

9-1-1996

Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War

Matthew Lippman

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>

 Part of the [International Humanitarian Law Commons](#), [International Law Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

Lippman, Matthew (1996) "Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War," *Penn State International Law Review*: Vol. 15: No. 1, Article 2.
Available at: <http://elibrary.law.psu.edu/psilr/vol15/iss1/2>

This Article is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

ARTICLES

Conundrums Of Armed Conflict: Criminal Defenses To Violations Of The Humanitarian Law of War

Matthew Lippman*

Following World War II the Allied Powers pledged to criminally prosecute those responsible for the commission of War Crimes.¹ The Nuremberg and Tokyo trials were followed by a series of national and multinational prosecutions of German and Japanese civilian and military officials.² These judgments established the foundation for the development of international criminal law and elaborated on the elements of criminal responsibility and proof.³ The most confused and contentious area of international

* Ph.D. Northwestern; J.D., American; LL.M. Harvard; Professor, Department of Criminal Justice, University of Illinois at Chicago, Chicago, Illinois. A portion of this research was undertaken during the author's tenure as "of counsel" in *Bosnia v. Yugoslavia (Serbia & Montenegro)* before the International Court of Justice. This article is dedicated with love and devotion to Lidia Janus (June 8, 1958-January 24, 1991).

1. Declaration On German Atrocities (Oct. 30, 1943) VI DOCUMENTS ON AMERICAN FOREIGN RELATIONS, July 1943-June 1944, 231 (1945).

2. See Matthew Lippman, *The Other Nuremberg: American Prosecutions Of Nazi War Criminals In Occupied Germany*, 3 IND. INT'L & COMP. L. REV. 1 (1992). See also Matthew Lippman, *Nuremberg: Forty Five Years Later*, 7 CONN. J. INT'L L.J. 1 (1991).

3. For background on post-World War II trials of alleged German war criminals, see Matthew Lippman, *Fifty Years After Auschwitz: Prosecutions Of Nazi Death Camp Defendants*, __CONN. J. INT'L__ (forthcoming); Matthew Lippman, *War Crimes Prosecutions Of Nazi Health Professionals And The*

criminal law concerns the character and scope of criminal defenses. Curiously, scant scholarly attention has been devoted to this topic which has been characterized as “a vast terra incognita.”⁴

Government officials invariably claim to have acted out of altruism and to have lacked criminal intent. They portray themselves as having been propelled by patriotic principle rather than self-promotion or uncontrolled passion. The vanquished also invariably claim to be the victims of “selective” or “victor’s justice.” The exiguous ethical distinction between legitimate acts of war and murder lends added weight to these claims.⁵

Former Secretary of Defense Robert S. McNamara published a volume in 1995 which outlined the flawed and deficient decisions which led to American involvement in Vietnam.⁶ McNamara was an early enthusiast of the effort and supported the insertion of combat troops and the initiation of bombing sorties. He feared that the defeat of South Vietnam would diminish American prestige and perceived power.⁷ His ardent advocacy⁸ resulted in Vietnam being labelled as “McNamara’s War.”⁹

McNamara gradually began to shift his sentiments, arguing in 1965 for the initiation of negotiations concerning the construction of a neutral South Vietnam.¹⁰ He concluded two years later that

Protection Of Human Rights, __T. MARSHAL L. REV. __ (forthcoming); Matthew Lippman, *War Crimes: The Trial Of Nazi Military Leaders*, 3 *TOURO INT’L & COMP. L.J.* 261 (1995); Matthew Lippman, *War Crimes Trials Of German Industrialists: The ‘Other Schindlers,’* 9 *TEMP. J. INT’L & COMP. L.* 101 (1995); Matthew Lippman, *The Nazi Doctors Trial And The International Prohibition On Medical Involvement In Torture*, 15 *LOY. L.A. INT’L & COMP. L.J.* 395 (1993); Matthew Lippman, *They Shoot Lawyers Don’t They?: Law In The Third Reich And The Global Threat To The Independence Of The Judiciary*, 23 *CAL. W. INT’L. L.J.* 257 (1993); Matthew Lippman, *Nuremberg*, 6 *LAW IN CONTEXT* 28 (1988); Matthew Lippman, *The Denaturalization Of Nazi War Criminals In The United States: Is Justice Being Served?*, 7 *HOUS. J. INT’L. L.* 169 (1985); Matthew Lippman, *The Trial Of Adolf Eichmann And The Protection Of Universal Human Rights Under International Law*, 5 *HOUS. J. INT’L. L.* 1 (1982). See generally, Matthew Lippman, *Towards An International Criminal Court*, 3 *SAN DIEGO J. I.* 1 (1995); Matthew Lippman, *War Crimes: The My Lai Massacre And The Vietnam War*, 1 *SAN DIEGO J.J.* 295 (1993).

4. Albin Eser, *Defences in War Crimes Trials*, 24 *ISR. Y.B. HUM. RTS.* 201, 202 (1984) (emphasis omitted).

5. See *id.*

6. ROBERT S. MCNAMARA, IN *RETROSPECT: THE TRAGEDY AND LESSONS OF VIETNAM* 34 (1995) (McNamara discussed eleven seminal decisions).

7. See *id.* at 106-07.

8. See *id.* at 148, 180.

9. *Id.* at 118. McNamara’s measuring success through the accumulation of “body counts” became a metaphor for America’s misguided mission. *Id.* at 48.

10. MCNAMARA, *supra* note 6, at 181, 204.

the United States was careening towards a “major national disaster”¹¹ and called for the cessation of bombing¹² and the freezing of force levels.¹³ McNamara was now convinced that a settlement would neither threaten United States military credibility nor undermine America’s perceived commitment to its allies.¹⁴ President Lyndon Johnson rejected this analysis and reassigned McNamara to the World Bank in 1968.¹⁵

McNamara’s recent recantation was rejected by critics who considered the former Defense Secretary to be a war criminal. He was criticized for having muzzled his misgivings so as to maintain his Pentagon position. Others praised McNamara for placing patriotism over principle.

What is the appropriate response of a high-ranking official who is confronted with illicit international conduct? Was McNamara justified in remaining in office in order to argue against escalation? Could he reasonably have believed that his muffled dissent would be effective? Should McNamara have intervened to halt the bombing of civilian targets? Would McNamara’s resignation have had an impact on American policy? Did McNamara’s dissent mitigate his earlier support for the war? What was the scope of McNamara’s liability for criminal acts committed by American troops in Vietnam? Should a governmental official be held liable for acts which he or she believed were required in self-defense or in furtherance of the national interest? Are decision-makers immunized from international penal liability stemming from official acts? Underlying these questions is the conflict between principles and patriotism. At what point should the dictates of conscience take precedence over the claims of domestic doctrine? Is it realistic to require individuals to risk life and limb in order to avoid criminal culpability?¹⁶

These conundrums recur in the consideration of international criminal defenses. This Article outlines the elements, scope, and

11. *Id.* at 271.

12. *Id.* at 153.

13. *Id.* at 270-71.

14. *Id.* at 306-09.

15. MCNAMARA, *supra* note 6, at 311. President Johnson honored McNamara by awarding him the Medal of Freedom. *Id.* at 316.

16. See Ronald Steel, *In Retrospect: The Tragedy and Lessons of Vietnam* by Robert S. McNamara with Brian Van De Mark, THE NEW REPUBLIC 34 (1995) (book review). See generally James C. Thomson Jr., *Getting Out And Speaking Out*, 13 FOREIGN POLICY 49 (1973-1974). The debate over the international legality of the Vietnam conflict is discussed in Matthew Lippman, *Vietnam: A Twenty Year Retrospective*, 11 DICK. J. INT’L L. 325 (1993).

underlying philosophy of various core criminal defenses, including superior orders, necessity, vicarious liability, good motive and reprisals against hostages. Some summary comments on the contemporary code of conflict are offered in the concluding section.

I. Superior Orders

A. *World War I*

During World War I, scholars debated whether German combatants should be permitted to rely on the superior orders defense.¹⁷ Commander Sir Graham Bower of the Royal Navy argued in 1915 that submarine officers and crews sinking merchant vessels should not be held liable: “the blame does not rest with them, but with their superiors.”¹⁸ According to Bower, the military could not function under circumstances in which “every subordinate . . . [was] permitted or required to constitute himself a judge of the legality or morality of the orders received from his superiors. . . . To make him responsible . . . [would] strike at the foundations of discipline in every army or navy in the world.”¹⁹ Low-level combatants were ill-equipped to evaluate the context of a command. An order might appear invalid but in fact be legally justified as an act of reprisal.²⁰ The extension of criminal culpabil-

17. The trial of Peter von Hagenbach is commonly viewed as the first international war crimes trial in which the superior orders defense was raised. Duke Charles of Burgundy appointed Hagenbach as Governor of Breisach in order to carry out a harsh and severe regime. Hagenbach was tried by a twenty-eight judge panel representing Alsatian and Upper Rhenanian towns, Berne from the Swiss Confederation and Austria. The panel rejected Hagenbach's superior orders defense. See GEORG SCHWARZENBERGER, II INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 462-66 (1968). For a historical sketch of superior orders in ancient and medieval law, see Nico Keijzer, *A Plea For The Defence Of Superior Orders*, 8 ISR. Y.B. HUM. RTS. 78, 80-83 (1978). The trial of Confederate Captain Henry Wirz before a United States military commission also is pointed to as an important milestone in the development of the superior orders defense. See *The Trial Of Captain Henry Wirz For Conspiracy And Murder, Washington, D.C. 1865*, 8 AMERICAN STATE TRIALS 657 (1917).

18. Graham Bower, *The Laws Of War: Prisoners Of War And Reprisals*, I TRANSACTIONS GROTIUS SOC'Y 15, 24 (1916).

19. *Id.* at 25.

20. *Id.* An officer also may possess knowledge which is not available to a subordinate. A merchant ship, for example, may be transporting military troops or munitions. *Id.* Bower noted that Section Four of the Naval Discipline Act of 1866 imposed the death penalty for a failure to carry out superior orders. *Id.* at 24-25.

ity would condemn soldiers to the often conflicting commands of domestic and international law.²¹

Commander Bower's argument appeared consistent with Anglo-American military manuals which insulated subordinates from liability.²² The British Manual of Military Law of 1914 provided that "[m]embers of armed forces who commit . . . violations of the recognized rules of warfare as are ordered by their Government or their commander are not war criminals, and cannot, therefore, be punished by the enemy."²³ American military law was modelled on the British manual. Article 366 stated:

[i]ndividuals of the armed forces will not be punished . . . 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

When any action or any service is commanded, every person subject to this Act who shall presume to delay or discourage the said action or service upon any pretence whatsoever, or in the presence or vicinity of the enemy shall desert his post or sleep upon his watch, shall suffer death or such other punishment as is hereinafter mentioned.

Bower, *supra* note 18, 24-25, citing The Naval Discipline Act of 1866.

21. See James W. Garner, *Punishment Of Offenders Against The Laws And Customs Of War*, 14 AM. J. INT'L L. 70, 84-85 (1920). Garner noted that absent the superior orders defense, a combatant who lacks criminal intent may be subject to punishment. He conversely recognized that a maliciously motivated soldier might rely on the defense. *Id.* at 84-85.

22. See *id.* at 84-87.

23. See Guenter Lewy, *Superior Orders, Nuclear Warfare, And The Dictates Of Conscience: The Dilemma Of Military Obedience In The Atomic Age*, 55 AM. POL. SCI. REV. 3, 6 (1961). The British military code of 1715 stated that combatants owed unconditional obedience to a superior officer and that disobedience was punishable by death. In 1749 the language was modified to require obedience to lawful orders. See H. Lauterpacht, *The Law Of Nations And The Punishment Of War Crimes*, 21 BRIT. Y.B. INT'L L. 58, 69, n.1 (1944). Article 443 of the 1914 edition of the Manual of Military Law reverted to the early English rule of unconditional obedience and non-liability for violations of international law committed pursuant to superior orders:

Members of armed forces who commit . . . violations of the recognized 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 such order if they fall into his hands; but otherwise he may only resort to the other means of obtaining redress.

Quoted in Hugh H.L. Bellot, *War Crimes: Their Prevention And Punishment*, II TRANSACTIONS GROTIUS SOC'Y 31, 46 (1917).

committed by their troops, may be punished by the belligerents into whose hands they may fall.²⁴

In contrast, Hugh H. L. Bellot of Oxford argued that the British provision "makes wastepaper" of the humanitarian law of war.²⁵ Responsibility would be shifted upwards in the military hierarchy until only the Kaiser remained liable. Prosecution of a head of state remained legally and politically precarious. Paralysis in prosecution and punishment would be the end result.²⁶ However, the imposition of criminal culpability on combatants who violated the humanitarian law of war in response to superior orders might nevertheless lead to "some mitigation in the present conduct of the war. No man likes to fight with a rope round his neck."²⁷

Bellot's views were consistent with the common law which did not recognize superior orders as a defense to a civilly actionable or criminal act.²⁸ In *Little v. Barreme*, Chief Justice John Marshall observed that "instructions cannot change the nature of the

24. United States Army Rules of Land Warfare (1914), *quoted in* Gordon Battle, *The Trials Before The Leipsic Supreme Court Of Germans Accused Of War Crimes*, 8 VA. L. REV. 1, 18 (1921). Article 64 of the French criminal code provided that an act which was carried out through threat of force did not carry criminal liability. Some commentators contended that this would excuse criminal acts committed by combatants under the threat of force. Others argued that this was not applicable to combat. *Id.* at 24-25. A war crimes reform commission recommended the extension of the superior orders defense for radio operators during armed conflict. See Commission of Jurists, *Report Upon The Revision Of The Rules Of Warfare*, 22 AM. J. INT'L L. 1, 11, art. 12 (Supp. 1938).

25. Bellot, *supra* note 23, at 46.

26. *Id.* "It must be noted that this Article enjoys no statutory force or official authority, and is declared to be only intended for the guidance of officers in the execution of their duty." *Id.* The British Manual of Military Law curiously retained Article 11 which provided that an inferior is justified in questioning, or even refusing to execute, an obviously illegal order. *Id.* at 48.

27. *Id.* at 50.

Upon what ground are the members of the enemy naval and military forces to be exempted from punishment for the commission of illegal acts under the orders of superior command? Can it seriously be contended that a German subaltern who commands his men to shoot batches of non-combatants without trial is not a war criminal because he acted under orders from headquarters? Is the officer . . . who sent to their death over 1,200 non-combatants on board the *Lusitania* to be treated when captured as a prisoner of war because he obeyed the orders of the German Admiralty? In both cases these officers knew . . . they were committing violations of well-known usages of warfare. . . .

Bellot, *supra* note 23, at 49.

28. See Garner, *supra* note 21, at 85. For a brief discussion of British precedents see Battle, *supra* note 24, at 20-22.

transaction, nor legalize an act which, without those instructions, would have been a plain trespass."²⁹ Chief Justice Roger Taney reiterated this view in *Mitchell v. Harmony* and noted that "it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify."³⁰ Qualms about the consequences of subordinate liability were occasionally expressed. The Supreme Court observed, in dicta, in *Martin v. Mott* that

prompt and unhesitating obedience to orders is indispensable. . . . [E]very delay, and every obstacle to an efficient and immediate compliance necessarily tend to jeopard [sic] the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey . . . the hostile enterprise may be accomplished . . . without resistance. Such a course would be subversive of all discipline. . . .³¹

The judiciary also ameliorated the harshness of the common law rule in criminal cases by recognizing the superior orders defense where a defendant carried out a seemingly lawful order without malicious intent.³²

The conflicting views of these scholars and jurists stymied the fifteen member commission appointed by the Paris Peace Conference to inquire into the criminal culpability of the Axis Powers.³³ The commission adopted the opaque position that "[i]t will be for

29. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177 (1804) (captain of frigate capturing Danish ship pursuant to Executive Branch letter broadly construing a Congressional statute).

30. *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 149 (1851) (seizure of property belonging to an American commercial trader by the United States military during Mexican War).

31. *Martin v. Mott*, 25 U.S. (12 Wheat.) 12, 19 (1827).

32. *United States v. Jones*, 26 F. Cas. 653, 658 (Case No. 15,495) (1813). The leading early twentieth century English authority was R. V. Smith, (1900) 17 S.C. 561, 567-69 (Cape of Good Hope) *quoted and cited in* L.C. Green, *The Defence Of Superior Orders In The Modern Law Of Armed Conflict*, 31 ALBERTA L. REV. 320, 324 (1993).

I think it is a safe rule to lay down that if a soldier honestly believes that he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the order of his superior officer.

Id.

33. See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 14 AM. J. INT'L L. 95 (1920).

the court to decide whether a plea of superior orders is sufficient to acquit the person charged from responsibility."³⁴

Germany resisted turning over those accused of war crimes to the Allied Powers for prosecution. However, the Reich finally succumbed to political pressure and brought thirty-three combatants to trial before the Penal Senate of the *Reichsgericht* at Leipzig.³⁵ Three cases raised the issue of superior orders.

In the earliest case, Karl Neumann was a First Lieutenant in the German Navy and Commander of the submarine U.C. 67. Neumann's vessel sighted, torpedoed, and sank the hospital ship *Dover Castle* on May 26, 1917, killing six members of the crew.³⁶ Neumann claimed to have been carrying out the orders of the German Admiralty. The Admiralty issued a memorandum in 1917 that hospital ships traversing the Mediterranean were being utilized as military transports and were to be regarded as vessels of war.³⁷ The court concluded that Neumann had relied on the memorandum in launching what he regarded as a legitimate act of reprisal.³⁸ In addition, the court determined that Neumann was entitled to rely on the superior orders defense.

The Admiralty Staff was the highest service authority over the accused. He [Neumann] was in duty bound to obey their orders in service matters. So far as he did that, he was free from criminal responsibility. Therefore he cannot be held responsible for sinking the hospital ship *Dover Castle* according to orders.³⁹

34. *Id.* at 117.

35. Battle, *supra* note 24, at 4-6.

36. Judgment In Case Of Commander Karl Neumann (1921), 16 AM. J. INT'L L. 704, 705-06 (1922) [hereinafter *Hospital Ship Dover Castle*].

37. *Id.* at 706. Submarine U.C. 67 initially torpedoed the *Dover Castle*. An accompanying destroyer rescued the crew as well as the sick and wounded. Ninety minutes later a second torpedo was fired which sunk the hospital ship. *Id.* at 705-06. The Military Penal Code adopted by the *Reichstag* in 1872 established that in instances in which a penal law was violated through the execution of the order of a superior, "the obeying subordinate shall be punished as accomplice (1) if he went beyond the order given to him, or (2) if he knew that the order of the superior concerned an act which aimed at a civil or military crime or offense." Lewy, *supra* note 23, at 7.

38. *Hospital Ship Dover Castle*, *supra* note 36, at 707-08. Neumann allegedly also had received reports of hospital ships carrying military men and munitions from his comrades. *Id.* at 707.

39. *Id.* at 707.

It is a military principle that the subordinate is bound to obey the orders of his superiors. The duty of obedience is of considerable importance from the point of view of the criminal law. Its consequence is that, when the execution of a service

Unlike the Neumann case, in *Llandoverly Castle* the German court refused to extend the superior orders defense to clearly illicit commands. The English hospital ship *Llandoverly Castle* was torpedoed and sunk off the Irish Coast by German U-Boat 86 on June 27, 1918. Only twenty-four of 258 survived.⁴⁰

First Lieutenant Helmut Patzig commanded the German submarine and was aware that the *Llandoverly Castle* was outside the attack area announced by the German command. He nevertheless erroneously assumed that American airmen were on the hospital ship and launched a torpedo assault. The boat sank within roughly ten minutes, permitting only a portion of the crew to crowd into three lifeboats.⁴¹ The submarine surfaced and approached one of the lifeboats. The occupants protested that the *Llandoverly Castle* was carrying neither military men nor munitions. Patzig nevertheless ordered Chief Boatswain's Mate Meissner to fire at the lifeboats, two of which were sunk. The defendants, First Lieutenants Ludwig Dithmar and John Boldt, remained on the deck and relayed the distance and position of the lifeboats.⁴²

The Court ruled that international law prohibited attacks on unarmed enemies and shipwrecked individuals at sea.⁴³ Dithmar

order involves an offence against the criminal law, the superior giving the order is alone responsible.

Id.

The German Court noted that a subordinate who has acted in conformity with orders may be punished in those instances in which the individual has gone beyond the scope of his orders or possessed knowledge that he had been ordered to commit a criminal act. The Court noted as to the former factor that the hospital ship was accompanied by two warships and it was impossible to issue a warning. Neumann did not act with particular brutality and made every effort to rescue those on board. Neumann also believed that he was engaged in a legitimate reprisal. *Id.*

40. Judgment In Case Of Lieutenants Dithmar And Boldt (July 16, 1921), 16 AM. J. INT'L L. 708, 709-10 (1922) [hereinafter *Hospital Ship Llandoverly Castle*].

41. *Id.* at 710-12.

42. *Id.* at 710, 719. Patzig attempted to conceal the incident. He made no entry in the vessel's log-book, altered the sailing chart and extracted promises of silence from the crew. Patzig's motive in ordering the attack on the lifeboats presumably was to eliminate the witnesses. *Id.* at 716-17.

43. *Id.* at 721.

The killing of enemies in war is in accordance with the will of the State that makes war . . . only in so far as such killing is in accordance with the conditions and limitations imposed by the laws of nations. The fact that his deed is a violation of international law must be well-known to the doer, apart from acts of carelessness, in which ignorance is a sufficient excuse. In examining the question of the existence of this knowledge, the ambiguity of many of the rules of international law, as well

and Boldt were found to have freely followed orders and assisted in firing at the lifeboats. However, the *Reichsgericht* found that the defendants did not harbor a deliberate intent to kill and convicted the two of being accessories to murder.⁴⁴ Both were sentenced to four years imprisonment. This relatively light punishment was premised on the mitigating circumstance that the defendants had been trained to obey orders.⁴⁵

It is certainly to be urged in favor of the military subordinates that they are under no obligation to question the order of their superior officer and they can count upon its legality. But no such confidence can be held to exist if such an order is universally known to everybody, including . . . the accused, to be without any doubt . . . against the law. This happens only in rare and exceptional cases. But this . . . was precisely one of them, for in the present instance it was perfectly clear to the accused that killing defenseless people in the life-boats could be nothing else but a breach of the law. They should, therefore, have refused to obey. As they did not do so, they must be punished.⁴⁶

The superior orders defense was also invoked by Major Benno Crusius in the *Stenger* case.⁴⁷ Crusius alleged that General Karl

as the actual circumstances of the case, must be borne in mind, because in war time decisions of great importance have frequently to be made on very insufficient material. . . .

See, *supra* note 40, at 721.

44. *Id.* The panel determined that Patzig had ordered the firing on the lifeboats in a "state of excitement" and that the execution of the deed cannot be characterized as "deliberate." *Id.* The Court rejected the contention that had the defendants refused to obey the order they would have faced retribution. On the contrary, a refusal to cooperate would have prevented Patzig from carrying out the order. *Id.* at 722.

45. *Id.* at 723. The court did emphasize that the defendants' deed had cast "a dark shadow on the German fleet, and . . . on the submarine weapon which did so much in the fight for the Fatherland." *Id.*

46. See, *supra* note 40, at 722. Vice Admiral (retired) von Trotha and Judge Toepffer (adviser to the Navy on the law during the war) testified that in the German fleet the impression prevailed that a naval officer who exceeded the bounds of the law in the course of a fight was not thereby rendered liable to punishment. The officer might, however, be responsible to his superior. The court stated that this related to the view of the high command and there was no evidence that this was the perception of the accused. These killings were "not done in the course of a fight, neither in an attack on the enemy nor in defence against him." *Id.*

47. See CLAUD MULLINS, *THE LEIPZIG TRIALS: AN ACCOUNT OF THE WAR CRIMINALS TRIALS AND A STUDY OF GERMAN MENTALITY* 151 (1921) (discussing judgment in the case of Lieutenant General Karl Stenger and Major Benno Crusius).

Stenger had ordered the execution of enemy prisoners and wounded captured on the battlefield. Crusius was charged with passing on Stenger's order as well as with intentionally killing several (at least seven) French prisoners and wounded.⁴⁸ Stenger and his subordinate officers testified that Crusius had misconstrued the General's remarks. They uniformly claimed that Stenger had casually mentioned that those wounded who concealed their weapons and then attacked German troops should be shot.⁴⁹

Crusius's misunderstanding of the facts and failure to grasp the illicit nature of Stengel's alleged order

seems only comprehensible in view of the mental condition of the accused. . . . [H]e was intensely excited and suffered from nervous complaints. . . . [T]hese complaints did not preclude the free exercise of his will, but were nevertheless likely to affect his powers of comprehension and judgment. . . . Had he applied the attention which was to be expected . . . [then] what was immediately clear to many of his men would not have escaped him, namely, that the indiscriminate killing of all wounded was a monstrous war measure, in no way to be justified.⁵⁰

The court convicted Crusius of "killing through negligence."⁵¹ He was sentenced to two years in prison.⁵²

In summary, the German Supreme Court's judgments recognized that a defendant might rely on the superior orders defense in those instances in which he harbored a good faith belief in the legality of an otherwise illicit command. Such a claim was barred in those instances in which the order contravened a "simple" and "universally-known" rule of international law. A combatant carrying out such a command was presumed to possess

48. *Id.* at 152.

49. *Id.* at 154. The court ruled that the protection afforded to the wounded does not extend to those who take up arms again and renew the fight. *Id.* at 155.

50. *Id.* at 160.

51. Mullins, *supra* note 47, at 161. The German Penal Code provides that "there is no criminal act if the doer at the time of his act was in a state of unconsciousness, or if his mind was deranged so that there could be no free volition on his part." *Id.* at 165. The court determined that Crusius suffered from a degenerative mental disease and by the afternoon had suffered "a complete mental derangement excluding beyond any doubt all criminal responsibility" *Id.* at 166.

52. *Id.* at 167. The court considered in mitigation that Crusius possessed a stellar moral and service record and suffered from a mental defect. The judges also speculated that General Stengel may have encouraged his subordinates to kill prisoners and wounded enemy combatants. *Id.* at 167-68.

criminal intent.⁵³ A soldier's subjective and false belief in the existence of an illegal order also was not adjudged exculpatory.⁵⁴ The superior orders defense was likewise inapplicable in those instances in which a subordinate independently and intentionally exceeded the scope of a criminal command.⁵⁵ The fact that a combatant had acted in response to an illegal order, or believed in good faith that such an order had been issued, was considered in mitigation of punishment.⁵⁶ Combatants were not charged with a duty to investigate or question an order and were able to rely on the facial validity of a command.⁵⁷

These principles balanced the existing tensions within Anglo-American law.⁵⁸ Yet, the defense remained perniciously political. As a case in point, in July 1916 the German courts rejected the superior orders plea of British subject Captain Charles Fryatt who had attempted to ram a German submarine in accordance with the British admiralty's instructions. Fryatt was subsequently executed.⁵⁹

B. Nuremberg

The promise of Allied prosecution of German war criminals stimulated scholars to propose various practices and procedures for the prospective Nuremberg tribunal.⁶⁰ The respondeat superior defense was the subject of comment and criticism. At a meeting of the American Society of International Law in 1943 Professor Edwin Dickinson observed that "if we permit the plea to get out of hand,

53. See *supra* note 46 and accompanying text.

54. See *supra* notes 47-52 and accompanying text.

55. See *supra* notes 40-46 and accompanying text.

56. See *supra* note 45 and accompanying text.

57. See *supra* note 46 and accompanying text.

58. See Bellot, *supra* note 23, at 46-50.

59. See James Brown Scott, *The Execution Of Captain Fryatt*, 10 AM. J. INT'L L. 865 (1916). These decisions of the German courts in reference to submarine warfare varied from a treaty on submarine warfare which had been drafted in 1922 by the Washington Conference On The Limitation Of Armament. The unratified treaty abrogated the superior orders defense. See A Treaty on Submarines and Noxious Gases in Warfare, 16 AM. J. INT'L L. 57, art. 3 (Supp. 1922) (never ratified). But the superior orders defense was not incorporated into subsequent treaties regulating submarine warfare. See Proce's Verbal Relating to the Rules of Submarine Warfare Set Forth In Party IV Of the Treaty of London on Apr. 22, 1930 reprinted in 31 AM. J. INT'L L. 137 (Supp. 1937). See also International Treaty for the Limitation and Reduction of Naval Armament (Apr. 22, 1930), T.S. No. 1 (1931).

60. See Sheldon Glueck, *By What Tribunal Shall War Offenders Be Tried?* 56 HARV. L. REV. 1059 (1943).

as we did after the last war, we shall be confronted with the *reductio ad absurdum* that the only war criminals available for punishment are Hitler and Tojo, neither of whom is likely to be available . . . when the victory is finally won."⁶¹ Another commentator noted that the superior orders plea resulted in more severe punishments for combatants who had impulsively or independently violated the law of war than for those whose acts were part of a deliberate design to disregard the law of war.⁶² Most argued for a nuanced approach which limited the defense to orders which were reasonably believed to be consistent with international law or which were carried out as a result of duress or coercion.⁶³ This compromise centered culpability on criminal intent in order to prevent the principle of *respondeat superior* from limiting "the effectiveness of the law in a manner which may be rightly regarded as a perversion of justice."⁶⁴

Still, others objected to condemning combatants to prison for the "sins of their superiors."⁶⁵ Perhaps the most prominent proponent of the superior orders defense was Professor Hans Kelsen who invoked the interests in military discipline and efficiency. He asserted that the abrogation of *respondeat superior* would impose an inordinate burden on combatants; orders emanating from high-echelon officials were colored by command and were rarely in clear contravention of the code of war. The intricacies of international law made it inconceivable for a conscript

61. Charles Cheney Hyde, *Punishment Of War Criminals*, 37 PROC. AM. SOC'Y INT'L L. 39, 49 (1943) (comment by Edwin Dickinson) (emphasis omitted). *But see* George Manner, *The Legal Nature And Punishment Of Criminal Acts Of Violence Contrary To The Laws Of War*, 37 AM. J. INT'L L. 407 (1943).

62. *See* Jacob Berger, *The Legal Nature Of War Crimes And The Problem Of Superior Command*, 38 AM. POL. SCI. REV. 1203, 1207 (1944).

63. *See* Lauterpacht, *supra* note 23, at 73.

[A] person obeying an obviously unlawful order the refusal to obey which would not put him in immediate jeopardy, will not be able to shield himself behind the excuse of superior orders. At the other end, a person obeying, in an isolated case, an illegal order which is not on the face of it unlawful and disobedience to which would expose him to the full rigours of summary military discipline, may rely on the plea of superior orders. There will be a variety of intermediate situations between these two extremes.

Id. at 73.

