale yet unmatched. The outcomes of these trials resulted in the conviction of thousands of Japanese military personnel for war crimes such as murder, torture, and other atrocities committed against Allied prisoners of war ('POW') and non-combatants.[4] Those convicted of war crimes received either prison sentences or, in many cases, the death penalty.

As was the case with the European trials, the Asia–Pacific war crimes trials frequently encountered complex ethical and legal questions in relation to the criminal responsibility of

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[1] 'Potsdam Declaration' (26 July 1945): Annex A-1, *Judgment International Military Tribunal for the Far East*.

[2] The United States, Great Britain, Australia, the Netherlands, France, China, the Soviet Union, and the Philippines.

[3] See appendix of this dissertation, 'Other Notable Allied Trials of the Asia-Pacific War' for a brief overview of the British and Australian war crimes trials.

[4] At the time of the Pacific and European trials, there was no fixed definition of a 'war crime'. Rather, war crimes were captured in a series of treaties and conventions from as early as the 19th century such as the various incarnations of the *Hague Conventions of 1899, 1907 and 1929* involving the *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field,* and *Convention relative to the Treatment of Prisoners of War* that outlawed certain conduct during time of war. In 1949, the *Geneva Conventions* and the subsequent protocols provided additional codification of the laws of war and war crimes. Customary international law for centuries prior had banned conduct such as murder and the mistreatment of captured military personnel. Examples of the types of crimes with which the accused were charged during the US Army trials in the Philippines—and will therefore form the basis of investigation for this thesis—include crimes such as the mistreatment and abuse of Allied personnel and non-combatants such as beating, extra judicial murder, placing in solitary confinement, superiors permitting atrocities to be committed by subordinates, and the wilful and unlawful failure to discharge duties of commanders to prevent the commission of atrocities by subordinates against Allied POWs and Philippine non-combatants.

those accused of war crimes. Three issues that often arose were known as the doctrine of 'command responsibility', the defence of 'superior orders' and the defence of 'military necessity'.

Command responsibility relates to whether criminal liability would apply to superiors for the alleged criminal actions of subordinates, particularly where there existed little or no evidence that the superior participated in, gave direct orders for, or even knew about, the alleged wrongdoing.[5] Commonly referred to as the doctrine of command responsibility, this form of criminal attribution was, and remains, problematic on various levels, particularly due to the ethical questions associated with convicting a person for a crime where their involvement is uncertain or indeterminate. The enduring nature of the ethical validity of convicting superiors for a crime they did not commit is as relevant now as it was throughout history.

Defendants frequently raised obedience to superior orders and military necessity to justify their conduct. The defence of superior orders, though rarely accepted as a full defence to a charge of war crimes, relies on the assumption that the accused acted only out of their duty to obey orders.[6] Also less likely to be accepted at the tribunal level was the so called plea of military necessity which is predicated on the notion that certain actions should be excluded from criminal liability on the basis that the conduct was necessary to achieve certain military objectives.

Particularly in the early stages of the Allied war crimes trials in the Asia–Pacific, military commissions, tribunals and courts struggled with delineating extant international law and adapting that law to the legal questions that confronted them. Part of the problem was due to the lack of clear and comprehensive legal direction at the outset of the trials in regard to these legal questions. The absence of a clear understanding of how to deal with these difficult legal questions ensured there was a corresponding gap in creating a just and equitable legal framework and, often, military commissions throughout the Allied war crimes trials struggled to produce a coherent legal justification for their decisions.[7]

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[5] Mirjan Damaska, 'The Shadow Side of Command Responsibility' (2001) 49(3) *The American Journal of Comparative Law* 455, 455–6. See also Alexandre Skander Galand, Emile Hunter and Ilia Utmelidze, 'International Criminal Law Guidelines: Command Responsibility' (Case Matrix Network, Centre for International Law Research and Policy, 2016) 5 <https://www.legal-tools.org/doc/7441a2/pdf/>.

[6] United Nations War Crimes Commission (UNWCC) 'Chapter X: Developments in the Doctrine of Individual Responsibility of Members of Governments and Administrators of Acts of State, of Immunity of Heads of State, and by Superior Orders' in *Complete History of the United Nations War Crimes Commission and the Development of the Laws of War* (HMSO, London 1948) 274. See also Koji Kudo, 'Command Responsibility and the Defence of Superior Orders' (Doctor of Philosophy Thesis, University of Leicester, 2007) 7.

[7] Nicholas Rengger, '*Jus in Bello* in Historical and Philosophical Perspectives' in Larry May (ed)

One group of trials where these problems were frequently encountered were the trials conducted by the US Army in Manila from 1945 to 1947 which prosecuted approximately 200 Japanese individuals accused of war crimes. The Manila trials, while not unique in terms of the volume of prosecutions or the legal issues raised, are nonetheless important to the contribution to and development of international law, given the important questions of criminal responsibility that were raised during those trials.

The Manila trials provide an opportunity for international law to draw on a range of decisions that focussed on the ethical and legal boundaries of criminal responsibility. They are an exposition of ideas and theories regarding the nature of criminal responsibility in relation to, *inter alia*, such issues as the duties and liabilities of superiors in time of war, the role of subordinates regarding unlawful orders and the nature of what can be deemed acceptable conduct during war to achieve military objectives.

The issues raised during the trials are as relevant today as they were over 70 years ago when the prosecution, at times, struggled to justify why Japanese superiors should be prosecuted for war crimes committed by their subordinates when there was little to no direct evidence linking them to the actual crimes for which they were charged, other than superiority in rank.[8] Similarly, historical trials such as the Manila trials also shed light on the problems that can result if defences such as superior orders and military necessity are accepted and broadened.

War: Essays in Political Philosophy (Cambridge University Press, 2008) 43–46. Rengger asserts that the laws of war are in a constant state of 'catchup' and this is reflected in the 'juridicalization' of law once something new develops. The same can be said about the Allies regarding the formulation of new laws to deal with criminal responsibility.

[8] The doctrine of command responsibility raises the prospect of a dilemma due to the fact that another person (a superior) may face liability which is attributed to the unlawful conduct of their subordinates. This notion of criminal responsibility does not sit well with preconceived notions of fairness and justice, as in law, it should be the perpetrator who faces criminal sanction. For instance, where a subordinate commits a criminal offence, under the doctrine of command responsibility, the superior may face criminal sanction for failing in their duty as a superior to prevent or punish the offending subordinates, or for inciting or allowing the offending behaviour to occur.

II. Thesis Overview

A. *Thesis Question*

The central question posed in this thesis is how the jurisprudential approaches to criminal responsibility at Manila contribute to, or provide guidance for other war crimes trials. This question relates to the normative aspects associated with how the law *ought* to be as far as command responsibility, superior orders and military necessity are concerned.

B. *Thesis Arguments*

This thesis posits that the Manila trials contributed to the development of the law in relation to command responsibility, superior orders and military necessity in the following ways:

1. Command responsibility: The Manila trials identified at least eight instances where commanders can be convicted for the unlawful acts of subordinates pursuant to the command responsibility doctrine;

2. Superior orders: The Manila trials developed and applied an 'intermediate' test as the most appropriate test to determine liability for subordinates carrying out unlawful orders; and

3. Military Necessity: The Manila trials limited the development of the doctrine of military necessity as a defence to charges of war crimes.

Command responsibility: In relation to argument number 1, the instances where a commander can be held criminally responsible for criminal acts committed by subordinates, are:

1) the existence of superior–subordinate relationship and
2) evidence that the commander personally participated in the crime or
3) the commander ordered the unlawful conduct or
4) the commander failed to prevent the crime (acquiescence) or
5) evidence that the commander failed to punish the perpetrators of the crime or
6) whether the commander had knowledge or suspicions of unlawful conduct or
7) whether the commander incited subordinates into carrying out the unlawful conduct or
8) the level of control exerted by the individual commander and whether the commander failed to control subordinates.

Superior orders: In relation to argument number 2, the defence of superior orders, the Manila trials accepted that superior orders could, under the right circumstances, be used as a defence to mitigate the harshness of the penalty, but not to absolve criminal responsibility of those who carried out unlawful orders.

Military necessity: In relation to argument number 3, the doctrine of military necessity, the Manila trials unequivocally limited its use as a defence to war crimes. The Manila trials did, however, articulate—albeit in vague terms—the 'general rule' regarding the 'three interdependent principles of military necessity'. Cases were particularly vague in relation to how the fault element (*mens rea*) should be regarded in terms of whether it should be a subjective or an objective assessment. Despite this, the Manila trials were consistent with the jurisprudence and doctrine of other historical trials supporting the proposition that the doctrine of military necessity should not be expanded to what it currently is. This is due to the unlimited scope that the defence of military necessity could provide those accused of war crimes since any conduct could constitute a defence if that action was carried out in furtherance of fulfilling a military objective.

An assessment of 'Justice' at the Manila Trials through the 'Just War' Lens

The judgments of the Manilla trials go beyond the pronouncements of guilt of individual Japanese soldiers: they provide an overarching narrative as to how Japanese forces *should* have conducted themselves in relation to US POWs and non-combatants. These principles are relevant today as they were then. The 'just war' tradition provides an important lens through which to assess the validity of the Manila war crimes trials and the law espoused during those trials to determine whether justice was served or whether the trials represent nothing more than 'victor's justice'.

C. *Thesis Aims*

The aim of this thesis is to shed light on the doctrinal application of criminal responsibility in international criminal law by examining a group of trials conducted by the US Army in Manila from 1945 to 1947[9] and comparing them to other historical trials where similar questions arose. Based on a doctrinal legal analysis of the Manila trials and other historical cases from elsewhere, the intent is to delineate a normative framework for how the law *ought* to be interpreted in respect to command responsibility, superior orders and military necessity. As such, this thesis aims to be of interpretive value not only for other war crimes trials, but also in understanding the nature of these complex areas of law.

The aims will be achieved by using a variety of legal case studies from Manila and elsewhere to critically examine and analyse problems centred around criminal responsibility in international criminal law.

[9] As will be discussed in the methodology section, this thesis utilises a vast array of historical case studies and legal codes to explore the development of, and provide context to, criminal responsibility as it relates to command responsibility, superior orders and military necessity.

This thesis is not an attempt to rewrite history nor is it a continuation of the discourse that has sought to condemn much of what the Allied trials set out to achieve in the wake of WWII.[10] With that in mind, however, it is important to highlight and acknowledge instances where legal mistakes occurred. As will be shown, mistakes did occur along the way. It is arguable that certain aspects of the trials did not conform with international notions of 'justice'[11] and as such, on some occasions, the trials did little to advance the development of international criminal law jurisprudence in relation to war crimes. As unfortunate as these mistakes were, reviewing these trials (and others like them) provides an opportunity to learn from the mistakes of the past.

It should also be kept in mind that this investigation in no way serves as an apology for any injustices meted out by the Allies against Japanese war criminals who, it must be said, undeniably committed some of the most heinous acts against human beings the world has ever seen. Rather, this investigation will examine a critical aspect of WWII where important areas of war crimes jurisprudence concerning criminal responsibility were developed.

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[10] Much has already been written on condemning the conduct of the Allies in the aftermath of the Pacific War. Principally among them, for example, see Richard H Minear, *Victors' Justice: The Tokyo War Crimes Trial* (Princeton University Press, 1972). In this seminal text, Minear is a vocal opponent of the way that the Allied forces established and prosecuted the IMTFE. He provides a substantial narrative on the legal deficiencies at international law in relation to the motives behind establishing war crimes trials in general and the IMTFE in particular. He also discusses the legal problems associated with the specific charges that were levelled at the Japanese defendants such as those charges relating to conspiracy, individual responsibility at international law, war of aggression, *ex post facto* liability and so on. Perhaps Minear's criticisms are best viewed in the context in which he wrote this work, which was at the height of the Vietnam War, and one cannot help but feel that Minear's opposition to the IMTFE was predicated, at least to some extent, by the possible hypocrisy of the selectivity of US authorities in choosing when and when not to prosecute war crimes. The inscription at the opening page says much for this proposition: 'Dedicated to the many Americans whose opposition to the war in Indochina has made them exiles, criminals, or aliens in their own land.'
Others who have also contributed to criticising the conduct of war crimes trials, particularly the IMTFE and General Douglas MacArthur's role in the trials, include, Dayle Smith, *Judicial Murder? MacArthur and the Tokyo War Crimes Trial* (Createspace, 2013); Dayle Smith, *MacArthur's Kangaroo Court* (Envale Press, 1999). In recent years, scholars have tried to move beyond the common narrative of 'victors' justice' that serves to criticise the IMTFE and look for other ways in which to assess legal questions arising from the Tokyo Trial – see, eg, Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, International Humanitarian Law Series (Martinus Nijhoff, 2011).

[11] The term 'justice' is fraught with interpretational issues and is dependent upon whom is defining it and in what period the term is defined. Essentially, the term is normative in the sense that it comprises values and other moral ideals as to how societies *should* or *ought* to be governed. The Allies during WWII referred widely to 'justice' and from this, it is possible to glean a sense of the meaning as it related to war crimes trials conducted at the time.

D. *Methodological Approach*

The broad methodological approach adopted for this research can be described as *qualitative doctrinal legal research* (QDLR). QDLR attempts to discover 'what the law is in a particular area. The researcher's sole aim is to describe a body of law and how it applies'.[12] To describe what the law is, the researcher engages in an examination of cases, legislation, codes and other jurisprudence that sheds light on the doctrinal nature of what the law 'is' and what it 'should' be in accordance with precedential legal doctrine. It is important to discern judicial reasoning and other promulgated laws since that is what sets the relevant legal standards at law. These standards are then followed or developed in subsequent cases as the facts dictate. The doctrinal aspects of command responsibility, superior orders and military necessity are discussed in Chapters 1, 2, 5 and 8 respectively. In those chapters, the thesis explores the historical foundations of the various doctrines and the legal rationale that underpinned the judgments according to each case.

Having established the relevant legal standards based on cases and other legal instruments, the thesis then examines and compares those judgments to key cases tried at Manila. These cases will add to the body of case law and will enable an examination of the normative position on what the law *should* be with the fullness of legal doctrine from those cases. The law, as determined at the Manila trials, is discussed in Chapters 3, 6 and 9 while the normative discussion of what the law ought to be—based on a greater body of cases and other laws with the inclusion of the Manila trials—is presented in Chapters 4, 7 and 9. Chapter 10 will then provide an overall qualitative assessment of the trials and the law through the 'just war' theoretical lens.

E. *The rationale for selecting the Manila trials of the US Army*

The original scope of this thesis was to examine archival documents generated from the trials of US, UK and Australian military commissions that took place after the Pacific War. The source documents of these trials are located in College Park, Maryland (near Washington DC), London and Canberra, respectively. While those documents are reasonably accessible in a physical and linguistic sense,[13] the same could not be said for the original scope of the thesis. The original intention to examine three complex legal issues (i.e. command responsibility, superior orders and military necessity) spanning three nations would have made the scope of the research far too broad.

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[12] Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Michael McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) Chapter 1.

[13] Being predominantly a monolinguist (with intermediate level Japanese language skills), I am unfortunately unable to engage with non-English language archives despite the undoubted advantage in being able to survey the public record that exists in multiple languages.

It quickly became apparent whilst reviewing the US Army trial records at the National Archives and Records Administration (NARA) at College Park that the Manila records provide a very useful discussion on the three legal issues which were being investigated. The US Army's Manila records provide a sufficient number of cases to justify a single research project looking at the doctrine of command responsibility and the defences of superior orders and military necessity and so the scope of the study was limited to the US Army trials in Manila.

There are, however, certain advantages and disadvantages of focussing on one set of trial documents. One advantage is that one is able to devote more time into one set of archival documents and gain a better understanding of the issues and subject matter contained within them. A disadvantage of focussing on one group of trials is, however, that one is unable to determine with certainty whether one trial series is truly representative of the issues that arose at other Allied trials. That being said, however, the legal complexities surrounding the doctrine of command responsibility and the defences of superior orders and military necessity have an enduring legacy over time and place. The extensive way that the Manila trials dealt with these issues provides a useful portal through which to examine these issues in depth. While it may not be completely possible to say that the Manila trials of the US Army were representative of *all* Allied war crimes trials, it is arguable that this group of trials is very useful for researchers to glean sentencing patterns in relation to the doctrine of command responsibility and the defences of superior orders and military necessity.

A further reason for selecting the US Army's Manila trials was that they were conducted in the shadow of the highly influential and controversial *Yamashita v Styer* 317 US 1; 66 S. 340 (US Supreme Court) ('*Yamashita trial*') and *Honma* trial conducted in the Philippines shortly after the conclusion of the Pacific War. It is interesting to understand whether sentencing patterns at other US Army trials at Manila were influenced by the outcome of the *Yamashita* and *Honma* trials.

Another reason to investigate the Manila trials is that, despite the scale of the Allied war crimes trials conducted in the Asia–Pacific arena, research by legal scholars of the Philippine trials has been relatively sparce.[14] Albeit with some exceptions, research has predominantly focussed on several major trials of World War II such as the *International Military Tribunal for Nuremberg* (IMTN), the *International Military Tribunal for the Far East* (IMTFE) and, in the Pacific context, the *Yamashita* and *Honma* trials.[15]

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[14] One exception to this is Yuma Totani, *Justice in Asia and the Pacficic Region, 1945–1952: Allied War Crimes Prosecutions* (Cambridge University Press, 2015). Totani provides an excellent overview of both English and Japanese scholarly literature on this topic. It should be noted, however, as will be discussed below in the literature review section, Totani does not exclusively examine the Manila trials, but adopts a broad view of the trials and has explored other nations' trials.

[15] See Jeanie M Welch, *The Tokyo Trial: A Bibliography Guide to English-Language Sources* (Greenwook Press, 2002) Chapter 6, 'Other War Crimes Trials in the Asia-Pacific Region'.

F. *Case Studies*

This study relies on case studies taken from the trials of approximately 200 Japanese individuals who were tried at Manila by the US Army. It is not possible, nor desirable, to report on every single one of those trials because not all of the cases dealt with aspects relevant to command responsibility, superior orders or military necessity.

With a number of cases, patterns began to emerge that formed convenient categories to group the cases. Categories arose such as the nature of the offences, the types of charges, the individual traits of the defendants (eg rank and the part the defendant played in the commission of the offence), the defences they raised, sentencing, and so on. It was then possible to select one or more cases that were representative of that particular group.

On that basis, case studies were selected in accordance with the following criteria:

1) rank (eg mid to senior ranks);[16]
2) function/ role performed by the individual (eg POW camp commander);
3) individuals who committed offences against US/ Allied personnel;
4) individuals who committed offences against Filipino non-combatants;
5) nature and seriousness of the offences (ie whether the accused was treated differently if the offence occurred against US military personnel as opposed to Filipino non-combatant);
6) the types of defences raised (ie defence of superior orders or military necessity); and
7) whether the defendant was charged in accordance with command responsibility.[17]

G. *Legal Research on Allied War Crimes – Justification of the research*

Notably missing in the war crimes literature in relation to the Asia–Pacific region, is a doctrinal study that examines criminal responsibility so far as it relates to the doctrine of command responsibility and the defences of superior orders and military necessity. The US Army's trial records emanating from the Manila trials are one set of trials that squarely raise these issues.

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[16] Notably, there appears to be an absence of research regarding trials of lower and mid-ranking defendants. There are several publications that have focused on senior military figures. This dissertation distinguishes itself from other research due to the focus that this research has on lower and mid-ranking military personnel.

[17] For the command responsibility trials, it was clear that anyone exercising effective control over another could be charged pursuant to command responsibility and the rank of the superior did not matter in the determination of criminal responsibility.
One major category of defendants was comprised of the POW camp commanders tried for wrongful acts of their subordinates.
Unsurprisingly, those individuals occupying lower positions of authority seemed more likely to raise the defence of superior orders or military necessity. Given that scenario, quite a number of these selected cases consisted of junior-ranking military personnel.

The issues raised during those trials are as relevant today as they were over 70 years ago when the prosecution struggled to justify why Japanese superior officers should be prosecuted for war crimes committed by their subordinates when there was no direct evidence linking them to the actual crime. Similarly, dilemmas were identified when Japanese subordinates raised the defences of superior orders and military necessity on the basis of the harshness of the law versus the leniency in allowing perpetrators to escape criminal liability. Research such as this is, therefore, a normative investigation of what the law *should* be, based on principles of justice and the rule of law.

There has, however, been some exceptional research undertaken on a range of issues regarding the Allied military war crimes trials of the Asia–Pacific. It has tended to focus on questions associated with evidentiary matters, procedural fairness and other administrative processes in establishing the various tribunals.[18] Unlike other research projects, this thesis makes a new contribution to the knowledge and understanding of this topic because it examines cases that, as yet, have remained underrepresented in much of the literature. It is also differentiated from other projects by its focus on the legal discourse of command responsibility, superior orders and military necessity, as opposed to focussing on other aspects such as the political, procedural, or evidentiary matters. As noted above, some authors have specifically written on 'command responsibility', 'superior orders', or 'military necessity'.[19] However, often these issues were not the primary focus of their investigation.

One recent exception to this is Yuma Totani[20] who provides a very detailed account of 14 separate trials centred on command responsibility (Totani's research is discussed in more detail below). Researchers often present their findings on command responsibility, superior orders and military necessity as a small part—usually just one or two chapters—of a larger research project. The result of presenting these issues in this manner is that the reader gains a good, but general overview of these matters. In the existing literature there does not appear to be a single study that is committed to examining all three of command responsibility, superior orders, and military necessity. This study goes beyond recounting individual cases but remains true to legal doctrinal analysis and makes a contribution to knowledge by suggesting possible ways to enhance the operation of how criminal responsibility is decided.

With the exception of Piccigallo[21] and Totani, researchers of the Allied war crimes trials in the Pacific have tended to focus on a single nation as opposed to examining and comparing several nations at a time. One recent extraordinary piece of scholarship that focuses on the Australian

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[18] See, eg, Caroline Pappas, 'Law and Politics: Australia's War Crimes Trials in the Pacific, 1943–1961' (PhD Thesis, University of New South Wales, 1998).

[19] Michael Carrel, 'Australia's Prosecution of Japanese War Criminals: Stimuli and Constraints' (PhD Thesis, University of Melbourne, 2005).

[20] Totani, (n 15) 14.

[21] Philip R Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951* (University of Texas Press, 1979).

trials is the work of Fitzpatrick, McCormack and Morris and other contributing authors, entitled *Australia's War Crimes Trials 1945–1951*.[22] Published in 2016, this comprehensive study comprises over 900 pages, and analyses the 300 Australian trials conducted throughout the Asia–Pacific in the aftermath of WWII. In this three-part volume, the authors explore a range of themes and legal issues that arose throughout those trials. It contains, *inter alia*, three chapters related to command responsibility[23] and superior orders.[24] Other scholarship regarding the Australian trials, includes, for example, authors such as Aszkielowicz,[25] Fitzpatrick,[26] Morris,[27] Okada,[28] Pappas,[29] and Sissons,[30] who examined the Australian war crimes trials; while Pritchard[31] and Sweeney[32] researched the British and Canadian trials, respectively. Other authors have covered the Yokohama trials; and much is written on the *Yamashita trial*.[33] Sharon Chamberlain in her recent book examines the Philippine trials as conducted by the newly independent nation of the Philippines after the US Army concluded its

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[22] Georgina Fitzpatrick, Timothy L H McCormack and Narrelle Morris (eds), *Australia's War Crimes Trials 1945–1951* (Brill/ Nijhoff, 2016) International Humanitarian Law Series, Volume 48.

[23] See Gideon Boas and Lisa Lee, 'Command Responsibility and Other Grounds of Criminal Responsibility' in Georgina Fitzpatrick, Timothy L H McCormack and Narrelle Morris (eds), *Australian War Crimes Trials 1945–1951* (Brill/ Nijhoff, 2016) 134–173; and Yuma Totani, 'Crimes Against Asians in Command Responsibility Trials' 266–290.

[24] Ibid, Monique Cormier and Sarah Finnin, 'Obedience to Superior Orders and Related Defences' 174–195.

[25] Dean Aszkielowicz, *The Australian Pursuit of Japanese War Criminals, 1943–1058: From Foe to Friend* (Columbia University Press, 2017); Dean Aszkielowicz, 'After Surrender: Australia and the Japanese Class B and C War Criminals, 1945–1958' (PhD Thesis, Murdoch University, 2012) <http://researchrepository.murdoch.edu.au/12180/2/02Whole.pdf>.

[26] Georgina Fitzpatrick, 'War Crimes Trials, "Victor's Justice" and Australian Military Justice in the Aftermath of the Second World War' in Kevin J Heller and Gerry J Simpson (eds), *The Hidden Histories of War Crimes Trials* (Oxford University Press, 2013).

[27] Narrelle Morris, '"Gross inefficiency and criminal negligence": The Services Reconnaissance Department in Timor 1943–45 and the Darwin War Crimes Trials in 1946' (2017) 31(2) *Intelligence and National Security* 179–194.

[28] Emi Okada, 'The Australian Trials of Class B and C Japanese War Crime Suspects 1945–51' (2009)(16) *Australian International Law Journal* 47.

[29] Pappas (n 19) 18.

[30] 'Australian War Crimes Trials 1945–1951', Papers of David Sissons, National Library of Australia, MS3092, Series 10, < http://www.nla.gov.au/ms/findaids/3092.html#prefercite1>.

[31] R. John Pritchard, 'The gift of clemency following British war crimes trials in the Far East, 1946–1948' (1996) 7(1) (1996/02/01) *Criminal Law Forum* 15.

[32] Mark Sweeney, 'The Canadian War Crimes Liaison Detachment – Far East and the Prosecution of Japanese "Minor" War Crimes' (PhD Thesis, University of Waterloo, 2013).

[33] Adolf Frank Reel, *The Case of General Yamashita* (Chicago University Press, 1949); Michael L Smidt, 'Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations' (2000) 164 *Military Law Review*; Ilias Bantekas, 'The Contemporary Law of Superior Responsibility' (1999) 93(3) *The American Journal of International Law* 573 xv; Richard L Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* (Scholarly Resources, 1982).

trials in 1947. While Chamberlain examines individual trials, a major focus of her research was concerned with the broader implications between the Philippines and Japan and what the trials meant for post-war reconciliation.[34] Unfortunately, Dutch, Soviet, French, Chinese and Philippine scholars remain underrepresented in the literature.

Why researchers would focus on a single nation rather than adopting a comparative approach is understandable given the voluminous amount of archival material in various languages. There are, however, benefits in adopting a comparative approach when researching the Pacific trials. Only by comparing how the various nations and, more importantly, individuals operating closely after war, interpreted and applied hastily drafted law is one able to glean a deeper understanding and make comparisons between each nation in relation to command responsibility, superior orders, and military necessity.[35]

David Sissons, in his seminal work, *The Australian War Crimes Trials and Investigations (1942–51)*[36] provides an account of the command responsibility trials conducted by Australia. That account, one section within his broader research project, is limited to the Australian context only and does not extend to other Allied nations. Although Sissons provides a fine account of command responsibility in so far as the Australian trials are concerned, a broader discussion of command responsibility would be useful to gain a more holistic understanding of this complex and evolving concept.[37]

Similarly, Pappas, in 1998, provided a comprehensive account of Australia's policies, procedures and practices of the trials as part of a PhD thesis.[38] She dedicates one chapter to 'Senior Officer and Command Responsibility Trials'.[39] That chapter is one part of a larger question, is not central to the thesis and deals only with the Australian trials.

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[34] Sharon Chamberlain, *A Reckoning: Philippine Trials of Japanese War Criminals* (University of Wisconsin Press, 2019).

[35] These legal and ethical questions relating to command responsibility, superior orders and military necessity have existed since war has existed, and are not unique to the Pacific War trials. See, eg, Yoram Dinstein, *Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, 2004); Roberta Arnold, Maria L. Nybondas, 'Command Responsibility and Its Applicability to Civilian Superiors' (2013) 11(4) (September 1, 2013) *Journal of International Criminal Justice* 943; Aziz Mohammed, 'Military Culture, War Crimes and Superior Orders' (PhD Thesis, Bond University, 2008).

[36] D C S Sissons, 'The Australian War Crimes Trials and Investigations (1942–51)' (undated) .

[37] To gain a deeper appreciation of the complexities and issues that arise with command responsibility, this thesis dedicates a substantial section to the doctrine in the hope that one is able to discern the origins and evolution of the doctrine. The wish is that by doing so, one is able to further the debate of the application of command responsibility as a whole, rather than how it was applied solely at one group of trials.

[38] Caroline Pappas, 'Law and Politics: Australia's War Crimes Trials in the Pacific, 1943–1961' (PhD Thesis, University of New South Wales, 1998).

[39] Ibid Chapter 9.

Michael Carrel, in his 2005 PhD thesis, 'Australia's Prosecution of Japanese War Criminals: Stimuli and Constraints',[40] dedicates one of fifteen chapters to command responsibility, superior orders and military necessity. While Carrel provides a very thorough account of these questions within the Australian trial context, the chapter is not central to the thesis as a whole. Rather than exploring the doctrinal elements of a particular area of law, Carrel appears to be broadening his discussion relating to the establishment and conduct of the trials by Australia. Similar to the early works of Sissons and Pappas, Carrel provides only an Australian perspective on command responsibility trials. In contrast, this thesis seeks to provide a broad discussion of the doctrine of command responsibility—including its historical evolution and contemporary context, when applying key findings of the Philippine trials to recent war crimes cases.

Philip Piccigallo: 'The Japanese on Trial'

The work of Piccigallo deserves special mention. It would be nearly thirty years after the Pacific trials before someone produced a comprehensive account of the Allied war crimes trials in the Asia–Pacific. In 1979, Philip Piccigallo completed his work, *The Japanese on Trial: Allied War Crimes Operations in the East*.[41] Picigallo appears to be the first to provide a comprehensive commentary of the entire Allied war crimes trials—albeit contained within 265 pages. He provides various statistical data in relation to the trials. They include the number of trials conducted, the number of accused, the number of convictions, numbers relating to those who received the death penalty, numbers relating to life convictions, and those who were acquitted.[42] Piccigallo warns of possible deficiencies with the numbers, however, particularly due to the exclusion of Soviet data due to the Cold War.

The lack of Soviet data does little to detract from the benefit of Piccigallo's work; the major problem with it is his reliance on non-primary trial data—a sentiment echoed recently by Totani.[43] Piccigallo mostly relies on secondary sources to substantiate his claims[44] and this is a flaw in his work. He relies mostly on government publications, news accounts, and another author, John Appleman, *Military Tribunals and International Crimes* (Bobbs-Merrill 1954) for

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[40] Michael Carrel, 'Australia's Prosecution of Japanese War Criminals: Stimuli and Constraints' (PhD Thesis, University of Melbourne, 2005).

[41] Piccigallo (n 22) 781.

[42] Ibid 264. Piccigallo provides two tables showing disputed figures – Table A from a Japanese source: *Homu Daijin Kanbo Shiho Hosei Chosabu: Senso hanzai saiban gaishi yo [General History of Trials of War Crimes, Tokyo 1973];* while Table B shows consolidated statistics taken from Allied governmental sources for American, British, and Australian trials. Despite the slight discrepancy in numbers in relation to certain categories, the numbers between the two groups of figures remain relatively close with a maximum statistical variance of approximately 5.5%.

[43] Totani (n 15) 145.

[44] Fitzpatrick, (n 27) 329 (especially see footnote 11 at page 329).

most of his statistics.[45] Piccigallo does make the point, however, that his work does not 'examine exhaustively' the thousands of Allied war crimes trials conducted throughout the Far East; although he concedes that such a study is ultimately needed.[46] One would need to keep this in mind when drawing any extrapolations from the numerical data he presents.

Although not a lawyer, one interesting observation Piccigallo offers is the temporal connection between the higher number of death sentences handed down at the beginning of the trials, versus the lower number of death sentences given— many of which were later commuted to prison terms—in the closing period of the trials. According to Piccigallo, this sentencing pattern reflects the level of aggrievement the individual nations felt towards Japan in 1945 and that the sentencing practices in the early part of the trials 'reflected a greater intensity of wartime *passion*, and less tempered *compassion*' than sentences in the later stages of the trials.[47]

Piccigallo has been criticised by some who argue that his analysis sorely ignores the myriad deficiencies of the trials. This is despite his express claims of objectivity, in the 'Von Rankean' tradition.[48] Richard Minear is one such critic who argues that Piccigallo's 'entire book is an attempt to undermine criticism of the Tokyo trial and the many minor trials'.[49] Minear makes this assertion on the basis that Piccigallo deliberately ignores 'larger issues', such as the causes of the Pacific War, the fact that the Allies also committed war crimes, and that Piccigallo explores nothing of the alleged Japanese crimes themselves.[50] Minear, an historian as opposed to a lawyer, is critical of Piccigallo due to Piccigallo's non-critical approach to the Allied war crimes trials. In essence, Minear seems to be asserting that Piccigallo is an apologist for any errors or injustices that the Allies meted out against the Japanese after the war.

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[45] Ibid 274. Rome Statute of the International Criminal Court UN Doc A/CONF.183/9 138, 138–9. For example, Piccigallo cites, among others, the following to substantiate his statistical claims throughout the book: US Department of State, Occupation of Japan: Policy and Progress, Publication 2671 (Washington, DC, 1947); Supreme Commander for the Allied Powers, *Trials of Class "B" and "C" War Criminals. History of the Non-Military Activities of the Occupation of Japan* (Tokyo, 1952); John Appleman, *Military Tribunals and International Crimes* (Bobbs-Merrill, 1954); US Department of Navy, *Final Report,* v I; *Stars and Stripes* (Tokyo); US Department of State, *Foreign Relations of the United States, 1948,* 17 October 1948; John R Pritchard, *The Nature and Significance of British Post-War of Japanese War Criminals, 1946–1948*; Australian Encyclopedia, *War Crimes Trials;* United Nations War Crimes Commission, 'History of the United Nations War Crimes Commission and the Development of the Laws of War' (HMSO, 1948*)*; and at least 16 different newspapers.

[46] Piccigallo (n 22) 21, xiii.

[47] Ibid 66.

[48] Ibid xv.

[49] Richard Minear, *Victors' Justice* (Princeton, 1971) 138.

[50] Ibid 138–9. Although, Piccigallo does offer some reasons why the Japanese committed such acts of cruelty, ie, Japanese unyielding adherence to strict discipline; blind obedience; obsessive empire building; Japanese moral codes; or 'the madness of war' (Piccigallo xii).

That Minear would make such a claim is understandable given the volatile context in which he wrote his seminal work, *Victor's Justice*. Minear produced this oft-cited work at the time the US was embroiled in a bitter conflict in Vietnam. His criticism of the IMTFE and the Pacific trials seems somehow linked to his criticism of US foreign policy in relation to Vietnam, since, as he asserts, much of the foreign policy of the US in the 1950s and 60s stems from an emboldened and victorious US in the European and, especially, Pacific theatres of war.[51]

There is some merit in Minear's accusation that Piccigallo failed to critically reflect upon the Allied trials. Minear's argument is supported by Piccigallo's tendency to use emotive statements such as, the 'Japanese waged … a ruthless and inhumane campaign against opposing military forces and local civilian populations'.[52] The apparent irony that the same could be said about the Allies, particularly with the bombing of Japanese cities, appears lost on him.

Another useful contribution that Piccigallo offers is the detailed way in which he describes the Allied 'procedures' and 'machinery'[53] for naming, locating and prosecuting Japanese military personnel suspected of engaging in war crimes against each of the Allied nations.[54] He asserts that his study 'seeks only to lay the groundwork for … further inquiry into Japanese war crimes trials … and makes no claim to definitiveness'.[55] Piccigallo's objective was to provide 'sweeping overviews of each nation's war crimes trials program'.[56] He has thus left open the opportunity for others to pick up where he finished but, sadly, few have attempted the challenge. Piccigallo's work stands as a useful introduction for understanding the trials, and as a platform for further research into the Allied war crimes trials of the Asia–Pacific.

His work has influenced this work in so far as *Japanese on Trial* provided a detailed overview of the Allied war crimes programme which, in turn gave an indication of the sorts of records that were available, albeit during the 1970s. Given that Piccigallo was not a lawyer, the legal analysis contained in *Japanese on Trial* was general at best, and therefore allows scholars to explore in detail the legal intricacies of specific elements of law, as is the objective of this project.

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[51] Minear (n 49). On this point, see also Yuma Totani, *The Pursuit of Justice in the Wake of World War II* (Harvard University Asia Center) 2. Totani eloquently states that 'Richard Minear treated the Tokyo trial as an early manifestation of the self-righteous foreign policy of the United States that culminated in the Vietnam War'. For another critical appraisal of the IMTFE, see also Dayle Smith, *Judicial Murder? Macarthur and the Tokyo War Crimes Trial* (CreateSpace, 2013).

[52] Piccigallo (n 22) 67, xi–xii.

[53] Terms used in the United Nation War Crimes Commission. See UNWCC, 'History of the United Nations War Crimes Commission and the Development of the Laws of War' (HMSO, 1948).

[54] See also regarding a discussion on procedure, In re Yamashita 327 U.S. 1, 27 (1946) 640.

[55] Piccigallo (n 22) 67, xi–xii.

[56] Ibid xiv.

Yuma Totani: Justice in Asia and the Pacific Region, 1945–1952

One recent publication that is clearly a standout in contemporary literature on the Asia–Pacific war crimes trials is Yuma Totani's *Justice in Asia and the Pacific Region, 1945–1952: Allied War Crimes Prosecutions.*[57] Although Totani does not appear to be trained as a lawyer, but as an historian,[58] her book is a comprehensive analysis of 14 separate trials of senior ranking Japanese army and navy officers. She poses a number of questions primarily concerned with understanding how 'the doctrine of command responsibility, first introduced at the famous *Yamashita trial* (1945) and subsequently applied broadly at other Allied courts, helped the prosecution, the defence, and the judges resolve knotty issues'.[59] By posing these questions, she asserts that, her research

> sheds light on the Allied courts' complex, and at times contradictory, findings on theories of criminal orders and knowledge, the Japanese system of command and control, organizational versus individual responsibility, and guilt or innocence of accused persons. A close inquiry into the jurisprudential legacy of the Allied war crimes trials will enable one to begin developing useful conceptual tools with which to tackle issues of Japanese institutional and individual responsibility of WWII-era mass atrocities.[60]

Totani is upfront with the reader regarding the boundaries and limits of her research. She restricts her analysis to 14 trials out of the thousands conducted, and furthermore, of those 14 trials, concedes that all were conducted by American, Australian, British, or Philippine authorities. In other words, she has only considered trials conducted by the Anglophone nations, to the exclusion of the Dutch, Russian, Chinese, and French trials. Her rationale for restricting the number of trials is more to do with the plethora of available archival information that one would need to assess to widen her scope which could run in excess of millions of documents.[61]

Totani further argues the case for limiting her analysis to English language sources on the basis that Anglo-American proceedings are freely available as opposed to the documents of other nations.[62] A further reason why she has restricted her analysis to only a few trials is due to the fact that by 'focusing on the trials of high-ranking individuals allows one to see the larger picture of the Allied war crimes program …' which includes the benefits of examining the trials in the context of 'Asian decolonization' particularly as it related to the British trials.[63]

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[57] Totani (n 15) 14.

[58] University of Hawaii, 'Yuma Totani', *Totani, Yuma – University of Hawai'i at Manoa Department of History* <http://manoa.hawaii.edu/history/people/faculty/totani/>. Although Totani does not appear to have formal legal qualifications, she has written extensively on WWII war crimes trials in the Asia–Pacific area.

[59] Ibid 5.

[60] Ibid.

[61] Ibid 11.

[62] Ibid 10.

[63] Ibid 11–12.

Such a targeted approach to examining the trials is not without merit and the corollary of Totani's research is an extremely well-researched and articulated narrative of a number of significant command responsibility trials. Totani's analysis is further aided by her ability to engage with primary and secondary Japanese language sources—a skill that few Western researchers can boast.

There may, however, have been some benefit had Totani extended her analysis to junior ranking personnel to determine whether the same legal reasoning permeated down to those ranks, as this thesis aims to achieve. Had she done so, one would arguably be in a position to determine whether the same law was being applied holistically, or whether there was a disconnect between the application of law based on rank.

This thesis offers no criticism of Totani's approach and it agrees with her rationale for selecting the methodology she has adopted. In fact, such an approach is very sensible given the practical limitations with which researchers are faced. Totani has, however, left open the possibility for others to build on her findings in *Justice in Asia and the Pacific Region*, which could be achieved by focusing on, for example, other command responsibility trials, such as the trial of Baba Masao and several others.[64]

Additionally, while it is obvious that Totani is a fine historian and has squarely raised a number of crucial legal elements throughout the book, she has not explored in finer detail the doctrinal basis and historical-legal evolution of command responsibility, superior orders, and military necessity. It is for this reason that legal scholars are able to offer a crucial point of departure from Totani's fine work. Legal scholars have the opportunity—perhaps even a disciplinary imperative—to engage in an exploration of the jurisprudential elements of the trials. As such, they are able to explore in greater depth a range of elements of criminal responsibility emanating from the trials such as: *mens rea*, knowledge, strict and vicarious liability, the effects of orders, mistake of fact/ law, duress, and necessity, to name a few.

In so doing, legal scholars are able to explore the underpinning legal principles that perhaps explain why these specific principles exist and why currently there are deficiencies in the way the law is applied. On that basis, as a point of differentiation to Totani's work, this thesis explores criminal responsibility not just from an historical perspective, but with a view to suggest possible reforms for contemporary legal interpretation.

H. *Summary of Observations and Findings from Manila*

As will be shown in the proceeding chapters, the Manila trials were presented with a series of complex legal questions that required the tribunals to consider possible defences relating to, among others, command responsibility, superior orders and military necessity. Research into

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[64] A WM A WMS4, 78011/6--DPW&1 History, Part V-War Crimes: 438, as cited in Carrel (n 20), 183.

these cases reveals common sentencing patterns and legal reasoning that are summarised below.

These findings, when assessed in light of the 'just war' tradition, show that overall the Manila trials can be considered 'just' in so far as the law upheld in the trials was representative of the principles according to *jus in bello* and *just post bellum*, as will be outlined in Chapter 10.

Command Responsibility

The Manila trials:

1. Applied 'contingent liability' where an accused could be convicted due to the position they occupied even where evidence was absent that they knew or gave orders relating to the crimes;
2. Implemented a broad interpretation of *mens rea*: The essential element to convict an accused—knowledge—was often broadly interpreted by tribunals so that the accused was presumed to have known or would have known that war crimes were being perpetrated under their command;
3. Defined 'disregarding and failing to discharge' duties based on the individual's rank;
4. Broadened the meaning of the charge 'permit' atrocities to occur: Commissions often broadened the scope of the term, 'permit' to the extent that an accused was held to 'permit' crimes to have occurred even when the accused did not give actual permission, or when they did not take pro-active measures to inquire about or punish alleged perpetrators;
5. Applied intermediary liability: Those who occupied positions between subordinates and higher raking officers or civilian entities were often held responsible for the actions or failures of those more senior;
6. Applied a broad interpretation of 'effective control': Commissions applied a broad definition of 'control' that effectively made an accused liable when they were physically not present or otherwise did not know about the atrocities;
7. Engaged in inconsistent sentencing due to 'temporal disconnection': There were significant variations in sentencing—those sentenced early in the trials received harsher sentences than did those who were sentenced towards the end of the trials;
8. Applied the 'proximal' principle: An accused could be held liable for similar offences where they were in 'proximal' location to subordinates who committed other offences;
9. Did not allow the apparent inability to prevent, punish or deter subordinates from committing atrocities to be a valid factor in mitigation.

Superior Orders

The Manila trials:

1. Highlighted the difficulties associated with attributing liability by allowing superior orders to be used as a full defence to war crimes. There was a concerted effort to disallow superior orders as a defence for criminal wrongdoing. Despite the existence of, or sound arguments for, a defendant's reliance on superior orders as either a defence

or in mitigation of sentence, military commissions were reluctant to accept a plea of superior orders or to extend the doctrine further.

2. Demonstrated subjective bias due to the status/ role of the accused: Consideration to superior orders was often contingent upon the nature/ status of the accused as to whether military commissions would or would not accept superior orders to mitigate the sentence. For example, Kenpeitai or others accused of committing offences against US military personnel were less likely to be successful in having their sentence mitigated on the basis of superior orders.

3. Relied on the presumption that the defence of superior orders is akin to an admission of guilt: An accused who seeks to rely on the defence of superior orders ipso facto makes admissions to part or all of the acts for which they are charged. Defendants who raised superior orders generally fared no better than if they had denied the acts for which they were charged and not raised superior orders as a defence.

4. Accepted superior orders was a major contributing factor to the crime, in a few cases and subsequently, the orders were treated as a point for sentence mitigation where the evidence was clear. Some military commissions in Manila accepted that superior orders were relevant in so far as the sentence was concerned. Where evidence clearly showed the defendant was following orders from higher command, even where those orders were manifestly unlawful in the commission's view, the commissions were prepared to reduce the sentence (particularly for sentences involving the death penalty) but not to relieve the accused of complete criminal responsibility.

5. Favoured a mitigation of sentence on the basis of superior orders in instances including: (1) where ambiguity existed regarding the lawfulness or unlawfulness of orders; (2) where it was clear the accused was following those orders; (3) where the accused did not wish to follow those orders, but did so out of legal compulsion; (4) where the accused derived no pleasure from and had no desire to and did not intend to commit such acts; and (4) where disobedience to those orders would result in severe punishment to the accused.

Military Necessity

The Manila trials:

1. Developed a definition that did not extend the use and application of the doctrine.

2. Developed a general rule known as the Three Interdependent Principles:

> (a) The principle of military necessity [is] subject to the principles of humanity and chivalry; (b) The principle of humanity, prohibiting employment of any such kind or degree of violence as is not actually necessary for the purpose of the war; and (c) The principle of chivalry, which denounces and forbids resort to dishonourable means, expedients, or conduct.

3. Developed and applied an ambiguous test in determining the elements of military necessity, particularly in relation to whether the fault element (mens rea) was subjective or objective: An aspect of military necessity requires that there be no 'cruelty' – but to determine whether cruelty was present, there was no clear application in regard to whether the test was subjective (i.e. what was in the mind of the accused at the time of the offence), or objective (i.e. whether a reasonable person would consider the acts of the accused to be cruel given the circumstances).

Chapter Overview

Chapter 1 of the thesis begins with a discussion of the establishment of the US Army war crimes trials in Manila. It provides important context behind the establishment of the trials with a particular focus on the introduction of the legal rules (in particular, the *Yamashita trial* precedent) that were used at the trial. Chapter 1 also provides a general overview of the nature of the types of punishments, conviction rates, and the rationale behind the limited availability of the defences of superior orders and military necessity.

Chapter 2 explores the historical attributes of command responsibility and in doing so, places the US Army trials at Manila in historical context in relation to command responsibility. The purpose of this chapter is to provide greater context and clarity surrounding the problems of command responsibility jurisprudence.

Chapter 3 delves into the Manila 'Command Responsibility Trials' and shows how the law coming from the trials was often redefined and manipulated to suit a conviction based on command responsibility. A cross-section of trials is presented with a view to gaining insights into how the various issues in relation to the doctrine of command responsibility were dealt with by the military commissions. A substantial focus is dedicated to the jurisprudence coming from the trials that clearly show how the tribunals attributed criminal responsibility to Japanese commanders for the actions of their subordinates.

Chapter 4 ties together Chapters 2 and 3 and provides a normative reconceptualisation of the elements of command responsibility by elucidating a framework for how command responsibility *ought* to be regarded in international law in light of the Manila trials and other trials throughout history where command responsibility was at issue. In view of the problems experienced with command responsibility and the inherent injustices associated with arbitrarily applying this doctrine, a detailed analysis of the reformulation of the elements of command responsibility is offered as a possible mechanism for application in other contexts.

Chapter 5 examines the first of two defences frequently raised at the Manila trials, the defence of superior orders. This chapter explores superior orders in other contexts, most notably WWI and how various military codes dealt with superior orders. The chapter shows that while superior orders was not regarded as a full defence to war crimes, it was regarded as a means to mitigate punishment.

Chapter 6 examines how superior orders was regarded at the Manila trials and looks at various primary sources that reflect the contradictory positions held by US authorities regarding its use as a defence to war crimes.

Chapter 7 ties together Chapters 5 and 6 and provides a normative framework of how the defence of superior orders *ought* to be regarded in other contexts. It examines jurisprudential concepts associated with the identified rules as *respondeat superior*, absolute liability, the *mens rea* aspects and articulates a new formulation regarding how the defence of superior orders *ought* to be regarded.

Chapters 8 and 9 move on to the second defence, military necessity. Chapter 8 provides an overview of military necessity as it was applied at Manila and in other contexts, in doing so, making it clear that military necessity has been used very frequently over time by States to justify and legitimise a whole range of actions that could, on the face of it, quite easily be deemed to be actions amounting to war crimes. The way the Manila trials dealt with questions of military necessity was to largely ignore it as a valid defence to war crimes. This chapter squarely raises a vexed issue of profound importance for contemporary international criminal law and the Laws of Armed Conflict whereby States will justify military action of their own, but will go to great lengths to condemn similar actions when committed by enemy forces.

Chapter 9 provides the normative rationale of the situations in which military necessity might be used as a valid basis for certain actions in order to fulfil a military objective. This chapter asserts that a valid theory of military necessity should focus on aspects such as the onus and standard of proof and three interdependent principles.

The concluding chapter of the thesis ties together the discussion by returning to the initial question posed in the Introduction:

> *This thesis seeks to determine how the jurisprudential approach to defining criminal responsibility at Manila contributes to, or provides guidance for other war crimes trials. This question relates to the normative aspects associated with how the law ought to be in so far as command responsibility, superior orders and military necessity are concerned.*

In short, as it will be shown, the answer to this question is multi-faceted. While legal historians have a multitude of case studies available to them in examining contemporary jurisprudential questions, the Manila trials provide a complex array of cases that illustrate how the law *should* be regarded to reach a more sustainable, equitable and justifiable approach to war crimes prosecutions.

PART I:
COMMAND RESPONSIBILITY

CHAPTER 1:
ESTABLISHING THE US ARMY WAR CRIMES TRIALS IN MANILA

I. Setting the Rules

The Judge Advocate Section at US General Headquarters, Southwest Pacific Area was responsible for undertaking war crimes investigations in the Philippines during and for a short time after the War.[65] Responsibility for investigating war crimes and prosecuting alleged violations later changed to the War Crimes Trials Division (WCTD) of the Philippines-Ryukyus Command once the new body was established in October 1945.[66] Before the Philippine authorities reclaimed responsibility for prosecuting the remaining Japanese defendants in 1947, the WCTD prosecuted 87 war crimes cases comprising 191 defendants.[67] These trials represent one small, but crucial, part of the Allied war crimes programme in the Asia–Pacific region post WWII and it is these trials that form the basis of investigation in this thesis.[68]

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[65] Greg Bradsher, 'Japanese War Crimes and Related Topics: A Guide to Records at the National Archives', US National Archives and Records Administration at College Park (NARA) (date unspecified) 188.

[66] Ibid.

[67] Ibid. See also Philip R Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East* (University of Texas Press, 1979) 67. Piccigallo's figures differ to those of Bradsher. Piccigallo claims that the US held 97 cases comprising 215 individuals of which 195 were convicted. For Piccigallo's numbers, he cites a newspaper report in the *China Press* dated 10 June 1947, and Appleman, *Military Tribunals,* p 267. Piccigallo claims 87 cases were tried.

[68] Note, for practical reasons, not all of the 187 cases are discussed. Rather, a sample of those cases were selected based on specific criteria as mentioned in footnote above, and discussed in detail in the 'methodology' section of this chapter. Specifically, (ie. the individual's rank and the function/ role he performed). During archival research, patterns of the types of individuals charged began to emerge and it was these patterns that enabled the formation of natural groupings for the selection of cases.

A. *The Yamashita Precedent*

The Manila trials are significant for international criminal law because it was in Manila that the first significant attempt was made by US authorities to bring Japanese leaders to justice for war crimes allegedly committed in the course of war. The high profile *Yamashita trial* conducted in the Philippines in the early months after Japan's surrender is still controversial and attracts debate to this day. Yamashita, the commander of the Imperial Japanese 14th Area Army in the Philippines, was indicted, convicted and later executed on allegations of war crimes committed by his forces against Philippine civilians. Given that researchers and international jurists have constantly referred to the *Yamashita trial* in recent times, one wonders what other benefits there might be for future war crimes trials the more we uncover about the dozens of lesser known cases that were also tried in the Philippines.

The *Yamashita trial* laid the groundwork for many of the procedural rules later adopted throughout the course of the trials of lesser-ranked individuals that followed. The case also created what would become known as the 'Yamashita precedent' which set the precedent for making superiors criminally liable for war crimes committed by their subordinates.[69] Much has been written on this trial. Suffice it to say for the purpose of this discussion, General Yamashita Tomoyuki was charged with 'willful [sic] disregard and failure to discharge his duty…' and 'permitting' war crimes to be committed by his subordinates.[70] A total of 123 particulars was provided in relation to the charge which read like a litany of some of the most heinous offences known to war crimes. These included acts such as: burning, pillage, looting, destruction of property, killing, massacre, rape, mutilation, mistreatment of the civilian population, extermination of the civilian population, starvation, torture, maiming, burning alive, and so on.[71]

Yamashita claimed he did not know of, or give orders to commit, any of the acts for which he was charged. He also contended that due to the chaos and success of the US counter-offensive, Japanese command structures had all but eroded and, on that basis, he should not be held accountable for the actions of those whom he had no ability to control. Despite his defence team raising these points, and a series of appeals that went to the US Supreme Court, General Yamashita was convicted on the basis of command responsibility and was executed on 23 February 1946.[72] General Yamashita was one of the first to be convicted under the command responsibility doctrine, hence the term the 'Yamashita precedent'.

In broad terms, the Yamashita principle was predicated on the notion that because he was the most senior person responsible for the IJA in the Philippines, he therefore bore all responsibility. While the *Yamashita case* was important to highlight the principle that a senior

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[69] Richard L Lael, The Yamashita Precedent: War Crimes and Command Responsibility (Scholarly Resources Inc, 1982).
[70] Totani (n 15) 12, 33.
[71] Ibid.
[72] Ibid 21.

commander could and would be held responsible for the conduct of his subordinates—even when no evidence existed that he gave direct orders to commit war crimes—it soon became apparent that the Yamashita jurisprudence could not readily be applied to all cases. To do so would mean that any commander of any rank could be held liable for unlawful acts committed by any subordinate providing there was some link between the subordinate and the commander, no matter how tenuous that link might be. Outside of the principle that stated commanders could be held liable for acts committed by subordinates, the Yamashita precedent was, to a large extent, not operable. The scope of liability was too broad and further refinement of the principle was required as and when these cases arose. Yamashita's status made it less problematic to hold him accountable for war crimes due to his executive position over the entire 14th Area Army in the Philippines but to hold junior officers responsible to the same extent was a problem, even for military tribunals.

The Manila trials dealt with a range of facts that were manifestly different to the Yamashita case and needed to be assessed on their own merits. The Manila trials provide significant judicial discussion on the finer points of command responsibility jurisprudence and, together with Chapters 2 and 3, have contributed to the normative discussion on the reformulation of the elements of command responsibility outlined in Chapter 4.

B. *Severity of Punishment*

The US Army's war crimes commission in Manila prosecuted cases of the most severe kind and, as such, the death penalty was frequently applied.[73] Although the overall number of trials conducted in Yokohama far exceeded the number of trials conducted in Manila, the offences tried in Yokohama ranged substantially in severity from minor offences to the more severe offences.[74] The severity of offences tried at Manila from 1945 to 1947 is reflected also in the rate of convictions. According to Piccigallo's assessment, the number of defendants convicted and executed at Manila greatly exceeded that of any other US military commission conducted in the Asia–Pacific region. Piccigallo cites statistics that show the number of defendants sentenced to death at Manila was around 43% of those tried.[75] In other words, nearly half of the defendants tried at the Manila trials received the death penalty.

In comparison, the number of death sentences handed out at other trials in the Asia–Pacific were fewer (ie Yokohama 5%, China 13%, and the Pacific Islands 8%).[76] Why were these figures so low in comparison to the number of death sentences handed down in Manila? Was

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[73] Piccigallo (n 22) 67, 66.
[74] Ibid 66–7.
[75] Ibid 95. Piccigallo states as authority for these figures research obtained by Appleman, *Military Tribunals,* p 267 and in turn attributes Appleman's figures to be have been taken from official estimates from SCAP, *Trial of Class "B" and "C" War Criminals,* p 202–4, and numbers from the US Department of the Navy, *Final Report, volume 1,* pp 103–110.
[76] Ibid.

it to do with the sheer brutality the Japanese forces inflicted upon the people of the Philippines and the POWs during their fateful occupation of the Philippine Islands?[77] Or were there other (political) factors at play? Was there a special vindictiveness displayed by the US military commissions in the Philippines due to the loss of face the US military experienced at the hands of an advancing Japanese expeditionary force several years prior? The extraordinarily high numbers of prosecutions and death sentences (in comparison to other US military commissions elsewhere) make the Philippine trials a compelling series of trials to examine.

C. *High Rate of Convictions for Command Responsibility*

The command responsibility trials, as they came to be known, arose because the Allies wished to prosecute Japanese commanders and staff officers of all ranks for certain acts committed by subordinates.[78] The objective behind the use of the doctrine of command responsibility is to hold liable those persons (including civilian and military) in positions of responsibility, for the acts perpetrated by subordinates under their command. The idea of command responsibility is to hold those in positions of influence to account even where there exists little or no evidence that the superior participated in, knew of, or ordered war crimes to be committed. Each of the Allied nations that participated in the trials prosecuted senior Japanese officers for crimes against Allied POWs and civilians.[79] The various charges related to, for example, the ill-treatment of POWs on the Sandakan–Ranau death marches, failure to discharge their duties as Commander to control the conduct of the members of their command, and failure to prevent brutal atrocities and other crimes.[80]

A unique perspective of the legal discussion surrounding command responsibility by the US military is offered by Adolf Frank Reel in his book, *The Case of General Yamashita*.[81] Reel was one of six US military defence lawyers assigned to defend General Yamashita Tomoyuki. While unique in terms of being a firsthand account, Reel's book deals only with one trial—

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[77] For a firsthand account of Japan's invasion and occupation of the Philippine Islands, see Teodoro A Agoncillo, *The Fateful Years: Japan's Adventure in the Philippines, 1941–45* (R P Garcia Publishing Company, 1965) vol 2.

[78] Koji Kudo, 'Command Responsibility and the Defence of Superior Orders' (PhD Thesis, University of Leicester, 2007) 105–6; Chantal Meloni, 'Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?' (2007) 5(3) (1 July 2007) *Journal of International Criminal Justice* 619.

[79] For example, the Australian military prosecuted a number of senior Japanese military officers: General Imamura (8 Army Group); Lt-General Adachi (18 Army); Lt-General Kanda (17 Army); Major General Hirota; and Lt-General Baba. Prosecution included Lt-General Kato (8 Army Chief of Staff) who was accused of unlawfully employing prisoners of war having a direct connection with the war, contrary to the provisions of the Hague Convention.

[80] David Sissons, Australian War Crimes Trials 1945–1951, National Library of Australia, MS3092, Series 10, < http://www.nla.gov.au/ms/findaids/3092.html#prefercite1>.

[81] Adolf Frank Reel, *The Case of General Yamashita* (Chicago University Press, 1949).

albeit an important precedential trial for US and Allied trials—and is limited in its discussion in regard to other US trials conducted subsequent to the *Yamashita trial*.

D. *The Limited Availability of the Defence of Military Necessity*

The accused at Manila were, for the most part, deprived of the opportunity to claim 'military necessity' as a valid excuse for certain acts committed where it was alleged those acts, while potentially a war crime, were committed to achieve a military objective. The term 'military necessity' is generally defined as covering those acts by a belligerent that serve to 'legitimize destructive actions and to privilege military considerations at the cost of humanitarian values'.[82] Throughout the Manila trials, military necessity was repeatedly raised by an accused as a defence to charges of war crimes on the basis that the circumstances in which the accused acted was purely to promote a military objective, rather than satisfy any 'blood lust' or criminal intent.[83]

At the time of the Manila trials, the concept of military necessity was nothing new. But it was not until 1956 when the United States Department of the Army Field Manual ('US Army FM') defined military necessity as:

> that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity.[84]

E. *The Limited Scope of the Defence of Superior Orders*

Throughout the Manila trials, defendants frequently pleaded, with little success, the defence of superior orders on charges of war crimes. The defence of 'superior orders' is predicated on the assumption that an accused should avoid criminal responsibility for acts done while under the orders of a superior, simply because soldiers owe a 'duty of obedience … to their superior officers'.[85] The 'defence' of superior orders, as it is often called, however, is not an absolute

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[82] Craig J S Forrest, 'The Doctrine of Military Necessity and the Protection of Cultural Property during Armed Conflicts' (2007) 37(2) *The California Western International Law Journal* 177, 219.
[83] In relation to examples where military necessity was raised, see the case of Major *Mikami Koe* of the Imperial Japanese Army, 27 March 1947, (NARA) where Major Mikami ordered the killing of six unarmed combatants (including women and children) so that Mikami and his small unit could avoid detection from US forces. The Commission in this case rejected Mikami's claim that such actions did not constitute a sufficient rationale for the application of military necessity.
[84] United States Department of the Army Filed Manual, 'The Law of Land Warfare' FM27-10, paragraph 3(a) <http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm27_10.pdf>.
[85] Alan M Wilner, 'Superior Orders as a Defense to Violations of International Criminal Law' (1966) 26(2) *Maryland Law Review* 127, 127.

defence to an allegation of war crimes under international law. The way 'superior orders' is regarded by most scholars is that it works to mitigate punishment rather than to completely defeat the charge. Some possible problems exist with this interpretation given the severity of punishment that a subordinate would face if he or she refuses even unlawful orders.

Possibly one of the most articulate legal scholars to enunciate the operation of superior orders is Yoram Dinstein in his seminal text, *The Defence of 'Obedience to Superior Orders' in International Law*.[86] Originally based on his doctoral thesis, submitted in 1964, Dinstein's detailed analysis of the concept of superior orders covers a wide range of legal scholarship and leading cases spanning centuries with emphasis on trials including WWI, WWII and other subsequent trials where superior orders was raised.[87]

However, despite a smattering of references to several Allied trials of Japanese B and C class soldiers, the vast majority of legal scholarship concerning superior orders makes scant reference to superior orders in relation to the Asia–Pacific trials.[88] This would indicate that legal scholars, on the whole, have had little, if any, engagement with the immense archival record with a view to better understand superior orders as it was applied during the Asia–Pacific trials.[89]

As is explained as part of the separate chapter dealing with superior orders at the Manila trials, this thesis puts forward several suggestions on how international law might better operate to deal with difficulties that arise when subordinates raise this defence. Primarily, the law needs to reflect the reality of the harshness of the consequences of disobeying orders and therefore incorporate both a subjective and objective assessment of the mental element of the offence. In addition, there exist sound arguments to allow a full defence to charges of war crimes on the basis of superior orders and not, as it currently stands, merely apply them to mitigate the

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[86] Richard Cryer, 'Superior Scholarship on Superior Orders' (2011) *Journal of International Criminal Justice* 959–72; Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (Oxford University Press, 2012).

[87] Ibid vii–ix.

[88] There are of course several exceptions to this – see, eg, Pappas (n 19) 18, chapters 7, 8; Carrel (n 20) 19, chapter 12.

[89] See, eg, Ilias Bantekas, 'The Contemporary Law of Superior Responsibility' (1999) 93 *American Journal of International Law* 573; P Gaeta, 'The defence of superior orders: the statute of International Criminal Court versus customary international law' (1999) 10(1) (1 January 1999) *European Journal of International Law* 172; Russell Grenfell, 'This Question of Superior Orders' (1951) 96(582) *Royal United Services Institution Journal* 263; James B Insco, 'Defense of Superior Orders Before Military Commissions' (2003) 13 *Duke Journal of Comparative and International Law;* Aziz Mohammed, 'Military Culture, War Crimes and Superior Orders' (PhD Thesis, Bond University, 2008); Mark J Osiel, *Obeying Superior Orders: Atrocity, Military Discipline and the Law of War* (Transaction Publishers, 2002); Natalia M Restivo, 'Defense of Superior Orders in International Criminal Law as Portrayed in Three Trials: Eichmann, Calley and England' (2006) Paper 18 *Cornell Law School Graduate Student Papers* 1.

sentence. The Manila trials provide several leading cases where such findings were warranted. Naturally, however, there are consequences to allowing superior orders to operate as a full defence to a charge of war crimes, and these too, are examined.

The following chapter will explore the concept of command responsibility at the Manila trials. In doing so it will become clear that much of the historical-legal context of command responsibility, was not entirely applied at the Manila trials. Instead, as the individual cases show, it was often the case that the law at Manila was an amalgam of some of the legal principles described above mixed with legal principles unique to the Manila trials. As a consequence, the law was not always applied consistently and often it was difficult to discern the true legal position of command responsibility.

CHAPTER 2:
COMMAND RESPONSIBILITY IN ITS HISTORICAL CONTEXT

I. Introduction

This chapter examines the doctrine of command responsibility in three historical periods and in doing so, establishes a comparative context for the doctrine at the Manila trials. The purpose of this chapter is to provide an examination of the jurisprudential rationale, underlying principles and judicial and legal standards that have underpinned the doctrine of command responsibility over the centuries. Taking into account a wide array of cases from various theatres of war (including several high profile US Army cases in the Philippines that preceded the bulk of trials at Manila), this chapter will highlight both the inherent flaws, deficiencies and desirable aspects of the application of the law surrounding command responsibility.

Command responsibility is a term applied in military and at international law to attribute criminal responsibility to those in positions of leadership—military and non-military—for the criminal wrongdoing of their subordinates.[90] Historically, through the application of command responsibility, superiors have been convicted of crimes such as genocide and crimes against humanity committed by subordinates.[91] To be liable for war crimes and other international crimes under the doctrine of command responsibility, a superior must have known 'or had reason to know that the subordinate will 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'.[92] Mitchell argues that the purpose of command responsibility is to ensure

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[90] Mirjan Damaska, 'The Shadow Side of Command Responsibility' (2001) 49(3) *The American Journal of Comparative Law* 455, 455–6. Generally, reference to criminal wrongdoing in the context of war crimes, are those types of crimes that involve offences of the gravest kind, such as unlawful killing and sexual offences. It should be noted, however, as will be discussed later, that the *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 38544 (entered into force 1 July 2002) ('*Rome Statute*') or ('*ICC Statute*') Art 28(a) and (b) makes a distinction between military and non-military leaders.

[91] Alexandre Skander Galand, Emile Hunter and Ilia Utmelidze, 'International Criminal Law Guidelines: Command Responsibility' (Case Matrix Network, Centre for International Law Research and Policy, 2016) 5 <https://www.legal-tools.org/doc/7441a2/pdf/>.