64. *Id.*

65. Ernst J. Cohn, *The Problem Of War Crimes To-day*, 26 TRANSACTIONS GROTIUS SOC'Y 125, 144 (1941).

to determine whether an act constituted a delict or a reprisal.⁶⁶ Kelsen concluded that “[t]he idea of justice . . . is certainly not favorable to the prosecution of individuals who committed war crimes in response to a superior command.”⁶⁷

Paving the way for the weakening of the superior orders defense was Professor L. Oppenheim of Cambridge who co-authored the British military manual’s provision on superior orders. This section reflected his 1912 text which opined that “[i]f members of the armed forces commit violations by order of their Government, they are not war criminals and may not be punished by the enemy.”⁶⁸ Oppenheim’s position was qualified in the manual’s sixth edition. The “major principle” he propounded was that “members of the armed forces are bound to obey lawful orders . . . and . . . cannot . . . 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.”⁶⁹

66. Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CAL. L. REV. 531, 556-58 (1943).

67. *Id.* at 558. The London International Assembly in 1943 adopted a resolution calling for the abrogation of the superior orders defense. Such commands might be considered as a defense or in mitigation in those instances in which the accused acted under duress. Such exculpating or extenuating circumstances were not to apply in the case of heinous acts or in those instances in which the accused was a member of an organization engaged in criminal conduct. The International Commission for Penal Reconstruction And Development endorsed a memorandum drafted by Professor Lauterpacht and adopted the view that superior orders should be available to an individual obeying an order in good faith which was not unlawful on its face. See UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 275-76 (1948). [hereinafter UN WAR CRIMES COMMISSION]. The United Nations War Crimes Commission, following extended debate and deliberation, declined to propound a principle or rule on superior orders. The Commission explained that the diversity of domestic rules and the complexity of factual scenarios mitigated against any single standard. But, the Commission did maintain that the “mere fact of having acted in obedience to the orders of a superior does not of itself relieve a person who has committed a war crime from responsibility.” *Id.* at 280.

68. L. OPPENHEIM, II INTERNATIONAL LAW: A TREATISE: DISPUTES WAR AND NEUTRALITY 310 (2d ed. 1912) (emphasis omitted). See also L. OPPENHEIM, II INTERNATIONAL LAW: A TREATISE: DISPUTES, WAR AND NEUTRALITY 410 (Arnold D. McNair ed., 4th ed. 1926).

69. L. OPPENHEIM, II INTERNATIONAL LAW: A TREATISE: DISPUTES, WAR AND NEUTRALITY 453 (H. Lauterpacht ed. 6th ed. 1944). The text qualified the rule by noting that a court would likely consider in exculpation the duty of obedience, the requirement of swift action, the ambiguity of rules and the fact that a war crime may be undertaken as an act of reprisal. *Id.* at 452-53. “To limit liability to the person responsible for the order may frequently amount . . . to

The British War Office finally abrogated the superior orders defense in April 1944.⁷⁰ The United States military followed suit in November 1944, one year prior to the Nuremberg trial, but did not recognize that superior orders could be considered "in determining culpability either by way of defense or in mitigation of punishment."⁷¹ However, Germany persisted in prohibiting the superior orders defense. Josef Goebbels declared that the Reich considered Allied pilots to be war criminals and that "[i]t is not provided in any military law that a soldier in the case of a despicable crime is exempt from punishment because he blames his superior, especially if the orders of the latter are in evident contradiction to all human morality and every international usage of warfare."⁷²

concentrating responsibility on the head of the State whose accountability . . . is controversial." *Id.* at 453. Professor Oppenheim had been responsible for the superior orders provision which appeared as Chapter XIV of the sixth edition in the British Manual of Military Law published in 1914. The doctrine of subordinate immunity survived for roughly thirty years. The Birkenhead Committee of Enquiry on War Crimes, established by the British Government in 1918 concluded that the statement in the Military Manual lacked authority and that it was the duty of a soldier to unquestioningly obey an order which he received. See N.C.H. Dunbar, *Some Aspects Of The Problem Of Superior Orders In The Law Of War*, 63 JURID. REV. 234, 242-43 (1951).

70. See Lewy, *supra* note 23, at 6. The revised Article 443 provided that:

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; . . . members of the armed forces are bound to obey lawful orders only and . . . cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiments of humanity.

Quoted in Lewy, supra note 23, at 6.

71. *Id.* Article 345.1 provided that:

Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. 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.

Quoted in Lewy, supra note 23, at 6.

72. *Quoted in Lewy, supra* note 23, at 7. Article 47 of the German Military Code (Oct. 10, 1947) only modestly differed from the provision applicable during World War I. See *supra* note 37.

(1) If a criminal law is violated through the execution of an order in a matter pertaining to the service, the superior giving the order is alone responsible. The subordinate who obeys such an order however is punishable as a participant

1. if he has exceeded the order given him, or

The Allied Powers convened in London to formulate the guiding principles for the prosecution of Nazi War Criminals.⁷³ Justice Robert H. Jackson, in a memorandum to President Roosevelt, noted that the immunity accorded to heads of state, as well as the superior orders defense, impeded the imposition of criminal liability: "It will be noticed that the combination of these two doctrines means that nobody is responsible. Society as modernly organized cannot tolerate so broad an area of official irresponsibility."⁷⁴ Jackson conceded that superior orders should be available to a conscript serving on a firing squad. But, he argued that the defense should not apply to individuals who possess discretion as to whether to obey an order or who voluntarily enlist in a criminal organization. Jackson advocated authorizing the Nuremberg Tribunal to determine on a case-by-case basis whether superior orders should "constitute a defense or merely extenuating circumstances, or perhaps carry no weight at all."⁷⁵

The American draft gave the Tribunal discretion to determine in each instance whether superior orders should be considered as a defense or a mitigating factor.⁷⁶ General I.T. Nikitchenko queried, as a matter of principle, whether major Nazi leaders should be permitted to raise the superior orders defense.⁷⁷ Sir David Maxwell Fyfe of the United Kingdom argued that the

2. if he knew that the order of the superior concerned an act, which had in view a general or military major or minor crime.

(2) If the guilt of the subordinate is trivial, he may be exempted from punishment.

Mitchell Franklin, *Sources of International Law Relating to Sanctions Against War Criminals*, 36 CRIM. L. & CRIMINOLOGY 153, 162-63 (1945).

73. See REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS (1945) [hereinafter JACKSON REPORT].

74. *Report to the President by Mr. Justice Jackson, June 6, 1945*, in JACKSON REPORT, *supra* note 73, at 42, 47.

75. *Id.*

76. See *American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945*, in JACKSON REPORT, *supra* note 73 at art. 11, at 22, 24.

The fact that a defendant acted pursuant to an order of a superior or government sanction shall not constitute an absolute defense but may be considered either in defense or in mitigation of punishment if the tribunal before which the charges are being tried determines that justice so requires.

Id. at 22.

77. See *Minutes of Conference Session of July 24, 1945* in JACKSON REPORT, *supra* note 73, at 360, 367.

application of the defense should remain within the discretion of the Tribunal: "Suppose someone said he was threatened to be shot if he did not carry out Hitler's orders. If he wasn't too important, the Tribunal might let him off with his life."⁷⁸ Justice Jackson noted that the superior orders defense would be helpful in clarifying the culpability of members of criminal organizations.⁷⁹ Sir David then received unanimous support for a modified proposal which he described as representing international doctrine. This provision provided that superior orders should "not be an absolute defense."⁸⁰ Article Eight of the Nuremberg Charter accordingly provided that "[t]he fact that the Defendant acted pursuant to [an] 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."⁸¹ Judge Robert Falco of France presciently pointed out that the provision neglected to enumerate the grounds for mitigation of punishment.⁸²

The Nuremberg defendants contended that the superior orders defense was universally recognized in those instances in which a defendant lacked knowledge of an order's illegality. They argued that this should be broadened since "[o]rders can . . . place the perpetrator under a state of compulsion, and for that reason exclude guilt."⁸³ In rebuttal, the chief French prosecutor, M. Francois de Menthon, argued that the superior orders defense does not encompass the execution of orders whose "illegality is manifest [A]ny other solution would . . . be unacceptable, for it would testify to the impotence of all repressive policy."⁸⁴ The American prosecutor, Justice Robert H. Jackson, noted that the defendants had "destroyed free government in Germany and now plead to be excused from responsibility because they became slaves. They are in the position of the fictional boy who murdered his father and

78. *Id.* at 368.

79. *Id.*

80. *Id.*

81. Agreement For The Prosecution And Punishment Of The Major War Criminals Of The European Axis Powers And Charter Of The International Military Tribunal, Aug. 8, 1945, art. 8, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

82. JACKSON REPORT, *supra* note 73, at 368.

83. XXI TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 626 (1948) (argument of Horst Pelckmann).

84. V TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 418 (1948).

mother and then pleaded for leniency because he was an orphan."⁸⁵

The judgment stressed that the core concept behind the Nuremberg Charter was that individuals possess international duties which transcend their domestic obligations. An individual who adheres to the authority of the State "cannot obtain immunity . . . if the state in authorizing [the] action moves outside its competence under international law."⁸⁶ The Tribunal noted that this criminal culpability was qualified by the superior orders provision of the Nuremberg Charter which, according to the judicial panel, was in conformity with "the law of all nations."⁸⁷ The Tribunal interpreted Article Eight to mean

[t]hat a soldier [who] was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.⁸⁸

This test applies to grave crimes (war crimes, crimes against humanity, and crimes against peace) and, in accordance with Article Eight of the Charter, stipulates that superior orders may only be considered in mitigation. The issue of moral choice presumably depends upon whether an individual was compelled to carry out an illicit order under threat of serious bodily harm or death.

Some questions remain. What factors will mitigate punishment? What is the test for determining actual or constructive knowledge of an order's illegality? Is subjective good faith a defense? What of commands which are not clearly criminal, such as those camouflaged as reprisals? Is there a requirement of proportionality between the harm inflicted and the harm threatened? Must the threat be reasonable, immediate and imminent? What amount of harm may individuals inflict on others in order to safeguard themselves or their families? How is the balance to be

85. XIX TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 424 (1948).

86. XXII TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 466 (1948) [hereinafter NUREMBERG JUDGMENT].

87. *Id.*

88. NUREMBERG JUDGMENT, *supra* note 86, at 466.

struck in cases of commands which call for damage to property or provisions?

Ultimately, the superior orders defense had limited relevance in the disposition of the twenty-two high-level defendants prosecuted at Nuremberg. Most had invented and issued the Nazis' criminal policies and practices.⁸⁹ The Tribunal did however explicitly address the superior orders defense in the disposition of General Alfred Jodl.

Jodl was Chief of the Operations Staff of the High Command. He was subordinate to Field Marshal Wilhelm Keitel, but reported directly to Hitler. Jodl helped to formulate orders and signed orders issued by Hitler which required the killing of Russian combatants without trial, the evacuation and destruction of northern Norway and the decimation of Leningrad and Moscow. He claimed that as a military man he was obligated to carry out these commands. His superior orders plea was rejected⁹⁰: "There is nothing in mitigation. Participation in such crimes as these has never been required of any soldier and he cannot now shield himself behind a mythical requirement of soldierly obedience at all costs as his excuse for commission of these crimes."⁹¹

The Nuremberg Tribunal thus introduced a "voluntariness" test. An individual carrying out a clearly criminal command under international law is culpable absent evidence that he lacked moral choice — that his action was the product of duress or coercion. This equivocal standard was subsequently endorsed by the United

89. See *id.* at 540-41 (Alfred Rosenberg) (formulation of policies in occupied territories of Germanization, exploitation of forced labor, extermination of Jews); see *id.* at 558 (Admiral Karl Donitz) (sinking neutral ships without warning when found within designated zones); see *id.* at 537 (Ernst Kaltenbrunner) (mistreatment of prisoners of war); see *id.* at 567 (Fritz Saukel) (enforced labor); see also *id.* at 578 (Albert Speer) (slave labor policies).

90. NUREMBERG JUDGEMENT, *supra* note 86, at 568-71 (Alfred Jodl).

91. *Id.* at 571. See also *id.* at 559-60 (Admiral Karl Donitz) (Commando Order); see *id.* at 563 (Admiral Erich Raeder) (Commando Order); and see also *id.* at 576 (Arthur Seyss-Inquart) (crimes in occupation of the Netherlands). Mitigating circumstances were recognized in the case of Konstantin von Neurath, Reich Protector for Bohemia and Moravia. Von Neurath intervened with the Security Police for the release of arrested Czech citizens and students. After being reprimanded by Hitler, he unsuccessfully offered to resign and then went on leave and refused to continue in office. NUREMBERG JUDGMENT, *supra* note 86, at 582. The Tribunal intimated the type of factors which might be pled in mitigation in the case of Albert Speer. Speer established a labor program in the occupied territories which permitted a number of foreign workers to avoid deportation to Germany, possessed the courage to tell Hitler that the war had been lost, and deliberately sabotaged the scorched earth policy "at considerable personal risk." *Id.* at 579.

Nations and cited in subsequent prosecutions of Nazi war criminals.⁹²

C. American Post-Nuremberg Prosecutions

The Allied occupation authorities subjected alleged German war criminals to prosecution. Control Council Law No. 10 established "a uniform legal basis" for the prosecutions.⁹³ The provision on superior orders was modelled on the Nuremberg Charter and provided that "[t]he fact that any 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."⁹⁴

This standard was interpreted by the three-judge American panel in the *Einsatzgruppen* judgment.⁹⁵ The *Einsatzgruppen*, or killing squads, shadowed the Nazi troops as they swept across Russia. The units ruthlessly carried out the *Führer* Order, summarily executing over a million Jews, Gypsies, disabled and homeless individuals, mentally disturbed persons, and Communist functionaries.⁹⁶ The *Einsatzgruppen* typically required their victims to kneel adjacent to a deep trench. They then shot them in the back of the neck. They then repeated the process with the next group. The victims, in other instances, were crowded into the ditch and massacred. The trench was then covered with dirt.⁹⁷ The psychological strain on the shooters eventually led the Germans to introduce mobile gas vans.⁹⁸

At trial, the *Einsatzgruppen* defendants argued that the Nuremberg Charter and Control Council Law No. 10 could not change the pre-existing legal rule acknowledged by the community of nations which recognized a strict superior orders defense.⁹⁹ The

92. See U.N.G.A. Res. 95(I), 188 U.N. Doc. A/64/Add. 1 (1946). This General Assembly resolution affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal." *Id.*

93. Control Council Law No. 10, reprinted in VI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 XVIII (1952).

94. *Id.* at art. 4(b).

95. See *United States v. Otto Ohlendorf*, IV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, 411 (1950) [hereinafter *Einsatzgruppen* Judgment].

96. *Id.* at 412-16.

97. *Id.* at 443-44.

98. *Id.* at 448-49.

99. IV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, 329 (1950) (Extract From

modifications in the British and American military manuals, according to the defense, were manufactured in anticipation of prosecution. But neither should be retroactively applied to encompass acts committed prior to 1944.¹⁰⁰ The defendants stated that the superior orders defense was premised on the availability of an appeal to higher authorities. This avenue was unavailable in Germany since draconian demands such as the *Führer* Order emanated from Adolf Hitler — Germany's effective command center. Protest would have led to repression rather than to the retraction of an order.¹⁰¹

The *Einsatzgruppen* Tribunal recognized that two principles were in conflict. On the one hand, "[i]t is axiomatic that a military man's first duty is to obey."¹⁰² On the other hand, "[t]he obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery."¹⁰³ The Tribunal somewhat facetiously noted the consequences of unreflective obedience: "a sergeant could order the corporal to shoot the lieutenant, the lieutenant could order the sergeant to shoot the captain, the captain could order the lieutenant to shoot the colonel, and in each instance the executioner would be absolved of blame."¹⁰⁴

Essentially, a subordinate is bound to obey only orders which are within a superior's scope of command.¹⁰⁵ An individual who voluntarily carries out an illicit order possesses the burden of establishing excusable ignorance.¹⁰⁶ This may not be pled in the

The Closing Statement For Defendant Erich Naumann) [hereinafter *Einsatzgruppen* MATERIALS].

100. *Id.* at 332-34.

101. *Id.* at 336-37.

102. *Einsatzgruppen* Judgment, *supra* note 95, at 470.

103. *Id.*

104. *Id.*

105. *Id.* The order must relate to military duty. An authority may not require a subordinate to commit a civilian crime, such as robbing a bank. *Id.*

106. *Einsatzgruppen* Judgment, *supra* note 95, at 473. The Tribunal noted that these requirements did not go beyond the requirements of Article 47 of the German Military Penal Code. This rule was incorporated into the Prussian Military Code as early as 1845 and subsequently was included in the Military Penal Codes of the Kingdom of Saxony in 1867 and of Baden in 1870. The superior orders defense was included in the Bavarian Military Penal Code of 1869 and in the Military Penal Code of the Austro-Hungarian Monarchy in 1855. *Id.* at 471. The Tribunal adopted a liberal interpretation of the phrase: "individuals . . . will not be punished for . . . offenses in case they are committed under the orders or sanction of their government or commanders" in Article 347 of the American Rules of Land Warfare. This clause did not limit liability to the chief executive. Instead, all who ordered troops under their command to commit war crimes were

case of a command which is “manifestly beyond the scope of the superior’s authority.”¹⁰⁷ An individual who enlists in an illicit campaign also may not claim that he or she was unaware that he or she would be called upon to commit a crime: “He who willingly joins an illegal enterprise is charged with the natural development of that unlawful undertaking. What S.S. man could say that he was unaware of the attitude of Hitler toward Jewry?”¹⁰⁸ Plainly, the *Führer* Order was illegal. The idea that Jews were the bearers and progenitors of Bolshevism and that they posed a threat to the Reich was disingenuous.¹⁰⁹ “What saved Benjamin Disraeli, Leader of the Conservative Party and several times Prime Minister of Great Britain, from being a Bolshevist? And had he lived in 1941, would Hitler have declared him a carrier of [B]olshevism?”¹¹⁰

Individuals carrying out such manifestly illicit orders with malicious intent could not claim the defense of duress either, in instances where the harm caused by obeying an order was disproportionately greater than the harm resulting from disobedience. Thus, a subordinate could not kill an innocent in order to avoid a few days of confinement.¹¹¹ However, an individual was not required to forfeit his life or suffer serious harm in order to avoid committing a crime. This threat had to reasonably be believed to be imminent and inevitable:

The test to be applied is whether the subordinate acted under coercion or whether he himself approved of the principle involved in the order When the will of the doer merges with the will of the superior in the execution of the illegal act, the doer may not plead duress under superior orders.¹¹²

liable. A strict interpretation would have permitted all officers below the individual who initially issued the order to plead *respondeat superior*. *Id.* at 487.

107. *Id.* at 471.

108. *Id.* at 473. “The sailor who voluntarily ships on a pirate craft may not be heard to answer that he was ignorant of the probability he would be called upon to help in the robbing and sinking of other vessels.” *Id.* “One who embarks on a criminal enterprise of obvious magnitude is expected to anticipate what the enterprise will logically lead to.” *Id.* at 481.

109. *Id.* at 474-76.

110. *Id.* at 476.

111. *Id.* at 471. The plea of duress is inapplicable once the initial threat lapses. *Id.*

112. *Einsatzgruppen* Judgment, *supra* note 95, at 480. Superior means dominant in capacity as well as in the power to compel an act. This does not mean superior in rank since a lower-ranking officer may direct a superior. *Id.* An individual who acquiesces in the illegal character of an order at any time may not plead duress. *Id.* at 481.

Ultimately the duress defense was dismissed in *Einsatzgruppen* because there was no evidence that the defendants had sought to avoid complicity in the exterminations. Combatants claiming a constitutional incapacity to kill, according to the Tribunal, were routinely relieved.¹¹³ “No one can shrug off so appalling a moral responsibility with the statement that there was no point in trying.”¹¹⁴ The defendants further contended that it was futile to resist because another would have aggressively assumed authority and ferociously carried out the *Führer* Order. But the Tribunal observed that guilt is a personal matter and that the reaction of others was speculative. A decision to dissent may have deterred the implementation of the *Führer* Order or inspired others to resist.¹¹⁵

The Tribunal finally articulated a test for analyzing pleas of superior orders:

Did he agree with the order or not? If he did not and thus was compelled by [the] chain of command and [a] fear of drastic consequences to kill innocent human beings, the avenue of mitigation is open for consideration. If, however, he agreed with the order, he may not . . . plead superior orders.¹¹⁶

Thus in the case of defendant Erich Naumann, the Commander of *Einsatzgruppen* B who received the liquidation order from Reinhard Heydrich, Chief of the Security Police and Security Service,¹¹⁷ the Tribunal held that his statement, that he “considered the decree to be right because it was part of our aim of the war and, therefore, it was necessary,” precluded his reliance on the superior orders defense.¹¹⁸ Other defendants attempted to avoid moral responsibility by deferring to the *Führer*. Otto Ohlendorf, the commander of *Einsatzgruppen* D, testified that “there is no

113. *Id.* at 481-82. Defendants did dissent against orders without suffering recrimination. Defendant Werner Braune opposed and sabotaged German policy in Norway. *Id.*

114. *Einsatzgruppen* Judgment, *supra* note 95, at 482. The Tribunal ruled that in considering the issue of intent, the defendants’ motives were irrelevant to the determination of guilt. It was irrelevant whether a defendant killed out of animus or personal ambition. *Id.* The defendants expressed greater concern for the soldiers who were ordered to kill than for the victims. *Id.* at 491.

115. *Id.* at 485. The Tribunal concluded that “Hitler struck the match, but the fire would have died a quick death had it not been for his fellow arsonists . . . who continued to supply the fuel . . .” *Id.* at 507-08.

116. *Einsatzgruppen* Judgment, *supra* note 95, at 517-18.

117. *Id.* at 517-18.

118. *Id.* at 518.

question for me whether it was moral or immoral, because a leader . . . decides from his own responsibility and this is his responsibility and I cannot examine and . . . judge. I am not entitled to do so."¹¹⁹ Erwin Schulz, commander of *Einsatzkommando 5*, a subordinate unit of *Einsatzgruppen C*, sought exoneration on the grounds that he was in Berlin when his squad executed 157 detainees. The Tribunal summarily dismissed Schulz's claim. "The man who places a bomb, lights the fuse, and rapidly takes himself to other regions is certainly absent when the explosion occurs, but his responsibility is no less because of that prudent nonpresence."¹²⁰

In the *Hostage* case the Tribunal continued to define the limits of the superior orders defense. The *Hostage* defendants were charged with the murder of hundreds of thousands of civilians in Greece, Yugoslavia and Albania, and with the destruction of property in Norway.¹²¹ German forces invaded Yugoslavia on April 6, 1941 and seized control nine days later. The Reich's regiments swept south and occupied Greece within six days. German occupation forces were subjected to persistent and prolonged attacks by Yugoslavian and Greek partisans. The guerrillas faded into the forests, mountains and rural villages following these armed forays.¹²² The German occupants, in an effort to deter and defeat guerilla activity, seized and executed hostages.¹²³ Suspected partisans were also summarily shot.¹²⁴ The Tribunal found a "record of killing and destruction seldom exceeded in modern history. Thousands of innocent inhabitants lost their lives by means of a firing squad or hangman's noose, people who had the same inherent desire to live as do these defendants."¹²⁵

Hitler personally assigned defendant Wilhelm List to suppress this insurgent movement in the Southeast. Field Marshal Wilhelm

119. See *EINSATZGRUPPEN MATERIALS*, *supra* note 99, at 303.

120. *Einsatzgruppen Judgment*, *supra* note 95, at 519.

121. See *United States v. Wilhelm List*, XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, 1230, 1233 (1950) [hereinafter *Hostage Judgment*].

122. *Id.* at 1243.

123. See *id.* at 1264. For the requirements for the detention and execution of hostages, see *id.* at 1250-51.

124. *Id.* at 1244, 1269. The Tribunal determined that the partisans did not abide by the requirements of the humanitarian law of war and were not entitled to the status of lawful belligerents. These executions were determined to be legally justified. *Hostage Judgment*, *supra* note 121, at 1244, 1269.

125. *Id.* at 1254.

Keitel, Chief of the High Command of the Armed Forces, simultaneously issued a directive, dated September 16, 1941, which ordered that "severest means are to be employed in order to break down this movement in the shortest time possible [T]he death penalty for 50 to 100 Communists must in general be deemed appropriate as retaliation for the life of a German soldier."¹²⁶

List distributed the Keitel command to his subordinate units and the order was reinforced by Franz Boehme, commanding general in Serbia. Boehme admonished his troops on September 25, 1941 that "[a]n intimidating example must be created for the whole of Serbia, which must hit the whole population most severely Everyone who wishes to rule charitably sins against the lives of his comrades"¹²⁷ Keitel distributed a directive three days later calling for the collection of hostages from among "leading personalities or members of their families."¹²⁸ List issued a subsequent order dated October 4, 1941 requiring retaliation against suspected partisans or partisan supporters.¹²⁹ General Boehme issued a reprisal ratio six days later: "[f]or each killed or murdered German soldier or ethnic German . . . 100 prisoners or hostages; [f]or each wounded German soldier or ethnic German, 50 prisoners or hostages."¹³⁰

List was succeeded by Lieutenant General Walter Kuntze in October 1941 who continued this method of "ratio" retaliation. Kuntze issued an order in March 1942 proclaiming, "[n]o false sentimentalities! It is preferable that 50 suspects are liquidated than one German soldier lose his life." Kuntze called for reprisals against the residents of villages surrounding the sites of partisan attacks "according to a definite ratio (for instance, 1 German dead — 100 Serbs; 1 German wounded — 50 Serbs)."¹³¹

When finally brought to justice, the defendants in the *Hostage* case argued that the superior orders defense was a maxim of international law. The Allied Powers were thus powerless to modify this rule by either domestic legislation or quad-partite

126. *Id.* at 1264. The two orders were issued on Sept. 16, 1941. *Id.*

127. *Id.* at 1265.

128. HOSTAGE JUDGMENT, *supra* note 121, at 1265.

129. *Id.* at 1265-66.

130. *Id.* at 1266. "[I]n Serbia all Communists, male residents suspicious as such, all Jews, a certain number of Nationalistic and democratically inclined residents are to be arrested as hostages by means of sudden actions. . . ." *Id.* at 1266. "Communists captured . . . in combat. . . are to be hanged or shot as a matter of principle at the place of crime. . . ." *Id.* at 1267.

131. HOSTAGE JUDGMENT, *supra* note 121, at 1278.

agreement.¹³² The attorney for defendant List noted that “[t]he events in Germany . . . showed very clearly where the casting overboard of fundamental principles of law has got us to. No legal system can survive such treatment; neither can international law.”¹³³ The abandonment of superior orders would compel combatants to consult with barristers during battle and bowdlerize military discipline.¹³⁴

The Tribunal dismissed Professor Oppenheim’s advocacy of the defense as a “decidedly minority view.”¹³⁵ The pre-prosecution American and British military manuals were also accorded slight significance: “[t]hey are neither legislative nor judicial pronouncements . . . [and] are not competent for any purpose in determining whether a fundamental principle of justice has been accepted by civilized nations.”¹³⁶

The Tribunal concluded without citation that

the rule that superior orders is not a defense to a criminal act is a rule of fundamental criminal justice that has been adopted by civilized nations extensively. It is not disputed that the municipal law of civilized nations generally sustained the principle at the time the alleged criminal acts were committed.¹³⁷

132. XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 759, 862-64 (1950) (Dr. Hans Latenser, Opening Statement for Defendant List) [hereinafter HOSTAGE MATERIALS]. The abrogation of respondeat superior under domestic law pertains to commands which contravene domestic rather than international law. The defense noted that this presents different considerations than are involved in the conflict between national and international law. *Id.* at 862-63.

133. *Id.* at 1225 (Extracts from Closing Statement for Defendant List).

134. *Id.* at 1227.

135. Hostage Judgment, *supra* note 121, at 1237. Oppenheim overlooks that “an illegal order is in no sense of the word a valid law which one is obliged to obey.” *Id.*

136. *Id.* Military manuals may “play an important role but . . . do not constitute an authoritative precedent.” *Id.* The determination of whether a custom or practice exists is a question of fact which is determined by an examination of judicial and legislative sources. *Id.* The Tribunal analyzed the latter materials in order to determine whether superior orders “is a fundamental rule of justice and for that reason has found general acceptance.” HOSTAGE JUDGMENT, *supra* note 121, at 1238. If the rights of nations and the rights of individuals who become involved in international relations are to be respected and preserved, fundamental rules of justice and rights which have become commonly accepted by nations must be applied. But the yardstick to be used must in all cases be a finding that the principle involved is a fundamental rule of justice which has been adopted or accepted by nations generally as such. *Id.* at 1235-36.

137. *Id.* at 1236. “This being true, it properly may be declared an applicable rule of international law.” *Id.*

The judges acknowledged the indispensability of obedience to orders but said that such obedience was limited to lawful orders. As such, the requisite criminal intent was established in instances where a subordinate was aware or reasonably should have been aware of an order's illegality.¹³⁸

While the Court conceded that an officer must choose between possible punishment for disobeying an illicit order and prosecution under the law of nations, it concluded that "[t]o choose the former in the hope that victory will cleanse the act of its criminal characteristics manifests only weakness of character and adds nothing to the defense."¹³⁹ The Tribunal justified this choice on the basis of necessity: "otherwise the opposing army would in many cases have no protection at all against criminal excesses ordered by superiors."¹⁴⁰

Defendant List distributed the September 16, 1941 Keitel command containing the reprisal ratios. The Tribunal ruled that it was immaterial whether the order was "mandatory or directory. . . . An order to take reprisals at an arbitrarily fixed ratio under any and all circumstances constitutes a violation of international law. Such an order appears to have been made more for purposes of revenge than as a deterrent."¹⁴¹ The Tribunal further noted that the killing of thousands under the guise of reprisals was the type of conduct which a defendant "knew or ought to have known" was criminal.¹⁴² List was therefore convicted of having knowingly conveyed the command to his subordinates:

An officer is duty bound to carry out only the lawful orders that he receives. One who distributes, issues, or carries out a criminal order becomes a criminal if he knew or should have known of its criminal character. Certainly, a field marshal of the German Army with more than 40 years of experience as a professional soldier knew or ought to have known of its criminal nature.¹⁴³

138. *Id.* "But the general rule is that members of the armed forces are bound to obey only the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates international law and outrages fundamental concepts of justice." Hostage Judgment, *supra* note 121, at 1236.

139. *Id.* at 1237.

140. *Id.*

141. *Id.* at 1269-70.

142. *Id.* at 1281.