[92] Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, U.N. SCOR, 48th Sess., Annex, Article 7(3) para 56, U.N. Doc. S/25704 (1993). See also Mark Osiel, 'Obeying Orders: Atrocity, Military Discipline, and the Law of War' (1998) 86 *California Law Review* 946, 1040.

commanders and leaders 'control their subordinates and to establish objective standards of diligence'.[93]

A. *Problems with the Command Responsibility Doctrine*

Osiel points out that making a superior criminally responsible on the basis of command responsibility poses a practical problem since the 'breadth of liability' is such that it discourages intermediate level commanders from initiating prosecutions of subordinates for fear that any investigation would 'invite attention to his own behaviour regarding the underlying crimes'.[94] Osiel further points out that the doctrine is problematic in an ethical sense because 'imposing liability for wilful blindness illegitimately transforms offenses requiring knowledge into crimes of simple negligence'.[95] The prosecution needs only to prove that the accused was in the position of authority and therefore *would* or *should* have been in a position to prevent or punish any wrongdoing by subordinates. The problem with this approach to imposing liability, as Damaska points out, is that it has long been a principle of law that criminality for war crimes should be assigned to those who have clear responsibility for criminal wrongdoing. As shown in the trial of General Yamashita Tomoyuki in the aftermath of the US retaking control of the Philippines in 1945, there is not always clear evidence that the superior either participated in the acts, gave the orders to commit the criminal acts, or even knew that subordinates were engaging in the acts in question.[96]

The key problem with using command responsibility as the basis of criminal responsibility, as noted by Colonel Clarke, senior defence counsel for General Yamashita during the trial, is the ambiguous and unlimited scope of liability for superiors for acts of subordinates:

> The Accused is not charged with having done something or having failed to do something, but solely with having been something. For the gravamen of the charge is that the Accused was the commander of the Japanese forces, and by virtue of that fact alone, is guilty of every crime committed by every soldier assigned to his command.[97]

That is, a person can be liable for war crimes merely because of the position they occupy rather than because there is any clear evidence of him having committed the unlawful acts or having

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[93] Andrew Mitchell, 'Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes' (2000) 22 *Sydney Law Review* 381, 381. See also Mark Osiel, 'Obeying Orders: Atrocity, Military Discipline, and the Law of War' (1998) 86 *California Law Review* 946, 1040–41.
[94] Mark Osiel, 'Obeying Orders: Atrocity, Military Discipline, and the Law of War' (1998) 86 *California Law Review* 946, 1040.
[95] Ibid.
[96] Damaska (n 91) 9090, 455.
[97] AG 000.5 (9-24-45) JA, "Before the Military Commission Convened by the Commanding General United States Army Forces, Western Pacific: Yamashita, Tomoyuki" page 31, as cited in Richard L Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* (Scholarly Resources, 1982) 82–3.

given the orders to commit the acts. As will be shown in the next chapter, this is exactly the type of problem that manifested during the US Army trials in Manila. Japanese defendants were convicted purely, it would seem, due to the position they occupied at the time offences were alleged to have occurred.

A further practical problem with attributing liability on the basis of command responsibility is determining where the chain of command begins and ceases since there is technically no limit to who could be held accountable for any act committed by subordinates.

While accepting that strict liability may create a sense of injustice for those in positions of authority, on the other hand the question centres on the injustices that would result if liability was assigned only to the actual perpetrators, thereby relinquishing the responsibility of those in positions of authority. Such was the legal dilemma that existed in the *Yamashita*[98] and *Kuroda*[99] trials.

II. The Foundations of Command Responsibility as a Legal Doctrine

The legal basis for attributing criminal responsibility to leaders for the acts of subordinates is, unsurprisingly, not new. The development of the command responsibility doctrine has varied greatly according to the context and the nature of the conflict and there appears to be variance in the way in which command responsibility was applied at various times even within trials conducted by the same authority.[100] As one traverses the historical landscape of international criminal law, a degree of uncertainty remains as to how best to achieve justice in regard to holding those in positions of authority to account.[101] On the one hand there is the need to punish

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[98] *Yamashita v Styer* 317 US 1; 66 S. 340 (US Supreme Court) (‘*Yamashita trial’)*.

[99] “Shigenori Kuroda” UD1323, RG331, SCAP Legal Section, Prosecution Division, Philippines v Various Japanese war Criminals Case File, 1947–1949, Boxes 1699-1702, as cited in Yuma Totani, *Justice in Asia and the Pacific Region, 1945–1952: Allied War Crimes Prosecutions* (Cambridge University Press, 2015) 16, 22–24, 46–55.

[100] For example in Yuma Totani, *Justice in Asia and the Pacific Region 1945–1952: Allied War Crimes Prosecutions* (Cambridge University Press, 2015) 22–24, Totani discusses the challenges associated with providing any definitive answers in relation to the way in which the command responsibility doctrine applied to three high profile cases of senior Japanese military leaders in the Philippines (the *Yamashita trial, Honma* and *Kuroda* trials). The reasons for this lack of clarity in the application of ‘a uniform theory of command responsibility’ doctrine, according to Totani, is due in part to the controversial nature of the *Yamashita trial* verdict regarding the two dissenting judgments by Justices Frank Murphy and Wiley B Rutledge of the US Supreme Court. A further point that Totani makes in relation to the difficulties in discerning any precedential value of the three trials, is due to the fact that little is understood about the *Honma* and *Kuroda* trials as opposed to the abundance of literature written about the *Yamashita trial*.

[101] For a discussion of the varying interpretations of the doctrine of command responsibility over time, see Chantal Meloni, ‘Command Responsibility Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?’ (2005) 5(3) *Journal of International Criminal Justice* 619, 623.

those who author and lead others to commit barbarous acts of wanton cruelty against fellow human beings, while on the other, there is the need to 'stay the hand of vengeance'[102] to ensure individuals are not prosecuted merely because of the position they occupy.

Holding leaders to account for war crimes—both civilian and military—has been and continues to be problematic for a number of reasons. As history has shown, it is not always clear as to who *should* be held to account and all too often it is those who occupy the lower to mid-ranks of seniority who are held to account, while those who occupy positions of senior leadership avoid liability.[103] Why is it that some leaders are held to account, while others escape liability? What fundamental elements must be present in determining the extent of criminal responsibility of an individual? Clearly the question as to whom should be held accountable in times of war has existed for millennia as demonstrated by the ancient teachings of Sun Tzu.

A. *Command Responsibility and Sun Tzu*

Some commentators place the initial recorded evidence of the doctrine of command responsibility as far back as 500 BC with the writings of Sun Tzu:

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[102] See Robert H Jackson, 'Opening Address for the United States of America' (Speech delivered at the International Military Tribunal, Palace of Justice, Nuremberg, Germany, November 21, 1945) as reproduced in the *Department of State Bulletin* (November 25, 1945) volume XIII, Number 335.

[103] This 'pyramidal' structure of liability means that there is a disproportionate number of those brought to account in the junior ranks as opposed to those prosecuted in the senior ranks. One only needs to observe proceedings in the IMTFE to see that while 27 senior members of the Japanese military and Government were brought to trial in Tokyo for their part in, *inter alia*, waging war of aggression against the Allies and people of the South-East Asia, thousands of Japanese soldiers were brought before military commissions all over the Asia–Pacific. For a list of those prosecuted at the IMTFE, see the 'International Military Tribunal for the Far East', *The Indictment.* It is curious as to why only 27 senior Japanese Class A defendants were brought to trial. This is despite the fact the US military had made a list of over 100 individuals who were senior members of the Japanese military and government. The Indictment also acknowledges that many more people were involved in the facilitation of Japanese war crimes – Counts 1–5 of the *Indictment* in relation to 'crimes against peace' refers to the '[d]efendants together with *divers* other persons'. For an excellent analysis on the process and decisions of selecting the defendants at the IMTFE, see several sources: Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press, 2008) chapter 3 'The Accused and the Indictment'; Awaya Kentaro, 'Selecting the Defenants at the Tokyo Trial' and Yoriko Otomo, 'The Decision Not to Prosecute the Emperor' in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff Publishers, 2011); Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Harvard University Press, 2008) chapters 2 and 3.

> 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.[104]

Although it is clear that Sun Tzu places a great deal of responsibility on the commander in relation to the behaviour of subordinates, he expresses nothing about attributing blame to commanders when their subordinates ill-treat the enemy or non-combatants. It is not clear, therefore, whether Sun Tzu believed that responsibility should be assigned to commanders when subordinates mistreated their enemy or non-combatants.

B. *Command Responsibility and the Renaissance*

In a similar vein, King Charles VII of Orleans in 1439 introduced a law that stated:

> the King orders that each captain or lieutenant be held responsible for the abuses, ills and offenses [sic] committed by members of his company. … If, because of his negligence or otherwise, the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offense as if he had committed it himself.[105]

It is clear that the King's orders adopted the position that attributed responsibility to a 'captain' or a 'lieutenant' for 'abuses, ills and offenses [sic] committed by members of his company'. The orders do not specify, however, against whom these acts must be committed in order to be liable, and on that basis, one can only presume that the orders intended to make captains and lieutenants responsible for acts committed against *any* person, whether enemy or not.[106]

A further two points can be made about the King Charles's orders. Firstly, it appears that strict liability is imposed on captains and lieutenants for the wrongdoing of their subordinates. The initial part of the order makes it clear that liability is strict in the sense that responsibility for any wrongdoing committed by a subordinate automatically assigns to captains and lieutenants merely because of the act having been carried out by the subordinate. In other words, all that is required is the *actus reus* and no consideration is given as to whether the superior gave any orders or whether he intended or allowed the subordinate to commit the offending behaviour. Secondly, the order imposes a form of liability on captains as if to make them a party to the offending behaviour, in the event that the captain fails to prevent the offender from escaping and they evade punishment.

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[104] M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd ed, Kluwer Law International, 1999) 423.

[105] Leslie C Green, *Essays on the Modern Law of War* (2nd ed, Ardsley, NY: Transnational, 1999) 283, as cited in Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd ed, Cambridge University Press) 418.

[106] Although without clear guidance to whom the offending behaviour must be directed, one could easily make the opposing argument that the King's orders could be interpreted to restrict the effect of the order to applying only to a certain class of persons or group such as the belligerent's own side and not the opposing side or non-combatants.

The imposition of strict liability on superiors and making them a party to the offence is something with which successive tribunals have grappled over the years. The idea of imposing strict liability was anticipated and argued at a number of Japanese war crimes trials in Manila.[107]

As for making civilian leaders responsible for the acts of military personnel, Solis cites a 1925 translation of the seventeenth century writings of Hugo Grotius who articulated that non-military leaders could be held to account for the crimes of their subjects. Grotius stated that '[a] community or its rulers may be held responsible for the crime of a subject if they knew of it and did not prevent it when they could and should prevent it'.[108] Later this chapter delves into the issue of responsibility of civilian leadership and investigates the International Military Tribunal for the Far East ('IMTFE' or the 'Tokyo trials').

Around the same time as Grotius, in 1621, Adolphus of Sweden promulgated Article 46 of the 'Articles of Military Lawwes to be observed in the Warres that 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 [sic]'.[109] This law does not provide any greater clarity than the examples cited above and, one could argue that the wide discretion afforded to 'judges' in fact makes it even more difficult to ascertain whether those other than 'Colonel or Capitaine' would be held accountable for the unlawful conduct of subordinates.

C. *Early American Influences on the Development of Command Responsibility*

In relation to assigning criminal responsibility to commanding officers for the acts of subordinates, greater clarity came some one hundred and fifty years later in colonial America during the American Revolution. During the struggle to gain independence from Great Britain, the Continental Army needed enforceable rules of military conduct. The *Massachusetts Articles of War* in 1775[110] was promulgated and Article 11:

> 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 beating or

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[107] See, eg, the *Yamashita trial* where General Yamashita vehemently argued that he knew nothing of the atrocities committed by his troops in the Philippines. Cf Solis argues that Yamashita was not found liable on the basis of strict liability; rather, according to Solis, the prosecution was able to avoid the question as to whether liability was strict, because the prosecution argued (and the Commission agreed) that Yamashita would have known about the atrocities and was therefore guilty on that basis.
[108] Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* [The Law of War and Peace], bk. II, ch. XXI, sec. ii, Francis W Kelsey trans (1925) 138, as cited in Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd ed, Cambridge University Press) 418.
[109] Article 46, *Articles of Military Lawwes to be observed in the Warres,* cited in William H Parks, 'Command Responsibility for War Crimes' (1973) 62 *Military Law Review* 1, 5.
[110] Ibid.

> 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.[111]

Article 11 is significant for a number of reasons. First, the provision squarely places responsibility for certain types of wrongdoing at the feet of 'every officer' which is a departure from earlier *lex scripta* that tended to hold responsible only those who were mid-ranking officers (eg captain and lieutenant). This meant that those who occupied any position of authority—no matter how junior or how senior—could be held accountable for the acts of their subordinates. Secondly, Article 11 placed a positive duty on the commanding officer to 'keep good order' and to 'redress all such abuses or disorders which may be committed by any officer or Soldier under his command'. This provision, therefore, required all officers to take positive steps to ensure these measures were undertaken. Consequences for failing to do so were also dealt with under Article 11 which made the superior susceptible to court-martial as if he had committed the offences.

A number of years later, in 1806, the US promulgated Article 33 of the *American Articles of War*.[112] This provision squarely placed the responsibility of any 'commissioned officer' or 'soldier' to assist authorities in the apprehension of any person under his command who was accused of a 'capital crime' or had used violence against another person or property. In the event that the superior failed in this endeavour, for whatever reason—either through neglect or refusal to apprehend an accused, then that officer would be 'cashiered'.[113] Article 33 stated:

> 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

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[111] *Provisional Congress of Massachusetts Bay, the Massachusetts Articles of War,* Article 11, as cited in William H Parks, 'Command Responsibility for War Crimes' (1973) 62 *Military Law Review* 1, 5. For an historical overview of the rules and codes of US military justice, see Judge Advocate General's School, US Army, *The Background of the Uniform Code of Military Justice* (1970). In relation to the *Massachusetts Articles of War*, refer to page 2 of *The Background of the Uniform Code of Military Justice*. Commentary in the Introduction of this text states that the foundations of US military law are 'modelled for the most part on the pre-Revolutionary War system of England based on the old Roman Code …', which, if correct, would indicate that the doctrine of command responsibility has its inception in ancient law as previous authors have indicated.

[112] Article 33, Articles of War, An Act for Establishing Rules and Articles for the Government of the Armies of the United States, *Articles of War* (Web Page, 1806) <http://suvcw.org/education/documents/articles.htm>.

[113] The term 'cashiered' in the military context, means to be dismissed from service or stripped of one's military insignia or rank – see, eg, Charles Carleton Coffin, *Following the Flag: From August 1861 to November 1862 with the Army of the Potomac* (Hurst and Company, 1865) 158.

> 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 on 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 wilfully 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.[114]

With the outbreak of the Civil War in 1861, it quickly became evident that the 1806 *Articles of War* were insufficient to deal with many new problems arising such as guerilla fighters, non-combatant sympathisers, spies, the use of slaves in the fighting, and the humane treatment of prisoners. In response to these ethical challenges, in 1863, with the assistance of the Union general-in-chief, Henry Halleck, Frans Lieber drafted what became known as the *Lieber Code*.[115] Article 71 of the *Lieber Code* stated:

> Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so [emphasis added], shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.[116]

Out of necessity, what began to emerge from the various conflicts was that there were certain instances where it became acceptable to hold superiors to account for the acts of their subordinates. Necessity, it must be said, was borne out of the fundamental need to reign in excessive conduct of subordinates to prevent acts of cruelty and unnecessary destruction of life and property. The way to do that was to hold their immediate superiors to account to 'establish objective standards of diligence' on the part of superiors.[117] As the following examples illustrate, there are now discernible elements in this mode of criminal responsibility stemming from a variety of conflicts that form part of the customary laws and usage of international law.

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The doctrine of command responsibility has been applied in varying ways over the ages. The evolution of the doctrine can be traced to Sun Tzsu and possibly beyond, and the one constant

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[114] Parks (n 109) 6.

[115] General Order No. 100, *Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War*, Washington DC April 24, 1863 ('*Lieber Code'*). For a detailed discussion on the history underpinning the drafting of the *Lieber Code*, see Daniel E Sutherland, *American Civil War Guerillas: Changing the Rules of Warfare* (ABC-CLIO, 2013) Chapters 5–6.

[116] Article 71, *Lieber Code*, cited in Leon Friedman (ed), *The Law of War: A Documentary History Volume 1* (Random House, 1972) 171.

[117] Mitchell (n 94) 93, 381.

in the application of the doctrine throughout the ages is the inherent desire to make superiors responsible for the acts of subordinates. The rationale that underpins the doctrine also varies.

In one sense the reason behind the doctrine is based on the need to maintain military discipline so as to ensure the military operates effectively as it can. In another sense, making superiors criminally responsible for the acts of their subordinates appeals to a sense of justice. That is to say we believe it is just to hold superiors to account for giving unlawful orders or when they are derelict in their duty to control subordinates when the superior creates the conditions (whether knowingly or otherwise) that result in wanton acts of violence against others.

However, when one talks of fairness and its relationship to command responsibility, several problems arise. Chief among them is whether the current concept of liability with command responsibility is whether the right people are held to account or whether the application of command responsibility allows those who are more criminally culpable to escape criminal responsibility.

CHAPTER 3:
THE MANILA COMMAND RESPONSIBILITY TRIALS: HOLDING COMMANDERS ACCOUNTABLE FOR THE ACTS OF SUBORDINATES

I. Introduction

With the conviction and execution of General Yamashita Tomoyuki, the law of command responsibility seemingly appeared settled at Manila. Simply stated, the principle was that those who occupied positions of authority could be held to account for the acts and omissions of their subordinates. However, as the number of trials increased for lower to mid-ranking Japanese military personnel charged for 'failing to control', or 'permitting' troops under their command to commit war crimes, it soon became evident that the law as pronounced in the *Yamashita trial* was simply not transferrable to all cases. A more nuanced assessment of criminal responsibility was needed. Each case needed to be assessed on the merits of evidence and the particular legal questions arising in that case. Japanese superiors often found themselves answering charges in relation to crimes for which they claimed to have had no prior knowledge. This was certainly the case in the joint trial in 1947 of Lieutenant-Colonel Onishi Seiichi, 1st Lieutenant Kawahara Hajime, and 2nd Lieutenant Ogata Tsugiharu ('Onishi's case'). In Onishi's case, the Tribunal seemed to favour circumstantial evidence mostly predicated on the accused's position. In other words, the criminal responsibility of the accused was contingent upon the position they held at the time of the alleged offences and not based on specific orders they gave to subordinates or knowledge they had in relation to offences committed. The notion of 'contingent liability' was a common mode by which the accused was found guilty based on the contingency associated with a person's superior rank to that of the perpetrators.

Onishi's case further illustrates that tribunals seemed less likely to accept the defence's argument that superiors had little to no control over the actions of their subordinates. A common argument by Japanese camp commanders was they had little control over subordinates due to the dire conditions of the camps prior to the conclusion of the war.[118]

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[118] See, eg, Trials of Kei Yuri (1st Lieutenant IJA, Camp Commander of Prisoner of War Camp 17-B Omuta, Fukuoka, Kyushu) (RG331, UD1321 290/12/12/1, Box 1557); Kaneko Takeo (Camp Commander, Prisoner of War Camp Number 5, Fukuoka, Kyushu) and Uchida Teshiharu (RG331, UD1321 290/23/6/2, Box 1581); Mizukoshi Saburo (Camp Commander, Sumidagawa Prisoner of War Camp) (RG331, UD1321 290/12/12/1, Box 1587); Hirate Kaichi (1st Lieutenant and later Captain and Commander of Prisoner of War Camp, Hakodate) (RG331, UD1321 290/12/2/2, Box 1389).

The ‘no control’ argument was not entirely without merit. Japanese forces were engaged in intense combat with the advancing US forces and the Filipino guerrilla insurgency in the months prior to the defeat of Japan in the Philippines. This created immense difficulties for communication between Japanese command and field operations.[119] The lack of communication meant that there was often a break in the chain of command and Japanese forces in the field were left to their own devices. The chaotic and dire circumstances in which the retreating Japanese forces endured, incubated the circumstances for ill-discipline and bandit-like behaviour. The prosecutorial way around the apparent lack of knowledge on the part of the accused was to broaden the scope of the essential element for certain crimes. The guilty mind or *mens rea* was redefined to include situations where the accused ‘would’ or ‘should’ have known about atrocities committed under their leadership and were therefore criminally liable.

This was certainly the case in Onishi’s case. In Onishi’s case it was shown that the higher the rank occupied by the accused, the greater the requirement was for them to ensure subordinates were not breaching the laws of war. This case illustrates that superiors can be held strictly liable for the criminal acts of subordinates based on the duty of a commanding officer to control their troops.

In the trial of Lieutenant Ko Shiyoku (‘Ko’s case’), the principle of ‘intermediary liability’ was brought into question. Intermediary liability exists whereby an intermediary (in this case, Lt-Gen Ko) is held criminally responsible for the actions or failures of a higher entity (i.e. the Japanese Government for failing to enforce the Geneva Convention against committing atrocities). Ko’s case further indicates that criminal responsibility can ensue where the accused is physically removed from the scene of the atrocities and is even unable to exercise ‘effective control’ over subordinates who commit atrocities.

At other times, tribunals showed an apparent disregard for sentencing principles espoused in previous trials. The rationale for a guilty verdict by the Tribunal in the trial of Vice Admiral Osugi Morikazu (‘Osugi’s trial’) appeared to be consistent with other trials, however, Osugi’s trial differed in terms of the sentence – he received a term of imprisonment while others in similar cases received the death sentence. The apparent reason was the quantum of killing. Vice Admiral Osugi Morikazu of the 23rd Naval Base Area, Imperial Japanese Navy was charged and convicted of war crimes committed by his subordinates during his command at Makassa, Celebes, Netherlands East India (as it was then known).[120] He somehow managed to avoid the death penalty and received life imprisonment for his part in the commission of war crimes against downed US airmen.

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[119] Teodoro A Agoncillo, *The Fateful Years: Japan’s Adventure in the Philippines, 1941–45* (R P Garcia Publishing Company, 1965) vol 2. For a discussion on the Filipino guerrilla insurgency, see especially pages 384, 645–777.

[120] For all documents referred to in the discussion of the *Trial of Vice Admiral Osugi Morikazu,* see NARA, RG331, UD1321, 290/12/12/1 Boxes 1571–3, Volumes I–XXII.

The 'proximal' and 'temporal' connection of an accused to offences was another legal principle examined at the Manila trials. In the trial of 2nd Lieutenant Minoru Kato ('Kato's case') it was held that where a superior who personally engaged in one (or more) instances of war crimes, it was sufficient to show that the same commander could be liable for other killings under the doctrine of command responsibility even where there exists no evidence of such orders. This rationale raises questions about the validity of guilt when a person is held criminally liable for past acts that have little or no relevance to the specifics of other criminal acts. The mode of finding liability solely rests on the 'proximal' and 'temporal' connection of the accused and the acts committed.

Tribunals in Manila redefined the law by placing a higher standard on some Japanese military organisations in relation to the duty to prevent and punish subordinates for war crimes, the failure of which was sufficient to constitute 'acquiescence'. The trial of Colonel Nagahama Akira of the Imperial Japanese Military Police (Kenpeitai) was an example of this. The harshness of the sentence meted out to Nagahama seemed to be related to his membership of the dreaded Kenpeitai and there was little regard given (even to mitigate the severity of the sentence) in relation to clear evidence of an inability to prevent the atrocities.

II. Command Responsibility Cases at Manila

A. *Trial of Lieutenant-Colonel Onishi Seiichi, First Lieutenant Kawahara Hajime, Second Lieutenant Ogata Tsugiharu, Imperial Japanese Army, Manila, 22–29 August 1946*

This case illustrates that military commissions in Manila were at times seemingly willing to broadly interpret the fault element (*mens rea*) where that element was present in the offence. In addition, Onishi's case demonstrates that commissions in Manila were more than willing to convict the accused based on the position, rank or other circumstances of the accused. A term that appears appropriate in this context is 'contingent liability' whereby the accused's criminal responsibility was 'contingent' solely upon the position the accused occupied.

Onishi's case[121] could be described as a typical 'command responsibility' case involving the conviction of a mid-ranked Japanese army officer for the alleged unlawful killing of a Filipino civilian. The case centred on the actions of Lt-Col Onishi in so far as whether he either gave orders or allowed the killing of Gavino Fuertes, a civilian who was suspected by members of a unit under the command of Onishi of engaging in guerrilla activities.[122]

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[121] United States of America vs Seiichi Ohnishi, Hajime Kawara, Tsugiharu Ogata (Review, 25 January 1947) RG331 UD290/12/12/1 Box 1570.

[122] As an aside, this case is also interesting in the sense that it provides some indication as to how US military commissions dealt with cases that involved reprisal killings by IJA forces against Filipino

Together with 1st Lt Kawahara and 2nd Lt Ogata, Onishi was charged with the unlawful torture and killing of Fuertes on 7 April 1944 at Dumanjug, Cebu Island. Like many of the cases that involved the killing of civilians by the Japanese in the Philippines at this time, the fact that Japanese forces were embroiled in a fierce guerilla war with local militia provides some context to the way that the Imperial Japanese Army ('IJA') engaged with suspected guerrillas. These cases involved significant levels of brutality meted out against those suspected of carrying out insurgent attacks against IJA forces.

Lt-Col Onishi was the commanding officer of the 173rd Infantry Battalion stationed on Cebu Island. Onishi's primary role was to establish garrisons throughout the island to suppress resistance from local Filipino militia and maintain control over the population and civilian infrastructure.[123] On 1 April 1944, Lt Akamine Yutaka, the company commander in Dumanjug was killed in attacks by guerillas in the area. In reprisal, it was alleged that Onishi gave orders to round up any suspected guerillas in the area and one of those apprehended was Fuertes.

Prosecution witnesses claimed that Fuertes was a shoemaker who entered the town looking for work and was not a member of the resistance.[124] Witnesses claimed he was hung by his hands from a tree and severely beaten by the Japanese who used an assortment of weapons to inflict severe wounds on him over several days. Fuertes eventually died of his wounds, but prior to his death, witnesses claimed he was paraded around the town and forced to carry a heavy stone above his head. A sign was placed around his neck that read, 'don't imitate me'.[125] It was alleged by the prosecution that Fuertes's body was later dumped and burned by the Japanese.

Conflicts of Evidence and the Subjectivity Dilemma when Establishing Facts

Due to the extent of conflicting and contradictory testimony offered by the defence and prosecution witnesses, Onishi's role in the killing can be described as unclear, to say the least. There is no direct evidence that linked Onishi to any orders for the actual beating and eventual killing of Fuertes, and certainly no evidence to indicate that Onishi either took part in the actual beating or witnessed the beating. Defence and prosecution witness testimonies were at odds

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civilians. In a broad sense, the approach to convicting and sentencing that US authorities took in relation to killings of Filipino civilians was, on the whole, not unlike cases involving atrocities committed against US military and civilian personnel. For instance, see *The Trial of Colonel Nagahama Akira Imperial Japanese Military Police (Kenpeitai),* 25 February – 11 March 1946, Manila (JA 201-Nagahama, Akira (Col), 'Trial by Military Commission', Review by Colonel Franklin P Shaw, Judge Advocate RG331 290/11/31/05 UD1243 Box 1276); and *The Trial of Lieutenant-General Ko Shiyoku, Imperial Japanese Army,* Manila, 15 March 1946 (*United States of America v Shiyoku Ko* are located at NARA, RG331 UD1321 290/12/12/1 Boxes 1559–60, volumes 1 and 2).

[123] Ibid pages 1–3 of the Review, 25 January 1947.

[124] Ibid 4.

[125] Ibid 4, (R-17). Other witnesses also claimed that a blackboard was placed near Fuertes whilst he hung from a tree that read, 'I'm a guerilla. Don't do bad things like I did' – see witness testimony of 2nd Lt Kato Minoro, page 12 of the Review.

and the Commission needed to wade through contradictory but equally plausible statements on both sides to make a determination of fact in relation to the role Onishi played in the killing of Fuertes.

How then, would the Commission treat such discrepancies? Despite being equally plausible, the Commission in Onishi's case favoured the prosecution's version of events without providing any substantial justification for doing so. The Commission's position in favouring the prosecution can, in a way, be viewed through a prism of subjectivity on the part of the accusers and underscores one of the primary flaws of war crimes trials—which is that there exists a perception of bias on the part of the accusers.

(a) Disputed Fact Evidence

A number of Filipino witnesses for the prosecution claimed that although they did not see Onishi directly taking part in the beating and torture of Fuertes, Onishi was seen looking in the direction of the beating as it occurred.[126] A witness claimed that Onishi was looking out from a window from the barracks at Fuertes being beaten and that the noise of the beating (including the blows and Fuertes's screams) would have been clearly audible and, despite this, Onishi did nothing to stop the beatings.[127]

Other witnesses claimed that Onishi gave direct orders to the townspeople, including the Mayor of the town, to beat Fuertes as he was being paraded by the Japanese through the town. The Mayor claimed that neither he nor anyone else beat Fuertes—a point that was directly contradicted by 2nd Lt Kato Minoro who stated that he saw the Mayor and other townspeople strike Fuertes as he was paraded through town.[128]

For his part, Onishi claimed that he never issued orders to kill civilians connected with guerilla activities and was unaware of any civilians who were hung from a tree and beaten to death by those under his command.[129] These assertions were backed up by several defence witnesses who claimed that no orders were given by Onishi to mistreat any Filipino prisoners during the time Onishi was in the vicinity and that Fuertes was killed on the orders of WO Sakamoto.[130] The same witness testified that Onishi was not in the same town on the day Fuertes died.[131]

The Application of 'contingent liability'

The conflicting evidence meant the Commission needed to make a decision of fact as to key parts of Onishi's involvement in the killing. What is clear from the trial documents is that the Commission focussed primarily on the position that Onishi occupied in relation to the accused.

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[126] Ibid 8, (R-117).
[127] Ibid.
[128] Ibid 12.
[129] Ibid 9, 'Exhibit 4', (R-131-132).
[130] Ibid 13, see witness testimony of Sergeant Major Sue Tadashi (R-290-291).
[131] Ibid 14.

The case clearly shows that Onishi's liability rested primarily on the fact he occupied a position of authority over the actual perpetrators and this seemed to be sufficient grounds on which to convict. The position adopted by the Commission in regard to the criminal responsibility of the accused can be described as being 'contingent' upon the position he occupied.

The Commission ruled that 'there is little doubt that the facts presented by the prosecution prove a case of command responsibility…'.[132] That the Commission reached such a conclusion is instructive given that it ruled out any direct participation by Onishi in the killing. However, besides excluding actual participation, the Commission sought to determine whether Onishi gave the orders to beat prisoners—either explicitly or implicitly. If such orders were given, then according to the Commission, such a finding would be 'sufficient to make him a participant even though physically [he] did not touch the prisoner and was not present at the crime'.[133]

The Commission ruled that in view of the testimony it received, Onishi would have at least had some prior knowledge of the killing before, during and certainly after it had occurred. The fact that Onishi was in such close proximity to the killing and the likelihood he would have known of the apprehension of any suspected insurgents, coupled with the fact he had the power to stop the killing but failed to do so, led the Commission to believe that he gave the orders to kill Fuertes.[134] Interestingly, for reasons that were not made abundantly clear, Lt Kawahara and 2nd Lt Ogata were acquitted of the charge.

Principal Offender or an Accessory After the Fact?

The Commission examined a variety of US and other legal sources for the purpose, it seems, of a palatable way to convict the accused. The Commission appeared as though it wanted to convict Onishi, but had a dilemma as to what legal basis the conviction should stand. During the trial the Commission considered whether Onishi was a 'principal', an 'aider and abettor' or an 'accessory before the fact'.[135] Ultimately, the Commission ruled that it mattered not what category applied, the fact he had a role in the killing was sufficient for a finding of criminal responsibility. The Commission quoted several early decisions from US courts martial and penal statutes that, in the words of the Commission, show that:

> an officer, who commands or advises his subordinates and others under his control to commit a crime, is liable as a principal, even though he was an accessory or aider and was not present at the time the crime was committed. He can be charged with doing the act himself, regardless of

[132] Ibid 17,
[133] Ibid 17.
[134] Ibid 18.
[135] Ibid.

> the fact that the proof shows that his agents, subordinates and others, under his control did the act at his instigation or control.[136]

Hence, Onishi was found liable as a principal offender on the basis that the Commission made a determination of fact that he gave the order to kill Fuertes. In reaching this conclusion of law in relation to Onishi being a principal offender, the Commission relied heavily upon what it believed to be sound precedent in the case of *America vs. Koe Mikami.*[137] To be tried as a principal, all the Commission needed to do was make a finding that Onishi gave the order to commit the unlawful act.

Once the Commission found that Onishi did give the order to commit a homicide, it ruled that 'he [Onishi] is just as guilty of the crime as if he swung the club or rifle that did the actual killing'.[138] The Commission ruled that the order to kill Fuertes was the 'first link in a chain of acts which resulted in the unlawful torture and killing of Gavino Fuertes'.[139]

Broad Interpretation of 'mens rea'

Onishi's case further illustrated a problem that re-emerges continually throughout the Manila trials which relates to the exact nature of the fault element (or *mens rea*) that was required to prove the charge. No discussion was apparent in the review documentation as to whether Onishi satisfied the fault elements as it related to the *mens rea* aspect of the offence for which he was charged. The elements of the charge stated that

> Seiichi Onishi … did … wilfully and unlawfully torture and murder Gavino Fuertes, an unarmed, defenseless Filipino civilian, by hanging and beating him, in violations of the laws of war.[140]

The first element related to the physical act or the *actus reus*—in this case, the torture and murder. Given the Commission ruled that he gave orders to carry out the conduct that led to the death of Fuertes, it may be taken that Onishi did satisfy the *actus reus* element of the offence. The second element related to the fault element or the *mens rea*—in other words, what

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[136] Ibid 19. In reaching its verdict, the Commission concluded that it was following the most recent precedent of '*America vs. Koe Mikami et al.*' tried at Manila 4 June 1946 – see General Headquarters Far East Command, Office of the Judge Advocate, 'Review of the Record of Trial by a Military Commission of Major Koe Mikami, ISN 150380, Imperial Japanese Army', 27 March 1947, document located at NARA, RG331 UD 290/12/2/2 Box 1389 Folders 14&26.

[137] Ibid. In *Mikami's case*, a Military Commission in Manila in 1946 found that 'he … did wilfully and unlawfully kill unarmed, non-combatant Filipino civilians' and thereby sentenced him to death, even though the actual killing was carried out by his subordinates. Importantly, the killings were determined to have been carried out on Mikami's orders and this alone was sufficient to render a guilty verdict.

[138] Ibid 20.

[139] Ibid.

[140] Review documents, "Head Quarters Ryukyus Command" 19 February 1947, Specification 1.

Onishi was thinking or had in his mind at the time he gave the orders. It is this aspect of the offence that proved somewhat elusive and questionable in regard to the findings of his guilt.

As specified in the charge, the prosecution still needed to prove beyond reasonable doubt that Onishi 'wilfully' tortured and murdered Fuertes. The requirement to prove *mens rea* at common law is crucial when making a determination of murder.[141] Without finding that the defendant satisfied the *mens rea* element of the offence, the question becomes whether or not he or she should be found criminally responsible. The prosecution still needed to prove therefore, that Onishi wilfully tortured and murdered his victim—albeit indirectly through the orders he gave to subordinates. In the absence of such a finding in relation to the defendant's state of mind at the time of the commission of the offence, it appears as though the Commission and the subsequent reviewing authority simply interpreted the knowledge aspect in a broad sense. On that basis it would appear as though the law, as determined by the Commission, was that Onishi, as the commanding officer in the area, was strictly liable for the death despite the requirement for the prosecution to prove that Onishi 'wilfully' acted to cause the torture and murder of Fuertes. The method used to determine Onishi's guilt by the Commission, is of crucial importance for international law because such a finding means that it would then be easier for the prosecution to prove a single element (in this case, the *actus reus*) in other similar cases.

A further point of interest in this case relates to the fact that Onishi's co-accused (Lt Kawahara and Lt Ogata) escaped liability completely for the killing. One explanation that can be offered for acquitting Kawahara and Ogata may have been the fact that Onishi was convicted on the basis of command responsibility—that is, he gave the orders, whereas, Kawahara and Ogata gave no such orders as Onishi took on that responsibility himself. Kawahara and Ogata's conviction, therefore, could not be made out because they gave no such orders, and were no different to many other lieutenants in the unit.

Sentence mitigated by the 'volume' of killing as opposed to the act of killing per se

Upon conviction, Onishi received a sentence of life imprisonment. Interestingly, however, despite the heinous nature of the crime and the brutality levelled at the victim and the fact that the killing was a consequence of prolonged and painful torture, Onishi did not receive the death penalty.

Also of interest in relation to the sentencing is the fact that the Commission (and subsequent review) did not seem to consider the killing of Fuertes to be a 'reprisal killing' given that the victim's torture and murder only came after Lt Akamine was killed by the guerilla insurgency. The Commission may or may not have accounted for this to mitigate the sentence. The trial documents do not seem to shed any light on whether the life sentence incorporated punishment

[141] The review authority made reference on page 18 to the 'common law' when the Assistant to the Staff Judge Advocate, James R Freemas stated that 'the best rules of the Common law and of the law of the states and nations can be used as guides to achieve justice'.

for ‘reprisal killings’. By contrast, it would be of interest to ascertain whether the same penalty would have applied had a reprisal killing been carried out on US military personnel.

That the Commission gave Onishi life imprisonment as opposed to a death sentence for the murder, seemed to place a premium on the number or volume of those killed rather than condemning the actual act itself. Although not expressly indicated in the judgment, one could ascertain from the sentence, when it is compared to others, that the Commission related the severity of the sentence to the quantum of victims. The life sentence Onishi received indicates that the greater the number of victims affected by the actions or omissions of the accused, the more likely it was that an accused would be subjected to the death penalty. If one victim was murdered, even under the most heinous of circumstances, a life sentence may be appropriate. Such a sentencing principle differentiates the seriousness of the offence of murder on the basis of scale. Emphasis on scale—as opposed to the fact that murder was committed—distorts the perception of murder. Under such a sentencing protocol, the crime is reduced to a numerical assessment so that sentencing becomes dependent upon enumeration of the dead as opposed to condemnation of the act itself.

B. *Trial of Lieutenant-General Kono Takeshi, High Commissioner’s Residence, Manila, 12 April 1946*

Kono’s case shows that a lack of evidence proving knowledge on the part of the superior of war crimes committed by subordinates is not an impediment to a conviction. The higher the position occupied by the accused, the greater the requirement is to ensure subordinates are not breaching the laws of war. Kono’s case further illustrates that superiors can be held strictly liable for the criminal acts of subordinates.

Lieutenant-General Kono Takeshi of the 77th Infantry Brigade of the IJA[142] is one of several senior members of the IJA considered in relation to the command responsibility trials.[143] Much of the jurisprudence considered at Kono’s trial, according the prosecution, was based on the *Yamashita trial* and the precedents contained therein.[144] A senior member of the IJA, Lt-General Kono was charged with crimes committed by Japanese troops against mainly Filipino civilians. The period in which the alleged crimes occurred spanned several years of the

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[142] Christopher Chant, *Operation Victor I* (2018) Codenames: Operations of World War 2 < https://codenames.info/operation/victor-p-i/>.

[143] Trial documents for *Kono’s case* are located at NARA, RG331 UD1321 290/12/12/1 Box 1563. Unless specified otherwise, all archival documents referred to in this chapter relating to the trial of Lt-General Kono are taken from this series.

[144] The prosecution made this point abundantly clear at the beginning of the trial. See document entitled, ‘Answer to Defense Motions for a Bill of Particulars to the Charge, for further particulars as to certain Specifications and additional Specifications and to strike certain Specifications and additional Specifications’*, United States of America vs Takeshi Kono* (Headquarters, United States Army Forces, Western Pacific War Crimes Commission) page 78, undated.

Japanese occupation of the Philippines Islands. Many of the atrocities committed by Japanese troops for which Kono was charged occurred on the island of Panay as part of the fierce and, at times, insurmountable battle that IJA forces waged against local guerrilla groups and the advancing US forces.[145]

Kono's case is important for understanding how military commissions dealt with the law surrounding the issue of command responsibility in the early stages of the Manila trials for senior ranking IJA officers in the months after the execution of General Yamashita. One of the controversial elements of *Kono's case*, as with other senior military trials dealing with the doctrine of command responsibility at Manila, was the volume of atrocities allegedly committed by Japanese forces which was attributed to one senior person, despite the absence of specific evidence that that person either knew or ordered the acts.

In accordance with the precedent established with the *Yamashita trial,* evidence that directly tied the senior person to have knowledge of the atrocities was seemingly unnecessary and conviction was primarily based on the position he occupied within the military structure. Commonly referred to as 'strict liability', all that was required to be shown was that the accused occupied a position of authority within the relevant chain of command. Once the chain of authority was established, it was not too difficult to establish the guilt of the accused on the basis that they 'permitted' atrocities to occur, simply because there was evidence that atrocities occurred and that the senior person did not prevent, control or punish subordinates for carrying out those acts.

As it will be discussed in Part II of this thesis, the application of strict liability in situations such as Kono's is problematic for a variety of reasons—primarily due to the arbitrary way that responsibility is attributed. There does not appear to be any formula or test that can be discerned to provide some semblance of consistency in regard to criminal attribution. As will be shown below and in the discussion in Part II, such an application of criminal responsibility leads to uncertainty and, in some cases, injustice for the accused.

The Charge and Specifications – 'Unlawfully Permitting'

Lt-General Kono was arraigned at the High Commissioner's residence at Manila on 15 April 1946.[146] The charge stated that Kono

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[145] For a detailed account of the scale and nature of Filipino resistance and the actions of the IJA in response to guerilla activities on the island of Panay during the three years prior to the Japanese surrender of the Philippines, see eyewitness testimony of Tozuka Ryoichi, Commander of the 37th Independent Security Battalion stationed in Iloilo City, Iloilo Province, RG331 UD321 290/12/12/1 Box 1563, Vol II, trial document pages 168–194.

[146] See *Arraignment and Public Trial – United States of America vs Takeshi Kono,* 'Before the Military Commission convened by the Commanding General, United States Army Forces, Western Pacific', Court No. 2-B, High Commissioner's Residence, Manila, 15 April 1946.

> … did …unlawfully disregard and fail to discharge his duties in controlling the operations of members of his command by permitting them to commit brutal atrocities and other high crimes against the people of the United States and the Philippines.[147]

Relating to the Charge, the indictment listed 49 separate specifications that gave details of specific incidents from which the charge flowed.[148] Each of the 49 specifications outlined allegations involving the unlawful killing of individuals, groups or both of 'unarmed, noncombatant Filipino civilians … in violation of the laws of war'.[149] Each specification outlined the name and place in which each victim was killed[150] or gave an approximate number of victims killed in that location within an approximate date.[151] At times the specification simply mentioned that Kono permitted forces under his control to kill an 'unascertained number of unarmed, noncombatant civilians …'.[152] The total number of those allegedly killed and tortured by Japanese forces in this area during the period of Kono's command on the island of Panay amounted to several thousand victims.

Of crucial importance here for the prosecution of Kono was the wording of the specification that related to the fact that Kono 'unlawfully permitted' the killing of non-combatants. No specification alleged Kono gave direct orders to kill, and no specification alleged he witnessed or took part in the actual killings. According to the charge and specifications, his apparent criminal responsibility rested solely on the fact he permitted the unlawful killings to take place.

Defence's Objections to the Charge: Clarification of the obligations of commanders for subordinate criminal conduct

The defence raised a series of comprehensive objections that extended to over 50 pages in relation to certain particulars of the specifications. The most contentious points for the defence rested on a number of aspects such as the meaning of 'permit' to kill, the ambiguities relating

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[147] General Headquarters, Supreme Commander for the Allied Power, 'Charge', *United States of America v Takeshi Kono* page 8.
[148] Ibid 9–21.
[149] Ibid.
[150] For example, Specification 1:
Takeshi Kono, in the month of September 1943 … did, at or near barrio Ticongeahoy, Sara Iloilo, Philippines, unlawfully permit members of the Imperial Japanese Army then under his command to kill about 14 unarmed, noncombatant Filipino civilians, including Buenvenido Azuilo in violation of the laws of war.
[151] For example, Specification 34:
Takeshi Kono, in the month of October 1943 … did, at or near Banga, Capiz, Philippines, unlawfully permit members of the Imperial Japanese Army then under his command to kill about 300 unarmed, noncombatant civilians, in violation of the laws of war.
[152] For example, Specification 35:
Takeshi Kono, in October and November 1943 … did, at or near Libacao, Capiz, Philippines, unlawfully permit members of the Imperial Japanese Army then under his command kill an unascertained number of unarmed, noncombatant civilians, in violation of the laws of war.

to the 'unascertained' number of victims, the actual perpetrators of the offences and the actual places where the killings took place. These objections were put to the prosecution in the form of a 'bill of particulars'.[153]

First and foremost, the defence argued the charge should be set aside because the prosecution was unable to provide any evidence the atrocities were committed with the knowledge or 'scienter' of the accused.[154] The defence further stated that, in the event the Commission refused to strike out the charge, the defence should be provided with answers to a series of questions regarding the 49 specifications. As a prelude to the defence's objections, the defence requested the prosecution address five specific questions:

> (a) What duties of a Lieutenant General of the Imperial Japanese Army is he charged with disregarding and failing to discharge?
>
> (b) How and in what manner did he disregard and fail to discharge the duties referred to in (a) above?
>
> (c) What measures for the control over members of his command, if any, should he have taken and is charged with disregarding or failing to discharge?
>
> (d) What is meant by the phrase 'permitting them', and does it allege a crime of commission or a crime of omission?
>
> (e) What ambiguities exist regarding the laws of war relating to the charge?[155]

These preliminary questions go to the heart of the obligations of a commander in the field for acts committed by subordinates—acts which may not have been known or knowable by the commander. In asking these questions, the defence sought clarification of the boundaries of criminal responsibility for commanders. It requested from the prosecution a response in relation to the duties of a commander (in this case, a Lieutenant General) in regard to 'disregarding and failing to discharge' their duties.

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[153] Ibid 23, as per Lieutenant McCullough for the Defence. See *United States of America v Takeshi Kono,* 'Motions for a Bill of Particulars to the charge, for further particulars as to certain specifications and additional specifications and to strike certain specifications and additional specifications', Headquarters, United States Army Forces, Western Pacific War Crimes Commission, pages 24–76 (Bill of particulars).

[154] Ibid 24.

[155] Ibid 24–5.

The Prosecution's Answers to the Defence's Objections

(a) The Duty of the Commanding Officer to Control his Troops

The prosecution responded to the defence's questions and objections, albeit in five pages.[156] In an extraordinary attempt to explain what the prosecution meant by reference to the 'violation of the laws of war', the prosecution stated that the violation of the laws of war as it related to Kono occurred

> in that the *gist* [emphasis added] of the charge is an unlawful breach of duty by the accused as a commanding officer to control the operations of the members of his command by 'permitting them to commit' the atrocities specified.[157]

The use of the term 'gist' is hardly a specific reference to any law that Kono violated. The prosecution attempted, however, to shed further light on the meaning of how Kono violated the laws of war by referring to the US Supreme Court's decision in the *Yamashita trial.* The passage from the *Yamashita trial* upon which the prosecution relied to explain how Kono violated the laws of war, stated that the 'law of war' required commanders, 'who are responsible for their subordinates' to take reasonable measures to ensure 'civilian populations and prisoners of war are protected from brutality' from an invading army.[158]

The prosecution stated that Kono had a positive obligation as commander to ensure he acquainted himself with what was occurring in the field so that his troops did not 'violate the laws of war' when it came to the protection of civilians and POWs. Such a duty being operative, would therefore render Kono, as commander, liable even if he claimed he had no knowledge of the atrocities committed, on the basis that he had a positive duty to ensure he acquainted himself fully of what was occurring in the field. In other words, the prosecution set up a cleverly constructed charge that would render Kono liable whether he knew or did not know of the atrocities. The prosecution stated that 'if the accused says he did not know [of the atrocities], that admission in and of itself will support the charge that he failed to exercise proper control as a commanding officer'.[159]

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[156] *United States of America vs Takeshi Kono,* 'Answer to Defense Motions for a Bill of Particulars to the charge, for further particulars as to certain specifications and additional specifications and to strike certain specifications and additional specifications', Headquarters, United States Army Forces, Western Pacific War Crimes Commission, pages 76–83 (Answer to the Bill of particulars).

[157] Ibid 78. In relation to the term 'gist', one cannot help but be drawn to the 1997 Australian film, *The Castle* in which a bumbling lawyer, struggling to explain to a District Court judge why his client's property should not be compulsorily acquired by the State to make way for a new airport runway, attempted to argue that his client's rights were within the 'vibe' of the law. See *The Castle* (Directed by Rob Sitch, Working Dog Productions, 1997).

[158] Ibid 79.

[159] Ibid.

The prosecution made it quite clear in their answer to the defence that it believed that Kono was criminally responsible as a military commander for failing to fulfil his duty to 'exercise control over his troops'.[160] Such an important and fundamental principle, the prosecution argued,

> distinguishes an army from a mob. It is a precept as old as armies themselves. For the commander to deny that he has control over his troops is for him to deny he has an army in the first place.[161]

From this, it would appear that the prosecution sought to charge Kono on the basis that his role alone as commander was sufficient for him to have the requisite responsibility.

(b) Meaning of 'Permit'

In addressing the meaning of the term 'permit', the prosecution relied upon a general definition to show that permit is to 'tolerate', to give 'consent', 'to grant (one) license or liberty', or to 'authorize'.[162] To prove their point further, the prosecution provided examples of antonyms to the term 'permit' that indicated the opposite of 'permit' is to 'forbid' or 'prohibit' something. In other words, Kono was criminally responsible because he failed to 'forbid' or 'prohibit', thereby 'permitting' his troops to commit atrocities. The prosecution went on to state that because Kono was under a positive obligation to control the conduct of his troops and failed to do so, he made himself a party to the unlawful conduct.[163]

Despite the defence's request in the Bill of Particulars, the prosecution would not be drawn on stipulating whether it asserted that to 'permit' something was akin to a 'commission' or an 'omission'.[164] Unfortunately, the prosecution did not elaborate on why it did not need to argue whether Kono's liability rested upon a specific act in 'permitting' his troops to commit atrocities, or an omission by him to prevent his troops from committing atrocities.

One can only speculate that the argument for not distinguishing between an act (or commission of the offence) and failing to control (or the omission to control) was simply due to the fact that to do so would invite a legal debate on the jurisprudential elements of the offence for which Kono was charged. Perhaps the prosecution feared that the more it was drawn into defining the offence for which Kono was charged, the more challenges they would face in distinguishing that charge from a charge akin to the common law tort of negligence—a charge which would have been non-existent under international criminal law. The prosecution strongly resisted the request by the defence to more fully define the charge and its requisite elements.[165]

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[160] Ibid 80.
[161] Ibid.
[162] Ibid, prosecution reference to Webster's Collegiate Dictionary (1943).
[163] Ibid 81.
[164] Ibid.
[165] In relation to the defence's request to provide more details surrounding the specifics of, for example, those members of the IJA who actually committed the acts, and the dates and places where

Broadening of the term 'permit' – implications for international law?

The prosecution argued strongly that Kono's conviction should rest upon a factual determination of the scale of atrocities committed by his troops while he was in command of his forces on the island of Panay as they carried out 'punitive expeditions' against civilians for the acts of Filipino guerilla forces.[166] Kono pleaded not guilty to the charge and denied all knowledge of the 49 specifications. The Commission, however, was satisfied with the factual evidence submitted by the prosecution and was, therefore, of the opinion that Kono was criminally responsible for 'permitting' atrocities to be committed by forces he commanded. On 1 May 1946, the Commission sentenced Kono to death by hanging.

Kono's case raised some interesting and important points for future trials in Manila and, no doubt, beyond. Of primary interest here is the fact that the Commission seemed to accept the wording of a charge that operated to make a superior criminally responsible for 'permitting' others to carry out unlawful acts irrespective of whether the superior knew of the acts in question. It was clear that the Commission aided and thereby advanced the understanding of how command responsibility would apply to the accused. In essence, the meaning of 'permit' as adjudged by the Commission in *Kono's* case, amounted to, *inter alia*, a failure to 'control'.

The Commission was willing to accept a broad definition of 'permit', whereby a senior person such as a Lieutenant-General could be held accountable for the actions of his subordinates even when he was neither present during the commission of those acts nor knew of the acts in question. Given that the Commission ruled that even a person as far removed physically from the atrocities could still be held criminally responsible, this had severe consequences for findings in trials of lesser ranked Japanese soldiers, as will be shown.

C. *Trial of Lieutenant-General Ko Shiyoku, Imperial Japanese Army, Manila, 15 March 1946*

Ko's case is indicative of the principle that criminal responsibility can apply where the accused is blamed for atrocities of the actions or inactions of a superior entity (in Ko's case, the Japanese Government and senior military command) to enforce the Geneva Convention. This case brought squarely into question the concept of 'intermediary liability'. Intermediary

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the acts were committed, the prosecution simply stated that they believed the defence's requests were unreasonable and that the prosecution had provided sufficient detail to enable the defence to prepare its case. Evidently, the Commission agreed with the prosecution as the Specifications were largely left intact albeit with minor amendments to downgrade some of the initial estimates of atrocities by several hundred overall. Suffice it say, however, that the downgrade ordered by the Commission did nothing to reduce the overall culpability of Kono as the scale of the atrocities clearly showed a widespread pattern of behaviour. For the downgraded number of victims, see Findings page 8–9, specifications 10, 19, 21, 22, 27, 31, 34, 39, 43, 44, 45 and 47.

[166] Ibid 86. The term 'punitive' is used throughout the Manila trials by the prosecution to indicate the retributive nature in which Japanese forces engaged in their attempts to subjugate civilian insurgency.

liability exists when an intermediary (in this case, Lt-General Ko) is held criminally responsible even though he was not able to exercise 'effective control' over the subordinates who committed the atrocities.

While Lt-General Kono was prosecuted for the unlawful killing of Filipino civilians,[167] Lt-General Ko Shiyoku[168] was charged and convicted for the mistreatment and unlawful killing of US POWs and dozens of US non-combatant internees while they were held captive by the Japanese in various places throughout the Philippines and whilst en route to POW facilities in Japan.[169]

Similar to the underlying circumstances involving Kono's criminal responsibility for the actions of his subordinates, Ko was physically nowhere near the scene of the alleged crimes and was at times thousands of kilometres from the actual brutality and killings meted out by his subordinates against their victims in the camps and elsewhere. For the most part, Ko was moving throughout the Philippines and was often away from the camps.

One unique feature of Ko's trial was the fact that his heritage lay not with Japan, but with Korea. Ko Shiyoku was born in a small village outside Seoul in 1889 and, as a young man, went to the Korean Military Academy and later studied in Japan at the Japanese Central Military Preparatory School and the Imperial Japanese Army Academy before Japan annexed Korea in 1910.[170] Thereafter, he rose quickly through the ranks of the Imperial Japanese Army. This fact was notable as his defence team attempted to argue that Ko should not be criminally responsible in accordance with the doctrine of command responsibility, since his authority was largely undermined by his subordinates' contempt towards him due to his Korean heritage, thereby negating the very essence of command.

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[167] NARA, RG331 UD1321 290/12/12/1 Box 1563.

[168] Trial documents for *United States of America v Shiyoku Ko* are located at NARA, RG331 UD1321 290/12/12/1 Boxes 1559–60, volumes 1 and 2. Unless specified otherwise, all archival documents referred to in relation to Ko Shiyoku are taken from this series.

[169] Many of the brutalities committed by Japanese forces against civilian and military POWs throughout the Asia–Pacific region where Japanese forces operated POW camps, have been extensively popularised since the Pacific War in film, television and books – see, eg, *Unbroken* (Angelina Jolie, Legendary Pictures, Jolie Pas, 3 Arts Entertainment, 2014); *Empire of the Sun* (Steven Spielberg, Amblin Entertainment, Warner Brothers, 1987); *Merry Christmas Mr. Lawrence* (Nagisa Oshima, National Film Trustee Company, Cineventure Productions, Recorded Picture Company, 1983); *Tenko* (Pennant Roberts *et al*, BBC Television, 1981). Many of the atrocities committed by Japanese forces during the operation of Japanese POW camps, and depicted in these films, are precisely the nature of the crimes for which Ko was charged.

[170] Tadashi Saito, *The Loyalty of Lt. Gen. Ko Shiyoku* (22 August 2013) Japan Institute for National Fundamentals < https://en.jinf.jp/weekly/archives/2428>.

The Charge reflective of Ko's Responsibility for the Welfare of POW and Civilian Internees

From March 1944 until January 1945, Lt-General Ko Shiyoku was part of General Yamashita's 14th Area Army in the Philippines and was the commanding General for all POW and civilian internees. During this time he had oversight of, and was responsible for, the supervision, supply, transportation, welfare and administration of all detainees held captive by the IJA. Given this level of responsibility, the prosecution alleged that his failure to properly exercise his duty in relation to the welfare of thousands of detainees rendered him criminally liable for the mistreatment and brutality meted out by his subordinates. Specifically, Ko was charged with:

> Unlawfully and wilfully disregard, neglect and fail to discharge his duties of command by permitting and sanctioning the commission of brutal atrocities and other high crimes against … prisoners of war and noncombatant civilian internees; and … thereby violated the laws of war.[171]

The Specifications of the Charge Linked to Ko's Administrative Responsibility for POW and Civilian Internees

Accompanying the charge were twelve specifications, each detailing hundreds of specific allegations of incidents involving inhumane and cruel treatment committed by IJA forces against US POWs and civilian internees. Each incident outlined by the prosecution occurred in numerous places during Ko's incumbency as the commanding General of POWs and civilian internees: Cabanatuan prisoner of war camp, the Sakura Detached Hospital Camp, the Davao penal colony prisoner of war camp and its branch at the Lasang Air Field, the Bilibid prisoner of war camp and hospital, the Santo Tomas civilian internment camp, the Baguio civilian internment camp, the Los Banos civilian internment camp, the Las Pinas prisoner of war camp, Pasay Elementary School prisoner of war camp, Palawan Air Field prisoner of war camp, and the transfer of prisoners of war and internees from Davao, Mindanao, to Cabanatuan, Luzon, via Manila.[172]

The types of incidents alleged by the prosecution consisted of treatment by IJA officers and NCOs such as deliberate starvation, failure and refusal to provide medical treatment and adequate medical facilities, failure to provide adequate housing and clothing, pilfering and confiscation of food packages from the American Red Cross, brutal treatment (including beatings, solitary confinement, torture and murder) of named US servicemen and civilian internees, forced labour (including of or by those who were sick and wounded), and infliction of brutal, unlawful and arbitrary disciplinary punishment.[173] Of particular note was the cruel

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[171] Box 1559, Vol 1, page 18, General Headquarters, Supreme Commander for the Allied Powers, 'Before the Military Commission convened by the Commanding General United States Army Forces, Western Pacific, *United States of America vs Shiyoku Kou,* 'Charge'.
[172] Ibid 48–9.
[173] Ibid 19–42.

and inhumane treatment of US POWs and internees whilst on board various Japanese ships en route to POW camps in Japan.[174]

The prosecution went to great lengths to argue that such treatment of US POWs and civilian internees was in direct breach of the various international conventions and treaties, namely the *Hague Convention* of 1907, the *Prisoner of War Convention* of 1929 and the *Red Cross Convention* of 1929. The prosecution cited article after article of the respective conventions outlining how Japan had breached its international obligations with respect to its treatment of POWs and civilian internees and, importantly, argued that Ko knew or suspected what was occurring within the camps.

Defence's Argument as to why Command Responsibility Should Not Apply

Lt-General Ko's defence team did not appear to challenge the veracity and strength of the evidence that outlined the extent, nature and scale of mistreatment meted out against US POWs and civilian internees. Nor did it directly challenge the point about Ko having some knowledge about the conditions in the camps.[175] Eyewitness testimony was overwhelming and, although arguable that some details might have been open to better scrutiny by the defence,[176] on the whole, it could see no reason to challenge the veracity of the eyewitnesses.

(a) Lt-General Ko unable to exercise command and control

Instead, the defence, rightly or wrongly, appeared to challenge the underlying rationale as to why Lt-General Ko should be held accountable pursuant to the doctrine of command responsibility. Lieutenant Weston for the defence raised several points. Firstly, he stated that *Ko's* case was a first of its kind for the Manila trials (and no doubt elsewhere) since the trial involved a Korean national who had made it to the senior ranks of the Japanese military and was now charged with 'command responsibility'.[177]

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[174] Ibid 35–41. The allegations surrounding the mistreatment of prisoners whilst en route to Japan, as alleged by the prosecution consisted of detainees being placed below decks for extended periods of time in extremely hot and overcrowded conditions without adequate water and sanitary conditions. The prosecution alleged the conditions below decks became so bad that officers ceased going below for roll call. The sanitary conditions also became intolerable to the extent that buckets were lowered by ropes each day in the morning and raised again in the afternoon to remove human waste – often the waste would spill over people (often intentionally) as it was removed through a small hole.

[175] Ko must have had at least some knowledge of the appalling conditions within the camps due to the fact that the defence highlighted evidence that General Muto admitted under cross examination that Lt-General Ko had 'protested to General Yamashita concerning the food situation in the prisoner of war camps and civilian internment camps' – see Box 1560, page 1415.

[176] For instance, the details accompanying the twelve specifications often omitted even general dates as to when certain incidents were supposed to have occurred.

[177] Box 1560, page 1414.

Lt Weston stated that, due to Ko's heritage, the Commission should consider him somewhat differently to his Japanese counterparts, purely on the basis that he was 'for many years suppressed by the Japanese and … a Korean in the Japanese Army would have very little weight in any command position.[178] He went on to state that 'it is my contention that [Lt-General Ko] had very little influence in the Japanese Army. He was resented by his subordinates, he was looked down upon by the officers over him.[179] Indeed, if it was the case that Lt-General Ko's subordinates and superiors regarded him with as little respect as the defence maintained, then there is some merit in the argument that Ko would have indeed struggled to reign in the excesses of his subordinates.

The defence tried to paint a picture that rendered Lt-General Ko, in effect, impotent as a commander in relation to his command of POW and civilian internment camps throughout the Philippines and beyond, and thereby invited doubt as to whether he was in a position to do anything at all to remediate the conditions within the camps.

(b) Ko's command responsibility was effectively dependent upon Japan's unwillingness to abide by the Geneva Convention

A second point the defence raised in support of the argument that Lt-General Ko was, at least to some extent, powerless to change the plight of POWs and civilian internees was due to the fact that Japan, at the start of the war, never intended to abide by the *Geneva Convention*, especially when it came to the matter of POWs and other internees. Lt Weston stated that:

> The War Ministry in Tokyo had no intention whatsoever of following or abiding by the *Geneva Convention,* yet here you have an accused, a middle man, furthermore a Korean, who is charged with violating the Geneva Convention. One man in the middle could not on his own follow the Geneva Convention. His superior officers, the headquarters in Tokyo, ignored the Geneva Convention. His subordinates knew nothing, practically, about the Geneva Convention. I ask you as members of this Commission, how could this Accused abide by the Geneva Convention under those circumstances. … Now, if anyone is to be held responsible for the violation of the Geneva Convention it is not the Accused. The responsibility lies in the Imperial Headquarters in Tokyo, the War Ministry.[180]

Lieutenant Weston's point is well made. By casting doubt on the chain of command in relation to Ko's circumstances, the defence argued that Ko was not solely responsible for the way that POWs and internees were treated by Japan. Rather, the fate of the tens of thousands of people who were unfortunate enough to be taken prisoner by the Japanese during the Pacific War, was sealed long before Lt-General Ko took command of the POW camps in the Philippines.

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[178] Ibid.
[179] Ibid.
[180] Ibid 1415.

(c) Ko unable to exercise effective control due to advancing US and guerrilla forces

A third point the defence raised as to why Ko should not be held accountable for the deaths and mistreatment of US POWs and internees in the Philippines was the success of the US military campaign to reclaim the Philippine islands[181] and the incessant Filipino guerilla insurgency that was wreaking havoc among stranded Japanese forces.[182] Such conditions, argued the defence, would have made it extremely difficult for Ko or anyone else, to maintain a semblance of decency in the face of advancing US and guerilla attacks and, as must have been plainly clear to those Japanese troops, the inevitable defeat of Japanese forces in the Philippines.

In relation to the prosecution's allegation that Lt-General Ko deliberately starved those held captive by the Japanese, Lt Weston made the following observation:

> Now, we all know that at that time [November 1944 to December 1944] Japanese shipping was practically non-existent. Our planes were raiding the mainland, they were raiding all shipping, and the majority of the Japanese ships were sunk. Now, how could they actually supply their camps and their own army under those conditions? The havoc and chaos created by our own armed forces was responsible for a good deal that went on.[183]

The efficiency of the advancing US and guerilla forces made it virtually impossible to ensure the survival of Japanese forces let alone Japanese held POWs and internees. Japanese forces were virtually cut off from supplies and reinforcements, and due to the necessity created by the circumstances in which Japanese forces found themselves, there was little doubt that POWs and internees would not have been able to receive better rations.

Commission's findings on the concept of 'effective control'

Despite the defence's best efforts, the Commission did not agree with the defence's arguments in relation to the minimalist level of control that Lt-General Ko exerted over the dire conditions in the camps. The Commission ruled that Ko had a form of control over his subordinates and it was his responsibility to exercise that control to ensure his subordinates were adhering to international laws and customs regarding internees and POWs. Essentially, the Commission applied a broad test in defining the concept of 'effective control'. The findings seemed to indicate that a superior could still exercise 'effective control' even in the face of plausible arguments to suggest that the accused did not have 'actual control'.

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[181] For an excellent account of the Philippines campaign, see John Costello, *The Pacific War* (William Collins Sons & Co, 1981) 505–521.

[182] Ienaga Saburo, *The Pacific War* (Pantheon Books, 1978) 147. The guerilla attacks on Japanese forces (with the assistance of advancing US forces once they landed on Leyte in October 1944 and Luzon in January 1945), according to Ienaga, caused Japanese units to be 'cut to pieces and stragglers scattered to the hills. They were driven deeper and deeper into the jungle by relentless enemy attacks and exhausted from lack of food. The privation and suffering was worse than Guadalcanal …'.

[183] Box 1560, page 1416.

Such a finding broadened the definition of 'effective control' in so far as the term related to senior officers who were physically removed or isolated from their area of delegation. The expanded understanding of 'effective control' meant that there was a high bar required to avoid criminal responsibility. Ko's circumstances were not sufficient to sever control. For his part in the mistreatment, starvation, torture and murder of thousands of US POWs and civilian internees, Lt-General Ko was found guilty of the charge and sentenced to death. He was executed on 26 September 1946.

Ko was the most senior person on the ground in the Philippines whose responsibility it was to administer the supervision, welfare and transportation of thousands of detainees. Seemingly, he failed in this role and paid the ultimate price for it. Having actual knowledge of the widespread, appalling privations and cruel treatment committed by Japanese guards in POW and internment camps under his command, and the scale of actual fatalities, it would have been extremely difficult for the Commission to consider any finding other than guilt.

In finding him guilty of the offence as charged, the Commission sent a clear message for other trials as to how it viewed the imperative for commanders to control subordinates, particularly when it came to the very sensitive matter of POWs. Very little credence was given by the Commission to the intervening events that made Lt-General Ko's command virtually impossible. The Commission found him guilty on the basis of command responsibility despite the fact, as it was argued by his defence, Ko's command was compromised to such an extent that he was ineffectual as a commander, not just simply because of the contempt his subordinates and superiors exhibited towards him, but also due to the dire circumstances in which Japan found itself at this juncture of the War. The same level of ineffectualness could well have been experienced by anyone occupying that role, including a native Japanese officer of equivalent rank.

Retribution for the loss and mistreatment of US POWs and civilian internees is an overriding feature of Ko's case. Someone needed to pay for the death and brutality that came out of Japanese POW and internment camps. By virtue of the position Ko occupied (despite not having actual control over many facets of his post), the Commission expanded the operation of the doctrine of command responsibility to the extent that a person could still be criminally responsible even where they were unable to exercise effective control over their subordinates.

The precedent established in Ko's case could render a person liable even if the commander took steps to rectify or alleviate the offences by subordinates for which they were charged. Simply by virtue of the position they occupied, a person could now be held liable. The commander's guilt is one of strict liability. The finding of guilt where a commander has taken actual steps to change the deleterious circumstances, as will be shown, does not compare well to other cases. Where a commander has taken steps to alleviate the wrongdoing, then such actions should be taken into consideration, at least in part to mitigate the sentence. That Ko took up the matter of rations directly with General Yamashita should have warranted greater attention.

The strict liability approach applied in Ko's case by virtue of him being a commander, however, was not necessarily uniformly applied in all cases. As the next case highlights, the Commission was at times willing to give the benefit of doubt to the accused commander where the evidence was unclear that he played a specific role in the commission of war crimes.

D. *Trial of Vice Admiral Osugi Morikazu, Imperial Japanese Navy, Manila, 22 January 1947*

Vice Admiral Osugi Morikazu of the 23rd Naval Base Area, Imperial Japanese Navy was charged and convicted of war crimes committed by his subordinates during his command at Makassa, Celebes, Netherlands East India (as it was then known).[184] Vice Admiral Osugi somehow managed to avoid the executioner and received life imprisonment for his part in the commission of war crimes against downed US airmen.

Charge and Specifications

Osugi was simply charged with violating the 'laws of war'.[185] Specifically, that charge related to the execution of nine US airmen whose planes were shot down during US bombing raids over Indonesian islands in the latter part of 1944. The airmen were held prisoner for approximately 40 days before they were taken to two separate locations—four were taken to Maros Airfield, Makassar, Celebes (then the Netherlands East Indies) and the remaining nine were taken to Kendari, Celebes—and were beheaded by individuals of the Imperial Japanese Navy ('IJN').

The specifications to the charge asserted that Osugi unlawfully permitted and consented to, or 'ratified' and failed to prevent and take corrective and punitive action against the executions of thirteen US airmen.[186]

Similar to the charges levelled against other senior Japanese military figures, there was no direct evidence, nor was there any claim by the prosecution, that Osugi personally participated in or witnessed the killings. A large question to settle was whether Osugi gave the orders to execute the thirteen airmen, or whether he knew that the executions were going to take place and did nothing to prevent them, thereby acquiescing in his duty to prevent atrocities from occurring.

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[184] For all documents referred to in the discussion of the *Trial of Vice Admiral Osugi Morikazu,* see NARA, RG331, UD1321, 290/12/12/1 Boxes 1571–3, Volumes I–XXII.
[185] Box 1571, vol I, 'Charge'.
[186] Ibid.

Sentence and Findings

Osugi pleaded not guilty to the charge, however the Commission found (as did the approving authority)[187] that Osugi was criminally responsible for the deaths of the 13 airmen and, on that basis, he was sentenced to life imprisonment.[188]

Rationale for Osugi's Criminal Responsibility

(a) Resolving Contested Fact on the basis of Subjective Fact Bias?

There was much factual conjecture between the prosecution and defence as to whether Osugi gave direct orders for the executions or at least had knowledge of them prior to them being carried out. The prosecution introduced several witnesses who claimed to have been present in the same room as Osugi when the matter of executions was discussed and when the decision to execute the men was made. In contradiction, the defence presented eyewitness testimony that suggested Osugi had no knowledge of the executions.

Chief among the witnesses for the defence was Osugi himself. He claimed to have no knowledge of the downed airmen as he was, at the time, struck down with dengue fever and some three kilometres from where the US airmen were being held. Osugi claimed that when he learned about the executions he was 'flabbergasted'.[189] He further claimed that upon hearing of the unauthorised executions, he had planned to investigate and, if necessary, punish those who executed the airmen in absence of specific orders to do so.[190] However due to the US bombing raids occurring each day, he was unable to follow through with his planned investigation and the punitive measures against his subordinates.[191]

Despite Osugi's protestations, the Commission favoured the prosecution's evidence. The issue remains as to whether the apparent favourable treatment of the prosecution's version of events was a direct result of the concept of 'subject fact bias'. Subjective fact bias, as argued in other cases, occurs where facts are interpreted and established according to preconceived notions that fit within the beliefs of those sitting in judgment.

(b) The Concept of 'Acquiescence' as the mode of liability – the Prosecution Claimed that Osugi 'let' his Subordinates Execute the Airmen

The Commission found that the prosecution's evidence—namely, eyewitness testimony of IJN personnel who were close to the Vice Admiral at the time the offences occurred—indicated that, although he did not order the executions, Osugi was aware the killings were going to take

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[187] See Box 1572, page Recommendation of the Approval Authority, pages 24–8, William D Shain, Civilian Attorney, Assistant to the Staff Judge Advocate, concurred by Major Enrie N Webster, Acting Staff Judge Advocate.

[188] Box 1571, 'Findings' and 'Sentence', dated 31 October 1946.

[189] Box 1571, Osugi's witness testimony, pages 21–2.

[190] Ibid.

[191] Ibid.

place and failed to prevent them. On this basis, Osugi failed in his duty to prevent the unlawful killings. Given this failure and the fact Osugi was in a position of authority, he was criminally responsible. One qualification that the Commission did concede, however, was that all of those who gave evidence against Osugi were awaiting trial themselves. As a result of that personal interest, the Commission held that all of the prosecution witnesses 'related their stories in words and meanings as they pleased to establish an atmosphere of innocence as far as they were personally concerned. Instances of this were numerous in the cases and the writer of this opinion has kept this fact in mind'.[192]

Despite the fact the prosecution's evidence may have been tainted by self-interest on the part of the witnesses, the Commission still favoured the prosecution's version of events in so far as Osugi's knowledge of the executions.[193] The Commission acknowledged that letters received on his behalf maintain that Osugi is not a 'bad or vicious person at heart' but that

> the effect of his tolerance alone is enough to convict him of major crime. He 'let' his subordinates kill 13 American airmen and the evidence shows that several of these airmen were passed around to various units for execution. They seemed to make quite an occasion of it when the … men were executed.[194]

As is discussed at length in Part II of this thesis, acquiescence as a mode of liability at international law is a complex concept and something that has arisen across many contexts over the history of war. The fact that acquiescence is a basis on which to hold a person criminally responsible, places a positive obligation on superiors to ensure subordinates are held to an appropriate standard of behaviour in accordance to the relevant laws. Failure to do so, as in Osugi's case, could be sufficient at international law to render a person criminally responsible.

(c) Responsibility of Commander to Uphold International Law

The Commission in Osugi's trial made it clear the accused would not escape criminal responsibility for, in essence, failing in his duty to prevent the executions from occurring. Acquiescence occurred here due to the fact the Commission adjudged that Osugi had some prior knowledge the executions would take place and did nothing to prevent them occurring.

The prosecution made the point in their opening address that

> [c]ommanders of troops who fail to prevent the commission of wrongs in violation of laws of war are themselves, war criminals. Justice Jackson, in his report to the President on June 7, 1945, stated, 'We do not accept as the paradox that legal responsibility should be the least where the power is the greatest.'[195]

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[192] Ibid 28.
[193] Ibid 29.
[194] Ibid.
[195] Box 1572, Vol XV, Folder 1, 31.

Given that Osugi had knowledge, and chose to do nothing, the Commission found he therefore gave 'tacit approval' to the acts. That Osugi would be deemed responsible for the executions is neither surprising nor out of step with the other cases examined above, particularly so given the Commission ruled that he had actual knowledge of the executions.

Life Imprisonment – a response to the temporal relationship between the offence and trial?

What is also noteworthy about this case, was the sentence of life imprisonment that Osugi received when compared to the sentences handed down in cases such as Yamashita, Kono and Ko, which were all death sentences. Why, then, did Osugi receive life imprisonment for knowingly allowing the unlawful executions of thirteen US airmen when, in other cases, death was the verdict? There are several explanations for this.

One explanation, as macabre as it may be, is that the number of victims in Osugi's case was limited to thirteen US airmen as opposed to the large scale wanton murder and destruction committed under the commands of General Yamashita and Lt-Generals Ko and Kono. A further reason that cannot be ignored relates to the dates during which Osugi was prosecuted, which were in 1947. By this time the Manila trials had been going since the *Yamashita trial* in late 1945 and there is some argument that sentences had relaxed, albeit slightly, since that time. That the US wanted to expedite their trials to bring them to a speedy conclusion, may also have played a part.

A further explanation relates to the fact that perhaps the Commission simply could not dismiss the charge—as sought by the defence—in the face of the unlawful executions of thirteen US airmen. Someone in a senior position needed to be held accountable for these deaths and, despite there being some questions surrounding the veracity of the prosecution's evidence, the Commission was not prepared to allow Osugi to walk free. But at the same time, the Commission was not prepared to condemn him to death.

E. *Trial of 2nd Lieutenant Minoru Kato, High Commissioner's Residence, 8–21 August 1946*

Findings by a Commission that a superior personally engaged in one (or more) instance of war crimes is sufficient to show that the same commander, therefore, ordered other killings and is likewise guilty by the doctrine of command responsibility for other war crimes committed by subordinates within a reasonable proximal and temporal space.

The trial of 2nd Lieutenant Minoru Kato[196] of the IJA is of interest in so far as the case illustrates that where a superior personally engages in war crimes, that person, therefore has provided the necessary authority to his subordinates to carry out similar acts.[197] On that basis, a commander

[196] Lt Kato Minoru RG331 UD1243 290/11/31/05 Box 1276.

[197] The Manila trials adjudicated over cases that raised similar points of law regarding whether an

may be deemed guilty for both personally committing the unlawful act, and also guilty for providing the necessary command or orders to his subordinates.

The Mode of Liability Arises from Orders to Commit Atrocities and by Personal Participation – liability continues until contrary orders to cease atrocities are given

Lieutenant Kato was charged with the 'violation of the Laws of War' as far as he unlawfully ordered and participated in the torture and murder of named and unnamed Filipino non-combatants on Cebu Island in 1944.[198] The nature of the torture and killings was particularly gruesome and involved the beating, burning and eventual murder of approximately 26 individuals.[199] On evidence provided at the trial, Kato was personally found to have participated in some, but not all, of the killings. On the basis of his participation, he was found guilty for the specific acts related to the torture and eventual deaths, but he was also found liable for the acts of his subordinates who had committed similar acts not under the direct orders of Kato. Kato was found guilty of war crimes and was sentenced to death by hanging. On review, the Reviewing Authority confirmed the original sentence.[200]

Legal Principle of 'temporal' and 'proximal' connection to the offence

The legal argument espoused by the defence was centred around the fact Kato should not be liable for acts committed by his subordinates on the basis he did not order them to engage in all acts for which he was charged. The Commission found there was sufficient evidence from several eyewitnesses who survived and could identify Kato as one of those present and 'who

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accused would be liable for acts he neither ordered nor committed, but had at some point committed and thus signaled to his subordinates that such acts were necessarily condoned. In regard to the case of Sgt Major Yoshida involved the offence of, *inter alia,* rape, Yoshida had previously, in company with several of his men, raped and murdered several Filipino women. His subordinates later committed similar acts without the knowledge of Yoshida, yet Yoshida was charged for those acts committed by his subordinates and was convicted for failing in his duty as their superior by failing to prevent those acts and was adjudged as liable as the perpetrators. He received the death penalty. It would seem that the Commission in Manila was consistent in their findings of guilt for those who committed acts of murder as for those who committed rape against non-combatants. See the trial of *Yoshida Tadashi and Ishisaka Iwao* RG331 UD1243 290/11/31/05 Box 1276.

[198] "Review of the record of trial by a Military Commission of Second Lieutenant Minoru Kato, ISN 51J-41070 of the Imperial Japanese Army", RG331 UD1243 290/11/31/05 Box 1276, page 1.

[199] For a full description of the atrocities committed by Kato and his subordinates, see specifications 1, 2 and 3 RG331 UD1243 290/11/31/05 Box 1276, page 2. As outlined in the three specifications, atrocities were of such a nature to include *inter alia*, beatings of victims with bats, placing wooden boards across victims' throats and 'seesawing' from side to side until the victims were unconscious, engaging in 'watercure' treatment (commonly known as waterboarding in contemporary parlance), burning victims with cigarette butts, hanging them upside down from trees, and burning victims to death.

[200] Reviewing Authority as per Major General George F Moore, Commanding General, United States Army Forces, Western Pacific.

was exercising authority over the Japanese soldiers who tortured and killed others' at the various scenes where the atrocities occurred.[201]

The defence tried, unsuccessfully, to claim others had provided the necessary orders which resulted in the unlawful killings and that Kato was not in command at the time. Curiously, the fact that someone other than Kato may have actually been in command at the time of the killings did not seem to affect the Commission's finding of guilt, and the Judge Advocate stated:

> What the defense offered amounted at most to evidence that another than the accused was in command of the garrison and company on paper when these incidents occurred. If the facts were as contended by the defense, this circumstance would neither exculpate the accused nor in any way mitigate his guilt.[202]

Unfortunately, Colonel Shaw JA did not elaborate on this statement. One can speculate, however, that Colonel Shaw—as did the original Commission who heard the initial evidence—considered that personal participation in criminal offences where the acts are later replicated by subordinates not under direct orders is sufficient to render a superior criminally responsible for the later criminal acts. That is, given that the superior personally authorised, participated in and observed initial unlawful conduct, this fact alone is sufficient to indicate to his subordinates that future acts are likewise acceptable and perhaps even desirable under certain circumstances.

The superior has set a precedent to which subordinates may adhere. Future unlawful conduct committed by subordinates under these circumstances is, therefore, sufficient to attract criminal sanction for the superior in the absence of direct orders to his subordinates to refrain from engaging in such conduct or where no evidence exists that the superior purported to punish subordinates for committing the said atrocities. Colonel Shaw made it clear that Kato was unable to rely on, or seek mitigation of sentence, on the basis of the fact that Kato did not order all the unlawful acts against Filipino non-combatants.

What is one to make of the legal principle stemming from such a finding? The original Commission which heard Kato's case, has, whether intentionally or inadvertently, provided a very interesting summation of the law as it relates to the 'temporal' and 'proximal' connection of the accused to the commission of the unlawful conduct. In finding Kato guilty, not purely for the acts he personally committed against non-combatants, but also for acts committed by his subordinates for which he may not have had full knowledge, it created a 'temporal' and 'proximal' relationship regarding the commission of the first and subsequent offences. In other words, time and place relative to the accused and the commission of the offences are relevant to a finding of criminal responsibility. Applying this line of argument, because Kato had ordered and participated in the initial acts, it was reasonable, therefore, to conclude he was

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[201] "Discussion" Colonel Franklin P Shaw, JAGD, Judge Advocate, RG331 UD1243 290/11/31/05 Box 1276, page 3.
[202] Ibid.

sufficiently responsible for similar acts committed at a later date. The chain of Kato's 'temporal' and 'proximal' connection between the first and subsequent unlawful conduct was not sufficiently broken.

F. *Trial of Colonel Nagahama Akira, Imperial Japanese Military Police (Kenpeitai), Manila, 25 February – 11 March 1946*

The trial of Colonel Nagahama shows that a failure to prevent and punish subordinates for war crimes is sufficient to constitute acquiescence of a mid-ranked officer, even though no evidence existed that the accused had actual knowledge of the scale of atrocities committed by subordinates. Inability to prevent atrocities is not a valid excuse and not a mitigatory factor in sentencing.

Charge and Specifications

Colonel Nagahama of the IJA, commander of the Kenpeitai in the Philippines, was charged with 'failing to control members of his command, permitting them to commit atrocities against the people of the United States, its allies'. He was also charged with ordering atrocities in violation of the laws of war.[203] There were four specifications and eight additional specifications to the charge that centred around Nagahama's role as a commanding officer in the torture and murders of Filipino civilians and members of the US and Philippine armies. The events took place in and around Fort Santiago, Cortabitarte, Wack Wack Golf and Country Club, and the Far Eastern University, all within the vicinity of Manila between 30 September 1942 and 8 January 1945.

After pleading guilty to the charge and all specifications for his role, Nagahama was convicted of the charge and sentenced to death by hanging. Details of the extent of the killings reads as a litany of depraved murder, torture and undisciplined debauchery committed by a defeated and depleted Japanese military police in the closing stages of the Pacific War. Most of the killings occurred in the latter stages of 1944 and early 1945 as US forces began landing at Leyte and elsewhere on the Philippine Islands.

Evidence of the killings that the prosecution produced extended to over 800 pages comprised predominantly of testimony of eyewitnesses who managed to survive captivity during Nagahama's command of various locations housing US and Filipino military and civilian personnel. Fort Santiago was the site of the worst of the killings and exhibits were produced by the prosecution that showed decapitations of four US civilians, executions of US aviators and other exhibits of headless and 'disembowelled bodies of white men and of a tongueless living Chinese'.[204]

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[203] JA 201-Nagahama, Akira (Col), 'Trial by Military Commission', Review by Colonel Franklin P Shaw, Judge Advocate RG331 290/11/31/05 UD1243 Box 1276.
[204] Ibid page 2.

Establishing Nagahama's Criminal Responsibility

Nagahama's criminal responsibility for the deaths of several thousand civilians and US military personnel held in captivity in various places near Manila, like that of other officers prosecuted at Manila, seemed to be predicated on the position and role within the military that he occupied at the time the atrocities were committed. As such, Nagahama's case (and others like it) represent a class of cases that imposed criminal liability on the accused, not for actual knowledge or direct participation in war crimes but on a strict basis of command responsibility so that the person in command was held accountable. Colonel Nagahama was the commanding officer of the Japanese military police (Kenpeitai) in the Philippines and records from his trial and subsequent review appear to indicate that his criminal responsibility rested on this point alone. Colonel Shaw JA stated that

> The responsibility of the accused is established beyond question. The evidence shows that he was, from about 1 October 1942 to 7 January 1945 commander of Military Police operations in all of the Philippines, maintaining his headquarter during that period … that he visited the rooms where prisoners were investigated; and that he acquiesced in the execution without trial of General Natividad and nine other officers of the Philippine Army; that he took no action against the guards; and that the officer who directed the confinement was permitted thereafter to remain in charge of prisoners at Fort Santiago.[205]

Nagahama had little reason to dispute the extensive eyewitness testimony that clearly implicated his subordinates in the commission of war crimes, but he did offer, by way of a defence, his purported inability to prevent atrocities from occurring. His defence team put forward the proposition that Nagahama, even if he did know or suspect that prisoners were being mistreated and murdered by his subordinates, he had no way of preventing such crimes from occurring since 'he was not strong enough to overcome the great forces which worked against any good intentions he had on arrival in the Philippines'.[206] His defence team claimed that Nagahama's inability to control his subordinates was exacerbated by the advancing US forces and the effectiveness of guerrilla campaigns orchestrated by locals.[207] He also claimed that his men were forced to 'live off the land' due to shortages of food.[208]

The law of command responsibility extended by the Commission

These arguments failed to sway the original tribunal and the subsequent reviewer. Likewise, clemency was rejected (despite receiving petitions from Nagahama's mother and relatives). Nagahama's criminal responsibility seemed to rest on the fact that he failed to prevent the atrocities, rather than the fact that he gave orders to commit such acts. From this assessment,

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[205] Ibid.
[206] Ibid 4.
[207] Ibid.
[208] Ibid.

the Commission, and subsequent reviewing authorities, broadened criminal liability to those who were arguably not in a real position to control the day-to-day actions of their subordinates.

Given that Nagahama was merely a colonel and had assumed enormous responsibility for thousands of prisoners and Japanese military personnel, it is arguable that he did lack the authority to control his subordinates. General Yamashita claimed even he lost authority in the closing phases of the Philippine campaign, so there was little hope a colonel could prevent atrocities from occurring in the extreme circumstances in which the Japanese found themselves.

The Commission kept this fact from disturbing the original death penalty and they affirmed the original sentence.[209] The law, as it now stood was clear—unless the accused could show clear evidence that he at least attempted to prevent and punish subordinates for atrocities, it mattered little of the circumstances surrounding the superior. Criminal responsibility was firmly established merely on the role or occupation of the accused. That such a proposition would be founded during the Manila trials is hardly surprising given the earlier finding at the *Yamashita trial.*

What was now illuminating, however, was the propensity of military commissions to apply the 'Yamashita precedent'[210] to those much more junior in rank who, importantly, did not have the same level of authority as a general. Why did the Commission refuse to acknowledge this fact and at least consider it as a point in mitigation that criminal responsibility should be shared? Instead, the Commission was satisfied with applying a strict precedent that as long as there was a connection ('temporal' and/ or 'proximal') then criminal responsibility was sure to follow. A further plank of command responsibility was clearly developed.

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As it should now be clear, the Manila trials highlighted several problematic features in relation to command responsibility. In short, the main problems with command responsibility stemming from those trials appear to be:

- the application of 'contingent liability';
- the broad interpretation of *mens rea* (especially, 'knowledge');
- subjective bias with disputed fact evidence;
- ambiguities regarding charges relating to 'disregarding and failing to discharge' their duties;
- a broadening of the meaning of the charge 'permit' atrocities to occur;

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[209] Ibid 3–5.

[210] The 'Yamashita precedent', at least in part, operated so as to confer liability to those who merely occupied positions of authority and were in some 'temporal' or 'proximal' connection to the offence or to those who committed the offences. Given that Colonel Nagahama satisfied the temporal and proximal connection to atrocities that occurred in Manila and elsewhere, this was sufficient to confer criminal responsibility.

- the application of intermediary liability;
- the broad interpretation of ‘effective control’;
- inconsistent sentencing due to ‘temporal disconnection’;
- the application of the ‘temporal’ and ‘proximal’ principle; and
- that the inability of the accused to prevent, punish or deter atrocities is not a valid factor to mitigate the sentence.

These problems, and how best to deal with them, are the subject of the following chapter, in which command responsibility is examined in its historical context to determine the requisite legal standard to develop a normative framework of command responsibility.

CHAPTER 4:
A NORMATIVE RE-CONCEPTUALISATION OF THE PRINCIPLES OF COMMAND RESPONSIBILITY

I. Introduction

The application of command responsibility throughout history, as shown by the cases at Manila and other cases, is far from uniform. The extent to which commanders have been held liable for the conduct of their subordinates has varied greatly and the decision as to whether to attribute guilt to those at all levels of civilian and military leadership seems to depend very much on the context and circumstances of the events in question. There are, however, several discernible elements or principles borne out by the cases and the *lex scripta* that can provide some clarity regarding criminal responsibility in relation to command responsibility.[211]

One eminent legal figure who articulated the elements of individual responsibility was Robert H Jackson of the US Supreme Court and the US Chief Prosecutor, during his opening statement at the International Military Tribunal for Nuremberg (IMTN). During his address, Jackson provided some indication of what he believed were some of the essential elements of individual criminal responsibility for war crimes that applied to everyone and which were reflected in the IMTN Charter. He stated that,

> [t]he Charter also recognizes individual responsibility on the part of those who commit acts defined as crimes, or who incites others to do so, or who join a common plan with other persons, groups or organizations to bring about their commission.[212]

Here, Jackson alluded to three essential elements for a person (including a civilian or military commander)[213] to face criminal responsibility: that is, where they have actually committed the

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[211] Command responsibility is not an offence per se; rather, command responsibility is a method of attributing criminal responsibility to those in positions of authority. As such the term 'elements' may not necessarily be the best term to use. A preferable term might be something that connotes the necessary 'conditions' that must be met or must exist for a person to be found criminally liable for a substantive offence (ie murder, genocide etc) on the basis of command responsibility. For a recent example of a junior commander convicted of war crimes on the basis of unlawful orders given to subordinates to kill non-combatants, see *United States. v Lorance*, Army 20130679 (US Army Ct. Crim. App. June 27, 2017).

[212] Robert H Jackson, 'Opening Address for the United States of America' (Speech delivered at the International Military Tribunal, Palace of Justice, Nuremberg, Germany, 21 November 1945) as reproduced in the *Department of State Bulletin* (25 November 1945) volume XIII, Number 335, page 857.

[213] The IMTN Charter made it patently clear that anyone could be charged with war crimes, no matter their status as military or non-military – see Article 7, *Charter of the International Military Tribunal*

act; or where they have incited others to do so; or where they have conspired with others to commit the acts in question. While there is little doubt that Jackson's statement holds true, the elements he outlined are far from exhaustive and, as will be discussed, history has shown that there are other instances where a commander could be found criminally liable for the acts of their subordinates.

A different case that provides additional insights into those other possible instances is the case of *Brigadefuhrer Kurt Meyer* which was conducted in accordance with the *Canadian War Crimes Regulations.*[214] In summing up the case as it pertained to the elements of command responsibility, the Judge Advocate stated that the following considerations needed to be present:

> The rank of the accused, the duties and responsibilities of the accused by virtue of the command he held, the training of the men under his command, their age and experience, anything relating to the question whether the accused either ordered, encouraged or verbally or tacitly acquiesced in the killing of prisoners, or wilfully failed in his duty as a military commander to prevent, or to take such action as the circumstances required to endeavour to prevent, the killing of prisoners, were matters affecting the question of the accused's responsibility.[215]

Others have stipulated that evidence of command responsibility must contain elements that clearly show that a superior–subordinate relationship exists, the superior knew or should have known a crime was committed or will be committed, the superior had the ability to prevent the crime, and the superior failed to take the necessary and reasonable steps to prevent or punish the criminal conduct.[216] Parks in his definition of the elements of command responsibility has added further details by stating that command responsibility includes other essential ingredients: evidence that the superior 'incited' subordinates to commit unlawful acts, that the superior failed in their duty to prevent unlawful acts, that there exists an executive structure placing the superior above the position of the subordinate, that the superior had knowledge (actual or constructive) and that the superior was negligent in their duties that allowed or facilitated the unlawful conduct.[217]

(*Nuremberg Charter*) London, 8 August 1945:
The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

[214] *Trial of BrigadefuhrerKurt Meyer (The Abbaye Ardenne Case)* Canadian Military Court, Aurich, Germany (10–28 December 1945) reproduced in *Law Reports of Trials of War Criminals,* United Nations War Crimes Commission, HMSO, volume IV, 1948, 97–110.

[215] Ibid 108.

[216] International Committee of the Red Cross, Advisory Service on International Humanitarian Law, *Command Responsibility and Failure to Act* https://www.icrc.org/en/document/command-responsibility-and-failure-act-factsheet>.

[217] Parks (n 109) 77–101.

Similarly, Solis characterises the elements of command responsibility as the 'commander's seven routes to trial'.[218] He states that a commander will be held accountable where he or she: (1) personally commits violations of international law; (2) personally orders a subordinate to commit unlawful acts; (3) fails to take action for the acts of subordinates for violations of which he or she is aware or does not take action to punish wrongdoers; (4) incites subordinates to commit unlawful acts; (5) fails to control troops who commit unlawful acts; (6) acquiesces in relation to the commission of unlawful acts; or (7) passes on manifestly illegal orders to subordinates.

II. 'Objective' and 'Subjective' Formulation of the Elements

In broad terms, the elements of command responsibility comprise 'objective' and 'subjective' standards. Nybondas asserts that '[…] the elements may best be divided into objective and subjective elements referred to *actus reus* and *mens rea* respectively'.[219] By 'objective', Nybondas refers to elements that can be objectively determined by discernable evidence that would indicate the superior did or failed to do an act preparatory or in furtherance to an offence.

Examples of objective elements could be such actions as those Solis terms, 'personally committing violations of international law' or what Jackson identifies as 'inciting' criminal acts.

The 'subjective' element, on the other hand, goes to a determination of the 'guilty mind' of the accused and looks to establish what the accused knew or should have known in relation to the acts of his or her subordinates. An example would be what most authors identify as being the 'knowledge' element.

III. Reformulating the Principles of Command Responsibility

While there is broad agreement across the literature in regard to the requisite elements of command responsibility, each of the formulations cited above are deficient since they fail to incorporate a more comprehensive list of factors that various tribunals and courts examined in the post-WWII war crimes in Nuremberg, the Philippines and beyond.

A consolidated list of the elements that incorporates additional elements of command responsibility as evidenced by post-WWII trials, would comprise the following:

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[218] Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2nd ed, 2016) 426–433.

[219] Maria L Nybondas, *Command Responsibility and its Applicability to Civilian Superiors* (TMC Asser Press, 2010) 31, as cited in Alexandre Skander Galand, Emile Hunter and Ilia Utmelidze, 'International Criminal Law Guidelines: Command Responsibility' (Case Matrix Network, Centre for International Law Research and Policy, 2016) 31 <https://www.legal-tools.org/doc/7441a2/pdf/>.

A. *evidence the commander personally committed the underlying crime;*[220]
B. *evidence the commander ordered the acts in question;*[221]
C. *whether or not the commander failed to act to prevent the crime (acquiescence);*[222]

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[220] For example, see Trial of Henry Wirz, Letter from The Secretary of War Ad Interim, in Answer to a Resolution of the House of April 16, 1866, transmitting a summary of the Trial of Henry Wirz, 40th Congress, House of Representatives, Ex. Doc. No. 23 <https://www.loc.gov/rr/frd/Military_Law/pdf/Wirz-trial.pdf>. The second charge in relation to Captain Wirz stated that he personally took part in the murders of 'unnamed individuals'. For other high profile cases where commanders have been charged for personally taking part in war crimes, see *US v Calley* 48 CMR 19 (USCMA, 1973). This case, infamously known as the My Lai Massacre occurred during the Vietnam War. Lieutenant William Calley of the US Army was charged and convicted by court-martial for the murder of twenty-two South Vietnamese non-combatants. Also, see regarding individual criminality of commanders accused of personally taking part in war crimes, *Prosecutor v Milan Lukic and Sredoje Lukic* IT-98-32/1-T (July 20, 2000) where a low-ranking Serbian police commander and member of a Serbian para-military unit was charged with, and convicted of crimes against humanity and violations of the customs or laws of war. Similarly, see *Prosecutor v Kupreskic et al* IT-95-16-T (January 14, 2000) involving a HVO (Croatian Defence Council) commander Zoran Kupreskic who was initially charged with crimes against humanity and violations of the laws or customs of war. Kupreskic was initially convicted of most of the charges and sentenced to ten years imprisonment, although this was later overturned on appeal. For trials where Japanese accused were alleged to have, and convicted of, personally taking part in war crimes, see Trial of First Lieutenant Fujii Hajime, RG331 UD1243 290/12/31/05 Box 1276.

[221] For examples of the types of cases that have been prosecuted involving acts directly ordered by a commander or by a person in command, see Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2nd ed, 2016) 428. Solis cites the cases of two separate US Air Force personnel convicted of murdering a South Korean non-combatant – *US v Kinder* 14 CMR 742 (AFBR 1954) and *US v Schreiber* 18 CMR 226 (CMA 1955). For US trials of Japanese war criminals convicted in Manila, see General Headquarters Far East Command, Office of the Judge Advocate, 'Review of the Record of Trial by a Military Commission of Major Koe Mikami, ISN 150380, Imperial Japanese Army', 27 March 1947, document located at NARA, RG331 UD 290/12/2/2 Box 1389 Folders 14&26; *Trial of First Lieutenant Fujii Hajime*, RG331 UD1243 290/12/31/05 Box 1276. For a contemporary example, see *Prosecutor v Milosevic* IT-98-29/1-T (12 December 2007).

[222] For examples of those convicted on the basis of acquiescence, see *The Trial of Sakamoto Yuichi* reproduced in the *Trial of General Tomoyuki Yamashita, Law Reports of Trials of War Criminals,* United Nations War Crimes Commission, HMSO, volume IV, 1948, 86. See also *USA vs Takeshi Kono* RG331 UD321 290/12/12/1, Box 1563; and *USA v Shiyoku Kou (Koh)* RG331 UD1321 290/12/12/1 Box 1559–1560. See also *Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War,* Geneva, opened for signature 12 August 1949, 75 UNTS 973 (entered into force 21 October 1950) arts 146–148; and *Geneva Convention Relative to the Treatment of Prisoners of War* Geneva, opened for signature 12 August 1949, 75 UNTS 972 (entered into force 21 October 1950) arts 129–131. Also, see *Report of the Majority, and Dissenting Reports of American and Japanese-Members of the Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties,* Versailles, March 1919, as cited in Bassiouni, above n 104, 425; and

D. *evidence the commander failed to punish the perpetrators of the crime;*[223]
E. *the existence of a superior–subordinate relationship between the subordinate and superior;*[224]
F. *the state of knowledge that the commander had prior to, during and after the event;*[225]
G. *whether the commander incited subordinates into carrying out the offending behaviour (incitement);*[226] and/or?

Friedman, above n 223, 842–67. Also dealt with in *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)* opened for signature 8 June 1977, 1125 UNTS 17512 (entered into force 7 December 1978) art 86.

[223] See *US Department of the Army Field Manual* (FM 27-10) para 507(b) (July 1956); *Koster v United States* 231 Ct.Cl. 301(1982) <http://lawofwar.org/koster_v__us.htm>; International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia* (September 2009) (ICTY Statute) art 7(3) < http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf>.

[224] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899, Art 1(1); and Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Art 1(1); Convention Relative to the Treatment of Prisoners of War, Geneva, 27 July 1929; *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Geneva Protocol I), 8 June 1977*, International Committee of the Red Cross <https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/ba2c2393da08b951c12563cd00437a1c> 1013; Ilias Bantekas, 'The Contemporary Law of Superior Responsibility' (1999) 93 *American Journal of International Law* 573, 578–87; *Prosecutor v Delalic, Mucic, Delic, and Landzo* IT-96-21-T (16 November 1998) ('*Celebici case'*) <http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf> 121–147.

[225] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia* (September 2009) (ICTY Statute) art 7(3) <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf>; *Celebici case*; *Trial of General Tomoyuki Yamashita, Law Reports of Trials of War Criminals,* United Nations War Crimes Commission, HMSO, vol IV, 1948, 1 ('*Yamashita trial*'); *US v List et al, Law Reports of Trials of War Criminals,* United Nations War Crimes Commission, vol XI, 1948, 1230; *US v von Leeb et al Law Reports of Trials of War Criminals,* United Nations War Crimes Commission, HMSO, vol XII, 1949,1 ('*High Command case'*); Geneva Protocol I, art 86.

[226] *Trial of BrigadefuhrerKurt Meyer* Canadian Military Court, Aurich, Germany (10–28 December 1945) in *Law Reports of Trials of War Criminals,* United Nations War Crimes Commission, HMSO, volume IV, 1948, 97–110 ('*Abbaye Ardenne case*'*)*; *Trial of Erich Heyer and six others, Law Reports of Trials of War Criminals,* United Nations War Crimes Commission, HMSO, volume I, 1947, 88, 88–91 ('*Essen Lynching case*').

H. *the level of control exerted by the individual commander and whether the commander failed to control the conduct of subordinates.*[227]

These elements will be discussed in significant detail, in the next section, providing the basis of the main elements of the doctrine of command responsibility.

A. *Evidence that the Commander Personally Participated in the Crime*

One would expect little controversy surrounding the question of criminal responsibility of a commander where clear evidence exists to support a charge that he or she directly participated in war crimes. However, history has shown that in cases where there is evidence that a superior officer has directly participated in war crimes—even where he or she has participated in the killing of another—the pronouncement of criminal responsibility was not always clear cut.

There have been several high profile cases where, despite clear evidence supporting a conviction—such as those of US servicemen involved in the My Lai-4 Massacre that occurred during the Vietnam War—findings of guilt and the administering of punishment, were far from uniform. As borne out in the cases discussed below, guilt and punishment is often dependent upon which side is prosecuting the crime and which side is being prosecuted. It was sometimes the case in situations where the prosecuting authority and the accused were from the same side, there was a different application of the law than in cases where the prosecuting authority and accused were from opposing forces. This raises the spectre of 'victors' justice', but it also raises the unfortunate point that the application of law during or after war, was rarely uniform and often infused with politics.

An additional inconsistency appears to have occurred where there was a decision to prosecute an individual who occupied a position of authority and who was alleged to have committed a war crime, but at the same time there was no corresponding decision to prosecute the subordinate who committed the unlawful act. This situation is curious because tribunals have overtly insisted that the plea of superior orders will not act as a bar to prosecution or a tool to relieve an accused of criminal responsibility. One speculation as to why this occurred in the past is possibly due to the need to reduce the number of prosecutions and also the desire to prosecute more senior ranking individuals as opposed to lower ranking individuals.

The following examples illustrate some of the complexities that have existed in relation to prosecuting superiors accused of directly committing war crimes.

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[227] For a discussion on the control aspects of a commander's role and their responsibility, see generally *Yamashita trial*. For a general discussion on the concept of 'control' in the military context, see also the *High Command case* and the *Hostages case*.

The Trial of Captain Henry Wirz, August 1865, Washington DC

Not long after the promulgation of the *Lieber Code,* at the conclusion of the American Civil War, the *Code* was tested during the trial of Captain Henry Wirz before a military commission convened at Washington DC in August 1865.[228] The case is demonstrative on a range of levels, not least of which involve early legal discussions of individual criminal responsibility for war crimes involving prisoners of war which directly implicated a person in authority for directly killing prisoners.

Captain Wirz, originally Swiss but became a US citizen prior to the Civil War, was a doctor and commandant of a Confederate prisoner of war camp at Andersonville in Georgia.[229] Wirz was charged and convicted by a military commission for violating the *Lieber Code* for his part in permitting the torture, mistreatment and death of Union prisoners of war while he was commandant of the facility.[230] The first charge related to Wirz's alleged part in a joint conspiracy with at least five others and others whose names were unknown, to torture and kill members of the Union army by subjecting prisoners to extreme confinement, exposing prisoners to extreme temperatures in summer and winter, forcing prisoners to drink contaminated water and causing starvation among the Union prisoners. The second charge related to wilful murder alleged that he personally killed prisoners under his control. None of the 13 specifications to the charges identified any of the victims but stated the victims comprised 'the number of one thousand, whose names are unknown, sickened and died by reason thereof'.[231] The prosecution called over 160 witnesses, including Colonel G C Gibbs of the Confederate Army who was the commandant of the prison prior to Wirz's arrival.[232] Colonel Gibbs conceded, even though Gibbs was superior to Wirz in rank, the management of the prisoner of war camp was not under Gibbs's control and that Wirz was given ultimate control over the running of the camp at Andersonville.[233] The implication for Gibbs, of course, was that if the prosecution could show that Gibbs somehow had control of what occurred at

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[228] *The Trial of Captain Henry Wirz*, Washington DC, 1865 8 *American State Trials,* 666 ff. (1918) as cited in Leon Friedman (ed) *The Law of War: A Documentary History Volume 1* (Random House, 1972) 783–798. Evidently, the US Government felt it sufficiently necessary to have Wirz's trial tabled in the US House of Representatives (HoR) and on that basis, a summary of the trial (all 840 pages), was presented to the HoR by Ulysses S Grant (Secretary for War) on 26 April 1866 – see *Trial of Henry Wirz, Letter from The Secretary of War Ad Interim, in Answer to a Resolution of the House of April 16, 1866, transmitting a summary of the Trial of Henry Wirz*, 40th Congress, House of Representatives, Ex. Doc. No. 23 <https://www.loc.gov/rr/frd/Military_Law/pdf/Wirz-trial.pdf>.

[229] Parks (n 110) 7.

[230] Ibid.

[231] Trial of Henry Wirz, Letter from The Secretary of War Ad Interim, in Answer to a Resolution of the House of April 16, 1866, transmitting a summary of the Trial of Henry Wirz, 40th Congress, House of Representatives, Ex. Doc. No. 23 <https://www.loc.gov/rr/frd/Military_Law/pdf/Wirz-trial.pdf> 4.

[232] Friedman (n 229) 783–98.

[233] Ibid 786.

the camp during Wirz's tenure as commandant, then Gibbs, too, could be implicated in the charges.

Interestingly, the prosecution relied on Gibbs's testimony to establish Wirz's authority over the camp. By establishing that Wirz had ultimate control over the camp, the prosecution could then argue that Wirz's liability rested in the fact that he, and he alone, was responsible for the treatment of Union prisoners under his command. Not only did Gibbs make it clear that he was not in control of the camp, due to his reassignment to Camp Sumter prior to Wirz's arrival at the prison,[234] he also made it abundantly clear that much of the pain and suffering of prisoners was avoidable had Wirz taken the necessary steps. Under cross-examination, Gibbs stated:

> I was Wirz's superior in rank. In many respects Wirz was under my command, but so far as the prison was concerned he was not.; there was food enough to feed all; the rations served to the troops and the prisoners were equal; … if the quality of the ration was unsound a board of survey could have been summoned to condemn it…[235]

Other witnesses for the prosecution were no less forthcoming with evidence regarding Wirz's responsibility for the appalling conditions and treatment of prisoners. Witnesses gave detailed accounts of the cruel and inhumane treatment of prisoners by guards at the prison. Although the Commission acknowledged that much of the conduct was committed by others, the overwhelming impression from the individual testimonies was that such treatment occurred because of Wirz's encouragement, negligence in preventing the abuse, and at his own hands.

Individual testimonies detailed the pain and suffering inflicted upon the prisoners due to extreme overcrowding, the lack of adequate clothing, food, medical treatment and the rampant incidence of disease.[236]

For his part, Wirz vehemently protested his innocence. He argued that he should not be convicted of the charges. He blamed his circumstances on the harsh conditions and attributed some responsibility to his superiors. He said:

> I was then ordered to report to the commandant of the military prison at Andersonville, Georgia, who assigned me to the command of the interior of the prison. The duties I had to perform were arduous and unpleasant, and I am satisfied that no man can or will justly blame me for things that happened here, and which were beyond my power to control. I do not think that I ought to be held responsible for the shortness of rations, for the overcrowded state of the prison, (which was of itself a prolific source of fearful mortality) for the inadequate supplies of clothing and want of shelter, &c., &c. Still I now bear the odium, and men who were prisoners have seemed disposed

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[234] Trial of Henry Wirz, Letter from The Secretary of War Ad Interim, in Answer to a Resolution of the House of April 16, 1866, transmitting a summary of the Trial of Henry Wirz, 40th Congress, House of Representatives, Ex. Doc. No. 23 <https://www.loc.gov/rr/frd/Military_Law/pdf/Wirz-trial.pdf> 20–21.
[235] Friedman (n 229) 787.
[236] Ibid 785–91.

> to wreak their vengeance upon me for what they have suffered. I, who was only the medium, or, I may better say, the tool in the hands of my superiors. This is my condition.[237]

Wirz's defence team asserted several grounds for his defence. They were primarily based on the defence of superior orders and jurisdictional error on the part of the Commission in conducting the trial in the first place. Regarding jurisdictional error, the Commission did not agree with the defence's argument that it lacked the requisite jurisdiction. In relation to the defence of superior orders, Wirz asserted that whatever his role was in relation to the conditions of the prison at Andersonville, he should not be found guilty for following orders.[238] His defence went on to state:

> Furthermore, if he [Wirz], as a subaltern officer, simply obeyed the legal orders of his superiors in the discharge of his official duties, he could not be held responsible for the motive that dictated such orders. … From his position at Andersonville, he should not be held responsible for the crowded condition of the stockade, the unwholesome food, etc., for the following reasons, among others, viz.: he was not responsible for the selection of the location, as it was located by W. S. Winder in 1863, while he was yet in Europe; that he did not assume command until March, 1864; the Colonel Persons, one of the principal witnesses for the prosecution, testified that the stockade was sufficiently large and properly located for the accommodation of ten thousand prisoners; that Colonel Persons' testimony fully exonerated him (Wirz) from complicity in the selection of the location, overcrowding the stockade, or failure to provide proper shelter for the prisoners;…[239]

The Commission paid little attention to Wirz's defence based on superior orders and held him criminally responsible for both charges, namely, that he did conspire with others to violate the laws of war, to impair and injure the health, and to destroy the lives of large numbers of Federal prisoners.[240] Wirz was sentenced to death and was executed in Washington DC on 11 November 1865.

Wirz's trial was notable for several reasons. It was the first time the US, as a nation, prosecuted a US citizen for war crimes committed against fellow US citizens and as such could be described as a watershed moment in the development of the law in relation to criminal responsibility for superiors specifically, and the development of war crimes theory more generally. The *Trial of Captain Wirz* represents an important indication as to how the US law would develop in terms of holding those in positions of authority accountable for cruel and

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[237] Trial of Henry Wirz, Letter from The Secretary of War Ad Interim, in Answer to a Resolution of the House of April 16, 1866, transmitting a summary of the Trial of Henry Wirz, 40th Congress, House of Representatives, Ex. Doc. No. 23 <https://www.loc.gov/rr/frd/Military_Law/pdf/Wirz-trial.pdf> 17–18.

[238] Given that by the end of the trial, Wirz's entire defence team had resigned, Wirz's final statement was read by Colonel Chipman of the prosecution – see Bill Carnes and Troy Drew, *The Trial of Captain Henry Wirz,* The Seminar in Famous Trials course at the University of Missouri-K.C. School of Law <http://law2.umkc.edu/faculty/projects/ftrials/Wirz/Wirz.htm>.

[239] Friedman (n 229) 793.

[240] Ibid 798.

inhumane actions of subordinates or for allowing their subordinates to act in such ways. It would be naïve to assume that this legal analysis did not permeate into other US cases where command responsibility was in question. Several other US cases where US military personnel were prosecuted on the basis of their position of command are worthy of discussion.

Wirz's case also illustrates the point that the Commission hearing the evidence was satisfied of Wirz's guilt in relation to the second charge that alleged he directly participated in the unlawful killing of Union soldiers. This was despite the fact there was little in the way of specification as to the identity of the alleged victims, and moreover, evidence that Wirz had actually taken a direct role in the killings. The Commission accepted oral testimony that Wirz had directly killed Union prisoners of war despite overwhelming and non-contested evidence that others had also killed prisoners. The fact that no others were brought to trial is indicative of the point that the Commission was primarily concerned with securing the conviction of Captain Wirz and not his subordinates. In fact, so intent was the Commission on securing convictions of those in superior positions within the Confederacy, the first charge in relation to conspiracy was drafted in such a way so as to include senior members of the Confederate Army, namely, John H Winder, Richard B Winder, Joseph White, W S Winder, and R R Stevenson. Only Wirz was ultimately brought to trial and convicted for the deaths of Union prisoners of war at the Andersonville prison. One can only speculate as to the reasons why Wirz alone was convicted of the crimes, but political expediency would have no doubt played a part in his eventual trial and execution. It was political in the sense that the US was then at a critical juncture in its healing and charging senior Confederate figures for war crimes would only have exacerbated existing tensions between the two former warring factions.

Political expediency as shown by the way the Commission acted in choosing Wirz to be prosecuted when clearly there were others who were equally, if not more culpable, was a sign of the way in which other future war crimes commissions would operate, and it has been a constant criticism of war crimes commissions.

US v Calley 48 CMR 19 (USCMA, 1973) My Lai Massacre

One of the most infamous and legally questionable war crimes cases in modern times involved the US Army prosecuting one of its own. The case notoriously became known as the *My Lai Massacre* and some have said that the case irreparably changed public sentiment about the Vietnam War in the US and around the world.[241] This was the case involving Lieutenant William Calley, whereby Calley was charged and convicted for war crimes that he both directly committed and ordered to be carried out against Vietnamese non-combatants. Calley commanded the 1st platoon of 'Charlie Company',[242] as it went into the South Vietnamese

[241] Howard Jones, 'The Lessons of My Lai Still Resonate', *The Washington Post* (16 March 2018) <https://www.washingtonpost.com/opinions/the-lessons-of-my-lai-still-resonate/2018/03/15/4d35613a-2708-11e8-874b-d517e912f125_story.html?utm_term=.fc3e7829e33c>.

[242] Lily Rothman, 'Read the Letter that Changed the Way Americans Saw the Vietnam War', *Time* (16 March, 2015) < http://time.com/3732062/ronald-ridenhour-vietnam-my-lai/>.

hamlet of My Lai-4 on 16 March 1968. The charges involved horrific acts of murder and sexual abuse of South Vietnamese non-combatants.[243] Calley himself was charged and convicted of the premeditated murders of twenty-two men, women and children.[244] He was initially sentenced to dismissal from the Army, and confinement at hard labour for life.[245]

On appeal to the US Court of Military Appeal, Calley claimed his initial conviction should be set aside on four grounds: that he was acting under superior orders,[246] that his trial was prejudiced due to the amount of negative publicity associated with his case, that there was insufficient evidence to establish beyond reasonable doubt he committed the alleged acts, and that the military judge was prejudicial in relation to Calley's trial.[247] The Court of Military Appeal affirmed his conviction and rejected the grounds of appeal, however, in relation to the sentence, US president Richard Nixon, and later the Secretary of the Army reduced his sentence to ten years, and having already served approximately one-third of his sentence, he was immediately eligible for parole.[248]

The *Calley case* is significant on a range of levels, not least of which is illustrative of the point that war crimes are committed by all sides in war. The significance of this case, however, represents one of the most obvious instances where the legal outcome of a war crimes trial was influenced by the political exigencies perceived by a government at the time. At the time that this incident became known to the public, it was widely accepted throughout much of the

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[243] For a more detailed and harrowing account of what occurred on the day, see the full letter by Ronald Ridenhour of the US Army that he sent to several government officials including President Richard Nixon – letter available at Douglas O Linda, 'Ron Ridenhour Letter, March 29, 1969', *Famous Trials* <https://www.famous-trials.com/mylaicourts/1649-ridenhour-ltr>. Although Ridenhour did not experience the massacre first hand, accounts of the day were relayed to him by those who had taken part in the massacre and who described in great detail the planning and systematic killing of approximately 300–400 South Vietnamese inhabitants of the village of My Lai-4. For other documents relating to the trial and testimony of witnesses to the event, see Douglas O Linder, 'Testimony and Documents Relating to the Court Martial of William L Calley', *Famous Trials* <https://www.famous-trials.com/mylaicourts/1608-myl-calt>.

[244] *US v Calley* 48 CMR 19 (USCMA, 1973), as cited in Solis, above n 105, 397–8. See also *Court-Martial of William L Calley, JR*, Fort Benning, Georgia, March 1971, *Instructions from the Military Judge to the Court Members in United States v First Lieutenant William L Calley Jr*, as cited in Friedman, above n 229, 1703–1728. For the conviction, see *US v Calley*, 46 CRM 1131 (ACMR, 1973).

[245] Solis (n 105) 397.

[246] Calley's defence team raised the proposition of the defence of superior orders based on Calley's claim that in committing the murders, he only did so on the basis he was following the orders of Captain Medina. The Court refused to accept the defence and Calley was unsuccessful in receiving any mitigation of sentence on the basis he was following the orders of his Captain.

[247] Solis (n 105) 397.

[248] Ibid.

commentariat and the wider community in the US and elsewhere that political influence played a large part in the obtuse way the Nixon Administration dealt with this matter. [249]

In terms of the doctrine of command responsibility, Calley's case represents an example of the inconsistency associated with sentencing for a conviction of war crimes when those on trial were prosecuted by their own side. Furthermore, the punishment Calley received was arguably disproportionate to the crimes for which he was convicted. Even during the trial, it was clear the political sensitivities were such that the US Government intervened and did what it could in relation to the sentence of Lieutenant Calley.

The command responsibility doctrine, if applied as it was in other cases, would have implicated those much higher than Lt Calley. The then future Secretary of Defence, John Kerry, while at a protest in New York, encapsulated the idea that the doctrine of command responsibility should have operated to ensnare many more up the chain of command than only Lt Calley. Kerry stated that:

> We are all of us in this country guilty for having allowed the war to go on. We only want this country to realize that it cannot try a Calley for something which generals and Presidents and our way of life encouraged him to do. And if you try him, then at the same time you must try all those generals and Presidents and soldiers who have part of the responsibility. You must in fact try this country.[250]

However, the outcome of the military investigation into the incident—known as the Peers Commission as it was headed by Lieutenant General William Peers—was misleading and excluded important testimony from eyewitnesses regarding orders in relation to the killing of non-combatants. Those orders allegedly came from General William Westmoreland who, at the time of the massacre, was the commander of US forces in Vietnam. According to Porter,

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[249] Trent Angers, 'Nixon and the My Lai Massacre Coverup', *New York Post* (15 March 2014) <https://nypost.com/2014/03/15/richard-nixon-and-the-my-lai-massacre-coverup/>.
For a contemporaneous account of the 'coverup' of the Nixon Administration and the military, see Seymor Hersh, 'Coverup', *New Yorker* (22 January 1972) <https://www.newyorker.com/magazine/1972/01/22/i-coverup>. See other sources that point to the Nixon 'coverup': Evie Salomon, 'Documents Point to Nixon in My Lai Cover-Up Attempt', *CBS News – 60 Minutes* (23 March 2014) <https://www.cbsnews.com/news/document-points-to-nixon-in-my-lai-cover-up-attempt/>. As for a discussion surrounding the deficiencies of military investigation in the aftermath of the massacre, and the reasons why more people in the military were not implicated in the murders, see Gareth Porter, 'The Untold Story of My Lai – How and Why the Official Investigation Covered up General Westmorland's Responsibility', *The Nation* (19 March 2018) <https://www.thenation.com/article/the-untold-story-of-my-lai-how-and-why-the-official-investigation-covered-up-general-westmorelands-responsibility/>.

[250] Lily Rothman, 'Read the Letter that Changed the Way Americans Saw the Vietnam War', *Time* (16 March 2015) < http://time.com/3732062/ronald-ridenhour-vietnam-my-lai/>.

in 1967, General Westmoreland addressed a commando unit by the name of Tiger Force just months prior to the massacre and stated that,

> [i]f the people are in relocation camps, they're green, so they're safe. We leave them alone. The Vietcong and NVA are red, so we know they're fair game. But if there are people who are out there—and not in the camps—they're pink as far as we're concerned. They're Communist sympathizers. They were not supposed to be there.[251]

This statement by Westmoreland was supposedly made in the context of US Army Directive 525-3 which stipulated that '[s]pecified strike zones should be configured to exclude populated areas *except those in accepted VC bases* [emphasis added].[252] The village of My Lai-4 was understood to be in a zone that was a 'specified strike zone' from which the VC and NVA actively operated and was, therefore, not subject to the protections of non-combatants in non-strike zones. The result of this directive and statement by senior command structures of the US Army led subordinates to believe that non-combatants could be lawful targets of Charlie Company.

Porter outlined in his article the reasons why the Peers Commission attempted to exclude this crucial information from the report and thereby limit the involvement of those in the US Army chain of command.[253] According to Porter, Lieutenant General William Peers was more concerned about his own career prospects than ensuring the truth surrounding the events of the massacre was revealed.

The Peers Commission report was released November 1974 and at the time it was released, Westmoreland was the Army Chief of Staff and, therefore, directly overseeing the work of the Peers Commission. Any adverse findings of the Peers Commission would have direct consequences for Westmoreland and, therefore, potentially for the chief author of the report.[254]

The result of the investigation and the muddying of the details of orders within the chain of command meant that it was more difficult to point to any specific directive that would implicate members of the military other than those who actually perpetrated the events on the ground that fateful day. The My Lai-4 Massacre is a prime example of how politics can operate to limit the responsibility of senior commanders. The 'politics of prosecution' as it is termed,[255] can

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[251] Gareth Porter, 'The Untold Story of My Lai – How and Why the Official Investigation Covered up General Westmorland's Responsibility', *The Nation* (19 March 2018) <https://www.thenation.com/article/the-untold-story-of-my-lai-how-and-why-the-official-investigation-covered-up-general-westmorelands-responsibility/>.

[252] Ibid. Porter claims to have uncovered these details as part of his archival research.

[253] ibid.

[254] Ibid.

[255] For a discussion of the political affect in war crimes prosecution, see Axel Marschik, 'The Politics of Prosecution: European National Approaches to War Crimes' in Timothy L H McCormack and Gerry J Simpson (eds) *The Law of War Crimes: National and International Approaches* (Kluwer Law

step in to obstruct and bend the outcome of prosecuting those who *should* be charged with war crimes.

B. *Where the Commander Ordered the Unlawful Conduct*

A commander will face liability where there is sufficient evidence that he or she ordered the unlawful conduct but did not necessarily take part in the actual commission of the act or omission. Generally, the cases associated with this form of criminal responsibility fall into one of two broad categories. The first category consists of cases where there is clear evidence the superior gave an unlawful order to a subordinate and the subordinate carried out the order. The second category consists of those cases where an order was *alleged* to have been made and that order was carried out, but there is some ambiguity in relation to the order or where there is a firm denial that such an order was actually given. Other situations where the latter category has frequently occurred are cases involving war crimes committed against prisoners of war.[256]

One of the problems associated with proving that unlawful orders existed in the first place relates to obtaining the requisite evidence of such orders. This is because orders are often given orally and no written record of them exists.

Another evidentiary problem exists where an order is given at a senior level in vague or broad terms which, by their nature, are open to interpretation by numerous individuals as the order passes down the chain of command. As is often the case, vital evidentiary matters are lost in the 'fog of war' and all that remains is witness testimony regarding the commission of the act, but not necessarily the actual orders that precipitated it. The order becomes lost in the chain of command. A lack of evidence about who gave the order often leads to a conviction of the person who perpetrated the act, as was characteristic of *Calley's case*.

The following examples illustrate the second instance where a commander will be held criminally responsible for war crimes; that is, where a commander has given orders to a subordinate to commit an offence.

International, 1997) 65–101. Marschik provides an illuminating discussion of the European experience in relation to various European nations' propensity towards conducting war crimes trials in their own jurisdictions. In doing so, Marschik highlights various political aspects that arise, and sometimes hinder, the national approaches to war crimes trials in those jurisdictions. For a discussion involving the political influences of war crimes trials associated with the IMTFE and other Pacific War trials, see, eg, Richard Minear, *Victors Justice'* (Princeton, 1971) entire book, Dayle Smith, *Judicial Murder? Macarthur and the Tokyo War Crimes Trial* (CreateSpace, 2013), and Dayle Smith, *MacArthur's Kangaroo Court* (Envale Press, 1999).

[256] General Headquarters Far East Command, Office of the Judge Advocate, 'Review of the Record of Trial by a Military Commission of Major Koe Mikami, ISN 150380, Imperial Japanese Army', 27 March 1947, document located at NARA, RG331 UD 290/12/2/2 Box 1389 Folders 14 and 26; *Trial of First Lieutenant Fujii Hajime*, RG331 UD1243 290/12/31/05 Box 1276.

Court-martial of Brigadier General Jacob Smith US Army, Manila, April 1902

The twentieth century heralded several important cases that dealt with the thorny issue of attributing criminal responsibility to commanders within the same army.[257] The case of *Brigadier General Smith*, held in Manila in 1902, addressed the issue of whether a brigadier general in the US Army could be held criminally responsible for orders given in relation to the killing of enemy insurgents.[258] The case clearly shows a pattern of behaviour that large institutions, such as the US military as early as the 1900s, were more adept at avoiding the issue of war crimes by disregarding the nature of the acts committed by their forces, or devising clever ways to present charges so that the issue of war crimes was not even addressed.

Brig. Gen. Jacob H Smith of the US Army was the commanding general of the Sixth Separate Brigade in the Philippines during the United States' hostilities in the island of Samar. Smith was charged with 'conduct to the prejudice of good order and military discipline' which was specified on the basis that he gave instructions to Major L W T Waller of the US Marine Corps that stipulated that Smith wanted 'no prisoners' and that he wanted Waller to 'kill and burn. … [t]he more you kill and burn, the better you will please me. … The interior of Samar must be made a howling wilderness'.[259] Further instructions from Smith stipulated that he 'wanted all persons killed who were capable of bearing arms'. When Major Waller enquired as to 'who were capable of bearing arms', Smith confirmed that the age limit was 10 years of age and older.[260]

Upon receiving these instructions, US forces engaged in a number of brutal tit-for-tat attacks against Filipino insurgents. It was not long until details began to emerge in the US of the brutal nature of the way that US forces dealt with the insurgency. Estimates differ but some have stated that US forces engaged in a brutal campaign of burning and destroying suspected insurgency infrastructure throughout the island of Samar and, in the process, killed an estimated 2500–5000 insurgents—not all of whom, it was alleged, were combatants.[261] Only

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[257] For other examples of US trials coming out of the US Army's activities in the Philippine conflict, see *Court-Martial of Major Edwin F Glenn*, Samar, Philippines, April 1902; and *Court-Martial of Lieutenant Preston Brown*, Manila, Philippine, June 1902 (each cited in Friedman, above n 229, 814-829). In both cases, the accused were members of the US Army and were prosecuted for their part in the unlawful killing of Philippine non-combatants. In *Glenn's case*, the accused was tried and convicted for ordering 'water cure' treatment (these days known as 'water boarding'); and in *Brown's case,* the accused was convicted for the actual killing of 'native insurgents'.

[258] *Court-Martial of General Jacob H Smith,* Manila, Philippines, April 1902, S. Doc. 213, 57th Cong., 2nd Sess., pp 5–17, as cited in Friedman, above n 229, 799-813.

[259] Ibid 801.

[260] Ibid.

[261] Arnaldo Dumindin, 'Balangiga Massacre, September 28, 1901', *Philippine–American War 1899–1902* <https://www.freewebs.com/philippineamericanwar/balangigamassacre1901.htm>. Dumindin provides several archival sources that indicate that news in the US of the brutality of US forces on the island of Samar was such that the US administration could no longer ignore the issue and an

after Major Waller's court-martial commenced did it emerge that Smith had given orders for the conduct for which Waller was then on trial. Smith was later charged, not with war crimes, but with offences that were more concerned with bringing the Army into disrepute and dishonour.

Smith was ultimately found guilty as charged. His sentence was forced retirement from the military with no further punishment. However there were no charges brought against him for murder or war crimes and the sentence was extremely light given the purpose for which his orders were clearly intended. The Army was therefore able to avoid an embarrassing war crimes prosecution of one of their own due to the clever way the charges were framed.

Instead, the Judge Advocate General, George B Davis, went to great lengths to play down the nature of the orders by indicating in clear language that:

> The Court is thus lenient in view of the undisputed evidence that the accused did not mean everything that his unexplained language implied; that his subordinates did not gather such a meaning, and that the orders were never executed in such sense, notwithstanding the fact that a desperate struggle was being conducted with a cruel and savage foe.[262]

In avoiding the possibility that Smith's orders had anything to do with the brutalities meted out to Philippine insurgents and the fact that Smith was not charged with actual war crimes, Davis went to stated that:

> As the charges were drawn the real offense of the accused was not made the subject of judicial inquiry. The specification alleges that certain instructions were given by General Smith to his subordinates, but does not allege that the circumstances under which and the manner in which they were given constituted a military offense, and were a substantial departure from the laws of war.[263]

The Judge Advocate General concluded by saying that … 'the Court does therefore sentence him … to be admonished by the reviewing authority'.[264] Ultimately, the Court acknowledged that Smith's orders were certainly unlawful, but it stopped short of trying Smith for war crimes. It did this by interpreting the facts in such a way that played down Smith's part in causing the brutality. Despite this reluctance on the part of the military to place limits on its own forces in fighting a brutal insurgency, a clear message needed to be sent—to whom the message was directed was not entirely clear, but, nonetheless, a message was sent.

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investigation was undertaken. Dumindin provides several archival sources (newspaper clippings and illustrations) published at the time and reported on the scale of the massacres. Some of the newspaper illustrations were political cartoons in reference to Smith's orders, that depicted US forces executing blindfolded boys under the looming presence of 'Old Glory' with the inscription, 'kill everyone over ten – General Jacob H Smith'.

[262] Friedman (n 229) 813.

[263] Ibid.

[264] Ibid.

President Theodore Roosevelt proved this when he approved Smith's sentence on 14 July 1902. While acknowledging Smith's proud military record and clearly stating the problems that the US Army had encountered during the bloody and costly Philippine insurrection, President Roosevelt made the point that,

> [t]he 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 positions 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 …[265]

President Roosevelt clearly articulated the point that senior officers have a duty to junior and officers and enlisted men in relation to cruel conduct in time of war. The problem that existed, and still exists to this day, is that there is a natural reluctance to hold one's own forces to the same standard as the enemy when it comes to ensuring superior orders are within lawful limits.

US v Kinder 14 CMR 742 (AFBR 1954) and US v Schreiber 18 CMR 226 (CMA 1955)

A successful prosecution of a superior for manifestly unlawful orders given to a subordinate is demonstrated by the cases of *US v Kinder* and *US v Schreiber* in 1954 and 1955, respectively.[266] During the Korean War, a US airman critically shot and wounded a South Korean non-combatant when the non-combatant unlawfully entered a US air base in South Korea. When the incident was reported up the chain of command, the airman's superior instructed him to 'take him to the bomb dump and shoot him', to which the airman replied, 'is that an order?'[267] The airman's superior replied that it was an order. The airman complied and shot and killed the non-combatant in the manner described in the order.[268]

When those further up the chain of command became aware of the incident, separate courts-martial were ordered and both individuals were convicted for unlawful killing. The Lieutenant who gave the unlawful order, upon conviction, was dismissed from the USAF.[269] Examples such as these clearly demonstrate that where there exists evidence that the order was given, then it should be unproblematic that a conviction would follow.

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[265] Ibid 799.

[266] *US v Kinder* 14 CMR 742 (AFBR 1954) and *US v Schreiber* 18 CMR 226 (CMA 1955), cited in, Solis (n 105) 428.

[267] Ibid.

[268] Ibid.

[269] According to Solis, the exact sentence was 'dismissal from the air force and confinement for life for the unlawful order'. It is unknown how long the Lieutenant was confined and no other details have been able to be located other than the brief reference and citation in Solis' text.

C. *Whether the Commander Failed to Prevent the Crime (Acquiescence)*

Due to the types of command and control structures in place within the military and civilian hierarchies, the more senior the person, the more unlikely it is that he or she would have directly participated in the commission of war time atrocities.[270] Instead, as history has repeatedly shown, the actual atrocities, such as torture or murder, for example, have been committed by those who occupy the lower ranks of the military.[271] In effect, rank can therefore provide a buffer against criminal responsibility for those in positions of authority because, unless there is clear evidence linking the superior to the crime—such as evidence the superior ordered the unlawful conduct—criminal responsibility will *prima facie* rest with the subordinate.[272]

That junior ranking soldiers face criminal responsibility for their part in atrocities when their actions were condoned or allowed to flourish or, at the very least, go unchecked by their superiors, does not sit well with conventional notions of justice. Can justice be said to have been achieved if those in positions of authority, whose role it is to maintain strict military discipline and ensure the laws of war are maintained, were able to escape sanction merely because they may not have given explicit orders to 'kill', or pulled the trigger themselves? What of the injustices that would result, particularly for subordinates, if those in positions of

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[270] To illustrate this point, on numbers alone, war crimes prosecutions coming out of the Asia–Pacific trials showed a highly disproportionate ratio of those who were subject to war crimes trials in the junior ranks as opposed to those in the senior ranks. Although figures vary slightly, the Allies prosecuted approximately 5700 Japanese individuals (see Philip R Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951* (University of Texas Press, 1979) 264, Tables A and B). With a few notable exceptions (such as the *Yamashita trial*, *Honma*, and *Kuroda* trials etc. where the judgments/ trial transcripts extend to many thousands of pages) the vast majority of those who were prosecuted were ranked lieutenant or below. The number of prosecutions diminished the higher the rank. Compare those numbers with the individuals brought before the IMTFE to face criminal charges for their part in Class A war crimes. Only 28 senior members of the Japanese government and war cabinet were prosecuted (see *Indictment, Tokyo War Crimes Trial November 1948)*.

[271] The disproportionate nature of the number of junior-ranking individuals prosecuted versus the number of senior Japanese military and civilian individuals prosecuted, can be described as resembling a pyramid—that is, more junior ranks occupying the lower rungs of the pyramid versus fewer individuals occupying the upper levels of the pyramid. Also of note here is the fact that the Emperor escaped prosecution and questions surrounding his level of authority and role in Japan's wartime activities. Although it is not necessarily a useful comparison given that far fewer individuals occupy senior government and cabinet positions, the asymmetrical nature of war crimes prosecutions clearly illustrates the perverse point that those in the lower ranks of the military bear the greatest burden during and after war.

[272] Amy Sepinwall, 'Failures to Punish: Command Responsibility in Domestic and International Law' (2009) 30(2) *Michigan Journal of International Law* 251, 253–5.

authority were to invoke the 'buffer' of rank to protect themselves while their subordinates faced criminal sanction?[273]

International criminal law and laws of war have long identified the injustices with this scenario and that is why the law has developed in such a way so as to hold those to account in positions of authority for failing to ensure their troops are not engaging in unlawful conduct. There are obvious injustices that could result if a superior was not held to account merely because he or she acquiesced or failed in their duty to prevent atrocities from occurring.

One solution to hold superiors to account for not maintaining strict military discipline is based on the premise that a superior will be criminally responsible for the acts of their subordinates if the superior knew (having either actual knowledge or constructive knowledge) and merely chose to do nothing to prevent the acts or punish the acts.

The superior's acquiescence to the subordinate's criminal conduct, therefore, forms a major element in holding commanders liable for war crimes.