143. *Id.* at 1271. "That he did know of it is evidenced by the fact that he opposed its issuance and, according to his own statement, did what he could to

As for those who attempted to ameliorate criminal commands, their sentences were mitigated. The *Führer* ordered the execution of thousands of Italian troops who resisted surrender following the Allied armistice. Hubert Lanz, Commander of the XXII Mountain Corps in Greece, resisted the *Führer's* order and successfully restricted executions to the officer corps.¹⁴⁴ The Court also mitigated the punishment of defendant Ernst Dehner, Commander of the LXIX Reserve Corps, who was subordinate to Lothar Rendulic, head of the 2d *Panzer* Army. Dehner issued an order in which he attempted to align the practice of German troops toward hostages with the requirements of international law.¹⁴⁵

In a third case before the Tribunal, the *High Command* case, several leading members of the Nazi officer corps were charged with the execution of various criminal commands. The judgment focused chiefly on the Commando, Commissar and Barbarossa Jurisdiction Orders. The Commando Order of October 1942 required the summary execution of Allied commando units operating behind German lines in Czechoslovakia, France, Italy and Norway.¹⁴⁶ The Commissar Order was issued in June 1941 and

ameliorate its effect." Hostage Judgment, *supra* note 121, at 1271. List regularly appealed for more troops to subjugate the resistance movement and his orders and directives were more moderate than those of his superiors. *Id.* at 1273. He was sentenced to life imprisonment. *Id.* at 1318.

144. Hostage Judgment, *supra* note 121, at 1313. "While his protests . . . were successful in reducing the number of Italians to be subjected to the unlawful order, the fact remains that the killing of the reduced number was just as much a criminal act." *Id.*

145. *Id.* at 1299-1300. Rendulic issued a reprisal order on Sept. 15, 1943 which required the execution of fifty hostages for each German killed and the execution of twenty-five hostages for each German wounded. *Id.* at 1289. Dehner ordered that innocent hostages were not to be held responsible for the misdeeds of partisans in the area adjacent to their own villages. *Id.* at 1300. He was sentenced to seven years in prison. Hostage Judgment, *supra* note 121, at 1319. A number of factors were considered in mitigation:

The degree of mitigation depends upon many factors including the nature of the crime, the age and experience of the person to whom it applies, the motives for the criminal act, the circumstances under which the crime was committed, and the provocation, if any, that contributed to its commission. It must be observed, however, that mitigation of punishment does not in any sense of the word reduce the degree of the crime. It is more a matter of grace than of defense. In other words, the punishment assessed is not a proper criterion to be considered in evaluating the findings of the Court with reference to the degree of magnitude of the crime.

Id. at 1317.

146. *United States v. Wilhelm von Leeb*, XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL

called for the killing of captured Soviet political operatives attached to Russian military units. The directive admonished that “[i]n this fight, leniency and considerations of international law are out of place . . . [t]he originators of barbarous Asiatic methods of warfare are the political commissars. They must . . . be dealt with . . . severely . . . and summarily.”¹⁴⁷ The Barbarossa Jurisdiction Order was issued in May 1941 in anticipation of the Reich’s invasion of the Soviet Union. The directive abolished the jurisdiction of military courts over crimes committed by enemy civilians. Partisans and enemy civilians suspected of having attacked Germans were subject to summary execution. Collective punishment was to be carried out against towns and villages that opened fire on German troops.¹⁴⁸ These mass murders and barbarities were designed to eliminate partisans and to expel and exterminate the Polish and Russian populations.¹⁴⁹

The Tribunal once again announced that acceptance of the respondeat superior doctrine would limit liability to Adolf Hitler and thus diminish the capacity of international law to channel and control the conduct of combatants. The Allied prosecutions were premised on the primacy of the law of nations.¹⁵⁰ It necessarily followed that a “directive to violate international common law is . . . void and can afford no protection to one who violates such law in reliance on such a directive.”¹⁵¹ Compliance with a “clearly criminal” command out of fear of discipline or disadvantage was held not to constitute a defense.¹⁵² The plea of coercion or necessity requires a demonstration that a “reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the

LAW NO. 10, 462, 492 (1950) [hereinafter High Command Judgment].

147. *Id.* at 517.

148. *Id.* at 521. The criminal prosecution of members of the *Wehrmacht* who had contravened the military code was not “obligatory.” *Id.* at 522 (emphasis omitted). In order to moderate the Barbarossa Jurisdiction Order, Field Marshal Walter von Brauchitsch, Commander in Chief of the Army, issued the so-called Disciplinary Order which obligated superiors to prevent “arbitrary excesses of individual members of the army and to prevent . . . the troops becoming unmanageable.” *Id.* at 519 (emphasis omitted). These orders violated the Reich’s obligation, as an occupying power, to insure the fair treatment of civilian inhabitants. Inordinate and indefinite discretionary power was lodged in subordinate officers. *Id.* at 525.

149. High Command Judgment, *supra* note 146, at 499.

150. *Id.* at 507-08.

151. *Id.* at 508.

152. *Id.* at 509.

wrong.”¹⁵³ In addition, a superior issuing an order could not invoke the defense that subordinates should have been aware that he or she did not expect compliance with the command. It is “contemptible” to argue that “subordinates should have had the courage to disobey the order which he himself in passing it down showed that he lacked.”¹⁵⁴

Citing the *Hostage* judgment, the Court stated that its central contribution was to set standards for adjudging the liability of field commanders who endorsed and transmitted illicit orders and subordinates who drafted, conveyed and implemented the commands. Field commanders were entitled to assume that their superiors’ orders conformed to international law. Officers were understandably preoccupied with the pressures of combat and could not examine every directive transmitted through their headquarters. However, the Tribunal limited the liability of field commanders to the transmittal of an order which was “criminal upon its face, or . . . which [the commanders knew] was criminal.”¹⁵⁵ Field commanders were also adjudged liable for criminal commands which they independently issued to subordinate units.¹⁵⁶ Clearly, the orders involved in the *Hostage* case:

were contrary to the customs of war and accepted standards of humanity. Any commanding officer of normal intelligence must see and understand their criminal nature. Any participation in implementing such orders, tacit or otherwise, any silent acquiescence in their enforcement by his subordinates, constitutes a criminal act on his part.¹⁵⁷

The Tribunal also clarified the liability of staff officers for drafting and transmitting criminal commands:

If the basic idea is criminal under international law, the staff officer who puts that idea into the form of a military order, either himself or through subordinates under him, or takes personal action to see that it is properly distributed to those

153. *Id.*

154. High Command Judgment, *supra* note 146, at 520-21.

155. *Id.* at 511.

156. *Id.* The Tribunal conceded that a field commander was in an untenable situation; a subordinate officer lacked authority to issue a countermanding order. Such a directive would have resulted in Hitler energetically enforcing his command. Resignation may have entailed severe sanctions and sabotage would not be of sufficient scope to impede the order. *Id.* at 511-12.

157. *Id.* at 512.

units where it becomes effective, commits a criminal act under international law.¹⁵⁸

As to the disposition of each defendant's case in *High Command*, Field Marshal von Leeb was Commander in Chief of the Army Group North in the Russian campaign. He had been present during the meeting at which Hitler discussed exterminating the commissars. Von Leeb later complained to the High Command that this might embolden Russian resistance. The *Führer* refused to modify the order and circumvented command resistance by routing the directive to subordinate army groups. Von Leeb countered by expressing opposition to his officers. The order was nevertheless implemented.¹⁵⁹

The Tribunal acquitted von Leeb on the grounds that he "did not disseminate the order. He protested against it and opposed it in every way short of open and defiant refusal to obey it. If his subordinate commanders disseminated it and permitted its enforcement, that is their responsibility and not his."¹⁶⁰ Despite his acquittal, von Leeb was considered criminally culpable for transmitting the Barbarossa Jurisdiction Order. He took no steps to prevent the order's implementation and "[h]aving set this instrument in motion, he must assume a measure of responsibility for its illegal application."¹⁶¹

Field Marshal von Kuechler was Commander of the 18th Army and later succeeded von Leeb. He received and transmitted the Commissar Order to his troops. Von Kuechler claimed that he had

158. High Command Judgment, *supra* note 146, at 513. Commanding officers signed communications to higher commanders as well as orders to subordinates which established policy. Most orders were issued by the chief of staff on behalf of the commanding officer. *Id.* at 514.

159. *Id.* at 555-57.

160. *Id.* at 557-58.

161. *Id.* at 560-61. Von Leeb's sentence was mitigated by the facts that he was not a member of the Nazi Party and was charged with authority for hundreds of thousands of soldiers. *Id.* at 563, 677. The Tribunal enumerated factors which might be included in mitigation:

We realize the feelings of professional pride, of ambition to succeed in their profession of arms, of fear for their personal safety or of reprisals against their families, their love of country, their soldiers' concept of obedience, and indeed, the ingrained respect of the German for those in authority over him, were factors in their decisions. We are aware of the tendency towards degeneration of "civilized" warfare in the modern concept of "total" war, and of the war madness that engulfs all people of belligerent powers.

High Command Judgment, *supra* note 146, at 553.

privately opposed the command, but feared the consequences of contumaciousness. The Tribunal ruled that despite von Kuechler's misgivings, "the cold, hard, inescapable fact remains that he distributed it, and that it was enforced by units subordinate to him in the 18th Army [I]t was a criminal order."¹⁶²

General Hermann Hoth was Commander of *Panzer* Group 3 and also conveyed the Commissar Order to his troops. He claimed that his subordinates

were sufficiently radar-minded to pick up the rejection impulses that radiated from his well known high character and that he believed that they would have the courage that he lacked to disobey the order That the character impulses were too weak or the minds of the subordinates were too insensitive to pick them up is shown by the documents.¹⁶³

General Hans Reinhardt, Commanding General of the XLI *Panzer* Corps under *Panzer* Group 4, transmitted the Commissar Order to his troops, despite his alleged misgivings. The Tribunal ruled that "[i]f international law is to have . . . effectiveness, high commanding officers . . . must have the courage to act, in definite and unmistakable terms . . . [T]he proper report to have been made . . . would have been that this unit does not murder enemy prisoners of war."¹⁶⁴

Certain defendants were also held liable for drafting and disseminating criminal orders. Lieutenant General Hermann Reinecke was Chief of the General *Wehrmacht* Office (AWA) with authority over Prisoner of War Affairs.¹⁶⁵ He drafted and prepared orders on behalf of Wilhelm Keitel, Chief of the High

162. *Id.* at 567. The Tribunal expressed doubt whether von Kuechler protested the order. Von Kuechler claimed to have been unaware of the execution of commissars. "[W]e cannot believe that the members of his staff would not have called these reports to his attention had he announced his opposition to the order." *Id.*

163. *Id.* at 582. General Hoth testified that he did not believe that Hitler would ask his commanders to do anything wrong. He further testified that Hitler was the head of the state and that a directives from him superseded section 47 of the German Military Penal Code. That section provides that an officer need not carry out an order that is clearly criminal on its face and commits a criminal act if he does so. *Id.*

164. High Command Judgment, *supra* note 146, at 598. The defendant contended that he had not transmitted the order and that it had been spread informally among the troops. The court rejected this contention, questioning "how it would sweep the entire Russian front. The obvious explanation . . . is that it became known because of its implementation." *Id.*

165. *Id.* at 648, 650.

Command of the Armed Forces. Reinecke then signed and distributed these draconian directives.¹⁶⁶ He was convicted: “[T]he defendant . . . cannot escape responsibility for decrees issued under his signature merely by the fact that they were issued ‘by order’ [of Keitel]. The defendant . . . concedes that many of the ideas . . . were his own”¹⁶⁷

Brigadier General Walter Warlimont was Chief of National Defense in the High Command. He crafted and refined the Commissar Order. “The idea for the murder of prisoners of war in the name of ideological warfare did not originate with Warlimont. However, the evidence establishes that he contributed his part to moulding it into its final form There is nothing to indicate that those contributions . . . in any way softened its harshness”¹⁶⁸ Rudolf Lehmann was Chief of the Legal Department of the High Command and was convicted of having assisted in the drafting of the Barbarossa Jurisdiction Order. Lehmann explained that he had removed jurisdiction over civilian offenses from military courts because he had anticipated that acquittals would lead Hitler to attack and abolish the tribunals. “In other words, it is apparent that, in order to avoid criticism of military courts by the *Führer*, he was ready to sacrifice the lives of innocent people.”¹⁶⁹

The military cases solidified the contours of superior orders and established that the defense does not relieve an individual of international legal liability.¹⁷⁰ A combatant is obligated to obey

166. *Id.* at 652.

167. *Id.* at 653.

168. High Command Judgment, *supra* note 146, at 665.

169. *Id.* at 693. Lehmann “became the main factor in determining the final form into which the criminal ideas of Hitler were put . . . and placed the whole into an effective military order which was transmitted to the troops and carried out.” *Id.*

170. See *supra* notes 137-40 and accompanying text.

Hitler was not above international law. Let us suppose that in 1935 Hitler ordered one of his men to go to Siam and there assassinate its King. Would it be argued that the assassin in that situation would be immune because acting under superior orders? Any judicial inquiry would establish that the Siam assassin had committed a crime and the fact that he had acted in pursuance to the order of his government or a superior did not possibly free him from responsibility for the crime. This is exactly what Control Council Law No. 10 says, and this is what the law has always said, or ever since there was international law.

Einsatzgruppen Judgment, *supra* note 95, at 486.

only lawful orders. An individual voluntarily carrying out an illegal order must establish excusable ignorance.¹⁷¹ The Tribunals adopted several objective standards for adjudging knowledge of an order's illegality.¹⁷² Application of these standards was to be adjusted in accordance with a defendant's military position and past experience.¹⁷³ Individuals enlisting in an illicit enterprise may not later claim that they were unaware that they would later be called upon to commit a crime.¹⁷⁴ In addition, defendants may not contend that resistance was futile since another may have carried out the order.¹⁷⁵

The Tribunals refined the Nuremberg standard¹⁷⁶ and ruled that defendants may rely upon the defense of duress in those instances in which they reasonably believe that they confront immediate and imminent physical peril. The harm resulting from the commission of the criminal command may not be disproportionate to the threat, and the defense is unavailable to a defendant who voluntarily carries out a superior's orders.¹⁷⁷ The *Einsatzgruppen* Tribunal determined that [i]f any of these *Kommando* leaders had stated that they were constitutionally unable to perform this cold-blooded slaughter . . . it is not unreasonable to assume that they would have been assigned to other duties, not out of sympathy . . . but for efficiency's sake alone."¹⁷⁸

Field commanders and staff in the military cases were held liable for drafting and transmitting clearly criminal commands.¹⁷⁹ They also possessed a duty to protest such orders or to issue countervailing commands.¹⁸⁰ A commander could not claim in

171. See *supra* notes 105-08 and accompanying text.

172. See *supra* notes 107 (manifestly beyond the scope of a superior's authority), 138 (aware or reasonably should have been aware), 143 (knew or ought to have known), 155 (criminal upon its face or known to be criminal), 157 (contrary to customs of war and accepted standards of humanity), 158 (basic idea is criminal under international law) and accompanying text.

173. See *supra* note 142.

174. See *supra* note 108 and accompanying text.

175. See *supra* note 115 and accompanying text. The Judgments balanced three values: the protection of civilians and combatants, see *supra* notes 140-41; the rule of international law, see *supra* note 151 and accompanying text; and military efficiency and individual morality, see *supra* notes 102-04.

176. See *supra* note 94 and accompanying text.

177. See *supra* notes 111-12 and accompanying text.

178. *Einsatzgruppen* Judgment, *supra* note 95, at 481. See also *id.* at 473.

179. See *supra* notes 155-158 and accompanying text.

180. See *supra* notes 160, 164 and accompanying text. Resignation following the implementation of an order did not relieve a defendant of liability. See *United*

defense that his subordinates should have known that they were not expected to fulfill the order.¹⁸¹ An officer's absence during the implementation of an order also did not constitute a defense.¹⁸² Swearing an oath of obedience to Hitler did not relieve military men of their obligation to obey lawful orders.¹⁸³ Assurances that orders to abuse prisoners of war were lawful under international law also did not exculpate a defendant.¹⁸⁴ The Tribunals did enumerate various factors which might be considered in mitigation of punishment.¹⁸⁵

This same analysis was applied to Japanese defendants. Rear Admiral Nisuke Masuda was accused in the *Jaluit Atoll* case of ordering four co-defendants to kill three Allied prisoners of war. Masuda's subordinates pled that an Imperial Rescript had established that the orders of superiors are "nothing but the orders personally from His Majesty the Emperor."¹⁸⁶ They pointed out that the individualistic values which animated Allied nations were inapplicable to authoritarian societies which were based upon subordination to the State. An even greater degree of devotion was demanded as Japan's strategic position worsened. It was unthinkable under such circumstances that a Warrant or Petty Officer would resist an order of Rear Admiral Masuda.¹⁸⁷ The Tribunal nevertheless ruled that an individual of ordinary sense and

States v. Josef Altstoetter, III TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, 954, 1086 (1951) (defendant Franz Schlegelberger) [hereinafter Justice Judgment].

181. See *supra* text accompanying note 154.

182. See *supra* text accompanying note 120.

183. See *United States v. Milch*, II TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 355, 689 (1950) (excerpts from the testimony of Defendant Milch) [hereinafter *Milch Materials*]; see also *id.* at 773, 792-95 (prosecution for medical experimentation and slave labor) [hereinafter *Milch Judgment*]. See also *id.* at 797, 858 (Concurring Opinion by Judge Michael A. Musmanno). Lawyers and jurists unsuccessfully contended that they were legally obligated to respect and enforce the law in the Third Reich. "The very essence of the prosecution case is that the laws, the Hitlerian decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime." See Justice Judgment, *supra* note 180, at 984.

184. See *Milch Materials*, *supra* note 183, at 192-95, 730, 747-50 (closing statement of the defendant).

185. See *supra* notes 144-45, 161 and accompanying text.

186. The *Jaluit Atoll Case* (U.S. Milit. Comm'n, Kwajalein Island, Kwajalein Atoll, Marshall Islands, Dec. 7-13, 1945), I LAW REP. TRIALS WAR CRIM. 71, 74 (U.N. War Crimes Comm'n, 1947). This trial was conducted under the authority of the Supreme Command of the Allied Powers (SCAP Rules). *Id.* at 75.

187. *Id.* at 74.

understanding would have grasped the illegal nature of the execution order, and sentenced all those integrally involved in the killings to death.¹⁸⁸

D. *British Post-Nuremberg War Crimes Prosecutions*

British war crimes tribunals clarified the mental element of the superior orders defense. Defendants who either knew or reasonably ought to have known of an order's illegality were denied the defense. Such individuals were presumed to possess the requisite criminal intent and were required to establish duress.¹⁸⁹

Defendant Otto Sandrock was convicted in *The Almelo Trial* for complying with a command to execute a captured British pilot and a young Dutch draft dodger in whose home the Allied airman had been apprehended.¹⁹⁰ The Judge Advocate instructed the

188. *Id.* at 75-76. Tasaki was custodian of the prisoners and was sentenced to ten years imprisonment. His participation was "brief, passive and mechanical."
Id.

The Tribunal in the trial of Lieutenant General Shigeru Sawada and three others was one of the few courts which openly applied superior orders in mitigation of punishment. Eight downed American airmen were charged with violations of the Enemy Airmen's Act and subjected to a swift, slanted, summary trial lacking in elemental due process. The evidentiary presentation and proceedings were orchestrated from Tokyo and the Court dutifully returned a sentence of death. Instructions later were issued to commute five of the sentences, to life imprisonment. Trial of Lieutenant General Shigeru Sawada and Three Others (U.S. Milit. Comm'n, Shanghai, China, Feb. 27-Apr. 15, 1946), V LAW REP. TRIALS WAR CRIM. 1, 2-4 (U.N. War Crimes Comm'n, 1948) [hereinafter SAWADA].

The Tribunal determined that the defendants had obeyed the laws and commands of the Japanese regime. They had merely followed the instructions issued by their superiors and had exercised little initiative in the trial and treatment of the American airmen. The court was persuaded that there were strong mitigating considerations. Sawada had unsuccessfully protested the death sentences to his superior, but had not pursued the matter in Tokyo. He was sentenced to five years at hard labor. *Id.* at 7-8. Defendants Wako and Okada had served on the Tribunal and were sentenced to hard labor for nine and five years respectively. Defendant Tatsuta had executed the three airmen and headed the prison where the other Allied pilots had been incarcerated. He was sentenced to five years at hard labor. *Id.* at 7-8. The pressure exerted by authorities in Tokyo resulted in the mitigation of the sentences. Defendants who participated in similar trials in which there was an absence of external pressure received harsher sentences. See Trial of Lieutenant General Harukei Isayama And Seven Others (U.S. Milit. Comm'n, Shanghai, China, July 1-25, 1946), V LAW REP. TRIALS WAR CRIM. 60 (U.N. War Crimes Comm'n, 1948).

189. See *infra* text accompanying notes 190-198.

190. Trial Of Otto Sandrock And Three Others (The Almelo Trial) (Brit. Milit. Ct., Almelo, Holland, Nov. 24, 1945), I LAW REP. TRIALS WAR CRIM. 35, 36-37, 41 (U.N. War Crimes Comm'n, 1947) [hereinafter Almelo Judgment]. Sandrock was informed the prisoners had been condemned to death and proceeded to shoot

panel that Sandrock was required to demonstrate that he "honestly believed that this British officer had been tried according to the law, and that they were carrying out a lawful execution."¹⁹¹ The court might conclude in the absence of such evidence that the "circumstances were such that a reasonable man might have believed that this officer had been tried according to law, and that they were carrying out a proper judicial legal execution, then it would be open to the court to acquit the accused."¹⁹²

The defendants in *Buck* were charged with the execution of captured American, British and French prisoners in Alsace. The Judge Advocate noted that in the circumstances of conscription, combat and controversies over the code of conflict, ignorance of the law may excuse criminal conduct. The accused were neither lawyers nor legal scholars and could not be expected to completely comprehend the documents and doctrines of the humanitarian law of war. The need to strike swiftly also might militate against a strict and scrupulous weighing of a superior's commands. The remainder of the Judge Advocate's charge was similar to that issued in *Almelo*. He instructed the court to ascertain whether the defendants believed that the execution orders were lawful. If so, the court was to determine "whether men who are serving either as soldiers or in proximity to soldiers know as a matter of the general facts of military life whether a prisoner of war has certain rights and whether one of those rights is not, when captured, security for his person."¹⁹³

The British military courts also augmented the jurisprudence of command liability. A commanding officer who amends an otherwise ambiguous order in a criminal fashion was determined to be liable for transmitting an illicit command. The intentional issuance of such an order is criminal regardless of whether the directive is implemented. The harm resulting from an order's implementation is relevant in assessing the appropriate punish-

and bury the victims. Sandrock had been a printer in civilian life. *Id.* at 36-37.

191. *Id.* at 40.

192. *Id.* at 41.

193. Trial Of Karl Buck And Ten Others (Brit. Milit. Ct., Wuppertal, Germany, May 6, 1946), V LAW REP. TRIALS WAR CRIM. 39; 44 (U.N. War Crimes Comm'n, 1948) (notes on the case). An accused would be guilty if he committed a war crime in pursuance of an order, "if the order was obviously unlawful, secondly if the accused knew that the order was unlawful, or thirdly if he ought to have known it to be unlawful had he considered the circumstances in which it was given." *Id.* at 43 (emphasis omitted) (Notes on the Case).

ment.¹⁹⁴ A defendant officer who issues or transmits an illegal order remains criminally responsible in those instances in which a subordinate exacerbates the illicit character of the command.¹⁹⁵

The issue of reprisals continued to trouble tribunals. For example, General *Oberst* Nikolaus von Falkenhorst, Commander-in-Chief of the German Armed Forces in Norway, was charged with transmitting the Commando Order to forces under his command. The result was the execution of a number of British prisoners and Falkenhorst was later convicted and sentenced to death.¹⁹⁶

Falkenhorst contended that the *Führer's* Commando Order was a lawful act of reprisal. The Judge Advocate issued no instructions on this defense and presumably the Tribunal was not satisfied that Falkenhorst had believed that commandos were being killed in reprisal. The reasonableness of a defendant's belief that an order is a lawful reprisal, in most instances, may be difficult to evaluate. A senior soldier may comprehend the rules of warfare while remaining confused about reprisals. Under these circumstances an officer may understandably choose to rely on the informed judgment of his superiors.¹⁹⁷ There is no more

difficult subject in the . . . law relating to war crimes than a . . . case where reprisal and superior orders are raised by the defense in respect of one and the same order which the defendant is alleged to have carried out. The whole basis of the wrongfulness of disobeying an unlawful order may fall to the ground . . .¹⁹⁸

194. See Trial Of Karl-Heinz Moehle (Brit. Milit. Ct., Hamburg, Germany, Oct. 15, 1946), IX LAW REP. TRIALS WAR CRIMINALS 75, 76 (U.N. War Crimes Comm'n, 1949).

195. See Trial Of General Von Mackensen And General Maelzer (Brit. Milit. Ct., Rome, Italy, Nov. 18, 1945), VIII LAW REP. TRIALS WAR CRIM. 1-2, 6-7 (U.N. War Crimes Comm'n 1949) [hereinafter ARDEATINE CAVE JUDGMENT] (pursuant to higher command defendant ordered the reprisal killing of those serving long-term imprisonment or sentenced to death).

196. Trial Of Generaloberst Nikolaus Von Falkenhorst (Brit. Milit. Ct., Brunswick, Germany, July 29, 1946), XI LAW REP. TRIALS WAR CRIM. 19-23 (1949) [hereinafter FALKENHORST JUDGMENT].

197. *Id.* at 26 (notes on the case). The Commando Order alleged that the enemy was utilizing methods which contravened the Geneva Conventions such as the execution of prisoners of war. The execution of commandos was portrayed as the "same procedure" which was being employed by the Allied troops. *Id.* at 20.

198. *Id.* at 27 (notes on the case). Reprisals may not be taken against prisoners of war. *Id.* (Notes on the Case).

E. Other Post-Nuremberg War Crimes Prosecutions

European post-war superior orders statutes varied. Most recognized the plea as a mitigating rather than a justifying factor while others were used to exonerate a defendant. This flexible approach thus permitted the individualization of punishment. Another set of states abrogated the defense while failing to enumerate the evidentiary significance of superior orders. In particular, The Netherlands War Crimes Law of July 1947 was singularly silent regarding the plea.¹⁹⁹

The Israeli Nazis and Nazi Collaborators (Punishment) Law provided that the superior orders defense in the Israeli criminal code is inapplicable to individuals prosecuted under the war crimes statute. The latter states that superior orders may be considered in mitigation of punishment other than in those instances in which the order was “manifestly unlawful.”²⁰⁰

In the trial of Adolf Eichmann, the Israeli District Court observed that the abrogation of the superior orders defense in the prosecution of war criminals had been acknowledged by the United Nations in 1946 and had “now become general in all civilized countries.”²⁰¹

199. SAWADA, *supra* note 188, at 20, 21 (notes on the case). See Trial Of Willy Zuehlke (Netherlands Special Court, Amsterdam, Aug. 3, 1948 and Netherlands Special Court Of Cassation, Dec. 6, 1948), XIV LAW REP. TRIALS WAR CRIM. 139, 146-49 (U.N. War Crimes Comm'n, 1949) (rejecting applicability of the Nuremberg standard as a general rule of international law).

200. Nazis and Nazi Collaborators (Punishment) Law, 5710/1950 cited in Attorney General Of The Gov't Of Isr. v. Adolf Eichmann, (Dec. 12, 1961) 36 INT'L REV. 18, 20 (1968) [hereinafter Judgment Of The District Court], *aff'd* Text Of Judgment Of The Supreme Court (May 29, 1962), *id.* at 277 [hereinafter Judgment Of The Supreme Court]. Article 8 of the Nazis and Nazi Collaborators Law provides that Section 19 of the Criminal Code Ordinance of 1936 is inapplicable. The latter provision absolves an individual of criminal culpability for an act committed in obedience to an order “unless the order is manifestly unlawful.” *Reprinted in* Judgment Of The District Court, *supra* note 200, at 255. Section 11(a) of the Nazis and Nazi Collaborators Law provides that an individual who commits an offense “under conditions which, but for Section 8, would have exempted him from criminal responsibility or constituted a reason for excusing the offense, and that he did his best to reduce the gravity of the offense” *Id.* at 256.

201. Judgment of The District Court, *supra* note 200, at 257. The United Nations affirmed the principles recognized in the Nuremberg Judgment. See U.N.G.A. Res. 95(I), *supra* note 92. This view was endorsed by the Supreme Court. See Judgment of the Supreme Court, *supra* note 200, at 317-18. The Supreme Court noted that this principle had crystallized in international law following the Nuremberg Judgment. The abrogation of the superior orders

The District Court determined that “the accused [Eichmann] well knew that the order for the physical extermination of the Jews was manifestly unlawful and . . . in carrying out this order he engaged in criminal acts on a colossal scale.”²⁰² He made no effort to reduce the scope or severity of this crime and “performed his duties at every stage . . . whole-heartedly and willingly.”²⁰³ Eichmann was no cipher, he displayed innovation and initiative in implementing the Nazi’s pernicious policies and plans. He was a man on a mission to ensure that even a single Jew would not survive.²⁰⁴

This “manifestly unlawful” standard was clarified by the Israeli Military Court of Appeal in upholding the convictions of six members of the Israeli Defense Forces for executing forty-three Arab citizens.²⁰⁵ The court asserted that a “reasonable soldier can distinguish a manifestly illegal order on the face of it, without requiring legal counsel and without perusing the law books [T]he expected danger from illegal orders issued maliciously or negligently or even with good intentions will be averted.”²⁰⁶ This required a case-by-case analysis of the context surrounding the

defense reflected an interest in extending criminal liability to those throughout the State who knowingly committed criminal acts against the law of nations. *Id.* at 315-317.

202. Judgment Of The District Court, *supra* note at 200, at 257. Eichmann headed Section IVB and was responsible for Jewish Affairs, including emigrations and evacuations. *Id.* at 224-25.

203. *Id.* at 263.

204. *Id.* at 226. The court expressed confidence that Eichmann could have avoided involvement in this murderous task. He would have been transferred to another task had he expressed reservations concerning the Final Solution. The Supreme Court noted that Eichmann had exceeded the requirements of his office in implementing the Final Solution. *See id.* at 261-62. *See also* Judgment of the Supreme Court, *supra* note 200, at 313.

205. Chief Military Prosecutor v. Malinki (Military Court of Appeal, 1957), II PALESTINE Y.B. INT’L L. 70, 77, 108 (1985) [hereinafter Kafir Qassem Judgment]. This case was not litigated under the standards of international law. *Id.* at 105-06. The court applied the Military Justice Law which provided that a soldier is not obligated to obey a manifestly illegal order. This mirrored the Israeli domestic criminal code. *See id.* at 116 (reprinting relevant sections of the criminal code).