The meaning of 'acquiescence'

A general definition of acquiescence is to passively accept something or some action without offering any protest or objection.[274] A legal definition of the term is similar but contains several key elements that are thought to be present for acquiescence to occur. These elements require a party to be silent in the wake of known actions of another, the party must know they have legal rights or an obligation to speak out, they must know that another party may act on the party's silence, and further action has occurred as a result of the party's silence.[275] At international law, acquiescence has been described as 'equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent…'.[276] In the *Gulf of Maine case*, an ICJ-determined case involving a dispute between the USA and Canada over the maritime boundaries in the Gulf of Maine, it was asserted that the meaning of acquiescence involves,

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[273] Sepinawall claims that a 'code of silence' exists between military superiors that insulates them from the administration of justice. The same benefit, Sepinwall argues, does not extend to subordinates – see William T Generous, *Swords and Scales: the Development of the Uniform Code of Military Justice* (Kennikat Press, 1973) 201 and Elizabeth L Hillman, 'Gentlemen Under Fire: The US Military and Conduct Unbecoming' (2008) 26 *Law and Inequality* 1, 3 as cited in Amy Sepinwall, 'Failures to Punish: Command Responsibility in Domestic and International Law' (2009) 30(2) *Michigan Journal of International Law* 251, 253–4.

[274] *Cambridge Dictionary* < https://dictionary.cambridge.org/dictionary/english/acquiesce>.

[275] Study.com, 'Acquiescence in Law: Definition and Concept' < https://study.com/academy/lesson/acquiescence-in-law-definition-concept.html>.

[276] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (Judgment) [1984] ICJ Rep 246, 305 [130] ('*Gulf of Maine case*').

> [o]ne government's knowledge, actual or constructive, of the conduct or assertion of rights of the other party to a dispute, and the failure to protest in the face of that conduct, or assertion of rights, involves a tacit acceptance [emphasis added] of the legal position represented by the other Party's conduct or assertion of rights.[277]

Essentially, acquiescence connotes some form of passivity by one party in relation to the actions of another thereby accepting, albeit in a tacit way, the conduct of the other party. The question then becomes, at law, whether the party who acquiesces shares the same responsibility as the party who actually performed the act, and if so, what of the legal consequences for the person who acquiesces?

The consequences for one party who acquiesces with knowledge of the conduct of another, varies according to the circumstances and context. In the context of customary international law regarding the conduct of states, according to Henry,

> inaction by a state faced with alleged violations of international law by another state can have … two distinct sets of legal implications: first, it can affect rights and obligations of the acquiescing state … or, alternatively, it can play an indirect role in the customary norm-creating process …[278]

Although Henry was writing in the context of the obligations and rights of states at international law in relation to legally binding custom, similarities exist in regard to individual criminal responsibility when it comes to assessing the consequences of one individual acquiescing on the actions of another. From this, inaction by one individual in a position where he or she has a positive obligation to act under certain circumstances—such as the superior–subordinate relationship—can, as Henry, asserts, 'affect rights' of the person who acquiesces thereby making them accountable for the actions of the subordinate. Several war crimes trials have dealt with the issue of criminality arising out of a superior's supposed acquiescence that allowed subordinates to commit war crimes, thereby rendering the superior also liable for the criminal wrongdoing.

According to Parks, the criminal responsibility of a superior on the basis of acquiescence can vary from that of a principal offender to a 'dereliction of duty' which is more akin to responsibility through negligence.[279] The degree of culpability, argues Parks, is related to the degree of acquiescence where greater accountability will result where the superior displayed an intention to assist the perpetrator.[280]

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[277] Ibid 304 [129].
[278] Etienne Henry, 'Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law (with special reference to the Jus Contra Bellum Regime)', *Melbourne Journal of International Law* (18)(2) (2017) 1, 4.
[279] Parks (n 109) 89.
[280] Ibid.

The 'Doolittle Trials' – Trial of Lieutenant-General Sawada Shigeru et al, United States Military Commission, Shanghai, 27 February – 15 April 1946

Lieutenant-General Sawada of the Imperial Japanese 13th Expeditionary Army in China was in command when eight members of the USAAF and 'joint Army-Navy bombing project',[281] also known as the *Doolittle Raiders*, were captured in China in 1942. Sawada's trial was conducted by a US Military Commission in Shanghai from 27 February to 15 April 1946.

(a) Background to the 'Doolittle Raids'

The *Doolittle Raiders*, so named after the expeditionary leader, Colonel James (Jimmy) H Doolittle, were a group of 80 volunteers whose mission was to fly sixteen B-25 Mitchell bombers off the deck of the USS Hornet in the Western Pacific approximately 600 miles off the east of Tokyo, and make their way to the main island of Japan. From there they were to pass over the Japanese cities of Tokyo, Yokosuka, Yokohama, Nagoya, Kobe and Osaka at which time they would bomb a number of strategic military targets. After completing that part of the mission the group were to proceed to China where they would land in various places and seek refuge with the Chinese before each of the men would be reunited with US forces.[282]

The raid went ahead as scheduled and was very successful in terms of the low casualties experienced during the raids and also during each of the crash landings in various locations in China and, for one plane, in the eastern part of the Soviet Union.

Although the *Doolittle* mission did not inflict substantial damage on the Japanese military effort or its civilian infrastructure, the mission was heralded as a huge success in terms of

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[281] Naval History and Heritage Command, 'Doolittle Raid, 18 April 1946' <https://www.history.navy.mil/browse-by-topic/wars-conflicts-and-operations/world-war-ii/1942/halsey-doolittle-raid.html>.

[282] For further reading in relation to the Doolittle Raiders and their mission, including the individuals involved and the significance of the Doolittle mission in the early stages of the war, see, eg , The Official Website of the Doolittle Tokyo Raiders <http://www.doolittleraider.com>; Carroll V Glines, Doolittle's Tokyo Raiders (D Van Nostrand, 1964); Ted W Lawson and Robert Considine (ed), *Thirty Seconds Over Tokyo* (1st published 1943 by T W Lawson and R Considine, reprint published by Ishi Press, 2015). For archival sources, the Naval History and Heritage Command centre cites several primary sources dealing with the Doolittle Raids – see Raid on Tokyo: Doolittle Report. Central Decimal Files, 1939–1942 (bulkies), box 525. Records of the United States Army, Army Air Forces. Record Group 18. National Archives and Records Administration (NARA), College Park, MD; Collected documents on Doolittle Raid. Central Decimal Files, 1939–1942 (bulkies), box 188. Records of the United States Army, Army Air Forces. Record Group 18. NARA, College Park, MD; The Tokyo Raid. File 370.2, 1August 1942 to 31 December 1942. Classified Decimal File, 1940–1942, box 525. Records of the United States Army, Army-AG. Record Group 407. NARA, College Park, MD; Doolittle Raid. Classified Decimal File, 1940–1942, box 543. Records of the United States Army, Army-AG. Record Group 407. NARA, College Park, MD; Aircraft Carrier Hornet (CV-8). RG24 Deck logs. 20 October 1941 to 30 June 1942. NARA, College Park, MD; Final Reports of United States Strategic Bombing Survey. (USSBS). M1013. 1945–1947. Pacific Survey. NARA, College Park, MD.

boosting morale in the US after the devastating defeat at Pearl Harbor in December the previous year.[283] The raid also signalled to Japan and its people that its home islands were not immune to outside attack, despite the seemingly swift victory it experienced over the US in December 1941.[284]

It is for these reasons that the Japanese treated the raids very seriously and went to great lengths to ensure as many US fliers were captured as was possible and that all Chinese airfields in the area were secured.[285] In the process, eyewitness accounts reported the Japanese military in China embarked upon a direct and ruthless campaign against support given to the US survivors of the raid by Chinese civilians.[286] It is perhaps with this heightened sense of urgency by the Japanese during this part of the early campaign of the Pacific War that one needs to view the way that Japanese authorities treated the captured airmen. Particularly relevant also was the fact that Japan had by then been embroiled in a vicious guerilla war of attrition with China for a number of years.

The charge against Sawada was that he did 'at or near Shanghai, China, knowingly, unlawfully and wilfully and by his official acts cause eight named members of the United States forces to

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[283] Carroll V Glines, *Doolittle's Tokyo Raiders* (D Van Nostrand, 1964) 219. For an extremely detailed and well written account of the invasion of Pearl Harbor on 7 December 1941, see Gordon W Prange, *At Dawn We Slept: the Untold Story of Pearl Harbor* (Michael Joseph, 1982) entire book; and Gordon W Prange, *December 7, 1941: the Day the Japanese Attacked Pearl Harbor* (Harrap, 1988) entire book. Prange has relied on voluminous primary records in compiling his research (including interviews with many senior Japanese planners behind the invasion of Pearl Harbor).

[284] Ibid. After the attack on Pearl Harbor, the Japanese were said to have gained an elevated sense of military superiority which led to the widely held perception that the entire war would soon be won by Japan. This sentiment was reported in the *Japan Times* in late 1941:
With the imminent fall of Corregidor, the entire waters of the South-Western Pacific will become an exclusive lake for the Japanese Navy, and all American and British Warships will be completely shut out. … With the losses of their naval bases in these parts of the world, warships of the United States and Great Britain have been made into inglorious baseless vagabonds of the high seas. … Most of them have been sent to the bottom by Japanese warships which have swept Anglo-American ships clean of these waters. (see Introduction by Sam Sloan, in Ted W Lawson and Robert Considine (ed), *Thirty Seconds Over Tokyo* (1st published 1943 by T W Lawson and R Considine, reprint published by Ishi Press, 2015).

[285] Masahiro Yamamoto, *Rape of Nanking: Separating Fact from Fiction* (Greenwood Publishing Group, 2000) 166.

[286] Ibid. Yamamoto cites evidence to support the proposition that over 10,000 Chinese civilians were killed in China after the *Doolittle* raids took place. Although Yamamoto does not attribute the deaths solely to the actions of the *Doolittle* raids, he does make the point that after the US airmen landed in China, there did appear to be a heightened sense of vigilance by Japanese forces, characterised by the increased deaths of civilians. See Yamamoto, Chapter 5 *Aftermath and Reaction Until 1945*, page 166, footnote 29.

be denied the status of Prisoners of War and to be tried and sentenced by a Japanese Military Tribunal in violation of the laws and customs of war'.[287]

The specifics of the charge alleged that Sawada 'caused' the deaths of the eight captured American airmen on the basis that 'he had the power to commute, remit and revoke … sentences handed down by a Japanese Military Tribunal'.[288] In support of the charge, the prosecution detailed accounts of how the US airmen was transferred to Tokyo for several months then returned to Shanghai where a supposed trial took place on 28 August 1942. In relation to the trial, the United Nations War Crimes Commission ('UNWCC') Law Reports of Trials of War Criminals ('*LRTWC'*) makes it clear that the prosecution went into a fair amount of detail regarding the procedural deficiencies of the Japanese Military Commission. Apparently lacking was an English translation of the charges and evidence of the offences for them. Lacking also was legal representation for the US airmen and the opportunity for the airmen to argue against the allegations made against them. Furthermore, in response to the *Doolittle* raids and the captured US airmen, the Supreme Commander at Nanking, General Hata, issued the '*Enemy Airmen's Act'* to take retrospective effect on any captured airmen. The effect of the enactment would, *inter alia*, allow any airmen who were captured to be sentenced to death or receive a minimum of ten years imprisonment.

All eight airmen were convicted and sentenced to death, however, five sentences were commuted to life imprisonment while three were affirmed and were carried out on 15 October 1942.

(b) The Verdict – Acquiescence

Sawada was found guilty as charged, however, he was found 'not guilty' of 'knowingly' and 'wilfully' failing to commute, remit or revoke the sentences handed down to the eight airmen. In his favour was the fact that Sawada did make several oral protestations, to no avail, to General Hata that the death sentences were too harsh. When Sawada's protestations were not accepted, Sawada failed to do anything further to prevent the executions from occurring.

The Commission did accept the fact that Sawada was not present in Shanghai at the time the airmen were tried, however, the Commission made special mention that, as the commander of the 13th Army:

> General Sawada, prior to his leaving Shanghai on 12th October, 1942, made no attempt to exercise any powers with respect to suspension, remission or mitigation of the sentences given by the court.[289]

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[287] United Nations War Crimes Commission, 'Trial of Lieutenant Shigeru Sawada and Three Others', *Law Reports of Trials of War Criminals Volume V* (HMSO, 1948) 1–22, 1.
[288] Ibid 1–2.
[289] Ibid 4.

The Commission also made particular mention that Sawada was familiar with the Geneva Convention on the treatment of prisoners of war and that he exercised total control over the prison which was being used to house the prisoners. The Commission stated that 'although this prison was only three hundred yards from his personal headquarters he never went inside it or concerned himself about its prisoners'.[290]

The Commission asserted that Sawada was culpable due to, *inter alia*, the fact that he, in essence, failed in his duty to further investigate the unlawful trial that was conducted in his absence against the eight US airmen. Given that the trial was conducted under his authority,[291] and the fact that Sawada did not make further protestations to Tokyo to prevent the executions, the Commission found that Sawada failed in his duty and thereby was liable to be convicted.

The Commission did, however, accept the defence's plea that Sawada did not 'wilfully' or 'knowingly' seek the executions of the three airmen. Instead, the Commission acknowledged that Sawada did try, albeit fleetingly, to change the outcome of the Japanese tribunal, to no avail. The existence of evidence to support his claim of being opposed to the executions was no doubt a very welcome thing for Sawada given the likely possibility that otherwise, it is very likely he would have met the same fate as the three executed airmen. Instead he was found guilty on the basis that he failed to prevent the executions and was sentenced to five years imprisonment.

The Commission did stress the point that the finding of 'not guilty' in relation to 'knowingly' or 'wilfully' would not apply in every instance merely because the accused does not fulfil their duties to prevent war crimes from occurring. The Commission was satisfied in this instance, however, that Sawada did at least attempt to prevent the executions and that was sufficient to mitigate the sentence, as opposed to relieving him of criminal responsibility. The Commission stated '[t]he action of the Commission in finding the accused not guilty on this, … cannot, however, be taken necessarily as meaning that inaction in such circumstances would not constitute a war crime had it been proved; since there was evidence that the accused had made some protest against the sentences and had been told that the matter was in the hands of the Tokyo authorities'.[292]

In reaching this conclusion, the Commission referred to the principle outlined in the *Yamashita trial*:

> In the Yamashita Trial it was held that a Commanding General has the affirmative duty to take such measures as are within his powers to protect prisoners of war from violations of the laws of war.[293]

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[290] Ibid 5.

[291] The trial was set up under Sawada's authority on the basis that one of Sawada's subordinates was granted delegated authority to command while Sawada was away during the time of the trial.

[292] LRTWC Vol V, 11.

[293] Ibid.

The verdict in *Sawada* was an interesting development at law since it was an example of a military commission exercising leniency towards an accused, even though he had full knowledge of the war crimes that were committed under his authority. There was no question that Sawada had actual knowledge and this point was not argued by the defence. In fact, Sawada never tried to hide the fact he had knowledge of the impending executions prior to them being carried out after he returned to headquarters because he produced evidence that he had attempted to prevent the executions from being carried out.

(c) The Trial of Wilhelm List and Others (The Hostages Trial), United States Military Tribunal, Nuremberg 8th July, 1947 – 19th February, 1948

The *Hostages trial* involved the prosecution of senior German military officers for the deaths and ill-treatment of thousands of European non-combatants, suspected communists, Jews, gypsies and others suspected of engaging in insurgent activities against the German *Wehrmacht* during WWII.[294] The US Military Commission examined, *inter alia*, the criminal responsibility of twelve senior German officers[295] for their part in failing to prevent reprisal war crimes being committed against non-combatants following the deaths of German soldiers. The reprisal killings by German forces arose out of an 'attempt to maintain order in the occupied territories in the face of guerrilla opposition'.[296]

The charges against the German officers stated that they were:

> principals in and accessories to the murder of thousands of persons from the civilian population of Greece, Yugoslavia, Norway and Albania between September 1939 and May 1945 by the use of troops of the German Armed Forces under the command of and acting pursuant to orders issued, distributed and executed by the defendants at bar.[297]

Evidence in relation to the charges consisted of oral testimony and documents regarding orders to kill hostages as reprisals for the killing of German soldiers.[298] During the trial, evidence was presented in relation to each of the accused's position relative to the reprisal murders that took place throughout the various European regions. Each of the accused occupied senior positions

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[294] United Nations War Crimes Commission, 'Trial of William List and Others' ('*Hostages trial'*), *Law Reports of Trials of War Criminals Volume VIII* (HMSO, 1948) (*LRTWC Vol VIII*) 34.

[295] The total number of those prosecuted was originally twelve, however the number was reduced part way through proceedings on account one of the accused committed suicide and one became too ill to be tried and, therefore, lacked the legal capacity to stand trial. The names of the accused are as follows: Wilhelm List, Maximilian von Wiechs, Rendulic Walter Kuntz, Hermann Foertsch, Franz Boehme, Helmut Felmy, Hubert Lanz, Ernst Dehner, Ernst von Leyser, Wilhelm Spiedel, and Kurt von Geitner. Boehme committed suicide and von Weichs became too ill to stand trial.

[296] LRTWC Vol VIII, 34.

[297] Ibid 35.

[298] Ibid 37. The Reports mention that much of the documentary evidence obtained in relation to the directives to kill hostages for reprisals was obtained in the aftermath of the downfall of German forces throughout Europe.

that rendered them in ultimate control over the *Wehrmacht* throughout various regions.[299] It was alleged that, depending on the office held, each of the senior officers had subordinate to them, divisions and battalions that were directly responsible for the killings.

By September 1941, attacks against German forces by insurgent groups in the Balkans, Yugoslavia and Greece had intensified to such an extent that the matter was being treated with the utmost importance by the German High Command.[300] German commanders in the field were applying their own measures to counter attacks levelled against them by the insurgents. In the early stages of insurgent attacks against German forces, reprisals were generally limited to those who were responsible for the attacks, as indicated by List's orders of 5 September 1941:

> Ruthless and immediate measures against the insurgents, against their accomplices and their families. (Hanging, burning down of villages involved, seizure of more hostages, deportation of relatives, etc, into concentration camps).[301]

However, with the growing effectiveness of insurgent attacks against German forces, on 16 September 1941, Hitler issued an order to List to 'suppress the insurgent movement in the Southeast' and ordered that for every German soldier killed, one hundred reprisal killings

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[299] The summary of the *LRTWC* trial documents indicates that each of the accused was responsible for particular areas and held various functions that, according to the indictment, put them in control of those German troops who were responsible for the killings. List was Commander-in-Chief of the Twelfth Army and was in control of Yugoslavia and Greece; Kuntz was appointed the Deputy Commander-in Chief of the Twelfth Army during List's absence due to illness; Foertsch was the Chief of Staff of the Army Group responsible for various departments and acted as an advisor to the Commander-in-Chief; von Geiter served as the chief of staff to the Commanding General in Serbia and the South East region; Rendulic was the Commander-in-Chief of the 2nd Panzer Army and later became the Commander-in-Chief of the Twentieth Mountain Army. Later he became Commander-in-Chief of the Army Group North; Dehner was the Commander of the LXIXth Reserve Corps towards the end of August 1943; von Leyser held various command positions in the XXIst Mountain Corps, XVth Mountain Corps, 269th Infantry Division and the XXVIth Corps in Russia; Felmy was the Commander of Southern Greece and later commander of the LXVIIIth Corps; Lanz was appointed to command of the XXIInd Mountain Corps; and Spiedel was the Military Commander Southern Greece and later became Military Commander Greece.

[300] For literature in relation to the insurgency and Germany's counterinsurgency in the Balkans, Greece and Yugoslavia during WWII, see, eg, Paul N Hehn, 'Serbia, Croatia and Germany 1941–1945: Civil War and Revolution in the Balkans' (1971) 13 (2) *Canadian Slavonic Papers* 344–373; Evan Mawdsley, 'Anti-German Insurgency and Allied Grand Strategy' (2008) 31(5) *Journal of Strategic Studies* 695–719; Ben Shepherd, *Insurgency in the Balkans: German Armies and Partisan Warfare* (Harvard University Press, 2012) whole book; Henning Pieper, 'The German Approach to Counterinsurgency in the Second World War' (2015) 37(3) *The International History Review* 631; and James H Burgwyn, 'General Roatta's War Against the Partisans in Yugoslavia: 1942' (2004) 9(3) *Journal of Modern Italian Studies* 314–329.

[301] LRTWC Vol VIII, 38.

would be carried out.[302] List then commissioned General Franz Boehme to handle matters in Serbia and, in doing so, transferred executive power to Boehme. Boehme remained subordinate to List during this time. Boehme then issued stern orders on 25 September and 10 October 1941 to units under his control that effectively widened the counterinsurgency to target 'the whole population' of Serbia. This included 'communists, male residents suspicious of such, all Jews, a certain number of nationalistic and democratically inclined residents to be arrested as hostages'.[303] In keeping with Hitler's earlier directives, Boehme's orders went on to state that,

> [i]f losses of German soldiers or Volksdeutsche occur, the territorial competent commanders up to the regiment commanders are to decree the shooting of arrestees according to the following quotas: (a) For each killed or murdered German soldier or Volksdeutsche (men, women or children) one hundred prisoners or hostages, (b) For each wounded German soldier or Volksdeutsche 50 prisoners or hostages.[304]

Further orders were issued by others with the requisite authority that more or less restated the initial orders in relation to the reprisal taking and executions of hostages. However, in reality the interpretation of these orders were approached with vigour, particularly by units of the SS, the SD[305] and local police units that were not, as was conceded at trial, subordinate to the auspices of the German Army and therefore not under the control of List and others in the Army.[306] Also conceded at trial was the fact that List had requested additional troops from Hitler to counteract the insurgency, however such requests were met with instructions to subjugate the insurgency by a more concerted 'campaign of terrorism and intimidation of the population'.[307]

Trial records indicate that the defence raised numerous factors in mitigation. Each of those factors predominantly focused on the lack of control and knowledge that they had in relation to the extent and nature of the reprisal killings. The mitigating factors raised by the accused can be summarised as follows:

- There was a lack of evidence to substantiate allegations that the accused gave specific orders on their own accord to kill the number of hostages that were killed;[308]
- The accused were merely following Hitler's directives regarding the ratio of hostages that were to be executed;[309]

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[302] Ibid 39.
[303] Ibid.
[304] Ibid.
[305] The SD (*Sicherheitsdienst des Reichsfuhrers* – Security Service) was the intelligence arm of the SS. The SS (*Schutzstaffel* – 'protection squad' and paramilitary organisation) was responsible for security and surveillance in Germany and throughout German occupied Europe.
[306] LRTWC Vol VIII, 40.
[307] Ibid.
[308] Ibid, see List and Kuntze, 40.
[309] See especially List, 40.

- The accused did not have full control over their areas, as the German High Command in Berlin impeded their authority and distributed contradicting orders;[310]
- The accused were not aware of the full extent of the killings as they were physically absent at times during the campaign and were not informed by their subordinates at all times;[311]
- The gathering of hostages and the number of executions in the field were carried out in a manner contrary to instructions;[312]
- The accused lacked the requisite authority to issue orders on their own initiative and that they merely acted as conduits for orders from Berlin and distributed them as instructed;[313]
- At times the accused questioned the legality of the orders given from above;[314]
- The accused took measures at certain times to correct the misapplication of particular orders;[315]
- The accused resisted some orders and, therefore, reduced the number of those who were executed.[316]

Despite the pleas of not guilty to the charges, the Tribunal found all but one of the accused guilty. The Tribunal did concede, however, that, for various reasons, each of those found guilty were not completely guilty as originally charged. The Tribunal held that there was no evidence to support an allegation that each of the accused participated in a 'preconceived plan to decimate and destroy the populations of Yugoslavia and Greece' and that there was no 'convincing evidence that [the] defendants participated in such measures for the preconceived purpose of exterminating the population generally'.[317]

Particularly favourable to List and Kuntze were the Tribunal's findings in relation to the status of guerilla fighters in occupied territory. The Tribunal found that because Yugoslavia and Greece had capitulated to Germany, both countries were thereby 'occupied' and remained so according to international law during the time that List was Commander Southeast.[318] This was a significant finding because it affected the applicability and operation of international law in relation to guerilla fighters. The Tribunal stated:

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[310] See Kuntze, 40.
[311] Foertsch, 42.
[312] von Leyser, 46.
[313] von Geitner, 43.
[314] Rendulic, 45.
[315] Dehmer, 46.
[316] Lanz, 48.
[317] LRTWC Vol VIII, 75.
[318] Ibid.

> It is clear from the record also that the guerillas participating in the incidents shown by the evidence during this period were not entitled to be classed as lawful belligerents within the rules … We agree, therefore, with the contention of the defendant List that the guerilla fighters with which he contended were not lawful belligerents entitling them to prisoner of war status upon capture. We are obliged to hold that such guerillas were *franca tirerurs* who, upon capture, could be subjected to the death penalty. Consequently, no criminal responsibility attaches to the defendant List because of the execution of captured partisans in Yugoslavia and Greece during the time Armed Forces Commander Southeast.[319]

For their part, List and Kuntze were sentenced to life imprisonment. While a sentence of this nature might appear harsh—particularly given the Tribunal agreed with substantial parts of their arguments—the sentence could have been much worse. The other defendants received sentences ranging from seven to twenty years imprisonment. In light of the severity of the charges and the number of deaths recorded during this time, all defendants were quite fortunate that the Tribunal reached the conclusions it did, given that the death penalty was a real option. Instead, each was found guilty on various counts but not all as first charged.[320] That the Tribunal took into account at least some of the mitigating factors was clear, given the relatively light sentences each received.

(d) Responsibility for the 'Commanding General of Occupied Territory' – Acquiescence not a defence to war crimes

The Tribunal did, however, go into quite some detail in relation to the standard of responsibility commanders in occupied territory must maintain. In so discussing, the case raised several important points for the responsibility of commanders in general. The Tribunal stated in clear terms that the responsibility of commanders in occupied territory is to 'maintain peace, order, punish crime and protect lives and property'.[321] Such a duty, argued the Tribunal, applies to the occupiers as much as it does to the occupied so that the commander is responsible for ensuring his own troops maintain peace and order and are punished for crimes they commit during periods of occupation.

Furthermore, the Tribunal stated that a commander will not be absolved from criminal responsibility merely because his troops obeyed an unlawful order from someone not under the control of their immediate commander. This was reference to the German Army taking orders, in relation to gathering and execution of hostages, from the SS which was under the control of Heinrich Himmler, who was not answerable to List.

Instead, the Tribunal made it abundantly clear that,

> [t]hose responsible for such crimes by ordering or authorising their commission, or *by a failure to take effective steps to prevent their execution or recurrence* [emphasis added], must be held to

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[319] Ibid.

[320] See the *LRTWC Vol VIII* pages 75-6 "*4. Findings of the Tribunal*" for a detailed description of the sentence of the accused.

[321] Ibid 69–70.

account if International Law is to be anything more than an ethical code, barren of any practical coercive deterrent.[322]

Evidence adduced at the trial made it clear also that List and several others were not active participants in the origination of the orders to execute hostages. The Tribunal did stipulate, however, that it was incumbent upon commanders at all levels to take steps to inform themselves, or to make inquiries to ensure unlawful conduct is not committed by their troops—particularly since List and the others knew of the orders from Hitler, as evidenced by the fact that they themselves had directed their subordinates in relation to those orders. Clearly, List and the others failed to adhere to this requirement and the Tribunal held that such a failure amounted to acquiescence on their part and on the part of their subordinates.

Acquiescence was effectively characterised by the Tribunal in *List's case*, as occurring where the commander fails in their duty in relation to any of the following:[323]

i. to keep abreast of occurrences within his territory of control (an exception to this is if the commander is temporarily outside of the region, however, the commander is required to ensure his temporary replacement is also abreast of happenings and that regular reports are transmitted to the commander;
ii. to acquaint themselves with the content of reports;
iii. to condemn unlawful killing of combatants and/ or non-combatants;
iv. to bring to account those responsible for the killing of innocent people, particularly, in instances where the killings occur for reprisals in relation to acts by unknown members of the population;
v. to terminate (or fail to attempt to terminate) unlawful killings; and
vi. to prevent (or fail to attempt to prevent) unlawful killings in the future.

Although the defendants managed to stave off the death penalty for their part in the offences, the circumstances of their command and the crimes committed against thousands of people as reprisals for the deaths of German soldiers, were such that they were not able to escape criminal responsibility.[324]

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[322] Ibid.

[323] See *LRTWC Vol VIII* pages 70–1 and 89–90 of the *Hostage trial* for a discussion regarding the duties of a commander and when a commander will be derelict of duties. Although the Tribunal was deliberating commander's duties in the context of occupied territory, as was the situation in the *Hostage trial,* the same principles have general application and there is no reason why these principles as enunciated by the Tribunal would not apply to the duties of commanders more broadly.

[324] A similar finding in relation to the responsibility of commanders was also discussed in the *Trial of Wilhmelm von Leeb and Thirteen Others, Case No. 72* ('*German High Command trial*') United States Military Tribunal, Nuremberg, 30 December 1947 – 28 October 1948, United Nations War Crimes Commission, *Law Reports of Trials of War Criminals Volume XII* (HMSO, 1948). Senior German officers were charged with the killing of civilians and others such as Soviet political prisoners on the Eastern front. General Field Marshall von Leeb was the commander of Army Group North and was

D. *Evidence that the Commander Failed to Punish the Perpetrators of the Crime*

Prior to the introduction of several ICL statutes that explicitly referred to a superior's duty to punish a subordinate for their criminal acts,[325] it was not entirely clear whether the failure to punish subordinates was an offence *sui generis* or rather that the superior would attract criminal responsibility for the same offence as committed by subordinates. Several leading cases post-WWII went some way to answer this question and, from these, it appeared as though the answer was that superiors would be liable for the same offences committed by their subordinates in the event that they failed to punish those subordinates for the criminal acts of the subordinates.

However, several judgments arising out of the ITCY seem to have cast doubt on whether a superior would be responsible for the underlying criminal acts where he fails to punish his subordinates.[326] Rather, the preferable position now appears to be that the superior would be

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charged for disseminating several illegal orders to his troops that resulted in war crimes. Von Leeb was found not guilty in relation to one of the charges due to the fact that von Leeb had no direct control over the issuing of the orders. However, he was found guilty in relation to a second order as it was found that he implemented an order by passing it down the chain of command that resulted in war crimes. At international law, he, therefore, assumed some responsibility for it and was guilty on the basis of a dereliction of duty to ensure the order was not implemented or its affect was mitigated. The Tribunal stated:

> Under basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal, violates a moral obligation under International Law. By doing nothing he cannot wash his hands of international responsibility. … 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. (*LRTWC Vol XII,* 75-6)

[325] For example, the following ICL statutes will be discussed as part of this discussion regarding the duty to punish: *Rome Statute* Art 28(a) and (b); International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia* (September 2009) ('*ICTY Statute*') art 7(3) <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf>; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)* opened for signature 8 June 1977, 1125 UNTS 17512 (entered into force 7 December 1978) art 86.

[326] *Prosecutor v Halilovic,* Case No. IT-01-48-T, Trial Judgment 91-100 (15 November 2005) ('*Halilovic case'*); and *Prosecutor v Hadzĭhasanović,* Case No. IT-01-47-T, Trial Judgment, 1777 (15 March 2006) ('*Hadzĭhasanović case'*).

liable for failing to punish subordinates responsible for committing the unlawful act. This position is, to some extent, at odds with several early, post-WWII decisions in relation to this element of command responsibility.

The Obligation to Undertake an Investigation as a Prerequisite to Punishment

A number of tribunals in the past have raised concerns about a failure of superiors to investigate or seek further information when instances of war crimes have been brought to their attention or when they suspect war crimes to have occurred under their command. The various tribunals have noted that the duty to punish includes a duty to investigate and this is something that must be done preparatory to any decision to punish their subordinates.[327]

Citing the judgment in *Kordic and Cerkez* IT-95-14/2 (26 February 2001) Trial Judgment [446] ('*Kordic case*'),[328] the Chamber in *Prosecutor v Halilovic,* Case No. IT-01-48-T, Trial Judgment 91-100 (15 November 2005) ('*Halilovic case'*) extended the legal principle that held that,

> the duty to punish at least includes the obligation to investigate possible crimes or have the matter investigated, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities.[329]

The Chamber in the *Halilovic case* also cited, with approval, the obligation to carry out an investigation as a prerequisite to punishing subordinates for unlawful conduct as decided in the *Yamashita trial* and the Shigemitsu and Tojo judgments from the IMTFE.[330] In the *Yamashita trial*, it was decided that,

> where murder and rape and vicious, revengeful actions are widespread offences and there is no effective attempt by a commander to discover and control the criminal acts, such commander may be held responsible, even criminally liable, for the lawless acts of his troops ...[331]

In a similar vein in the judgment regarding Japanese Foreign Minister Shigemitsu Mamoru at the IMTFE in Tokyo in 1948, it was held that the defendant Shigemitsu,

> took no adequate steps to have the matter investigated ... He should have pressed the matter, if necessary to the point of resigning, in order to quit himself of a responsibility which he suspected was not being discharged.[332]

Also decided at the IMTFE in Tokyo, was that Prime Minister Tojo Hideki likewise did not take any adequate steps,

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[327] *Halilovic case* 38–9, [97].
[328] *Kordic and Cerkez* IT-95-14/2 (26 February 2001) Trial Judgment [446] ('*Kordic case*').
[329] Halilovic case 39 [97].
[330] Ibid. In the *Halilovic case,* see footnotes 218, 219 and 220.
[331] Ibid 39, footnote 218. See also the *Yamashita trial*, *LRTWC Vol IV,* 35.
[332] IMTFE Judgment, 49 831.

> to punish the offenders and to prevent the commission of similar offences in the future. ... He did not call for a report on the incident. ... He made perfunctory inquiries about the march but took no action. No one was punished.[333]

The Obligation to 'Punish'

There are several early examples that provide an express obligation for those in positions of authority to facilitate the punishment of subordinates, or assist others to bring subordinates to justice in the event of criminal wrongdoing. King Charles VII of Orleans in 1439 made it an express requirement that a captain 'will be deemed responsible for the offense as if he had committed it himself … [if] …because of his negligence or otherwise, the offender escapes and thus evades punishment'.[334] Similarly, during the American War of Independence against the British, article 11 of the *Massachusetts Articles of War* stipulated that commanding officers 'shall keep good order … and redress all such abuses or disorders which may be committed by an officer or soldier under his command'.[335] A similar requirement was also included in Article 33 of the *American Articles of War* in 1806 which included the express obligation for a commanding officer to deliver any subordinate to a civil magistrate if that person was charged with a 'capital crime' or has 'used violence' or 'committed any offense against the person or property of any citizen of … the United States'.[336]

Article 507(b) of the US Field Manual 27-10 places an obligation on commanding officers of the US military to 'insure that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished'.[337] This obligation was not, however, present during the time that the US and its Allies conducted the war crimes trials in Europe or in the Asia–Pacific. The inclusion of an express obligation to punish US military personnel was not included until the 1956 edition of the Field Manual.

The *Hostages case* also touched on the issue of punishment for those in positions of authority. In that case, it was held that '[t]he primary responsibility for the prevention and punishment of crime lies with the commanding general, a responsibility from which he cannot escape by denying his authority over the perpetrators'.[338]

As was shown in the *Hostages case*, a failure to punish a perpetrator for a specific crime has been used as part of the justification for a superior being criminally responsible for the actions of a subordinate. The Tribunal in the *Hostages case* intimated that the superior's failure to

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[333] IMTFE Judgment, 49 845.
[334] Green cited in Solis (n 105) 418.
[335] Parks (n 109) 5.
[336] Ibid 6.
[337] *US Department Field Manual* (FM 27-10) para 507(b) (July 1956).
[338] United Nations War Crimes Commission, 'Trial of William List and Others' ('*Hostages case'*), *Law Reports of Trials of War Criminals Volume VIII* (HMSO, 1948) 89.

punish the criminal wrongdoing of a subordinate indicates a tacit acceptance of the criminal wrongdoing.[339]

In the *High Command case,* the International Military Tribunal (IMT) alluded to the fact that those in authority did have an obligation to punish their subordinates for illegal acts. The Tribunal commented on the inadequacy of the punishment that General von Salmuth ordered in relation to an excessive number of executions carried out by non-unauthorised German units on civilians in Kodyma, central Ukraine in August 1941. General Hans von Salmuth (Commander-in-Chief of the German 15th Army) distributed an order on 2 August that stated:

> **Participation of soldiers in actions against Jews and Communists**
>
> The fanatical intent of the members of the Communist party and of the Jews to stop the German Wehrmacht at all costs must be broken under all circumstances. In the interest of the security of the army rear area it is therefore necessary to proceed with all vigor. Sonderkommandos have been charged with this mission. *At one place, however, members of the armed forces participated in such an action in an unpleasant manner.* [emphasis added]
>
> For the future I order:
>
> Only those soldiers may participate in such actions who are expressly ordered to do so. I also forbid all members of the troops subordinate to me any participation as spectators.
>
> *In as much as members of the armed forces are ordered to participate in such actions, they must be under the command of officers. These officers are responsible that every unpleasant excess on the part of the troops be avoided.* [emphasis added][340]

For the 'unpleasant' manner to which von Selmuth referred, the Tribunal noted the lenient punishment of a 20-day confinement for one of his staff for unauthorised participation in the executions.[341]

Several judgments coming out of the IMTFE in Tokyo also placed an obligation on superiors to punish their subordinates for criminal wrongdoing and held that the failure to do so, can render the superior criminally responsible. In the Kimura Heitaro and Tojo Hideki judgments, the IMTFE made special mention of the fact that Kimura's acquiescence in relation to the treatment of Allied POWs in Burma during WWII, facilitated the deaths of thousands of prisoners at the hands of Japanese POW guards. The Tribunal held that '[Kimura] took no disciplinary measures or other steps to prevent the commission of atrocities by the troops under his command'.[342] For their part for, *inter alia*, failing to punish those responsible and

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[339] Ibid 57, 69–70.

[340] *The United States of America v Von Leeb et al*, US Military Tribunal Nuremberg, Judgment 27 October 1948, 623.

[341] Ibid.

[342] IMTFE Judgment, 49 809.

preventing the needless deaths of Allied POWs *hors de combat*, Kimura and Tojo were executed in Tokyo at Sugamo Prison in 1948.

Post-WWII, several international law statutes were enacted that have specifically addressed a superior's duty to investigate and punish subordinates for certain international crimes. The Additional Protocol I, art 86(2) states:

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[343]

The *Rome Statute* also introduced a similar provision, in art 28(a) and (b) that, *inter alia,* which makes a military commander[344] or a superior[345] criminally responsible where the military commander or superior:

> failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[346]

Failure to Punish: A Substantial Offence or 'Mode of Liability'?

On that basis it follows that even if the criminal acts were not initially met with the approval or knowledge of the superior, a failure to punish the perpetrator once the superior becomes aware of the acts, renders the superior criminally responsible as he or she is deemed to have accepted the wrongdoing and therefore approves of the conduct of the subordinate.[347] Investigation and punishment (if warranted) by a superior serves as evidence for the renouncement of those crimes and, importantly for the superior, may relieve him or her from criminal responsibility.[348]

Sepinwall contends that the 'failure to punish' a subordinate can be viewed in two ways. Firstly, a failure to punish can be understood as constituting a dereliction of duty and can, therefore,

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[343] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) opened for signature 8 June 1977, 1125 UNTS 17512 (entered into force 7 December 1978) art 86(2).
[344] *Rome Statute*, art 28(a).
[345] *Rome Statute*, art 28(b).
[346] See *Rome Statute*, art 28(a) and (b).
[347] Sepinwall (n 272) 255.
[348] Ibid. See also *Trial of Yuicki* [sic] *Sakamoto*, cited in *Trial of General Tomoyuki Yamashita, US Military Commission, Manila, LRTWC Vol IV,* 867, where Sakamoto, who was the Commanding Officer at the Fukuoaka 1 camp, not only acquiesced in his duty so as to allow 'brutal atrocities' to be committed against Allied POWs, but also that he failed to bring the perpetrators to account once he became aware of their illegal acts.

form a separate (or *sui generis*) offence arising from the offence(s) committed by his or her troops.[349] A second view is that the superior can be liable for the atrocity itself.[350] Sepinwall makes the valid point that there is some uncertainty about which is the preferred view.[351] That is, does the law hold the superior criminally responsible for merely failing to punish the subordinate, or does the law implicate the superior in the underlying atrocity? The former view creates a separate offence of 'failing to punish', while the latter makes the superior a party to the underlying criminal act, whether it be a war crime, genocide, a breach of humanitarian law etc.

Reaching a determination of the specific offence is critical, as such a determination will have implications for success or failure for the prosecution and for the severity of the sentence. A finding of dereliction of duty may not have the same punitive consequences as if the accused was charged with the commission of genocide or other breach of international law, for example. A conviction of genocide, for instance, would be understood to carry a more severe penalty than would a conviction for a superior being derelict in his or her duty.

The uncertainty as to whether there is a separate offence relating to a failure to punish or whether the superior will be charged with offences committed by subordinates, argues Sepinwall, has arisen out of several judgments coming out of the ICTY.[352] The problem, as he correctly points out, stems from the wording of art 7(3) of the ICTY Statute in so far as the provision fails to stipulate whether the superior would be subject to a separate offence for failing to punish subordinates, or whether the superior would be liable for the actual offence committed by the subordinate.

Article 7(3) sets out:

> 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* [emphasis added].[353]

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[349] Sepinwall (n 272) 255–6. Sepinwall calls this type a 'substantive offence'. That is, an offence that is considered to be *sui generis* and is considered to be an offence of its own, ie the offence of 'failing to punish'.

[350] Ibid 256. Sepinwall has termed this type as 'mode of liability' which simply refers to that form of liability that renders the superior criminally responsible for the offence of his or her subordinate to the extent that the superior had committed the actual criminal act.

[351] Ibid 261.

[352] Ibid 255–6. Halilovic case; and Hadžihasanović case.

[353] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia* (September 2009)

In reaching an interpretation about whether the accused should be liable for the omission to punish an offender or whether the accused should be held liable for the actual offence(s) committed by subordinates, the Trial Chamber of the ICTY found that the correct interpretation is that criminal responsibility should rest on the failure to punish. At paragraph 54, the Chamber stated:

> The Trial Chamber finds that under Article 7(3) command responsibility is responsibility for an omission. The commander is responsible for the failure to perform an act required by international law. This omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates. Thus 'for the acts of his subordinates' as generally referred to in the jurisprudence of the Tribunal does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act. The imposition of responsibility upon a commander for breach of his duty is to be weighed against the crimes of his subordinates; a commander is responsible not as though he had committed the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed.[354]

In reaching that conclusion, the Chamber referred to an earlier decision in the *Prosecutor v Hadžihasanović,* Case No. IT-01-47-T, Trial Judgment, 1777 (15 March 2006) ('*Hadžihasanović case'*) that made a similar finding in relation to whether art 7(3) should be interpreted as a substantive offence or as a mode of liability. In applying the *Hadžihasanović case,* the Chamber stated that:

> The position of the appellants seems to be influenced by their belief that Article 7(3) of the Statute has the effect, as they say, of making the commander 'guilty of an offence committed by others even though he neither possessed the applicable mens rea nor had any involvement whatsoever in the actus reus.' No doubt, arguments can be made in support of that reading of the provision, but I prefer to interpret the provision as making the commander guilty for failing in his supervisory capacity to take the necessary corrective action after he knows or has reason to know that his subordinate was about to commit the act or had done so.[355]

E. *The Existence of Superior–Subordinate Relationship*

In order for a superior to be liable for the illegal actions of a person junior in rank or seniority must first be shown that the individuals are in a superior–subordinate relationship.[356] That

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('*ICTY Statute*') art 7(3) <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf>.

[354] Halilovic case, 23, [54].

[355] Ibid 23 [53] at footnote 129 with the Chamber of the *Halilovic case* quoting the *Hadžihasanović case* Appeals Chamber Decision, [32].

[356] For an extensive discussion of the superior-subordinate relationship in the context of the Bosnian-Serbian conflict as judged at the ICTY, see Alexandre Skander Galand, Emile Hunter and Ilia

requirement is of primary importance because without it, the risk is that there is virtually unlimited scope to hold any superior criminally responsible for violations of international and military law by anyone inferior to them in rank. The requirement places an obligation on those who prosecute international law violations to adduce evidence that the accused superior was, at the time of the commission of the offence, in a superior–subordinate relationship with those who actually committed the alleged offences.[357]

Whether a person was in a position of authority over another person comes down to how that authority was established. Within military contexts it is not difficult to establish such authority since clear lines of command are delineated based on rank and, accordingly, command responsibility can exist between superiors and subordinates at any rank.[358] The relationship between superiors and subordinates is, in the military context, predominantly—though not exclusively—based on what is known as *de jure* authority, whereby the relationship is born out of military law and formalised military structures.[359]

However, the existence of authority is not always immediately clear, particularly when questions arise involving civilians who are not governed by the same hierarchical structures that exist in the military. Problems with establishing authority also exists where it is not clear that a person—even if superior in rank—was actually exercising *de jure* control over subordinates at the time the offences were committed.[360] On that basis, 'administrative' control

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Utmelidze, 'International Criminal Law Guidelines: Command Responsibility' (Case Matrix Network, Centre for International Law Research and Policy, 2016) Chapter 5, 'Superior-Subordinate Status', 55–63. <https://www.legal-tools.org/doc/7441a2/pdf/>. The section of the thesis that deals with the existence of superior-superior relationship (and in particular *de jure* and *de facto* concepts of superiority) relies substantially on the work of Galand *et al*.

[357] See the *Celebici case* where it was held, *inter alia,* that the command responsibility doctrine is 'anchored on the relationship between superior and subordinate'.

[358] In providing examples of the instances where command responsibility can arise, the Chamber in *Kunaric et al*, TC Judgment, Case No. IT-96-23-T&IT-96-23/1-T, 22 February 2001 [398] held that art 7(3) of the *ICTY Statute* will apply to 'a colonel commanding a brigade, a corporal commanding a platoon, or even a rankles individual commanding a small group of men'.

[359] In the *Kordic case*, the Chamber very eloquently articulated the various ways authority can be established, stating that authority occurs firstly from an 'official appointment or formal grant of authority'. The Chamber went on to discuss the ways command responsibility can arise at the highest levels with those who formulate policy down the chain of command to those who implement those policies on the battlefield (also referred to as 'tactical command').

[360] An example where a superior was not exercising actual authority over a person who is subordinate in rank might occur where the superior was exercising administrative control over subordinates as opposed to tactical control. The difference being that where a person was exercising *de jure* administrative control they may have no substantial control over a subordinate in the field whose actions would be governed by a person in closer proximity.

as opposed to 'tactical' control is relevant since administrative control may not attract the same culpability as a commander exercising 'tactical' responsibility on the battlefield.[361]

Attempts to address such problems have been made by applying what is known as *de facto* control so that it is possible to show that for a person exercising *de facto* authority over another, such authority will be sufficient to render a superior criminally responsible. Where there is compelling evidence that a form of 'constructive' authority sufficiently exists to render another person criminally responsible for the acts of subordinates.

Establishing the superior-subordinate relationship – de jure

There is an underlying assumption that a superior–subordinate structure exists in the military context and this has been recognised at international law in a variety of contexts. For example, art 1 of *Convention II, Hague Regulations 1899 annexure,* states that each belligerent force requires to 'be commanded by a person responsible for his subordinates'.[362] *Convention IV* of the *Hague Regulations* in 1907 likewise created command obligations for each belligerent.[363] The codification is merely the recognition of the underlying command structures inherent in any military institution necessary for the basis of criminal responsibility. Bantekas talks of a 'hierarchical model' being 'built on a vertical scale, which seeks to effectively filter the dictates of the decision-makers down to the soldier on the battlefield'.[364]

A further example of *de jure* authority is provided by Additional Protocol I of the *Geneva Convention* which provides for the various duties that arise out of the superior–subordinate relationship and requires commanders to 'control', 'prevent' or 'suppress' breaches of the Conventions.[365] Of importance here also is the fact that the responsibility of the commander is extended by AP I art 87(1) and (3) to 'other persons under their control'. This extension of responsibility is meant to encompass those situations where a military commander's responsibility goes beyond the military and extends to civilian entities. In the event that civilians (or non-combatants) are accused of violations of the laws of war (such as where such entities have facilitated, ordered or failed in their duties to suppress such violations), then a commander who has oversight of those civilian entities, may also attract criminal liability. Where this provision is most likely to apply is in occupied territories where military

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[361] For a discussion on the differences between 'administrative' control and 'tactical' control, see Parks (n 112) 83–6.

[362] *Convention (II) with Respect to the Laws and Customs of War on Land and its annex*: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899, Art 1.

[363] *Convention (IV) Respecting the Laws and Customs of War on Land and its Annex*: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Art 1.

[364] Ilias Bantekas, 'The Contemporary Law of Superior Responsibility' (1999) 93 *American Journal of International Law* 573, 578.

[365] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) opened for signature 8 June 1977, 1125 UNTS 17512 (entered into force 7 December 1978) art 87(1), (2) and (3).

commanders exercise command over civilian bureaucracies—bureaucracies which may involve enormous local and regional power over those who fall within their auspices.[366]

Bantekas has identified four broad levels of command that are susceptible to criminal responsibility in the event that war crimes are committed by subordinates.[367] His structure assumes that command ultimately begins with policy formulation from non-military entities and that military command cannot be viewed in isolation from the policy that comes from such civilian entities:

> Both the civilian and military components of every state's machinery constitute integral defense structures. This hierarchical model is built upon a vertical scale, which seeks to effectively filter the dictates of the decision-makers down to the soldier on the battlefield.[368]

From this, Bantekas identifies that the initial level of command starts with the formulation of policy by those charged with that function.[369] The function of forming policy, at least in the context of liberal democracies, is given primarily to those who occupy elected positions in Legislature and those who are in charge of policy formulation at the cabinet level. The instrument that legitimates the policy formulation (and ultimately law-making powers) is generally provided by national constitutions.[370] Although the numbers are far less than those who actually perpetrate war crimes, a number of tribunals have sought to indict and convict civilian authorities.[371]

The second tier Bantekas identifies is the 'strategic phase' where the most senior military personnel devise a military plan to achieve the policy objectives expressed by the civilian leadership.[372] The third level where criminality can occur is when the plan proceeds down the chain of command.[373] At this level, senior and mid-ranking military personnel are subject to criminality in the event that they pass on manifestly unlawful orders or construe the plan in

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[366] *International Committee of the Red Cross,* 'Treaties, States Parties and Commentaries: Duty of Commanders', Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (ICRC Commentaries) Article 87, page 1017.

[367] Bantekas (n 364) 578–79.

[368] Ibid 578.

[369] Ibid. Bantekas identifies this as 'policy command'.

[370] For example, s 51 (xxix) of the *Commonwealth Constitution of Australia* s 51 deals with the 'external affairs power' which allows the Australian Government to, among other things, engage in international affairs and ultimately to commit troops to foreign shores.

[371] Civilians have been prosecuted and convicted—some of whom have even received the death penalty—for war crimes over the years. Specifically, see the IMTFE where nine of the twenty-eight defendants charged as Class A war criminals were civilians, including Hirota Koki (former Prime Minister and Foreign Minister) who was convicted and executed.

[372] Bantekas (n 364) 579.

[373] Ibid.

such a way that they themselves formulate and issue unlawful orders to their subordinates.[374] At the fourth level, or as Bantekas describes it, 'the end of the scale', those who are charged with the responsibility of tactical command may attract criminal responsibility if they themselves commit unlawful acts, give unlawful orders, are derelict in their duties as superiors or, in some other way, are found guilty of war crimes by virtue of their position as superiors.[375]

While in many instances the facts can demonstrate whether or not a superior–subordinate relationship existed and whether policies formulated at the civilian level were responsible for atrocities and other war crimes, there are instances where the links between superiors, subordinates and the offences committed on the battlefield are much less clear. Despite the existence of the superior–subordinate relationship being less clear in some instances, there have been times throughout history where *de facto* control has been found to have applied to superiors rendering them criminally responsible in instances where they have exercised 'effective' control over subordinates, as will now be discussed.

Establishing the superior–subordinate relationship – de facto control

The second—and somewhat problematic—path in establishing the requisite criminal relationship between the superior and the subordinate perpetrator is to prove the superior had *de facto* control of the subordinate at the time of the commission of the unlawful acts. The *de facto* method of establishing responsibility of a superior would be relied upon in situations where the prosecution deemed it appropriate to argue that a person has 'effective' control over the criminal actions of subordinates despite the absence of clear *de jure* command structures, or other evidence placing the superior in direct authority of the subordinate at the time the unlawful acts were committed.

One example of *de facto* control is where a civilian is prosecuted for the criminal actions of military personnel because the civilian authority had 'effective' control over troops on the battlefield, for example, through the formulation of policy.[376]

The point was raised above that proving *de facto* control is somewhat problematic in the sense that the prosecution can put forward any evidence it wishes to establish a link between the superior and the unlawful conduct committed by the subordinate. It is then up to the arbiters of fact (whoever or whatever that happens to be in the circumstances) to determine whether there exists a causal link between the actions of the superior and the acts of the subordinate. The problem with this approach lies with the issue of remoteness in terms of the subordinate's actions to the superior.

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[374] Ibid.

[375] Ibid.

[376] *de facto* control in the civilian context can be seen in the example of the IMTFE and the IMTN where civilians, as well as military personnel, were prosecuted for their part in the commission of policies of, eg, committing acts of aggression and other indictable offences under those Tribunals – see 'International Military Tribunal for the Far East', *The Indictment.*

The meaning of 'effective control'

In the case of *Mucic et al* at the ICTY it was held that a person who holds 'effective' command with the 'power to prevent and punish the crimes of persons who are … under their control' can be criminally responsible in certain circumstances in the event that they do not fulfil this duty.[377] The Chamber went on to state that it matters not whether the individuals are in positions of civilian or military authority and that criminal responsibility may result,

> under the doctrine of command responsibility on the basis of their *de facto* as well as their *de jure* positions as superiors. The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude impositions of such responsibility.[378]

What is clear then is that a key aspect of 'effective control' includes the power to prevent and punish those under their control. Also apparent is the fact that, for the purpose of attracting criminal responsibility, the superior can be a military or civilian authority[379] and the absence of any formal structures is not an obstacle to prosecution. The term 'effective control' was given further attention in the *Kordic case* when the ICTY Chamber said that the notion of effective control included such things as the ability to issue and sign orders, the nature and 'substance' of the documents signed by the superior and whether those orders were in fact acted upon by the subordinates.[380] Even where the superior has, or is able to exercise, what can be described as partial control, this too, can be sufficient to render the superior liable.[381]

F. *The State of Knowledge that the Commander had in relation to the Unlawful Conduct*

A superior's knowledge of specific offences carried out by subordinates is a further element in establishing criminal responsibility of a superior for actions of their subordinates. If it can be shown that a superior had the requisite guilty mind—or *mens rea*—then criminal responsibility will flow accordingly. The extent of *mens rea* to attract criminal responsibility can be that of a 'spectrum' of knowledge ranging from complete knowledge of the actions of the perpetrators to 'constructive knowledge' where the superior may not have had specific knowledge but

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[377] Celebic case, [354].

[378] Ibid.

[379] This point was also made at the ICTY in the case of *Aleksovski*, TC, Judgment, Case No. IT-95-14/1-T, (25 June 1999) [103] where it was held that:
anyone, including a civilian, may be held responsible … if it is proved that the individual had effective authority over the perpetrators of the crimes. This authority can be inferred from the accused's ability to give orders, and to punish them in the event of violations.

[380] Kordic case.

[381] For the proposition of partial control being sufficient to render a superior criminally responsible, Bantekas cites the *Yamashita trial* as authority (see Bantekas, above n 365, 580). Some merit must be given to support this argument on the basis that General Yamashita had what could only be described as partial control over his troops given the dire circumstances in which he and his command found themselves in the final days of the US recapture of the Philippine islands.

would or *ought*[382] have formed a reasonable assumption that crimes were being committed by their subordinates.[383]

The path to 'Constructive knowledge'

Evidence showing that the accused had actual knowledge of the offences is not problematic. The issue is whether an accused should face criminal sanction where there is a lack of evidence that they did have actual knowledge. The path to 'constructive knowledge', then, has been used in numerous notable trials over time to prevent superiors—both civilian and military—from escaping liability.

One notable example is the IMTFE, where senior members of the Japanese civilian and military leadership were indicted for war crimes committed against POWs and civilian members of the Allied nations.[384]

Another important example, illustrative of the way that knowledge is construed, is the case of General Yamashita Tomoyuki. Regarding whether Yamashita had actual knowledge of the crimes being committed by Japanese forces throughout the Philippines, Yamashita's defence counsel went to great pains to point out that there was no evidence to support the allegation that he had actual knowledge of such events. The defence counsel argued that a conviction should not proceed without proving the all-important fault element of the offences charged. Colonel Clarke for the defence argued that, '…[i]t is the basic premise of all civilized criminal justice that it punishes not according to status but according to fault, and that one man is not held to answer for the crime of another'.[385]

This point was countered by Major Kerr for the prosecution who argued that the atrocities committed by Japanese forces,

> [w]ere so notorious and so flagrant and so enormous, both as to the scope of their operation and as to inhumanity, the bestiality involved, that they must have been known to the Accused if he were making any effort whatever to meet the responsibilities of his command or his position; and that if he did not know of those acts, notorious, widespread, repeated, constant as they were, it was simply because he took affirmative action not to know.[386]

The Judge Advocate agreed with the prosecution and stated it was inconceivable that a person in Yamashita's position would not have known at least in part, of the acts being perpetrated by Japanese forces:

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[382] Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press, 2008) 228.
[383] Mitchell (n 93) 385.
[384] 'International Military Tribunal for the Far East', *The Indictment.*
[385] Lael (n 97) 83
[386] Ibid.

> From all the fact and circumstances of record, it is impossible to escape the conclusion that the 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.[387]

In so doing, the Military Commission construed knowledge on the part of Yamashita on the basis that the atrocities were so widespread it would have been difficult for him not to have been aware of what was occurring. This proposition is interesting given there was no evidence directly proving that Yamashita did know of the actions of his subordinates, particularly when there was actual evidence proving that communications between Yamashita's command and the field had irretrievably broken down due to the effectiveness of the US's invasion of the Philippines.[388]

G. *Whether the Commander incited subordinates into carrying out the Unlawful Conduct*

A person who incites others to commit acts of violence, although not directly taking part in the violence, can still be regarded as a principal in war crimes, even if that person is not present at the time the crime occurs. One case that illustrates how a superior can be prosecuted on the basis of incitement is that of Captain Erich Heyer who was convicted and sentenced to death by hanging for his part in the deaths of three allied airmen.

The Trial of Erich Heyer et al (the Essen Lynching Case)[389]

In 1944, three captured British airmen were handed over to the supervision and authority of Captain Erich Heyer. Heyer gave orders to parade the POWs in front of a crowd of townspeople on their way to being interrogated. Details were given to a crowd of people and by the time the men were marched through the streets, a crowd of angry Germans had gathered to jeer at them. The crowd became increasingly violent and before long the men were beaten with sticks. They were then thrown off a bridge, killing one. The surviving two were beaten and shot by the crowd. The accompanying German military personnel, instructed by Heyer, did nothing to quell the violence.

After the war, Heyer went on trial for the deaths of the three men on the basis that he incited the crowd to carry out acts of violence. Although it was acknowledged that Heyer was not

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[387] William H Parks, 'Command Responsibility for War Crimes' (1973) 62 *Military Law Review* 1, 32 as cited in Bassiouni (n 104) 429-31.

[388] Lael (n 97) 367. See also entire chapter one "War in the Philippines, 1944-45" for a detailed and thorough description of the conditions endured by Japanese forces prior to US forces retaking the Philippines. Aside from an increasingly fierce insurgency by Filipino guerilla fighters, Japanese command structures lay in disarray which might indicate that Yamashita was not fully cognizant of the extent of the activities of his forces prior to the US recapturing the Philippine Islands.

[389] Case Number 8, *Trial of Erich Heyer and Six Others,* "The Essen Lynching Case," British Military Court (18–22 Dec 1945) 1 *LRTWC* 88, as cited in Solis, above n 105, 430–31.

present at the time, and did not actually perpetrate the acts that killed the fliers, he effectively 'lit the match':

> From the moment they left those barracks, the men were doomed and the crowd knew they were doomed and every person in that crowd who struck a blow was both morally and criminally responsible for the deaths of the three men.[390]

Effectively, it was held that Heyer knew of the fate of the men and, on that basis, he not only allowed, but facilitated an action that caused the deaths of the men.

Given that Heyer was not present and did not give orders to kill *per se* the question was on what basis he would be found criminally responsible. Would he face trial as a secondary offender and not the primary offender (thereby reducing his culpability, and therefore, his sentence) or would he be treated as a principal offender as if he had committed the acts himself?

The Court acknowledged that he did not strike or shoot the men. However, it also found that this fact was irrelevant given that Heyer took an active part in the deaths from the moment he relayed the men's whereabouts to a group of German civilians outside the barracks and gave orders preventing the escorts from intervening should the men be 'molested' en route to the interrogation unit.[391] On this point, the Court stated:

> Heyer admittedly never struck any physical blow … [but] an instigator may be regarded as a principal. … Although the person who incited was not present when the crime was committed.[392]

On the basis that it was held that, factually, Heyer incited the crowd to kill, he was in some respects more guilty than the corporal who escorted the three airmen and obeyed orders not to intervene.[393]

H. *The Level of Control Exerted by the Individual Commander and whether the Commander failed to Control Subordinates*

The level of control a superior exerts over individuals is an important factor in determining criminal responsibility, because unless there is evidence that the superior exerted the requisite control, then criminal responsibility for the acts of subordinates should not follow. However, when one observes the ruling in the *Yamashita trial*, it becomes apparent that even when there is scant evidence that a superior exerted sufficient control over subordinates, the superior may still be criminally responsible under the doctrine of command responsibility.

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[390] Ibid 430.

[391] *The Essen Lynching Case*
http://www.worldcourts.com/imt/eng/decisions/1945.12.22_United_Kingdom_v_Heyer.pdf> 89.

[392] Ibid 89.

[393] Ibid.

In the *Yamashita trial*, General Reynolds of the Commission acknowledged that Yamashita did not personally take part in the acts or even order the acts to be carried out against US POWs and Filipino civilians:

> It is absurd to consider a commander a murderer or rapist because one of his soldiers commits a murder or rape. Nevertheless, 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 … for the lawless acts of his troops…[394]

General Reynolds added that the actions of Japanese forces against civilian and US POWs while Yamashita was in command of the 14th Area Army in the Philippines 'were not sporadic in nature … and that [he] failed to provide effective control of [his] troops as was required by the circumstances'.[395]

Given that the Commission held that Yamashita was in control of his troops during this time, and that he failed to exercise control over his troops in preventing and punishing those who committed crimes, the Commission sentenced him to 'death by hanging'.[396]

As the cases and the discussion above have made it clear, there were several problems with command responsibility between how it was applied at Manila and the various interpretations of the doctrine throughout history. Several issues reside in the fact that liability is sometimes attributed to superiors merely due to the position a superior occupied rather than specific evidence linking the individual to the actual crime. Quite often, to make the crime fit the necessary criminal elements of the offence, tribunals at Manila adopted a broad interpretation of the mental element *mens rea*.

The following chapter examines the first of two defences that were raised at Manila—the defence of 'superior orders'. As was the case with command responsibility, the US Military Tribunals tended to decide the legal principles to suit the desired outcome.

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[394] Cited in Lael (n 97) 95.

[395] Ibid 95.

[396] Ibid. Despite Yamashita's legal defence team appealing to the US Supreme Court, the decision to execute him was upheld and the sentence was carried out on 26 February 1946 at Los Banos, Philippines.

PART II:
SUPERIOR ORDERS

CHAPTER 5:
HISTORICAL OVERVIEW OF SUPERIOR ORDERS

I. Introduction

This chapter examines the defence of superior orders in international law. The discussion will commence with a précis of the origins of the defence, its development over time, and its application in several major conflicts throughout history. The purpose of the chapter is to demonstrate the lack of agreement between scholars, lawmakers and military officials regarding the validity and application of superior orders.

The defence of 'superior orders' has been one of the most commonly raised and controversial defence pleas throughout the history of international criminal law.[397] A plea of superior orders is typically raised on the grounds that the accused committed the criminal act merely because they were legally obliged to follow orders, the failure of which, would render the accused liable to court martial by their own military.

The question whether superior orders *should* be a valid defence under international criminal law is made difficult due to several injustices from allowing or disallowing the defence. On the one hand, there is a sense of injustice to the victims if those who commit acts of violence are able to escape criminal responsibility merely because they were following orders. On the other hand, some argue that injustice will also result for the accused due to the inherent power imbalance of military structures which operate to remove, or at least 'muddy' the concept of free will and *mens rea* on the part of the subordinate.[398]

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[397] United Nations War Crimes Commission ('UNWCC') 'Complete History of the United Nations War Crimes Commission and the Development of the Laws of War' (HMSO, London 1948) *Chapter X: Developments in the Doctrine of Individual Responsibility of Members of Governments and Administrators of Acts of State, of Immunity of Heads of State, and by Superior Orders,* 274. See also Koji Kudo, *Command Responsibility and the Defence of Superior Orders* (PhD Thesis, University of Leicester, 2007) 7.

[398] See, eg, James B Insco, 'Defense of Superior Orders Before Military Commissions' (2003) 13 *Duke Journal of Comparative and International Law* 389, 390; see also Lassa Oppenheim, *International Law: A Treatise Volume 2* (1906) as cited in Charles Garraway, 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied' (1999) (836) *International Review of the Red Cross* <https://www.icrc.org/eng/resources/documents/misc/57jq7h.htm>.

The expected legal outcome of a plea of superior orders post WWII can be described as something that resembles the 'middle ground' or, in other words, a compromise. From the Nuremberg and Pacific trials (including the Manila trials), as far as criminal responsibility was concerned, the plea of superior orders did not relieve the accused from criminal responsibility if the orders were manifestly unlawful. Rather, the plea of superior orders might be considered as a plea of mitigation of the sentence.

The law as it currently stands (the *lex lata*) in relation to superior orders at international law is not difficult to ascertain. It has been articulated in clear terms in a significant number of war crimes trials, particularly those in Nuremburg and also in contemporary developments in light of Article 33 of the Rome Statute.[399] The *lex ferenda* question, however, is far from settled. The *lex ferenda* question relates to the normative justification for punishing a subordinate who is legally obliged to follows orders involving acts which would otherwise fall within the realms of war crimes. To put it another way, why should a person faced with fear of punishment for disobeying superior orders be susceptible to criminal sanction under international criminal law for carrying out those orders? Such is the dilemma for the subordinate—either way, punishment is a consequence.

This chapter examines the jurisprudence of superior orders as it has been interpreted throughout various historical periods with a view to addressing the question whether the international community needs to reconsider the legal status of superior orders as a defence to war crimes (in certain circumstances) as opposed to its current status as a factor in mitigation. In addressing this question, the chapter begins with a discussion of the concept of superior orders and then moves to an analysis of the way superior orders has been addressed historically. As will be shown, the current law in relation to superior orders is largely constructed upon a post-WWII manifestation of the will of the victorious Allied nations in response to the atrocities committed by Germany and Japan and their Allies during WWII. This begs the question whether that an interpretation can be reconsidered given the amount of time that has elapsed between the events of WWII and now.

II. Superior Orders and Case Law – Pre WWI

A. *Hagenbach's Case*

One of the first international prosecutions of a person accused of war crimes was that of Peter von Hagenbach (*Haganbach's case*) which occurred in Breisach, on the Upper Rhine in

[399] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, A/CONF.183/9 (entered into force 1 July 2002) art 33.

1474.[400] *Hagenbach's case* dealt with, *inter alia*, the issue of superior orders as a defence.[401] Hagenbach was tried and convicted for acts that occurred under his rule after he was appointed by the Duke of Burgundy to serve as governor in the area.[402] To subjugate the people of Breisach after an uprising, Hagenbach employed tactics for which he would be later charged with 'murder, rape, perjury, and other crimes against the laws of God and man'.[403] After the town was eventually liberated, Hagenbach was charged and stood trial before a tribunal comprising twenty-eight judges from allied states. Upon conviction of the charges, he was stripped of his knighthood and beheaded.[404]

As part of his defence, Hagenbach argued that the orders he gave to quell the uprising were in direct response to the orders he received from the Duke of Burgundy and, therefore, he should not be punished for merely following orders. Hagenbach made the point that 'soldiers owe absolute obedience to their superiors'.[405] The tribunal dismissed his plea of superior orders on the basis that his crimes were 'considered contrary to the laws of God and because the defendant's crimes had already been established beyond doubt'.[406]

Around 180 years after *Hagenbach's case*, the plea of superior orders was tested yet again, this time involving the execution of Charles I in England.[407] In *Axtell's case,* the accused, Captain

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[400] M Cherif Bassiouni, *Crimes Against Humanity in International Law* (Kluwer Law International, 2nd ed, 1999) 517–8; see also Timothy LH McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime' in Timothy LH McCormack and Gerry J Simpson (eds), *The Law of War Crimes: National and International Approaches* (Kluwer Law International, 1997) 37. McCormack makes the point that, as important as *Hagenbach's case* is, there is a danger in placing too much emphasis on the case '"as the first international war crimes trial" and then relying on it as an international legal precedent for more contemporary developments'(page 38). See also Gregory S Gordon, 'The Trial of Peter von Hagenbach: Recording History, Historiography and International Criminal Law' in Kevin Jon Heller and Gerry Simpson (eds) *The Hidden Histories of War Crimes Trials* (Oxford University Press, 2013).

[401] See, eg, Kudo (n 397) 26.

[402] Timothy L H McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Regime', in Timothy L H McCormack and Gerry J Simpson (eds), *The Law of War Crimes: National and International Approaches* (Kluwer Law International, 1997) 37.

[403] Ibid 38. As evidence, McCormack cites George Schwarzenberger, *International Law as Applied in International Courts and Tribunals* (1968) 462–6. See also Bassiouni (n 400) 517 citing as evidence Amable G P B De Barantee, *Histoire Des Ducs de Bourgogne,* vols 9, 10 (1837) and Hildburg Brauer-Gramm, *Der Landvogt Peter von Hagenbach* (1957) 235, 282–84.

[404] Ibid.

[405] Edoardo Greppi, 'The evolution of individual criminal responsibility under international law' (1999) 835 *International Review of the Red Cross* <https://www.icrc.org/eng/resources/documents/article/other/57jq2x.htm>.

[406] Ibid.

[407] For a comprehensive account of the trial of Charles I, see Geoffrey Robertson, *The Tyrannicide Brief: The Story of the Man Who Sent Charles I to the Scaffold* (Anchor, 2007).

Axtell who raised the defence of superior orders after he had killed the monarch, allegedly on the orders of his superior officer, claimed that as an officer he was bound to obey his superior's orders or himself be put to death. On this point, the Court stated, 'it was … no excuse, for his superior was a traitor … and where the command is traitorous, there the obedience to that command is also traitorous.'[408]

B. *Property Related Offences and the Plea of Superior Orders*

Little v Barreme (1804)

The question of superior orders in relation to property offences was addressed by the US authorities in *Little v Barreme* 6 US 170 (1804) ('*Little's case*') in 1804.[409] This case involved the capture of a Danish vessel, the *Flying Fish,* by the US frigate, *Boston* which was commanded by Captain Little. The *Flying Fish* was intercepted in 1799 during its voyage from Jeremie, Haiti to St Thomas in the Caribbean and was later brought to Boston on account of an allegation that the vessel had violated provisions of what was then known as the '*nonintercourse law'*.

The *nonintercourse law* was a law passed by the US congress that prohibited commercial activities from occurring between US nationals and French territories on account of the hostilities that existed between the two nations at the time. The Act,[410] at section 1, prohibited any US vessel travelling to a French territorial port, the violation of which would result in the forfeiture of cargo and the subsequent seizure of the vessel by US authorities.

Section 5 of the nonintercourse law made it lawful for the President of the United States to give instructions to the commanders of armed ships of the United States to stop and examine any ship or vessel of the United States on suspicion that any US vessel was transiting to and engaging in commerce in French territories. Pursuant to the nonintercourse law, the President of the US issued the following orders to commanders of US vessels:

> Sir: herewith you will receive an act of Congress further to suspend the commercial intercourse between the United States and France and dependencies thereof, the whole of which requires your attention. But it is the command of the President that you consider particularly the fifth section as part of your instructions and govern yourself accordingly. [411]

The President's directive then went to state,

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[408] *Axtell's case* (1661), Kelyng 13; 84 ER 1060 cited in Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2nd ed, 2016) 374. See also Kudo (n 397) 26–7.

[409] Little v Barreme 6 US 170 (1804) ('Little's case').

[410] The full title of the 'nonintercourse' law: An Act further to suspend the Commercial Intercourse between the United States and France and the Dependencies Thereof 1 Story's LUS 558 (1799).

[411] Little's case 171.

> you are to be vigilant that vessels or cargoes really American, but covered by Danish or other foreign papers, and bound to or from French ports do not escape you.[412]

Lastly, the President gave this stern warning to his commanders:

> At the same time that you are thus attentive to fulfil the objects of the law, you are to be extremely careful not to harass or injure the trade of foreign nations with who we are at peace nor the fair trade of our own citizens.[413]

On 2 December 1779, the *Flying Fish* and its entire cargo was seized by US authorities. The seizure was partly due to the fact that Samuel Goodman, the vessel's owner, spoke English with an American accent and, to the authorities, appeared to be a US citizen. In reality, however, Samuel Goodman was Prussian born and, at the time, an inhabitant of the island of St Thomas. As such, his ship was not liable to capture under the nonintercourse law. Goodman later filed and received an order from the US District Court for the return of the vessel on the grounds of false capture and detention. He also filed for damages and eventually received $8,504 but later appealed on the basis that the quantum awarded by the Court was insufficient.[414]

In his judgment on the appeal, Chief Justice Marshall alluded to the fact that Commander Little had made an error in apprehending a 'neutral' vessel travelling to French territories, which was not intended to have been apprehended under the US law. Little argued that the apprehension of the vessel was done in following the President's orders.

Marshall CJ then examined the nature of the President's orders and in particular whether the defence of superior orders would apply in the circumstances. His Honour raised the question, 'is the officer who obeys them [orders] liable for damages sustained by this misconstruction of the act, or will his orders excuse him?'[415] His Honour initially thought that due to the fact that the 'implicit obedience which military men … pay to their superiors' is paramount within the military system, Little might escape personal liability for damages. However, on closer consideration, he concluded that Little could not rely on the President's instructions as they did not permit the capture and seizure of neutral vessels, the contravention of which, Little had clearly committed. His Honour succinctly stated that, 'instructions cannot change the nature of the transaction to legalize an act which without those instructions would have been a plain trespass'.[416] In other words, Little could not rely on the President's instructions because Little's actions were not in accordance with them and, therefore, it could not be said that he was in fact following orders.

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[412] Ibid 172.
[413] Ibid.
[414] Ibid.
[415] Ibid 178.
[416] Ibid 179.

Little's case illustrates that, from as early as the beginning of the 19th century, at least in the US, superior orders were limited to the extent of the lawfulness, or rather, the correctness of the facts that underpinned the order.

Mitchell v Harmony (1851)

The matter of superior orders was examined again some decades later in another case that involved the US military and the seizure of private property in time of war, this time between the US and Mexico. In the case of *Mitchell v Harmony* 54 US 115 (1851) ('*Mitchell's case*'),[417] the US Supreme Court considered an appeal by Harmony, a US commercial trader, whose goods were seized by Mitchell because Harmony was allegedly in contravention of US laws that prohibited trade with Mexico. Harmony had ventured into Mexican territory that was held at the time by the US authorities and engaged in trade with the inhabitants of that territory . He brought an action against the seizure on the grounds that the seizure constituted an unlawful trespass against him. He claimed that:

> The defendant, on 10 February 1847, at Chihuahua, in the Republic of Mexico, seized, took, drove, and carried away and converted to his own use the horses, mules, wagons, goods, chattels, and merchandise of the plaintiff and compelled the workman and servants of the plaintiff having charge to abandon his service and devote themselves to the defendant's service. The property alleged to have been taken is averred to be of the value of $90 000, and damages $100 000.[418]

Unfortunately for Mitchell, because the place where Harmony had engaged in commerce was already under the control the US authorities, there was no breach of US law and therefore the seizure of the goods was unlawful because trading in this area was in fact lawful.

Mitchell's defence was based in part on superior orders since he claimed that the reason Harmony's goods were seized was predicated on the orders of his commander, Colonel A W Doniphan, who Mitchell was bound to obey. The Circuit Court had initially stated that,

> Colonel Mitchell, who executed the order, was not alone responsible; Colonel Doniphan, who gave the order, was also liable; they were jointly and severally responsible.[419]

The Supreme Court said that this direction was in fact 'contrary to law' as it implied that there was no defence available to Mitchell—a position which the Supreme Court found difficult to accept in light of the possible injustice that subordinates would suffer if a superior orders defence could not be raised. In relation to that defence, the Supreme Court stated:

> the court is referred to the act of Congress of the 10th of April, 1806, 'for establishing rules and articles for the government of the armies of the United States', and particularly the 9th article of

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[417] *Mitchell v Harmony* 54 US 115 (1851) cited in Nico Keijzer, *Military Obedience* (Sijthoff and Noordhoff, 1978) 159.
[418] Ibid 117.
[419] Ibid 122.

> the 1st section, which makes disobedience to the 'lawful command of his superior officer' punishable, at the discretion of a court-martial, with death…[420]

The order was such a one as Mitchell was bound by law to obey; and it would be contradictory in the law to bind him to obey, and then to punish him for obeying.

Although the case was ultimately decided on different grounds, the Court's reference to the contradictory nature that accompanies unlawful orders and the lack of a defence based on those orders, is telling of how these matters may have been viewed by the earlier courts in the US.

Clark v State (1866)

The plea of superior orders was accepted as a complete defence when raised in relation to charges that stemmed from setting fire to a civilian's house. The incident occurred during the American Civil War when a subordinate was ordered to burn down the house by his superior officer as part of military operations. When Clark raised the defence of superior orders, the Court recognised that the instruction to carry out the burning of the house was issued by his superior officer and the imperative that accompanies orders made it essential, as a matter of law, that the order be fulfilled.

The Court provided interesting commentary on why justice would not be served if the private who carried out the burning of the house was guilty for following an order which he was obliged to obey. It emphasised the role that coercion plays in such transactions. The Court stated:

> The act was ordered by an officer in command, and the private could not but obey. What also did he dare do? He cannot stop to question the authority of his superior. Obedience or death are the alternatives in military government in such cases. Military government is but another name for an absolute despotism; the subordinate almost always acts under coercion; his acts are the acts of others, for which in the clear light of common sense he cannot be held answerable.[421]

C. *Plea of Superior Orders not available for all Offences*

United States v Bright (1809)

Some courts have focussed on the type and nature of the offence when determining the availability of the plea of superior orders: the greater the severity or consequences that would result from executing the order, the less likely that superior orders would be available as a defence to such offences. One example of this reasoning can be found in the US case of *United States v Bright* in 1809. In relation to the plea of superior orders, the Court acknowledged that

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[420] Ibid.

[421] *Clark v State* (1867) 135 ALR 52, cited in Nico Keijzer, *Military Obedience* (Sijthoff and Noordhoff, 1978) 158.

subordinates should have a degree of latitude regarding individual criminal responsibility when acting under orders in time of war. The Court stated:

> In a state of war … great indulgence must necessarily be extended to the acts of subordinate officers done in obedience to their superiors. But even there the order of a superior to take the life of a citizen, or to invade the sanctity of his house and to deprive him of his property, would not shield the inferior against a charge of murder or trespass … It may … be observed that, had the defendants refused obedience, and had been prosecuted … they ought to have been acquitted upon the ground that the orders themselves had been unlawful and void.[422]

Here the Court appears to be offering a distinction between the types of offences committed and the availability of a plea of superior orders. For offences involving murder and trespass it appears as though the defence of superior orders would not be available to relieve criminal responsibility. For other offences—left unstated—the Court mentioned that 'great indulgence' should be offered to subordinates in execution of superior orders, but such indulgence is limited when such orders involve murder or trespass. In these instances, the Court argued, the subordinate would have no protection if the order was unlawful and the order executed.

However, the Court also indicated that, if the subordinate refused to execute the unlawful order, then, for reasons not entirely apparent in the judgment, such conduct should be sufficient to allow the subordinate to be acquitted of charges stemming from disobedience. This normative assertion regarding the acceptability of the subordinate to disobeying unlawful orders espoused by the Court is not unlike the position adopted later for military codes and other domestic legislation that restricts the accused from raising the plea of superior orders.[423] Removing, or greatly limiting the ability of the accused to plead superior orders, in essence, places the emphasis squarely on the subordinate to question their orders in a judicious manner that, in effect, alters the superior–subordinate relationship—the subordinate is forced to act more as a lawyer than as a soldier.

That difficulty was illustrated in the case of *Riggs v State* 43 Tenn. (3 Cold) 85, 91 Am. Dec. 272 (1866) ('*Riggs*').[424] In *Riggs*, the Supreme Court of Tennessee reiterated the long-held

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[422] *US v Bright* 24 Fed Cas 1232 (case no. 14, 647) (1809) cited in Nico Keijzer, *Military Obedience* (Sijthoff and Noordhoff, 1978) 158.

[423] For examples of domestic legislation adhering to this position, see Canada – *Canadian War Crimes Regulations 1945* ('*CWCR*'); France – *Ordinance of the Suppression of War Crimes 1944* ('*OSWC*'); Norway – *Law on the Punishment of Foreign War Criminals 1946* ('*LPFWC*'); Czechoslovakia – *Law Concerning the Punishment of Nazi Criminals, Traitors and their Accomplices 1946* ('*LCP*'); Poland – *Decree Concerning the Punishment of Fascist-Hitlerite Criminals guilty of Murder and Ill-treatment of the Civilian Population and of Prisoners of War, and the Punishment of Traitors to the Polish Nation 1946*; Austria – *Constitutional Law 1945 (War Crimes and other National Socialist Misdeeds)* ('*WCNSM*'); The Netherlands – *Penal Law Decree 1947* ('*PLD*'); Australia – *War Crimes Act 1945* (Cth) ('*WCA*').

[424] *Riggs v State* 43 Tenn. (3 Cold) 85, 91 Am. Dec. 272 (1866) ('*Riggs*') cited in Nico Keijzer, *Military Obedience* (Sijthoff and Noordhoff, 1978) 159.

proposition that subordinates are required to obey all orders of superior officers and that such orders shall not constitute a defence to any illegality committed by the subordinate in furtherance of those orders. It stated:

> A soldier … is bound to obey all lawful orders of his superior officers, or officers over him, and all he may do in obeying such lawful orders constitutes no offence as to him. But an order illegal in itself and not justified by the rules and usages of War, or in its substance clearly illegal, so that a man of ordinary sense and understanding would know as soon as he heard the order read or given that such order was illegal, would afford a private no protection for a crime committed under such order … [425]

However, the Court drew a distinction between orders that are clearly unlawful and orders that were less so or which were ambiguous or make it more difficult for the subordinate to determine the legality of the order. It stated:

> Any order given by an officer to his private, which does not expressly and clearly show in its face or in the body thereof its own illegality, the soldier would be bound to obey, and such order would be a protection to him.[426]

Here the Court saw it necessary to include an assessment of the degree of clarity of the orders in determining whether a plea of superior orders is available. If the order was not, *prima facie* unlawful but turns out later to be so, then, according to *Riggs*, the subordinate should be able to raise the plea of superior orders as a defence to a criminal charge.

D. *Superior Orders and Case Law – WWI*

To a large degree, World War I marked a turning point in the jurisprudence surrounding superior orders. The plea was raised a number of times after the War and, although the rulings that came from each of the cases were not widely different from the decisions of previous decades, WWI was significant because it was one of the first occasions in which the plea of superior orders was addressed at international law. Up until that time, most of the questions involving a plea of superior orders fell within the jurisdiction of domestic courts.[427]

Llandovery Castle Case

A number of cases arising out of World War I are worthy of mention, such as those conducted as part of the *Leipzig trials* held in Germany before the German Supreme Court (the

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[425] Ibid.

[426] Ibid.

[427] See footnote 400 where McCormack cautions the evidence surrounding *Haghenbach's case* being touted as a major contributing force in the development of international legal jurisprudence of superior orders. McCormack appears to stress the point that researchers should avoid placing too much emphasis on *Hagenbach's case* as a substantial authority on the law of superior orders.

Reichsgericht) in 1921.[428] One of the more infamous trials was the *Llandovery Castle* case[429] which involved a British hospital ship deliberately sunk by a German U-Boat with full knowledge of the status of the ship. In 1916, as part of Britain's war with Germany, the *Llandovery Castle* was a steamship that was commissioned to carry sick and wounded—mostly Canadian soldiers[430]—from the battlefields of Europe to the safety of the British Isles.

On 27 June 1918, the vessel was on its way back to England transporting 164 wounded, 80 medical officers and 14 nurses. No active combatants or munitions were on board. Late on the evening of 27 June, the ship was struck by a German U-Boat torpedo causing it to sink in the Atlantic Ocean. Twenty-four people survived the attack and made it to the relative safety of lifeboats before the stricken vessel sank below the surface of the ocean.

The Commander of the German U-Boat, First-Lieutenant Patzig, gave the initial order to fire on the *Llandovery Castle* even though evidence was given that he knew that to do so would be a violation of international law by way of the tenth Hague Convention.[431] He believed, based on unverified evidence, that the ship was in fact carrying military personnel in the guise of a hospital ship and, on that basis, deemed it appropriate to breach international law and attack the vessel. He, therefore, knew that he would be violating international law but believed that such an act was consistent with his requirements in engaging enemy ships.

Sometime after the initial attack, Patzig also ordered subordinates Dithmar and Boldt to fire on the survivors who had managed to climb aboard the lifeboats. Evidence adduced in Court pointed to Patzig going to some lengths to conceal not only the sinking of the *Llandovery Castle* but also the killing of the survivors.

After the war, Patzig could not be found, however Dithmar and Boldt were arrested and tried for killing survivors in the lifeboats. In their defence, they attempted to raise superior orders as a justification for their part in the killings. Boldt argued that:

> Whatever part he took in the events in question, he was always under the orders of his commander. He says that it was not known to him that these orders contained anything for which

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[428] UNWCC History, 286. Solis argues that the reason why the Allies allowed Germany to conduct the trials was in part due to the protestations made by Germany regarding the unpopularity associated with foreign courts trying German nationals. Due to the instability of the then weakened German Government, the Allies compromised and allowed these trials to be conducted by German courts – see Gary D Sollis, 'Obedience of Orders and the Law of War: Judicial Application in American Forums' (1999) 15(2) *American University International Law Review* 482, 498. See also *War Crimes: Report of the War Crimes Inquiry 46* (1989).

[429] 'German War Trials: Judgment in Case of Lieutenants Dithmar and Boldt' (1922) 16(4) *The American Journal of International Law* (American Society of International Law) 708–24 ('*Llandovery Castle case'*).

[430] Ibid 709.

[431] Hague Convention X: *Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention* (of 6 July 1906). This Convention prohibits the firing on hospital ships.

> punishment would be inflicted, or that by carrying them out he rendered himself liable to punishment.[432]

However, despite the Court finding that 'Patzig gave the decisive order, which was carried out without demur in virtue of his position as commander' and that what occurred in terms of the unlawful killings was indeed 'in accordance with his orders',[433] the two accused were held guilty for their part in the killings.

The Court held that there was no evidence to suggest the *Llandovery Castle* was engaged in anything other than medical activities and, therefore, was not in contravention of clause 10 of the *Hague Conventions.*[434] As such, the decision to attack the vessel and later kill most of the survivors constituted a breach of international law. Anyone involved in such activities would also be in breach and subject to punishment.

However, the Court determined that Dithmar and Boldt were guilty only as accessories since there was no evidence they did form an intention to kill, but acted solely on the basis they were following Patzig's orders.[435] It held that Patzig's orders did not absolve them from criminal responsibility, even under the German *Military Code*.[436] The Court held that knowledge that the accused possessed regarding the illegality associated with killing of defenceless people in lifeboats was such that Dithmar and Boldt not only should have questioned their orders, but did have an obligation to do so and ultimately 'should have refused to obey' the orders to fire upon the survivors.[437]

The Court regarded superior orders to be relevant not on the matter of criminal responsibility but more in relation to the issue of the quantum and severity of sentencing. In relation to issue of punishment, the Court stated at 723 that:

> They should have certainly have refused to obey the order. This would have required a specially high degree of resolution. A refusal to obey the commander on a submarine would have been something so unusual, that it is humanly possible to understand that the accused could not bring themselves to disobey. That certainly does not make them innocent, as has been stated above. They had acquired the habit of obedience to military authority and could not rid themselves of it. This justifies the recognition of mitigating circumstances.[438]

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[432] Llandovery Castle case, 716.
[433] Ibid 719–20.
[434] Clause 10, Hague Convention X: *Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention* (of 6 July 1906). This clause prohibits ships carrying any cargo or troops when acting as a medical ship.
[435] Llandovery Castle case, 721.
[436] *Military Penal Code* (Germany) No. 2: 'the subordinate obeying such an order is liable to punishment, if it was known to him that the order of the superior involved the infringement of civil or military law'(page 722).
[437] Ibid 722.
[438] Ibid 723.

The Court then sentenced the pair to be dismissed from the Navy and to imprisonment for a period of four years. That the Court saw fit to recognise the dilemma faced by the subordinates in questioning superior orders yet still be held criminally liable for the act, was consistent with earlier decisions across a range of legal jurisdictions. [439] Although consistent with the strict liability approach adopted after WWI, it was interesting that the decision was contrary to Oppenheim's theory of *respondeat superior* liability which would have rendered both Dithmar and Boldt free of criminal responsibility had that rationale been applied. The *respondeat superior* theory of responsibility in relation to superior orders underwent a theoretical shift and as such, the decision in the *Llandovery Castle* case appears to be the turning point in the reconceptualisation of liability in regard to superior orders.[440]

The Dover Castle Case

Another case involving a plea of superior orders at the *Leipzig trials* was what is commonly known as the *Dover Castle* case.[441] Similar to the *Llandovery Castle* case, the *Dover Castle* case was another incident that involved the unlawful sinking of an Allied hospital ship by a German U-Boat. One of the questions for the Court on whether a plea of superior orders was open to First Lieutenant Karl Neumann, the commander of the U-Boat who was charged with unlawfully killing in violation of international law.[442] Specifically, Neumann was charged with sinking the hospital ship 'without warning and with having sunk her with exceptional brutality'.[443]

On 26 May 1917, Neumann spotted two British destroyers that were accompanying two steamers which clearly displayed the distinctive markings of military hospital ships pursuant

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[439] See, eg, *Little case*; Mitchell v Harmony 54 US 115 (1851); Clark v State (1867) 135 ALR 52; US v Bright 24 Fed Cas 1232; *Riggs*.

[440] See section above on 'United Nations War Crime Commission', especially footnote 469, for discussion involving the evolution from *respondeat superior* to the *strict liability* theoretical approaches in relation to superior orders.

[441] 'Judgment in Case of Commander Karl Neumann, Hospital Ship' (1921) 16 *American Journal of International Law* 704 ('*Dover Castle* case').

[442] Neumann was charged pursuant to the *Treaty of Versailles*, Versailles, France, signed 28 June 1919, [1919] UKTS 4, entered into force 10 January 1920, Art. 228, para 2:
The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.
The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.

[443] *Dover Castle* case, 705.

to the *Hague Convention* number 10.[444] Neumann never disputed the fact he knew the *Dover Castle* was, or at least purported to be, a hospital ship.

Without warning to the enemy ships, Neumann gave the order to fire a torpedo which struck the *Dover Castle* which neither sank the vessel nor caused any deaths at that time. For approximately one-and-a half hours the sick and the wounded were transported off the ship to one the destroyers that had come up alongside it. Neumann then ordered a second torpedo be fired at the *Dover Castle* which did finally sink the ship and cause the deaths of six British crew.

In his defence, Neumann claimed that in firing at the ship, he was merely following orders and, on that basis, he should escape criminal responsibility. Neumann referred to orders that came from the German Admiralty that made it lawful to fire upon enemy hospital ships in certain circumstances. The German Admiralty believed that Britain was violating the *Hague Conventions* by transporting crew and armaments for military purposes. It stated in a memorandum that,

> Only such hospital ships will be protected, which fulfilled certain conditions. The hospital ships had to be reported at least six weeks previously and were to keep to a given course …[445]

Any hospital ships that were not reported during the six week grace period were to be 'attacked forthwith, excepting such only as have been expressly notified from here'.[446]

Turning to the plea of superior orders, the Court reached the conclusion that the orders issued by the German Admiralty were lawful under international law and as such, Neumann as a member of the military was obliged to obey them because 'it is a military principle that the subordinate is bound to obey the orders of his superiors'.[447] The Court deemed it necessary to examine in some detail the requirements of subordinates of the German army to obey superior orders, but also mentioned the corresponding duty in the English army.

It stated at 707:

> This duty of obedience is of considerable importance from the point of view of the criminal law. Its consequences is that, when the execution of a service order involves an offence against the criminal law, the superior giving the order is alone responsible. This is in accordance with the terms of the German law s 47, para 1 of the Military Penal Code. It also accords with the legal

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[444] Hague Convention X: *Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention* (of 6 July 1906). This Convention prohibits the firing on hospital ships.
[445] *Dover Castle* case, 706.
[446] Ibid. The specific orders from the German Admiralty were issued on 29 January 1917 and 29 March 1917 to the German Flotilla in the Mediterranean.
[447] *Dover Castle* case, 707.

> principles of all other civilized states (see, for example, as regards England, the Manual of Military Law (1914), chapter XIV, Art. 443 …[448]

The Court found that Neumann was obliged to follow the lawful orders of the Admiralty and, on that basis, he should not be subject to criminal responsibility for the sinking and killing. It said that Neumann could only be held accountable for the act if he went beyond his orders or if the orders themselves were manifestly unlawful. Given that the German Admiralty had provided six weeks grace until the policy would take effect, and also that Neumann himself waited one-and-a-half hours before firing the second torpedo, he was not guilty of the charges.[449]

The *Llandovery Castle* case and the *Dover Castle* case show that the German Courts[450] were willing to assess the legality and nature of the orders and make a determination of their lawfulness.

III. Superior Orders under the United States and British Military Codes: WWI and WWII

Prior to the commencement of WWI, the position of some nations regarding the issue of superior orders was very different to the position they adopted after WWII, as the next section explores.[451]

A. *United States Army – 1914 Rules of Land Warfare (RLW)*

In 1914, under the chapter *Offences Committed by Armed Forces*,[452] the US Army's *RLW* contained the following statement in relation to superior orders:

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[448] Ibid 707.

[449] One can only speculate whether the finding of a British or Allied tribunal would reach the same conclusion as the Court did in this case.

[450] Note that the *Leipzig trials* were not without controversy, and the decision to allow Germany to conduct these trials was tainted not only due to the perception of bias, but also because of the seeming reluctance of the German authorities to fully engage in prosecuting their own soldiers. See, eg, Alan M Wilner, 'Superior Orders as a Defense to Violations of International Law' (1966) 26(2) *Maryland Law Review* 134–5. Wilner declares that the trials conducted at Leipzig after WWI were 'a farce' on the basis that of the 896 persons the Allies accused of committing war crimes who were therefore subject to criminal trial pursuant to Article 228 of the *Treaty of Versailles*, the German authorities tried only twelve and of these, six were acquitted. The longest sentence handed out by the Court was four years.

[451] Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (Oxford University Press, 2012).

[452] The offences mentioned at paragraph 366, included: making use of poisoned and otherwise

> Individuals of the armed forces will not be punished for these offences in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall. [453]

The US position was clearly representative of the immunity that was to be afforded to soldiers from criminal responsibility so long as there was some evidence that the acts were committed pursuant to 'orders or sanction of their government or commanders'. This position was in line with Oppenheim's earlier position in 1906 that provided for a complete defence to what would otherwise have been criminal conduct if one was acting under obedience to superior orders.[454]

Furthermore, this rule not only provided the defence of superior orders, and thereby absolving of liability the subordinate, it operated to punish those who issued the orders in the first instance. Nowhere in this rule is the issue of *mens rea* addressed and it is unclear whether the court would need to assess whether the accused in fact believed or knew the orders were lawful. The rule contains no requirement that the order must be unlawful for a plea of superior orders to apply. All that appears necessary is that the accused committed the offending acts under the 'orders or sanction of their government or commanders'.

B. *United Kingdom – 1914 Manual of Military Law (MML)*

At the same time, Britain adopted an interpretation not unlike the US position in relation to superior orders. Chapter XIV of the British *MML* deals with the *Laws and Usages of War on Land.* In relation to superior orders, it states:

> members of the armed forces who commit such violations of the recognised rules of warfare as are ordered by their Government or by their commander are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for

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forbidden arms and ammunition; killing of the wounded; refusal of quarter; treacherous request for quarter; maltreatment of dead bodies on the battlefield; ill treatment of prisoners of war; firing on undefended localities; abuse of the flag of truce; abuse of the red cross flag and emblem; and other violations of the Geneva Convention; use of civilian clothing by troops to conceal their military character during battle; bombardment of hospitals and other privileged buildings, improper use of privileged buildings for military purposes; poisoning of wells and streams; pillage and purposeless destruction; ill treatment of inhabitants in occupied territories. See War Department: Office of the Chief of Staff, *Rules of Land Warfare* (Washington Government Printing Office, 1914) [366] (*RLW*) <https://archive.org/stream
/rulesoflandwarfa00unitrich#page/n1/mode/2up>.

[453] *USRLW* [366].

[454] Dinstein (n 87).

> such order if they fall into his hands, but otherwise he many only resort to other means of redress which are dealt with in this chapter.[455]

Although differing slightly from the US position, the overall intent of paragraph 443 of the British *MML* is almost identical to that of the US *RLW*. The plea of superior orders is provided for in the sense that there was *prima facie* an assumption that the person was 'not a war criminal' and could not 'be punished by the enemy' so long as the orders were given by the person's government or commander.

Similar to the US position, liability rested with those who issued the orders. No mention of *mens rea* is given in this provision and there was no requirement that the person either knew or understood that the orders were lawful.

C. *Superior Orders – US and British Military Codes between the Wars*

Towards the conclusion of WWII, the position that individual states adopted in relation to superior orders was markedly different to that taken by the US and Britain at the time of WWI.[456] By the end of WWII, both the US and Britain had changed their position on the matter of superior orders and those changes were represented in amendments to their respective military codes. The UNWCC stated that the main impetus for change was because earlier versions of the codes in relation to superior orders were now at odds with both 'the principle proclaimed by the 1919 Commission on Responsibilities and with the corresponding principles of English and Constitutional Law'.[457] No doubt there was a different view of superior orders after WWI than there had been at the time the US and British Codes were drafted, due to the fact that maintaining the same position as promulgated in 1914 would allow many Germans to escape liability for possible war crimes committed against British and Allied forces.

In light of that perception, the British *MML* was comprehensively amended in 1944. At paragraph 443, it stated:

> The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. Undoubtedly, a court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that the obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces, and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received. The question, however, is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that

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[455] British War Office, *Manual of Military Law* (HMSO, 1914) <http://www.slideshare.net /oldcontemptible/manual-of-military-law-1914> [443].

[456] The primary research source for this section is derived from the UNWCC History, 281–6.

[457] UNWCC History, 281.

> they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity.[458]

Also reflecting changed perceptions of superior orders, the amended US *RLW* stated the rule more succinctly:

> Individuals and organisations who violate the accepted laws and customs of war may be punished therefore. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defence or in mitigation of punishment. The person giving such orders may also be punished.[459]

Both Codes, as amended at the end of WWII, represent a significant departure from the earlier Codes in relation to a plea of superior orders. The UNWCC stated that one significant point of difference between the 1914 British *MML* and the 1944 amended version, is the addition of the phrase, 'cannot be expected to weigh scrupulously the legal merits of the order received'. The argument made by the UNWCC is that the wording of that provision gives rise to the emergence of the *mens rea*, or subjective element.[460] It is not entirely clear how this addition creates a subjective element and the UNWCC failed to clearly articulate its position on this point. In fact, a different interpretation of that passage could actually indicate the absence of any need to consider the subjective beliefs of the accused in committing the act, as the statement appears to reduce the need of the accused to consider the orders at all.

On the other hand, in support of the UNWCC's assertion, if 'weigh scrupulously' connotes the degree or the extent to which a soldier must assess the order before the order is carried out, then such an interpretation could lend some support to the UNWCC's analysis. In other words, a court would need to make a determination of the extent to which the accused weighed 'scrupulously' the lawfulness of those orders before carrying them out.

The phrase contained in paragraph 443 of the British *MML* that does not appear to give any support to the existence of *mens rea* can be found in the last sentence of that paragraph which creates liability for an accused who, 'in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity'.[461] All that appears necessary to dismiss the applicability of the plea of superior orders is an objective assessment as to the physical nature of the offence. Once it is established that the acts for which the accused seeks to raise a plea of superior orders were in contravention of 'the general sentiment of humanity', nothing is required to establish the subjective attributes of the accused in committing those acts.

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[458] Ibid 282.
[459] Ibid.
[460] Ibid.
[461] Ibid.

IV. Other Domestic Laws/ Regulations

As the UNWCC points out, the stance in relation to superior orders adopted by both the British and the US, appears to a large extent mirrored in the military codes and other regulations of numerous Allied nations in Europe and around the world, albeit with some interesting exceptions.[462] For example, nations such as Canada, France, Norway, Czechoslovakia, Poland, the Netherlands and Australia each had adopted similar provisions that operated to restrict the plea of superior orders so that such regulations would mitigate the harshness of the sentence as opposed to offering complete relief from criminal responsibility. This common theme, however, was not entirely adopted throughout and there were some exceptions, such as Norway, that seemed to allow greater flexibility—to the extent of providing relief from criminal responsibility. Examples of some of the various domestic provisions dealing with a plea of superior orders will now be discussed.[463]

(a) Canada – *Canadian War Crimes Regulations 1945* (‘*CWCR*’)

> [15] The fact that an accused acted pursuant to the order of a superior or of his Government shall not constitute an absolute defence to any charge under these Regulations; it may, however, be considered either as a defence or in mitigation of punishment if the military court before which the charge is tried determines that justice so requires.

While not a complete defence, the Canadian provision arguably left open the possibility for an accused to seek—in addition to mitigation of sentence—to have the charges downgraded to a lesser charge, or alternatively, some other reduction in punishment. This possibility arose due to the fact the provision excluded an ‘absolute defence’ which signalled the possibility of a defence that was *less* than ‘absolute’; that is, some form of a partial defence. Therefore, one could argue that while the plea of superior orders was insufficient to remove liability from the accused completely, there was the possibility that superior orders would lead to a different charge, taking into consideration the circumstances of the case.

A second reason why the drafting of this provision might have provided something in addition to mitigation of sentence, is the inclusion of conjunctive terms ‘either’ and ‘or’ which have the

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[462] Ibid 283. In relation to ‘ex-enemy controlled territory’, see Article II (b) of the Nuremburg Charter, and Law No. 10 of the Allied Control Council for Germany: ‘The fact that the person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation’. See also the American Regulations for the Trial of War Crimes: ‘The fact that an accused acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the commission determines that justice so requires’. Likewise, the American Regulations Governing the Trial of War Criminals in the Pacific Area, states: ‘Action pursuant to order of the accused’s superior, or of his Government, shall not constitute a defence, but may be considered in mitigation of punishment if the commission determines that justice so requires’.

[463] Ibid 283–5.

effect of offering possibilities in relation to punishment. For instance, consider the two sentences:

(a) '(superior orders) shall not constitute an absolute defence'; and
(b) 'it (superior orders) may be considered *either* as a defence *or* mitigation of punishment'.

That the drafters sought to include these terms in this form, strongly suggests the Canadians wanted to give their courts the opportunity to consider handing down some alternative sentence or to have a degree of flexibility in addition to a reduced sentence. Whether this was an error in drafting or whether the intention was to allow the accused to have some other defence, it is arguable from a statutory interpretation perspective, that those who were charged pursuant to the *CWCR* would have had in their defence, slightly better prospects than those charged under the regulations of various other countries.

A further point is that the Canadian provision makes it clear that the decision to recognise, or not, the influence of superior orders in the commission of the crime, is determined by the relevant military court, and the test to be used when deciding whether to allow superior orders to influence the court's final decision is if 'justice so requires'. In other words, it is up to the individual court to make a subjective assessment of the circumstances surrounding the charge and the relevance of superior orders within that context. In determining if 'justice so requires', presumably, consideration would be given to a range of factors, such as: the nature of the order and whether the order was clearly unlawful; the nature and severity of the offence; the individual circumstances of the accused; and the origins of the order, among others. The subjective nature of making this assessment, however, could have led to an inconsistent application of these principles across the various courts, and would have, no doubt, been a cause for some concern on the part of the defence.

(b) France – *Ordinance of the Suppression of War Crimes 1944* ('*OSWC*')

> Article 3: Laws, decrees or regulations issued by the enemy authorities, orders or permits issued by these authorities, or by authorities which are or have been subordinated to them, cannot be pleaded as justification within the meaning of Article 3327 of the penal code, but can only, in certain circumstances, be admitted as extenuating or exculpating circumstances.
>
> Article 4: Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as accomplices, they shall be considered as accessories in so far as they have organised or tolerated the criminal acts of their subordinates.

Article 3 of the *OSWC* makes it clear that orders of 'enemy authorities' cannot be used to *justify* criminal conduct but can only, 'in certain circumstances' be used as 'extenuating or exculpating circumstances'. The wording of Article 3 raises several questions and perhaps, some concerns. First, the use of ambiguous language with the phrase, 'in certain circumstances', leaves open the possibility of inconsistent application of superior orders. Some courts may be more inclined to allow superior orders to influence their decisions, while other courts might be less so.

A second question relates to whether the court's acceptance of superior orders in relation to the criminal conduct, could result in a full acquittal, given the use of the word, 'exculpating', which itself implies some alleviation of guilt. Whether this would mean full exculpation is doubtful.

(c) Norway – *Law on the Punishment of Foreign War Criminals 1946* ('*LPFWC*')

> [5] Necessity and superior order cannot be pleaded in exculpation of any crime referred to in para. 1 of the present law. The court may, however, take the circumstances into account and may impose a sentence less than the minimum laid down for the crime in question or may impose a milder form of punishment. In particularly extenuating circumstances the punishment may be entirely remitted.

Interestingly, 'necessity' and 'superior orders' under the Norwegian provision were grouped together in the same section so that the rationale that applied to superior orders, applied equally to necessity. Similar to the French and Canadian provisions, there is some ambiguity associated with what punishment the Norwegian courts could actually have handed down. This ambiguity relates to the fact that the court, 'may impose a sentence less than the minimum … for the crime *or* may impose a milder form of punishment'.

Additionally, however, in going further than any of the previous examples, the Norwegian provision clearly indicated that superior orders (and necessity) could lead to a sentence where the 'punishment is entirely remitted' which would enable the accused to escape punishment altogether. Such a provision, while not entirely exonerating the accused from criminal responsibility, indicates Norway's view of superior orders was similar to the earlier positions of the US and Britain prior to WWI.

(d) Czechoslovakia – *Law Concerning the Punishment of Nazi Criminals, Traitors and their Accomplices 1946* ('*LCP*')

> Article 13:
>
> (1) Actions punishable under this law are not justified by the fact that they were ordered or permitted by the provision of any law other than Czechoslovak law or by organs set up by any state authority …
>
> (2) Nor is the guilty person justified by the fact that he was carrying out his prescribed duty if he behaved with especial zeal, …
>
> (3) The irresistible compulsion of an order from his superior does not release any person from guilt who voluntarily became a member of an organisation whose members undertook to carry out all, even some criminal orders.

The Norwegian stance on the use of superior orders as a defence to war crimes was in stark contrast to that of Czechoslovakia. Unambiguous language indicated there would be no justification of war crimes on the basis of superior orders.

The Czechoslovakian provision at Article 13(3) removed, without doubt, the use of superior orders as a justification for war crimes for those persons belonging to an 'organisation' that

carried out criminal orders. Given the title of the regulations, presumably the organisation most at the forefront of drafters' minds was the German Armed Forces.

(e) Poland – *Decree Concerning the Punishment of Fascist-Hitlerite Criminals Guilty of Murder and Ill-treatment of the Civilian Population and of Prisoners of War, and the Punishment of Traitors to the Polish Nation 1946*

Article 5:

(1) The fact that an act or omission was caused by a threat, order or command does not exempt from criminal responsibility.

(2) In such a case the court may mitigate the sentence taking into consideration the circumstances of the perpetrator and the deed.

Poland was another nation that made its position quite clear in relation to superior orders. According to the Polish provisions contained in Article 5, superior orders would not absolve criminal responsibility but in certain circumstances *may* be used to 'mitigate the sentence'.

Similar to the provisions contained in the rules of other nations, there is no indication as to what 'circumstances' a court could or should apply when making an assessment of the suitability of superior orders, other than 'consideration of the circumstances of the perpetrator and the deed'. The emphasis was placed on the accused and the act which attracted the criminal charge.

(f) Austria – *Constitutional Law 1945 (War Crimes and other National Socialist Misdeeds*) ('*WCNSM*')

Article 1: The fact that the same act was committed in obedience to an order shall not constitute a defence.

Austria adopted an even more strict approach to superior orders in that it not only prohibited the plea of superior orders being raised to a charge of war crimes, it also prohibited the plea as a means to mitigate the sentence.

(g) The Netherlands – *Penal Law Decree 1947* ('*PLD*')

1. He who during the time of the present war and while in the forces or service of the enemy State is guilty of a war crime or any crime against humanity as defined in Article 6 under (b) or (c) of the Charter belonging to the London Agreement of 8th August 1945 … shall, if such crime contains at the same time the elements of a punishable act according to Netherlands law, receive the punishment laid down for such act.

To be read in conjunction with:

Dutch Penal Code 1943 ('*DPC*')

Article 43: Not punishable is he who commits an act in the execution of an official order given him by the competent authority.

> An official order given without competent [sic] thereto does not remove the liability to punishment unless it was regarded by the subordinate in all good faith as having been competently [sic] and obeying it came within his province as a subordinate.

The Netherlands regulated superior orders under its own penal system. This is because it did not wish to depart from what it regarded as the efficiency and functionality of the existing Dutch legal system.[464] The Dutch, therefore, tied war crimes and any defences to those crimes to the established laws of the Netherlands. At the time, the existing laws of the Netherlands in relation to superior orders were similar to the positions taken by the US and Britain prior to WWI and as such, a subordinate could escape criminal liability on a plea of superior orders.[465]

This was tempered, however, by the fact that the order which led to the commission of the offence by the subordinate, was 'given [to] him by the competent authority' pursuant to Article 43 of the *DPC.* On that basis, the plea of superior orders could have been greatly restricted had the orders been issued by an authority not acting with proper authority.

(h) Australia – *War Crimes Act 1945* (Cth) ('*WCA*')

> Section 16: Subject to subsections 6(2) and 13(2), the fact that, in doing an act alleged to be an offence against this Act, a person acted under orders of his or her government or of a superior is not a defence in a proceeding for the offence, but may, if the person is convicted of the offence, be taken into account in determining the proper sentence.

In response to war crimes committed against Australian forces operating in various theatres of war against Germany and its Allies, Australia took a similar approach to other countries under which the plea of superior orders could not absolve criminal responsibility completely, but could be used as a mitigating factor in determining the proper sentence. No further guidance is offered as to what is a 'proper' sentence and it can only be presumed that the individual court would have had overall discretion in reaching a determination of what was 'proper'.

V. United Nations War Crimes Commission and the Plea of Superior Orders – A Manifestation of the Will of the Victorious Allies

At the conclusion of WWII, the UNWCC published its seminal works on the history of the Commission and the development of the laws of war.[466] Chapter X of the UNWCC's report, *inter alia*, details the difficult issues that had hitherto arisen from a plea of superior orders.[467]

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[464] UNWCC History, 285.
[465] Ibid.
[466] United Nations War Crimes Commission 'Complete History of the United Nations War Crimes Commission and the Development of the Laws of War' (HMSO, London 1948) ('UNWCC History').
[467] UNWCC History, Chapter X: Developments in the Doctrine of Individual Responsibility of Members of Governments and Administrators of Acts of State, of Immunity of Heads of State, and by Superior Orders, 274–288; see also UNWCC History, 96–8, 101.

The UNWCC acknowledged that prior to WWII, there was not a clear understanding and application of the plea of superior orders, and quite often,

> [superior orders] has been given differing legal solutions from one country to another, and until recently there were in the matter no fixed or precise rulings of principle in international law. In legal systems of certain countries there were even reversals of provisions dealing with the issue in the course of a comparatively brief period of time.[468]

Such confusion, as Dinstein points out, is reflected in the conceptual evolution of the various positions regarding the legitimacy of superior orders espoused by two eminent legal theorists—Lassa Oppenheim in 1906 and Hersch Lauterpacht in 1944 (and later further revised in 1952).[469] The UNWCC was acutely aware of the differing positions held by member states regarding the application of superior orders. The Commission was especially cognisant of the dilemma that might have arisen if immunity from prosecution for 'state administrators' and a corresponding immunity for subordinates was granted—an outcome that, perversely, would have operated to ensure no one was accountable for crimes committed in war.[470] This would have been a most unpalatable outcome for the victorious Allies given so many lives had been lost and so much had been invested to defeat Germany and Japan, and their Allies. This undesirable consequence was presented by Robert H Jackson, US Chief Prosecutor at Nuremberg as 'an area of official irresponsibility'.[471]

The Czechoslovakian representative to the UNWCC in January 1944 (Dr Ecer) identified that superior orders deserved 'early attention' by the Commission to provide clarity in future war crimes trials.[472] In response, the Commission established the Legal Committee and later a sub-committee that attempted to articulate the Commission's position on the plea of superior orders, thereby 'insuring the application of the same rule by all courts charged with the trial of war

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[468] Ibid 274.

[469] Illustrative of the changed attitudes towards *respondeat superior* over the first five decades of the twentieth century, Dinstein cites Oppenheim's original text in 1906 of *Oppenheim's International Law* (volume 2, 1st edition, 1906) 264–5; and the later revised editions by Lauterpacht (*Oppenheim's International Law* (volume 2, 6th edition, 1944) 452; and *Oppenheim's International Law* (volume 2, 7th edition, 1952) 568. Dinstein notes, in the words of Schwarzenberger, that the gradual alteration of Oppenheim's original position on *respondeat superior* to that of later editors of Oppenheim's text, represents a "*volte face*" (see Dinstein (n 87) 38–48.

[470] UNWCC History (n 467) 274.

[471] Robert H Jackson, 'Report to the President of the United States', June 1945 as cited in UNWCC History, 274. Although the US did not suffer similar numbers of casualties to the Soviet Union, China, Germany, Poland, Japan and even British India, one estimate places the loss of life for US military personnel at 418,500 deaths over the course of the entire conflict—a figure rivalled only by the American Civil War. See Second World War History, *World War Two Statistics: Total Death By Nation* <http://www.secondworldwarhistory.com/world-war-2-statistics.asp>; Civil War Trust, *Civil War Casualties: The Cost of War: Killed, Wounded, Captured, and Missing* <http://www.civilwar.org/education/civil-war-casualties.html>.

[472] UNWCC History (n 468) 278.

criminals'.[473] In working towards providing a clear position on superior orders, the United States provided a draft submission and recommended, pursuant to Article 30 of the draft:

> 1. The plea of superior orders shall not constitute a defence … if the order was so manifestly contrary to the laws of war that a person of ordinary sense and understanding would know or should know, given his rank or position and the circumstances of the case, that such an order was illegal.
>
> 2. It shall be for the Tribunal and its Divisions to consider to what extent irresistible compulsion shall be a ground for mitigation of the penalty or for acquittal.[474]

Despite what the draft aimed to achieve, the UNWCC later agreed with a separate report by Dr Yien-Li Liang (legal scholar and the Chinese representative), that, in the face of the complexity and diversity of domestic laws, it would be 'futile to attempt to formulate, by means of an agreement among the United Nations, an absolute rule in regard to the plea of superior orders'.[475] To overcome this hurdle, Liang suggested the Commission 'could recommend some guiding principle which, without trying to reconcile the divergent national practices and to formulate an absolute rule, would represent the consensus of opinion among the United Nations'.[476] Given that pretext, the Legal Committee then submitted a report that made the following recommendation in regard to superior orders:

> The Commission is satisfied that the following rule is in accordance with general international practice and is consistent with international law:
>
> > The Defence of obedience to superior orders shall not constitute a justification for the commission of an offence against the laws and customs of war, if the order was so manifestly contrary to those laws or customs that, taking into account his rank or position and the circumstances surrounding the commission of the offence, an individual or ordinary understanding should have known that such an order was illegal.[477]

The draft submission on the principles of superior orders, while acknowledging that there should be no justification for the commission of an offence merely for obeying orders, recognised that courts could consider the nature of the order, and importantly, also take into consideration the rank or position of the individual and the circumstances in which the offence occurred. Whether the individual would have known that the 'order was so manifestly contrary' to laws or customs, should be determined objectively on the basis of an individual of 'ordinary understanding'. The outcome of this principle, if adopted, could in theory allow a lower ranking member of the military to argue that, when assessed objectively, were they not in a position to know that certain orders were illegal or 'manifestly contrary' to laws or customs. The level of knowledge and understanding of such matters would be commensurate with their rank and, on

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[473] Ibid.

[474] Draft Convention on the Trial and Punishment of War Criminals, cited in UNWCC History, 278.

[475] Yien-Li Liang, *Report on the Plea of Superior Orders*, cited in UNWCC History 278–9.

[476] Ibid 278.

[477] Ibid 279.

that basis, many of the perpetrators of war crimes might escape criminal sanction. These concerns were raised by the Czechoslovakian representative on the basis that the strength of existing laws in some Allied nations was stronger than the proposed recommendation, and furthermore, if the recommendation was adopted, individuals belonging to the SS or Gestapo would be in a more favourable position than they would have been had they been subjected to the domestic law of some Allied nations.[478]

As a result of this concern, an alternative proposition was submitted that excluded members of 'an organisation [the membership of] which implied the execution of criminal orders',[479] thereby quelling the possibility of individuals from organisations such as the SS or Gestapo escaping liability. Despite the inclusion of this provision, the submission was ultimately rejected. Instead, the Commission opted for a declaration stating that,

> it is better to leave it to the court itself in each case to decide what weight should be attached to a plea of superior orders. But the Commission wants to make it clear that its members unanimously agree that in principle this plea does not of itself exonerate the offenders.[480]

This was not the ideal outcome the Commission had hoped for, and in substance, it did nothing to address the inconsistent application of superior orders by member states that the Commission originally aimed to rectify. After the Czech and French representatives attempted to reopen the question in March 1945, the Commission confirmed its position in a report. In that report, the Commission stated:

> Having regard to the fact that many, if not most, of the member States have legal rules on the subject, some of which have been adopted very recently, and that in most cases these rules differ from one another, and to the further consideration that the question how far obedience to the orders of a superior exonerates an offender or mitigates the punishment must depend on the circumstances of the particular case, the Commission does not consider that it can usefully propound any principle or rule.
>
> The Commission unanimously maintains the view which it expressed in connection with the United Nations War Crimes Court that the mere fact of having acted in obedience to the orders

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[478] Ibid.

[479] 1. An order given by a superior to an inferior to commit a crime is not in itself a defence;
2. The Court may consider in individual cases whether the accused was placed in a state of irresistible compulsion and acquit him or mitigate the punishment accordingly;
3. The defence that the accused was placed in a state of compulsion is excluded:
(a) if the crime was of a revolting nature,
(b) if the accused was, at the time when the alleged crime was committed, a member of an organisation, the membership of which implied the execution of criminal orders.

[480] Explanatory memorandum to accompany the Draft Convention for the Establishment of a United Nations War Crimes Court cited in UNWCC History, 280.

> of a superior does not of itself relieve a person who has committed a war crime from responsibility.[481]

Whether the Commission's failure to reach a definitive position on the plea of superior orders was because member nations could not agree on a suitable form of words that would be acceptable to all, and therefore in accordance with their own domestic laws, or whether it was due to the jurisprudential complexity of issues involved with superior orders, is uncertain. The consequence, however, was the uncertainty about how each of the prosecuting nations would approach the plea of superior orders once the trials of German and Japanese individuals accused of war crimes commenced. The rules that each of the Allies in the prosecution adopted were often based on the domestic rules contained in that nation's military rules.

VI. Superior Orders and the Nuremberg Trials

The Nuremberg trials set the tone for much of the subsequent treatment of the law in relation to superior orders not only in Nuremberg, but also for the Tokyo trials and the subsequent trials throughout the Pacific. Article 8 of the *Charter of the International Military Tribunal* (the 'Charter') provided that:

> The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.[482]

It was clear from the drafting of Article 8 that the accused would not escape criminal responsibility but could, providing they satisfy the necessary evidentiary burden, use the plea of superior orders as a factor in mitigation.[483]

One interesting fact that Dinstein points out is that, prior to the promulgation of the Nuremberg Charter, Robert H Jackson, the Chief Prosecutor for United States, had previously expressed in a report to the US President, 'that a soldier in a firing-squad is entitled to impunity'.[484] Jackson expressed a similar sentiment in his opening speech when he hinted that the effect of the Charter in relation to the obedience of superior orders did *not* operate to completely disregard the presence of superior orders. He said,

> Of course, we do not argue that the circumstances under which one commits an act should be disregarded in judging its legal effect. A conscripted private on a firing squad cannot expect to

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[481] UNWCC History, 280.
[482] Charter of the International Military Tribunal (Nuremberg), 8 August 1945, art 8.
[483] Mark J Osiel, Obeying Orders: Atrocity, Military Discipline & the Law of War (Transaction Publishers, 2002) 42–3.
[484] Dinstein (n 87) 126–7.

> hold an inquest on the validity of the execution. The Charter implies common sense limits to liability just as it places common sense limits upon impunity.[485]

The implication of Jackson's statement was that under certain circumstances 'common sense' would dictate that an accused who acted under the obedience of superior orders could escape criminal liability. This sentiment was not accepted by other senior Allied prosecution figures in the trials and Jackson himself seemed to depart from his earlier remarks in his closing speech when he dismissed the applicability of superior orders on the basis that, despite Hitler being the 'chief villain', those below him were not acting completely under superior orders, but were in positions themselves to control the information on which Hitler based many of his policies and orders. As Jackson pointed out, Hitler was 'always in their hands'.[486]

Other senior Allied prosecution figures were more equivocal in their disregard for the obedience to superior orders. For instance, Sir Hartley Shawcross, chief prosecutor for the United Kingdom, made it very clear in his closing address that there was no rule under international law that provided immunity for those who obey orders which are 'manifestly contrary to the very law of nature from which international law has grown'.[487] Similarly, the French chief prosecutor, M De Menthon followed suit when he stated that 'orders from a superior do not exonerate the agent of a manifest crime from responsibility'.[488] A very similar sentiment was expressed by the Soviet chief prosecutor, General Rudenko, when he said that the authors of the Charter were very aware that many defendants 'would hide behind Hitler's orders' and this was the reason the Allies specifically included in the Charter a 'special proviso to the effect that the execution of an obviously criminal order does not exonerate one from criminal responsibility'.[489] Dinstein asserts that such sentiments were a reflection of the manifest illegality principle.[490]

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[485] Robert H Jackson, International Military Tribunal ('Nuremberg Trial') vol 2, 150–1.

[486] Robert H Jackson, *Nuremberg Trial*, vol 19, 430.

[487] Hartley Shawcross, *Nuremberg Trial*, vol 19, 465–6. Shawcross did, however, reiterate the principle that the accused could raise obedience to superior orders to mitigate the sentence when he stated at page 465, 'Article 8 provides that it may in appropriate cases be considered in mitigation of punishment, if the Tribunal thinks that justice so requires.' However, on the point of mitigation, Shawcross spoke of the futility of mitigation in the face of mass killing and destruction. He said, 'some may be are more guilty than others; some played a more direct and active part than others in these frightful crimes. But when those crimes are such as you have to deal with here—slavery, mass murder and world war, when the consequences of the crimes are the deaths of over 20 million of our fellow men, the devastation of a continent, the spread of untold tragedy and suffering throughout the world—what mitigation is it that some took less part than others, that some were principals and others mere accessories. What matters it if some forfeited their lives only a thousand times whilst others deserved a million deaths?' (Shawcross, *Nuremberg Trial*, vol 19, 528).

[488] M De Menthon, *Nuremberg Trial*, vol 5, 418.

[489] General Rudenko, *Nuremberg Trial*, vol 19, 577.

[490] Dinstein (n 87) 128.

VII. Superior Orders and the International Military Tribunal for the Far East

By the time superior orders started being claimed by the defence at the IMTFE, the legal status of the doctrine of superior orders appeared relatively settled. Consequently, although superior orders was raised on several occasions throughout the trial, it was clear the Tribunal had little time for the plea as an excuse to criminal responsibility.

An enduring problem that most of the accused experienced in raising the plea of superior orders, was the fact there were very few (if any) superiors above them whom they could attribute responsibility.[491] Most of the accused had attained the highest positions within the government and military which made it extremely difficult to attribute responsibility to superiors. As Boister and Cryer correctly point out, if the accused wished to raise the plea of superior orders then it would have been made in relation to the Emperor[492]—no doubt something that would not have been seriously contemplated, even though they were on trial for their lives.

In any event, Article 6 of the IMTFE Charter was drafted in such a way that it removed the possibility of raising the defence of superior orders, so any hope of attributing responsibility to a superior was unlikely. In relation to the 'responsibility of the accused', Article 6 stated,

> Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.[493]

Article 6 was drafted in much the same way as Article 8 of the Nuremberg Charter, however, some have criticised its narrow application.[494] Boister and Cryer cite, and appear to agree with, Dinstein's argument, that the Tokyo Charter provided a greater degree of flexibility than did the Nuremberg Charter, because the wording of the latter expressly stated that 'orders "shall not free … [a defendant] … from responsibility"'.[495] The Tokyo Charter did not contain these words and, arguably, could allow an accused to escape criminal liability altogether by raising a defence of superior orders. Given that the decisions from Nuremberg did not allow the obedience to superior orders as a factor to escape criminal responsibility, it is hardly surprising that the Tokyo Tribunal followed suit.

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[491] Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press, 2008) 237.
[492] Ibid.
[493] International Military Tribunal for the Far East Charter (IMTFE Charter), 19 January 1946, art 6.
[494] Boister and Cryer (n 491) 236–8. See also Dinstein (n 87) 156–9.
[495] Ibid 236.

Whatever flexibility was available to the Tribunal in this regard was neither recognised nor accepted by those who sat on the Tribunal and consequently, the plea of superior orders at the Tokyo trials was, similarly to the Nuremberg trials, disallowed.

CHAPTER 6:
SUPERIOR ORDERS AND THE US ARMY TRIALS, MANILA

I. Introduction

Notably absent from much of the literature dealing with superior orders is scholarship relating to the Asia–Pacific trials of Japanese war criminals that were conducted in the aftermath of the Pacific War.[496] As Solis points out, given that the defence of superior orders was raised repeatedly throughout the war crimes trials in the Asia–Pacific, it is curious that so little has been written on the topic.[497] Had scholars delved more deeply into the US trial records, there would undoubtedly be some remarkable insights into the jurisprudence regarding the plea of superior orders. The aim of this chapter is to fill this void by providing a window into the US trials conducted in Manila.

How US tribunals were to deal with the issue of superior orders if it was raised as a defence was addressed by the Supreme Commander for the Allies in the Pacific ('SCAP') by way of regulations introduced on 5 December 1945.[498] Although SCAP's directions as to how tribunals should approach the superior orders plea seemed clear enough, the directions seemed to be at odds with various other legal interpretations that existed at the time. As Robert L Ward pointed out in 1946, there was strong legal argument to suggest the jurisprudence of superior orders, as understood at the time, was in fact good law for a complete defence to criminal responsibility under certain conditions.[499]

As evidenced by the various legal interpretations prior to WWII, the plea might have been applied as a complete defence and not, as SCAP determined later, a factor in mitigating the sentence. Had SCAP not intervened by adopting such a stern position, the present understanding of superior orders may have been different.

If one single pattern emerged from the cases surveyed in this thesis, it would be that superior orders was generally less accepted in mitigation in those trials in which the victims were US

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[496] See Chapter 1 of this thesis for a comprehensive review of the literature relating to superior orders. Unless indicated otherwise, all archival sources used as part of this chapter were obtained by the author from the National Archive and Record Administration (NARA) at College Park, Maryland, USA.

[497] Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd edition, Cambridge University Press, 2016) 374.

[498] 'Letter Order of 5 December 1945, as amended 27 December 1946, Paragraph 5d(6) (redesignated paragraph 5d(4)' located in RG331, SCAP Legal Section, Law Division, Decimal File 1945–1951, 000.5 to 004 E, Box 1414.

[499] Report of Robert Jackson, *Trial of War Criminals*, Department of State Publication 2420, Subsection III, paragraph 2, as cited in a letter by Robert L Ward 'Questions of Law – Superior Orders', unsigned, RG331, SCAP Legal Section, Law Division, Decimal File 1945–1951, 000.5 to 004 E, Box 1414, page 32.

military personnel, as opposed to Filipino civilians. However, this was not always the case and, as shown in the trials of 2nd Lieutenant Otsuka, First Lieutenant Toyota and the joint trials of 1st Class Petty Officer Hayashi and 2nd Class Petty Officer Tanaka, for example, the plea of superior orders was accepted where clear evidence showed that the accused either: unwillingly participated in the unlawful killing; derived no pleasure from performing the unlawful orders; or it was clear that the orders to kill came from senior officers and were not *prima facie* unlawful.

In other cases, the plea of superior orders was successful in a number of clemency cases which commuted the death penalty to a sentence of incarceration, as was the case in the trial of Petty Officer Suguwara Isaburo in which it was accepted that the accused, *inter alia*: acted under obedience to superior officers; had little contact with the victims prior to the execution; had no command discretion; had no knowledge of the rules of war; and had no ill will towards the victims.[500]

These cases were, however, the exception rather than the norm. More often than not, tribunals were reluctant to accept the plea of superior orders even in mitigation of sentence. A common example of this was if the accused was a member of the Kenpeitai and/ or was alleged to have committed acts of cruelty against prisoners of war, as in the case of Warrant Officer Shin Fusataro of the Kenpeitai.

With reference to relevant cases and other sources that touched on the issue of superior orders in the Philippine trials, this chapter provides a portal into the way various trials tackled difficult questions that arose when an accused sought to use superior orders as a defence to charges of war crimes. The primary question this seeks to answer is, how did the US trials in the Philippines grapple with the ethical dilemma associated with maintaining a fair trial on the one hand, while ensuring those who were responsible for committing cruel and inhumane acts against US servicemen and Philippine civilians were adequately punished?

II. SCAP's Interpretation of Superior Orders

Not long after the US commenced the trials in the Philippines, it became clear the prosecution was extremely reluctant to accept the validity of the plea of superior orders at international law.[501] However, ruling the plea was invalid was not as straightforward as the prosecution

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[500] See, eg, *The Trial of Suguwara Isaburo*, RG331 UD1321 290/12/12/1. Suguwara's case is an example where the plea of superior orders was accepted upon an application for review of the original trial decision that sentenced the accused to death for his seemingly hapless role in the execution of US POWs. Although Suguwara carried out the execution, and was duly sentenced to death for this act, the reviewing authority overturned the decision on the basis that the accused did not display the requisite *mens rea*.

[501] See, eg, RG331 UD1321 290/12/12/1 – Shin Fusataro, Box 1566 Vol I–III; Nanjo Masao, Box

perhaps would have liked and it was clear the issue was troubling senior US prosecutors in the lead-up to the trials. In response to this, in December 1945, General Douglas MacArthur introduced an amendment into the US Field Manual that had the effect of altering the availability and effect of the defence of superior orders. SCAP amended the US Field Manual by inserting Paragraph 5d(6) that stated:

> The official position of the accused shall not absolve him from responsibility, nor be considered in mitigation of punishment. Further, action pursuant to order of the accused's superior, or of his government, shall not constitute a defense, but may be considered in mitigation of punishment if the commission determines that justice so requires.[502]

In one series of exchanges between November 1946 and January 1947 involving the Chief of the SCAP Legal Section, Colonel Alva Carpenter, and US Defense Counsel, Robert L Ward, the matter was finally referred to General Douglas MacArthur's office for clarification.[503]

Prior to that, Defense Counsel Ward, by way of a Motion during the trial of an accused Japanese war criminal, Nanjo Masao, whom he was defending,[504] submitted that the plea of superior orders was good law and, therefore, should be a complete defence at international law. This was contrary to the views of the US Legal Section which took the line that superior orders could only mitigate the sentence and have no effect on criminal responsibility.[505] Ward nonetheless cited a range of sources as authority for his argument. According to Ward, that argument was premised on strong legal grounds, such as: the US Rules of Land Warfare Basic Field Manual (FM27-10, paragraph 345.1); the writings of reputable publicists Oppenheim and Wheaton; a report by Robert Jackson to the US President; a statement by President Roosevelt; and several leading cases that upheld the view that obedience to superior orders constituted a defense under both US and international law.[506] Several of these authorities are worthy of closer consideration to assess the strength of his argument.

1573; Onishi Seichi, Box 1570 Vol I–VII; Toyota Chiyomi, Box 1567 Vol I–X; Nakamura Takeo et al; also see RG331 UD1322 290/12/19/01, Box 1674; Obara Yoshio, RG125 A1-3 290/C/68/5 Box 1.

[502] 'Motion – Superior Orders' from Counsel for the Defence (Robert L Ward) RG331, folder 13 'Superior Orders', page 1.

[503] For documents relating to the Defense and Prosecution's substantive legal arguments regarding superior orders as it related to the trial of Nanjo Masao, see RG331, SCAP Legal Section, Law Division, Decimal File 1945–1951, 000.5 to 004 E, Box 1414. For correspondence to General Douglas McArthur, see memorandum dated 19 January 1946 titled "The Defense of Superior Orders in War Crimes Trials" and subsequent letter dated 2 December 1946 from Robert L Ward, Defense Counsel seeking an "order for retrial for *US v Masao Nanjo*", each located in folder 7.

[504] See the trial of *Nanjo Masao,* RG331 UD1321 290/12/12/1 Box1573.

[505] 'Questions of Law – Superior Orders', unsigned, RG331, SCAP Legal Section, Law Division, Decimal File 1945–1951, 000.5 to 004 E, Box 1414, pages 32–3.

[506] Ibid 32.

A. *US Basic Field Manual 27-10 'Rules of Law Warfare' paragraph 345.1*

Ward cited the Basic Field Manual 27-10 of the US War Department entitled, Rules of Land Warfare (RLW) as amended 1 November 1944. According to Ward, the RLW made it 'mandatory that superior orders be considered a complete defense'.[507] Paragraph 345.1 of the RLW stated:

> Individuals and organizations who violate the accepted laws and customs of war may be punished therefore. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished.[508]

Ward asserted that SCAP's rule 'governing the trial of war criminals' dated 5 December 1945 contradicted superior orders as contained in FM27-10 paragraph 345.1. By way of objection, Ward challenged SCAP's assertion in the 5 December regulations that orders of an accused's superior, or of his government 'shall not constitute a defense, but may be considered in mitigation in punishment'.[509] Ward contended that this position was illegal and contrary to the laws and customs of war and asserted that the correct position, at law, to the obedience of superior orders was,

> a defence unless the accused knew the order to be illegal, or, if the order was in fact unlawful, he had reasonable grounds to believe that it violated the laws and customs of war, or the principles of criminal law generally prevailing in civilized nations.[510]

According to Ward, there could be little doubt that he was on strong legal grounds in relation to the existence of superior orders at US military law and at international law. In support of his position, he offered several case authorities and the published works of international scholars.[511] Although few details were given of the cases and other published works that

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[507] Ibid.

[508] FM27-10 Rules of Land Warfare, paragraph 345.1, US War Department, 1 November 1944 < https://archive.org/stream/Fm27-10-nsia/Fm27-10_djvu.txt>.

[509] 'Questions of Law – Superior Orders', unsigned, RG331, SCAP Legal Section, Law Division, Decimal File 1945–1951, 000.5 to 004 E, Box 1414, pages 32–3. Paragraph 5d(6) of the SCAP rule (5 December 1945) stated:
The official position of the accused shall not absolve him from responsibility, nor be considered in mitigation of punishment. Further, action pursuant to order of the accused's superior, or of his government, shall not constitute a defense, but may be considered in mitigation of punishment if the commission determines that justice so requires.