206. *Id.* at 109. The prosecution “need not prove that it was obvious to the defendant. . . but even if the defendant believed that the order was not manifestly unlawful, his belief will be of no avail if it was not reasonable, that is, objectively justified.” *Id.* at 110. Such an extreme order “bursts out of the confines . . . calling for help on the sense of lawfulness that lies deep within the conscience of every human being . . . even if he is an not expert in the law.” Kafir Qassem Judgment, *supra* note 205, at 108. This involves a relaxation of the rule that ignorance of the law does not constitute a legal excuse as pertains to those orders which are not manifestly illegal. *Id.*

command: "After all these factors have been placed in the scale, we must ask the main decisive question . . . was the order bound to appear manifestly unlawful in the eyes of those who received it?"²⁰⁷ Two privates were acquitted on one of the murder counts "since they had not yet had sufficient time to consider the illegality of the order to open fire . . . taking into account the suddenness of the order and the habits of immediate obedience to orders . . . with which they were inculcated."²⁰⁸

A Dutch court in *B and Van E* relied on a similar rationale in acquitting two defendants. B was a former officer in the Dutch resistance who had ordered Van E to execute four Dutch Nazis for murder and treason. B feared that the prisoners would interfere with the unit's capacity to combat an anticipated German assault. The Tribunal concluded that B and Van E had contravened the humanitarian law of war.²⁰⁹ Nevertheless, both were adjudged to have acted in good faith under the pressure of exigent circumstances. B possessed no possibility of "consulting a superior [because] . . . he was placed in a position for which he had not been prepared . . . in circumstances in which a calm weighing of interests was impracticable. . . . [I]t cannot even be said that he ought to have been conscious of the illegality of his act."²¹⁰ Van E was presumably adjudged to have been prey to similar pressures and poorly positioned to adjudge the legality of the order.²¹¹

The jurisprudence of superior orders was further refined by the Austrian Supreme Court in *Leopold L*. The defendant was an S.S. deputy troop leader and a Labor Camp T guard. The court stated

207. *Id.* at 110. The Tribunal noted that in determining whether an order is manifestly illegal, a court will consider the totality of the circumstances: a recipient's rank; the respective ranks of the superior and subordinate; the reasonableness of the belief that the commanding officer possessed special insight and information; the pressures placed on the subordinate as well as the time available for reflection; and the reasonableness of any mistake of fact. *Id.* at 109-10. The question of a manifestly unlawful order "is not just a technical 'legal question,' that is, a matter of the court setting a standard but is, at least in part, also a legal question in a narrower sense . . . what is the relevant law and how far did the defendant deviate from the law." *Id.* at 111.

208. *Kafir Qassem Judgment, supra* note 205, at 112. "Such an order should have aroused the conscience of all the appellants, including the privates, even in the special circumstances that prevailed on that day. . . . [But] a consideration which cannot tip the balance in favor of acquittal can nevertheless exert an influence toward reducing the sentence." *Id.* at 114.

209. *Military Prosecutor v. B. and Van E.*, 18 INT'L L. REP. 536 (1957) (Holland, Court Martial Jan. 2, 1951).

210. *Id.* at 537.

211. *Id.* at 536-37.

that the general orders issued by occupation authorities to exterminate Jews and Poles were not directly addressed to the defendant. Unauthorized killings which were in line with these directives may have been tolerated or even approved and supported by the defendant's immediate superiors, but defendant Leopold was not required to undertake any of the killings with which he was charged. The labor camp regulations stated that internees were to be subjected to hard labor; no instructions were issued requiring their ill-treatment or death. Even the most draconian German laws provided for a preliminary proceeding.²¹² Thus, any putative orders to exterminate internees "were straightaway recognizable as illegal . . . [R]ecognizable by anybody as illegal . . ." ²¹³

Continental courts also convicted several defendants who displayed confusion about the requirements of the humanitarian law of war. The German Federal Supreme Court, in the *Preventive Murder Judgment*, confronted the question of reciprocity.²¹⁴ The Nuremberg Tribunal had acquitted Admirals Donitz and Raeder of unrestricted submarine warfare based upon the rule of reciprocity. The same policy had been practiced by the British in the Skagerrak and the Americans in the Pacific.²¹⁵ But the Federal Court failed to find an equivalency between Allied air attacks on civilians and the killing of foreign workers.²¹⁶

In addition, a French military court confronted the challenge of reprisals in 1945 at the trial of Colonel Carl Bauer in which Bauer ordered defendant Ernst Schrameck to execute three captured French resistance fighters. These orders were passed on to Lieutenant Herbert Falten whose squad executed the prisoners. Bauer contended that he had acted pursuant to Hitler's order to make reprisals against irregular combatants and Schrameck testified that Bauer's order was not subject to discussion or dissent. Falten had postponed the executions and had unsuccessfully asked Schrameck to cancel the command. The defendants were convicted of having unlawfully executed the three prisoners. Bauer was sentenced to death but because Schrameck and Falten had acted on

212. *Public Prosecutor v. Leopold L*, 47 INT'L L. REP. 464 (1974) (Austrian Supreme Court, May 10, 1967).

213. *Id.* at 466.

214. *WAR CRIMES (PREVENTIVE MURDER) (GERMANY) CASE*, 32 INT'L L. REP. 563, 565 (1966) (Federal Supreme Court, Sept. 30, 1960) [hereinafter *PREVENTIVE MURDER JUDGMENT*].

215. *See NUREMBERG JUDGMENT*, *supra* note 86, at 559.

216. *PREVENTIVE MURDER JUDGMENT*, *supra* note 214, at 564-65.

Bauer's orders this fact was admitted as a mitigating circumstance and the two were instead sentenced to five years imprisonment.²¹⁷

Were the three victims lawful belligerents entitled to the protections accorded to prisoners of war? The one question remaining from this case is whether the detainees displayed the identifying insignia required of lawful belligerents. The three men were dressed as civilians when captured and the arm of one was adorned with a tricolor strap while another wore an American helmet. The partisans fought alongside uniformed free French forces, but it was uncertain as to whether they were organized under the required military command. The Tribunal conceded that the defendants' status was ambiguous and suggested that the defendants may have lawfully and spontaneously taken up arms to defend the unoccupied territory of Autun. Such considerations may have explained their failure to organize themselves into military units. German control over French territory was being challenged by invading Allied troops, but it was unclear as to whether Autun constituted unoccupied territory. A hearing, of course, is a prerequisite to execution. But, the victims' admission that they had fought against the Germans may have reasonably been viewed as satisfying this procedural requirement.²¹⁸

Following these cases, an American military commission convicted Lieutenant General Kurt Maelzer for obeying the order of Field Marshal Kesselring to parade hundreds of American and British prisoners of war through Rome. The crowds allegedly showered the captives with sticks and stones. Prisoners who responded with derisive gestures were purportedly threatened with

217. Trial Of Carl Bauer, Ernst Schrameck And Herbert Falten (Perm. Milit. Trib., Dijon, Oct. 18, 1945), VIII LAW REP. TRIALS WAR CRIM. 15-16, 17-18, 20-21 (U.N. War Crimes Comm'n, 1949) [hereinafter Bauer Judgment]. Colonel Schrameck and Lieutenant Falten had been involved in the capture of the three partisans. They were aware that executions had been scheduled within a day of the apprehension and that a hearing could not possibly have been conducted. Schrameck nevertheless passed on the order to kill which was carried out by Falten. *Id.* at 16-20.

218. *See id.* at 16-20 (notes on the case). A lawful belligerent at that time was legally required to wear a fixed, distinctive and visible insignia, carry arms openly, fight under organized military command and respect the laws and customs of war. The law of war also provided belligerent status to the inhabitants of a territory who spontaneously took up arms without having had time to organize themselves on the approach of the enemy. *Id.* at 16-17. *See* Convention (No. IV) Respecting The Laws And Customs Of War On Land, With Annex Of Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 arts. 1 (qualifications of a belligerent), 2 (right of inhabitants to resist invading troops in unoccupied territory) (1907) [hereinafter Hague Convention].

armed retaliation. Films and photos of the event were disseminated in order to quell rumors of German defeat. Maelzer's superior orders plea was rejected and he was sentenced to ten years imprisonment, later reduced to three years, for contravening the requirement that prisoners should be humanely treated and protected from public insult. Still, was Maelzer's offense manifestly illegal? Did parading the prisoners clearly constitute inhumane treatment?²¹⁹

F. Superior Orders And Vietnam: The Calley Case

The contemporary American standard for superior orders was established in the 1953 case *United States v. Kinder*. Airman First Class Thomas L. Kinder was convicted for obeying an order to kill a Korean civilian who had been apprehended in an Air Force bomb dump. The Air Force Board of Review held that the orders of a superior officer "will not justify a homicide resulting from such acts if the acts ordered are manifestly beyond the scope of the superior officer's authority and the order is so obviously and palpably unlawful as to admit of no reasonable doubt on the part of a man of ordinary sense and understanding."²²⁰

The *Calley* case followed the rule of the *Kinder* decision. In 1973 Lieutenant William Calley was convicted by a general court martial of premeditated murder and assault with intent to commit murder. Calley's platoon participated in a March 1968 assault against the elite 48th Viet Cong Battalion. His troops swept through sub-hamlet My Lai (4) and then joined other units in encircling the Viet Cong. An investigation later revealed that Calley had supervised and had participated in the shooting of two groups of Vietnamese civilians, including infants and children.²²¹ The Court of Military Review concluded that:

219. Trial Of Lieutenant General Kurt Maelzer (U.S. Milit. Comm., Florence Italy, Sept. 9-14, 1946), XI LAW REP. TRIALS WAR CRIM. 53 (U.N. War Crim. Comm'n, 1949). A defendant may not raise a mistake of law defense to a manifestly illegal order: such a command would be instantly recognizable as illicit by a person of ordinary sense and understanding. See *supra* notes 206-08 and accompanying text.

220. *United States v. Kinder*, 14 C.M.R. 742, 773 (1953). The court dismissed the defense that the defendant believed he was obligated to obey superior orders. The Board of Review queried whether a subordinate would be obliged to cut off his or her head in response to a command. *Id.* at 775.

221. *United States v. Calley*, 46 C.M.R. 1131, 1164, 1169-70 (A.C.M.R. 1973) *aff'd* 22 C.M.A. 534, 48 C.M.R. 19 (A.C.M.R. 1973), *rev'd sub nom.* *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), *verdict reinstated*, 519 F.2d 194 (5th Cir. 1975) *cert. denied*, 425 U.S. 911 (1976).

[t]here is no doubt that a group of submissive defenseless Vietnamese, women, children, and old men . . . were shot down in summary execution . . .²²² Reprisal by summary execution of the helpless is forbidden in the laws of land warfare Whether an armed conflict be a local uprising or a global war, summary executions as in My Lai (4) are not justifiable.²²³

Calley claimed that he had been ordered to eliminate the villagers. He testified that Captain Ernest Medina ordered the troops to destroy everything and everyone encountered in their rapid advance through My Lai (4). The civilians would be at the market and Medina allegedly stressed that the Americans would finally confront the Viet Cong. Medina conceded that he advised Calley to use prisoners to lead the troops through the mine fields. Calley responded that he had been in radio contact with Medina during the My Lai mission and had been instructed to execute the prisoners.²²⁴ The Court of Military Review concluded:

[i]f the members found that appellant fabricated his claim of obedience to orders, their finding has abundant support in the record. If they found his claim of acting in obedience to orders to be credible, he would nevertheless not automatically be entitled to acquittal. Not every order is exonerating.²²⁵

The Court of Military Review approved the trial judge's instruction that Calley could not rely on the superior orders defense if the jury determined that Calley knew, or a man of ordinary sense and understanding would have known, that the order was illegal.²²⁶ A purely "subjective innocence-through-ignorance" standard would diminish the protections afforded to innocents and risk fueling a cycle of retaliation.²²⁷

222. *Calley*, 46 C.M.R. at 1170.

223. *Id.* at 1174.

224. *Id.* at 1180-81. Medina conceded that he had ordered troops to burn the homes, kill livestock, close wells, destroy food crops, and deploy prisoners to lead troops through the mine fields. He also noted that the incursion would be preceded by artillery fire. *Id.* at 1181-82. The witnesses all anticipated that they would encounter the Forty-eighth Viet Cong Battalion. Only three of twenty-three prosecution witnesses remembered a direction to kill. *Id.* at 1182.

225. *Calley*, 46 C.M.R. at 1182-83.

226. *Id.* at 1183. The illegality of the alleged order is "apparent upon even cursory evaluation by a man of ordinary sense and understanding." *Id.*

227. *Id.* at 1184. "Casting the defense of obedience to orders solely in subjective terms of *mens rea* would operate practically to abrogate those objective restraints which are essential to functioning rules of war." *Id.*

The Court of Military Appeals also endorsed the trial judge's actual knowledge or objective person of ordinary sense and understanding standard.²²⁸ The defense conceded before the appellate tribunal that an objective standard was required but contended that the controlling test should be whether the order was so "palpably or manifestly illegal that a person of 'the commonest understanding' would be aware of its illegality."²²⁹ The ordinary sense and understanding test was described as unfair to those with a slow or substandard mentality who were continuously challenged by the conflicting commands and conundrums of domestic and international law.²³⁰ The intellectually indolent thus confronted the prospect of being sanctioned for negligent rather than intentional violations of the humanitarian law of war.²³¹ Judge Robert E. Quinn rejected these arguments and stated that Calley would not be absolved by adopting a lower standard: "[W]hether Lieutenant Calley was the most ignorant person in the . . . Army . . . or the most intelligent, he must be presumed to know that he could not kill . . . infants and unarmed civilians who were . . . demonstrably incapable of resistance . . ."²³²

Judge William H. Darden in his dissent argued that the majority standard was too strict. It would lead to sanctioning those who, as a result of attitude, aptitude or training, were inclined to comply with commands. The commonest understanding standard recognized that discipline is the central component of the military mission and should not be compromised by the fictional reasonable person test under which "an accused . . . after the fact may find himself punished for either obedience or disobedience, depending on whether the evidence will support . . . simple negligence on his

228. *Calley*, 48 C.M.R. at 19-26. The jury was to apply the superior orders instructions unless it determined beyond a reasonable doubt that Calley had not received such commands. In considering whether Calley possessed knowledge of the illegality of the order, the jury was instructed to review all relevant facts. This included Lieutenant Calley's age, background, education, rank, and training. *Id.* at 27.

229. *Id.* at 27.

230. *Id.*

231. *Id.* at 27-28. Defense psychiatrists testified that Calley had acted automatically and lacked the capacity to premeditate the killings because he lacked the capacity to reflect upon alternative courses of action. *See* 46 C.M.R. at 1177. The Court of Military Review conceded that Calley's judgment, perception, and stability were "lesser in quality" than the average officer and that these deficiencies to some extent mitigated his guilt. *Id.* at 1196.

232. *Calley*, 48 C.M.R. at 29.

part.”²³³ Judge Darden believed that Medina’s bombastic briefing, combined with faulty intelligence and Calley’s experiences in Vietnam, may have made “the illegality of . . . orders to kill civilians . . . less clear than they are in a hindsight review.”²³⁴

Calley was singled out for trial while his superiors escaped prosecution. This inequity was exacerbated by the fact that his conduct was a logical extension of the strategy and tactics employed by the United States. Calley and his men had been precipitously propelled to Vietnam and were unprepared and poorly trained for combat. Could not Calley reasonably conclude that his conduct would have been rewarded rather than reviled? Analysts also argued that Calley’s crimes were a predictable psychological response to the pressures on his platoon. The question of whether it was unreasonable to expect Calley to counter Medina’s subtle suggestion to murder the Vietnamese still remains.²³⁵

American court-martials continued to struggle with superior orders claims. For example, in *United States v. Griffen*, an American platoon apprehended a Viet Cong. As the platoon moved forward, the men feared that they were being shadowed. The wounded were evacuated by helicopter, but the company headquarters refused to authorize the prisoners removal.²³⁶

The accused, Staff Sergeant Walter Griffen, overheard a radio order to execute the detainee. Griffen then received and complied with a direct command to remove and shoot the prisoner. He later

233. *Id.* at 31. Judge Darden noted that, while the reasonable person test was commonly employed in legal jurisprudence, in this instance, the standard should be compromised by the concern with discipline. *Id.* Judge Robert M. Duncan concurred in the judgment. He noted that he favored a standard which required that “every member of the armed forces would have immediately recognized that the order was unlawful, as well as a consequence of his age, grade, intelligence, experience, and training.” *Id.* at 30. The man of ordinary sense and understanding standard is contained in the court-martial manual:

An order requiring the performance of a military duty may be inferred to be legal. An act performed manifestly beyond the scope of authority, or pursuant to an order that a man of ordinary sense and understanding would know to be illegal, or in a wanton manner in the discharge of a lawful duty, is not excusable.

MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 216 (rev. 1969) *quoted in id.* at 29-30.

234. *Calley*, 48 C.M.R. at 33.

235. See Matthew Lippman, *War Crimes: The My Lai Massacre And The Vietnam War*, *supra* note 3, at ____.

236. *United States v. Griffen*; 39 C.M.R. 586, 587 (A.B.R. 1968).

testified that he believed that the detainee's execution was justified since the prisoner impeded the platoon's progress and increased the likelihood of an enemy attack. This fear was heightened by the fact that the platoon had suffered heavy casualties several months earlier in the same vicinity. Griffen also believed that the execution order was required to prevent the prisoner from escaping and breaching security since one detainee had previously attempted to flee.²³⁷

The Army Board of Review rejected Griffen's superior orders defense and ruled that the order was "so obviously beyond the scope of authority of the superior officer and so palpably illegal on its face as to admit of no doubt of its unlawfulness to a man of ordinary sense and understanding."²³⁸ Griffen's guilt was nonetheless mitigated because he had been caught in a confusing kaleidoscope of events and had no criminal record. He was sentenced to two years hard labor.²³⁹

Realistically, could Griffen be expected to defy a directive of his company commander and platoon leader while isolated in the jungles of Vietnam? Was the order clearly contrary to the humanitarian law of war? This was a case of the selective imposition of criminal culpability: both officers were acquitted while Griffen and two other low-level combatants were convicted for obeying superior orders.²⁴⁰

When it came to actually being sent to Vietnam, combatants were unsuccessful in using the superior orders defense as a shield to prevent being sent. Captain Howard Levy, for instance, was prosecuted for refusing to establish and operate a dermatological training program for Special Forces personnel. He contended that these types of troops were committing war crimes and that obedience to the orders violated medical ethics. The court rejected Levy's claim and ruled that he had "failed to show that Special Forces aidmen as a group engaged systematically in the commission of war crimes by prostituting their medical training."²⁴¹

237. *Id.* at 588.

238. *Id.* at 590.

239. *Id.* at 591. The Army Field Manual prohibited putting prisoners to death because their presence retarded movements or diminished the power of resistance. *Id.* at 589.

240. *Griffen*, 39 C.M.R. at 591.

241. *Levy v. Parker*, 478 F.2d 772, 797 (3d Cir. 1973), *aff'd sub nom. Parker v. Levy*, 471 U.S. 733 (1973). See generally *Switkes v. Laird*, 316 F. Supp. 358 (S.D.N.Y. 1970).

G. A Contemporary Canadian Case

In 1994, the Supreme Court of Canada in *Regina v. Finta* ruled that the superior orders defense was available to defendants charged with war crimes and crimes against humanity.²⁴² The court noted that war crimes and crimes against humanity are core legal concepts controlling the conduct of States. These principles would be frustrated “if individuals could be absolved of culpability for such crimes simply because it was not illegal under the law of the state on behalf of which they acted [T]he mere existence of such law cannot be a defence to an individual charged with a war crime.”²⁴³

The Canadian criminal code authorizes those accused of war crimes and crimes against humanity to rely on any justification available “under the laws of Canada or under international law at that time or the time of the proceedings.”²⁴⁴ The Canadian Supreme Court stated that this presumably included military necessity and reprisal.²⁴⁵ Section Fifteen of the Penal Code provides that a defendant may not rely on the defense that he or she acted in obedience to, or in conformity with, legal codes and statutes.²⁴⁶ Thus, the Supreme Court accordingly ruled that Section Fifteen precluded the “simple argument that because a domestic law existed . . . authoriz[ing] the conduct . . . the law in itself acts as an excuse.”²⁴⁷ The court observed that recognizing a defense that an individual acted in accordance with a domestic decree which contravened international law would be illogical and senseless.²⁴⁸ There are “higher responsibilities than simple

242. *Regina v. Finta* [1994] 1 S.C.R. 701. The accused, Irme Finta, was charged with illegal confinement, robbery, kidnapping and manslaughter as well as with war crimes and crimes against humanity. Finta, an officer in the Gendarmerie, allegedly committed these crimes pursuant to the “Baky Order,” a decree issued by the Hungarian Ministry of Interior. He purportedly supervised the shipment of 8617 Jews to the gas chambers. *See id.* at 788-92 (Cory, J.).

243. *Id.* at 729 (La Forest J.).

244. *Id.* at 776 (La Forest, J.) quoting Criminal Code, § 7(3.74). The war crimes statute provides that a war crime or crime against humanity perpetrated abroad is considered to have occurred in Canada so long as the act, if committed in Canada, would constitute a breach of Canadian domestic law. *Id.* at 801-02 quoting § 7(3.71)(3.76) (Cory, J.).

245. 1 S.C.R. at 777 (La Forest, J.).

246. *Id.* at 776 (La Forest, J.).

247. *Id.*

248. *Id.* at 865-66 (Cory, J.). It is not a violation of fundamental justice to preclude a defense which is “inconsistent with the offense proscribed in that it would excuse the very evil which the offense seeks to prohibit or punish.” *Id.* at

observance of national law [T]he standards of international law are part of our [Canadian] domestic law [and we] cannot allow for other states simply to deny or violate observation of the standards of international law by the enactment of contrary domestic laws."²⁴⁹ After all, "even Hitler could have defended charges . . . by claiming that he was merely obeying the law of the country."²⁵⁰

Section Fifteen could not be used by a defendant to plead the defense of superior orders or, in the case of a sworn officer, the police officer defense.²⁵¹ According to Judge Gerard La Forest, "the rationale for these defences is that a realistic assessment of police or military organizations requires an element of simple obedience; there must be some degree of accommodation to those who are members of such bodies."²⁵² He added that respect for the equality, dignity and autonomy of the individual cannot be fully extended to members of the military. The armed forces are vital for national defense and depend upon "instant, unquestioning obedience to . . . those in authority. . . . This is . . . the only way in which a military unit can effectively operate [T]he lives of every member of a unit may depend upon . . . instantaneous compliance *with orders even though those orders* may later . . . appear to have been unnecessarily harsh."²⁵³ (emphasis in original).

865 (Cory, J.). Section 7(3.74) appears to have been enacted to limit the scope of section 15 which provided a defense against conviction in those cases in which the accused acted "in obedience to the laws for the time being made and enforced by persons in de facto possession of the sovereign power in and over the place the act or omission occurs." 1 S.C.R. at 839 *quoting* § 15 (Cory, J.).

The Supreme Court noted that section 7(3.74) is permissive. Where a law falling within section 15 is not manifestly unlawful, the accused may be able to argue a mistaken belief in the validity of the law. This belief may be taken into account in determining whether the defendant possessed the requisite guilty mind. *Id.* at 864 (Cory, J.).

249. *Id.* at 780-781 (La Forest, J.).

250. *Id.* at 840 (Cory, J.).

251. *Id.* at 840-41 (Cory, J.). The police officer defense provides "legal protection to a police officer, who, acting in good faith and on a reasonable belief that his or her actions are justified by law, later finds out that those actions were not authorized because the law was found to be defective." 1 S.C.R. at 842 (Cory, J.). The defense is not available in those instances in which the order is manifestly unlawful. *See id.* Section 25 sets forth the peace officer defense. *See id.* at 803 (Cory, J.) *quoting* § 25. This provides a defense to law enforcement officers or others involved in the administration or enforcement of the law who in good faith carry out or reasonably rely on force to carry out various legal procedures. *Id.*

252. 1 S.C.R. at 777 (La Forest, J.).

253. *Id.* at 828-29 (Cory, J.).

The *Finta* court further explained that criminal codes traditionally had limited liability for illegal orders to those who issued and transmitted the commands. These individuals possessed the opportunity and knowledge to ensure that military orders conformed to the humanitarian law of war. But in those instances in which such commands were manifestly illegal, respect for international morality and law dictated the extension of liability to low-level combatants.²⁵⁴ This test has received "a wide measure of international acceptance" and balanced the imperative of obedience with the requisites of the humanitarian law of war. A manifestly illegal order is one that "offends the conscience of every reasonable, right-thinking person" and must be "obviously and flagrantly wrong."²⁵⁵ It is "not a requirement that the accused knew or believed, according to his or her own moral code or knowledge of the law, that the orders and his or her actions were unlawful."²⁵⁶

The court did, however, recognize that the Canadian code permitted the use of superior orders as a defense or mitigating defenses.²⁵⁷ A defendant confronting a manifestly illegal order might still plead superior orders in those instances in which he or she was subjected to duress and possessed "no moral choice but to obey."²⁵⁸ A threat which is "imminent, real, and inevitable" is considered to constitute a "level of compulsion that disables a subordinate from forming a culpable state of mind."²⁵⁹ In determining the reasonableness of such a threat, a court may consider the subordinate's circumstances and state of mind.²⁶⁰ The lower the subordinate's rank, "the greater will be the sense of compulsion that will exist and the less will be the likelihood that the individual will experience any real moral choice."²⁶¹

254. *Id.* at 829 (Cory, J.).

255. *Id.* at 834 (Cory, J.). Judge Cory proved the example of the order of King Herod to kill babies under two years of age which was considered to "offend and shock the conscience of the most hardened soldier." *Id.*

256. 1 S.C.R. at 844 (Cory, J.).

257. *Id.* at 777-78 (La Forest, J.).

258. *Id.* at 778 (La Forest, J.).

259. *Id.* at 837 (Cory, J.).

260. *Id.* (Cory, J.). The circumstances include a subordinate's age, education, intelligence, length of time in action, the nature of the hostilities, the type of enemy confronted and the opposing methods of warfare. Circumstances going to state of mind include the announced and probable sanction for disobedience, the reasonable beliefs of other combatants and the subordinate's beliefs concerning the possible penalty, and the alternatives available to avoid imposition of the sentence. 1 S.C.R. at 837-38 (Cory, J.).

261. *Id.* at 838 (Cory, J.). The "whole concept of the military is . . . coercive. . . . The question of moral choice will arise far less in the case of a private accused

Finta is a testimony to the coherence and consensus surrounding the superior orders defense. The Canadian Supreme Court recognized superior orders as a fundamental principle of the humanitarian law of war incorporated into the Canadian Criminal Code. This decision was a concession to the exigencies of military and police organizations. The court incorporated the reasonableness, manifest illegality and duress standards into Canadian jurisprudence of superior orders, but at the same time would not extend the defense to individuals simply complying with their country's legal code. Canada of course deviated from the international standard by recognizing superior orders as a defense, as well as a factor in mitigating punishment.²⁶²

H. Summary

In 1946 the United Nations affirmed the principles of international law recognized by the Nuremberg Tribunal.²⁶³ The Tribunal's interpretation of the superior order provision of the London Charter continues to set the standard for international instruments. The Draft Code of Crimes Against The Peace and Security of Mankind in Article Nine lists as one of the "exceptions to criminal responsibility" for crimes against the peace and security of mankind "[t]he order of a Government or of a superior, provided a moral choice was in fact not possible to the perpetrator."²⁶⁴ The superior orders defense is incorporated into a separate article in the amended 1991 draft code while other defenses are encompassed within a generic provision.²⁶⁵ The admissibility of these defenses

of a war crime or a crime against humanity than in the case of a general or other high ranking officer." *Id.* Judge Peter Cory noted that a defendant might rely on mistake of fact in those instances in which an order is not manifestly unlawful. A peace officer or soldier in such circumstances may plead that he or she reasonably believed that the order was lawful. *Id.* at 845 (Cory, J.).

262. See *supra* notes 242-61 and accompanying text. The state of war, the presence of German occupation forces, the declared state of emergency, government and public approval of the persecution of Jews and the imminent invasion of the German forces give "an air of reality to the defenses" of obedience to superior orders. 1 S.C.R. at 848 (Cory, J.). For the jury instructions see *id.* at 779-80 (Cory, J.).

263. U.N.G.A. Res. 95(I), *supra* note 92.

264. Draft Code of Crimes Against the Peace and Security of Mankind, art. 9(d), U.N. Doc. A/CN.4/25 (1950), reprinted in INT'L L. COMM. 150 (1954). See Benjamin B. Ferencz, *The Draft Code of Offences Against the Peace and Security of Mankind*, 75 AM. J. INT'L L. 674 (1981).

265. Report of the International Law Commission, U.N. GAOR, 43d Sess. Supp. (No. 10) at 242, U.N. Doc. A/46/10 (1991). The order of a superior does not relieve an individual of responsibility "if, in the circumstances at the time, it was

is to be considered by a competent court "under the general principles of law . . . [in] the light of the character of each crime."²⁶⁶ Superior orders may also be considered as an extenuating circumstance at sentencing.²⁶⁷

Superior orders were also included in the Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment, which provides that "[a]n order from a superior officer or a public authority may not be invoked as a justification . . . [for] torture."²⁶⁸ In fact, the statute granting jurisdiction to the tribunal judging war crimes in former Yugoslavia incorporated the Nuremberg standard.²⁶⁹

Scholars continue to disagree about whether there is an international consensus on the contours of the superior orders defense.²⁷⁰ Neither the Genocide²⁷¹ nor Apartheid Conventions²⁷² contain superior orders provisions. Furthermore, a proposal by the International Committee of the Red Cross to incorporate a superior orders provision in the Geneva Conventions of 1949 was rejected.²⁷³ The Red Cross submitted a similar draft

possible for him not to comply with that order." *Id.* at art. 11, 242. The "competent court shall determine the admissibility of defences under the general principles of law, in the light of the character of each crime." *Id.* at art. 14(1), 243.

266. *Id.* at art. 14(1)m 243.

267. *Id.* at 14(2), 243.

268. Convention Against Torture And Other Cruel Inhuman or Degrading Treatment or Punishment, 31 U.N. GAOR, 31st Sess., Supp. No. 51, at 197, U.N. Doc. E/CN.4/1984/72, Annex (1984), art. 2(3). A similar provision is contained in the Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Ser. No. 67, O.A.S. Doc. OEA/ Ser. P, AG/Doc.2023/85 rev. 1, at 46 (1986), art. 4.

269. See United Nations Secretary General, 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, 32 I.L.M. 1159, 1175, art. 7(4) (1993).

270. See Theo Vogler, *The Defense of "Superior Orders" in International Criminal Law*, in I A TREATISE ON INTERNATIONAL CRIMINAL LAW: CRIMES AND PUNISHMENT 619 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973). But see L.C. Green, *The Defence of Superior Orders In the Modern Law of Armed Conflict*, 31 ALBERTA L. REV. 320, 331 (1993).

271. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 297.

272. See International Convention on the Suppression and Punishment of the Crime of "Apartheid", U.N. GAOR, 28th Sess., Supp. No. 30 at 75, U.N. Doc. A/9030 (1974).