[510] 'Questions of Law – Superior Orders', unsigned, RG331, SCAP Legal Section, Law Division, Decimal File 1945–1951, 000.5 to 004 E, Box 1414, pages 32–3.

[511] *Regina v Smith* – Ward asserts that this authority is the 'leading English case'; and 'Summation by the Russian Prosecutor in the Kharkov Trials, December, 1943'. As further authority, Ward cites several leading publicists, 'Winthrop, Military Law and Precedents, pages 296–297', 'Oppenheim, International Law, page 453' located in RG331, SCAP Legal Section, Law Division, Decimal File 1945–1951, 000.5 to 004 E, Box 1414.

allegedly supported superior orders as a complete defence 'or' mitigation of sentence, the fact that the Legal Section continued to deny the existence of the defence is perhaps telling about the way legal questions such as these were addressed throughout the trials. Some might even reach the conclusion that the prosecution were operating so as to appear wilfully blind to the existence of legal authority that would have required them to consider the extent of criminal responsibility of an accused.

For its part, the Legal Section disregarded Ward's legal interpretation and reiterated that its position in relation to the status of superior orders was in accordance with the regulation of 5 December 1946 promulgated by General Douglas MacArthur. Internally, however, the Legal Section was far from satisfied in regard to the legality of its position in light of the clear and unambiguous language expressed in FM27-10, paragraph 345.1. That confusion was borne out in an internal memo dated 19 December 1946 from J Bassin of the Law Division to Colonel Carpenter of SCAP Legal. Bassin shared with Carpenter an extraordinary admission in regard to the possible error of SCAP's rule with respect to the plea of superior orders.[512] Bassin clearly declared in the memo that,

> my problem at the time was to justify the denial of a new trial to Ward's client, as well as justify to you the recommendation of the present rules to conform with paragraph 345.1. This I have not been able to do to my satisfaction. [It] is true that paragraph 345.1 can be interpreted to mean that the War Department instructed MacArthur to provide both the defense of superior orders and to provide that it be considered a mitigation of punishment.[513]

Bassin went on to state that, '[i]n brief, this is my problem; How can we recommend that Ward's client not be given a new trial … and still recommend that paragraph 345.1 be adopted in to the rules'.[514] The admission that SCAP's rule of 5 December 1946 contradicted FM27-10 was prejudicial against any accused who raised superior orders as a defence to war crimes. Bassin was clearly troubled by this unfortunate legal dilemma—not so much it seems for reasons of injustice against an accused, but because of the possible embarrassment for the Legal Section and SCAP if word got out amongst defence teams that incorrect law had applied throughout the US trials. By this time, the US and Allied trials were well underway and an admission by the US in relation to the wrongful denial of a defence could lead to an inordinate number of retrials, and potentially completely alter the direction of the entire US and Allied proceedings. The ramifications of such an outcome would be unthinkable, particularly since quite a number of convicted minor Japanese war criminals had already been executed by late 1946.

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[512] 'Memorandum For Colonel Carpenter, Comments on Memo – Superior Orders', 21 December 1946, located in RG331, SCAP Legal Section, Law Division, Decimal File 1945–1951, 000.5 to 004 E, Box 1414.
[513] Ibid 1.
[514] Ibid 2.

The sensitivity regarding the quandary in which the Legal Section found itself was no small matter. Potentially, the wrongful denial of the existence of superior orders at such a pivotal juncture in the formation of international law could have had lasting consequences for the validity of the trials in terms of their legitimacy. This dilemma was not lost on Bassin which is no doubt why he opted to appraise his superior in the first instance rather than burden General MacArthur with such a dilemma. Bassin, not surprisingly, handed the unenviable responsibility of informing MacArthur of the issue to Carpenter when he concluded his memo by stating:

> I have not incorporated these views of mine in the memorandum to MacArthur, although we may attach them as your memo for the record, in proper form if you so desire, and submit them as an annex to the memorandum for the C. in C.[515]

Noting the importance of the legal advice he received from Bassin, Carpenter in his memo to MacArthur devised a solution to SCAP's seemingly embarrassing problem that could be both an acknowledgement of the legitimacy of the plea of superior orders, but also a clarification of the legal effect for an accused who successfully raised the plea. Carpenter provided MacArthur with a logical compromise when he advised a course of action that acknowledged superior orders as a valid defence but, at the same time, would not absolve the accused from complete criminal responsibility. With reference to a variety of legal authority and his own interpretation of FM27-10, Carpenter advised MacArthur that the effect of a successful plea of superior orders should do no more than mitigate the sentence, thereby providing the legal basis of the Legal Section's original position.[516]

The main thrust of Carpenter's argument appears to be based on the question as to whether superior orders, as covered in paragraph 345.1 of FM27-10 were 'mandatory or discretionary'.[517] In other words, he questioned whether the wording of FM27-10 made it mandatory for US tribunals to consider and accept a plea of superior orders or whether they had the discretion to do so where evidence was clear that the accused was acting in obedience to superior orders. Carpenter framed the issue with reference to the position of the 'common law' of wars and customs of war.[518] Specifically, he made an assessment as to whether under the 'common law' an 'accused war criminal is entitled to the defense of superior orders as a matter of 'inherent right'. Accordingly, Carpenter went on to say,

> if the defense is not inherent, then FM27-10, paragraph 345.1 is not mandatory, and its alternative provision that a superior order may be considered as a mitigating circumstance is valid, and superior orders as a defense need not be accorded an accused.[519]

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[515] Ibid.
[516] 'Memorandum to Supreme Commander for the Allied Powers, From Chief, Legal Section, The Defense of Superior Orders in War Crimes Trials', 19 December 1946, located in RG331, SCAP Legal Section, Law Division, Decimal File 1945–1951, 000.5 to 004 E, Box 1414.
[517] Ibid 2.
[518] Ibid.
[519] Ibid.

Conveniently, Carpenter answered the question by asserting that any recourse to the defence of superior orders was purely discretionary and thereby removed the potential for any embarrassing acknowledgment of errors in relation to the misinterpretation of law. Carpenter did acknowledge that several leading authorities[520] 'are essentially in favor of the plea of superior orders', however, the 'Anglo-Saxon doctrine and practice are opposed to the excusing of war crimes on the plea of superior orders'.[521] Carpenter concluded his advice to MacArthur by stating that,

> the entire question of 'defense of superior orders' is one which is not definitely settled, not clearly crystallized, and dependent upon the circumstances, the facts, and the times. The international law on the subject compels one to conclude that the 'defense of superior orders' is not inherent in the rights of an accused war criminal, nor has it been universally accepted by the civilized countries as providing complete immunity.[522]

According to Colonel Carpenter, the decision whether the plea of superior orders was available to US commissions was 'a matter of policy and views' and since FM27-10 paragraph 345.1 is discretionary, it was for General MacArthur to decide whether to accept superior orders as a defence or in mitigation of punishment.[523]

Despite the prosecution's assertions that superior orders was not a complete defence at international law, Ward swiftly sought to refute their position.[524] He questioned, on jurisdictional grounds, General MacArthur's authority to make regulations regarding superior orders that, *prima facie*, contradicted FM27-10 paragraph 345.1. He argued that since US FM27-10 was sanctioned and approved by the Chief of Staff and the Secretary of War, whose authority was above that of General MacArthur, any directive promulgated by General MacArthur would be subordinate to the Chief of Staff, US Army. In the event a direction of law, promulgated by General MacArthur, expressly or impliedly, conflicted with any directive given by the Chief of Staff, MacArthur's directive would be void due to jurisdictional error because it was *ultra vires* to the original enactment.

On a further point of jurisdictional error, Ward boldly questioned General MacArthur's authority to make regulations. Ward contended that General MacArthur's position as the

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[520] Carpenter cites the following: *British Manual of Military Law* (1914) No. 443; *US War Department Rules of Land Warfare* (1940); and Oppenheim's *International Law* (1935, Vol. II, p. 453).

[521] Ibid 6.

[522] Ibid 7.

[523] Ibid.

[524] 'Letter Order of 5 December 1945, as amended 27 December 1946, Paragraph 5d(6) (redesignated paragraph 5d(4)' located in RG331, SCAP Legal Section, Law Division, Decimal File 1945–1951, 000.5 to 004 E, Box 1414. In a reply letter to Ward from the prosecution, dated 13 January 1946, contained in the same file, the prosecution dismissed Ward's arguments by stating *inter alia* that 'superior orders is not inherent to the rights of an accused war criminal, and … a superior order may be considered in mitigation of punishment…'.

Supreme Commander for the Allied Powers in the Pacific was administrative in nature rather than legislative and as such, MacArthur did not have the power to 'alter or disregard established rules and customs of war, which are part of international law'.[525] Such bold assertions in relation to the apparent contradiction between MacArthur's regulation of 5 December and FM27-10 gained little traction in view of the legal interpretation offered by Colonel Carpenter. Defence Attorney Robert Ward then offered further argument to substantiate his assertions that the defence of superior orders was valid at international law. This argument centred on a report by Robert H Jackson to President Roosevelt that seemed to imply that it was superior officers who should bear the brunt of criminal responsibility for acts committed by subordinates who were acting under orders.

B. *Report of Robert H Jackson – 'Trial of War Criminals'*

In his ongoing argument with the Legal Section, Ward cited a report by Robert Jackson who at the time was the US Chief Prosecutor at the Nuremberg trials.[526] Jackson's report was commissioned by President Roosevelt and released on 7 June 1945. If the literal interpretation of Jackson's report is to be accepted, then, prior to the conclusion of the Pacific War, superior orders was intended to be a defence under certain circumstances. Paragraph 2 of Jackson's report states:

> There is doubtless a sphere in which the defense of obedience to superior orders should prevail. If a conscripted or enlisted soldier is put on a firing squad, he should not be held responsible for the validity of the sentence he carries out. But the case may be greatly altered where one has discretion because of the rank or the latitude of his orders.[527]

Ward highlights three points from this excerpt from Jackson's report that may provide evidence that at the time of the commencement of the Nuremberg trials, the US prosecution believed that there was, at least in part, legal validity in relation to the plea of superior orders. The first part of Jackson's assertion relates to an explicit acknowledgement that Jackson himself believed that the defence of superior orders was indeed available to an accused. The second point relates to a specific circumstance—but with the obvious intention of general application—in which a person should escape liability if he had no part in forming an unlawful sentence other than his part in carrying it out. The third point in relation to Jackson's seemingly favourable position in regard to the plea of superior orders, relates to the lack of discretion afforded to a person due to his 'rank or the latitude of his orders'.[528] By this, Jackson appears to allude to the lack of discretion afforded to military personnel in relation to orders,

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[525] Ibid.

[526] Report of Robert Jackson, *Trial of War Criminals*, Department of State Publication 2420, Subsection III, paragraph 2, as cited in letter by Robert L Ward 'Questions of Law – Superior Orders', unsigned, RG331, SCAP Legal Section, Law Division, Decimal File 1945–1951, 000.5 to 004 E, Box 1414, page 32.

[527] Ibid.

[528] Ibid.

particularly pertinent to those who are junior in rank and who would have little, if any, 'discretion' or 'latitude' as to whether or not to lawfully disobey orders they suspected were unlawful.

Why the US and Allied position hardened against accepting the defence of superior orders to relieve criminal responsibility is hardly surprising given the unpalatable prospect of Japanese soldiers escaping liability for their part in committing cruel and inhumane acts against US soldiers and civilians merely because they could prove they were following superior orders. Such an outcome was no doubt politically untenable and would attract the ire of a war-weary US population if these perpetrators were able to escape punishment.

How then, did the US trials in the Philippines approach the underlying dilemma associated with possible injustices that might result from punishing a junior-ranking soldier who was clearly following the orders of his superior, against a basal, psychological need to punish those who committed acts against US service personnel and Philippine civilians? What is clear from many of the cases is that those trials where the tribunals were forced to examine the possibility of superior orders playing a real part in the commission of the offence, pleas of superior orders were met with varying degrees of apprehension and confusion on the part of the defence and prosecution teams. The apparent trend in most trials where superior orders were raised was to disallow the plea as a defence and, in circumstances where the evidence of orders were clear and those orders were not manifestly illegal, to take into account those orders as a plea in mitigation in sentencing. However, the application of superior orders was far from uniform and, as the following section highlights, inconsistencies emerged with the application of superior orders.

III. The Application of Superior Orders at the US Philippine Trials

The following section examines a number of cases in which superior orders was raised by the accused as part of their defence. In doing so, it provides an overview of the types of circumstances where the plea arose in the US war crimes trials in the Philippines and goes some way to articulate a general theory on how the plea was applied throughout those trials.

Cases in this section were selected using a range of criteria. An important—but not sole—criterion for selecting a case for inclusion was a requirement that there be some express reference in the case documents to the plea of superior orders. Once this hurdle was met, and there was clear evidence the case was connected to the plea of superior orders, other criteria were applied to narrow the plethora of cases to be used for detailed examination.[529] To examine

[529] The plea of superior orders was raised repeatedly throughout the US trials. As such, the volume of cases generated from the US trials alone would require time and resources beyond the scope permissible for this project. The cases selected as part of this discussion are predominantly limited to trials conducted by the US army in the Philippines—although some cases have been included from

a broad cross section of the cases that went before US military tribunals, those that appeared to be representative of various types of classes of cases that emerged during the research were selected. For instance, it quickly became apparent there were commonalities in the circumstances of the accused. The groups that were evident included, for example, cases involving junior to mid-level ranking POW camp commanders. A number of cases involving camp commanders as well as junior ranking personnel in those camps were examined to determine how the tribunals assessed the validity of the defence of superior orders when US and Allied prisoners of war were killed while being held captive.

A. *Trial of 2nd Lieutenant Otsuka Noriyuki, Imperial Japanese Army, Manila, 6 July 1946*

The trial and subsequent review of the conviction for Second Lieutenant Otsuka Noriyuki[530] was typical of the trials involving the plea of superior orders in the US Army trials in the sense that little regard was given to the defence of superior orders despite there being reasonable evidence that a subordinate was acting on the direct orders of an immediate superior.

Offences involved mass murder of, and brutality against, non-combatants

Otsuka was convicted and sentenced to death by a US Military Commission in the Philippines for his part in the unlawful killing, torture, and mistreatment of several hundred Filipino civilians on various islands in the Philippines during 1943.[531] The trial occurred at the High Commissioner's Residence in Manila from 1–6 July 1946. A review of the trial was handed down by Colonel Franklin P Shaw, Judge Advocate General on 17 February 1947. Specifications of criminal conduct 1–6 were based on activities that occurred during the Sara-Ajuy expedition and further charges 9–13 were laid in relation to his conduct during Japan's infamous Bataan expedition. The charges covered various acts that Otsuka was later found to have committed whilst passing through numerous towns in the Iloilo Province of Panay.[532] Such acts included the rounding up of non-combatants (including men, women and children) for the purpose of ascertaining the whereabouts and activities of guerrillas in the area. On written and oral testimony, the tribunal concluded that many of these non-combatants were later executed without trial or any evidence that they were involved in guerrilla activities. Eyewitness testimony indicated that the number of deaths was well in excess of 200. Although

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the US Navy and the Military trials conducted at Yokohama, Japan. Cases considered as part of this discussion are taken from the following sources: RG331 UD1321 290/12/12/1 Box 1566 VOl I–III; RG331 UD1321 290/12/12/1 Box 1567 Vol I–X; RG331 UD290/12/12/1 Box 1570; RG331 UD1321 290/12/12/1 Box1573; RG331 290/12/2/2 Box 1389 Folder 5(2); RG331 UD1227 290/11/27/5 Boxes 1230–1232;

[530] RG 331, 290/12/12/1, Box 1570 Vol I–VII.

[531] Ibid.

[532] Ibid [2]. See GHQ Far East Command Office of the Judge Advocate, Otsuka Noriyuki Review of the Record of Trial by a Military Commission of Second Lieutenant Noriyuki Otasuka 51J-150382 IJA.

it was unspecified, the prosecution alleged—with little dispute by the accused—that Otsuka personally took an active part in the killings, mostly by beheading his victims via a 'samurai sword'.[533]

Eyewitness testimony and personal admissions made by Otsuka placed him firmly at the scenes of the civilian massacres for which he was charged. This part of the case was uncontroversial and the accused and his defence team did not contest evidence in relation to the number of civilians killed or the methods used in the killings. What was contested, however, were the circumstances that lead to the accused's conduct in relation to the killings. As pointed out by his US defence counsel, Otsuka claimed he was operating under the direct command of Captain Watanabe who accompanied Otsuka's expeditionary force. The defence also contended that Captain Watanabe was following a direction from Colonel Tozuka to 'destroy everything – inhabitants, food, animals and buildings'.[534] The thrust of Otsuka's defence was predicated on the basis that he and his subordinates were following orders from their immediate and higher authorities.

Defence's argument – Compulsion of Japanese Law to Obey Superior Orders

There were three main points to Otsuka's defence. The first argument was that he and his troops did not kill anyone on their own initiative, as they believed they were acting under direct orders at all times from Captain Watanabe who was most likely acting under the orders of Colonel Tozuka. Otsuka's second argument focused on the fact that under Japanese military law, company commanders in the field had lawful authority to carry out executions; and thirdly, failure to adhere to or refusal to obey superior orders (including those of Captain Watanabe) would result in the court-martial and execution of anyone who disobeyed a superior order.[535]

On review, Colonel Shaw considered the evidence of Otsuka's part in the killings and rejected clemency. He upheld the Military Commission's finding that Otsuka was a direct 'participant

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[533] Ibid [2].

[534] Ibid [3]. In an unrelated trial, Tozuka contradicted any assertion that his orders involved the killing and torture of non-combatants. Colonel Tozuka testified at the trial of one of his junior officers in separate proceedings that his orders were that 'armed bandits be systematically taken care of, but that civilians must not be injured, and that in examining suspects, threatening words were permitted but no torture was allowed'. See Exhibit R 353, 358 GHQ Far East Command Office of the Judge Advocate, Otsuka Noriyuki Review of the Record of Trial by a Military Commission of Second Lieutenant Noriyuki Otasuka 51J-150382 IJA [3]. For the trial of Colonel Tozuka Ryoichi, see US v Japanese War Criminal Case Files RG331, UD1321 290/12/12/1, Box 1565 Vol I–III.

[535] Otsuka asserted that he often pleaded with Watanabe to spare women and children, but the success of his pleadings would often depend on whether Watanabe was 'in good humor'. In a strange, but obscene way, Otsuka alleged as part of his defence, that he did not kill children because they 'cannot be cut by a sword because their neck is too short' – see GHQ Far East Command Office of the Judge Advocate, Otsuka Noriyuki Review of the Record of Trial by a Military Commission of Second Lieutenant Noriyuki Otasuka 51J-150382 IJA [3].
R 325-328.

in the repeated brutal mistreatment and mass execution without trial of numerous, helpless prisoners'.[536] Regarding the defence of superior orders, he stated that the defence had failed to present sufficient evidence of the defence of superior orders. Colonel Shaw made a point of stating that the only reason Otsuka raised superior orders was due to his 'fear of the consequences to him of disobedience of those orders'.[537] Shaw made it perfectly clear that Otsuka's conduct was 'fully approved by his superiors'; however, he doubted whether Otsuka's actions on all occasions were limited to those specifically directed by his superiors. The implication was that Otsuka was a willing participant in the killings and went beyond what was actually ordered.

Importantly for the outcome of the case, Colonel Shaw went on to state that the defence counsel had failed to establish the 'requisite circumstances constituting a defense, either under the rules governing such cases as this, or under international law as understood prior to the promulgation of such rules'.[538]

Is the Defence of Superior Orders a Valid Defence?

The rules to which Shaw referred were those contained in MacArthur's regulation of 5 December 1945. Shaw indicated that superior orders may well have constituted a defence had there been sufficient evidence. That Shaw would make such a statement implying that superior orders could well have been a defence under the right conditions is curious given SCAP's clear position that superior orders was not a defence, but was to be used only to mitigate the sentence.

In relation to the defence counsel's assertion regarding the applicability of the death penalty for disobeying an unlawful order, Colonel Shaw examined an extract from the Military Laws of Japan. He reached the same conclusion as the Military Commission which was that the death penalty for disobeying an order, in the context of the accused, was contrary to Japanese military law. According to Chapter 4, Article 57 of the Military Laws of Japan:

> Anyone who objects to and disobeys orders of superiors is to be punished as follows:
>
> (1) In cases before an enemy – he shall be punished by death or imprisonment for life or over ten years.
>
> (2) In cases of military operations or in territories under martial rule – he shall be punished by an imprisonment between one and seven years.
>
> (3) In cases of other circumstances – he shall be punished by an imprisonment of less than two years.[539]

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[536] GHQ Far East Command Office of the Judge Advocate, Otsuka Noriyuki Review of the Record of Trial by a Military Commission of Second Lieutenant Noriyuki Otasuka 51J-150382 IJA [3].
[537] Ibid.
[538] Ibid.
[539] Ibid [4].

Colonel Shaw stated that 'the assertions of the accused as to his liability to the death penalty for willful [sic] disobedience are … without merit'.[540] From what he and the original military commission could ascertain from Japanese military law, the maximum penalty to which Otsuka would have been liable for disobeying orders for killing non-combatants under Japanese military law were contained in paragraph (2) or possibly (3), which would be a penalty between one to seven years imprisonment, but not death. The fact that Shaw did not consider that paragraph (1) was applicable presumably due to the fact that the orders were not related to 'an enemy' but were made in relation to non-combatants.

Shaw did not believe that any defence of superior orders would be available to mitigate the original death sentence even if Otsuka was acting under orders. The reason was seemingly that he believed that Otsuka could and should have disobeyed any unlawful order given to him. However, the reality of disobeying orders from a superior would have been unimaginable to many in the IJA at the time.

B. *Trial of Warrant Officer Shin Fusataro Imperial Japanese Army (Kenpeitai), Manila, 16–18 July 1946 (the 'civilian massacre' case)*

Shin Fusataro was a warrant officer in the Kenpeitai. The crimes with which he was charged were indicative of the cruelty meted out by the Imperial Japanese Army as it swept across the Philippine islands.[541] This trial, like many others, represents a chapter in Japanese history where eyewitness testimony revealed the sorts of acts that Japanese troops perpetrated against unarmed non-combatants during this tumultuous period.[542] As tragic as the case is for the innocent victims of Japanese military expansionism, Shin's case, and others like it, sheds some light on the way the US tribunals dealt with the plea of superior orders when the plea was raised in the context of civilian massacres committed by members of the Kenpeitai. That is, there seemed to be an unwillingness on the part of military commission to accept the plea where the accused was Kenpeitai, which illustrates an inconsistent application of the doctrine in places.

The outcome of the Law was Contingent on the Nature of the Accused and the Victim – emergence of subjective bias due to the status of the defendant

The Commission did not look favourably on the plea of superior orders in Shin's case. The question arising from this case was whether the decision to disregard the plea of superior orders

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[540] Ibid.

[541] Unless indicated otherwise, archival material in relation to the trial and review of Shin Fusataro is located in RG331 UD1321 290/12/12/1 Box 1566 Vol I–III, folder 82.

[542] I note that the Japanese are in no way the sole perpetrators of cruel treatment meted out to non-combatants during times of war. Crimes such as those for which Shin Fusataro and many other Japanese military personnel were sentenced, indicates what humanity is capable of in terms of violence and cruelty towards fellow human beings under certain conditions.

was due to the nature of the perpetrator (ie Kenpeitai). The nature of the victim(s), too, is relevant here given that the tribunal was dealing with mass killings of civilian non-combatants.

No Consideration Given to Japanese Broader Policy to Form the Basis of Military Operations – Commission's Attempt to Deny Defence of Superior Orders

The Commission chose to ignore Shin's possible defence of military necessity even though strong evidence existed that the military objective of the Kenpeitai was to deter the actions of guerrilla resistance. This case can be framed in the context that the killings were part of a broader military objective by Japanese forces in the area to suppress an aggressive, and at times extremely effective, guerrilla insurgency against the occupying Japanese forces. One might argue, as indeed the Japanese did, that stopping the guerrilla insurgency was necessary for Japan to achieve its strategic position throughout the Philippines against US and Allied forces.[543] The orders to stop guerrillas and other pockets of resistance could, therefore, be viewed as a broader policy objective coming from much higher up the military chain of command in Tokyo. If the Commission saw Shin's actions as falling within the ambit of superior orders emanating from higher command, then he would have a greater chance of arguing the defence of superior orders. No such consideration of superior orders was entertained, and it is clear the Commission went to significant lengths to deny the operation of superior orders at his trial, even as a means to mitigate the harshness of the sentence.[544]

According to the indictment, Shin Fusataro was charged with numerous offences each involving the unlawful killing of unarmed Filipino non-combatants in various locations throughout the Iloilo province on the Philippine island of Panay.[545] The first specification states that Shin, during September 1943, killed five members of the Yap family at Jimomoa, Iloila in the Philippines without lawful justification. Specifications 2, 3, and 4 each alleged he participated in the killing of approximately 50, 100, and 30 unarmed non-combatants in various locations throughout the same province from August to September 1943.[546] Shin pleaded not

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[543] See discussion on *military necessity* at pp 33–36 above. Military necessity is premised on the notion that in order to advance one's military objective, certain acts that would otherwise be deemed unlawful could be considered necessary so as to bring about a more hasty conclusion to the conflict, which would in turn have other positive results such as reducing the number of casualties and the destruction of civilian and military infrastructure.

[544] See, eg, the *Trial of Suguwara Isaburo* (RG331 UD1321 290/12/12/1) where superior orders was accepted upon a recommendation of the Judge Advocate for clemency which reduced the death sentence to fifteen years imprisonment, on the basis the accused Suguwara was regarded more as a hapless executioner than a willing participant in the unlawful killing of three US fliers.

[545] See *United States of America Vs Fusataro Shin*, Summary of charges, 'Military Commission, Orders No. 1', APO 500, 10 January 1947.

[546] Shin was also charged with unlawfully permitting soldiers under his command to kill eight unarmed non-combatants in various locations throughout Iloilo province. The charges relate to command responsibility and are the subject of discussion in the section that deals with US trials involving command responsibility. On the charge relating to his role in allowing subordinates to carry

guilty to each of the charges. After a trial lasting several days, on 18 July 1946, the tribunal found the accused guilty on all specifications, albeit amending the initial specifications by revising down the number of victims due to lack of evidence.[547] The sentence handed down the same day, was 'death by hanging'.[548]

Throughout the trial, Shin professed his innocence of all charges and maintained that he did not at any time take part in the killings, even stating that on some occasions he was not in the vicinity of where they took place. The facts of the case were strongly contested by the accused and after the trial, while his pending execution loomed ever closer, Shin petitioned the commander of the AFWESPAC—unsuccessfully—for a retrial so that he could 'ascertai[n] the true facts of the case'.[549]

The Strength of the Prosecution's Evidence

After the initial trial, evidentiary aspects of the case were re-examined by the reviewing authority, headed up by Dayton M Harrington, a civilian attorney assigned to assist the Staff Judge Advocate, Colonel Ashton M Haynes JA.[550] The evidence relied upon by the prosecution consisted of testimony from two Filipino eyewitnesses who claimed to have seen Shin at the various scenes of the alleged killings.

In addition to the testimony of eyewitnesses, the prosecution also relied on sections of written testimony taken from a convicted Japanese war criminal, Lieutenant-General Kono Takeshi at Shin's trial.[551] According to details outlined in the review documents, evidence from the Kono trial revealed that Kenpeitai were not in the habit of conducting trials of guerrilla suspects on Panay Island because there was no authority to try them. Instead, the policy of the Japanese Army, according to Kono's testimony, was to transport guerrilla suspects to Manila for interrogation and trial.[552]

The evidence from Kono's trial in relation to the policy of dealing with guerrilla suspects in Manila, rather than in the field, made it clear that Shin's activities were contrary to higher orders that required captives to be afforded a proper trial and not be summarily dealt with in

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out the killings based on command responsibility, he was found not guilty.

[547] Specification 1: guilty of killing four people; Specification 2: guilty of killing 5; Specification 3: guilty of killing 6; Specification 4: guilty of killing 3. See Folder 82, pages 1–2.

[548] Folder 82, 'Pleas, Findings, and Sentence', page 2.

[549] Petition to the Commanding Officer AFWESPAC, from Shin Fusataro WO 517-40895, 3 January 1947.

[550] Review, *United States of America v Fusataro Shin*, Headquarters, United States Army Forces Western Pacific, Office of the Staff Judge Advocate, Manila, 15 November 1946. (Folder 82).

[551] Ibid 3–4.

[552] Ibid 4.

the field. Such a practice seemed to accord with the testimony of eyewitnesses who testified against Shin.[553] The significance of this point was taken as proof of Shin's guilt at trial.

The Testimony of Monito Tubungbanwa and the Yap Family Killings

The prosecution relied upon the testimony of Monito Tubungbanwa, a Filipino resident of Panay Island who was taken prisoner, interrogated by the Kenpeitai, and later made to work as a baggage carrier. Tubungbanwa claimed to have encountered Shin at the Kenpeitai jail at Iloilo city and later to have travelled with him and others on an expedition from Iloilo to various locations during which time the Japanese captured, interrogated, and summarily executed large numbers of Filipino civilians.

On one such encounter, Tubungbanwa testified that he witnessed Shin and his interpreter question five members of the Yap family in Jimomoa. According to Tubungbanwa, the entire Yap family—two parents and three children aged eight to thirteen years of age—were beheaded and their bodies incinerated. Tubungbanwa made the claims that the killings were committed by Shin even though, as it was later revealed under cross examination, Tubungbanwa never actually witnessed Shin killing any members of the family or had direct knowledge that the family members were even executed at that time.[554]

The Testimony of Norberto Padora – Civilian Massacres

Padora, a Filipino resident of Jimomoa on Panay Island, himself captured by the Japanese on 10 September 1943, was forced to take part as a baggage carrier on the same expedition as Tubungbanwa. Once the expedition reached San Rafael and Nueva Invencion, Padora claimed that approximately 50 unarmed civilians were arrested by the Japanese Army and, despite the absence of any trial, were executed the following morning. Padora testified that another person—a Filipino by the name of Concordio—identified Shin as one of the perpetrators of the killings who personally 'severed the heads from the bodies of three men and one woman and stabbed a boy in the abdomen'.[555] Further evidence from Padora placed Shin at Salingan and Maligayligay where approximately 100 unarmed civilians were questioned and later executed without trial.

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[553] Kono's evidence regarding policies in relation to the requirement that suspected guerrillas be sent to Manila could be seen as an attempt to avoid criminal responsibility on his part through command responsibility on the basis that, if it were proven that troops in the field broke with established orders by killing guerrilla suspects without trial, such actions would form the basis of a defence against an allegation of command responsibility.

[554] Review, *United States of America v Fusataro Shin*, Headquarters, United States Army Forces Western Pacific, Office of the Staff Judge Advocate, Manila, 15 November 1946. (Folder 82) page 5. Tubungbanwa and Padora's testimony are cited as exhibits R-21 – R-79.

[555] Ibid 5.

Defence Evidence Contradicts Eyewitness Accounts

Citing excerpts from the trials of *United States v Otsuka Noriyuki* and *Kuwano Tadataka*, Shin's defence team claimed that the objective of the Panay expedition was to seek out and apprehend Filipino guerrillas. The Panay expedition was commanded by Lieutenant General Kono and the Brigade was commanded by General Kuroda, under which three battalions were commanded by Lieutenant Colonel Tozuka. Given that Filipino insurgents were a significant impediment for the Japanese military occupation, it could be argued—as it was by Shin's defence team—that it was common policy throughout the Japanese military to suppress Filipino resistance. It was commonly understood that any order to kill civilians would, on the face of it, would be consistent with policy and have come from the senior ranks of the Japanese military. On that basis, no junior ranking Japanese soldier would have questioned the lawfulness of an order or would have had any reason to question its legality.

In relation to the specific allegations levelled against Shin, his defence team attempted to show that the orders pertaining to, and the subsequent treatment of, Filipino civilians was at the command of Lieutenant Nakatsukasa.[556] The defence further claimed that the direct order given to Shin to carry out the expedition was given by Lieutenant Okura in September 1943. Defence counsel claimed that, during the expedition, operational orders were given by Lieutenant Colonel Tozuka and Captain Watanabe. Shin's defence attempted to show a clear delineation of roles and responsibilities with respect to orders involving civilians tried, to establish distance between Shin and his superiors in relation to the orders.

Shin admitted to being at the location during the time some of the massacres occurred, but adamantly denied giving the order to execute any of the victims or participating in the killings. He even denied seeing the executed bodies.[557] In relation to the allegations concerning the Yap family, Shin stated there were only two children and that he had not personally questioned any member of the family.[558]

Review Authority favours the accused's evidence, but defence Counsel did not plea the defence of superior orders

The reviewing authority expressed some concerns over parts of the prosecution's evidence—particularly those aspects regarding the number of members of the Yap family and other details of the circumstances surrounding the killings. The review authority favoured Shin on the point that there were four members and not five members of the family. Unfortunately for the accused, this was not enough to sway it regarding Shin's assertion that he had no further knowledge of the killings and it accepted Tubungbanwa's testimony regarding Shin's involvement in the killings. Despite those findings in Shin's favour, such as the review

[556] Ibid 6. Defence exhibits relied upon during the trial and referred to as part of the review are cited in the review documents as exhibits R-108 – R-147.
[557] Ibid 7.
[558] Ibid 8.

authority revising down the number of Yap family members killed, Shin was found guilty of the killings.

Raising Superior Orders as a defence is akin to an admission of guilt

Shin's defence counsel attempted to dilute his role in the killings by insisting that any actions he took in relation to the atrocities that occurred during the expedition were minor and, importantly, that any role he had in the killings was out of a legal obligation to obey orders. Curiously, Shin's defence counsel stopped short of formally raising the defence of superior orders despite stressing the point that he was acting out of a legal obligation to obey orders. The Commission took this aspect of his defence as an admission that he committed at least some of the atrocities for which he was charged. Therein lies a fundamental flaw in the superior orders defence. An accused, as in Shin's case, has a major problem with advancing the plea of superior orders for to do so is akin to admitting some or all of the facts surrounding the charges.

The defendant must choose whether to deny the charges completely, or whether to risk making admissions while justifying the acts on the basis of superior orders. The plea of superior orders is incongruous in that it may involve arguing that, on the one hand, the accused did not participate in any unlawful acts, while at the same time arguing that he committed the acts because he was ordered to do so.

Shin's defence counsel chose not to raise the defence of superior orders, possibly to the detriment of the accused. If successfully argued, the plea of superior orders might have reduced Shin's death sentence to a lengthy jail term, as in *Toyota's* case. Instead, they chose to focus on evidentiary deficiencies in the prosecution's case which, although acknowledged by the Commission (and subsequently by the reviewing authority) were seemingly disregarded in the final decision. With all appeals exhausted, Shin Fusataro was executed on 24 February 1947 along with three other condemned Japanese war criminals at the Luzon POW camp in Manila.[559]

C. *Trial of First Lieutenant Toyota Chiyomi, Imperial Japanese Army, Manila, 20–31 July 1946*

Despite the severity of the charges and the fact the defence counsel did not seek to raise superior orders as a defence, the Commission mitigated the sentence to a period of imprisonment possibly because the accused followed explicit orders which were promulgated from higher command.

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[559] Correspondence from Headquarters Philippines-Ryukyus Command, Subject: *Execution of War Criminals Tomizo Hirakawa, Tokizo Makita, Hisaki Itai and Fusutaro Shin,* to Commander in Chief, Far East. See also Memorandum to Commanding General, PHILRYCOM, Subject: *Report of Execution of Japanese*, from Headquarters 795th Military Police Battalion Luzon Prisoner of War Camp No.1. All documents contained in Folder 82.

First Lieutenant Toyota Chiyomi of the Imperial Japanese Army was charged with killing scores of specified and unspecified Filipino civilians during September 1943.[560] The killings occurred in various locations throughout the Western Visayas as part of the IJA's campaign to suppress Filipino guerrilla resistance. The charge consisted of four specifications detailing allegations against Toyota for his part in the killings.[561]

Toyota received a period of imprisonment of 25 years as opposed to the death sentence. One reason why Toyota avoided the death penalty could be the fact that the Commission focused on aspects of command and control thereby enlivening the possibility that Toyota acted out of a legal obligation that he honestly and reasonably held.

Order of Battle and Superior Orders

Interestingly in this case, the plea of superior orders was not raised by the defence. However, despite this fact, the Commission and the reviewing authority went to unusual lengths in discussing the order of battle that existed when Toyota was alleged to have committed the crimes. The purpose in doing so was to ascertain whether Toyota's actions were explicitly in accordance with IJA orders. One cannot rule out the possibility that both the Commission and subsequently the reviewer, were influenced by the likelihood that the harsh treatment meted out to civilians by the IJA during this phase of the Philippine campaign, occurred as a result of orders coming from the highest echelons of the IJA to suppress Filipino guerrilla resistance. The Commission could not ignore the possibility that killing Filipino civilians as a countermeasure to the insurgency was so commonplace that it would hardly have been viewed by Toyota and his subordinates as unlawful.

At the time of the alleged killings, the Commission accepted that Toyota was under the direct supervision of Lieutenant Colonel Tozuka. It was also accepted that Tozuka and Toyota were both under the control of General Kono Takeshi of the 14th Japanese Army. Christiansen especially noted that Toyota was the only person charged for these killings despite their scale

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[560] Arraignment, *United States of America vs Chiyomi Toyota*, Military Commission convened by the Commanding General, United States Army Forces Western Pacific, Volume I, pages 1–17; see also 'Trial of Chiyomi Toyota', Headquarters Philippines-Ryukyus Command, Major General J G Christiansen, US Army Deputy Commander and Chief of Staff, 6 January 1947. Both documents located in *United States of America vs Chiyomi Toyota* RG331 UD1321 290/12/12/1 Box 1567 Vol I–X, folder 86.

[561] Ibid. Specification 1 involved the killing of '2 unarmed, non-combatant civilians' and the attempted killing of Agustin Dasas near Dumarao, Capiz. The names of the two civilians for the deaths of which Toyota was charged, were not specified; Specification 2 alleged that Toyota killed and unlawfully permitted others under his command to kill 'approximately 52 unarmed, non-combatant civilians'; Specifications 3 and 4 alleged that Toyota killed and permitted others to kill, 'an unascertained number of unarmed, non-combatant civilians' in various locations.

and the apparent chain of command and evidence suggesting that their orders emanated from above.[562]

Specifications Relating to the Charge

Specifications 1 and 2 of the charge of unlawful killing stipulated that Toyota was responsible for directly killing, or permitting others under his command to unlawfully kill, at least 54 'unarmed, non-combatant civilians'. None of the victims in specification 2 were named. Specifications 3 and 4, however, were even less specific regarding the number of civilians killed and simply alleged that Toyota killed an 'unascertained number of unarmed, non-combatant civilians'.[563] Not only were the number of civilians killed unspecified, but the prosecution was also unable to identify and name a single victim.

Toyota pleaded not guilty to the charge. The Military Commission, however, found him guilty but only in relation to specification 1 and not of specifications 2, 3 and 4. It sentenced him to imprisonment for 25 years to be served at Sugamo Prison, Tokyo. The sentence was approved by Major General J G Christiansen, the Deputy Commander and Chief of Staff, and was in-turn approved by Colonel and Adjutant General J Gerhardt of the US Army.[564]

Evidence for the Prosecution

In relation to specification 1, the prosecution produced one eyewitness—Augustin Dasas, a local farmer from Gibato who was captured by the Japanese and brought to an area where he claimed to have witnessed Toyota 'in the process of killing a man with a sword'. Dasas claimed that he did not know the two victims, however, he was sure the two persons were deceased as he could see their severed heads. He also claimed that in the moments after he was brought to the field, he too was to be executed by Toyota. He claimed he survived the attempted execution after Toyota 'hacked' at his neck and he pretended to be dead.[565] No further evidence for specifications 2, 3, and 4 was offered by the prosecution.

Defence's Argument

The main thrust of the defence's argument against the charge was based on mistaken identity, as Toyota claimed he was never in the place where the killings were alleged to have been committed. According to the defence's evidence, the killings were most likely to have been

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[562] *United States of America v Chiyomi Toyota*, Headquarters United States Army Forces Western Pacific, Office of the Staff Judge Advocate, 27 December 1946, document located in *United States of America v Chiyomi Toyota* RG331 UD1321 290/12/12/1 Box 1567 Vol I–X, folder 86, page 4.
[563] Arraignment, *United States of America vs Chiyomi Toyota*, Military Commission convened by the Commanding General, United States Army Forces Western Pacific, Volume I, pages 1–17; *United States of America vs Chiyomi Toyota*, Headquarters United States Army Forces Western Pacific, Office of the Staff Judge Advocate, 27 December 1946, documents located in *United States of America vs Chiyomi Toyota* RG331 UD1321 290/12/12/1 Box 1567 Vol I–X, folder 86.
[564] Ibid.
[565] Ibid, pages 4–5.

committed by other IJA units—most likely members of the Kinoshita Unit—which he saw at Ticongeahoy. Specifically, Toyota claimed that the members of the Kinoshita Unit he met were members of the Nozaki platoon who had come from Capiz and who had told him were present at Gibato (the home of Dasas).

Three individuals who were tried and convicted of war crimes substantiated aspects of Toyota's testimony and this was accepted by the Commission and the reviewing authority.[566]

Decision of the Review Authority

The reviewing authority, assisted by William D Shain—civilian attorney and assistant to the Staff Judge Advocate—upheld the Commission's initial findings of guilt for specification 1. The reviewer also agreed that the evidence for specifications 2, 3, and 4 was insufficient and, therefore, upheld the finding of 'not guilty' for those specifications. Despite there being several discrepancies regarding Dasas's testimony, which was not corroborated, both the Commission and the reviewer believed his testimony to be sufficiently credible 'to enable the Commission to find that Toyota was guilty beyond a reasonable doubt'.[567] Had it not been for the Commission's willingness to consider the order of battle and the likelihood Toyota was following orders promulgated from above, then it is likely his sentence would not have been as favourable.

It is curious, therefore, given the cases of Toyota and Shin, that the defence counsels did not raise the plea of superior orders. Instead, in the case of Toyota, the accused had to rely on the judgment of the Commission to implicitly allow superior orders into the sentence and in doing so, to implicitly give authority to the legitimacy of superior orders as a defence to war crimes.

D. *Trial of 2nd Class Petty Officer Tanaka and 1st Class Petty Officer Hayashi Imperial Japanese Navy, Manila, 8–13 January 1947*

The defence of superior orders can be considered as a means to mitigate the sentence (but not to absolve the accused from criminal responsibility) where certain criteria are established by the defendant, that is, where: (1) ambiguity exists about the lawfulness or unlawfulness of orders; (2) it is clear that the accused was following those orders; (3) the accused did not wish to follow those orders, but did so out of legal compulsion; (4) the accused derived no pleasure or desire and did not intend to commit such acts; and (4) disobedience of those orders would result in severe punishment to the accused.

In the joint trial (and subsequent Review on 17 March 1947) of Tanaka Yukitsuna (2nd Class Petty Officer) and Hayashi Yoshinori (1st Class Petty Officer), superior orders was argued by the defence as a complete defence to criminal responsibility for their part in the execution of

[566] Ibid pages 7–8.
[567] Ibid page 9.

eight US airmen.[568] The Military Commission conducting the trial in the first instance rejected that defence. The commission did accept, however, that superior orders was relevant in mitigation of sentence where there was some ambiguity in relation to the lawfulness of the orders, and where there was no evidence of any particular desire or pleasure derived from killing the victims. In circumstances such as those affecting Tanaka and Hayashi, it seems as though some tribunals were more inclined to award a sentence of incarceration instead of the death penalty.

Tanaka and Hayashi were both junior members of the IJN stationed at the jail at Tolitoli in 1944 when they received orders to be part of a team which was to carry out the execution of eight US airmen. The airmen were being held captive at Tolitoli after their plane ditched into the sea at Boeol in September or October of that year.[569] The executions took place in a small coconut grove about two and a half kilometres from the seaplane base at Tolitoli. Each of the prisoners had their hands tied and were blindfolded. The first prisoner was told to kneel in front of a hole that had been dug earlier that day and Hayashi was ordered to carry out the first execution. Tanaka claimed that he carried out the seventh execution.[570]

Who gave the initial order to execute the airmen was not fully established as there were conflicting reports. A number of IJN personnel who were called to give evidence testified that they believed the order initially came from a senior officer from the 22nd Special Naval Base at Balikpapan.[571] The person who sent the message was Lieutenant Junior Grade Igami who was in charge of the Dispatch Seaplane Base. Tanaka himself gave evidence that he believed the order came from Lieutenant Nishida who was present at the execution. Either way, there was clear evidence to suggest that Tanaka and Hayashi had no role in the origination of the order and they acted out of obedience to a superior order. Hayashi stated he did not know who gave the order and, because commanders of the jail changed often, he did not know who was in charge of the unit of which he was a member. Warrant Officer Suitsu was responsible for arrangements at the scene of the execution and issued instructions as to the order of the executioners, but it was clear that Suitsu was not the initiator of the execution order.

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[568] Material in relation to the trial and subsequent review can be located at Judge Advocate Section War Crimes Decisions, RG331, UD1865 290/23/06/02, Box 9781, Folder 34.

[569] The exact dates as to when the US airmen were taken prisoner and executed, although not entirely relevant in this case, were in dispute during the trial. Some affiants held the date of the capture and execution to be in July or August, while other affiants believed the airmen were captured and executed in September or October 1944. Despite the debate as to these exact dates, the material facts of the case were, for the most part, agreed between the prosecution and defence teams.

[570] Affidavit of Tanaka Yukitsuna, (prosecution exhibit 7).

[571] Affidavits of Awazu Yoshio (prosecution exhibit 4), Fujita Gonroku (prosecution exhibit 5), Hayashi Yoshinori (prosecution exhibit 8).

Legal Basis of the Defence's Appeal

Tanaka and Hayashi were both convicted of the executions and, after circumstances of mitigation were taken into consideration, each received a sentence of 30 years' imprisonment. The defence appealed the sentences on the basis that the Military Commission had failed to take into account the defence of superior orders regarding criminal responsibility. The defence claimed that superior orders should have been available to the trial commission because the accused were compelled to follow all orders from a superior, failure of which would render them liable to receive the death penalty under Japanese Military Law.[572]

The defence also attempted to argue on appeal that paragraph 345.1 of the FM 27-10 did allow for superior orders to be a full defence to criminal responsibility[573] and that Robert Jackson's report to the President of the United States[574] was sufficient evidence of US executive intention to validate superior orders in such a way. A further argument was raised by the defence that related to the existence of a State Department publication of a letter from President Roosevelt on 21 April 1943.[575] The defence team asserted that President Roosevelt's intention was to differentiate *officers* from junior-ranking military personnel by holding only *officers* criminally liable for crimes committed against US airmen. In paraphrasing the President's letter, the defence argued it was the President's intention that,

> all officers of the Japanese Government responsible for the execution of the Doolittle fliers will be brought to justice. Also he warns that if there are any other violations of the rules, the officers of the Japanese Government responsible for the violations will answer for them.[576]

The defence based their argument on the fact that liability was not attributable to junior military personnel due to the President's use of the word, 'officer'. Although the defence appeared to

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[572] RG331, UD1865 290/23/06/02, Box 9781, Folder 34, page 13. As outlined in a letter from the General Liaison Office and Japanese Regulations Governing obedience to superior orders and treatment and punishment of enemy fliers (Defence Exhibit A) 13 June 1946; Enclosures A, B and C, 28 July 1942; Enclosure D, 19 October 1942; Enclosure E, 21 February 1944; Enclosure F, 17 October 1942. The defence claimed that the evidence showed that 'no orders are deemed illegal and anyone failing to obey it did so at their own risk' and that 'enemy airmen … could be punished by death'.

[573] FM27-10 Rules of Land Warfare, paragraph 345.1, US War Department, 1 November 1944 <https://archive.org/stream/Fm27-10-nsia/Fm27-10_djvu.txt>. RG331, UD1865 290/23/06/02, Box 9781, Folder 34, Defence Exhibit B, 1 October 1940.

[574] Report of Robert Jackson, *Trial of War Criminals*, Department of State Publication 2420, Subsection III, paragraph 2, as sited in letter by Robert L Ward 'Questions of Law – Superior Orders', unsigned, RG331, SCAP Legal Section, Law Division, Decimal File 1945–1951, 000.5 to 004 E, Box 1414, page 32. RG331, UD1865 290/23/06/02, Box 9781, Folder 34, Defence Exhibit C.

[575] US State Department, *Japanese Trial and Execution of American Aviators*, letter from US President Franklin D Roosevelt, 21 April 1943, as outlined in Defence Exhibit D, RG331, UD1865 290/23/06/02, Box 9781, Folder 34, page 14.

[576] Ibid.

be relying on matters of semantics, there is some merit in their argument, albeit due to an apparent if imprecise use of the word 'officer' by the President. It is more likely than not that the President did not intend to limit liability to military officers, but rather 'agents' of the Japanese Government, which would include any military and civilian personnel whose actions (or omissions) were responsible for the executions.

Findings of the Review Panel

The review panel rejected all of the defence's arguments regarding the availability of superior orders to absolve an accused of criminal responsibility. It did so primarily because of the importance it attributed to SCAP's letter of 5 December 1945 which provided that 'action of an accused pursuant to superior orders may not be considered by way of defense, but may be considered in mitigation of punishment'.[577] Such an unequivocal statement by SCAP regarding superior orders was too much for the panel to ignore, despite clear evidence that the deaths would not have occurred *but for* the orders from a superior authority. It chose to disregard the inconsistency between FM27-10 and SCAP's 5 December letter in favour of MacArthur's directive. It regarded FM27-10 to be 'for information and guidance and not mandatory' whereas SCAP's letter, promulgated by General Douglas MacArthur, was seen as a directive intended for military tribunals.[578]

In relation to the purported contradictory statements of President Roosevelt and Justice Jackson regarding the availability of superior orders as a valid defence, the review panel stated that the comments from the pair were,

> generalizations regarding the punishment of war criminals whereas par 5 d (4) is the enunciated rule specifically governing … punishment of accused war criminals standing trial at this headquarters.[579]

The fact that commissions and review panels were more likely to favour directives from MacArthur, than 'generalized' statements by the President, is telling of the hold that MacArthur appeared to have in relation to the conduct and the outcome of the trials.

Additional Mitigation of Sentence

In deciding whether to further mitigate the original sentence of 30 years' imprisonment, the review panel examined a number of facts. First, the panel acknowledged that each of the accused received their orders to be on the execution squad the evening before the day of execution and would not have otherwise harmed the victims. Secondly, the panel took the

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[577] RG331, UD1865 290/23/06/02, Box 9781, Folder 34, page 17.

[578] Ibid.

[579] Ibid 17–18. As mentioned above, Justice Jackson stated in Paragraph 2 of his report that:
There is doubtless a sphere in which the defense of obedience to superior orders should prevail. If a conscripted or enlisted soldier is put on a firing squad, he should not be held responsible for the validity of the sentence he carries out. But the case may be greatly altered where one has discretion because of the rank or the latitude of his orders.

extraordinary step of suggesting that the reason both accused made no protest about the legality of the orders was 'due to the fact that they were so stunned at being ordered to kill a man in cold blood that they were unable to protest'.[580] Thirdly, the panel accepted that there was no evidence that suggested the two accused displayed any signs of 'gratuitous acts of cruelty'.[581] Fourthly, the panel took into account the actions of Hayashi when he 'offered a prayer for the flier he had killed, and … left after the fourth execution'.[582] For Tanaka's part, the panel acknowledged he returned to his quarters after the execution and did not work for rest of the day on account of being unfit to do so.[583] The panel's inference of the emotional toll the executions had on Hayashi and Tanaka at the time was obvious.

The panel accepted that the conduct of the two accused was purely on the basis of following orders. For that reason, Hayashi and Tanaka, as far as the panel was concerned, demonstrated that they did not want to kill, did not volunteer, and were not 'gratuitous killers'.[584]

In view of the evidence, the review panel recommended the original sentences of 30 years' hard labour were excessive and should be reduced to 15 years' hard labour.[585] The fact that the panel was willing to drastically reduce the sentences by half, despite the fact that Hayashi and Tanaka by their own admissions participated in the killing of eight US airmen, is telling in a number of respects. It could be argued that the panel placed more emphasis on the effect of superior orders as it related to the *mens rea* element of the crime. In other words, given that some of the evidence strongly indicated a lack of willingness on the part of the two accused to carry out the killings, the panel was prepared to reduce the sentence. The ultimate sentence appears, on the face of it, to have been awarded for the actual killing (or the *actus reus*). Given that Hayashi and Tanaka received a sentence at all, indicates the panel was keeping true to rejecting a plea of superior orders as a full defence.

E. *Trial of Petty Officer Suguwara Isaburo, Imperial Japanese Navy, Manila, 8–10 February 1947*

Superior orders can operate to mitigate a death sentence under certain circumstances: (1) where the accused was acting in obedience to the order of a superior officer, (even if not his immediate commander); (b) the accused had no contact with the victims prior to their execution; (c) the accused had no command discretion; (d) the accused was not chargeable with knowledge of the rules of war; (e) in performing the task for which he was ordered, the accused manifested

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[580] RG331, UD1865 290/23/06/02, Box 9781, Folder 34, page 19.
[581] Ibid.
[582] Ibid.
[583] Ibid. The fact that Tanaka and Hayashi were in some way affected by the incident was borne out in their own testimony and was accepted by the panel.
[584] Ibid.
[585] Ibid 19–20.

neither spirit of vengeance nor personal ill will; and (f) the accused had no other offence alleged or proven against him.

In the case of Superior Petty Officer Suguwara Isaburo, the plea of superior orders was successfully raised to commute the sentence of death handed down in the first instance by a military commission which sentenced Suguwara and two others to death by 'musketry'.[586] Interestingly, in Suguwara's case, the recommendation to commute his death sentence to a custodial sentence, came from the reviewing authority, Colonel Shaw, Judge Advocate, after it was determined that a number of arguments existed to accept the defence of superior orders as mitigation of punishment.

Suguwara was jointly tried with two others: Lieutenant Yamaguchi Sentaro and Ensign Tasuki Kiyoto, both of whom were members of the Imperial Japanese Navy. The three accused were charged with the violations of war, specifically the unlawful executions of three captured US airmen whose plane crashed landed at Sanga Sanga, near Samarinda in Borneo in May 1945.[587] All three Japanese accused were found guilty by a US military commission and sentenced to death for their role in the executions.

According to the review of the Record of Trial, the three US airmen were the three surviving crew members of a US Army airplane. They were apprehended by the IJN and taken to a wharf at Samarinda. The airmen endured captivity for over a month during which time they were subjected to irregular bouts of moderate interrogation by Japanese Keibitai (security personnel). After one month's confinement, the three airmen, blindfolded with their hands tied behind their backs, were taken by a group of ten IJN personnel to a location and made to kneel beside a shallow grave where they were each beheaded by Suguwara and another man, Tasuki.[588]

The fact that Suguwara and Tasuki performed the executions were not disputed. What was contentious, however, as far as the convictions was concerned, according to Suguwara's defence team, was the level of culpability that should be attributed to Tasuki and Suguwara who performed the acts as opposed to Yamaguchi (superior to both men) who admitted to giving the order to carry out the executions on the day.

Review Authority Overrules Military Commission – Death Penalty Mitigated on the basis of Superior Orders

Upon review of the original case on 8 February 1947, the reviewing authority, headed by Colonel Shaw recommended that the death penalty for Yamaguchi and Tasuki be confirmed and carried out.

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[586] RG331 UD1321 290/12/12/1, 'Evidence', page 2.
[587] 2nd Lieutenant Leslie W Jacobs, Sergeant James W Hagerty and Corporal Frank J Molinari of the US Army.
[588] RG331 UD1321 290/12/12/1, 'Evidence', pages 2–3.

However, the authority took a rare step and recommended Suguwara's sentence be confirmed but be commuted to a period of incarceration for 15 years. The recommendation to overturn the original decision was based on several factors.

The authority cited 'extenuating circumstances disclosed by the evidence in the case …, and which contrast it uniquely with cases submitted to the confirming authority in the past'.[589] The extenuating circumstances to which Colonel Shaw referred were, in his view, of the nature that would constitute sufficient grounds to form the basis of a plea of superior orders for clemency in Suguwara's case. He cited several reasons for this conclusion. First, he stated that the evidence presented to the reviewing authority strongly suggested that Suguwara:

a. was acting in obedience to the order of a superior officer, his immediate commander;

b. had no contact with the airmen prior to their execution;

c. had no command discretion;

d. was not chargeable with knowledge of the Rules of Land Warfare;

e. in performing the task to which he was ordered Suguwara manifested neither spirit of vengeance nor personal ill will; and

f. had no other offense alleged or proven against him.[590]

Colonel Shaw argued that the evidence to substantiate the plea of superior orders in Suguwara's case was stronger than other cases where superior orders was raised. In distinguishing other cases where superior orders had been raised and had failed, he stated that the other cases usually involved orders of,

> indiscriminate slaughter or were otherwise palpably illegal; that the orders were indefinite or not directly received; the accused was in a position of some discretion, or that the accused was a volunteer or eagerly obedient. None of those elements and nothing comparable thereto are present in Suguwara's case.[591]

Colonel Shaw contested that the facts and circumstances in relation to Suguwara's involvement regarding the execution of the three US airmen were very different from other cases and, on that basis, the plea of superior orders to mitigate the sentence was not precluded.

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[589] 'Supplement to Review of the Record of Trial by Military Commission of Lieutenant (jg) Sentaro Yamaguchi, 51J-127752, Ensign Kiyoto Tasuki, 51J-127753 and Superior Petty Officer Isaburo Suguwara, 51J-127754, of the Imperial Japanese Navy', to The Supreme Commander for the Allied Powers, from Colonel Franklin P Shaw, Judge Advocate, General Headquarters Far East Command Office of the Judge Advocate, 22 February 1947, RG331 UD1321 290/12/12/1.
[590] Ibid [3 a–f].
[591] Ibid [4].

With reference to the documentary evidence cited by the initial trial commission, Colonel Shaw agreed there existed no reason for 'disturbing the extreme penalty adjudged against Yamaguchi'.[592] His reasons for agreeing with the original sentence were based on the fact that Yamaguchi directed the executions of the three US airmen he had knowledge of—or at least reason to suspect—the illegal nature of the executions as indicated by his contradictory statements throughout the trial. This gave the impression that he was attempting to hide behind the 'protective cloak of superior orders as a defense' by claiming that the execution order came from higher headquarters—despite later admitting that the order came from him and no one else.[593]

Plea of Superior Orders Not Available to those Who Willingly, Knowingly and Unquestioningly Participate in Unlawful Orders

Despite accepting that Yamaguchi was responsible for giving the initial order to execute the three US fliers, Shaw JA did not accept that the co-accused Tasuki, unlike Suguwara, was in a position to plead obedience to superior orders. He agreed with the confirming authority that Tasuki's sentence should not be disturbed.

According to Colonel Shaw, the reason for taking this position in relation to Tasuki was not due to the fact that Tasuki was the officer in charge of the execution party. Rather, it was because Tasuki was shown to have had greater responsibility than Suguwara in the days and weeks that preceded the executions. The evidence clearly showed that he was in charge of interrogating the airmen and took part in beating the three prisoners at various times.[594] Furthermore, Tasuki knew that the three airmen did not receive a trial—something that Tasuki, according to his rank and experience, would or should have known. Shaw JA concluded that:

> We thus do not have the case of an executioner who receives and blindly carries out a mandate of his superior, without knowledge of its illegality, or in fear of dire personal consequences awaiting refusal to obey. … There is no reason to doubt that Tasuki's concurrence or at least acquiescence in the plan of execution was given. He did not hesitate to fulfill the order nor does he claim coercion or fear of consequences for failure to act. Any Japanese naval officer is well aware of the fact that an execution cannot be carried out without a written order from a competent commander and a writ of the prosecutor concerned, and that under Japanese naval law, a further order of the Minister of the Navy is required (Japanese Naval Court-Martial Law Article 504). Tasuki, one of the senior officers under Yamaguchi and admittedly aware of the lack of legal procedure, was in a position to refuse his order if he so desired.[595]

The main grounds for distinguishing Suguwara's role from Tasuki's role in the executions were that Suguwara, unlike Tasuki, had no personal contact with the airmen prior to their execution

[592] Ibid page 5, [4] Clemency.
[593] Ibid.
[594] Ibid page 6.
[595] Ibid.

and was, therefore, not within the 'inner-sanctum' of the command.[596] Suguwara could also not be held criminally responsible because he had little knowledge of the rules of land warfare and did not exhibit any ill feeling or vengeance towards the victims. On that basis, he was doing 'no more than what to him was military duty, and would have no greater degree of guilt than would any military member of a firing squad who, unbeknown to himself, was carrying out an execution under an illegal order'.[597]

Establishing a Precedent for Applying Superior Orders

Significantly, the second reason why Shaw JA accepted that superior orders should mitigate Sugiwara's original sentence, was that to do so would provide precedential value and clarification for other military commissions. Shaw JA acknowledged that by accepting the prospect that superior orders did play a crucial role in the unlawful killing of the three US airmen, SCAP would establish 'a criterion for the exercise of clemency which will not strip of meaning his instructions respecting mitigation of punishment under paragraph 5d(6) of the regulations promulgated by him'.[598]

Shaw JA accepted that the 'possibility of creating an undesirable precedent is not present' because Suguwara's case was unique.[599] That assessment was based on his view that obedience to superior orders was the 'sole impelling inducement to the commission of an act, not to the accused, patently illegal'.[600] In other words, possibly due to Suguwara's limited knowledge of military law and his rank, it was not entirely clear that it would have been clear to him the order to execute the airmen was unlawful under the laws of war. On that basis, argued Shaw JA, Suguwara's case presented the precise 'case for which must have been intended the exercise of clemency authorized by the Supreme Commander…'.[601]

Contained in correspondence dated February 1947 from General MacArthur's office, Shaw JA's recommendations were upheld and Suguwara's death sentence was commuted to 15 years' imprisonment. Likewise, Shaw JA's recommendations that Yamaguchi and Tasuki not be granted clemency was also accepted and their execution orders were confirmed.[602]

Suguwara's case is significant because it provides an example of the types of instances where a review authority was willing to disturb an original sentence by a military commission in favour of an accused, in this case, when superior orders might operate to provide clemency to the death penalty to a junior ranking Japanese soldier. In commuting the sentence, the review

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[596] Ibid.
[597] Ibid.
[598] Ibid [2].
[599] Ibid [5].
[600] Ibid.
[601] Ibid.
[602] General Headquarters Supreme Commander for the Allied Powers, APO500, correspondence from Douglas MacArthur, General of the Army, United States Army, Supreme Commander, February 1947.

tribunal examined a range of circumstances that justified the application of superior orders and distinguished the conduct of Suguwara from that of his co-accused. This case represents a situation whereby the reviewing authority clearly believed clemency was warranted.

A counter argument could just as well have been made if the accused was ranked higher, then clemency would not be available because, for example, the accused would have had the opportunity to exercise his discretion in relation to the unlawful order. It is curious, therefore, why clemency would be offered to junior ranking soldiers but not higher ranking soldiers on the basis that one's discretion increases with rank, when in reality, it would be highly doubtful that a Japanese soldier of any rank would be in a position to refuse any order from superiors.

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The main points in relation to the defence of superior orders coming from the Manila trials are as follows:

- repeated disregard of evidence supporting, and a denial of, the validity of the defence of superior orders;
- subjective bias due to the status/ role of the accused;
- reliance on the defence of superior orders is akin to an admission of guilt;
- superior orders at times were accepted as a point of mitigation where evidence was clear that orders were promulgated from higher command;
- the defence of superior orders can be considered as a reason to mitigate the sentence (but not to absolve the accused from criminal responsibility) where certain criteria are established by the defendant.

The following chapter argues for a 'normative reconceptualization' of superior orders in light of the historical context of the defence of superior orders and its application at the Manila Trials how the law 'ought' to be constructed.

CHAPTER 7:
THE PARADOX OF SUPERIOR ORDERS: A NORMATIVE RECONCEPTUALIZATION OF AN OLD DILEMMA

I. Introduction

This chapter posits a normative theoretical position on how the doctrine of superior orders *should* be applied as part of future war crimes jurisprudence. The normative position adopted in this chapter is based on the legal standards and jurisprudence derived from cases and the *lex scripta* outlined in Chapters 5 and 6. In short, this chapter argues that the defence of superior orders *should* be available to defendants to mitigate the sentence and, in rare circumstances, absolve the defendant of all criminal responsibility. One of the key aspects underlying this position is the fact that military orders are far too important to be ignored as a significant contributing factor as to why war crimes are carried out. What the cases in the Manila trials and elsewhere clearly point out, is that if not for specific orders, some war crimes would not have occurred.

The test that should be undertaken to determine whether superior orders played a part in the criminal wrongdoing, is what is termed in this thesis, as the 'intermediate' test that requires the prosecution to prove beyond reasonable doubt that the defendant was not able to exercise his or her 'moral choice' when it came to carrying out the order and that he or she neither knew or believed that the order was manifestly illegal. This test incorporates both the subjective assessment of the *mens rea* and an objective assessment of what would have been reasonable under the circumstances. The 'intermediate' position operates to hold those personally responsible for carrying out criminal acts, while at the same time allows the external factors (ie the imperative to obey superior orders) to be incorporated as part of determining criminal responsibility.

This thesis rejects the 'absolute liability' theory that holds a subordinate responsible merely for following unlawful orders for the reasons outlined and discussed below. Essentially, the reason why this thesis rejects the 'absolute liability' theory is that it fails to reflect the real and perceived consequences for a subordinate if they refuse to follow orders. At the same time this thesis rejects the *respondeat superior* position adopted by some who assert that subordinates should not be held responsible if they are merely following superior orders. The *respondeat superior* position fails to acknowledge that subordinates have agency and can lawfully reject orders they believe are illegal.

The plea of superior orders is raised by an accused who seeks to avoid criminal responsibility for their acts because such acts were committed as a direct result of orders from a superior—

whether the orders came from military or civilian sources.[603] As has been shown by the examples cited in earlier chapters, the defence of superior orders was made throughout history, with varying degrees of success by those who have sought to rely on it. Superior orders has undergone a series of reformulations in its application to criminal responsibility over the course of WWI and WWII.[604] One of the enduring problems with allowing the plea of superior orders to serve as a legitimate defence to war crimes is that it would validate conduct that would, under most circumstances, constitute brutal, criminal acts.[605] On the other hand, to disregard completely any legitimacy to a plea of superior orders could lead to an unacceptable level of injustice imposed on the subordinate who merely followed what they believed to be a lawful superior order.

This dilemma was succinctly put by A V Dicey in 1885:

> Hence the position of a soldier is in theory and may be in practice a difficult one. He may … be liable to be shot by a Court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it.[606]

In one of the seminal texts on the question of superior orders, *The Defence of 'Obedience to Superior Order' in International Law,* Yoram Dinstein describes the transformation in thinking within the international legal community of superior orders as a legitimate defence in international law.[607] Dinstein asserts, with seeming approval from other scholars,[608] that the legitimacy of superior orders as a defence throughout international legal history, has swung between 'absolute liability' on the one hand and '*respondeat superior*' on the other.[609] Kudo, however, describes a third position, which he suggests is an 'intermediate position' that takes

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[603] Geneviève Dufour, 'The Defence of Superior Orders: Does it still exist ?' (2000) (840) *International Review of the Red Cross* <https://www.icrc.org/eng/resources/documents/misc/57jqtf.htm>.

[604] Insco (n 398) 389–90.

[605] Ibid 393.

[606] A V Dicey, *Introduction to the Law of the Constitution* (First published 1885, 8th ed, 1915, Liberty Fund) 194.

[607] Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (Oxford University Press, 2012). Dinstein's argument was first developed as part of a doctoral thesis submitted in 1964 – see I. Prolegomena, xv.

[608] See, eg, Richard Cryer, 'Superior Scholarship on Superior Orders' (2011) *Journal of International Criminal Justice* 959–72; Insco (n 398); See, eg, Paola Gaeta, 'The defence of superior orders: the statute of International Criminal Court versus customary international law' (1999) 10(1) *European Journal of International Law* 172.