273. See Howard S. Levie, *Some Comments On Professor D'Amato's "Paradox"*, 80 AM. J. INT'L L. 608, 609 (1986). See generally Convention For The Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75

to the Diplomatic Conference which drafted the 1977 Protocols to the Geneva Conventions. Unfortunately, the proposal failed to receive the required two-thirds support.²⁷⁴

The judgments of national and international tribunals have nevertheless mainly “displayed a commendable uniformity in the matter of superior orders.”²⁷⁵ The reasonable person and manifest illegality standards have received wide-spread acceptance. The reasonableness standard is calibrated to the defendant’s background, rank and circumstance, thus taking into account the typical conscript’s level of understanding and the conflicting pressures placed upon him. A more comprehensive command of the law has been demanded of officers in comparison to subordinates.²⁷⁶

The manifest illegality standard also reflects an appreciation for the view that a “soldier cannot be expected to carry in his knapsack not only a Field Marshal’s baton but also a treatise on international law.”²⁷⁷ In the words of the District Court in *Finta*, the order “must wave like a black flag . . . a warning saying: ‘forbidden.’” [A]n unlawfulness that pierces the eye and agitates the heart” must be apparent.²⁷⁸ Defendants charged with serious

U.N.T.S. 85 [hereinafter Geneva II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

274. See Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977 U.N. JURID. Y.B. 95, reprinted in 16 I.L.M. 1391 (1977) [hereinafter “Protocol I”]; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977 U.N. JURID. Y. B. 135, reprinted in 16 I.L.M. 1442 (1977) [hereinafter “Protocol II”]. The Red Cross proposal denied the superior orders defense if “in the circumstances at the time he should have reasonably known that he was committing a grave breach . . . and that he had the possibility of refusing to obey the order.” Green, *supra* note 270, at 330. But such orders might be considered in mitigation of punishment. Industrialized countries favored extending the defense to all war crimes while developing countries opposed recognizing the privilege to disobey orders. Other countries advocated a generic provision that an individual only may be convicted of a war crime if demonstrated to have wilfully committed the crime. *Id.*

275. N.C.H. Dunbar, *Some Aspects of the Problem of Superior Orders in the Law of War*, LXIII JURID. REV. 234, 250 (1951). The duty of absolute obedience to superior orders has been “discredited. . . . But it is also true that the contrary view according to which superior orders can in no circumstances constitute a defense is equally untenable.” *Id.* at 251.

276. *Id.*

277. *Id.* at 261.

278. *Kafir Qassem Judgment*, *supra* note 205, at 108. The Nuremberg standard did not distinguish between the gravity of criminal offenses for purposes of the superior orders defense. Nevertheless, the Nuremberg Charter and judgment addressed the grave offenses of war crimes, crimes against humanity, and crimes

offenses are thus precluded from relying on the superior orders defense. Combatants are "expected to realize that acts such as the killing and ill-treatment of prisoners of war, the mass extermination of civilian inhabitants . . . and the wanton devastation and pillage of property . . . are manifestly unlawful."²⁷⁹

The superior orders standard, as such, creates an irrebuttable presumption that a defendant carrying out a manifestly illegal order possesses the requisite knowledge of the command's criminal character. An international law defense is thus precluded²⁸⁰ because these orders are plainly contrary to international law. "Although military discipline is a necessity for the smooth operation of a hierarchical chain of command, allowing obedience as a defense to carrying out an obviously illegal order makes military obedience superior to the rule of law."²⁸¹ The legal application of the manifest illegality test nevertheless remains an irresistibly political one.²⁸²

The Nuremberg Judgment's "moral choice" standard provides a defense of duress to subordinates who reasonably believe that they are coerced or compelled to comply with a command to commit an illegal act.²⁸³ The *Einsatzgruppen* panel decided that an individual is not required to "forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns."²⁸⁴ The threat must be "imminent, real and inevitable"²⁸⁵ and must be disproportionate to the harm caused by a defendant's criminal conduct. Thus "[i]t would not be an adequate excuse . . . if a subordinate . . . killed a person . . . because by not obeying it he himself would risk a few days of confinement. Nor . . . may he . . . commit the illegal act once the duress ceases."²⁸⁶

To date, there is no reported case in which a defendant successfully combined the superior orders and duress defenses. The Tribunals uniformly rejected the claim that Nazi defendants would have suffered severe retribution had they refused to comply with superior orders. In contrast, the *Einsatzgruppen* panel observed

against peace. See Nuremberg Charter, *supra* note 81, at art. II.

279. Dunbar, *supra* note 275, at 255.

280. See Jeanne L. Bakker, *The Defense of Obedience to Superior Orders: The Mens Rea Requirement*, 17 AM. J. CRIM. L. 55, 60, 67 (1989).

281. *Id.* at 60.

282. See Scott, *supra* note 59 and accompanying text.

283. 1 S.C.R. at 836, 838.

284. *Einsatzgruppen* Judgment, *supra* note 95, at 480.

285. *Id.*

286. *Id.* at 471.

that the reluctant and recalcitrant interfered with the efficiency of extermination and were swiftly dispatched from the battlefield.²⁸⁷ Thus, the issue of whether combatants ever feel free to disregard an order during combat remains. When are threats so clear and compelling that the duress defense is applicable? What war crimes may be justified under the defense of duress?²⁸⁸

Clearly, an officer is charged with a singular duty to refuse to carry out or to convey an illegal command. "If international law is to have any effectiveness, high commanding officers . . . must have the courage to act, in definite and unmistakable terms, so as to indicate their repudiation of such an order."²⁸⁹ This duty appears to be satisfied by a good faith effort to interfere with the enforcement of an illicit order. Specifically, there is no requirement that an officer openly defy a dictate²⁹⁰, but a superior who passes on an illegal order may not later contend that his or her character was so well known that subordinates should have realized that they were not to obey the order.²⁹¹

Indeed, the rule of resistance may place a commander or combatant in a precarious position. He may be forced to choose "between possible punishment by his lawless government for . . . [disobeying] the illegal order . . . or . . . lawful punishment for the crime under the law of nations. To choose the former in the hope that victory will cleanse the act of its criminal characteristics manifests only weakness of character."²⁹² The fact that others would have carried out the command had the defendant desisted does not constitute a defense. An individual is responsible for his or her own conduct and the reaction of others is speculative.²⁹³ In addition, individuals who knowingly enlist in an illegal enterprise

287. *Id.* at 401-03.

288. Bakker, *supra* note 280, at 71.

289. High Command Judgment, *supra* note 146, at 598.

290. *Id.* at 557.

291. *Id.* at 520-21.

292. Hostage Judgment, *supra* note 121, at 1237. An individual who is not under a legal duty to prevent an illegal act is not privileged to intervene. See *United States v. Berrigan*, 283 F. Supp. 336 (D. Md. 1968) *aff'd sub nom.* *United States v. Eberhardt*, 417 F.2d 1009 (4th Cir. 1969) *cert. denied*, 397 U.S. 909 (1970); *State v. Marley*, 54 Haw. 450, 509 P.2d 1095 (1973) (rejecting Nuremberg defense). See generally Matthew Lippman, *Liberating the Law: The Jurisprudence of Civil Disobedience and Resistance*, 2 SAN DIEGO L.J. 299 (1994); Matthew Lippman, *Civil Resistance: Revitalizing International Law In The Nuclear Age*, 13 WHITTIER L. REV. 17 (1992).

293. *Einsatzgruppen* Judgment, *supra* note 95, at 485.

may not later contend that they were compelled to commit a criminal act.²⁹⁴

In terms of mitigating punishment, the Nuremberg standard provides for reducing the grade of the offense or the severity of punishment.²⁹⁵ Various domestic codes permit superior orders to be considered as either an extenuating or exculpatory consideration.²⁹⁶ The sentences of low-ranking combatants were reduced in cases where they complied with commands due to a lack of comprehension or circumstance.²⁹⁷ The sentences of officers who acted to ameliorate the impact of superior orders were also mitigated²⁹⁸ and defendants deemed to have lacked the opportunity for deliberation and decision were exculpated.²⁹⁹

The slight difference in drafting between international and domestic codes reflects a profound philosophical division. The Nuremberg tribunals emphasized individual accountability and the amelioration of criminal conduct. Domestic courts, particularly when adjudicating the fate of domestic defendants, typically stressed the imperative of organizational obedience and efficiency and consequently imposed lighter sanctions.³⁰⁰

The superior orders defense remains a topic of continuing debate. The imposition of culpability on combatants is counter to trained obedience and instinctual group solidarity and support. The law of war's complexities also thrust soldiers into a maze of rules which are complicated by reciprocity, reprisal, selective prosecution and problems of proof.³⁰¹ One country's celebrated combatants are often another's war criminals. For instance, were the North Vietnamese justified in characterizing captured American pilots as criminals?³⁰² Was the Hiroshima bombing authorized under international law³⁰³ or the attack on the *Al-Amariyah* command

294. *Id.* at 480-81.

295. See NUREMBURG JUDGMENT, *supra* note 88 and accompanying text.

296. See *supra* text accompanying note 199.

297. See Bauer Judgment, *supra* note 217 and accompanying text.

298. See Hostage Judgment, *supra* notes 144-45 and accompanying text.

299. See Military Prosecutor v. B. and van E. *supra* notes 209-11 and accompanying text.

300. See generally Kafir Qassem Judgment, *supra* note 205, at 76.

301. See Bakker, *supra* note 280, at 55-67.

302. See Hamilton Desaussure, *The Laws of Air Warfare: Are There Any?* 5 INT'L LAW 527 (1971).

303. See Matthew Lippman, *Nuclear Weapons and International Law: Towards a Declaration on the Prevention and Punishment of the Crime of Nuclear Humancide*, 8 LOY. L.A. INT'L & COMP. L.J. 183 (1986).

and control bunker in Baghdad which housed civilians?³⁰⁴ What of the United States' 1986 air raid on Libya in retaliation for the bombing of a Berlin discotheque?³⁰⁵ These American attacks inflicted extensive damage and human destruction and were characterized as catastrophic crimes by the victims. Were the acclaimed and admired pilots who fulfilled these missions courageous combatants or war criminals?³⁰⁶

Some continue to argue that liability should not extend beyond the policy level. This purportedly provides an adequate deterrent and vindicates the rule of law. But the prosecution of policy makers is politically precarious and presents perplexing problems of proof. The treatment of subordinates as mindless machines who are immune from punishment also contravenes the principle of criminal culpability. A strict liability standard is unfair and unrealistic because combatants who lacked criminal intent would be subject to sanctions. But, this would encourage the examination of orders and impede the military machine.³⁰⁷ The so-called "gold mean" limits liability to combatants who carry out commands which contravene "the sense of lawfulness that lies deep within the conscience of every human being . . . even if he is not [an] expert in the law."³⁰⁸ The Israeli Military Court of Appeal, in *Kafir Qassem*, concluded that "this solution . . . is the best that can be attained, and is fully consistent with . . . a country . . . based on the rule of law."³⁰⁹

304. See *United States: Department of Defense Report to Congress on the Conduct of the Persian Gulf War—Appendix on the Role of the Law of War*, 31 I.L.M. 612, 624-26 (1992).

305. See Christopher Greenwood, *International Law and the United States Air Operation Against Libya*, 89 W. VA. L. REV. 933 (1987).

306. See Lewy, *supra* note 23. A Tokyo District Court concluded that the United States bombing of Hiroshima and Nagasaki violated international law. See Richard Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759 (1965).

307. See Eser, *supra* note 4, at 204-11.

308. II PALESTINE Y.B. INT'L L. at 108 (Kafir Qassem Judgment). But, combatants are not held strictly liable for implementing orders which do not rise to the level of manifest illegality. "To this end the legislator compares a mistake of law to the general rule that an honest and reasonable mistake of fact exempts the mistaken person from criminal responsibility." *Id.*

309. *Id.* at 109 (Kafir Qassem Judgment).

II. Necessity

A. *Military Necessity*

In World War I the German military followed the credo that military necessity supersedes the humanitarian law of war.³¹⁰ The German General Staff of Prussia expressed contempt for the fact that “the tendency of thought of the last century was dominated . . . by humanitarian considerations which not infrequently degenerated into sentimentality and flabby emotion.”³¹¹ This thinking was criticized as being “in fundamental contradiction with the nature of war and its object.”³¹² Oxford Professor Hugh H.L. Bellot commented in a 1917 essay that “[m]ilitary necessity knows no law. Each belligerent is a law unto himself. It means the abrogation of all law. Its application can only result in anarchy, and in reprisals culminating in a competition of barbarism.”³¹³

German defendants invoked military necessity as a defense to the reprisal execution of hostages, seizure of property and use of slave labor during World War II. In the *Hostage* case, the Tribunal ruled that military necessity permits the incidental maiming and killing of civilians during attacks on military targets which are demanded by the exigencies of war. But military necessity does not justify a violation of the positive provisions of the humanitarian law of war. Necessity only qualifies a legal rule in those instances in which it is explicitly incorporated into a positive principle.³¹⁴ The Tribunal rejected the view that the rules of warfare “are anything less than they purport to be. Military necessity . . . [does] not justify a violation of positive rules. International law is prohibitive. . . . The rights of the innocent . . . must be respected even if military necessity or expediency decree otherwise.”³¹⁵ An occupant who is unable to control the local population must either curtail operations or withdraw from the territory; it is not justified in violating the law of war.³¹⁶

The *High Command* Tribunal rejected the view of German publicists that “military necessity includes the right to do anything

310. See Theodore S. Woolsey, *Retaliation and Punishment*, 9 PROC. AM. SOC'Y INT'L L. 62, 63 (1916).

311. Hugh H. L. Bellot, *supra* note 23, at 41.

312. *Id.*

313. *Id.* at 32.

314. *Hostage Judgment*, *supra* note 121, at 1253-54.

315. *Id.* at 1256.

316. *Id.* at 1272.

that contributes to the winning of a war [S]uch a view would eliminate all humanity[,] . . . decency law from the conduct of war and . . . [is] contrary to the accepted usages of civilized nations.”³¹⁷ Recognition of such an expansive version of military necessity would mean that a belligerent in danger of defeat would be authorized to suspend the humanitarian law of war. The result would be that “the rules of war would quickly disappear. Every belligerent could find a reason to assume that it had higher interests to protect.”³¹⁸ The pernicious result of this philosophy is illustrated by the Nazi’s killing of Russian Jews, the “bearers of Bolshevism.”³¹⁹

German defendants also contended that the saturation bombing of cities during World War II exemplified the increasingly “totalitarian aspect”³²⁰ of contemporary “total war.”³²¹ *Einsatzgruppen* recognized that the Allies attacked cities for tactical purposes, to shut down communications, railroads, ammunition plants, and factories in order to obtain military advantage. Civilians were inevitably injured and killed in these operations but the bombing was terminated following surrender. This behavior differed from the German justification of exterminating enemy civilians on the basis of necessity. The exterminations bore little relation to the pursuit of military success and continued long after the enemy’s capitulation.³²²

Necessity is implicitly incorporated into the law of the governance of occupied territory. An occupant is authorized to “take all . . . measures . . . to restore and ensure . . . public order and safety, while respecting . . . the laws in force in the country.”³²³ Article 53 permits an occupying power to requisition property and services in order to satisfy the “needs of the army of occupation They shall be in proportion to the resources of the country”³²⁴ Requisitions include billets, stables, food and

317. High Command Judgment, *supra* note 146, at 541. The Tribunal opined that “[t]he devastation prohibited by the Hague Rules and the usages of war is that not warranted by military necessity.” *Id.*

318. *Einsatzgruppen Judgment*, *supra* note 95, at 463.

319. *Id.* at 464. “If merely being an inhabitant of Russia made that inhabitant a threat to Germany then the *Einsatzgruppen* would have had to kill every Russian, regardless of race.” *Id.*

320. HOSTAGE JUDGMENT, *supra* note 121, at 1317.

321. *Id.*

322. *Einsatzgruppen Judgment*, *supra* note 95, at 467. See Protocol I, *supra* note 274, at arts. 51-52 (protection of civilian population from indiscriminate attack).

323. Hague Convention, *supra* note 218, at art. 43.

324. *Id.* at art. 52.

urgently needed equipment and supplies. There is no provision for the large-scale despoliation or transfer of industrial property to the occupant's home territory.³²⁵

B. War Crimes Prosecutions And The Defense Of Military Necessity

The *Krupp* Tribunal rejected the contention that the "great emergency" in the German economy justified the plunder and spoliation of industrial property in the occupied territories.³²⁶ The rules and customs of warfare were designed for "all phases of war. . . . To claim that they can be wantonly — and at the sole discretion of any one belligerent — disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely."³²⁷ The panel in *Farben* rejected the idea that the necessities of economic warfare had qualified the Hague Convention and that the instrument should be interpreted in accordance with the exigencies of total war.³²⁸

In *Krupp* the *Farben* firm argued that its acquisition of a controlling share in plants, factories and other interests in the occupied territories were in accordance with an occupant's obligation to provide for an orderly economy. The Tribunal rejected this explanation and determined that these acquisitions "were not primarily for the purpose of restoring or maintaining the local economy, but were rather to enrich *Farben* as part of a general plan to dominate the industries involved, all as part of *Farben's* asserted "claim to leadership."³²⁹ The *Flick* Tribunal conceded that the *Flick* firm's seizure of the Rombach plant in Lorraine could be defended on the grounds of military necessity. There was an absence of responsible management and an idle population needing work. But *Flick's* conversion of the plant

325. United States v. Alfried Krupp, IX TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 1327, 1344-45 (1950) [hereinafter *Krupp* Judgment].

326. *Id.* at 1347.

327. *Id.*

328. United States v. Carl Krauch, VIII TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 1081, 1137-38 (1950) [hereinafter *Farben* Judgment]. The Tribunal determined that the provisions governing the conduct of an occupant were neither vague nor had been altered through custom and usage. *Id.* at 1138.

329. *Id.* at 1141.

indicated that the firm's intent was to plunder rather than to preserve order.³³⁰

The issue of military necessity was also addressed in the context of the outright destruction of occupied territory. Defendant Lothar Redulic was commander of the 20th Mountain Army which retreated from Finland in the face of a Russian advance. The Germans depopulated the Norwegian province of Finmark and destroyed houses, highways and infrastructure in order to deny resources to enemy forces. The *Hostage* Tribunal noted that Article 23(g) of the Hague Convention prohibits the destruction or seizure of enemy property, "unless . . . imperatively demanded by the necessities of war."³³¹ The destruction of public and private property which would provide aid and comfort to the enemy by retreating military forces may, under the appropriate circumstances, fall within the necessity provision of Article 23(g). But the Tribunal failed to find a military necessity for the destruction and devastation of Finland.³³² Rendulic was nevertheless acquitted on the ground that "[t]he conditions, as they appeared to the defendant at the time, were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made."³³³

The British Judge Advocate elaborated on military necessity in the prosecution and conviction of Field-Marshal Erich von Manstein. Von Manstein had ordered the destruction of property and the evacuation of the Ukrainian population in order to deny assistance to the advancing Russian forces. The Judge Advocate opined that necessity permits that degree of destruction which is required to preserve the safety and security of troops. It does not authorize depredations undertaken to obtain a mere military

330. VI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 1187, 1206 (1952) [hereinafter Flick Judgment]. "Military necessity is a broad term. Its interpretation involves the exercise of some discretion. . . . [I]f after seizure the German authorities had treated their possession as a conservatory for the rightful owners' interests, little fault could be found with the subsequent conduct of those in possession." *Id.*

331. Hague Convention, *supra* note 218, at 23(g).

332. Hostage Judgment, *supra* note 121, at 1296.

333. *Id.* at 1297.

The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commands, and the uncertainty of his intentions. . . . [T]he defendant may have erred in . . . his judgment but he was guilty of no criminal act.

Id.

advantage. Armies in retreat would otherwise routinely ravage property. The destruction of property must be limited to that which would militarily assist the enemy and which does not include desolation of vegetation or closing of wells. However, the accused is to be accorded the benefit of the doubt in adjudging whether he harbored a good faith belief under the circumstances that the nature and scope of the devastation was justified.³³⁴

The Judge Advocate also stated that necessity does justify deporting the population in order to deny recruits and labor to enemy forces. In limited circumstances, such evacuations may be undertaken on humanitarian grounds in order to alleviate poverty and starvation. The Judge Advocate raised an issue which remains unresolved. What constitutes military necessity as opposed to a mere military advantage? Von Manstein contended that the destruction of property was required in order to deny the Russians billets, observation posts and machinery and to delay their advance as well. Necessity presumably requires that the destruction was demanded to preserve and protect the lives of troops.³³⁵

In the case of maiming or killing protected persons, courts were unwilling to accept such acts on the basis of military necessity. A British military court ruled that *Kapitanleutenant* Heinz Eck was not justified in directing machine gun fire and grenades at the remnants of the sunken ship *The Peleus*, killing a number of survivors. Eck contended that air surveillance would have spotted the detritus and detected and destroyed his submarine. The court rejected Eck's defense of operational necessity and sentenced him to death. The Judge Advocate noted that the facts contradicted Eck's claim. Eck had surveilled and sprayed the site for five hours rather than attempting to escape. He undoubtedly realized that this strafing could not eliminate the oil slicks which were easily observable from the air.³³⁶

In another case, Gunther Thiele and Georg Steinert were convicted of executing a wounded American officer. The accused were part of a German unit which was hiding from nearby United States troops. The verdict suggests that the American military

334. In Re von Lewinski (Brit. Milit. Ct., Hamburg, Germany, Dec. 1949), 16 INT'L L. REP. 509, 521-23 (1955) [hereinafter von Manstein Judgment].

335. *Id.*

336. Trial Of *Kapitanleutenant* Heinz Eck And Four Others For The Killing Of Members Of The Crew Of The Greek Steamship *Peleus*, Sunk On The High Seas (Brit. Milit. Ct., Hamburg, Germany, Oct. 17-20, 1945), 1 LAW REP. TRIALS WAR CRIM. 1, 12 (1947) (The *Peleus*).

commission rejected the claim of necessity. It determined that the defendants breached their obligation to humanely treat a prisoner of war.³³⁷ Similarly, an Australian military court rejected Lieutenant General Baba Masao's claim that the lethal 165 mile forced-march of American and British prisoners of war from Sandakan to Ranau in Borneo was justified by the operational necessity of an anticipated Allied invasion.³³⁸

The Tribunal in the *Hostage* case convicted Helmuth Felmy, Commander of the LXVII Corps in Greece, for failing to vigorously pursue those responsible for two massacres involving civilians. The court noted that "under no circumstances can cold-blooded mass murder . . . be considered as related remotely . . . to the exigencies of war."³³⁹ Defendant Ernst Lautz, Chief Prosecutor of the People's Court, relied on necessity to retroactively extend the German law of treason to Poles for unspecified acts against racial Germans. The *Justice* Tribunal stated that this violated "every concept of justice and fair play . . . [and] [became] a monument to Nazi arrogance and criminality."³⁴⁰

In sum, military necessity does not justify a violation of the code of conflict because it would permit a belligerent to disregard legal doctrine when confronted with disaster or defeat. Necessity may only be relied upon in instances where this justification is incorporated into the humanitarian law of war.³⁴¹ There are difficulties in distinguishing between the destruction of property for military advantage or profit as opposed to military necessity.³⁴² The *Rendulic* judgment indicates that, in such instances, courts will exonerate decision-makers who mistakenly, but in good faith, rely on necessity.³⁴³

A belligerent is privileged to destroy property or harm protected persons incidental to an otherwise lawful military action so long as the damage is not disproportionate to the anticipated military advantage. This invites combatants to camouflage their targeting of civilians as either collateral damage or as an accidental

337. Trial Of Gunther Thiele And Georg Steinert (United States Milit. Comm'n, Augsburg, Germany, June 13, 1945), II LAW REP. TRIALS WAR CRIM. 56-57 (1948). See *id.* at 58 (Notes on the Case).

338. Trial Of Lieutenant-General Baba Masao (Aust. Milit. Ct., Rabaul, May 28, 1947), XI LAW REP. TRIALS WAR CRIM. 56 (1949) [hereinafter *Baba Masao*].

339. *Hostage Judgment*, *supra* note 121, at 1309.

340. *Justice Judgment*, *supra* note 180, at 1127.

341. See *supra* notes 326-28 and accompanying text.

342. See *supra* notes 331-34 and accompanying text.

343. See *supra* note 334 and accompanying text.

attack. Even those acting in good faith will be tempted to subordinate their concern with safeguarding protected persons to the military advantage to be gained from attacking civilian areas.³⁴⁴

The United States Department of Defense's report on the Gulf War conceded that air attacks resulted in collateral civilian death and destruction. For example, communications and utility grids which were attacked were situated in civilian areas. The report concluded that the "attack of legitimate . . . military targets, notwithstanding the fact it resulted in collateral injury to civilians and damage to civilian objects, was consistent with the customary practices of nations and the law of war."³⁴⁵ In addition, the report concluded that accidents are inevitable. Those who had selected the *Al-Firdos* Bunker for attack had been unaware that the command center sheltered civilians during the evening hours. According to the report, this miscalculation illustrated "the difficulty of decision making amid the confusion of war."³⁴⁶ Nevertheless, "[u]nder the rule of . . . military necessity . . . this was a legitimate military target. Coalition forces had no obligation not to attack it. If Coalition forces had known that Iraqi civilians were occupying it . . . they may have withheld attack . . . (although the law of war does not require such restraint)."³⁴⁷

The related defense of reciprocity was also rejected as a defense under certain circumstances. Admiral Karl Donitz was acquitted of waging unrestricted submarine warfare on the ground that the American and British navies had officially pursued a similar policy. The defense of *tu quoque* was rejected by the Supreme Court of the Federal Republic of Germany in convicting an accused of executing involuntary workers fleeing Germany in 1945. The German Court stated that "[a]ny close connection between air attacks by the enemy or acts of violence by foreign troops after the invasion of German territory . . . and the killing of defenseless foreign workers . . . must be vigorously denied."³⁴⁸

344. See Protocol I, *supra* note 274, at art. 51(5)(b).

345. United States Department Of Defense, Report To Congress On The Conduct Of The Persian Gulf War—Appendix On The Role Of The Law Of War, 31 I.L.M. 612, 624 (1992).

346. *Id.* at 626. Iraqi "disinformation" created the "misimpression" that the United Nations had failed to exercise a "high degree of care" in aerial attacks. *Id.* at 624.

347. *Id.* at 627.

348. PREVENTIVE MURDER JUDGMENT, *supra* note 214. "The rule . . . means that no State may accuse another State of violations of international law and

Reciprocity is a potentially pernicious device which repeals all legal restraints. Nation-states which have been victimized by an illegal weapon or tactic are authorized to adopt the same strategy. This rarely invoked doctrine permits State practice to modify legal principle.³⁴⁹

C. *Individual Necessity*

The tribunals presiding over the prosecutions of Nazi industrialists recognized the common law necessity defense. The defense involves: a reasonable belief that an individual confronts an imminent and irreparable harm, a lack of legal avenues to avoid the evil, the commission of a criminal act which is reasonably calculated to eliminate the harm; and a proportionality between the crime and the threat. Those acting under compulsion are considered to have lacked criminal intent. The defense is inapplicable in those instances in which a defendant voluntarily engaged in criminal conduct.³⁵⁰

In *Flick*, the American tribunal asserted that the necessity defense was not incorporated into Control Council Law No. 10. The Tribunal nevertheless observed that it might be "reproached for wreaking vengeance rather than administering justice if it were to declare as unavailable to defendants the defense of necessity. . . . This principle has had wide acceptance in American and English courts and is recognized elsewhere."³⁵¹ The court recognized the challenge of applying a defense whose broad and flexible nature impeded precise analysis.³⁵²

The Tribunal stated that the Nazi regime assigned production quotas to industrial plants. The management submitted requests

exercise criminal jurisdiction over the latter's citizens in respect of such violations if it is itself guilty of similar violations against the other State or its allies." *Id.* at 564. The rule does not affect the right and duty of a State to hold its own citizens responsible, in accordance with its municipal criminal law, for violations of international law. *Id.* The "most stringent requirements must be observed where crimes against life are concerned because there is a rule of law accepted by all civilized nations . . . that the right of a human being to his life must be protected in the highest degree." *Id.*

349. *Id.*

350. Krupp Judgment, *supra* note 325, at 1438-39. International law was determined to extend to civilians as well as to governmental officials. "Acts adjudged criminal when done by an officer of the government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality." Flick Judgment, *supra* note 330, at 1192.

351. *Id.* at 1200.

352. *Id.* at 1201.

for labor and involuntary foreign workers, prisoners-of-war and concentration camp inmates. These were then assigned to plants through the governmental labor office. A plant's production quota could not be met without these laborers and failure to accept the workers would have likely resulted in capital punishment or the loss of title to the property.³⁵³ The defendants understandably hid their dissent and complied with Reich regulations, seeking when possible to ameliorate the atrocious treatment of workers by the Security Police.³⁵⁴

The Tribunal found that the defendants had acted under the threat of a "clear and present danger."³⁵⁵ The Reich secret police were "always 'present,' ready to go into instant action and to mete out savage and immediate punishment against anyone doing anything that could be construed as obstructing or hindering the carrying out of governmental regulations or decrees."³⁵⁶ However, the defense of necessity was denied to defendants Bernhard Weiss and Friedrich Flick. Weiss, with Flick's support, obtained an increased production for the Linke-Hofmann Works. Weiss then secured a complement of Russian prisoners of war in order to satisfy this. The "steps taken . . . were initiated not in governmental circles but in the plant management. They were not taken as a result of compulsion or fear, but admittedly for the purpose of keeping the plant as near capacity as possible."³⁵⁷

The General Tribunal of the Military Government of the French Zone of Occupation in Germany followed the *Flick* standard in convicting industrialist Hermann Roechling and two other executives.³⁵⁸ The French Tribunal applied the initiation standard in rejecting the necessity defense. It determined that Roechling, President of the Reich Association, had repeatedly

353. *Id.* at 1197.

354. *Id.* at 1198-99. The slave labor program was administered by the Reich and the labor camps were under the jurisdiction of the military or security police. Workers in the plants generally were under the control of private industrial police. Industrial managers controlled workers' clothing, feeding, and work schedules. The Tribunal determined that the Flick firm had treated the workforce in a humane fashion. *Id.* at 1198-1200.

355. Flick Judgment, *supra* note 330, at 1201.

356. *Id.*

357. *Id.* at 1202.

358. France v. Hermann Roechling (General Tribunal Of The Military Government Of The French Zone Of Occupation In Germany, June 30, 1948), XIV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, 1075 (1952) [hereinafter Roechling Trial Judgment]. See *id.* at 1061 (Indictment).

intervened to secure involuntary labor from the occupied territories.³⁵⁹ Roechling “sacrificed all human considerations and demonstrated a complete lack of respect for the rights of the civilian population in the occupied countries” in an effort to raise steel production.³⁶⁰ He was indifferent to the fate of those he had deported and ignored their continuing abuse and mistreatment.³⁶¹ Roechling and his co-defendants “were not moved by a lack of moral choice, but . . . embraced the opportunity to take full advantage of the slave-labor program. Indeed . . . they were, to a very substantial degree, responsible for broadening the scope of that reprehensible system.”³⁶²

The *Farben* Tribunal also adhered to the initiation test. It ruled that the necessity defense was applicable in those instances where an individual was deprived of a “moral choice as to his course of action [T]he defense . . . is not available where the party seeking to invoke it was . . . responsible for the existence or execution of such order or decree, or where his participation went beyond the requirements thereof, or was the result of his own initiative.”³⁶³

The American judges in *Farben* determined that a refusal to satisfy a plant’s production schedule or to utilize slave labor would have been treated as treasonous sabotage, resulting in swift and severe retaliation.³⁶⁴ Yet, several *Farben* executives took the initiative in locating a buna rubber plant at Auschwitz because of the availability of concentration camp workers. These defendants also deployed prisoners of war and concentration camp labor in mining operations. The use of involuntary workers “with the initiative displayed by . . . *Farben* [officials] in the procurement and utilization of such labor, is a crime against humanity and, to the extent that non-German nationals were involved, also a war crime, to which the slave-labor program of the Reich will not warrant the

359. *France v. Hermann Roechling*, (Superior Military Government Court Of The French Occupation Zone In Germany, Jan. 25, 1949) (appeal judgment) XIV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, 1097, 1104-05 (1952) [hereinafter *Roechling Appeal Judgment*].

360. *Id.* at 1131.

361. *Id.* at 1136. Hans Lothar von Gemmingent-Hornberg and Wilhelm Rodenhauser were determined to have exercised initiative in the mistreatment of workers. *Id.* at 1136-38.

362. *Farben Judgment*, *supra* note 328, at 1179.

363. *Id.*

364. *Id.* at 1175.

defense of necessity."³⁶⁵ The members of various Farben administrative boards and plant leaders were ultimately acquitted on the ground that they had not gone "beyond what the regulations required in the treatment or discipline of workers."³⁶⁶

The *Krupp* Tribunal rejected the defense of necessity and determined that the defendants had eagerly employed involuntary workers as part of the firm's plans for industrial expansion.³⁶⁷ The criminal acts committed by the defendants were disproportionate to the harm with which they were threatened. Alfried Krupp, for instance, confronted a forfeiture of industrial property and the others risked a loss of employment. Notwithstanding this dilemma, "it is difficult to conclude that the law of necessity justified a choice favorable to themselves and against the unfortunate victims who had no choice at all in the matter."³⁶⁸ Furthermore the defendants were not likely to be punished with sanctions, let alone confinement in a concentration camp. In fact, Gustav Krupp was a confidant of the *Führer* who had consolidated corporate, financial and political support for the Nazi regime. Hitler reciprocated by issuing a decree which permitted Krupp to continue as a family enterprise. The firm's select standing was suggested by Krupp's successful defiance of decrees prohibiting births among eastern workers, peacetime production and the sale of Reich bonds.³⁶⁹

In a similar case, a Norwegian panel refused to recognize the defense of necessity to justify acts of abuse and torture. The court rejected the defendants' plea that they would have confronted serious retribution had they refused to abuse members of the resistance. The court also suggested that the defendants had willingly engaged in brutality, refusing to "believe that a state, even Nazi Germany, could force its subjects, if they were unwilling, to

365. *Id.* at 1187. Defendants Otto Ambros, Heinrich Bueteffisch and Walter Duerrfeld, and Fritz ter Meer, were convicted of employment of slave labor at Auschwitz. *Id.* at 1187, 1192. Defendant Carl Krauch also was determined to have exercised initiative in employing such workers in the chemical industry. Farben Judgment, *supra* note 328, at 1188.

366. *Id.* at 1194. The members of the *Vorstand* (board of directors) were aware that slave labor was being employed on an extensive scale. But, according to the Tribunal, the defendants were not shown to have exercised initiative in securing involuntary workers or to have been aware that the availability of concentration camp labor was a factor in locating the plant at Auschwitz. *Id.* at 1195.

367. *Id.* at 1442.

368. *Id.* at 1145. Various authorities dispute whether the anticipated loss of property will justify reliance on the necessity defense. Farben Judgment, *supra* note 328, at 1145.

369. *Id.* at 1444-48.

perform such brutal and atrocious acts as those of which the defendants were guilty."³⁷⁰ In addition, a British military court rejected the plea of necessity where there had been no explicit threat of retribution and where the defendant was free to refuse to apprehend and execute escaped prisoners of war.³⁷¹

In summary, American judges accepted the industrial defendants' plea of necessity. Defendants who cooperated in the slave labor program and condoned and committed criminal acts against involuntary workers were absolved from criminal liability. These defendants were deemed to have reluctantly employed involuntary workers. Only those who went beyond the parameters of the program were considered criminally culpable.³⁷²

The defendants may have preferred German workers, but embraced the employment of slave labor.³⁷³ Judge Paul M. Herbert of Louisiana State University Law School dissented in *Farben*, arguing that the defendants could have creatively circumvented complicity in the slave labor program. The American Court's uncritical acceptance of the necessity defense, according to Herbert, constituted "unbridled license for the commission of . . . crimes . . . on the broadest . . . scale through the simple expediency of the issuance of compulsory governmental regulations combined

370. Trial Of *Kriminalsekretar* Richard Wilhelm Hermann Bruns And Two Others (Eidsivating Lagmannsrett and Supreme Court Of Norway, March 20, 1946 and July 3, 1946), III LAW REP. TRIALS WAR CRIM. 15, 18 (1948).

371. Trial Of Max Wielen And 17 Others (Brit. Milit. Ct., Hamburg, Germany, July 1, 1947), XI LAW REP. TRIALS WAR CRIM. 31, 49 (1949) (*The Stalag Luft III Case*).

372. See *supra* notes 350-69 and accompanying text.

373. *Farben* Judgment, *supra* note 328, at 1307, 1309 (Herbert, J., on slave labor charges).

Under the majority view a defendant who is a plant manager may willingly cooperate in the execution of cruel and inhumane regulations, such, for example, as putting into effect the required discriminations as to food and clothing in the case of the eastern workers, or putting the miserable workers beyond barbed wire fences; this was no more than complying with the requirements of the governmental regulations and, according to the majority opinion, does not result in criminal responsibility. Similarly, where the evidence establishes that a defendant was responsible for the erection of a disciplinary camp at a *Farben* plant, or participated in the initiation of disciplinary measures against unruly compulsory workers—there is no criminal responsibility, the action is protected by the defense of "necessity" as the defendant did no more than that which the cruel and inhumane regulations required. . . .

Id. at 1311.

with the terrorism of the totalitarian or police system.”³⁷⁴ This effectively elevated the dictates of domestic doctrine over the international protection of human rights.³⁷⁵

American courts thus determined that the enslavement and sacrifice of prisoners was a justified effort to protect the defendants’ person, power and privilege. But, even if the defendants had been incarcerated, they would not have found themselves “in a worse plight than the thousands of helpless victims whom they daily exposed to . . . death[,] . . . starvation[,] . . . air raids upon . . . armament plants[,] . . . involuntary servitude and . . . other indignities. The disparity in the number of actual and potential victims is . . . thought provoking.”³⁷⁶ Yet, should judges in cloistered chambers impose a duty of defiance on relatively impotent private citizens?

III. Command Responsibility

A. *The Yamashita And Tokyo Judgments*

General Tomoyuki Yamashita assumed the position of Japanese Supreme Commander in the Philippines on October 9, 1944, nine days prior to the United States’ invasion. His jurisdiction also included the military police and prisoner of war and civilian internment camps.³⁷⁷ Yamashita was charged, convicted and sentenced to death by a United States military war crimes commission which determined that he had disregarded and failed to discharge his duty to control his command.³⁷⁸

374. *Id.* at 1310. “The coercion exercised by a totalitarian police state in the form of commands to its citizens should not be permitted to operate as a complete negation of the opposing command of international penal law which has erected standards for the protection of human rights.” *Id.* at 1311.

375. *Id.* at 1310-11. Judge Herbert argued that the Farben executive committees were well-aware of the Auschwitz initiative. Farben Judgment, *supra* note 328, at 1322.

376. Krupp Judgment, *supra* note 325, at 1446.

377. General Headquarters United States Army Forces, Pacific Office Of The Theater Judge Advocate, Review of the Record of Trial by a Military Commission of Tomoyki Yamashita, General, Imperial Japanese Army, *reprinted in* COURTNEY WHITNEY, THE CASE OF GENERAL YAMASHITA: A MEMORANDUM 60, 69 (1950) [hereinafter Military Commission]. Additional military and naval forces were eventually assimilated into Yamashita’s command between December and January 1944. His command reached 240,000 in Luzon and included 160 coastal ships, various prisoner of war and civilian internment camps and the military police. *Id.* at 69-70.

378. *Id.* at 60.

Japanese depredations against civilians, prisoners of war, internees and the hospitalized during the invasion included:

(1) Starvation, execution or massacre without trial and mal-administration . . . of civilian internees and prisoners of war; (2) Torture, rape, murder and mass execution of . . . large numbers of residents of the Philippines . . . by starvation, beheading, bayoneting, clubbing, hanging, burning alive, and destruction by explosives; (3) Burning and demolition without adequate military necessity of large numbers of homes, places of business, places of religious worship, hospitals, public buildings, and educational institutions³⁷⁹

Japanese forces also intentionally deprived the indigenous population and prisoners of adequate food, shelter, medical care, hygiene, food and water. These acts resulted in malnutrition and death. Non-combatants were also compelled to construct entrenchments and fortifications and to assist the occupation forces. Public, private and religious property was destroyed, looted and pillaged.³⁸⁰

Sixteen thousand unarmed non-combatant civilians were killed in Batangas Province, Luzon Island, alone between November 1944 and April 1945. Individuals were shot, bayoneted and buried alive. Three hundred Filipinos were forced to leap into a deep well into which heavy weights were dropped. Those who survived were shot. Three to four hundred civilians were bayoneted, shot, and immolated in another incident.³⁸¹ Prisoners of war were mistreated and were compelled to catch and consume cats, pigeons, and rats. Over fifteen hundred Americans were crowded into the cramped cargo hold of a Japanese steamship. They were starved and driven to dementia, wildly attacking one another, and sucking their victims' blood.³⁸²

The Japanese also destroyed large portions of Manila as American troops approached the city. Eight thousand residents were killed and over seven thousand were mistreated, maimed and wounded without cause or trial. Hundreds of females were beaten and raped, their breasts and genitals abused and mutilated. The Military Commission concluded that the Filipino people,

379. Trial Of General Tomoyuki Yamashita (U.S. Milit. Comm'n, Manila, Oct. 8-Dec. 7, 1945), IV LAW REP. TRIALS WAR CRIM. 1, 4 (U.N. War Crimes Comm'n, 1948) [hereinafter Yamashita Trial].

380. *Id.* at 5-6.

381. Military Commission, *supra* note 377, at 63.

382. *Id.* at 68-69.

including thousands of women and children, were tortured, starved, beaten, bayoneted, clubbed, hanged, burned alive and subjected to mass executions rarely rivaled in history, more than 30,000 deaths being revealed by the record. Prisoners of war and civilian internees suffered systematic starvation, torture, withholding of medical and hospital facilities and execution in disregard of the rules of international law [There were] systematic . . . [executions] with indescribable bestiality of little girls and boys only months or even days old³⁸³

Yamashita claimed that he had been unaware of these atrocities. His troops had been scattered and communications disrupted. He admitted having approved the execution of forty convicted partisans but denied having approved the summary execution of suspected guerrillas.³⁸⁴

The American military commission concluded that the crimes had been so widespread, similar and systematic, that the accused must have known and ordered, or tacitly condoned, the actions of the Japanese troops. Yamashita also failed to punish the perpetrators.³⁸⁵ The Commission concluded that “[t]aken all together . . . the accused failed to discharge his responsibility to control troops[,] thereby permitting the atrocities[,] . . . and was thus guilty as charged.”³⁸⁶

General Douglas MacArthur affirmed the verdict: “This officer, of proven field merit, entrusted with high command involving authority adequate to responsibility, has failed . . . his

383. *Id.* at 79.

384. *Id.* at 73.

He was completely absorbed by the operational command of preparing to confront superior United States forces; communications were poor; he was unfamiliar with the character and ability of his subordinates; because of the day and night pressure consuming all of his time he was completely out of touch with the situation.

Id. at 74.

385. Military Commission, *supra* note 377, at 80-81. The accused issued an order to “mop up” the guerrillas. “One cannot be unmindful of the fact that the accused, an experienced officer, in giving such an order must have been aware of the dangers involved when such instructions were communicated to troops the type of the Japanese.” *Id.* at 80.

386. *Id.* at 81-82. The Commission propounded an unprecedented and perplexing doctrine: “[t]he accused was not accused of having done something or having failed to do something, but solely of having been something, namely commander of the Japanese forces. It was . . . claimed that . . . he was guilty of every crime committed by every soldier assigned to his command.” Yamashita Trial, *supra* note 379, at 12.

duty to his troops, to his country, to his enemy, to mankind[,] [he] has failed utterly his soldier faith."³⁸⁷

In affirming Yamashita's conviction, the United States Supreme Court observed that unrestrained and unsupervised military operations inevitably result in violations of the humanitarian law of war, undermining the protections afforded civilian populations and prisoners of war.³⁸⁸ According to the majority, the central role of a commanding officer in protecting civilians and wounded or captured enemy belligerents, was recognized in the Hague Convention of 1907. Article 1 established as a condition of lawful belligerency that troops are "commanded by a person responsible for his subordinates."³⁸⁹ The Court cited additional provisions which purportedly provided support for the conclusion that the humanitarian law of war "presupposes that its violation is to be avoided through the control of the operations of war by commanders who are . . . responsible for their subordinates."³⁹⁰

The majority ruled that Yamashita had failed to fulfill his "affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."³⁹¹ The Court also observed that the military commission had not required Yamashita to take measures which "were beyond his control or inappropriate for a commanding officer to take in the circumstances."³⁹²

In his dissent, Justice Frank Murphy argued that international law does not provide the "slightest precedent for the charge"

387. General Headquarters Supreme Commander For The Allied Powers Government Section, Memorandum For The Record ("The Case of General Yamashita," by A. Frank Real) (Nov. 22, 1949), Military Commission, *supra* note 377, at 1, 4. General MacArthur issued a warning as the Americans invaded the Philippines:

As Commander in Chief of the Allied forces in the field, I shall in addition, during the course of the present campaign, hold the Japanese military authorities in the Philippines immediately liable for any harm which may result from failure to accord prisoners of war, civilian internees or civilian non-combatants the proper treatment and due protection to which they, of right, are entitled.

Id. at 5.

388. *In Re Yamashita*, 327 U.S. 1, 14-15 (1945).

389. Hague Convention, *supra* note 218, at art. 1. *See also id.* at art. 43, which requires an occupying power to "take all the measures in its power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." *Id.*

390. 327 U.S. at 15.

391. *Id.* at 16.

392. *Id.* at 16-17.

against Yamashita.³⁹³ According to Murphy, in holding Yamashita culpable for the criminal conduct of his subordinates, the Court had abrogated the principle of individual responsibility. All executive officials, including the President of the United States, were now potentially liable for the actions of the armed forces.³⁹⁴ Charging and convicting Yamashita, in the view of the dissenting justices, was particularly unfair. The American military had decimated and scattered the Japanese forces. These disorganized troops had then engaged in repeated depredations. Justice Murphy criticized the Court for presuming, without proof, that Yamashita had ordered, condoned or been complicitous in these crimes: "To use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality."³⁹⁵ Intentional or negligent inaction may give rise to liability, but the prosecution had failed to establish that Yamashita had been cognizant of, or directly connected with, the atrocities. The imposition of responsibility on Yamashita for the widespread criminal conduct of his anarchic army during a devastating enemy attack established a dangerous precedent.³⁹⁶ Justice Murphy noted that "[b]y this flexible method a victorious nation may convict and execute any or all leaders of a vanquished foe, depending upon the prevailing degree of vengeance and the absence of any objective judicial review."³⁹⁷

Altogether, the *Yamashita* decision imposed an affirmative duty upon commanding officers to prevent and punish violations of the humanitarian law of war. The judgment appeared to impose strict liability on military officers. Clearly, Yamashita was not cognizant of and could not have been aware of each and every crime committed under his command. The type of affirmative

393. *Id.* at 28.

394. *Id.* See 327 U.S. at 38, (discussing the provisions of the United States Army Field Manual).

395. *Id.* at 35.

396. *Id.* at 39-40.

397. *Id.* at 40.

Mass guilt we do not impute to individuals, perhaps in any case but certainly in none where the person is not charged or shown actively to have participated in knowingly to have failed in taking action to prevent the wrongs done by others, having both the duty and the power to do so.

Id. at 43-44 (Rutledge J., dissenting).

actions required of Yamashita were never suggested by the Court.³⁹⁸

The vicarious liability standard was elaborated upon by the International Military Tribunal at Tokyo.³⁹⁹ The Allied Powers charged the Japanese Cabinet, high-level military officers and correctional officials with varying degrees of duty in safeguarding prisoners of war.⁴⁰⁰ The members of the Japanese Cabinet were considered collectively responsible for the care of convicts. Those with authority over prisoners who possessed actual or constructive knowledge of mistreatment were under an obligation to prevent the recurrence of such abuse or resign. A cabinet member with knowledge of the ill-treatment of prisoners who lacked authority to curb such crimes was required to leave office. Those who voluntarily remained were held responsible for any additional mistreatment.⁴⁰¹

Military and civilian officials who were responsible for protecting prisoners were held criminally culpable in those instances in which they were aware or should have been aware of abuse and mistreatment and failed to take curative action. In contrast, bureaucrats with knowledge of ill-treatment and who were not charged with the care of convicts were neither under a duty to act nor required to resign.⁴⁰²

The requisite criminal intent was established in those instances in which an individual occupying an authoritative position possessed actual or constructive knowledge of war crimes and failed to prevent their recurrence. Actual knowledge was established in those instances in which an individual planned or ordered a course of criminal conduct. Constructive knowledge was imputed in those cases in which an individual possessed access to information; for

398. See *supra* notes 377-397 and accompanying text.

399. See International Military Tribunal for the Far East, The Tokyo War Crimes Trial (Nov. 1948), reprinted in II THE LAW OF WAR: A DOCUMENTARY HISTORY 1029 (Leon Friedman ed. 1972) [hereinafter Tokyo Trial]. This doctrine was implicitly applied in the Nuremberg trial. See NUREMBERG JUDGMENT, *supra* note 86, at 539 (Ernst Kaltenbrunner), 546 (Wilhelm Frick).

400. Tokyo Trial, *supra* note 399, at 1038. A duty was imposed upon members of the government; military or naval officers in command of formations having prisoners in their possession; officials in those departments which were concerned with the well-being of prisoners; officials, whether civilian, military or naval, having direct and immediate control of prisoners. *Id.*

401. *Id.* at 1039.

402. *Id.* at 1039-40.

example, the memorialization of war crimes in reports or widespread and sustained delicts.⁴⁰³

The Tokyo Tribunal thus relaxed and replaced the *Yamashita* standard with an actual or constructive knowledge requirement.⁴⁰⁴ An individual occupying an authoritative position was not obligated to take affirmative acts absent evidence that he was cognizant of criminal conduct. As a case in point, Shimada Shigetaro, Navy Minister in the Tojo Cabinet between 1941 and 1944 was acquitted. The Tribunal ruled that he had not ordered, authorized, permitted or been aware of the “disgraceful massacres and murders of prisoners.”⁴⁰⁵

However, in the case of an official with plenary power such as Kuniaki Koiso, appointed Prime Minister in 1944, atrocities and crimes were so “notorious” that it was “improbable” that Koiso “would not have been well-informed either by reason of their notoriety or from inter-departmental communications.”⁴⁰⁶ These brutalities were also discussed at a meeting of the Supreme Council for the Direction of War at which the Foreign Minister requested the issuance of a directive discouraging indiscipline. Koiso remained in office for an additional six months during which prisoners and internees continued to be mistreated — “[t]his amounted to a deliberate disregard of duty.”⁴⁰⁷

In addition, a government official with knowledge of war crimes must act in an affirmative and aggressive fashion. Hideki Tojo, Minister of War and then Prime Minister in October 1941, was aware of the casualties which occurred during the Bataan Death March. Tojo had failed to request a report about the event, made only perfunctory inquiries, and refrained from initiating criminal proceedings. He was also aware of the plight of prisoners involved in constructing the Burma-Siam Railway. Yet, Tojo made no effort to improve their billeting, food and hygiene and only brought a single combat commander to trial. Deaths due to starvation and disease continued until the completion of the project.⁴⁰⁸ The condition of prisoners in Japanese custody at the end of the war, as well as the enormous number who died from

403. *Id.* at 1038-40.

404. *See* Tokyo Trial, *supra* note 399. *See also, supra* notes 400-03; and accompanying text.

405. *Id.* at 1149 (Shimada Shigetaro).

406. *Id.* at 1141.

407. *Id.*

408. *Id.* at 1154-55.

starvation, constituted "conclusive proof that Tojo . . . [did not take] proper steps to care for them."⁴⁰⁹

As for a high-ranking official who receives assurances that criminal conduct will be curtailed, he may not ignore continued reports of criminal conduct. For instance, when Japanese troops entered Nanking in December 1937, an estimated twelve thousand non-combatants were killed during the first few days alone. Twenty thousand were raped during the initial month of occupation. The death toll of civilians and prisoners of war in the first six weeks reached two hundred thousand.⁴¹⁰ Foreign Minister Koki Hirota learned of the atrocities through diplomatic reports and newspaper accounts. The War Ministry assured Hirota that the atrocities would be halted. The brutalities nevertheless continued for roughly a month. The Tribunal ruled that Hirota was derelict in failing to take all available action, including a demand that the Cabinet quickly end the atrocities. Instead, he was "content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to negligence."⁴¹¹

Finally, an official who orders a halt in criminal conduct has the duty to ensure compliance with his commands. Heitaro Kimura was appointed Commander-in-Chief of the Burma Area Army. Kimura's first act was to admonish his troops to act in a professional fashion and to respect prisoners. However, atrocities continued in the vicinity of his headquarters and he failed to issue additional disciplinary directives. The Tribunal ruled that

[t]he duty of an army commander in such circumstances is not discharged by the mere issue of . . . orders. . . . His duty is to take such steps and issue such orders as will prevent . . . war crimes and to satisfy himself that such orders are being carried out. This he did not do. . . . [H]e deliberately disregarded his legal duty to take adequate steps to prevent breaches of the law of war.⁴¹²

As a case in point, Iwane Matsui was commander of the Central China Area Army during the siege and seizure of Nanking. He issued orders prior to the city's capture, cautioning against war

409. *Id.* at 1155.

410. *Id.* at 1061-62.

411. *Id.* at 1134.

412. *Id.* at 1140.

crimes. The Tribunal concluded that Matusi must have been aware that these orders were being disregarded. "He had the power as he had the duty to control his troops and to protect the unfortunate citizens of Nanking. He must be held criminally responsible for his failure to discharge this duty."⁴¹³

B. Prosecutions Under Control Council Law No. 10

In the *Hostage* case, the Tribunal imposed a duty on military officials to investigate suspected criminal conduct. The Court ruled that the commanding general of occupied territory is charged with the responsibility of maintaining peace and order and is accountable for the conduct of all military units within the scope of his territorial jurisdiction, regardless of whether they are within his chain of command. A military officer is considered to possess constructive knowledge of reports transmitted to headquarters as well as notorious events and occurrences within his territorial command.⁴¹⁴

The Tribunal elaborated upon the scope of this duty in convicting Field Marshal Wilhelm List, Commander of German forces in Greece and Yugoslavia. List's absence from headquarters did not relieve him of responsibility for acts carried out in accordance with his orders but he would not be charged with acts committed in his absence by troops in response to orders issued outside his chain of command. He was, however, required to rescind those illicit orders which were brought to his attention and to take steps to prevent a recurrence of such activity.⁴¹⁵

In addition, List was under a duty to remain informed of events within his territorial command and to request additional information to supplement facially inadequate or incomplete reports. A lack of awareness of a report or a failure to investigate a deficient report did not constitute a defense.⁴¹⁶ List received reports recounting the killing of thousands of innocents in reprisal for the acts of partisans. These executions had not been carried out by troops under his command but the Tribunal rejected List's claim of an absence of authority: "The authority is inherent in his

413. *Id.* at 1142. A staff officer in a subordinate position with knowledge of atrocities who lacked the authority to take steps to halt the atrocities was not criminally liable for a failure to act. See Tokyo Trial *supra* note 399, at 1144 (Akira Muto).

414. *Hostage Judgment*, *supra* note 121, at 1256. See also *id.* at 1271.

415. *Id.* at 1271.

416. *Id.*

position. . . . [T]he primary responsibility for the prevention and punishment of crime lies with a commanding general[,] a responsibility from which he cannot escape by denying his authority over the perpetrators."⁴¹⁷ Defendant Hermann Foertsch was chief of staff under List. Foertsch was aware of the execution of reprisal prisoners, but was acquitted based upon a lack of command authority.⁴¹⁸

A military commander in List's position was, according to the Tribunal, also required to restrain the recurrence of reported atrocities. For instance, defendant Walter Kuntze, appointed Deputy Armed Forces Commander Southeast in October 1941, neither ordered the shooting nor the transfer of Jews to the camps. Kuntze was nevertheless cognizant that his troops were detaining and deporting Jews and yet, he "acquiesced in their performance when his duty was to intervene to prevent their recurrence."⁴¹⁹ In the same situation, defendant Hubert Lanz's explanation that he was too preoccupied to prevent the continuance of illicit reprisals was dismissed as a "lame excuse. The unlawful killing of innocent people is a matter that demands prompt and efficient handling by the highest officer of any army."⁴²⁰

Following the ruling of the *Hostage* Tribunal, liability was limited to those military officials with actual or constructive knowledge of criminal activity in the *High Command* case as well. The court argued that "[m]ilitary subordination is . . . not conclusive . . . in fixing criminal responsibility. . . . A high commander cannot keep completely informed of the details of military operations . . . [;][h]e has the right to assume that details entrusted to . . . subordinates will be legally executed."⁴²¹ The imposition of criminal culpability on military commanders required either deliberate dereliction or gross criminal negligence.⁴²² The strict liability standard was considered by the judges to "go far beyond

417. *Id.* at 1272.

418. *Hostage Judgment*, *supra* note 121, at 1286. "His mere knowledge of the happening of unlawful acts does not meet the requirements of criminal law. He must be one who orders, abets, or takes a consenting part in the crime." *Id.*

419. *Id.* at 1279-80.

420. *Id.* at 1311.

421. *High Command Judgment*, *supra* note 146, at 543. "The President of the United States is Commander in Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command." *Id.*

422. *Id.* The personal neglect must amount to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. *Id.* at 543-44.

the basic principles of criminal law as known to civilized nations."⁴²³

The Tribunal also recognized, as the *Hostage* case did, a military commander's territorial responsibility for troops not attached to his command.⁴²⁴ The court stated that an occupational commander is endowed with executive authority and is obligated to maintain order and to protect the civilian population. Absent a directive limiting a commander's executive powers, he possesses the right and duty to curb crime.⁴²⁵ However, liability only attaches in those instances where an occupying commander possesses actual or constructive knowledge of these offenses and either acquiesces, participates or criminally neglects to intervene.⁴²⁶

The Tribunal narrowly applied the criminal intent standard and resisted imputing knowledge to commanders based upon the size and scale of the activities of killing squads. In many instances, these executions were far removed from military headquarters and reports were routed through the security police in Berlin. The most visible and notorious killings were attributed to local pogroms and ethnic persecutions. The Tribunal thus refused to impute knowledge to the defendants and instead examined whether they possessed actual knowledge of the *Einsatzgruppen's* illicit activities.⁴²⁷

Clearly, in the case of Georg Karl Friedrich-Wilhelm von Kuechler, successor to von Leeb as Commander of Army Group North in 1942, numerous reports detailing illegal executions were brought to von Kuechler's attention. In fact, "he not only tolerated but approved the execution of these orders."⁴²⁸ Henry Hoth,

423. *Id.* at 544.

424. High Command Judgment, *supra* note 146, at 544-45. "It cannot be said that he exercises the power by which a civilian population is subject to his invading army while . . . the state which he represents may come into the area . . . and subject the population to murder of its citizens and to other inhuman treatment." *Id.* at 544. The Tribunal distinguished *Yamashita* based on the fact that Yamashita possessed complete control in the Philippines. The crimes in the *High Command* case, in contrast, were committed at the insistence of higher military and Reich authorities. *Id.*

425. *Id.* at 547.

426. *Id.* at 545. The Tribunal also based a commander's responsibility on the executive power vested in military commanders under the handbook for the general staff in wartime. This assigns occupying commanders with the responsibility for the maintenance of law and order. High Command Judgment, *supra* note 146, at 545-46.

427. *Id.* at 547-48. The *Einsatzgruppen* were formally charged with providing security behind military lines. *Id.*

428. *Id.* at 568.

Commander of the 17th Army attached to Army Group South, was also aware of the activities of the killing squads within his territorial command but instructed his chief of staff to halt the squad's activities. Hoth's troops nevertheless continued to transfer prisoners and Jews to the security police for execution and Hoth was convicted of having failed to safeguard the civilian population.⁴²⁹

Overall, absent reports, it was difficult to establish actual awareness. Prisoners of war within Field Marshal Wilhelm von Leeb's territorial command, for instance, were under the supervision of the quartermaster general who relied on officers subordinate to von Leeb. The Tribunal ruled that von Leeb had the right to assume that his officers were properly performing their assignments. The use of prisoners in dangerous localities and occupations was "obviously illegal under international law but there is no substantial evidence that such illegal uses . . . were ever brought to the attention of the defendant."⁴³⁰ Von Leeb was not found to have been aware of the activities of the *Einsatzgruppen*. Only the murder of forty thousand at Kovno (Riga) was indisputably brought to his attention, and this was attributed to a local Latvian self-defense organization. Von Leeb fulfilled his duty and affirmatively acted to prevent a recurrence of such incidents. The Tribunal concluded that von Leeb had not known that the *Einsatzgruppen* was carrying out exterminations and thus had not acquiesced in the killings.⁴³¹

The *WVHA* case addressed the issue of constructive knowledge as well, ruling that the murders and atrocities committed in the Ukraine by the troops under the command of Erwin Tschentscher were "not of sufficient magnitude or duration to constitute notice . . . and . . . [to] give him [Tschentscher] an opportunity to control their actions."⁴³² But, a defendant may not ignore obvious facts and raise the defense of a lack of knowledge. An additional defendant in *WVHA*, Karl Mummenthey, directed various industries owned and operated by the Security Police.

429. *Id.* at 595-96.

430. High Command Judgment, *supra* note 146, at 558.

431. *Id.* at 561-62. In terms of his criminal liability, the Tribunal determined that it was immaterial whether von Leeb knew that the killings were carried out under governmental sponsorship or that he believed that the *Einsatzgruppen* were acting autonomously. *Id.* at 561.

432. United States v. Oswald Pohl, V TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, 958, 1011 (1950) [hereinafter *WVHA JUDGMENT*].