[609] Dinstein (n 607) see chapter 2 'The Doctrine of *Respondeat Superior*' and Chapter 3 'The Doctrine of Absolute Liability'.

into consideration the invidious position of the subordinate yet ensures that certain acts remain within the realms of criminality, as will be explained below.[610]

A. *'Absolute Liability' of the Subordinate a Failure of Justice*

Dinstein asserts that the proponents of absolute liability tend to adopt a binary position reflective of the notion that 'obedience to orders does not create a defence *per se*, nor can it be taken into account within the compass of any other defence'.[611] As such, the doctrine of absolute liability is the exact opposite of the defence of superior orders in so far as absolute liability presumes liability on the part of the subordinate for unlawful acts irrespective of whether the genesis of those acts emanated from orders of the subordinate's superior(s). The doctrine of absolute liability cares not that the subordinate is under a legal obligation to follow orders, but rather that the subordinate has an obligation to differentiate between lawful and unlawful orders. If the subordinate fails to make an appropriate determination between lawful and unlawful orders and proceeds to commit acts that violate the laws of war in obedience to such orders, then liability will flow to the subordinate.

The proponents of absolute liability arrive at their position more out of a rejection of the mischief which they believe exists in the doctrine of *respondeat superior* through the 'upward transfer' of liability from the subordinate to the superior.[612] This 'swinging of responsibility from one echelon of command to another' results in 'total immunity' or, what has been described by some, as the '*reductio ad absurdum'* which operates to avoid criminal responsibility being assigned to anyone.[613] Such an undesirable outcome could allow the actual perpetrators to escape criminal responsibility—due to the favourable approach given to subordinates with the doctrine of *respondeat superior*—and also those who gave the order in the first place. What ensues is that each subordinate hides behind the orders of his superior—a situation so described by Appleman:

> The soldier says, 'I shoot this man upon the sergeant's orders'. The sergeant says, 'Captain Hirsch issued a general order covering this situation'. Captain Hirsch refers to Major Blank, Major Blank to Colonel Jacobs, Colonel Jacobs to Lieutenant General Abrams, and Abrams refers to a directive of Goering. Goering says, 'Ah yes, but the Fuhrer ordered it'.[614]

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[610] Kudo (n 397) 11–14. See also, Gaeta (n 608) 174 – Gaeta contends that international law departs from the absolute liability approach to determining criminal responsibility, and has moved to the 'conditional liability' approach.

[611] Dinstein (n 607) 68.

[612] Ibid 71.

[613] Ibid. Dinstein cites a number of authors who have come to this conclusion: see Dinstein, footnotes 216, 218, 219 and 220.

[614] Appleman, as cited in Dinstein (n 607) 71.

The same situation was succinctly put by Robert H Jackson, the US Chief Prosecutor at the Nuremberg Trials, when he stated that the 'inference is that the doctrine of *respondeat superior* incites "international lawlessness" on a large scale'.[615]

As to whether the position in modern times is one of absolute liability or *respondeat superior*, Paolo Gaeta concludes that 'close scrutiny of national legislation and case law shows that the … customary rule on superior orders upholds the absolute liability approach'.[616] Indeed, early proponents of the absolute liability approach cite 'heavenly' authority for their stance on the absolute liability of those who violate the 'laws of nature'. Hugo Grotius espoused this ideal in the seventeenth century when he wrote that, 'if the authorities issue any order that is contrary to the law of nature or to the commandments of God, the order should not be carried out.[617] As Insco points out, the position adopted by Grotius and those who support this ideal, was predicated on the basis of 'natural law' and religion in the assignment of moral blameworthiness to subordinates who adhere to unlawful orders.[618]

B. *Mens Rea and Superior Orders*

Insco, an opponent of the absolute liability approach, argues that subordinates who obey unlawful orders from superiors should have available to them the defence of superior orders.[619] That argument is given some support if one is to believe that criminal responsibility should be limited to those who attempt or complete the physical elements of the offence in conjunction with possessing the requisite 'guilty mind'. The *mens rea*, or 'guilty mind' that is used to attribute criminal responsibility under criminal law, is one aspect that both Dinstein and Insco argue should be present if an accused is to be criminally liable for carrying out unlawful orders from a superior.

The principle of *mens rea* is one of the fundamental tenets of criminal law which has been used to attribute guilt to an accused person for centuries throughout common law jurisdictions. Given the important relationship that exists between *mens rea* and the attribution of criminal responsibility elsewhere, it is difficult to imagine why an assessment of the accused's mind at the time of the commission of the alleged offence(s) would not be relevant. In other words, why is it that international criminal law relating to war crimes does not require one of the most

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[615] R Jackson, 'Nuremberg in Retrospect: Legal Answers to International Lawlessness' (1949) 35 *American Bar Association Journal* 813–16, 881–887, cited in Dinstein (n 607) 71.
[616] Paola Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law' (1999)10 *European Journal of International Law* 172, 172, 183–7.
[617] Hugo Grotius, *2 De Jure Belli Ac Paris Libri Tres [The Law of War and Peace]* 138 (Francis W Kesley trans, 1925), cited in Gary D Solis, 'Obedience of Orders and the Law of War: Judicial Application in American Forums' (1999)15 *American University International Law Review* 481, 486, as cited in Insco, above n 398, 390.
[618] Insco (n 398) 390.
[619] Ibid 391.

important elements of an offence—namely that of *mens rea*—to be at the forefront in the process of determining criminal responsibility?

Dinstein asserts that the 'mere fact of obedience [to superior orders] is of secondary importance' and the fact that a person obeys what may or may not appear to be lawful orders should not constitute a 'defence *per se* but only a factual element that may be taken into account in conjunction with the other circumstances of the given case ...'.[620] He goes on to assert that 'only a lack of *mens rea*, … serves to protect from criminal responsibility'.[621]

Accordingly, that a subordinate followed superior orders would merely constitute but one of a multitude of factual matters such as the 'time when, and the place where, the offence was committed; just like the weapon by which it was carried out; and just like myriads of other circumstantial minutiae'.[622] Dinstein's position is clear when he states that 'the mere fact that a defendant obeyed orders does not render him immune from criminal prosecution under international law' and he may be convicted even when the offences are committed under superior orders.[623] The existence of superior orders does, however, 'contribute to the proof of lack of *mens rea* and consequently bring about the acquittal of the accused.'[624] Similarly, Insco asserts that the 'law does not seek to assign responsibility to those who do not deserve it and some degree of mental culpability is usually a condition precedent for determining [just] desserts.'[625]

C. *Respondeat Superior*

The doctrine of respondeat superior operates as a form of strict liability for superiors and assumes that a superior will bear responsibility for the acts of subordinates, even though he or she did not directly give the order in relation to the subordinate's criminal act. The doctrine of respondeat superior has been argued by some to absolve subordinates from culpability, thereby acting as a form of defence to allegations of war crimes. One eminent legal theorist who supported the doctrine of respondeat superior was Lassa Oppenheim, as shown in his first five editions of the second volume of *Treatise on International Law*. Oppenheim was unequivocal in his position regarding the lack of liability that is attributable to subordinates where direct orders emanate from either the subordinate's Government or his commanders. Oppenheim stated his position in the first edition of the Treatise published in 1906:

> Violations of rules regarding warfare are war crimes only when committed without an order of the belligerent Government concerned. If members of the armed forces commit violations by order of their Government, they are not war criminals and cannot be punished by the enemy; the

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[620] Dinstein (n 607) 88.
[621] Ibid.
[622] Ibid.
[623] Ibid 89.
[624] Ibid.
[625] Insco (n 398) 398.

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

It is clear from Oppenheim's position that the outcomes for subordinates who obey unlawful orders from either their Government or their commanders is that they bear little liability. The difference, however, argued by Oppenheim, are the consequences for the issuing of unlawful orders insofar as enemy reprisals are lawful, if the unlawful orders come from the Government, and that commanders who issue unlawful orders are themselves held accountable for those orders (the situation being akin to command responsibility).

The doctrine of respondeat superior arguably formed the underlying rationale for liability for acts committed in violation of the laws of war prior to WWI. Dinstein argues, however, that this doctrine was not without controversy, primarily due to the lack of authority that Oppenheim cited for his position. Despite this, there appears to have been little resistance in the literature to the doctrine at the time. As Dinstein notes, the lack of a challenge to Oppenheim's respondeat superior doctrine was probably due to the fact that at the time the world was in a state of peace rather than conflict, and the cruelties which were to come in the subsequent two world wars were not yet contemplated.

As it became clear in the subsequent decades, nations which suffered from the ravages of war were in no way amenable to sit back and allow the perpetrators—no matter how senior or junior in rank—to escape liability merely on the basis that they were obeying superior orders. Not long after WWI commenced, a stark re-evaluation of the respondeat superior doctrine began with a number of opponents arguing that it was not viable under international law.

The basis of Oppenheim's position appeared to be premised on the injustice that would result if a subordinate faced criminal charges merely for obeying something that he was 'compelled by law to commit'. Thus, according to Oppenheim, the dilemma that is created through the collision of interests in preventing crime against the interests of maintaining military discipline, appears to be answered in favour of the subordinate. Oppenheim recognised the dilemma that existed for both subordinates and military discipline should a subordinate disobey superior orders, no matter how manifestly illegal the orders may have appeared. The respondeat superior doctrine, however, as argued by Insco, fails in a number of areas such as 'favouring military efficiency to the complete neglect of criminal accountability', and its 'underinclusivity to assign responsibility in cases where a subordinate willingly follows an illegal order that he or she knows to be illegal'.

D. *An 'Intermediate Position'?*

The 'intermediate position' is neither absolute in assigning guilt to the accused nor does it entirely relieve the accused of guilt for having committed an offence/atrocity/war crime?. Rather, the 'intermediate position' acknowledges the imperative that accompanies obedience to superior orders and, at the same time, accepts that the perpetrator also played some part in

committing the acts and, on that basis, they should not be completely absolved from criminal responsibility. The intermediate position, as argued by Kudo, can be divided into the following:

1. the 'moral choice test'; and
2. the 'manifest illegality principle'.[626]

Kudo asserts that the 'moral choice test' permits the use of superior orders as a defence at times when 'moral choice' is impossible—in other words, when the accused feels they are unable to refuse the order.[627] He fails to elaborate by providing examples of when such choices are impossible, but one could speculate that such instances might include when the subordinate is faced with grave consequences for failing to obey orders such as possible loss of liberty and/or life. Kudo asserts that the 'moral choice test' is subjective in nature since it would be necessary to subjectively ascertain whether the accused actually believed they had choices about whether or not to carry out the unlawful orders.[628]

The second aspect of the 'intermediate position' which Kudo argues is the 'manifest illegality' principle. This principle, according to Kudo, is premised on the notion that a subordinate should escape criminal responsibility if they did not know (according to the test of a reasonable person) that the orders were unlawful. So, where the order was manifestly unlawful according to a reasonable person, they would not escape liability.[629]

While Kudo's ideas have some merit, what he fails to make clear is that the 'moral choice test' and the 'manifest illegality principle' are better described as factors of mitigation regarding the final sentence rather than factors affecting criminal responsibility. As such, an intermediate position would operate to mitigate the sentence rather than completely absolve the individual from criminal responsibility. As was shown throughout this thesis, the various tribunals that examined the question of superior orders were far more inclined to accept that superior orders could be used to mitigate the sentence rather than absolve the accused from criminal responsibility.[630]

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The purpose of this and the two preceding chapters regarding superior orders was to highlight the complexities and difficulties with which courts and tribunals have struggled in trying to

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[626] Kudo (n 397) 11.
[627] Ibid.
[628] Ibid.
[629] Ibid 12. For authority to his argument in relation to the existence of 'moral choice' and 'manifest illegality', Kudo cites the Nuremberg judgment which states that:
a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment.
[630] Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press, 2008) 237–8, 248–50.

develop an optimal stance on superior orders. This chapter put forward a normative conceptualisation of superior orders and in doing so, it is hoped that that such a framework is useful for future trials where superior orders is an issue. The final issue that will be addressed in this thesis is that of military necessity.

PART III:
MILITARY NECESSITY

CHAPTER 8:
HISTORICAL OVERVIEW OF MILITARY NECESSITY

I. Introduction

By the end of August 1945, much of the Japanese home islands lay in smouldering ruins.[631] A relentless Allied aerial bombing campaign had brought the once mighty Imperial Japan to a halt.[632] Still, whatever pockets of resistance remained of the Japanese Imperial Army and Navy were enough to cause great apprehension in the minds of the Allied military and civilian planners as they advanced on the Japanese homeland. The President of the United States, Harry S Truman believed—as did most other Allied leaders—that any Allied landing force arriving on the shores of the Japanese main island Honshu would be met with fierce opposition from whatever military and non-military resistance remained. Such a potential threat, even for a well-armed, advancing Allied landing force, was a risk too great to take.

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[631] Paul Ham, *Hiroshima Nagasaki* (Harper Collins, 2011) 131.

[632] For a detailed account of the US bombing missions of Japan, see United States Strategic Bombing Survey, *Effects of Incendiary Bomb Attacks on Japan: A Report on Eight Cities* (Physical Damage Division, 1947) <https://archive.org/details/U.S.StrategicBombingSurveyReport90IncendiaryAttacksOnJapan>; United States Strategic Bombing Survey (Pacific) Naval Analysis Division, *The Campaigns of the Pacific War* (USGPO, 1946) Chapters XIII–XVI; S Woodburn Kirby, M R Roberts, G T Wards and N L Desoer, *The War Against Japan: The Surrender of Japan* (HMSO, 1969) Volume V, 101–7, 147–80, Appendix 14; J R M Butler (ed), *History of the Second World War: Grand Strategy,* by John Ehrman, *October 1944 – August 1945* (HMSO, 1956) Vol VI, 257–74; Haywood Hansell, *The Strategic Air War against Germany and Japan: A Memoire* (1986) 135–259 <http://www.ibiblio.org/hyperwar/AAF/Hansell/Hansell-4.html>. According to Hansell's memoir, Major General Haywood Hansell flew in WWII and he 'became Commanding General, Third Bombardment Wing (B-26s), Eighth Air Force, in the European Theater. Subsequently, General Hansell commanded the First Bombardment Division (B-17s), Eighth Air Force, and in 1944–45 the XXI Bomber Command (B-29s), Twentieth Air Force, in the Pacific. The latter command was one of only two long-range B-29 commands conducting strategic air warfare against Japan.'; see also Robert Guillain, *I Saw Tokyo Burning: An Eyewitness Narrative from Pearl Harbor to Hiroshima* (William Byron trans, John Murray Publishers, 1981) especially, 57–70, 145–214 [trans of : *La Guerra Au Japon*].

By the middle of 1945, the fate of the industrial cities of Hiroshima and Nagasaki, along with the lives of over 200,000 civilians, was settled. On 8 August 1945, the first atomic weapon to be used against human beings was dropped on the city of Hiroshima—a city with over 318,000 people.[633] Over 100,000 people were killed instantly with many more in the coming weeks, months and years.[634] In a matter of days, a second bomb was detonated over the city of Nagasaki, an industrial city situated on the southern tip of the island of Kyushu. Similar to Hiroshima, the results were complete destruction of buildings, roads, railways and other vital infrastructure, and the annihilation of over 100,000 people within a 2.5 kilometre radius of the epicentre of the blast. Like Hiroshima, tens of thousands of people who initially survived the blast lived only to experience excruciating pain and suffering for months and years to come. The aftereffects of burns and radiation, with virtually no medical assistance, would have been horrific. Within days of the dropping of the atomic bombs, Japan's war with the Allies was over.

On what basis did the US Commander-in-Chief, President Truman, believe he had the legal authority under international law to issue an order that would, knowingly, lead to the deaths of so many non-combatants, and the destruction of civilian infrastructure, much of which was not directly related to Japan's war effort? The answer to this question lies in the conceptualisation of what constitutes 'necessity' at law. The decision to use two atomic weapons against civilians was not taken lightly.[635] The loss of US military personnel suffered during the Okinawan campaign was a particular cause for concern for Truman.[636] He, like many of his Cabinet, believed that casualties would be far greater once they reached Honshu and the use of such weapons would pre-emptively alleviate that loss.[637]

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[633] Ham (n 640) 149.

[634] For an authoritative account of the immediate and long term after effects of the atomic bombs on the people of Hiroshima and Nagasaki, see United States Strategic Bombing Survey, *The Effects of the Atomic Bomb on Hiroshima, Japan* (Physical Damage Division, 1947) <https://archive.org/details/TheEffectsOfTheAtomicBombOnHiroshima>; The Committee for the Compilation of Materials on Damage Caused by the Atomic Bombs in Hiroshima and Nagasaki (ed), *Hiroshima and Nagasaki: The Physical, Medical, and Social Effects of the Atomic Bombings* (Hutchinson & Co, 1981) [trans of: *Hiroshima Nagasaki no Genbaku Saigai* (first published 1979)] especially Part II; John Hersey, writing in 1946, provided one of the most harrowing and revered eyewitness accounts of the dropping of the atomic bomb on Hiroshima, see John Hersey, *Hiroshima* (A A Knopf, 1946).

[635] For a discussion on the lead up to the decision to use nuclear weapons against Japan, see J R M Butler (ed), *History of the Second World War: Grand Strategy,* by John Ehrman, *October 1944 – August 1945* (HMSO, 1956) Vol VI, 275–98; Andrew J Rotter, *Hiroshima: The World's Bomb* (Oxford University Press, 2008) especially chapters 4 and 5.

[636] Ham (n 631) 170. Ham puts the figure at 12,500 US sailors, GIs and marines killed as part of this campaign.

[637] See D M Giangreco, 'A Score of Bloody Okinawas and Iwojimas: President Truman and Casualty

Many factors played in the minds of those who made the decision to drop the atomic bombs on Hiroshima and Nagasaki. Principally, the decision to strike an already embattled nation with two atomic weapons was justified at the time on the basis of 'military necessity'—necessity to save the lives of untold numbers of US military personnel and to hasten the conclusion of a bloody and costly war. The US Administration believed that the deaths of countless Japanese non-combatants and the destruction of vital civilian infrastructure, while unfortunate, could be justified under international law through the doctrine of military necessity.

Military necessity is a doctrine that permits belligerents to commit acts that would otherwise breach the rules and customs of war.[638] It has long been recognised as a valid rationale for belligerents to fulfil their military objective when no reasonable alternatives exist. What would have necessitated the use of atomic weapons on two cities in Japan? Perhaps there is no one reason for this: it was necessary to use atomic weapons to hasten the end of the War, save US lives, to prevent Japan falling to the USSR, and to assert US military and geo-political dominance in North Asia.

This chapter examines the apparent contradictions and inconsistencies in the application of military necessity over time. In short, the overall position adopted in this thesis regarding military necessity, as borne out by the cases from Manila and elsewhere, is that international law jurisprudence should not be expanded further to allow a broader acceptance of military necessity. The danger of allowing an expanded definition of military necessity—despite the apparent convenience to military and political decision-makers—is that to do so would inevitably result in greater suffering to non-combatants and unreasonably high US casualties.

Estimates for the Invasion of Japan' in Robert James Maddox, *Hiroshima in History: The Myths of Revisionism* (University of Missouri Press, 2007) 75–115. Giangreco addresses the controversial and often derided estimates of US casualties. The author cites evidence presented to Harry S Truman at the time that placed casualty estimates at 500,000 to 1,000,000 men had the US invaded Japan prior to Japan surrendering (eg Herbert Hoover, 'Memorandum on Ending the Japanese War' in Stimson 'Safe File' Japan (After 7/41), Box 8, Records of the Secretary of War, RG 107, National Archives and Records Administration, College Park, Md). Giangreco claims that the prediction of massive US casualties was supported by 'US Army, White House, Selective Service, and War Department Documents'. He claims that contemporary scholars fail to understand the methodology used by military planners in estimating losses and this has led to criticism by scholars of these figures being inflated. Giangreco rejects the notion that Truman fraudulently concocted heavy losses to justify the dropping of the atomic bombs. Cf Barton J Bernstein, 'A Postwar Myth: 500 000 US Lives Saved' (1986) 42(6) *Bulletin of the Atomic Scientist* 38–40 <https://books.google.ca/books?id=oQYAAAAAMBAJ&pg=PA38&source=gbs_toc_r&cad=2#v=onepage&q&f=false>;

[638] Gary D Solis, The Law of Armed Conflict: International Humanitarian Law in War (2nd ed, Cambridge University Press) 276–7.

II. Defining Military Necessity

The jurisprudence surrounding military necessity predates WWI and WWII and can be traced to early human civilization.[639] The regularity with which nations have deemed it necessary to engage in armed conflict is a constant theme throughout the 'human project'. Some suggest that war is the natural 'state' and that it is more accurate to say that war is interrupted by an 'outbreak of peace'.[640] Although the occurrence of war has been, and continues to be, an integral part of the human experience, less clear are the bases for the rules for engaging in a war of necessity and the circumstances in which criminality should follow the violation of those rules.[641] As indicated by the mass aerial bombing campaigns that were carried out by both sides of the conflict during WWII, nations at war are prepared to go to extraordinary lengths to achieve what they believe are their military objectives. The important normative question is, however, what are the limits and the boundaries of these actions? Is it only the case that the victors get to decide what is and what is not considered 'necessary' and allowable during war? To answer this question, one must explore how the concept has been defined throughout the ages.

The term 'military necessity' can generally be defined as those acts by a belligerent that serve to 'legitimize destructive actions and to privilege military considerations at the cost of humanitarian values'.[642] Prior to WWII, the term was undefined. In 1956, the United States Department of the Army Field Manual ('US Army FM') defines military necessity as:

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[639] For a detailed overview of the history and philosophy underlying 'military necessity' as a doctrine, see, Nobuo Hayashi, 'Requirements of Military Necessity in International Humanitarian Law and International Criminal Law' (2010) 28(39) *Boston University International Law Journal* 39–140.

[640] Geoffrey Blainey, *The Causes of War* (MacMillan Press, 1973) viii, 3–17. Louis Henkin, *International Law: Politics and* Values (Martinus Nijhoff Publishers, 1995) Vol 18, 110–11. Henkin describes that war and aggression 'are so incessant and pervasive as to inspire the view that they are 'natural' in the nature of man, of peoples, of states and the state system' (page 110). Contrast such sentiments with Article XXIX, *Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, promulgated as General Orders No. 100 by President Lincoln, April 24, 1863* ('*Lieber Code*') that states:

'Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace.'

As early as the nineteenth century, those responsible for the drafting of the *Lieber Code* refused to accept that war was the state of nature; rather that war was something to be avoided.

[641] Edoardo Greppi, 'The evolution of individual criminal responsibility under international law' (1999) (835) *International Review of the Red Cross* <https://www.icrc.org/eng/resources/documents/article/other/57jq2x.htm>.

[642] Craig J S Forrest, 'The Doctrine of Military Necessity and the Protection of Cultural Property during Armed Conflicts' (2007) 37(2) *The California Western International Law Journal* 177, 219.

> that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity.[643]

Incorporating this definition of military necessity, pursuant to paragraph 41 of the US Army FM under the heading of 'Unnecessary Killing and Devastation', provides further clarification of the scope and limitations of what may lawfully be done in the field under the guise of military necessity. Paragraph 41 states that:

> loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places … but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated. Moreover, once a fort or defended locality has surrendered, only such further damage is permitted as is demanded by the exigencies of war, such as the removal of fortifications, demolition of military buildings, and destruction of military stores.[644]

Downey, writing in 1953, posited that any lawful claim to military necessity must satisfy four elements comprising urgency, indispensability, regulated violence and non-prohibited laws. Downey states that:

> Military necessity is an urgent need, admitting of no delay, for the taking by a commander of measures, which are indispensable for forcing as quickly as possible the complete surrender of the enemy by means of regulated violence, and which are not forbidden by the laws and customs of war.[645]

Kennedy and Andreopoulos argue that the nature of military necessity is subjective and that 'everything hangs upon a decision by generals and/or politicians as to what they judge to be needed'.[646] They describe military necessity as a 'catch all excuse' and cite numerous examples of where military necessity was regarded as a legitimate excuse for engaging in conduct that would otherwise be contrary to the laws and customs of war.[647] Similarly, Schmidt argues that

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[643] United States Department of the Army Field Manual, 'The Law of Land Warfare' FM27-10 (18 July 1956) paragraph 3(a).

[644] Ibid, paragraph 41.

[645] William Gerald Downey, 'The Law of War and Military Necessity' (1953) 47(2) *The American Journal of International law* 251, 254.

[646] Paul Kennedy and George J Andreopoulos, 'The Laws of War: Some Concluding Reflections' in Michael Howard, George J Andreopoulos and Mark R Shulman (eds), *The Laws of War: Constraints on Warfare in the Western World* (Yale University Press, 1994) 218.

[647] Ibid. For example: the sacking of Drogheda was for little else other than to keep up troop morale; the elimination of North American Indians by American colonists was argued necessary because of fear from Indian reprisals; Germany's U-boat campaign against neutral shipping in 1917.

military necessity has been used to 'justify horrendous abuses during armed conflicts' and to legitimise the abrogation of the rules of international law.[648]

A. *United States v Russell*

The concept of 'necessity' in domestic and international law has been considered in a range of contexts. In 1871, the United States Supreme Court considered it in the case of *United States v Russell.*[649] In *Russell*, the Court was required to consider an earlier decision handed down in the Court of Claims that awarded damages to Captain J H Russell—the owner of three steamers that were seized by authority of the United States Government. The circumstances of the seizure and use of the steamers by US authorities arose during the US Civil War when they were commandeered for reasons of military 'emergency'. The US authorities seized the vessels for varying lengths of time to transport freight between various US ports. When Captain Russell claimed compensation, the US authorities argued that the Court of Claims had no legitimate jurisdictional basis on which to hear the matters as the property had been 'appropriated' pursuant to an Act of Congress in 1864. In reference to the Act, the US authorities asserted that seizing the vessels amounted to an 'appropriation' by the US authorities which was beyond the jurisdiction of the Court of Claims, due to the wording of the Act which stated that:

> The jurisdiction of the said court shall not extend to or include any claim against the United States, growing out of the destruction or appropriation of, or damage to property by the army, navy, or any part of the army or navy engaged in the suppression of the rebellion, from the commencement to the close thereof.[650]

The US Supreme Court disagreed and affirmed the earlier decision of the Claims Court to award compensation of $41,355 to Captain Russell. In doing so it held that there was no evidence to suggest the extent and scope of use of the vessels indicated that the authorities intended to 'appropriate' the vessels for any length of time beyond the military emergency. The US authorities merely intended to 'compel the captains and crews with such steamers to perform the services needed, and to pay a reasonable compensation for such services'.[651] The Court therefore held that there was no 'appropriation' of the claimant's property and that 'each

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[648] Michael N Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50(4) *Virginia Journal of International Law* 795, 796. Like other authors, Schmitt places the 'roots' of military necessity in the nineteenth century German conceptualisation of *Kriegsraison geht vor Kriegsmanier* (necessity in war overrules the manner of warfare).

[649] United States v Russell 80 US 623 (1871).

[650] United States v Russell, 624.

[651] Ibid, 626.

of the steamers, so soon as the services for which they were respectively required had been performed, were returned to the exclusive possession and control of the claimant'.[652]

In reaching its decision, however, the Court acknowledged that the justification for seizing private property in times of necessity is valid. It stated:

> Such a taking of private property by the Government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate and the danger is impending.[653]

Although rejecting the US Government's argument on the definition of 'appropriation', the US Supreme Court did provide a useful description of the elements of military necessity. It includes a 'public service' aspect to the necessity, 'in a time of war or impending public danger'. It also held that necessity occurs when there is some degree of urgency and the need for the use of the property is 'imperative' and 'immediate'.

B. *Mitchell v Harmony*

In 1851, the US Supreme Court was asked to consider the meaning of 'urgent necessity' in the case of *Mitchell v Harmony.*[654] Several years prior, when the United States was at war with Mexico, Harmony's property was seized by Lieutenant Colonel Mitchell, an officer of the US army on the basis that Harmony was alleged to have been trading with the enemy and, as importantly, so as 'to insur[e] the success of a distant expedition'.[655] The 'distant expedition' to which the Court referred, related to a US expeditionary force that was to advance to a position forward of where Harmony was trading. To ensure the most favourable circumstances for the expedition, Lieutenant Colonel Mitchell, acting under the orders of Colonel A W Doniphan, 'seized, took, drove, and carried away and converted to his own use the horses, mules, wagons, goods, chattels, and merchandise of the plaintiff and compelled the workmen and servants of the plaintiff having charge to abandon his service and devote themselves to the defendant's service'.[656]

Harmony, being an American sutler, had lawfully ventured into the Mexican provinces of Chihuahua and Santa Fe to trade with the occupying US army and Mexican locals. The lawfulness of Harmony's activities was based on the fact that in 1845, the US Congress passed

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[652] Ibid, 627.
[653] Cited in William Gerald Downey, 'The Law of War and Military Necessity' (1953) 47(2) *The American Journal of International Law* 251, 255.
[654] *Mitchell v Harmony* 54 US 13, 115 (1851). The term, 'sutler' has traditionally been used to describe the business in which Harmony was engaged. For additional discussion of *Mitchell v Harmony* in relation to superior orders, see Chapter 5.
[655] Ibid, 115.
[656] Ibid, 116.

an Act that allowed such trading to occur in certain areas. Thus, the Court held that Harmony was not in breach of any US laws in relation to trading with the enemy.[657]

The basis of the Army's claim for seizing Harmony's property was predicated on the urgent necessity to confiscate the goods so that they would not fall into the hands of the enemy—thus depriving the enemy of some, albeit small, material advantage.[658] The Army also claimed that seizure of the goods was compatible with the military objectives associated with the forward expedition, thereby satisfying a further necessity. The case report does not explain why or how the Army arrived at this conclusion. However, in considering the Army's claims, the Court examined the nature of the urgency of the necessity in confiscating the goods. The Court determined that, as a general rule, private property could indeed 'be taken by a military commander to prevent it from falling into the hands of the enemy or for the purpose of converting it to the use of the public'.[659] However, the important thing is that there must be an immediate and impending danger or an urgent necessity in taking the goods. The Court held that possession of private property must not be taken 'for the purpose of insuring the success of a distant expedition upon which he is about to march'.[660]

The problem for the Court was that the Army was unable to show that there was any such urgency that would warrant the seizure of the goods in the manner in which they were taken from Harmony. The Court ruled that the property was not taken to defend military positions or to repel an advancing attack, but merely for a possible advantage at some point in the future.[661] This lacked any sense of urgency that would necessitate taking private property. On that basis, the Army was ordered by the Court to pay Harmony restitution.

C. *William Hardman (Great Britain v United States)*

An example can be seen of where the actions of one party did constitute a valid military necessity in *Hardman's* case.[662] In 1898, in the period during the war between the United States and Spain, the United States military occupied the Cuban town of Siboney. The US Army burned and destroyed a number of dwellings and other property in the town to prevent the spread of yellow fever among US military personnel. One of the houses destroyed belonged to a British citizen by the name of William Hardman. On behalf of Hardman, the British government brought an action against the US government seeking an amount of £142 on account of the destroyed property.

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[657] Ibid, 117.
[658] Ibid, 115.
[659] Ibid.
[660] Ibid.
[661] Downey (n 661) 255.
[662] *William Hardman (Great Britain v United States)* Reports of the International Arbitral Awards (1913) VI RIAA 25.

The US government claimed that because they were in a time of war, the right arose to 'destroy private property for the preservation of the health of the army … and that such authorized destruction constituted an act of military necessity … and did not give rise to any legal obligation to make compensation'.[663] Britain argued that the US did have such a right because Hardman's loss did not constitute a 'necessity of war'; rather the US Army carried out the destruction simply to 'better secure the comfort and health of the United States troops'. For that reason, they argued compensation should be payable.[664] The question for the Tribunal was whether, under the circumstances, the destruction of the private property 'was or was not a necessity of war'.[665]

In arguing its case, the US adduced evidence from Brigadier-General George H Torney, Surgeon General of the United States Army, who believed that the sanitary conditions in the town were such that the destruction of property was necessary.[666] Britain failed to produce any contrary evidence that contradicted or negated that evidence in relation to the degree of health risks.

On the question of necessity, the Tribunal established that the necessity of war for the United States in this case was primarily 'the occupation of Siboney, and that occupation, which was not criticized by the British Government, involved the necessity, according to medical authorities … of taking the said sanitary measures'.[667] It is apparent that the necessity primarily related to the occupation of the town of Siboney and the necessity of destroying the property was necessarily directly related to maintaining the occupation. On that basis, the Tribunal held, 'the presence of the United States troops at Siboney was a necessity of war and the destruction of civilian property required for their safety was consequently a necessity of war'.[668] The Tribunal ruled in favour of the United States.

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[663] Ibid, 25.
[664] Ibid.
[665] Ibid, 26.
[666] Brigadier-General Torney was present at the town when the order was given to destroy the property and was believed to have a sufficient understanding of the scientific and health conditions for which the order was made.
[667] William Hardman, 26.
[668] Ibid. Although the Tribunal agreed that the action taken by the United States did constitute a valid necessity of war, in the closing paragraph of the decision, it urged the United States, on the basis of 'humanitary conduct', to compensate the plaintiff's losses 'as a matter purely of grace and favour … when the sufferer appears to be specially worthy of interest', despite there not being any legal obligation; rather a moral duty 'which cannot be covered by law'.

D. *The Lieber Code*

Carnahan asserts that the modern conceptualisation of the law of war stems from the 1860s.[669] Specifically, he cites a number of key developments starting in 1862 with Dunant's *Un Souvenir de Solferino* which, two years later, led to the first Geneva Convention on the treatment of the sick and wounded.[670] Following these developments was the promulgation of the Declaration Renouncing Explosive Projectiles under 400 Grammes.[671] However, even more prescient than these developments, argues Carnahan, was the promulgation in the United States of the *Lieber Code*[672] which 'may be considered the final product of the eighteenth-century movement to humanize war through the application of reason'.[673]

He argues that one of the most significant influences on the development of the *Lieber Code* was the 'identification of military necessity as a general legal principle to limit violence, in the absence of any other rule'.[674] Bringing the skill and knowledge gained from combat during the Waterloo campaign and the Greek War of Independence, Francis Lieber was able to codify laws in relation to how the American Civil War should be conducted.[675] Drafted during a tumultuous time in American history meant that the *Lieber Code* provided a significant contribution to creating a legal framework to deal with a number of urgent issues incident of the War. For instance, how to treat Confederate prisoners, how to deal with guerilla fighters, the creation of offences and punishment, and so on. From a political point of view, argues Carnahan, Francis Lieber offered the Lincoln administration an attractive way to 'accord individual Confederates the privileges of belligerency for humanitarian reasons, without in any way recognizing the legitimacy of their government'.[676]

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[669] Burrus M Carnahan, 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity' (1989) 92(2) *The American Journal of International Law* 213, 213. For these assertions, Carnahan cites various authorities – see, eg, Arthur Nussbaum, *A Concise History of the Law of Nations* (rev ed 1954); Henry Dunant, *A Memory of Solferino* (English ed 1959).

[670] Ibid. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Opened for signature 22 August 1864.

[671] Declaration Renouncing the Use in War of Certain Explosive Projectiles Under 400 Grammes Weight, opened for signature 29 November 1868 (entered into force 11 December 1868).

[672] General Orders 100, Instructions for the Government of the Armies of the United States in the Field, Article 14. ('*Lieber Code*') or (the '*Code*').

[673] Carnahan (n 669) 213.

[674] Ibid.

[675] Ibid, 214.

[676] Ibid. Carnahan cites as authority for this proposition Richard S Hartigan, *Lieber's Code and the Law of War* (1983).

The *Lieber Code* came into force at Washington DC on 24 April 1863 with the title, 'Instructions for the Government of Armies of the United States in the Field'.[677] The *Code* comprises ten sections, each dealing with a specific issue in relation to matters arising during war.[678] Section I deals with three provisions directly related to military necessity.[679] Article 14 states that:

> Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war.

Article 14 defines, in broad terms, the meaning of military necessity. The definition of military necessity incorporates an understanding that certain conduct in war—which might otherwise be contrary to the principles of humanity—is legitimate providing the conduct is engaged in by the belligerent on the basis of 'necessity' and is intended to achieve the goal of securing an end to war. Is such a provision, therefore, a denouncement of, and a departure from the principles espoused by, for example, the likes of earlier military thinkers such as Clausewitz? Clausewitz saw the sole object of war as the 'disarmament' of the enemy—to lead to an end of hostilities and an eventual political conclusion.[680] There is one significant qualification between what acts may legitimately be deemed necessary in accordance with Article 14 and the concept of necessity espoused by earlier military thinkers, such as Clausewitz. The difference is the explicit limitation that Article 14 places on the belligerent. The provision requires that the conduct itself is limited to being lawful in accordance with the 'modern law and usage of war'. Such a limitation does not appear to be a requirement in the Clausewitzian framework. For that reason it can be argued that the *Lieber Code* was an express departure from the rules of war that existed at that time in relation to military necessity.

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[677] *Lieber Code* reprinted in Leon Friedman (ed) *The Law of War: A Documentary History Volume 1* (Random House, 1972) 158.

[678] Ibid, 158–86 citing the *Lieber Code*, Sections I–X. Section I deals with Martial Law, Military Jurisdiction, Military Necessity and Retaliation; Section II addresses Public and Private Property of the Enemy, Protection of Persons, and Especially of Women, of Religion, the Arts and Sciences, Punishment of Crimes against the Inhabitants of Hostile Countries; Section III deals with Deserters, Prisoners of War, Hostages and Booty on the Battlefield; Section IV – Partisans, Armed Enemies Not Belonging to the Hostile Army, Scouts, Armed Prowlers and War Rebels; Section V – Safe Conduct, Spies, War Traitors, Captured Messengers; Section VI – Exchange of Prisoners, Flags of Truce, Abuse of the Flag of Truce and Flags of Protection; Section VII – The Parole; Section VIII – Armistice and Capitulation; Section IX – Assassination; and Section X – Insurrection, Civil War and Rebellion.

[679] General Orders 100, Instructions for the Government of the Armies of the United States in the Field, Articles 14, 15 and 16.

[680] Anatol Rapoport (ed), *Clausewitz: On War* (Pelican Books, 1968) 122–3.

The question, what is 'lawful' in accordance with 'modern law and usage of war' can be ascertained in the preceding and subsequent Articles of the *Code*.[681] In other words, it operated as an all-encompassing interpretive framework setting forth the rules of war, and reference to lawfulness 'according to the modern law and usages of war' in Article 14, simply meant according to the *Code* itself and the rules contained therein. The *lex scripta* that bound the Union soldiers was contained in the *Code* and, therefore, provided the legal framework for how Union soldiers could operate during that conflict.[682]Article 15 of the *Lieber Code* states that:

> Military necessity admits of all destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety, and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.[683]

Article 15 is a further qualification of the definition of military necessity that is contained in Article 14. It accepts that acts committed under the auspices of military necessity include killing and wounding of 'armed enemies'. It also accepts that under a legitimate claim of military necessity it is acceptable to kill others—such as non-combatants—'whose destruction is incidentally unavoidable'. The modern understanding of that assertion is colloquially known

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[681] For example, see Sections I–X of the *Lieber Code.*

[682] See Schmitt (n 656) 801, especially footnote 20. Schmitt claims that there is only minimal reference to the notion of military necessity arising within the *lex scripta* and that the *Lieber Code* was a significant contribution to it. Schmitt correctly points out that the *Lieber Code* was a national regulation and not a treaty, however, the significance of the rules contained within the *Lieber Code* led to the creation of much of the subsequent international humanitarian law.

[683] *Lieber Code* as cited in Leon Friedman (ed) *The Law of War: A Documentary History Volume 1* (Random House, 1972) 161.

as 'collateral damage'[684] and is still regarded as an acceptable, although unfortunate, incidence of war.[685]

Article 16 of the *Lieber Code* states that:

> Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

This provision provides further qualification of what is not acceptable within the auspices of military necessity. There is an emphasis on the prohibited conduct in relation to 'revenge' and 'torture'. The same principles regarding revenge—or reprisal killings—were applied in the *Nuremberg* trials in the *Hostages* case where a number of German officers failed in their attempt to argue that the killing of civilians was necessary to prevent insurrection against, and

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[684] The term appears ubiquitously in a variety of contexts, including throughout scholarly disciplines, especially within the field of medical science, see, eg, Erik von Elm and Markus K Diener, 'The Language of War in Biomedical Journals' (2007) 369 *The Lancet* 274; Sheila M Bird, 'Military and Public Health Sciences Need to Ally' (2004) 364 *The Lancet* 1831. In the context of war, the term is now synonymous—often used pejoratively—with the invasions of Iraq and Afghanistan, and appears commonly throughout scholarly literature and popular culture. See, eg, Michael Mandel, *How America Gets Away with Murder: Illegal Wars, Collateral Damage and Crimes Against Humanity* (Pluto Press, 2004) especially Part I Illegal Wars/ Collateral Damage; Bruce Cronin, 'Reckless Endangerment Warfare: Civilian Casualties and the Collateral Damage Exception in International Humanitarian Law' (2013) 50(2) *The Journal of Peace Research* 13; Robert McCAdams, 'Iraq's cultural heritage: Collateral damage' (2001) 293 *The American Association for the Advancement of Science* 13; Michael Welch, *Crimes of Power and States of Impunity: The US Response to Terror* (Rutgers University Press, 2009) especially pages 113–35; In the context of war, the term also refers to damage incidental to combatants such as post-traumatic stress disorder – see, eg, Terri Tanielian and Lisa H Jaycox (eds), *Invisible Wounds of War: Psychological and Cognitive Injuries, Their Consequences, and Services to Assist Recovery* (Rand, 2008).

[685] In 2006, responding to over 240 separate allegations of war crimes committed in the course of the Coalition's invasion of Iraq, the Office of the Prosecutor, International Criminal Court ('ICC'), investigated, *inter alia*, 'allegations concerning the targeting of civilians or clearly excessive attacks' and 'allegations concerning wilful killing or inhuman treatment of civilians'. On both counts, the prosecutor's office found no evidence to substantiate the allegations, despite the clear evidence of high civilian casualties. The ICC was unable to act upon civilian deaths due to the 'specific gravity threshold … set down in Article 8(1) [of the *Rome Statute*]'. See open letter from Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court, 9 February 2006 <https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf> 4–10.; *Rome Statute* Article 8(2)(b)(i) Article 8(2)(b)(iv); Article 51(5)(b) of the 1977 Additional Protocol I to the 1949 Geneva Conventions.

the killing of German soldiers in various theatres throughout Europe.[686] Article 16 also prohibits the use of poison and the 'devastation of a district'—acts considered making the return to 'peace unnecessarily difficult'.

Article 19 permits for necessity in relation to surprise attacks by stating that:

> Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be necessary.

The corollary of the principles espoused throughout the *Lieber Code* provide a substantial addition to the *lex scripta* in relation to the law of necessity, not only for subsequent jurisprudence regarding the laws of armed conflict during the American Civil War and its immediate aftermath, but it also served as a valuable precursor to the legal understanding and application to major international conflicts including the various tribunals conducted after the Pacific War.

E. *Duncan v Kahanamoku*

In 1946, the US Supreme Court reversed two earlier decisions of the United States District Court for Hawaii in relation to the denial of habeas corpus.[687] The case of *Duncan v Kahanamoku* involved two US civilians—White and Duncan—who were charged and convicted separately for offences committed while Hawaii was under martial law in the aftermath of the Japanese invasion of Pearl Harbor. White was charged with offences involving embezzlement on 20 August 1942. He was arrested and brought before a military tribunal and was denied the right to a jury. Duncan was arrested on 22 February 1944 for offences involving 'brawls' with US marines and was tried and convicted before a military tribunal. The decisions of the military tribunals were challenged by White and Duncan in the District Court for Hawaii in 1944 with that Court reversing the earlier decisions of the military tribunals on the basis of jurisdictional error. The District Court held that there was insufficient argument for 'military necessity' that would justify denying the prisoners' constitutional rights to a trial in a regular court. The District Court held that the only reason why civilians would come before a military tribunal, even under martial law, is if,

> required by military necessity due to actual or threatened invasion, which even if it did exist on December 7, 1941, did not exist when the petitioners were tried; and that, whatever the necessity

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[686] *United States v List (Wilhelm) and Ors*, ('*Hostages case*') Case No 7, (1948) 8 LRTWC 34, reprinted in William Schabas and Göran Sluiter (eds) *Oxford Reports on International Law* <http://opil.ouplaw.com/view/10.1093/law:icl/491us48.case.1/law-icl-491us48>. See below n 686 for further explanation of the facts and legal rationale associated with the *Hostage case*.

[687] *Duncan v Kahanamoku* 327 US 304 (1946).

> for martial law, there was no justification for trying them in military tribunals rather than the regular courts of law.[688]

The Circuit Court of Appeal, however, later reversed the District Court's verdicts on the basis of, what it believed, the broad powers conferred upon the military under s 67 of *Hawaiian Organic Act.* The powers of the *Act*, according to the Court of Appeal, included the power to remove the constitutional right of habeas corpus.[689] On appeal, the US Supreme examined the scope of military power during martial law and disagreed with the Circuit Court of Appeal. The Supreme Court indicated that there was no practical reason martial law would preclude the right of habeas corpus and a jury trial, unless the

> dangers apprehended by the military were … sufficiently imminent to cause them to require civilians to evacuate the area or even to evacuate any of the buildings necessary to carry on the business of the courts. In fact the [Court] buildings had long been open and actually in use for certain kinds of trials.[690]

That the military tried the individuals some two or more years after the Pearl Harbor attacks—conditions that were no longer in what could be described as imminently dangerous—the Court ruled that there was no valid reason for which to suspend habeas corpus to White and Duncan and reversed the District Court's ruling.

In its majority judgment, the Court made it clear that there needed to be exceptional circumstances for which to elevate the powers of a military tribunal beyond its usual powers. The necessity for which the Court alluded to must be capable of disturbing the long established 'political philosophy' of the 'boundaries between military and civilian power'.[691]

F. *United States v List (Wilhelm) and Ors (the Hostage Case)*

The US Military Tribunal in the *United States v List (Wilhelm) and ors*, ('*Hostage case*') Case No 7, (1948) 8 LRTWC 34[692] rejected the argument that military necessity could be used to defend reprisal killings to compel the submission of the enemy. In 1947, the German Field Marshall, Wilhelm List, and eleven other senior-ranking German officers were charged with a

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[688] Ibid 310–12.

[689] The *Hawaiian Organic Act* took effect when Hawaii was placed under martial law as a result of the Japanese surprise attack on Pearl Harbor on 7 December 1941. Section 67 of the *Act* suspended the constitutional writ of habeas corpus and authorised the Territory's Governor to take action 'in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it'.

[690] *Duncan v Kahanamoku* 327 US 304 (1946) 314.

[691] Ibid 324.

[692] *United States v List (Wilhelm) and ors*, Case No 7, (1948) 8 LRTWC 34, reprinted in William Schabas and Göran Sluiter (eds) *Oxford Reports on International Law* <http://opil.ouplaw.com/view/10.1093/law:icl/491us48.case.1/law-icl-491us48>; see also *United States v Wilhelm List & Ors* LRTWC, United Nations War Crimes Commission Vol VIII, 34–92. For additional discussion of the *Hostage case* in the context of command responsibility, see Chapter 4.

range of offences including committing war crimes and crimes against humanity. The prosecution alleged that each of the defendants were accessories to the unlawful killing of civilians across a wide area of German occupied territory, including Greece, Yugoslavia, Norway and Albania. It was alleged that the accused either issued orders, or were central in the systematic apprehension, torture and killing of civilians. The Tribunal's Carter J summed up the indictment by stating that each of the accused:

> participated in a deliberate scheme of terrorism and intimidation, wholly unwarranted and unjustified by military necessity, by the murder, ill-treatment and deportation to slave labor of prisoners of war and members of the civilian populations in territories occupied by the German armed forces; by plundering and pillaging public and private property and wantonly destroying cities, towns, and villages for which there was no military necessity.[693]

The acts perpetrated by the German forces were in response to civilian insurrection and reprisal attacks from resistance movements throughout the German occupied territory. Orders were given that, for every German soldier killed, 100 hostages would be executed; and for every German soldier injured, 50 hostages would be executed.[694]

As part of their defence, the accused claimed that hostages were taken on the basis of military necessity to prevent the killing of German forces and to maintain order within the occupied territories. On the plea of necessity, Carter J discussed at length a number of salient points in relation to the applicability of necessity as it relates to the killing of hostages in time of war. He claimed that the 'origination' of killing civilians in modern times as a retaliatory act, lies squarely at the feet of Germany.[695] While acknowledging that British, American and French field manuals allow reprisal killings of civilians 'as a last resort',[696] no evidence was presented at the time that such actions were taken by forces other than Germany.

Carter J was critical of the 'complete failure on the part of the world to limit or mitigate the practice [of killing civilians as reprisals] by conventional rule', and for that reason he was

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[693] *Hostages case*.
[694] Ibid [17].
[695] Ibid [68]. Carter J cited a number of examples in the judgment where the German army targeted the killing of civilians, including, the Franco-Prussian War, World War I and World War II. Carter J claimed that 'no other nation has resorted to the killing of members of the civilian population to secure peace and order insofar as our investigation has revealed.'
[696] Ibid. As cited by Carter J: The American manual provides in part [Rules of Land Warfare, US Army, Field Manual 27–10, op. cit. supra, par. 358d, p. 89–90.]: 'The offending forces or populations generally may lawfully be subjected to appropriate reprisals. Hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people may be punished or put to death if the unlawful acts are nevertheless committed.'; and the British field manual provides in part [British Manual of Military Law, par. 458.]: 'Although collective punishment of the population is forbidden for the acts of individuals for which it cannot be regarded as collectively responsible, it may be necessary to resort to reprisals against a locality or community, for some act committed by its inhabitants, or members who cannot be identified.'

required to apply customary law to reach an outcome.[697] In discussing the general principle of military necessity, Carter J asserted that the Germans 'confuse for convenience and strategical interests' correct usage of military necessity. He goes on to state that, 'where legality and expediency have coincided, no fault can be found … but where legality of action is absent, [killing civilians] as a measure of reprisal is not only criminal but it has the effect of destroying the basic relationship between the occupant and the population'.[698] His Honour identified serious deficiencies with the way the accused controlled the population by taking reprisal hostages. What is necessary, argued Carter J, is a 'proclamation' clearly indicating consequences in the event the perpetrators are not apprehended. However, if the 'perpetrators are apprehended, there is no right to kill either hostage prisoners or reprisal prisoners'.[699] His Honour went on to state that a belligerent would not have the right, under international law, to execute reprisal prisoners unless the entire population from which the prisoners are taken is a party to the acts committed by the perpetrators. In other words, there is no right to arbitrarily assign collective guilt to an entire group for the actions of a few. Even more importantly, if the reprisal hostages are taken from communities other than those from where the perpetrators are not from, then there is little deterrent effect in taking hostages.[700] He also stated that the scope of reprisals must not exceed the actual offences committed and that there must be some form of proportionality associated with them.[701] He stated that 'fundamental concepts of justice and the rights of individuals' require that the belligerent provide a fair trial prior to pronouncement of sentence and execution.[702] On the issue of military necessity, His Honour summed up by stating:

> Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.[703]

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[697] Ibid, [70].
[698] Ibid, [71].
[699] Ibid, [72].
[700] Ibid, [73].
[701] Ibid.
[702] Ibid, [74]. Although Carter J does allude to the fact that trials conducted in war time may give the appearance of being 'ritualistic' and 'superficial', judicial proceedings are still the best chance of preventing 'cruelty' and 'injustice'.
[703] Ibid, [76].

While expressly acknowledging the legitimacy of military necessity, and alluding to some of the circumstances in which it might arise, Carter J was forthright in his assessment of the limitations and boundaries as to when military necessity can legitimately be argued. Clearly, it is accepted that any claim to military necessity will be subject to the 'laws of war'. While accepting that military necessity be claimed by a belligerent to 'protect the safety of his forces' and to 'facilitate the success of his operations'—including the destruction of life as a natural incidence of war—there are limitations to such a claim. Carter J held that killing premised on revenge, or 'the satisfaction of a lust to kill', falls outside of the scope of any legitimate plea of military necessity. The actions of the accused in their part in the reprisal killings, in Carter J's view, clearly fell outside of the scope of a legitimate claim to military necessity. The circumstances for which List and others stood accused, in no way satisfied this basic test.[704] Carter J did not believe that there was any necessity—or indeed whether there was anything to be achieved—in the execution of civilians on the basis of reprisals. The Tribunal found List guilty of three of the four charges and sentenced him, and another, to life imprisonment. Another six defendants were also found guilty and received varying sentences between seven and twenty years imprisonment. Two defendants were found not guilty of any of the charges, one committed suicide, and one lacked the capacity to stand trial.[705]

The limitations to which the Tribunal in the *Hostages case* alluded, were, at the time clearly provided for at international law and did not constitute substantially new ground. Schmitt argues that the relationship between military necessity and international humanitarian law represents a fine balance 'which seeks to limit the suffering and destruction incident to warfare'.[706] Such limitations were provided for by way of codification in numerous international law instruments.

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[704] It is important to note that military necessity was not the only concept under judicial consideration as part of the trial. The Tribunal faced further questions associated with whether List and the others were criminally responsible for orders that came from as far up the chain of command as Hitler himself. Thus, the Tribunal grappled with questions relating to the criminal responsibility of the accused based on 'superior orders'. That is, whether List and the others should be absolved from some criminal responsibility based on the fact they were merely following superior orders. On this point, the Tribunal held, as was commonplace in other Allied tribunals, that an unlawful order—no matter from whom—was unlawful *per se* and that the excuse of superior orders would in no way relieve individual responsibility from those carrying out such orders. Although, it must be said that perhaps there was some, albeit tacit, acknowledgement of superior orders playing some part in the conduct of the accused. Such an acknowledgment being reflected in the sentencing whereby none of those sentenced received the death sentence.

[705] *Hostages case*.

[706] Michael N Schmitt, 'Military Necessity and Humanity International Humanitarian Law: Preserving the Delicate Balance' (2010) 50(4) *Virginia Journal of International Law* 795, 796, 816. Schmitt states that the balance between military necessity and humanity exists 'in fragile equipoise' in international humanitarian law.

G. *Military Necessity and the Declaration of St Petersburg*

The *Declaration of St Petersburg*, December 1868, was a declaration renouncing the use in war of certain explosive projectiles that 'fixe[s] by a common accord the technical limits within which the necessities of war ought to yield to the demands of humanity …[707] In furtherance of this object, the *Declaration* stated:

> That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;
>
> That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
>
> That for this purpose it is sufficient to disable the greatest possible number of men;
>
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

The *Declaration* makes it an express requirement to reduce as much as possible the 'calamities of war', while at the same time stipulating that there is but one legitimate object during war, which is reducing the capacity of the military forces of the enemy. The emphasis which the *Declaration* places on the weakening of enemy forces by disabling the greatest number of men, is a recognition of the *kriegsraison* doctrine. The qualification of the *kriegsraison* doctrine occurs in the proceeding sentence which serves to particularise the excessive use of, in this case, weapons that 'uselessly aggravate' the suffering of 'disabled men, or render their death inevitable'. Such weapons, according to the *Declaration*, are those employed by 'military or naval forces that employ any projectile of less weight than four hundred grammes, which is explosive, or is charged with fulminating or inflammable substances'. In other words, weapons designed to disable an individual to such an extent that there is no useful, or beneficial, military objective achieved as a result of the employment of that particular weapon.

Some years later, the *Hague Regulations* of 1899 and 1907 made it clear that there are limitations to a belligerent's right to use whatever means necessary to achieve a military objective:

> Article 22: The right of belligerents to adopt means of injuring the enemy is not unlimited.[708]

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[707] *Declaration Renouncing the Use in War of Certain Explosive Projectiles Under 400 Grammes Weight,* opened for signature 29 November 1868 (entered into force 11 December 1868) ('*Declaration*'). The *Declaration* was the first formal international agreement which sought to restrict the use of certain kinds of weapons during war – see International Committee of the Red Cross, *Treaties and State Parties to Such Treaties* <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=3C02BAF088A50F61C12563CD002D663B>.

[708] Convention (II) with Respect to the Laws and Customs of War on Land and its annex art 22,

> Article 23 In addition to the prohibitions provided by special Conventions, it is especially forbidden: …
>
> (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;[709]

H. *Military Necessity and the Destruction of Infrastructure and other Property*

Aside from being used as a justification for the use of force against combatants and non-combatants, military necessity provides a legitimate basis for the destruction of property and infrastructure—including both military and non-military related property.[710] Necessity in relation to the destruction of property, in this discussion, refers to both cultural heritage property and property associated with combatant and non-combatant infrastructure—that is, any physical property that is subject to destruction during armed conflict. That one would adopt such a wide definition of property is logical given the destructive capacities of war.

According to Forrest, cultural property is often damaged intentionally during war—for example, where property is used to 'shield' military equipment; or where property is destroyed through pillaging.[711] Property is also destroyed unintentionally through the natural incidence

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opened for signature 29 July 1899 ('Hague II'); Convention (IV) Respecting the Laws and Customs of War on Land and its annex art 22 The Hague, opened for signature 18 October 1907 ('Hague IV').

[709] *Hague IV*, article 23(g).

[710] The *Lieber Code* reprinted in Leon Friedman (ed) *The Law of War: A Documentary History Volume 1* (Random House, 1972). See especially Articles XIV, XV, XVI, XXXVIII, and XLIV. Also, for a contemporary definition of cultural property, see UNESCO definition of cultural property. See Article 1. Definition of cultural property *Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention* (14 May 1954):

> (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
> (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
> (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and
> (d) to be known as 'centers containing monuments'.

[711] Craig J S Forrest, 'The Doctrine of Military Necessity and the Protection of Cultural Property during Armed Conflicts' (2007) 37(2) *The California Western International Law Journal* 177, 178. Forrest cites the Iraqi military as an example where during the invasion of Iraq in 2003, the Iraqi military placed military equipment near a museum and the Arch of Ctesiphon.

of war. The importance of protecting cultural property during times of war has been recognised in various *lex scripta* throughout history. For example, the *Lieber Code* provides several provisions that aim to protect various institutions and repositories of cultural property emanating from religious institutions, museums, and places of education.[712] Specific provisions under Section II of the *Lieber Code*—ie Articles 35 and 36—provide rules for the protection and preservation of private property of the enemy, including property in relation to religion, the arts and sciences.[713]

At the international level, the *Hague Convention* of 1907 similarly provides protection for property.[714] Article 23(g) prohibits the destruction or seizure of 'the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war'. In relation to cultural property, the *Hague IV* provides protection of cultural property by virtue of Articles 27 and 56. Article 27 provides that:

> In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.[715]

Article 56 provides that:

> The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.[716]

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[712] *Lieber Code* reprinted in Leon Friedman (ed) *The Law of War: A Documentary History Volume 1* (Random House, 1972) 164–5.

[713] *Lieber Code*: Article 35:
Classical works of art, libraries, scientific collections or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.
Article 36:
If such works of art, libraries, collections or instruments belonging to a hostile nation or government can be removed without injury, the rule of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.
In no case shall there be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured..

[714] *Hague IV* art 23(g).

[715] *Hague IV* art 27.

[716] Ibid Article 56.

Throughout much of the literature that deals with war and military necessity, there appears to be general agreement regarding the contemporary origins of the principles associated with military necessity.[717] As with much of international law, the origins of military necessity have historical roots stemming from the rules promulgated in the chivalric period. As stated by Henkin, 'modern international law has addressed the rules of war—the offspring of the age of chivalry'.[718] Downey, writing in 1953, begins his survey of the law of necessity from its beginnings within the concept of *Kriegsraison*.[719] Downey asserts that the pure conceptualization of *Kriegsraison* represents an understanding that necessity 'overrode all law'.[720] Such an understanding, however, as Downey goes on to state, is tempered with new conceptualisations of military necessity that came from the International Military Tribunal at Nuremberg in the aftermath of World War II, that held that 'military necessity is governed by positive international law'.[721]

Prussian born soldier and philosopher, Carl von Clausewitz, in his seminal work of the early nineteenth century—*Clausewitz on War*—stressed that the sole objective of war is to disarm the enemy: disarmament being the necessary precursor to achieving the 'political' objective.[722] Then, and only then, will the enemy be forced to make peace.[723] An intention 'to do him damage in a general way' is a natural incidence of disarming the enemy.[724] Clausewitz states that war,

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[717] For example, see Michael N. Schmitt, Jelena Pejic and Yoram Dinstein, *International law and armed conflict: exploring the faultlines: essays in honour of Yoram Dinstein,* International humanitarian law series v. 15 (Martinus Nijhoff Publishers, 2007) 213; Craig J S Forrest, 'The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts' (2007) 37(2) *California Western International Law Journal* 177, 182–91; Maria Agius, 'The Invocation of Necessity in International Law' (Master of Laws Thesis, Uppsala, 2006) <https://www.uppsalajuristernasalumnistiftelse.se/wp-content/uploads/2014/11/Maria-Agius.pdf> 8-10.

[718] Louis Henkin, *International Law: Politics and Values* (Martinus Nijhoff Publishers, 1995) Vol 18, 110. See also Robert C Stacey, 'The Age of Chivalry' in Michael Howard, George J Andreopoulos and Mark R Shulman (eds) *The Laws of War: Constraints on Warfare in the Western World* (1994, Yale University Press) Chapter 3. Stacey traces the chivalric period back to roughly 1100 and 1500, but stresses that laws of war coming from this period were heavily influenced from Roman times.

[719] William Gerald Downey, Jr., 'The Law of War and Military Necessity' (1953) 47(2) *The American Journal of International Law* 251, 252.

[720] Ibid.

[721] Ibid.

[722] Anatol Rapoport (ed), *Clausewitz: On War* (Pelican Books, 1968) 122–3. Clausewitz served in a number of military campaigns and went on to become the director of the Military Academy at Berlin. Anatol Rapaport claims that Clausewitz was 'more a philosopher than a soldier'. Having served in various campaigns, under different sovereigns, and his involvement in military affairs from 1793 to 1813, it is not difficult to see the authority for which Clausewitz wrote on matters involving war.

[723] Ibid 124.

[724] Ibid 127.

> is an act of violence intended to compel our opponent to fulfil our will … and in order to attain this object fully, the enemy must be disarmed, and disarmament becomes therefore the immediate object of hostilities in theory...[725]

The necessity which Clausewitz writes is the disarmament and the eventual cessation of armed conflict leading to the political goal. Clausewitz makes it quite clear that to achieve the interim and final goals, the military objective is to be achieved from whatever means available. For instance, Clausewitz writes,

> Now, philanthropists may easily imagine there is a skillful method of disarming and overcoming an enemy without causing great bloodshed, and that this is the proper tendency of the Art of War. However plausible this may appear, still it is an error which must be extirpated; for in such dangerous things as War, the errors of which proceed from a spirit of benevolence are the worst. … it follows that he who uses force unsparingly, without reference to the bloodshed involved, must obtain a superiority if his adversary uses less vigour in its application. The former then dictates the law to the latter, …[726]

He went on to say:

> This is the way in which the matter must be viewed, and it is to no purpose, it is even against one's own interest, to turn away from the consideration of the real nature of the affair because the horror of its elements excites repugnance. If the Wars of civilized people are less cruel and destructive than those of savages, the difference arises from the social condition both of States in themselves and in their relations to each other. Out of this social condition and its relations War arises, and by it War is subjected to conditions, is controlled and modified. But these things do not belong to War itself; they are only given conditions; and to introduce into the philosophy of War itself a principle of moderation would be an absurdity.[727]

The corollary of Clausewitz's argument is that acts committed during times of war must be seen in their relationship to the overall goal, and that necessity in achieving that goal will dictate the nature of those acts committed. Clausewitz asserts that 'control' and 'modification' of

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[725] Ibid 101.

[726] Ibid 102.

[727] Ibid. It is doubtful whether Clausewitz truly believed in unfettered violence during war. The apparent lack of 'excessive humanitarian considerations' could be attributed to the fact that Clausewitz was 'a child of his time'—an officer who had grown up with false views of war. Of the German 'war class', Justice Carter in the *Hostages case* [79], cites a German text (introduction to the German War Book, as translated by J. H. Morgan [John Murray, London, 1915] on pages 555) that described the German 'war class'. It states, 'the officer is a child of his time. He is subject to the intellectual tendencies which influence his own nation; the more educated he is the more will this be the case. The danger that, in this way, he will arrive at false views about the essential character of war must not be lost sight of. The danger can only be met by a thorough study of war itself. By steeping himself in military history an officer will be able to guard himself against excessive humanitarian notions, it will teach him that certain severities are indispensable to war, nay more, that the only true humanity very often lies in a ruthless application of them'.

behaviour during war—presumably through the implementation of rules of war—have no place in the nature of war and are, in fact, an 'absurdity'. A pragmatist focused solely on achieving a military objective might agree there is some merit to this notion. To impose rules upon acts, such as killing in time of war, is not only oxymoronic but also an anathema to achieving the subjugation and eventual disarmament of one's enemy. Indeed control and modification of what is permissible in times of war was a firm tenet of, for example, those involved with the American Civil War.[728]

In 1921, Elihu Root, the then President of the American Society of International Law, raised concerns of the inherent dangers associated with *kriegsraison* as a doctrine of international law.[729] The danger lies, according to Root, in that the belligerent is the 'sole judge' as to what constitutes a valid 'necessity' which justifies a violation of international law. Root suggests that international law—with the adoption of *kriegsraison*—becomes, in effect, superfluous, or 'no more' and that the result will be a 'world without law, in which alliances of some nations … enforce their ideals of suitable conduct upon other nations'.[730]

Having now outlined the problem for international law of the doctrine of military necessity, the following chapter will provide a normative overview of the way that the law should be regarded. As will become clear, any further expansion in regard to the legitimisation of military necessary at international law is problematic due to the expansionary effect that such a position might have.

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[728] For a detailed discussion on the political, legal and historical circumstances of the American Civil War, see generally Stephen Douglas Engle, *All the President's Statesmen: Northern Governors and the American Civil War* (Marquette University Press, 2006); Lewis L Gould, *Alexander Watkins Terrell: Civil War Soldier, Texas Lawmaker, American Diplomat* (University of Texas Press, 2004); Jeremy Black, *America As a Military Power, 1775–1865* (Greenwood Press, 2002) especially chapter 7; Bruce Catton, *America Goes to War: The Civil War and Its Meaning in American Culture* (Wesleyan University Press, 1992); Leon Friedman (ed), *The Law of War: A Documentary History – Volume 1* (Random House, 1972) especially 'Treaties, Conventions and Agreements: The *Lieber Code (1863)*'; Mark E Neely, *Lincoln and the Triumph of the Nation: Constitutional Conflict in the American Civil War* (University of North Carolina Press, 2011).

[729] Downey (n 719) 253.

[730] Ibid.

CHAPTER 9:
THE PLEA OF MILITARY NECESSITY AT THE US ARMY TRIALS, MANILA – A VALID DEFENCE AT INTERNATIONAL LAW?

I. Introduction

The excuse of 'military necessity' was argued by defendants at the US trials in Manila as a means to avoid criminal responsibility, although it was not raised to the same extent as the plea of superior orders. Defendants used military necessity as a way of explaining or excusing otherwise unlawful behaviour—behaviour which often involved atrocities committed against US and Allied POWs or Filipino non-combatants. The excuse of military necessity was predicated on the notion that the actions were necessary to achieve a military objective (and were therefore necessary—hence the term, 'military necessity'). The Manila trials show that it was not used as a defence *per se*, but was used by the defence to mitigate or justify the accused's actions in committing acts such as killing and/ or torture.

In the Manila trials, Japanese defendants predominantly raised military necessity on the basis that their harsh actions were required to subjugate a fierce guerrilla insurgency being waged against their forces. Military necessity also arose in the context of summary executions of US and Allied POWs—particularly of downed airmen and POW escapees. In addition, military necessity was raised in situations whereby the Japanese forces killed US military personnel *hors de combat* by virtue of captivity, injury or sickness. Often the accused argued it was necessary to kill the victims simply to save their own lives, such as in the case of Major Mikami.