Despite Mummmenthey's frequent visits and receipt of reports, he protested that he lacked awareness of the conditions in the industrial plants and work camps. The Tribunal ruled that "Mummmenthey's assertions . . . [do] not exonerate him. It was his duty to know."⁴³³

Constructive knowledge also involves an element of judicial discretion. Was it credible to claim that a defendant was unaware of the illicit activities of the killing squads? An American tribunal determined that this was true in the case of Field Marshal Erhard Milch. The Tribunal found that Milch neither received reports nor attended conferences discussing the high altitude and freezing experiments. It decided that he was unaware that humans were involuntarily subjected to experimentation. The Tribunal acquitted Milch of complicity in the experiments, accepting the defense that he had turned responsibility over to a subordinate department and was preoccupied with other concerns.⁴³⁴

In a similar case, three members of I.G. Farben were board members in the Degesch firm in which Farben possessed a forty percent interest. Defendants Wilhelm Mann, Heinrich Hoerlein and Karl Wurster were charged with approving the company's provision of Zyklon-B gas which fueled the death chambers in the concentration camps. The Farben Tribunal decided that neither the volume of production nor the fact that large shipments were destined for concentration camps was sufficient to place the board of directors on notice that inmates were being exterminated. The court concluded that the defendants may have reasonably believed that the gas was being used to disinfect displaced persons congested in the concentration camps.⁴³⁵ The same defendants were also charged for knowingly providing drugs which were used in spotted fever and typhus experiments in the concentration camps. The Tribunal dismissed the charge and found that Farben had discontinued dispatching drugs as soon as the firm suspected such activity in the camps.⁴³⁶

The American Tribunal in the *Medical* case also imposed an affirmative duty on high-level officials to investigate medical experiments. Defendant Karl Brandt, Reich Commissioner for

433. *Id.* at 1055.

434. Milch Judgment, *supra* note 183, at 773-78.

435. Farben Judgment, *supra* note 328, at 1168-69.

436. *Id.* at 1171-72. The question whether the defendants were on notice of the experiments centered on whether the German word "*Versuch*" in the doctor's reports connoted "experiment" or "test." *Id.* at 1172.

Medical and Health Services, was given plenary authority over the medical field and charged with a positive duty to supervise medical protocols involving human subjects. He received reports and attended meetings describing sulfanilamide experiments in which seventy-five persons had been intentionally and involuntarily infected and treated with various anti-infectious diseases. Brandt neither objected nor investigated the experiments; had he made an effort he could have ascertained that non-German nationals were being involuntarily subjected to these protocols and that additional experiments were planned for the future.⁴³⁷ The Tribunal stated that had defendants such as Brandt exercised their responsibility, "great numbers of non-German nationals would have been saved from murder."⁴³⁸

Brandt was also in charge of the euthanasia program. He conceded that he was involved in the extermination of so-called "incurables," but testified that he was unaware that Jews and other non-German internees were part of euthanasia experiments. The Tribunal ruled that Brandt's failure to monitor the euthanasia program constituted "the gravest breach of duty. . . . [W]hatever may have been the original aim of the program, its purposes were prostituted by men for whom Brandt was responsible, and great numbers of non-German nationals were exterminated under their authority."⁴³⁹

Clearly, military and civilian officials are responsible for insuring lawful conduct within their operational and territorial command. The duty of military officers with jurisdiction over occupied territory also extends to units outside the chain of command.⁴⁴⁰ An official who either intentionally or negligently fails to respond to reports or to notorious facts and circumstances is criminally culpable⁴⁴¹ and factually deficient reports are required to be investigated and supplemented.⁴⁴² Since actual knowledge was difficult to establish, absent reports, courts were inconsistent in their application of the constructive knowledge standard.⁴⁴³

437. *United States v. Brandt*, II TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 193-94 (1950) [hereinafter *Medical Judgment*].

438. *See id.* at 207 (Siegfried Handloser).

439. *Id.* at 197.

440. *See supra* notes 414-18 and accompanying text.

441. *See supra* notes 419-20 and accompanying text.

442. *See supra* note 416 and accompanying text.

443. *See supra* notes 426-27 and 430-34 and accompanying text.

C. *Other Allied War Crimes Prosecutions*

Other Allied courts adhered to the contours of the *Yamashita* decision and appeared to hold German and Japanese military commanders strictly liable for war crimes. *SS Brigadeführer* Kurt Meyer was convicted by a Canadian military court of willful and criminal negligence and failure to perform his duties as a military commander. Evidence was adduced that Canadian prisoners of war had been interrogated and then shot within one hundred meters of Meyer's headquarters. Meyer was in his headquarters at the time, but claimed to have been unaware of the killings.⁴⁴⁴ The proximity of the killings to Meyer's headquarters presumably led the panel to conclude that he had either ordered or countenanced the murders.⁴⁴⁵ Similarly, Kurt Student, the Commander-in-Chief of the German forces in Crete, was found guilty of the killing and illegal employment of prisoners. The court determined that these executions would not have occurred absent a belief by the German troops that they had been either ordered or condoned by Student.⁴⁴⁶

In the Pacific theater Takashi Sakai, commander of Japanese forces in South China between 1941 and 1943, was convicted of inciting or permitting his troops to engage in atrocities.⁴⁴⁷ The Tribunal rejected Sakai's claim that he had been unaware of these acts and therefore should be exonerated. "That a field Commander must hold himself responsible for the discipline of his subordinates, is an accepted principle. It is inconceivable that he should not have been aware of the acts of atrocities committed by his subordinates."⁴⁴⁸ Lieutenant General Baba Masao, General Officer commanding the 37th Japanese Army in Borneo, acted on an order to move one thousand American and British prisoners sixty-five miles from Sankakan to Ranau. The order had been issued prior to Masao's assumption of command but he was aware of the

444. Trial Of S.S. *Brigadeführer* Kurt Meyer (Canadian Milit. Ct., Aurich, Germany, Dec. 10-28, 1945), IV LAW REP. TRIALS WAR CRIM. 97, 101-04, 106-07 (1948) [hereinafter *The Abbaye Ardenne Case*].

445. *Id.* at 108. Meyer was originally sentenced to death by shooting, but this was commuted to life imprisonment. *Id.* at 109.

446. Trial Of Kurt Student (Brit. Milit. Ct., Luneberg, Germany, May 10, 1946), IV LAW REP. TRIALS WAR CRIM. 118-120 (1948). See also *id.* at 124 (Notes on the Case).

447. Trial Of Takashi Sakai (Chinese War Crimes Milit. Trib., Nanking, Aug. 19, 1946), XIV LAW REP. TRIALS WAR CRIM. 1 (1949).

448. *Id.* at 7 (Notes on the Case).

prisoners' dilapidated condition and nevertheless permitted the march to proceed by ordering the reconnaissance of the route. Many died of disease and ill-treatment, and others were shot. Masao ordered the evacuation of the remaining 540 prisoners six months later; but only 183 reached Ranau. Thirty-three survived the next two months and were subsequently shot. Masao was ultimately convicted and executed.⁴⁴⁹ The military panel presumably relied on the instructions of the Australian Judge Advocate who cited *Yamashita* and found that Masao had an affirmative duty to take such measures as were within his power and appropriate under circumstances to protect the prisoners.⁴⁵⁰

D. *The Sabra And Shatilla Incidents*

The most complete contemporary discussion of command responsibility involved the incursion into the Sabra and Shatilla refugee camp. This event arose when Lebanese President-elect and Christian Phalangist leader Bashir Jemayel was assassinated in a car bomb explosion in September 1982. Israeli defense forces (I.D.F.) entered West Beirut in order to prevent an escalating cycle of violence. The Israelis were fearful of close-order combat and sent the Phalangists into the Sabra and Shatilla refugee camp in order to denominate and detain Palestinian terrorists. The Phalangists were ordered to respect civilians because they were known to disregard legalities and were eager for revenge. Nevertheless, their rage erupted inside the camp resulting in the execution of between seven and eight hundred civilians.⁴⁵¹

There was no evidence that Israeli troops participated in the killings or that the slaughter was visible from their observation post. But a commission of inquiry determined that Israel bore international responsibility:

If . . . West Beirut may be viewed . . . as occupied territory . . . then it is the duty of the occupier, according to . . . international law, to do all it can to ensure the public's well-being and security. Even if these legal norms are invalid . . . as far as the obligations applying to every civilized nation and ethical rules

449. Trial Of Lieutenant General Baba Masao (Australian Milit. Ct., Rabaul, May 28, 1947), XI LAW REP. TRIALS WAR CRIM. 56-57 (1949).

450. *Id.* at 59 (Notes on the Case).

451. Israel: Final Report Of The Commission Of Inquiry Into The Events At The Refugee Camps In Beirut, Final Report, 22 I.L.M. 473, 478-81, 491 (1983) [hereinafter Committee Of Inquiry].

accepted by civilized peoples go, the problem of indirect responsibility cannot be disregarded.⁴⁵²

A degree of responsibility was imposed on Prime Minister Menachem Begin because he was informed of the Phalangist incursion thirty-six hours following their entry into the camp. The Commission concluded that he had justifiably relied on the calming reports issued by subordinates. However, had Begin expressed concern, the Defense Minister may have been alerted and adopted protective measures.⁴⁵³

In the case of Defense Minister Ariel Sharon the commission recommended his dismissal.⁴⁵⁴ Sharon had authorized the Phalangist entry into the camps, explaining that no warning had been issued by the intelligence services. Sharon need not have possessed prophetic powers in order to have anticipated the danger of slaughter since he was well-acquainted with the Phalangists. Furthermore, as a politician responsible for security affairs, he possessed a duty to safeguard the residents of the camps.⁴⁵⁵

Lieutenant General Rafael Eitan, Chief of Staff in the Defense Ministry, was also deemed to have breached his duty when he approved the Phalangists' entrance into the camps without insuring the safety of the residents. He immediately met with the Phalangist commanders upon receiving the first reports of atrocity. Eitan testified that he believed the report to be erroneous since the Phalangists failed to mention the killings. Instead of canceling the operation he permitted additional Phalangists to enter the camp and provided tractors to bulldoze terrorist concentrations. The Phalangists may have reasonably concluded that the I.D.F. condoned or encouraged the killings.⁴⁵⁶

Similarly, Major General Yehoshua Saguy, Director of Israeli Military Intelligence, claimed that although he had been present during discussions, he had been unaware of the decision to permit the Phalangists to enter the camp. The Commission concluded that he had demonstrated "indifference and a conspicuous lack of concern, of shutting of eyes and ears to a matter regarding which it was incumbent on the director of the intelligence arm . . . to

452. *Id.* at 496.

453. *Id.* at 501.

454. *Id.* at 519.

455. *Id.* at 501-02.

456. Committee of Inquiry, *supra* note 451, at 505-07.

open his eyes and listen well to all that was discussed and decided."⁴⁵⁷ Brigadier General Amos Yaron was present at the forward command post and received three reports of killings. He promptly admonished the Phalangist liaison officer, but failed to convey these reports to his superiors. Yaron also permitted additional Phalangist forces to enter the camp and made no effort to monitor their movements.⁴⁵⁸

Major General Amir Drori, head of the Northern Command, was held responsible for their neglects. He received a report of possible killings, promptly ordered a cessation of Phalangist operations, telephoned the Defense Ministry and attempted to persuade the Lebanese Army to restore order in the camp. The Commission concluded that Drori had acted "properly, wisely, and responsibly."⁴⁵⁹ But he also neglected to investigate the reported killings and failed to urge Lieutenant General Eitan to raise the issue when Eitan met with the Phalangists in Beirut. The Commission concluded that the latter constituted a breach of duty.⁴⁶⁰

The Commission regretted that Israeli civilian and military officials failed to halt the massacre. Combatants are required to be courageous "[b]ut the end never justifies the means, and basic ethical and human values must be maintained in the use of arms."⁴⁶¹

Ultimately, the Israeli Commission of Inquiry imposed vicarious liability on civilian and military officials.⁴⁶² These individuals were considered to have an affirmative duty to anticipate the danger accompanying the Phalangist incursion into Sabra and Shantilla and to investigate reports of atrocities.⁴⁶³ This duty required closely monitoring the activities of the Phalangists,⁴⁶⁴ expressing concern to cabinet ministers,⁴⁶⁵ transmitting information to higher officials,⁴⁶⁶ interrogating Phalangist officers⁴⁶⁷ and

457. *Id.* at 508. He made no effort to contact the Defense Minister or Chief of Staff following the Phalangist entry into the camps and the first report of killing. *Id.* at 509.

458. *Id.* at 513.

459. *Id.* at 511.

460. Commission of Inquiry, *supra* note 451, at 512.

461. *Id.* at 519.

462. *See generally* Commission of Inquiry.

463. *See supra* text accompanying notes 453, 455-57, 460.

464. *See supra* text accompanying notes 456 and 457.

465. *See supra* text accompanying notes 458 and 460.

466. *See supra* text accompanying notes 458 and 460.

467. *See supra* text accompanying notes 456 and 460.

halting Phalangist operations in the camps following the receipt of reports.⁴⁶⁸

E. Summary

The imposition of vicarious liability on military officers is an accepted component of the international code of war.⁴⁶⁹ The doctrine was first foreshadowed in the *Yamashita* case which imposed strict liability on command authorities in occupied territories.⁴⁷⁰ The Tokyo War Crimes Tribunal extended this precedent to civilian as well as military officials. The latter adhered to an actual or constructive knowledge standard and imposed duties of investigation and intervention upon officials to curb war crimes.⁴⁷¹ The *Hostage* and *High Command* cases extended an officer's liability to the territorial scope of his or her command and adhered to the Tokyo standard.⁴⁷² Other Allied tribunals reverted to the strict liability standard.⁴⁷³ The Israelis' inquiry into the killings at Sabra and Shatilla returned to the Tokyo investigation and intervention standard.⁴⁷⁴

The strict liability standard imposes liability on commanding officers for the transgressions of their troops. Application of strict liability promotes diligence by military commanders and thus furthers the humanitarian law of war by limiting harm to innocents.

468. See *supra* text accompanying notes 458 and 459.

469. See Protocol I, *supra* note 274, at art. 86.

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Convention or of this Protocol which result from a failure to act when under a duty to do so.

2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal 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.

Id.

470. See *supra* text accompanying notes 377-98.

471. See *supra* text accompanying notes 399-413.

472. See *supra* text accompanying notes 414-31.

473. See *supra* text accompanying notes 444-46.

474. See *supra* text accompanying notes 451-68.

There are nevertheless equitable objections to imposing liability on an officer for the actions of his or her subordinates.⁴⁷⁵

Actual knowledge is difficult to establish other than in the limited instances in which a commander is physically present or has planned or ordered a military operation. This standard also fails to capture the informal communication within a bureaucratic structure and has been characterized as "an invitation to the commander to see and hear no evil. It is not consistent with a serious effort to make the command structure responsive to the humanitarian goals involved."⁴⁷⁶

The constructive knowledge standard vests inordinate discretion in the finder of facts leading to inconsistent and irreconcilable verdicts, and offers civilian and military decision-makers limited guidance. But this certainly encourages command authorities to closely monitor the activities of their troops.⁴⁷⁷ Judge Kenneth A. Howard instructed the jury that "[t]he mere presence at the scene without knowledge will not suffice While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or are about to commit atrocities."⁴⁷⁸ Critics noted that a proper application of the Yamashita strict liability standard would have resulted in a conviction.⁴⁷⁹

There would seem to be little controversy over holding a commander liable for knowingly failing to intervene because high-echelon officials have a legal and moral duty to intervene. But some dilemmas still exist. Should an officer also be held jointly and severally liable for the wrongs of those under his or her command given the precarious contours of command and control? Does joint and several liability unacceptably replace personal with collective liability? Is this merely a mechanism to impose criminal punishment in those instances in which the prosecution of the perpetrators is precarious or problematic?

475. See Roger S. Clark, *Medina: An Essay On The Principles Of Criminal Liability For Homicide*, 5 RUT.-CAM. L.J. 59, 70-78 (1973).

476. *Id.* at 78.

477. See *id.* at 69-78.

478. Kenneth A. Howard, *Command Responsibility For War Crimes*, 21 J. PUB. L. 7, 11 (1972).

479. See Clark, *supra* note 475.

V. Good Motive

The motive which animates a criminal act is ordinarily irrelevant in determining guilt. Consideration of motive is limited to the sentencing phase. "[O]nce the commission of a crime is established—the doing of a prohibited act with the necessary intent—proof of a good motive will not save the accused from conviction."⁴⁸⁰ A concern with motive is conceived as an invitation for chaos:

[n]o civilized nation can endure where a citizen can select what law he would obey because of his moral or religious belief [C]haos would exist if an individual were permitted to impose his beliefs upon others and invoke justification in a court to excuse his transgressions of a duly enacted law.⁴⁸¹

Motives are immeasurable: one person's magnanimity may appear malevolent and misguided to another. The introduction of motive at the guilt-determination phase presents a range of problems. How can a court establish that a criminal act was animated by a particular motive? Which motives are exculpatory? What acts may be excused? How is the balance between harm and motive calibrated? Must the act achieve the actor's aspiration? The Fourth Circuit Court of Appeals, in upholding the conviction of anti-Vietnam war protesters who had destroyed draft records, stated that absolving the defendants would mean that those who breached the law in order to propel the prosecution of the war would also merit acquittal. This would invite disorder rather than democracy: "[n]o legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable."⁴⁸²

480. *United States v. Berrigan*, 283 F. Supp. 336, 338 (D. Md. 1968), *aff'd sub nom.*, *United States v. Eberhardt*, 417 F.2d 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 909 (1970). *See also* *United States v. Boardman*, 419 F.2d 110, 114 (1st Cir.), *cert. denied*, 397 U.S. 997 (1969).

481. *Berrigan*, 283 F. Supp. at 339.

482. *United States v. Moylan*, 417 F.2d 1002, 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970). The so-called Berrigan instruction provides that:

Intent and motive should never be confused. Motive is that which prompts a person to act. Intent refers only to the state of mind with which the act is done. Personal advancement, financial gain, political reason, religious beliefs, moral convictions or some adherence to a higher law even of nations are well recognized motives for human conduct. These motives may prompt one person to voluntary acts of good and another

Defendant Ernst von Weizsaecker was the most prominent defendant to proffer the good motive defense, claiming that he should be acquitted based on his secret resistance to Hitler's regime. Von Weizsaecker was appointed State Secretary under Foreign Minister Joachim von Ribbentrop in 1938. He was not privy to the conferences at which Hitler planned his imperialist program; his role was to carry out the *Führer's* criminal commands.⁴⁸³

Von Weizsaecker claimed to have countered rather than collaborated with the Nazi regime. He testified that he had been convinced that the *Führer's* policies would lead to "death, disaster and destruction."⁴⁸⁴ As a result, von Weizsaecker devoted himself to frustrating Hitler's aspirations and enlisted in the anti-Nazi resistance. The court rejected von Weizsaecker's good motive defense and ruled that an altruistic attitude cannot compensate for criminal conduct.

We reject the claim that good intentions render innocent that which is otherwise criminal, and which asserts that one may with impunity commit serious crimes, because he hopes thereby to prevent others, or that general benevolence toward individuals is a cloak or justification for participation in crimes against the unknown many.⁴⁸⁵

A defendant seeking exoneration based on the fact that "while apparently acting affirmatively he was in fact acting negatively" was required to demonstrate that "he did all that lay in his power to frustrate a policy which outwardly he appeared to support. If . . .

to voluntary acts of crime. The law does not recognize political, religious, moral convictions or some higher law as justification for the commission of a crime no matter how good that motive may be. The reason this is so is that such personal motives or firm beliefs, if you will, would enable the individual holder to select the law which he would obey according to those beliefs. These personal convictions could prompt him to steal, rob, commit assaults upon those holding contrary views and even to kill, under certain circumstances.

United States v. Pearl, 584 F.2d 1316, 1322 n.6 (4th Cir. 1978) *cert. denied*, 439 U.S. 1130 (1979).

483. United States v. von Weizsaecker, XIV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, 314, 340-41 (1950) [hereinafter *Ministries Judgment*].

484. *Id.* at 341.

485. *Id.* at 341-42. The Tribunal noted that the defense that an individual was opposed to the policies which he or she was carrying out was "readily available to the most guilty." *Id.* at 341.

he so acted, we are not interested in his formal, official declarations, instructions, or interviews with foreign diplomats."⁴⁸⁶

Von Weizsaecker wrote von Ribbentrop in April 1941 advising against the invasion of the Soviet Union. He believed that this would detract from the central concern: the defeat of England. Still, von Weizsaecker maintained a stoic silence and did not disclose that Germany intended to invade Russia in a meeting with the Soviet ambassador.⁴⁸⁷

The Tribunal acquitted von Weizsaecker of waging a war of aggression based on his challenge to the invasion of Russia. He was not held responsible for deceiving the Russian ambassador because he was compelled to communicate through an interpreter who might not have conveyed the content of the conversation. The possibility that Hitler might postpone or cancel the invasion also existed. Most importantly, the revelation of the Russian offensive would have led to the suffering and death of thousands of German conscripts.⁴⁸⁸ Von Weizsaecker could certainly not be required to betray his own country. The Tribunal ruled that "the failure to advise a prospective enemy of the coming aggression in order that he may make military preparations which would be fatal to those who in good faith respond to the call of military duty does not constitute a crime."⁴⁸⁹

Von Weizsaecker also opposed the plans to penetrate the Low Countries. Yet, he pressured Belgium to accede to German authority while continually denying that the Reich planned to invade.⁴⁹⁰ The Tribunal found that such "misdoing[s]" were overshadowed by von Weizsaecker's continual contesting of German policy. "Even a stout heart for a time might fail under these circumstances, and the lethargy of futility take its place. . . .

486. *Id.* at 356.

487. Ministries Judgment, *supra* note 483, at 381-82.

488. *Id.* at 382-83.

489. *Id.* at 383. "We are not to be understood as holding that one who knows that a war of aggression has been initiated is to be relieved from criminal responsibility if he thereafter wages it, or if, with knowledge of its pendency, he does not exercise such powers and functions as he possesses to prevent its taking place." *Id.* Von Weizsaecker was even more enthusiastic in opposition to the *Führer's* Polish policy. He subtly sent messages to other continental countries to anticipate an armed invasion, implored Italy to dissuade the *Führer* and connived to arrange a peace conference between Germany and Poland. The Tribunal noted that he "used every means in his power to prevent the catastrophe." *Id.* at 369. But, he did attempt to persuade the English to limit their support of Poland. Ministries Judgment, *supra* note 483, at 357.

490. *Id.* at 376-78.

Even heroes have their bad days, he should not be held to a stricter test."⁴⁹¹

However, as Foreign Secretary, von Weizsaecker was consulted on policies pertaining to foreign Jews and was aware of plans for the Final Solution.⁴⁹² There is little evidence that he endeavored to delay their deportation and death.⁴⁹³ Von Weizsaecker approved the deportation of six thousand French Jews in March 1944 with the comment, "to be selected by the police." Neither von Weizsaecker nor his deputy, Ernst Woermann,

questioned its propriety, objected . . . or protested . . . or availed themselves of the opportunity to suggest . . . that even from the viewpoint of German foreign policy its execution would be a catastrophic mistake . . . [and] would arouse a wave of horror and resentment throughout the world. Neither [defendant] . . . suggests it was other than a flagrant violation of international law and . . . of the Hague Convention.⁴⁹⁴

The Tribunal refused to accept von Weizsaecker's claim that he believed that the Jews were in greater peril in France, where they were subject to reprisals, than in Auschwitz. The defendants "knew and were well-informed of the fate of any Jew who came into the tender hands of the SS and Gestapo; they knew what had been the fate of the Jews of Poland, the Baltic states and Russia; they knew what had been the horrible fate of German Jews."⁴⁹⁵

Von Weizsaecker pled that he had harbored mental reservations, but remained in office so as to serve the resistance by gathering intelligence and to promote peace. The Tribunal stated that this might be considered in mitigation, but did not constitute a defense to war crimes or crimes against humanity: "One cannot give consent to or implement the commission of murder because by so doing he hopes eventually . . . to rid society of the chief murderer. The first is a crime of imminent actuality while the

491. *Id.* at 378. The Tribunal initially convicted von Weizsaecker of complicity in the seizure of Bohemia and Moravia, determining that his opposition was "anemic" and that he had misled the Czechs, British and French. *Id.* at 350. "Silent disapproval is not a defense to action." *Id.* at 354. The Tribunal later reversed this finding. See Von Weizsaecker—Order And Memorandum Of The Tribunal And Separate Memorandum Of Presiding Judge Christianson, *id.* at 950 [hereinafter Order And Memorandum].

492. Ministries Judgment, *supra* note at 483, 475-91.

493. *Id.* at 494.

494. *Id.* at 496. Initialing a draft signified formal approval, regardless of the signator's mental reservations. *Id.* at 497.

495. Ministries Judgment, *supra* note 483, at 497.

second is but a future hope.”⁴⁹⁶ As State Secretary, von Weizsaecker was under a duty to resist involvement in war crimes and crimes against humanity. This obligation is not satisfied by “saying or doing nothing . . . [B]eing a member of that [resistance] movement did not justify one in becoming a party to the program of the murder of Jews.”⁴⁹⁷ “There is a vast difference between saying ‘no’ and saying ‘no objection.’ The first would exonerate, the second is criminal.”⁴⁹⁸ Von Weizsaecker’s seven year sentence⁴⁹⁹ was ultimately reduced to time served.⁵⁰⁰

Sympathy for the resistance was not enough to exonerate an official either. Defendant Schwerin von Krosigk, Reich Minister of Finance and an Oxford-educated Rhodes Scholar, was devoted to his family and religion and exhibited a stringent and simple lifestyle. He quelled his purported inner opposition and remained in office out of a sense of patriotism in order to provide balance in the bureaucratic debates.⁵⁰¹ As Minister of Finance, he issued and signed regulations for the levying of fines and the confiscation of Jewish property.⁵⁰² Yet, his contributions paled in comparison to his crimes.

A troubled conscience is not a defense for acts which are otherwise criminal. Nor can we hold that he who signed, cosigned, executed, or administered measures which violate international law, because he thought that acquiescence would enable him to maintain and safeguard the integrity of his department and the career of his officials or even the life or liberty of individuals whose cases came to his attention, but who by his actions condemned the great inarticulate mass to persecution, mistreatment, brutality, imprisonment, deportation, and extermination, escapes responsibility for his conduct.⁵⁰³

496. *Id.* at 497-98.

497. *Id.* at 498.

498. Order And Memorandum, *supra* note 491, at 959.

499. Ministries Judgment, *supra* note 483, at 866.

500. See Statement of the High Commissioner for Germany, Jan. 31, 1951, upon Announcing His Final Decisions Concerning Requests for Clemency for War Criminals Convicted at Nuernberg, XV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, 1176, 1189 (1950) [hereinafter Ministries Case].

501. Ministries Judgment, *supra* note 483, at 671-72. He contended that he had protected civil servants from being purged and had alleviated the crushing billion dollar fine levied on the Jewish community by Hitler. Nevertheless, von Krosigk conceded that all those who had come in contact with the Nazi regime had been corrupted. *Id.* at 672-73.

502. *Id.* at 675-79.

503. *Id.* at 674-75.

Membership in the resistance was also not an excuse from responsibility. Wolfram Sievers, business manager of the Ahnenerbe Society for racial research, and a direct subordinate of Heinrich Himmler, was responsible for funding and organizing research. He obtained experimental subjects from the concentration camps for use in high altitude, freezing, mustard gas, sea water and typhus experiments. He was also involved in the murder of 112 Jews whose skeletons were used to complete a collection at Strasbourg University.⁵⁰⁴

Sievers claimed to be a member of a secret resistance movement in 1933. The underground group was dedicated to the assassination of Hitler and Himmler and to the overthrow of the Nazi regime. He obtained a position in the Ahnenerbe Society in order to be close to the Reich leadership. The Tribunal held that, even if these claims were true, Sievers' underground activities did not constitute a defense to the murder of "countless thousands of wretched concentration camp inmates who had not the slightest means of resistance. . . . It certainly is not the law that a resistance worker can commit no crime, and least of all, against the very people he is supposed to be protecting."⁵⁰⁵

In some instances defendants unsuccessfully claimed that their successors would prove pernicious and unprincipled. Franz Schlegelberger served as Secretary of State in the Justice Ministry under Reich Minister Franz Guertner. He resigned in August 1942 after roughly eighteen months in office. Schlegelberger asserted that he had sheltered the justice process from assault by Hitler and his henchmen. But the price was exorbitant; he converted the courts into a blunt instrument of racial and political repression.⁵⁰⁶

Schlegelberger was convicted and sentenced to life imprisonment.⁵⁰⁷ The Tribunal observed in the *Justice* judgment that "he loathed the evil that he did, but he sold that intellect and that scholarship to Hitler for a mess of political pottage and for the vain hope of personal security."⁵⁰⁸

504. Medical Judgment, *supra* note 437, at 254-61.

505. *Id.* at 263. The fact that an individual joined the resistance following his departure from the Nazi regime also was not recognized as a defense. See WVHA Judgment, *supra* note 432, at 1041 (discussing Hans Hohberg).

506. Justice Judgment, *supra* note 180, at 1082, 1086.

507. *Id.* at 2000.

508. *Id.* at 1087. Schlegelberger was succeeded by Otto Thierack who permitted the police to usurp the role of the courts. *Id.* at 1086.

The occasional kind gesture also did not counter a defendant's crimes. Defendant Karl Mummmenthey managed the German Earth and Stone Works (DEST) and later directed brick and ceramic works and quarries owned and operated by the Security Police. These industrial plants employed between fourteen and fifteen thousand inmates.⁵⁰⁹ At trial, Mummmenthey's crimes were neither mitigated nor excused by his occasional altruistic gestures: "It is not an unusual phenomenon in life to find an isolated good deed emerging from an evil man [T]he kind deed is not enough to obliterate . . . indifference to the wholesale suffering of which he could not but be aware. . . ."⁵¹⁰

Despite the altruistic efforts like Mummmenthey's, in 1963 a Frankfurt court sentenced Doctor Franz Bernhard Lucas to three years and three months at hard labor.⁵¹¹ Lucas had served as a doctor at Auschwitz and had participated in four selections on the train ramp in which at least one thousand had been dispatched to the gas chambers. Lucas was praised by the prisoners for providing care to the sick and infirm. He had unsuccessfully resisted involvement in the selections and was "caught in a net and did not have the strength to get out."⁵¹²

Advocacy of criminal conduct under certain circumstances may be justified where the purpose was to avoid more severe harm. The Tribunals examined two issues related to this point in the case of Adolf Pakorny: whether the defendant was motivated by a desire to prevent prospective criminal conduct, and whether the defendant's proposed penal plan led to substantially less harm than would have resulted from the original proposal. Pokorny was a captain in the German Army and a medical officer. He wrote to Himmler in October 1941, suggesting the use of the drug caladium seginum as an efficient and effective means of medical sterilization. He contended that this would accomplish the sterilization of three million Russians who could then be used as slave labor. At trial Pokorny claimed that he believed that caladium seginum was ineffective and that he had hoped to sabotage the sterilization program. The Tribunal questioned his motivations but found that:

509. WVHA Judgment, *supra* note 432, at 1051-52.

510. *Id.* at 1054, Mummmenthey was sentenced to life imprisonment. *Id.* at 1063-64. See also Medical Judgment, *supra* note 437, at 280-81 (discussing Viktor Brack).

511. Bernd Naumann, AUSCHWITZ: A REPORT ON THE PROCEEDINGS AGAINST EOBERT KARL LUDWIG MULKA AND OTHERS BEFORE THE COURT AT FRANKFURT 413 (1966) [hereinafter AUSCHWITZ JUDGMENT].

512. *Id.* at 423-24.

As monstrous and base as the suggestions in the letter are, there is not the slightest evidence that any steps were ever taken to put them into execution by human experimentation. We find, therefore, that the defendant must be acquitted — not because of the defense tendered, but in spite of it.⁵¹³

In contrast, defendant Kurt Blome was Plenipotentiary for Cancer Research and was charged with participation in the extermination of Poles. Blome was consulted on a proposal to kill over two hundred thousand allegedly tubercular Poles. He protested that this would engender global opposition and persuaded Himmler to quarantine the consumptives.⁵¹⁴

The Tribunal accepted Blome's explanation that opposition based on humanitarian and moral grounds would have proven ineffective.

[I]t cannot be held that the letter was not well-worded when considered as an attempt to put an end to the plan originally adopted, and to bring the substitution of another plan not so drastic [T]he letter did . . . divert Himmler from his original program and . . . the extermination plan was abandoned.⁵¹⁵

Blome persuaded the judges that he was driven by a desire to derail the extermination plan.⁵¹⁶

Although motive is generally irrelevant in the determination of guilt, it may be considered in mitigating a sentence.⁵¹⁷ Unarticulated opposition or reservations will not exonerate a defendant because an individual is required to interfere with the implementation of an illicit policy.⁵¹⁸ Tribunals acquitted defendants of crimes against peace only in those instances in which they actively opposed such policies. However, protesters were not required to place principle over patriotism and to betray their country.⁵¹⁹

War crimes and crimes against humanity were measured against a stricter standard and were generally not mitigated by a defendant's secret opposition.⁵²⁰ Membership in the resis-

513. Medical Judgment, *supra* note 437, at 294.

514. *Id.* at 233.

515. *Id.* at 234.

516. *Id.* at 233.

517. *See supra* text accompanying notes 480-82.

518. *See supra* text accompanying notes 501-505.

519. *See supra* text accompanying notes 489-505.

520. *See supra* text accompanying notes 496-500.

tance,⁵²¹ the contention that resignation would result in increased repression⁵²² and isolated altruistic gestures did not constitute a defense.⁵²³ Kurk Blome's actions demonstrated that a defendant might justify a course of criminal conduct on the ground that it was less harmful than that contemplated by higher authorities.⁵²⁴

Motive is too ambiguous in the calculation of criminal liability. Defendant Erwin Tschentscher provided provisions to the *Waffen-SS* concentration camp guards. He attempted to ameliorate the assistance that he had afforded the camp administration by pointing to the fact that he had periodically provided pabulum to inmates.⁵²⁵ But, the Tribunal concluded that Tschentscher's primary motive was to insure that the inmates "would regain a better physical condition and be able to perform their work better."⁵²⁶ Can we be confident of a person's motives? At what point should cooperation with camp officials in these cases have been counter-balanced by altruistic gestures? Were any other avenues of opposition available? Should the law require those in opposition to risk martyrdom as the price of exoneration?

IV. Reprisals

A. *The Hostage Case*

A belligerent who violated the humanitarian law of war traditionally provided monetary compensation to the aggrieved State. But negotiations were often drawn-out and such payments could not substitute for the loss of life.⁵²⁷

Military reprisals were recognized in both the American and British military manuals during World War I as an accepted method of enforcing the humanitarian law of war.⁵²⁸ Critics characterized reprisals as a crude instrument which created a spiraling cycle of violence, much of which was directed at the innocent. Theodore S. Woolsey opined that "[i]f state A permits

521. See *supra* notes 505-06 and accompanying text.

522. See *supra* text accompanying note 506.

523. See *supra* text accompanying notes 501-512.

524. See *supra* text accompanying notes 514-16.

525. WVHA Judgment, *supra* note 432, at 1010-14.

526. *Id.* at 1015 (emphasis omitted).

527. See Bellot, *supra* note 23, at 35-36. See also Hague Convention, *supra* note 218, at art. 3 (requiring the payment of compensation).

528. See Bellot, *supra* note 23, at 35; Bower, *supra* note 18, at 27-28. The Lieber Code of 1863 and the Oxford Code adopted by the Institute of International Law in 1880 both recognized reprisals. See Woolsey, *supra* note 310, at 63-64.

or orders its soldiers to terrorize a population by violence to women, by killing non-combatants or shielding a body of men behind them, by waste and destruction of property, retaliation by B is neither logical nor civilized. If A bombards Rheims cathedral, shall B knock down the cathedral of Cologne?"⁵²⁹ Woolsey also pointed out that the weak lacked the capacity to retaliate against the strong: "If Germany uses asphyxiating gases in war with Serbia, how can Serbia retaliate! How could the Boers reply to British devastation by wasting England".⁵³⁰ Hugh H. L. Bellot of Oxford University proclaimed that Prussia's advocacy of reprisals as the main mechanism for enforcing the humanitarian law of war "must be denounced as a foul libel upon civilization and humanity by every self-respecting individual outside Germany."⁵³¹ This inevitably would lead to war degenerating into "mere competitions of barbarism."⁵³²

Reprisals were nonetheless recognized as a defense to war crimes. The German *Reichsgericht*, as previously explored, acquitted First Lieutenant Karl Neumann of attacking the hospital ship *Dover Castle*. The Tribunal ruled that Neumann "reasonably believed that the measures taken by the German Admiralty against enemy hospital ships were not contrary to international law, but were legitimate reprisals."⁵³³

The law of reprisals was explained by the American court in the *Hostage* judgment. The German Army occupied Yugoslavia and Greece in April 1941 and the defeated forces faded into the population and engaged in guerilla tactics.⁵³⁴ The *Wehrmacht* attempted to repress the armed rebellion through reprisals against the civilian population.⁵³⁵ The Tribunal recognized that international law is "prohibitive law" and that the "barbarous practice" of reprisals had not been outlawed.⁵³⁶ But strict restraints had been imposed in order to insure that reprisals did not degenerate into a reign of terror and result in a cycle of continuous chaos and

529. Woolsey, *supra* note 310, at 66.

530. *Id.*

531. Hugh H.L. Bellot, *War Crimes And War Criminals*, XXXVI THE CANADIAN LAW TIMES 754, 766 (1916).

532. *Id.*

533. Hospital Ship *Dover Castle*, *supra* note 36, at 707.

534. Hostage Judgment, *supra* note 121, at 1243, 1263.

535. *Id.* at 1264-65.

536. *Id.* at 1252.

crime.⁵³⁷ The court ruled that reprisals against hostages may only be undertaken as a last resort following the exhaustion of other remedies. Hostages may only be seized in the event that these precautionary measures fail to deter attacks and the perpetrators are not apprehended.⁵³⁸ Such hostages are to be selected from a population having some connection with the crimes of the partisans.⁵³⁹ Further, a proclamation must be issued listing the names and addresses of the hostages seized and must notify the population that the hostages will be shot in the event of additional armed attacks. The number of hostages executed must not exceed the severity of the assault which the shooting is designed to deter. The order of a military commander to kill hostages must be based upon the finding of a competent court martial that these requirements have been meticulously met.⁵⁴⁰ A hearing may be waived in exigent circumstances⁵⁴¹ but the shooting of hostages, absent the satisfaction of these requirements, constitutes a war crime in contravention of international law.⁵⁴²

Field Marshal Wilhelm List, commander of the Armed Forces Southeast and chief of the military in the Balkans and Greece, completely disregarded these duties and responded to armed

537. *Id.* The Tribunal rejected the German theory that fear of reprisal is the only mechanism for enforcing the humanitarian law of war. Reprisals are not the exclusive remedy; “[i]f it were, the persons responsible would seldom, if ever, be brought to account. The only punishment would fall upon the reprisal victims who are usually innocent of wrongdoing.” *Id.* at 1256.

538. Hostage Judgment, *supra* note 121, at 1249-50. These measures may include one or more of the following: Registration of inhabitants; the issuance of passes or identification certificates; establishment of restricted areas; limitations of movement; curfew regulations; the prohibition of assembly; the detention of suspected persons; limitations on communication; the imposition of restrictions on food supplies; the evacuation of troublesome areas; the levying of monetary contributions; compulsory labor to repair damage from sabotage; the destruction of property in proximity to the site of the crime; and any other regulation not prohibited by international law that would in all likelihood curtail partisan attacks. *Id.*

539. *Id.* at 1250. “If the act was committed by isolated persons or bands from distant localities without the knowledge or approval of the population or public authorities, and which, therefore, neither the authorities nor the population could have prevented, the basis for the taking of hostages, or the shooting of hostages already taken, does not exist.” *Id.* The inhabitants of an occupied territory owe a duty to refrain from attacks on occupying forces. *Id.* at 1249. The partisans were not determined to have complied with the requirements of lawful belligerency. Hostage Judgment, *supra* note 121, at 1244.

540. *Id.* at 1250-51.

541. *Id.* at 1253.

542. *Id.* at 1250. The provisions of the American and British manuals are reprinted in *id.* at 1251.

opposition with arbitrary reprisals. One hundred Jews were killed in Belgrade on July 25, 1941 in retaliation for a sixteen-year old girl's throwing of a gasoline bottle at a German motor vehicle, an act allegedly instigated by a Jew.⁵⁴³ On October 4, 1941, List directed his troops in Serbia to detain those suspected of "having taken part in combat, of having offered the bandits support of any sort, or of having acted against the armed forces in any way [I]n the event that bandits appear, or anything against the armed forces is undertaken in the territory mopped up or in their home localities . . . they are to be shot."⁵⁴⁴

List subsequently distributed an order which called for the execution of one hundred reprisal prisoners in retaliation for the killing of a German soldier on one occasion, and the execution of fifty reprisal prisoners in retaliation for the wounding of a German soldier on another. The Tribunal concluded that an order to engage in reprisals at this arbitrary ratio was both excessive and unwarranted and constitutes a violation of international law. Such a command "appears to have been made more for the purposes of revenge than as a deterrent to future illegal acts which would vary in degree in each particular instance. . . . International law places no such unrestrained and unlimited power in the hands of the commanding general of occupied territory."⁵⁴⁵

Reprisals were ruthlessly carried out by List's troops. As many as twenty-one hundred Jews and Gypsies were shot near the Serbian town of Topola in October 1941 in retaliation for the killing of twenty-two German soldiers. Almost nine-hundred of the victims had been selected from hostage camps. There was no evidence that the inhabitants of Topola had either engaged in or had supported the armed attack. Nor was there a connection between the hostage camp victims and the provocation.⁵⁴⁶ List received notice of reprisals through reports routed to his headquarters. Yet, he did not condemn or call the culprits to account. The Tribunal found List guilty of a serious breach of duty for "compla-

543. Hostage Judgment, *supra* note 121, at 1263.

544. *Id.* at 1265-66. General Franz Boehme, commander of German troops in Serbia, supplemented this order on Oct. 10, 1941 with a decree calling for the execution of one hundred prisoners or hostages for each German soldier killed; and the execution of fifty prisoners or hostages for each German soldier wounded. *Id.* at 1266.

545. *Id.* at 1270.

546. *Id.*

cently permitt[ing] thousands . . . to die before the execution squads of the *Wehrmacht*”⁵⁴⁷

Defendant Walter Kuntze, Deputy Armed Forces Commander Southeast and Commander in Chief of the 12th Army in the Balkans, and Lothar Rendulic, Commander in Chief of the 2d *Panzer* Army in Croatia, were convicted along with List. Over eleven thousand hostages were shot and another twenty thousand were scheduled for execution in the first month of Kuntze’s command.⁵⁴⁸ Kuntze issued a directive on March 19, 1942 stating that “the more unequivocal and the harder reprisal measures are applied from the beginning the less it will become necessary to apply them at a later date. No false sentimentalities! It is preferable that 50 suspects are liquidated than one German soldier loses his life”⁵⁴⁹ In those instances in which the partisans who perpetrated an attack were not apprehended, “reprisal measures of a general kind may be . . . advisable, for instance the shooting to death of all male inhabitants from the nearest villages according to a definite ratio (for instance, 1 German dead — 100 Serbs; 1 German wounded — 50 Serbs).”⁵⁵⁰ Kuntze was judged guilty for issuing illicit orders and for failing to take steps to curtail the unlawful killings.⁵⁵¹

Similarly, Rendulic ordered that attacks on the *Wehrmacht* were to be answered by shooting or hanging hostages, destroying surrounding villages and arresting males capable of bearing arms. Fifty were to be executed in reprisal for the killing of a German; and twenty-five were to be executed in retaliation for the wounding of a German.⁵⁵² Rendulic received reports of reprisals and yet failed to ensure that the threshold conditions had been satisfied. He made no effort to apprehend those responsible for the attacks, public proclamations were not issued concerning the detention and death of hostages, and no court martial proceedings were conducted. Hostages with no connection to the attack were killed without trial.⁵⁵³

The Tribunal concluded that the taking of reprisals “became so common that the German commanders became indifferent to

547. Hostage Judgment, *supra* note 121, at 1272.

548. *Id.* at 1277.

549. *Id.* at 1277-78.

550. *Id.* at 1278.

551. *Id.* at 1278-79.

552. Hostage Judgment, *supra* note 121, at 1289.

553. *Id.* at 1290-91.

the seriousness of the acts. They appear to have been accepted as legitimate acts of war with the extent of their use limited only by the whim or judgment of divisional commanders."⁵⁵⁴ The evidence indicates that "the practice of killing . . . got completely out of hand, legality was ignored, and arbitrary action became the accepted policy."⁵⁵⁵ Jews, Gypsies and suspected Communists were singled out to be shot. The court stated that reprisals directed against a certain race or group "irrespective of the circumstances . . . sounds more like vengeance than an attempt to deter . . . criminal acts . . . [and] contravenes established rules. This is a matter which a judicial proceeding should determine from available evidence."⁵⁵⁶

The *Hostage* case established that reprisals must conform to various restrictions and restraints. The mere claim that a criminal act was a reprisal was not recognized as a justification.⁵⁵⁷

B. Other War Crimes Prosecutions

SS *Obersturmbannführer* Friedrich Ernst Flesch headed the Security Police in Northern Norway. He ordered the arrest and execution of a number of Norwegian citizens, six of whom were shot. Flesch contended that this was in retaliation for the illegal activities of the Norwegian underground. The victims were shot in the back to give the impression that they had been killed while escaping.⁵⁵⁸

The Norwegian Lagmannsrett found that the Germans had not publicly proclaimed that the shootings were reprisals. Flesch claimed that the killings were intended to deter the continuance of guerilla attacks but the court ruled that guerilla warfare was not necessarily contrary to international law. British brigades had been sent into Norway to sabotage factories but these attacks, for the most part, were carried out by uniformed combatants and did not constitute breaches of international law. The retaliatory killings ordered by Flesch, though, were not legitimate reprisals. They

554. *Id.*

555. *Id.* at 1299.

556. *Id.* at 1303.

557. *See supra* text accompanying notes 528-57.

558. Trial Of Gerhard Friedrich Ernst Flesch, SS *Obersturmbannführer*, *Oberregierungsrat* (Frostatting Lagmannsrett, Nov.-Dec. 1946 and Sup. Ct. Norway, Feb. 1948), VI LAW REP. TRIALS WAR CRIM. 111, 114-15 (U.N. War Crimes Comm'n 1948).

were acts of terrorism designed to deter the population from supporting the underground opposition.⁵⁵⁹

Three members of the German security force contended, in a related case, that their torture of partisans constituted justifiable reprisals. The Norwegian Lagmannsrett determined that the underground's activities had been limited to military training and that the partisans had not attacked German forces. The resistance thus had not contravened international law.⁵⁶⁰ German forces had never publicly proclaimed that their acts of torture were intended to modify the illicit conduct of the partisans. Such abuse, in fact, was routinely used to punish or to elicit confessions from suspects.⁵⁶¹

The most significant reprisal cases centered on the Ardeatine Cave killings. A bomb exploded in March 1944 on Rosella Street in Rome, killing thirty-two German police. Hitler directed Field Marshal Albert Kesselring, the Commander of Army Group C in Italy, to execute ten Italians in retribution for each German police officer killed. The order was passed on to General Eberhard von Mackensen, Commander of the German 14th Army in Rome, who in turn, telephoned the accused, General Maelzer, who was the military commander in Rome. Maelzer then conveyed the command to Lieutenant Colonel Kappler, head of the Security Service in Rome, who was responsible for prisons.⁵⁶²

Kappler testified that he informed von Mackensen and Maelzer that the requisite number of reprisal prisoners was not available, but that he would compile a list of 280 people "worthy of death." The latter included those who were awaiting execution or serving long sentences as well as those who had been detained for partisan activities or acts of sabotage. The defense contended that Kappler privately promised von Mackensen that only prisoners confronting capital punishment would be executed, but that he would nevertheless issue a communique that 320 had been shot. Both the defense and prosecution stipulated that Kappler had

559. *Id.* at 115-16. The judgment was confirmed by the Norwegian Supreme Court. *Id.* at 118 (decision of the Supreme Court).

560. Trial Of *Kriminalsekretar* Richard Wilhelm Hermann Bruns And Two Others (Eidsivating Lagmannsrett, Mar. 20, 1946 and Supreme Court Of Norway, July 3, 1946), III LAW REP. TRIALS WAR CRIM. 15, 18 (U.N. War Crimes Comm'n. 1948).

561. *Id.* at 19 (Decision of the Supreme Court).

562. Trial Of General Von Mackensen And General Maelzer (Brit. Milit. Ct., Rome, Nov. 1830, 1945), VIII LAW REP. TRIALS WAR CRIM. 1 (U.N. War Crimes Comm'n 1949).

informed the defendants that only four of the proposed victims had been connected with the bombing.⁵⁶³

Kappler executed 335 people, claiming that thirty-three Germans had died and that the Italian police had inadvertently included an additional five prisoners. The victims ranged in age from fourteen to seventy. Fifty-seven were Jews not affiliated with the partisans and a number of them were not even Italian. The victims were gathered in the Ardeatine Cave on March 24 and shot at close range. They were divided into groups of five, each of which was required to kneel on top, or beside, the corpses of the previous victims. The cave was blown up following the executions.⁵⁶⁴

Von Mackensen and Maelzer contended that this reprisal was required to deter additional attacks. They wanted to dampen the harshness of Hitler's execution order by limiting the killings to those confronting death or long-term imprisonment. Both were sentenced to death, which was later commuted to life imprisonment.⁵⁶⁵ There was uncertainty as to whether the British Military Court determined that the reprisals were unreasonable, excessive, or were carried out in an unnecessarily cruel fashion. The manifest illegality of the command presumably prevented von Mackensen from pleading superior orders.⁵⁶⁶

Field Marshal Albert Kesselring was convicted in a separate trial. Kesselring testified that Kappler had informed him that there were a sufficient number of convicts confronting capital punishment available to satisfy the reprisal order. Kesselring then proceeded to issue the command to "kill 10 Italians for every German. Carry out immediately."⁵⁶⁷ Kesselring also instructed his troops to aggressively attack Italian partisans. He pledged in June 1944 to protect any commander who severely and swiftly sanctioned the

563. *Id.* at 1-2.

564. *Id.* at 2.

565. *Id.*

566. *Id.* at 7-8 (Notes on the Case). An unreasonable reprisal would include the unwarranted taking of lives. Reprisals taken at a ten-to-one ratio also may have been determined to be excessive. The court presumably did not feel it necessary to address the significance of the fact that a plurality of the reprisal prisoners had been sentenced to death. U.N. War Crimes Comm'n 1949, *supra* note 562, at 7.

567. The Trial Of Albert Kesselring (Brit. Milit. Ct., Venice, Italy, Feb. 17, 1947), VIII LAW REP. TRIALS WAR CRIM. 9 (U.N. War Crimes Comm'n 1949). Kesselring testified that he had omitted the term "hostages" in order to avoid the killing of persons not sentenced to death. *Id.* at 10.

guerrillas.⁵⁶⁸ A month later he ordered the arrest of a portion of the male population in partisan-infested areas. These detainees were to be shot in the event of violence. Villages from which shots had been directed against German troops were also to be immolated. Kesselring admonished his troops that “[a]ll counter measures must be hard[;] . . . [T]he dignity of the German soldier demands it.”⁵⁶⁹ Over a thousand innocents were subsequently killed by German combatants, compelling Kesselring to remind his troops to control their conduct.⁵⁷⁰

Kesselring was sentenced to death, later commuted to life imprisonment.⁵⁷¹ Regarding the Ardeatine Cave massacre, the Judge Advocate stated that there had been no organized opposition in Italy with which to negotiate. The only avenue available to the Germans may have been to shoot hostages but the execution of five of the hostages was not a legitimate reprisal and constituted a war crime.⁵⁷² The Judge Advocate also argued that Kesselring’s reprisal orders against the Italian partisans were deliberately drafted and designed to incite and result in the types of excesses engaged in by German troops.⁵⁷³

Similar acts by the Germans took place in the Netherlands. Albert Rauter, Higher S.S. and Police Leader and General Commissioner for Public Safety in the occupied Netherlands, was the second highest-ranking Nazi official. He was accused of directing illegal reprisals against civilians, including collecting fines, pillage, detention, and mass executions.⁵⁷⁴ He acknowledged that he ordered the shooting of innocents and conceded that the expression in public announcements, “shot while attempting to escape,” was a euphemism for summarily shooting the victim.⁵⁷⁵ The Netherlands Tribunal sentenced Rauter to death⁵⁷⁶ because his commands contravened the humanitarian law of war. He exerted no effort to apprehend the perpetrators under his command and executed hostages as an act of “revenge or intimidation

568. *Id.* at 10.

569. *Id.* at 10-11.

570. *Id.* at 11.

571. The Trial of Albert Kesselring, *supra* note 567, at 12.

572. *Id.* at 12-13 (Notes on the Case).

573. *Id.* at 13-14.

574. Trial Of Hans Albin Rauter (Netherlands Special Court, ‘S-Gravenhage, May 4, 1948 and Netherlands Special Court of Cassation, Jan. 12, 1949), XIV LAW REP. TRIALS OF WAR CRIM. 89, 91-92 (U.N. War Crim. Comm’n 1949) [hereinafter Rauter Judgment].

575. *Id.* at 104.

576. *Id.* at 107.

. . . . [B]y killing several hostages at a time for the death of one . . . German . . . he . . . committed excessive reprisals in violation of the rule requiring due proportion."⁵⁷⁷ The court noted that "Germany is the only country in modern times which has proceeded with the killing of innocent citizens in occupied territory for the purpose of maintaining peace and order . . . in a manner contrary to the most elementary conceptions of humanity and justice."⁵⁷⁸

The Netherlands Special Court of Cassation considered the case on appeal and held that Germany had carried out a war of aggression against the Netherlands and had engaged in illegal occupation policies. Members of the indigenous population were entitled to resist the Reich, and Germany was authorized to punish those who breached the boundaries of law and order. However, the Germans were not entitled to retaliate against innocents in order to dampen opposition. Reprisals were a response to State criminality and were not to be deployed to deter partisan attacks in occupied territories.⁵⁷⁹

In the majority of cases, tribunals approved the reprisal execution of hostages subject to reasoned restraints. Those who engaged in or ordered excessive, unnecessary, or unreasonable reprisals were criminally convicted.⁵⁸⁰ Only the Netherlands Special Court of Cassation clearly condemned reprisal killings in occupied territories.⁵⁸¹ There was a suggestion in a British Military Court that, under some circumstances, even innocents might be justifiably killed.⁵⁸²

Still, a question remains as to whether publicly proclaimed, proportional executions of those connected with the perpetrators of armed attacks should receive judicial endorsement. Reprisals are rationalized in the interests of public safety and order. But, should an occupying power supplement or withdraw its forces rather than engage in reprisals? Will hostage reprisals encourage

577. *Id.* at 131 (Notes on the Case).

578. *Id.* at 130 (Notes on the Case).

579. Rauter Judgment, *supra* note 574, at 132-38 (Notes on the Case). The Hague Convention was silent on inter-State reprisals, but prohibited collective penalties by an occupying power. *Id.* at 133. See Hague Convention, *supra* note 218, at art. 50 (prohibiting collective penalties); Nuremberg Charter, *supra* note 81, at art. 6(b) (prohibiting execution of hostages). Reprisals, in the view of the court, were appropriate in the case of acts attributed to a belligerent State. Such reprisals were inapplicable in instances of individual action. Rauter Judgment, *supra* note 574, at 132, 137-38.

580. See *supra* text accompanying notes 528-58.

581. See *supra* text accompanying note 580.

582. See *supra* text accompanying note 573.

rather than end violence? Do reprisals blur the boundaries between lawful belligerents and protected persons? Is collective responsibility being substituted for individual liability? Will domestic military tribunals effectively encumber hostage reprisals?⁵⁸³

The Judge Advocate, in the trial of von Manstein, questioned the killing of reprisal hostages. The Advocate noted that such executions defy the dictate that an occupant respect the lives of inhabitants. He also opined that such killings contravene the Martens Clause in the preamble to the Hague Convention. This provides that, in cases not covered by the Convention, "inhabitants of the belligerents remain under the protection and governance of the principles of the law of nations derived from the usages established among civilized peoples from the laws of humanity and from the dictates of public conscience."⁵⁸⁴

VI. Conclusion

War crimes tribunals have generally restricted the scope of defenses in order to preserve and protect the sanctity of the humanitarian law of war. The rules of the code of conflict were viewed as having already incorporated the relevant conditions of the Law of War and these provisions had thus achieved a balance between the competing considerations of humanitarianism and war's necessities.

The contemporary code of conflict is concerned with confining conflict and circumscribing the harm to protected persons. Developing doctrinal defenses for enemy combatants accused of criminal conduct is of secondary significance.⁵⁸⁵ In the past, defenses were structured to restrict reliance on superior orders, limit the scope of military necessity and extend vicarious responsibility to military commanders. The good motive defense was rejected and individual necessity, although liberally interpreted in

583. See *supra* notes 528-80. Reprisals are prohibited under contemporary military conventions. See Protocol I, *supra* note 274, at arts. 20 (prohibiting reprisals against the wounded, sick and shipwrecked) 51(6) (prohibiting reprisal attacks on civilians). Commentators generally agree that reprisals are prohibited under the United Nations Charter. See Gregory Francis Intocchia, *American Bombing Of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT'L L. 177, 198-200 (1987). But see Guy B. Roberts, *Self-Help In Combatting State-Sponsored Terrorism: Self Defense and Peacetime Reprisals*, 19 CASE W. RES. J. INT'L L. 243, 282-86 (1987).

584. Quoted in von Manstein Judgment, *supra* note 334, at 519.

585. See *supra* text accompanying notes 310-49.

the trials of industrialists, was limited to a proportionate response to an imminent threat. This rationale recognized that individuals confronting calamities will invariably act in their own self-interest and cannot be deterred by the threat of sanction. The imposition of criminal punishment in such situations will only succeed in bringing the law into disrepute.⁵⁸⁶ The defenses also incorporated a guilty knowledge or reasonableness requirement rather than impeding prosecutions with a less settled subjective standard. The requirement gave some discretion to tribunals in determining whether to impute criminal knowledge or intent to a defendant.⁵⁸⁷

Reprisal against hostages is an anomaly in that it condones retribution against innocents. Such an unfortunate practice recognizes the need to reinforce and respect the reciprocal rights and obligations of the occupant and the inhabitants of the occupied territory. American tribunals substantially limited the availability of this remedy through the imposition of procedural prerequisites. There is no reported instance in which a defendant during World War II successfully relied on the defense of lawful reprisal in an American court.⁵⁸⁸

In each of the war crimes cases the defendants face a dilemma: whether to conform and thus commit crimes, or to assert their autonomy and risk retribution. The collective view of war crimes courts is that combatants' duty of obedience to domestic doctrine is limited by the principles of the humanitarian law of war. The prototype is a soldier conversant with the code of war and the conditions of his command. The combatant is charged to resist illegality and to curb criminal conduct, and necessity is subordinate to the absolute adherence to the code of conflict. This rationale provides a rule of moral conduct but defies human inclinations. The code's effectiveness is further reduced by the modest probability that a combatant will confront criminal consequences. The violence inherent in war inevitably results in trials which engage in "selective prosecution" or "victor's justice."⁵⁸⁹

The integrity of trials is also weakened by the incomplete, imprecise character of the law of war. Aerial combatants, for instance, appear to have almost complete immunity from criminal prosecution since military targets encompass an enormous range of

586. See *supra* text accompanying notes 17-480.

587. See *generally supra* text accompanying notes 191-192, 206, and 226-27.

588. See *supra* text accompanying notes 528-85.

589. See *generally supra* text accompanying notes 144-45, 164, and 289-91.

sites. The result is substantial collateral damage from aerial attacks.⁵⁹⁰

In the final analysis, there is a chasm between common criminals and conscripts charged with crime in combat. The realist cannot avoid discomfort in judging soldiers by the same standards of the peacetime conditions of the common law. Courts typically minimize the significance of trained obedience and the cataclysmic circumstances of military conflict. Yet, recognition of such realities would reduce respect for the integrity of the humanitarian law of war.⁵⁹¹ The distance between the code and conditions of conflict is enhanced by the problems encountered in enforcing the humanitarian law of war. The chaos of war and the code of complicity among armed comrades complicate the reconstruction of events and the apprehension and prosecution of offenders.⁵⁹²

Doctrinal discussions of the humanitarian law of war may divert attention from the destruction accompanying armed conflict. Ultimately, we must guard against being satisfied with simply ameliorating, rather than abolishing, war.⁵⁹³

590. See Hamilton DeSaussure, *The Laws of Air Warfare: Are There Any?* 3 INT'L LAW. 527 (1971).

591. See generally *supra* text accompanying notes 301-09.

592. See *War Crimes: The My Lai Massacre and the Vietnam War*, *supra* note 3.

593. See generally Matthew Lippman, *Liberating the Law: The Jurisprudence of Civil Disobedience and Resistance*, 2 SAN DIEGO L.J. 299, 305, n.55 (1994); Matthew Lippman, *Civil Resistance: Revitalizing International Law in the Nuclear Age*, 13 WHITTIER L. REV. 17 (1992); Matthew Lippman, *Nuclear Weapons and International Law: Towards a Declaration on the Prevention and Punishment of the Crime of Nuclear Humancide*, 8 LOY. L.A. INT'L & COMP. L.J. 183 (1986).