However, the cases show that even as a factor in mitigation, military necessity was mostly unsuccessful and did not relieve the accused of criminal responsibility. This was despite the plethora of US municipal law, international law, military law, and scholarly commentary in existence at the time regarding the validity of the plea of military necessity as a basis for relieving criminality in certain contexts. The fact that tribunals were reluctant to entertain military necessity as a valid plea—even to mitigate the sentence—was understandable given the plea was often associated with extremely brutal acts committed against US soldiers and Filipino civilians. Any precedent set by allowing military necessity to mitigate the sentence would have profound consequences for many Japanese who were on trial for killing US soldiers, and military commissions could not entertain an accused escaping criminal responsibility under such circumstances.

This chapter begins with a discussion of the US military's interpretation of military necessity at the time. Integral to that discussion is an important legal memo provided by Lieutenant Walter H Robinson of the US Army who outlined significant aspects of the law in relation to

military necessity.[731] Robinson's memo is important because it provides a then contemporaneous record of military necessity as it was interpreted at the trials. As far as can be determined, it is one of the only legal advices in existence that provides a detailed overview of the doctrine.

II. US Army's Legal Interpretation of Military Necessity at the Manila War Crimes Trials

A. *The Use of Force against Filipino Insurgents not Prima Facie Unlawful*

From the beginning of the Manila trials in 1945, it quickly became apparent to both prosecution and defence counsel that additional direction from legal sources was required on how to tackle the difficult issue of military necessity when raised as a defence to war crimes. Clarification of the legal position of the doctrine of 'necessity' was particularly warranted in the Philippines trials given that many of the crimes alleged to have been committed by Japanese forces were committed as part of Japan's attempt to subjugate a fierce Filipino insurgency. Japanese forces were therefore engaging in the use of force to put down pockets of resistance to their authority, thus, the case was made by some defendants that tough measures were required, and they contended this was a legitimate tactic under international law.

Pertinent legal arguments regarding Japan's use of force against Filipino insurgents could be made if it was deemed that Filipino guerrilla activities were unlawful. In addressing this problem, US lawyers expended some considerable time and effort in formulating a legal argument that acknowledged the legal conundrum, and as is discussed below, validated the actions of Filipino guerrillas in their resistance against Japan. The legal position adopted by the US thus avoided the uncomfortable situation of legitimising the excuse of military necessity.

B. *Designing a 'Fit for Purpose' Definition of Military Necessity*

In the Manila trials, military necessity needed to be defined in such a way that it did not extend to the actions of Japanese defendants, while at the same time did not implicate the US and its Allies in war crimes—particularly over the use of nuclear and non-nuclear weapons against Japanese civilians. If the elements of military necessity were defined too narrowly, the US may not have been able to justify its own actions (and the actions of its troops) during the course of

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[731] 'Memorandum of Law – Military Necessity, the content and limitations of the doctrine', memo from Lieutenant Walther H Robinson to Lieutenant Fishman, 24 October 1945. RG331 UD290/12/2/2 Box 1389 Folders 14 and 26. It is not entirely clear how much weight military commissions gave Robinson's advice, or indeed whether the existence of the advice was known to the defence and prosecution members. The advice still provides an interesting overview of the law as it was envisaged at the time.

the War. The US itself might very well have been accused of committing the very crimes for which they were holding Japanese individuals accountable.

Likewise, any definition that was too broad meant that the perpetrators of heinous acts against US and Allied combatants and non-combatants, might evade criminal responsibility. One interpretation of acceptable conduct in the guise of military necessity might allow a broad, and possibly unlimited array of actions that would make prosecuting war crimes an impossible task.

C. *Towards a Theory of Military Necessity*

For this purpose, in October 1945, Lieutenant Walter H Robinson of the US Army provided some guidance on the matter when he drafted a memo in which he attempted to deal with the specific content of, and limitations to, the doctrine of military necessity.[732] In the memo, Lieutenant Robinson outlined a range of factors associated with the doctrine and described the general legal position of military necessity at law and the application of military necessity in relation to people and property.

As will be shown below, however, Robinson's memo appears predominantly designed to provide a legal justification for denying military necessity as a defence for Japanese defendants accused of war crimes. At the very least, Robinson's memo could be described as an attempt to define the doctrine in very specific terms. The memo suited the US prosecution while, at the same time, avoided the embarrassing situation of an interpretation too broad that it might prevent the US from justifying the killings of hundreds of thousands of Japanese civilians and annihilating vast areas of property and infrastructure throughout Japan.

In fairness to Lieutenant Robinson's analysis, there is little doubt that boundaries needed to be applied to the doctrine since, without limitations, any allegation of war crimes could be defeated due to 'necessity'. In other words, the more broadly military necessity is defined, the more likely it would be that perpetrators of cruel and inhumane acts could escape criminal sanction. Such a proposition would have been unpalatable to the Allies given the scale of loss in terms of human life and property due to Japan's military activities during the War.

D. *No Clear Direction on Onus and Standard of Proof*

Lieutenant Robinson's legal advice was silent on important matters regarding the onus and standard of proof required when raising the excuse of military necessity. He did not make it clear whether the defendant needed to prove military necessity beyond reasonable doubt or to the lesser civil standard, on the balance of probabilities. From the cases, one can extrapolate that the accused needed to do several things. They firstly needed to raise the excuse and, in

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[732] 'Memorandum of Law – Military Necessity, the content and limitations of the doctrine', memo from Lieutenant Walther H Robinson to Lieutenant Fishman, 24 October 1945. RG331 UD290/12/2/2 Box 1389 Folders 14 and 26 ('Robinson's memo').

doing so, provide sufficient evidence that would substantiate a reasonable basis on which commissions could even consider it.

Once the excuse was raised, the onus was squarely placed on the accused to prove military necessity to a very high standard. Although there does not appear to be any discussion in relation to the nomenclature of the standard, it would appear that the relevant standard for which the accused must prove is akin to the higher standard of beyond reasonable doubt—a difficult task for the accused given the limited resources available to defence teams.

E. *General Statement of the Rule: the Three Interdependent Principles*

Robinson began his discussion of military necessity by outlining the background of and rationale for, the doctrine. He submitted that 'military necessity was not the sole influence determining the laws of war, but that it was … subject to other principles'.[733] By 'other principles', he was making the obvious point that military necessity is subject to certain requirements under international law and could never be used as an excuse for all acts committed in the course of war. On this point he referred to the legal writings of Grotius and Hersch Lauterpact.[734] To further this point, he stated that the limits of military necessity are predicated on three separate, but 'interdependent principles' which were incorporated in paragraph 4 of the US FM27-10:

> (a) The principle of military necessity [is] subject to the principles of humanity and chivalry;
>
> (b) The principle of humanity, prohibiting employment of any such kind or degree of violence as is not actually necessary for the purpose of the war; and
>
> (c) The principle of chivalry, which denounces and forbids resort to dishonorable means, expedients, or conduct.[735]

Robinson also cited paragraph 23 of the US FM27-10 which stated that 'military necessity justifies resort to all the measures which are indispensable for securing this object and which are not forbidden by the modern laws and customs of war'.[736] As further evidence for his legal advice regarding the correct legal position of military necessity, he cited, with approval, the

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[733] Ibid page 2.

[734] Robinson provides no specific scholarly works of Grotius to substantiate his point, however, in relation to Lauterpact, he cites: Hersch Lauterpact, *Oppenheim's International Law* Volume 2 (6th ed, 1940) 179.

[735] United States Field Manual 27-10, cited in 'Memorandum of Law – Military Necessity, the content and limitations of the doctrine', memo from Lieutenant Walther H Robinson to Lieutenant Fishman, 24 October 1945. RG331 UD290/12/2/2 Box 1389 Folders 14, 26, page 2.

[736] Ibid page 3.

work of C Hyde and emphasised that military necessity 'does not embody a formulation of excuses for lawlessness'.[737]

Robinson relied heavily on various aspects of the *Hague Convention IV Respecting the Laws and Customs of War on Land* 1907 ('*Hague IV*') for his analysis. The *Hague IV* (together with its annexed Regulations) was intended to provide an international standard on the acceptable limits of armed conflict. Specifically, Robinson cited the Preamble which provided that, *inter alia*, the parties to the Convention 'desire to diminish the evils of war, as far as military requirements permit… .' He went on to cite Article 22: '[t]he right of belligerents to adopt means of injuring the enemy is not unlimited'.[738] Furthermore, he cited Article 23 which forbids a range of specific actions that was regarded as being unjust, unfair and unethical. Article 23(a) – (g) prohibits:

(a) employment of poison gas;

(b) killing or treacherous wounding;

(c) killing or wounding of an enemy that has 'laid down his arms' or no longer has the means of defence;

(d) declaration that 'no quarter' will be given;

(e) … intention to cause 'unnecessary suffering';

(f) improper use of flags of truce or other national and international insignia;

(g) unnecessary destruction or seizure of enemy property;[739]

Further to the list of prohibited conduct are those matters that are contained in subsequent treaties, such as the rule against killing or mistreating prisoners of war, as stated in the 1929

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[737] C C Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2nd ed, 1945) as cited in 'Memorandum of Law – Military Necessity, the content and limitations of the doctrine', memo from Lieutenant Walther H Robinson to Lieutenant Fishman, 24 October 1945. RG331 UD290/12/2/2 Box 1389 Folders 14 and 26, page 3.

[738] 'Hague Regulations (1907), IV, Art 22' as cited in 'Memorandum of Law – Military Necessity, the content and limitations of the doctrine', memo from Lieutenant Walther H Robinson to Lieutenant Fishman, 24 October, 1945. RG331 UD290/12/2/2 Box 1389 Folders 14 and 26, page 2 and 5. For the full text of the *Hague Convention*, see *Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land,* opened for signature 18 October 1907, UKTS 9 (entered into force 26 January 1910).

[739] *Hague Regulations* 1907, art 23. Note article 23 contains a further provision (h) where it is forbidden to, 'declare abolished, suspended, or inadmissible in a court of the law the rights and actions of the nationals of the hostile party. A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country …'.

Geneva Prisoners of War Convention (GC 1929).[740] According to Robinson, belligerents must adhere to these rules, and the rules themselves are 'not subject to or suspended by circumstances of military necessity, no matter how compelling these may be'[741] and 'military necessity does not justify the violation of any of these treaty rules, even though in an extreme case compliance with the rule might cause the belligerent to lose the war.'[742]

The fact that Robinson appeared to give such weight to the *Hague IV* is hardly surprising given that Japan and the United States were both parties to the *Hague Convention.* However, although a signatory, Japan failed to ratify the later Geneva Convention on Prisoners of War, so it is debatable whether Robinson's analysis in relation to Japan is correct in so far as it includes Japan being bound by the provisions as in the Prisoner of War Convention. Despite the ambiguity on this point, Robinson argued that the body of international law already in existence up until the close of the Pacific War made it clear that the correct characterisation of military necessity should be distinguished from the 'doctrine of military necessity (*Kriegsraison*) propounded by certain German writers'.[743]

The danger of accepting the earlier conceptualisations of military necessity along the lines of the *Kriegsraison* doctrine, meant that almost any action could be justifiable—no matter how brutal or inhumane—provided there was some proof of the nexus between the act and the necessity to achieve the military objective. Such a broad interpretation would, according to Robinson, mean that 'necessity knows no law'.[744] Instead, he set about in his advice to further develop a framework for the lawful application of the doctrine of military necessity based on what could be described as restrictive principles derived from the various conventions and treaties previously in force.

F. *Military Necessity as it Related to War Crimes against 'People'*

When applying the doctrine of military necessity in so far as it affected people (combatants and non-combatants), Robinson argued that the extent of lawful force that is justified on the

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[740] *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 27 July 1929, 118 LNTS 343 (entered into force 19 June 1931).

[741] Cited in 'Memorandum of Law – Military Necessity, the content and limitations of the doctrine', memo from Lieutenant Walther H Robinson to Lieutenant Fishman, 24 October, 1945. RG331 UD290/12/2/2 Box 1389 Folders 14 and 26, page 6.

[742] Ibid. Robinson cited for this last argument, A Berriedale Keith *Wheaton's International Law Volume 11* (7th ed, 1944) 203; and Hersch Lauterpact, *Oppenheim's International Law* (6th ed, 1944) 184.

[743] 'Memorandum of Law – Military Necessity, the content and limitations of the doctrine', memo from Lieutenant Walther H Robinson to Lieutenant Fishman, 24 October, 1945. RG331 UD290/12/2/2 Box 1389 Folders 14 and 26, page 7.

[744] Ibid. On this point, Robinson cited the work of James Wilford Garner, *International Law and the World War* (1929) 195.

grounds of necessity, can be found in *Hague Regulations* and the *Rules of Land Warfare* (FM 27-10). Paragraph 24 of the FM 27-10 provided that military necessity allows:

> (a) All direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of war;
>
> (b) The capturing of every armed enemy, and of every enemy of importance to the hostile government, or of peculiar danger to the captor.[745]

In relation to paragraph 24(a), there is no further discussion from Robinson as to the types of 'destruction' that is 'incidentally unavoidable'. On this point he merely cites paragraph 25 of the FM27-10 which provides

> Military necessity does not admit of cruelty … that is, the infliction of suffering merely for spite or revenge; nor of maiming or wounding except in combat; nor of torture to extort confessions. … It admits of deception, but disclaims acts of perfidy.[746]

Paragraph 25 makes it clear that 'maiming or wounding' is not permitted, unless in combat or torture.

G. *Ambiguity in Relation to the Relevant Test to Determine the Meaning of 'Cruelty' – Subjective or Objective Determination?*

Paragraph 25 provides a further problem in so far as it relates to the meaning of 'cruelty'. The provision is unclear as there is no indication as to an appropriate test. Accordingly, a literal reading of the paragraph would make cruelty acceptable *per se*, so long as it is not accompanied by, or occurs as a result of, 'spite' or 'revenge'. In the absence of evidence proving the accused acted with 'spite' or 'revenge', liability would not follow. A determination of what constitutes 'cruelty', therefore, would require a subjective assessment of what was in the mind of the accused at the time of committing the offence. On that basis, the fault element, *mens rea,* is an integral part in the determination of military necessity.

An alternative interpretation of whether 'cruelty' existed, is based on an objective assessment. An objective assessment examines the accused's actions in light of the surrounding circumstances in which the offending took place and asks whether the accused's conduct was reasonable. In other words, the determination of 'cruelty' based on the existence of 'spite' and 'revenge' is not dependant on what the accused was thinking, but an assessment of the circumstances that led to the offending behaviour. Potentially that would allow a wide range of matters to be considered.

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[745] 'Memorandum of Law – Military Necessity, the content and limitations of the doctrine', memo from Lieutenant Walther H Robinson to Lieutenant Fishman, 24 October, 1945. RG331 UD290/12/2/2 Box 1389 Folders 14 and 26, page 7.
[746] Ibid page 8.

An objective assessment tends to favour the prosecution's argument. This is because acts of cruelty and violence are more difficult to justify to a reasonable observer. On the other hand a subjective analysis seeks to determine whether the accused 'subjectively' believed it necessary to act the way they did—which is more difficult to prove since this is an assessment of the machinations of the mind of the accused.

Unfortunately, as part of his analysis, Robinson did not consider these points and appeared oblivious to the ambiguities that FM 27-10 paragraph 25 provided regarding the definitions of 'cruel' and 'torture'. The fact remains that it is unclear whether Robinson's avoidance of any discussion of these points was deliberate or whether it was inadvertent. However, there was certainly no disadvantage to the prosecution by Robinson not resolving these points.

H. *Whether Objectively and Subjectively Determined, Defendants had Good Arguments in Places*

Given that Japanese forces throughout the Philippines were mired in a fierce and bloody struggle with Filipino guerrilla forces—coupled with the US forces inflicting heavy casualties as they advanced towards retaking the Philippines—the argument could quite easily be made that the Japanese were acting out of military necessity. Whether based on a subjective or objective assessment, the argument was made that acts such as torture, which was commonly inflicted by the Kenpeitai, was a military requirement in an attempt to extract information from anyone who was suspected of having information about Filipino guerrilla activities. Likewise, food and resources for POWs and other non-combatants was in such short supply due to the success of the Allied counteroffensive, which impacted the way that Japanese guards behaved in the camps.

Such arguments, however, were not sufficient to sway commissions and a defendant who relied on military necessity in those circumstances was not successful whether pledging it either as a complete defence to criminal responsibility or to mitigate the sentence.

I. *Military Necessity as it Related to 'Property'*

In discussing the law of military necessity as it related to property, Robinson clearly expressed, in no uncertain terms, that 'no attempt is made to summarize all the laws of war relating to property.'[747] That he ignored the plethora of law—including US law, foreign law, and international law—that could have provided valuable precedents for the US military commissions, is curious to say the least. Robinson did, however, rely on the Hague Regulations.[748] Here he cited a number of provisions that related to property and the rules

[747] Ibid page 8.
[748] Hague IV.

associated with the protection as well as the lawful destruction of property in the context of military necessity. Specifically, of the Hague Regulations he cited included,

> Article 23(g)
>
> It is especially forbidden …
>
> To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the *necessities of war.*
>
> Article 46
>
> Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.
>
> Article 56
>
> The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.
>
> All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

III. Cases

A. *United States v Major Mikami Koe Imperial Japanese Army, Manila, 4–13 June 1946*

The case against Major Mikami Koe[749] illustrates the dilemma that exists for military commanders in the field when faced with decisions that involve protecting the lives of fellow soldiers at the expense of civilians and other non-combatants. Mikami's case touches on what, in contemporary parlance, is often referred to as collateral damage whereby the loss of civilian life, while unfortunate, is deemed necessary to ensure military objectives are achieved.[750] The one difference in Mikami's case, however, was that the

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[749] RG331 UD 290/12/2/2 Box 1389 Folders 14 and 26.

[750] For contemporary writing of the meaning and nature of 'collateral damage', see, eg, David Turns, 'Droning on: some international humanitarian law aspects of the use of unmanned aerial vehicles in contemporary armed conflicts' in Caroline Harvey, James Summers and Nigel D White (eds), *Contemporary Challenges to the Laws of War* (Cambridge University Press, 2016) 204–5; David Luban, *Torture, Power and Law* (Cambridge University Press, 2014) 9; Michael L Gross, *Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict* (Cambridge University Press, 2010) 197–201 and 255–62; Stephen Nathanson, *Terrorism and the Ethics of War* (Cambridge University Press, 2010) Chapters 7, 17–18; David Lefkowitz, 'Collateral Damage' in Larry May, *War: Essays in Political Philosophy* (Cambridge University Press, 2008)

decision to take civilian lives was not carried out with the goal of achieving military objectives, but to avoid detection and likely annihilation by advancing US forces.

The Charge

Mikami was charged with violating the laws of war on the grounds that he committed the wilful and unlawful killing of six unarmed, non-combatant Filipino civilians.[751] The killings, which were not disputed, occurred on 16 September 1943 near Langasian on the island of Mindanao and were carried out on the orders of Mikami by several members of his unit. The victims consisted of one adult male, two adult women, and three children aged twelve, ten and four. For his role in the killings, Mikami was sentenced to death by hanging by a military commission in Manila on 13 June 1946.

Evidence for the Prosecution

On the day of the killings, the victims, who were travelling together on a boat going upstream near Sagunto on Mindanao Island, were intercepted by 21 Japanese survivors of the 1st Battalion, 77th Regiment, 30th Division of the IJA.[752] The soldiers were retreating from an area that had seen some of the bloodiest fighting in the Philippine theatre. They were coming in the opposite direction in an attempt to avoid detection from US forces engaged in mopping up operations in the mountains of Mindanao.[753]

When the six civilians were spotted by the Japanese, they were forced ashore and interrogated by Mikami. He was unaware that Japan had already surrendered in August as all communications between Mikami's group and other retreating Japanese units had been destroyed.[754] The civilians produced several leaflets written in Japanese that contained information regarding the surrender. Mikami concluded the leaflets were based on a lie and, shortly after, issued orders to execute the entire civilian group on the basis they were spies for US forces. There was no evidence that a trial was conducted.[755]

The prosecution produced photographic evidence of the victims' remains which, despite decomposition, bore marks of severe violence. The bodies showed signs that death may have been caused by sharp instrument trauma caused by a bayonet or knife. All of the victims showed signs of lacerations to the abdomen, chest and other parts of the body. The clothing of

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145–64. The US Field Manual 1940 (FM 27-10 paragraph 24a) describes 'collateral damage' as 'destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the Armed contests of war.'

[751] General Headquarters Far East Command, Office of the Judge Advocate, 'Review of the Record of Trial by a Military Commission of Major Koe Mikami, ISN 150380, Imperial Japanese Army', 27 March 1947, document located at NARA, RG331 UD 290/12/2/2 Box 1389 Folders 14, 26.

[752] Ibid page 2.

[753] Ibid.

[754] Ibid.

[755] Ibid.

the two women and female child had been removed. The evidence also suggested that the four-year-old boy was shot in the head.[756]

Defence's Argument Based on Necessity to Preserve Lives of Japanese Soldiers

The defence offered several arguments to defend the charge against Mikami. The primary argument focused on the fact that he made the decision to execute the civilians based on necessity. His primary objective was to ensure the survival of his unit. Due to the intensity of the fighting from which they were fleeing, Mikami's unit had been reduced from a force of 700 men to 21 survivors. Mikami knew that a warning had been issued to civilians to stay away from the area. It was apparently issued prior to the Japanese surrender so, that when Mikami and his group apprehended the civilians, he was under a mistaken belief that Japan was still at war with the Allies.

He claimed that because he knew of other instances where children had been used as spies for the US and guerrillas, he could not risk allowing any of the group—including the children—to reveal their position to Filipino guerrillas or the US Army. For that reason, he ordered their execution. Mikami claimed the executions were made because of military necessity to maintain secrecy to avoid detection by the advancing US forces.[757] The defence also claimed that when Mikami became aware, in the following days, that Japan had actually surrendered, no other civilians were harmed, and he too surrendered shortly after.

Military Necessity Not Proven

Unfortunately for Mikami, the original Commission—and later the reviewing authority—did not believe that the evidence supported the defence's argument about the necessity to execute the six Filipino civilians. The reviewer, Colonel Shaw JA, stated that,

> Reasons assigned by the accused for the killings are so patently devoid of merit as to render any discussion of details unnecessary … Neither the members of the commission nor Major General J G Christiansen … recommend clemency. In a 'petition for retrial' filed by the accused, he again seeks to justify his act as a necessary and urgent battlefield measure. However, this cannot be considered a mitigating factor under the circumstances.[758]

The decision of the original military commission, death by hanging, was upheld and the order to execute the sentence was affirmed.

The evidence was clear that Mikami ordered the killings and that the killings were carried out under those orders. However, in some respects, the strength of the excuse of necessity in Mikami's case is not without merit. When faced with the real possibility that he and his unit could be annihilated if information of their whereabouts was passed on to US forces, Mikami made a decision in the field to eliminate that possibility. The prosecution neither presented any

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[756] Ibid page 3.
[757] Ibid.
[758] Ibid.

evidence of, nor sought to argue for, the proposition that the victims were killed for blood lust, as had been the case in other trials. The decision Mikami took to kill the civilians was taken to ensure the survival of men who were fleeing for their lives.

The fact that the accused raised military necessity as a possible excuse—or, at the very least, as a reason for the killings—should have enlivened a discussion of aspects associated with *mens rea.* That Mikami's defence team did not advance this line of inquiry, or at the very least attempt to focus the Commission's attention on an analysis of the law of military necessity, is curious. The concept of 'necessity' would require a subjective analysis of what the accused may or may not have believed at the time of the commission of the offence. A subjective assessment would have been beneficial to the accused given that it would have made it possible to raise many external aspects (such as the dire conditions in which Mikami and the group found themselves).

Necessity, by its nature, would require an exploration of the subjective elements at play in the mind of the accused that were created by an objective analysis of the surrounding events at the time of the offence. In other words, given the dire circumstances in which the accused found himself, his plight and that of his men depended on him taking drastic action to alleviate the possible—and probable in Mikami's mind, given that fellow soldiers had been killed in this way—disclosure of their position to US forces.

In any event, the Commission chose not to entertain the idea that military necessity played any part in the killings and represented a missed opportunity to develop, or at the very least, gain further insight into what constitutes military necessity.

B. *Trial of Corporal Ogo Yokio, Imperial Japanese Army, Manila, 27 February 1947*

Military commissions appeared unlikely to award latitude to junior NCOs on a finding of military necessity, even in circumstances where the accused appeared to be acting in self-defence, as the trial of Corporal Ogo in February 1947, clearly showed. Ogo's case was a trial involving a junior NCO being sentenced to death for striking a Filipino guerrilla with a 'bolo'.[759]

The Charge

Corporal Ogo was charged, along with others under his supervision and control, for violating the laws of war on the basis that he and his subordinates committed rape, unlawfully killed several Filipino non-combatants and that Ogo 'permitted the killing' of a Filipino combatant.[760]

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[759] A 'bolo' refers to a large knife. These weapons were often used by the Filipino guerillas during the Japanese occupation of the Philippines.

[760] Opinion of the Board, Colonel Shaw, JA, JAGD, 24 November 1947, RG331 290/11/31/05 UD1243 Box 1276, 'Reviews by SCAP, 1947'.

For his part in the atrocities, Corporal Ogo was sentenced to death. His co-accused each received sentences varying from 15 years to life imprisonment.

The findings of the original Commission were later reviewed and, as part of that review, the reviewing authority looked at Ogo's part in the killing. Ogo's defence team claimed he was acting in self-defence on the basis that his life and the lives of his six subordinates depended upon him killing the victim.

Self-defence or 'military necessity'?

It was alleged, and seemingly accepted by the Commission, that Corporal Ogo was indeed attacked by Elliser (a Filipino guerrilla). The skirmish occurred while Ogo and his men were on patrol. Elliser attempted to attack Ogo but was subdued. Ogo then disarmed Elliser of his 'bolo' and stabbed the victim in the back. At that point Elliser took flight but later collapsed. He was then hit in the back of the head by Private Eto and this was said to be the blow that killed him. The question for the Commission was, who was ultimately responsible for the death?

The Commission looked at the law surrounding self-defence and held that while Ogo did have a reasonable and valid excuse of self-defence at the time he was attacked, he could not rely on that defence after the victim was subdued with a stab wound. The Commission held that at the time Elliser was lying disarmed on the ground, he no longer posed a clear and present danger to Ogo or his men. On that basis, Ogo allowing Eto to land the fatal blow on the victim, went beyond the realms of legality.

The killing of the victim was not out of necessity and allowing such conduct to take place was deemed by the Commission to be unlawful. The original death sentence against Ogo was upheld.

IV. The Restriction of Military Necessity as a Defence at International Law – A Valid Approach?

Several important points emerged from the Manila trials in relation to the defence of military necessity. As shown in this chapter and in Chapter 8, the US trials were consistent with extant jurisprudence at the time regarding the approach to restrict the application of military necessity. The Manila trials thereby restricted any possible expansion of the doctrine becoming further legitimised at international law during those trials. The approach the tribunals adopted was consistent with Lieutenant Robinson's analysis of the underlying jurisprudence at the time regarding military necessity.[761]

[761] 'Memorandum of Law – Military Necessity, the content and limitations of the doctrine', memo from Lieutenant Walther H Robinson to Lieutenant Fishman, 24 October 1945. RG331 UD290/12/2/2 Box 1389 Folders 14 and 26 ('Robinson's memo').

The question is, however, whether such an approach was, and remains, a legitimate practice? In other words, should the doctrine of military necessity be expanded to act as a defence to war crimes by allowing a broad range of acts to constitute a legitimate excuse to criminal responsibility on the basis that those acts were done in the course of securing a military objective?

If one is to use as the standard by which to assess this question, the jurisprudence coming from the cases and the *lex scripta*—such as Articles 22 and 23 of *Hague Regulations* of 1899 and 1907,[762] the *Declaration of St Petersburg,* [763] Article 14 of the *Lieber Code,*[764] the US Army Filed manual 27-10,[765] *United States v Russell,*[766] *Mitchell v Harmony,*[767] *Hardman's* case,[768] and the *Hostage case,*[769] and the cases of *Mikami*[770] and *Ogo*[771]—there are strong grounds to argue that the military commissions in Manila were correct in their application to restrict the expansion of military necessity becoming further legitimised as a defence at international criminal law. There were clear signals in the early cases and the law that military necessity should be restricted in its application due to the dangers associated with legitimising,

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[762] Convention (II) with Respect to the Laws and Customs of War on Land and its annex art 22, opened for signature 29 July 1899 ('Hague II'); Convention (IV) Respecting the Laws and Customs of War on Land and its annex art 22 The Hague, opened for signature 18 October 1907 ('Hague IV').

[763] *Declaration Renouncing the Use in War of Certain Explosive Projectiles Under 400 Grammes Weight,* opened for signature 29 November 1868 (entered into force 11 December 1868) ('*Declaration*'). The *Declaration* was the first formal international agreement which sought to restrict the use of certain kinds of weapons during war – see International Committee of the Red Cross, *Treaties and State Parties to Such Treaties* <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=3C02BAF088A50F61C12563CD002D663B>.

[764] General Orders 100, Instructions for the Government of the Armies of the United States in the Field, Articles 14.

[765] United States Field Manual 27-10, cited in 'Memorandum of Law – Military Necessity, the content and limitations of the doctrine', memo from Lieutenant Walther H Robinson to Lieutenant Fishman, 24 October 1945. RG331 UD290/12/2/2 Box 1389 Folders 14, 26, page 2.

[766] United States v Russell 80 US 623 (1871).

[767] *Mitchell v Harmony* 54 US 13, 115 (1851). The term, 'sutler' has traditionally been used to describe the business in which Harmony was engaged.

[768] *William Hardman (Great Britain v United States)* Reports of the International Arbitral Awards (1913) VI RIAA 25.

[769] *United States v List (Wilhelm) and ors*, Case No 7, (1948) 8 LRTWC 34, reprinted in William Schabas and Göran Sluiter (eds) *Oxford Reports on International Law* <http://opil.ouplaw.com/view/10.1093/law:icl/491us48.case.1/law-icl-491us48>; see also *United States v Wilhelm List & Ors* LRTWC, United Nations War Crimes Commission Vol VIII, 34–92.

[770] The United States v Major Mikami Koe Imperial Japanese Army, Manila, Philippines, 4–13 June 1946RG331 UD 290/12/2/2 Box 1389 Folders 14 and 26.

[771] *Trial of Corporal Ogo Yokio, Imperial Japanese Army Manila*, 27 February 1947Opinion of the Board, Colonel Shaw, JA, JAGD, 24 November 1947, RG331 290/11/31/05 UD1243 Box 1276, 'Reviews by SCAP, 1947'.

potentially, unlimited killing and destruction to property so long as it occurred on the basis of securing military objectives.

Other trials that were occurring in Europe at the same time as the Manila trials adopted a similar position by restricting the application and legitimacy of military necessity becoming a standard defence to allegations of war crimes—the *Hostage case*, as discussed above, was a good example of the Allied attempts to restrict the doctrine of military necessity becoming a legitimate doctrine by refusing to accept that the killing of Allied POWs constituted a valid practice under any circumstances.[772]

The problem with expanding or further legitimising the doctrine of military necessity by allowing it to become a stronger defence for the accused, is the potentially unlimited scope that it would provide for those charged with war crimes seeking an excuse for actions that would otherwise constitute criminal behaviour. If the doctrine of military necessity was expanded further, any conduct that causes harm to humans or property damage, could potentially be justified as being necessary so long as the conduct occurred in the context of war.

The fact that there is no evidence that military necessity was given any reasonable credence at Manila is perhaps one reason why the tribunals did not provide further clarity around Robinson's analysis of the 'general rule' relating to the 'three interdependent principles' or define in greater detail the elements of what constitutes a valid assertion of military necessity—for them the question of military necessity was settled and there appears very little difference with current laws. The approach to limit the use of the doctrine of military necessity at the Manila trials is, therefore, one of the enduring legacies of those trials.

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This chapter has outlined the historical and legal contexts of military necessity as it was applied at the Manila War Crimes Trials.

The following chapter examines the Manila trials through the 'just war' theoretical framework. The purpose of this chapter will be to determine the extent and nature of 'justice' that was applied at Manila.

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[772] *United States v List (Wilhelm) and ors*, Case No 7, (1948) 8 LRTWC 34, reprinted in William Schabas and Göran Sluiter (eds) *Oxford Reports on International Law* <http://opil.ouplaw.com/view/10.1093/law:icl/491us48.case.1/law-icl-491us48>; see also *United States v Wilhelm List & Ors* LRTWC, United Nations War Crimes Commission Vol VIII, 34–92.

CHAPTER 10:
AN ASSESSMENT OF 'JUSTICE' AT THE MANILA TRIALS THROUGH THE 'JUST WAR' LENS

In accordance with the 'just war' tradition, this thesis asserts that there is sufficient evidence to conclude that the Manila trials were 'just' and provided Japanese defendants and—to the extent that is possible—the victims of the Japanese occupation, an appropriate level of justice in accordance with the 'just war' tradition. The reasons for this assertion is predicated on the fact that the US Army trials in Manila: were created under legitimate authority; applied and developed law according to *stare decisis* by relying on, and developing existing international criminal law doctrine; and applied the criminal standard that required the prosecution to prove the case against the defendants beyond reasonable doubt. Importantly, there is very little evidence that the Manila trials engaged in disproportionate sentencing or indiscriminate prosecution.

The 'just war' tradition is a useful framework to assess the conduct of belligerents at all levels throughout each phase of war because it can assist with identifying acceptable conduct in relation to war—before, during and after hostilities.[773] The 'just war' tradition can be used to assess several important questions in relation to war: whether a war is justified in its conception;[774] whether it is 'just' in terms of how it is prosecuted once hostilities commence;[775] and whether the conduct post war is legitimate in terms of the conduct of the victors towards the vanquished.[776]

As such, the 'just war' tradition comprises three limbs:

(1) *Jus ad bellum:* legitimation of war based on initial justification for going to war
(2) *Jus in bello:* legitimate and lawful conduct 'in' or during war
(3) *Jus post bellum:* legitimate conduct after the cessation of war.

The Tokyo trials found that Japan embarked on a war of aggression and convicted 27 senior Japanese military and civilian leaders for the planning and preparation of the War. In that

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[773] For a detailed description and application of the 'just war' theory by leading scholars, see, Jean Bethke Elshtain, *Just War Theory* (Blackwell Publishing, 1992) and Michael Wazer, *Just and Unjust Wars: A moral argument with historical illustrations* (Basic Books, 1977).
[774] Carsten Stahn, ''Jus ad bellum', 'just in bello' … 'jus post bellum'? – Rethinking the Conception of Laws of Armed Force' (2006) 17(5) *European Journal of International Law* 921, 921–43; Lindsay Moir, *Reappraising the resort to force at international law, jus ad bellum and the War on Terror* (Hart Publishers, 2010) especially chapter 4.
[775] Steven R Ratner, '*Jus ad Bellum* and *Jus in Bello* after September 11' (2002) 96(4) *The American Journal of International Law* 905, 911–12.
[776] Brian Orend, 'Jus Post Bellum' (2000) 31(1) *Journal of Social Philosophy* 117, 119.

regard, the Tokyo trials primarily examined the *jus ad bellum* or the justification of the reasons for Japan embarking on war. In contrast, this thesis is primarily concerned with the second, and the third limbs of the 'just war' tradition.

Opponents of the 'just war' doctrine can be cast into two camps: pacifists who strictly oppose war under any circumstances and 'permissivists' who believe that the state should have very few (if any) limits imposed upon it with regards to fulfilling its policy agenda, including the right to employ whatever force it deems necessary to promote its own interests.[777] The pacifists fail to appreciate that war, unfortunate as it seems, is a reality and will occur irrespective of any ethical objections. Permissivists, on the other hand, while more reflective of the realities of the frailties of peace, fail to acknowledge the humanitarian consequences arising from unobstructed state action.[778]

Jus in bello and Japanese conduct during the occupation of the Philippines

In accordance with *jus in bello*, belligerents must at all times uphold certain standards of conduct whilst engaging in war and if conduct falls below an acceptable standard, then the party whose conduct is substandard, is said to have engaged in an 'unjust' war. Thomas Nagel suggests that political and military strategists view the death of innocent civilians, while regrettable, but a necessity to military strategy and long-term outcomes.[779] In determining the requisite standard, in accordance with *jus in bello* there are several principles that need to be shown to determine whether a party is behaving or has behaved in a 'just' way. These are: 'proportionality', 'discrimination', 'responsibility' and 'necessity'.[780]

Discrimination and proportionality operate to restrict the level of violence of war and the scope of those who are affected by its violence. These principles require the belligerent to direct only so much force against a legitimate target as is required to affect the legitimate military objective. The difficulty lies in determining what is a legitimate target and the extent of force required to suppress that target. The practicalities of warfare make this problematic at times, as the defendants claimed. The killing of non-combatants, for example, is permissible under certain circumstances where the killing was done to achieve a legitimate military objective. The Manila trials commonly convicted those defendants who it believed violated the principles of discrimination and proportion. For example, in Onishi's case[781] the defendant was convicted

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[777] David D. Corey and J. Daryl Charles, *Just War Tradition: An Introduction* (ISI Books, 2012) 3–7.
[778] Ibid. See also, Kristopher Norris, 'Never again war: Recent shifts in the Roman Catholic Just War Tradition and the Question of "Functional Pacifism"' (2014) 46(2) *The Journal of Religious Ethics* 289 for a discussion on the Roman Catholic's position on 'functional pacifism'.
[779] Thomas Nagel, 'War and Massacre' in Marshall Cohen, Thomas Nagel and Thomas Scanlon (eds) *War and Moral Responsibility* (1974) 3, 7–8.
[780] Raphael van Steenberghe, 'Proportionality under *Jus ad Bellum and Jus in Bello*: clarifying their relationship' (2012) 45(1) *Israel Law Review* 107.
[781] United States of America vs Seiichi Ohnishi, Hajime Kawara, Tsugiharu Ogata (Review, 25 January 1947) RG331 UD290/12/12/1 Box 1570.

for the murder of Filipino non-combatants after Japanese forces took revenge for guerrilla attacks. Other cases where defendants were convicted for the indiscriminate and disproportionate killing of Filipino non-combatants included Kono's case,[782] Ko's case,[783] Kato's case,[784] and Nagahama's case.[785]

The principle of 'responsibility' in *just in bello* operates to hold persons responsible for certain acts committed during war, whether or not those acts were committed by the defendant. The purpose of the responsibility principle upholds the moral requirement that someone should be held responsible for war crime under certain circumstances. The command responsibility and superior orders cases were an attempt by the tribunals to provide legal reasoning to pronounce guilt on the basis of responsibility.

Many of the command responsibility cases were tried against defendants who did not personally participate in the crimes but were, according to the tribunals, morally and legally responsible for the wrongdoing. The Manila trials found criminal responsibility on the basis that the commander failed to prevent the crimes, failed to punish the perpetrators, where the defendant had knowledge or suspicion of the crimes, where the commander incited the subordinates into carrying out the crimes, or even where the commander failed to effectively control his subordinates. The cases mentioned above are also examples of the tribunals interpreting the law so as to attribute responsibility for wrongdoing, as was the case of Osugi,[786]

Similarly the principle of responsibility was instrumental in attributing criminal wrongdoing to those defendants seeking to invoke the defence of superior orders. The Manila trials did not allow the defence of superior orders to prevent a conviction for war crimes on the basis that the criminal acts were committed due to the existence of criminal orders. In the event that clear evidence existed that the defendant acted out of superior orders, the tribunals enforced the responsibility principle and finding him guilty but allowed the sentence to be mitigated on the basis of superior orders. As such, the superior orders doctrine could only reduce the sentence

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[782] Trial documents for *Kono's case* are located at NARA, RG331 UD1321 290/12/12/1 Box 1563. Unless specified otherwise, all archival documents referred to in this chapter relating to the trial of Lt-General Kono are taken from this series.

[783] Trial documents for *United States of America v Shiyoku Ko* are located at NARA, RG331 UD1321 290/12/12/1 Boxes 1559–60, volumes 1 and 2. Unless specified otherwise, all archival documents referred to in relation to Ko Shiyoku are taken from this series.

[784] "Review of the record of trial by a Military Commission of Second Lieutenant Minoru Kato, ISN 51J-41070 of the Imperial Japanese Army", RG331 UD1243 290/11/31/05 Box 1276, page 1.

[785] JA 201-Nagahama, Akira (Col), 'Trial by Military Commission', Review by Colonel Franklin P Shaw, Judge Advocate RG331 290/11/31/05 UD1243 Box 1276.

[786] For all documents referred to in the discussion of the *Trial of Vice Admiral Osugi Morikazu,* see NARA, RG331, UD1321, 290/12/12/1 Boxes 1571–3, Volumes I–XXII.

but not absolve the defendant from criminal responsibility. Cases that illustrate these points are Otsuka,[787] Shin,[788] Tanaka and Hayashi,[789] and Toyota.[790]

The necessity principle was strictly enforced is so far as the tribunals never acknowledged that conduct of the Japanese defendants constituted a valid defence to war crimes against people or property on the basis of military necessity. Cases such Mikami[791] and Ogo illustrate this point.[792]

Jus Post Bellum

The *jus post bellum* limb of the 'just war' tradition looks at the way justice operates after war. The *jus post bellum* is an examination of the way in which the victors enforce terms associated with surrender, the nature of war crimes trials and prosecutions, whether compensation and reparations are applied, whether the rights of the vanquished are recognised and any other aspects associated with discerning the 'nature of the peace' after cessation of hostilities.[793] In relation to war crimes trials, Orend argues that 'proportionality' and 'discrimination' are crucial elements needed to satisfy *just post bellum*.[794] In so far as proportionality relates to war crimes trials, according to Orend, in order for justice to occur the victors need to ensure that the number of defendants prosecuted and the nature of punishment is proportionate and reflective of the crimes committed during the conflict.[795] Orend also argues that those prosecuted should be held accountable only for the crimes for which they are responsible.[796]

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[787] RG 331, 290/12/12/1, Box 1570 Vol I–VII.

[788] Unless indicated otherwise, archival material in relation to the trial and review of Shin Fusataro is located in RG331 UD1321 290/12/12/1 Box 1566 Vol I–III, folder 82.

[789] Material in relation to the trial and subsequent review can be located at Judge Advocate Section War Crimes Decisions, RG331, UD1865 290/23/06/02, Box 9781, Folder 34.

[790] Arraignment, *United States of America v Chiyomi Toyota*, Military Commission convened by the Commanding General, United States Army Forces Western Pacific, Volume I, pages 1–17; see also 'Trial of Chiyomi Toyota', Headquarters Philippines-Ryukyus Command, Major General J G Christiansen, US Army Deputy Commander and Chief of Staff, 6 January 1947. Both documents located in *United States of America v Chiyomi Toyota* RG331 UD1321 290/12/12/1 Box 1567 Vol I–X, folder 86.

[791] RG331 UD 290/12/2/2 Box 1389 Folders 14 and 26.

[792] A 'bolo' refers to a large knife. These weapons were often used by the Filipino guerillas during the Japanese occupation of the Philippines.

[793] Davida E Kellogg, '*Jus Post Bellum:* The importance of War Crimes Trials' (2002) 32(3) *Parameters* 87, 89–97; see also, Larry May and Andrew Forcehimes, *Morality, Jus Post Bellum and International Law* (Cambridge University Press, 2012).

[794] Brian Orend, 'Justice After War' (2002) 16(1) *Ethics and International Affairs* 43, 52–55.

[795] Ibid 54–5.

[796] Ibid.

An assessment of the number of trials carried out by the US at Manila indicates that there were similar conviction rates to other trials conducted by the US throughout the Asia-Pacific.[797] For instance, the conviction rate at Manila was 90% of all defendants tried, while the conviction rates at Yokohama was 85%, China 89%, and the Pacific Island trials was 91%. The total average conviction rate for all US trials was 87% so there is not a strong indication that the Manila trails disproportionately convicted defendants.

The Manila trials did, however, have a relatively low acquittal rate (9%) when compared to the total average (13%). However, the differences between the Manila trials and other US trials was striking when comparing the rate of death sentences and is a cause for some concern. At Manila 42% of those convicted received the death sentence. This was very high when compared to the Yokohama trials (5%), China trials (13%), and the Pacific trials (8%). One explanation for this high variance is that other trials, particularly Yokohama, were concerned with a range of offences, including relatively minor assaults and property offences and as such dealt with a high volume of cases.

In contrast, the Manila trials dealt with what appear to be most severe cases involving murder and torture against US POWs and non-combatants, and to a lesser extent, sexual assault and rape committed against Filipino women. Arguably, a further reason why the US Army trials in Manila had a high rate of death sentences, may have had something to do with the ousting of US forces from the Philippines in the early stages of the War. The loss of the Philippines to the US may have been a humiliating loss and coupled with enormous US casualties during that campaign and the subsequent Japanese occupation, the trials were a way to exercise revenge against the Japanese. However, there is scant evidence of such a proposition in the trial documents and it would be pure conjecture to argue that the US tribunals sought widescale vicarious revenge against Japanese soldiers for military and foreign policy failings of their leaders.

In relation to the 'discrimination' principle of *jus post bellum,* the Manila trials did not appear to engage in indiscriminate prosecution of Japanese soldiers for war crimes. The cases reviewed showed that at most times there was a clear connection between those charged and the crimes for which they were charged. It must be said, however, that in some cases the connections were not always strong. For example, there were several cases involving superiors charged and convicted for war crimes committed by subordinates where the superior alleged he had no knowledge of his subordinates actions. In these cases, the tribunals appeared to accept a lower standard of proof and raised the required standard of responsibility incumbent upon a superior to know and control what his troops are doing at all times.[798]

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[797] For statistics in relation to the number of cases, acquittals convictions and death sentences, see, Philip R Piccigallo, *Japanese on Trial* (University of Texas Press, 1979) 95.

[798] See, eg, Trials of Kei Yuri (1st Lieutenant IJA, Camp Commander of Prisoner of War Camp 17-B Omuta, Fukuoka, Kyushu) (RG331, UD1321 290/12/12/1, Box 1557); Kaneko Takeo (Camp

The following section (Conclusion) ties together all three issues that were frequently raised in Manila—command responsibility and the defences of superior orders and military necessity. In the Conclusion the thesis returns to the central question posed at the beginning which is in what ways does the Manila trials provide any guidance for future war crimes trials, the law 'ought' to be shaped when looking at these three areas of law.

Commander, Prisoner of War Camp Number 5, Fukuoka, Kyushu) and Uchida Teshiharu (RG331, UD1321 290/23/6/2, Box 1581); Mizukoshi Saburo (Camp Commander, Sumidagawa Prisoner of War Camp) (RG331, UD1321 290/12/12/1, Box 1587); Hirate Kaichi (1st Lieutenant and later Captain and Commander of Prisoner of War Camp, Hakodate) (RG331, UD1321 290/12/2/2, Box 1389).

CONCLUSION:
TOWARDS AN ENDURING LEGACY OF THE MANILA TRIALS

I. Thesis Question

The central question posed at the beginning of this thesis asked how the jurisprudential approach to criminal responsibility at Manila contributes to, or provides guidance for other war crimes trials. This question relates to the normative aspects associated with how the law *ought* to be in so far as command responsibility, superior orders and military necessity are concerned.

The short answer to the question is that the Manila trials provide a great deal of guidance. In addressing this part of the question, throughout the thesis I have provided an ontological account of the law as it was applied at the US Army trials in Manila in respect to command responsibility, superior orders and military necessity. These observations were then compared with other historical trials where command responsibility, superior orders and military necessity were at issue.

There were obvious deficiencies in the way that the law was interpreted at Manila and this is borne out in blunt application and the possible errors in the construction of fundamental legal principles of criminal responsibility. In answer to the thesis question as to what guidance the trials provide for other war crimes trials, the following section provides a summary of the normative assessment of the way that law perhaps *ought* to be applied in respect to future war crimes trials that this thesis has advanced.

II. Normative Assessment of the Law

A. *Command Responsibility*

As it has been shown, the Manila trials, and other trials throughout history, devised ways to hold superiors criminally responsible for the acts of subordinates. In theory, such an approach is desirable on a range of levels, namely, to ensure that superiors at all levels ensure their subordinates abide by law and do not commit war crimes. Furthermore, holding superiors to account when war crimes are committed also satisfies an innate sense of justice.

However, as the cases from the Manila trials make it clear, several problems associated with command responsibility appear, including the fact that liability is sometimes attributed to superiors merely because they occupy positions of authority (known as contingent liability). If liability is attributable merely on the position a superior occupies, quite often to make the crime fit the necessary criminal elements of the offence, tribunals will adopt a broad interpretation of the mental element *mens rea*. The problem with manipulating or adapting the mental element of offences (which has been an enduring plank of the common law legal system) is that it makes a mockery of the underlying requirement of having to prove this element at all. The requirement to prove the 'mental' element of the offence as well as the physical elements, were, even at the

time of the Manila trials, well established, fundamental legal principles of the criminal law. By relaxing the requirement of the prosecution to prove this element, other problems emerged, and how they should be dealt with is summarised below.

Application of 'contingent liability': Contingent liability should be viewed with great caution and applied sparingly. The consequences of tribunals and commissions applying contingent liability will produce a situation whereby a person will be convicted despite, on occasions, not having any direct involvement in the crimes or not having any knowledge of the crimes. Contingent liability provides legal uncertainty. Contingent liability is a form of strict liability whereby an accused was convicted of offences merely due to the position he occupied. In many cases, it is highly questionable whether the accused was actually able to exercise any, let alone effective control over his troops. The joint trial of Lieutenant-Colonel Onishi Seiichi ('Onishi's case') squarely raised this principle. In Onishi's case, the Tribunal favoured circumstantial evidence for which they convicted based on the accused's position. In other words, the criminal responsibility of the accused was 'contingent' upon the position he occupied at the time of the alleged offences. His conviction was not, it seemed, based on specific orders he gave or knowledge he had in relation to the offences. The notion of 'contingent liability' in the Manila trials was used to convict the accused based on the contingency associated with a person's superior rank to that of the perpetrators.

It is a well-established principle under international criminal law that to be liable for war crimes under the doctrine of command responsibility, a superior must have known 'or had reason to know that the subordinate will 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'.[799] Mitchell argues that one of the benefits of applying contingent liability in this way is that it forces those in positions of authority to 'control their subordinates and to establish objective standards of diligence'.[800] There is merit in this suggestion. However, as Damaska points out, criminality for war crimes should be assigned to those who have clear responsibility for criminal wrongdoing.[801] A further problem identified by Colonel Clarke in the Yamashita trial is that attributing liability to superiors simply based on the superior's rank relative to the subordinate produces an ambiguous and, potentially, unlimited scope of liability.[802]

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[799] Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, U.N. SCOR, 48th Sess., Annex, Article 7(3) para 56, U.N. Doc. S/25704 (1993). See also Mark Osiel, 'Obeying Orders: Atrocity, Military Discipline, and the Law of War' (1998) 86 *California Law Review* 946, 1040.

[800] Andrew Mitchell, 'Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes' (2000) 22 *Sydney Law Review* 381, 381. See also Mark Osiel, 'Obeying Orders: Atrocity, Military Discipline, and the Law of War' (1998) 86 *California Law Review* 946, 1040–41.

[801] Damaska (n 91) 9090, 455.

[802] AG 000.5 (9-24-45) JA, "Before the Military Commission Convened by the Commanding General

Broad interpretation of mens rea (especially, 'knowledge'): There is a real danger in expanding or otherwise utilising a broad interpretation of *mens rea* to convict those under the doctrine of command responsibility. The problem goes to the very essence of having to prove the 'guilty mind' as it becomes a construction of the subjective mind of the accused based on an indeterminate number of variables. The loosening of the requirement of proving the guilty mind is an erosion of one of the most fundamental concepts in criminal law. Military commissions adopted a broad interpretation of the fault element in regard to 'knowledge'. Often they presumed the accused would or should have known of war crimes being committed by subordinates. Onishi's case was also a prime example of this.[803] The conflation of would and should is problematic since 'would' is a determination of fact and 'should' is a normative assessment in the absence of evidence. Boister and Cryer have stated that for the 'guilty mind' or *mens rea* to be sufficiently proven for criminal responsibility, it is sufficient to prove that there is a 'spectrum' of knowledge.[804] Such a spectrum would range from complete knowledge of the actions of the perpetrators to 'constructive knowledge' so that the superior may still be held liable on the basis that they *would* or *ought*[805] have formed a reasonable assumption that crimes were being committed by their subordinates.[806] Constructive knowledge was used in the IMTFE to convict senior Japanese military and civilians,[807] as was also the situation in Yamashita's case.[808]

Subjective bias with disputed fact evidence: Where disputes arose regarding witness testimony, even where the accused's version of events was substantiated with witness testimony, the commissions tended to favour prosecution witnesses. There was insufficient information contained in the cases that shows clearly why the tribunal members accepted the prosecution's version of events where instances of conflicting evidence were presented. Perhaps a common aspect of war crimes is the perception that the victors get to determine the outcome of trials. The real or perceived aspects of 'Victor's Justice' in relation to Allied war crimes trials has

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United States Army Forces, Western Pacific: Yamashita, Tomoyuki" page 31, as cited in Richard L Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* (Scholarly Resources, 1982) 82–3.

[803] See Section RG331 UD1321 290/12/12/1 – Onishi Seichi, Box 1570 Vol I–VII and Section II, A of this thesis for a detailed discussion of Onishi's case that discussed, among other things, the concept of an expanded *mens rea.* See also Case Number 8, *Trial of Erich Heyer and Six Others,* "The Essen Lynching Case," British Military Court (18–22 Dec 1945) 1 *LRTWC* 88, as cited in Solis, above n 105, 430–31 that went into much discussion over the issue of 'constructive knowledge' and its applicability in command responsibility trials.

[804] Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press, 2008) 228.

[805] Ibid.

[806] Mitchell (n 93) 385.

[807] 'International Military Tribunal for the Far East', *The Indictment.*

[808] Ibid. See also, William H Parks, 'Command Responsibility for War Crimes' (1973) 62 *Military Law Review* 1, 32 as cited in Bassiouni (n 104) 429-31 that discusses the same point.

been a constant source of criticism from those who claim the trials were biased on a range of levels.[809]

The fact that there were such high conviction rates and so few acquittals could feed into the notion that there was an underlying bias against the Japanese accused at Manila. One lesson learnt from the Manila trials that applies for all war crimes trials is that 'Victor's Justice' and its associated perceptions is real and is something that needs to be kept in mind for future war crimes trials.

Ambiguities regarding charges relating to 'disregarding and failing to discharge' their duties: An oft-utilised charge centred on the commander's failure to properly discharge their duty. However, nowhere was it apparent that the commission sought a delineation of what constituted 'disregard' and 'failure to discharge' one's duties, or whether such duties varied according to rank and circumstances. The term 'disregard' was raised in the Yamashita trial when he was charged with 'willful [sic] disregard and failure to discharge his duty…'.[810] Although Yamashita was ultimately convicted of the offence, very little discussion was provided on the meaning of the term and what specific actions would constitute 'disregard'. The meaning of the term was also raised repeatedly after the Yamashita case, such as in the case of Lt-General Kono.[811]

Kono's charge stated that he did 'unlawfully disregard and fail to discharge his duties in controlling the operations of members of his command by permitting them to commit brutal atrocities and other high crimes against the people of the United States and the Philippines'.[812] The defence raised many arguments about the meaning of the term and put a series of questions to the prosecution about the meaning of 'disregard' and how such actions led to a failure to discharge his duties. These questions went largely unanswered. Similar concerns arose in the case of Lt-General Ko Shiyoku. As in other cases, Ko was successfully convicted without the prosecution having to fully explain the meaning of the term 'disregard' and how Ko disregarded his duties in relation to the atrocities.

There was no clear discussion from either the prosecution or the tribunal that sufficiently defined the term.

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[809] For example, see, Richard Minear, *Victors Justice'* (Princeton, 1971) entire book, Dayle Smith, *Judicial Murder? Macarthur and the Tokyo War Crimes Trial* (CreateSpace, 2013), and Dayle Smith, *MacArthur's Kangaroo Court* (Envale Press, 1999).

[810] Totani (n 15) 12, 33.

[811] See *Arraignment and Public Trial – United States of America vs Takeshi Kono,* 'Before the Military Commission convened by the Commanding General, United States Army Forces, Western Pacific', Court No. 2-B, High Commissioner's Residence, Manila, 15 April 1946.

[812] General Headquarters, Supreme Commander for the Allied Power, 'Charge', *United States of America v Takeshi Kono* page 8.

Broadening of the meaning of the charge 'permit' atrocities to occur: Military commissions broadened the meaning of 'permit' to include a range of instances where the accused neither gave permission nor took any pro-active steps to inquire or punish perpetrators. The commissions interpreted 'permit' to mean 'acquiescence', although the term was never fully explained throughout the trials. Conviction patterns indicate that the meaning of 'permit' could apply in any situation where a person held a position of seniority, atrocities were committed and there was no clear indication that the person ordered cessation of the atrocities or where the person took steps to punish the perpetrators.

General definitions of 'permit' were applied to show that it meant 'tolerate' or give consent to or to authorise, or 'to grant …license or liberty'.[813] The trials made it clear that the act of 'permitting' something to happen was expanded to include instances where permission was tacit or assumed to have been given, even if the person giving permission had no knowledge of the acts and there was no evidence of specific orders to commit the atrocities. The expanded definition of 'permission' enabled the prosecution to successfully convict a greater number of people than might otherwise have been the case. Definition 'creep' in relation to the term 'permit', was another example of how the Manila trials sought to widen the scope of criminal responsibility.

Application of intermediary liability: The commissions had a habit of making an intermediary criminally responsible for the actions or failures of higher entities (civilian or military entities). The conviction of Lt-General Ko Shiyoku was largely predicated on the wrongdoing of the Japanese Government and senior military for their part in failing to enforce the Geneva Convention in relation to US and Allied POWs. Ko was effectively made liable for the actions, or inactions, of others more senior to him, despite the apparent fact that he was unable to exercise effective control over those who committed the atrocities.

Intermediary liability is problematic in law since its application lacks clarity as to who will be held liable and is therefore indiscriminate in nature. This is particularly apparent during war when the lines of command are varied and complex. The conviction of Ko in March 1946 gave the appearance that the tribunal punished Ko for wrongdoings in which he had no involvement. Cases such as Ko's gave the appearance that the tribunal transcended doctrinal legal discourse and moved into a broader political discussion on the conduct of the War by his superiors.

Broad interpretation of 'effective control': Similar to other terms that proved problematic in a definitional sense, so too was the meaning of 'effective control'. The commissions applied a broad definition of 'control', whereby the accused could be held liable even when physically removed or otherwise somehow separated from atrocities committed. The broad definition of 'effective control' was a further example of the tribunal applying the law to suit the

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[813] *United States of America vs Takeshi Kono,* 'Answer to Defense Motions for a Bill of Particulars to the charge, for further particulars as to certain specifications and additional specifications and to strike certain specifications and additional specifications', Headquarters, United States Army Forces, Western Pacific War Crimes Commission, pages 76–83 (Answer to the Bill of particulars).

circumstances of the crime. Even if the accused was not present at the time atrocities were committed, under the broad definition of the term, they could be held criminally liable for the actions of others unless there was clear intervention or orders that were contrary to the actions of subordinates who committed the crimes. These convictions tended to be in the context of atrocities committed against US POWs so it was likely that the tribunals decision was based on crimes that had quite a considerable degree of emotive influence.

Inconsistent sentencing due to 'temporal disconnection': Sentences varied substantially at times as military commissions applied inconsistent sentencing based on, for instance, the temporal disconnection between the date of the commission of the offence and the date of the trial. Where the trial was held in the latter part of the trial program, the accused had a greater chance of receiving a more lenient sentence.

The primary concern with applying different sentences is that it leads to inconsistency for those convicted of similar offences. It also indicates that different standards were applied during the early stages of the trials as opposed to the latter stages and that those unfortunate enough to be tried earlier were at a distinct disadvantage compared to others who were tried later. Sentencing should be applied consistently over any trial process. One can only speculate why sentences varied according to time and there may have been a variety of reasons why the tribunals appeared to show greater leniency in relation to the sentence in the later trials, such as the political exigencies to finalise the trials.

The application of the 'temporal' and 'proximal' principle: Where a superior personally engaged in one (or more) instance of war crimes it is sufficient to show that the same commander ordered other killings and is likewise guilty by the doctrine of command responsibility for other war crimes committed by subordinates within a reasonable 'temporal' and 'proximal' space.

In the trial of 2nd Lieutenant Kato, he was found to have participated in some, but not all, of the killings. However, given the tribunal's findings regarding his participation in some of the acts, he was also found guilty for other similar acts, even though there was insufficient evidence to place him at the scene at the time the acts took place. He was found guilty of all acts and was sentenced to death by hanging.

The fact that the tribunal attributed liability to him in this way shows that they believed there was a 'temporal' and 'proximal' relationship between the acts he initially committed and other similar acts. Such a finding lacks basis in fact and leads to convictions purely on similar fact evidence.

The inability to prevent, punish or deter atrocities is not a valid factor to mitigate the sentence: Failure to prevent and punish subordinates for war crimes is sufficient to constitute acquiescence of a mid-ranked officer. This would be the case even though no evidence existed that the accused had actual knowledge of the scale and nature of atrocities committed by subordinates. It was held that the inability to prevent atrocities was not a valid excuse and not a mitigatory factor in sentencing.

The apparent refusal to mitigate the sentence for superiors who were, purportedly, unable to prevent their subordinates from committing atrocities was a constant sentencing pattern throughout the trials. The refusal of the tribunals to mitigate the sentence appears to fly in the face of facts presented by the defence, particularly in the latter stages of the Philippines campaign when Japan suffered huge losses in personnel and equipment. Such a situation would indicate that Japanese commanders were unable to control their forces unless they were in close proximity to the atrocities.

There are little clues available to suggest why the tribunal did not accept factual evidence that would indicate the accused did, in fact, have little to no ability to prevent subordinates from committing atrocities in the field of battle. In any event, the arbitrary application of such a refusal indicates a flaw in sentencing at the trials.

B. *Superior Orders*

The main points in relation to the defence of superior orders coming from the Manila trials are as follows:

Repeated disregard of evidence for, and a denial of, the validity of the defence of superior orders: Despite the existence of sound arguments for a defendant's reliance on superior orders as either a defence or in mitigation of sentence, military commissions were reluctant to accept a plea of superior orders or to extend the doctrine further.

Subjective bias due to the status/ role of the accused: Consideration to superior orders was often contingent upon the nature/ status of the accused as to whether military commissions would or would not accept superior orders to mitigate the sentence; Kentpeitai or others accused of committing offences against US military personnel were less likely to be successful in having their sentence mitigated on the basis of superior orders.

Reliance on the defence of superior orders is akin to an admission of guilt: An accused who seeks to rely on the defence of superior orders ipso facto makes admissions to part or all of the acts for which they are charged. Defendants who raised superior orders fared no better than if they had denied the acts for which they were charged and not raised superior orders.

Superior orders at times were accepted as a point of mitigation where evidence was clear that orders were promulgated from higher command: Some military commissions in Manila accepted that superior orders were relevant in so far as the sentence was concerned. Where evidence clearly showed the defendant was following orders from higher command, even where those orders were manifestly unlawful in the commission's view, the commissions were prepared to reduce the sentence (particularly for sentences involving the death penalty) but not relieve the accused of complete criminal responsibility.

The defence of superior orders can be considered as a means to mitigate the sentence (but not to absolve the accused from criminal responsibility) where certain criteria are established by the defendant: (1) where ambiguity exists regarding the lawfulness or unlawfulness of orders; (2) where it is clear the accused was following those orders; (3) where the accused did not wish

to follow those orders, but did so out of legal compulsion; (4) where the accused derived no pleasure from and had no desire to and did not intend to commit such acts; and (4) where disobedience to those orders would result in severe punishment to the accused.

C. *Military Necessity*

The important points coming from the Manila trials in relation to the excuse of military necessity are as follows:

1. *A self-serving and malleable definition of military necessity*: the legal definition of military necessity put forward by the US Army was self-serving in the sense that the definition did not extend to exclude the acts committed by US forces and Allies such as the bombing of Japanese cities.

2. *General Rule: Three Interdependent Principles*:

   (a) The principle of military necessity [is] subject to the principles of humanity and chivalry; (b) The principle of humanity, prohibiting employment of any such kind or degree of violence as is not actually necessary for the purpose of the war; and (c) The principle of chivalry, which denounces and forbids resort to dishonorable means, expedients, or conduct.

3. *Ambiguous test in determining the elements of military necessity, particularly in relation to whether the fault element (mens rea) is subjective or objective*: An aspect of military necessity requires that there be no 'cruelty' – to determine whether cruelty was present, there was no clear application in regard to whether the test was subjective (i.e. what was in the mind of the accused at the time of the offence), or objective (i.e. whether a reasonable person would consider the acts of the accused to be cruel given the circumstances).

III. What is the Legacy of the US Army's Manila Trials?

The Manila trials with their immense *corpus* of case law and jurisprudence provide an intriguing archive of a series of trials conducted in the aftermath of a major conflict. This thesis has examined cases from those trials involving questions regarding command responsibility (both *de jure* and *de facto* command), and the defences of superior orders and military necessity. The large body of case law, *lex scripta* and jurisprudential commentary that came out of the Manila trials, in conjunction with other previous cases, provides an important indication of the normative basis of what the law is and what it *ought* to be regarding a person's criminal responsibility. What is obtained from such an analysis is an intricate and complex view of the machinations of the law and how the law *was* and *should* be applied when determining a person's criminal responsibility for war crimes.

This research will, hopefully, allow researchers to understand and articulate the nature of law and criminal responsibility better than had the old, dog-eared files been left to slowly

deteriorate on archival shelves. By understanding the nature of law we are better able to achieve just outcomes for the victims of war crimes by holding those responsible (both civilian and military) to account.

As to whether the US Army trials in Manila were 'just', the answer to that question is that there is strong evidence that the trials did provide an appropriate level of justice to the defendants. Assessed insofar as the *jus post bellum* limb of the 'just war' theory, the US Manila trials exercised proportionality in terms of the number of Japanese defendants tried in relation to the number of atrocities committed. Although death sentences were not uncommon, the severity of punishment was not disproportionate to the nature of the crimes and was not unlike punishment meted out at other Allied war crimes trials. There remains some doubt, however, in relation to several cases where the tribunals applied what appeared to be indiscriminate responsibility so as to make someone accountable for war crimes.

This problem notwithstanding, the US Manila war crimes trials did represent justice for the defendants and went some way towards addressing the crimes committed against the victims of Japanese atrocities. The fact that the US Army conducted trials in the first place, and the lengths taken to ensure justice was seen to be done, provides further insight into the importance placed on the desire of the US to ensure justice was done.

Under international law it is clear that those in positions of command will have certain responsibilities and will be held accountable for failing to uphold those responsibilities. Likewise, subordinates will be held to account and will not be able to rely on such excuses as merely 'obeying superior orders' or because they believed they needed to satisfy a military objective.

The problem becomes more complex, however, when the circumstances surrounding the accused's conduct do not allow a straightforward application of facts to the law. There are a myriad of reasons that needs to be considered when determining criminal responsibility, and in the aftermath of major conflict this task is made even more difficult. In particular, every person is potentially susceptible to committing war crimes—not just those Japanese commanders and military personnel who committed crimes against humanity nearly 80 years ago. The clear and present threat of war crimes is an enduring phenomenon of the human project and decisions that bring nations to war and the conduct of that war once it commences, must be held under tight scrutiny.

There is hardly a desire by our leaders to linger over past wars such as the Vietnam War and the more recent invasions of Iraq and Afghanistan. However, serious questions remain over the conduct of not only those involved in direct conflict, but the commanders (military and civilian) who were responsible for creating the conditions in which potential crimes were committed in the first place. If we are not prepared to examine the responsibility of our civilian leaders and military commanders for the possible commission of war crimes—just as the Allies exposed the Japanese and Axis leaders—then the complex array of war crimes jurisprudence that came from the Manila trials and the thousands of trials throughout history may well be lost.

The enduring question is whether we are now prepared to apply the law to past incidents of possible war crimes and dubious questions of criminal responsibility, in the same way as it was applied at Manila and in so many other contexts. The answer to that question is yet to be known.

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