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Christopher N. Crowe
University of Richmond

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COMMAND RESPONSIBILITY IN THE FORMER YUGOSLAVIA: THE CHANCES FOR SUCCESSFUL PROSECUTION*

I. INTRODUCTION

On 22 February 1993, the United Nations Security Council passed Resolution 808 calling for the establishment of an international tribunal for the prosecution of persons responsible for "serious violations of international humanitarian law committed in the territory of former Yugoslavia."¹ The resolution also asked the Secretary-General to submit to the Security Council for consideration a report on aspects of the tribunal considering "suggestions put forward in this regard by Member states."² In May, Secretary-General Boutros Boutros-Ghali issued his report and proposed the Statute of the International Tribunal ("*Statute*"),³ designed to govern the tribunal's establishment and operation.⁴

In addition to establishing the tribunal's legal foundations and organizational structure, the Secretary-General outlined the principles comprising its competence. Specifically covered were its subject-matter, personal, territorial, and temporal jurisdictions.⁵ The Secretary-General, in the notes accompanying Article 7 of the proposed *Statute*, addressing individual criminal responsibility, stated that a military commander should:

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1. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993).

2. *Id.* at para. 2.

3. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. SCOR, U.N. Doc. S/25704 (1993) reprinted in 32 I.L.M. 1159 (1993) [hereinafter Report of the Secretary-General].

4. For a more in-depth discussion on aspects of the tribunal see Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia, 1993 A.B.A. Int'l Law Section.

5. Report of the Secretary-General, *supra* note 3, at 1169.

be held responsible for failure to prevent a crime or to deter the unlawful behavior of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.⁶

The Security Council by Resolution 827 adopted the Secretary-General's proposal.⁷ This Note will examine the chances for successful prosecution under Article 7, paragraph 3 of the *Statute*. That paragraph provides that superiors will be held responsible for the illegal acts committed by their subordinates if the superiors (1) knew or had reason to know that such acts were about to be committed and initiated no preventive action or, (2) were committed and took no measures to prevent their repetition. This is the doctrine of command responsibility.

As Article 7, paragraph 3 provides, a successful prosecution based on command responsibility requires proof of two elements. The first can be characterized as the knowledge element and the second as the lack of action element. Historically, convictions predicated on this doctrine have pivoted on the application of the first element as numerous courts have grappled with the degree of knowledge required. Is it enough to prove that accused commanders should have known of the atrocities being committed by their subordinates or must actual knowledge be proven? There have been as many different answers to this question as there have been courts addressing the issue. Accordingly, it is crucial to the prosecution of alleged war criminals in the former Yugoslavia to understand exactly what is meant by the "knew or had reason to know" language of Article 7, paragraph 3. This Note will attempt to answer the knowledge question through an analysis of the numerous cases and debates which have addressed the command responsibility doctrine.

6. *Id.* at 1175.

7. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

In addition, this Note will trace the evolution of the doctrine from its inception in the Yamashita case through the Nuremberg trials and the My Lai courts martial. It will highlight not only the changes the doctrine has undergone, but also its gradual acceptance as a legitimate facet of international humanitarian law. This Note will also devote special attention to the numerous international conventions which have attempted to establish rules governing how states conduct themselves in times of war and their impact on the doctrine. This Note's main purpose, however, is to detail the current operation of command responsibility and to outline for potential prosecutors its appropriateness to the situation in the territory that was once Yugoslavia.

The principles underlying command responsibility have existed for centuries.⁸ The first international prosecution under this doctrine, however, occurred in response to atrocities committed by Japanese soldiers as American forces recaptured the Philippine Islands at the end of the Second World War.⁹ Japanese soldiers, primarily those of the 14th Area Army, were accused of intentionally, and at times methodically, killing tens of thousands of Filipinos and American POW's. A U.S. military commission tried and convicted the supreme Japanese commander in the Philippines, General Tomoyuki Yamashita. Following a review of the commission's decision by a board of review created by General Douglas MacArthur, Yamashita was hanged. It is essential to note that he was not charged with ordering any il-

8. For example, in 190 B.C., Roman commander Aemilius Regillus successfully besieged the Greek city, Phocaea. In exchange for guaranteeing the safety of the city, Regillus accepted its surrender. Regillus's troops, however, despite contrary orders, sacked the city. Upon regaining control of his army, Regillus "punished those chiefly at fault, restored the freedom, lands, and goods of those victims whose lives [he] had been able to preserve, and offered public atonement for the deeds." PETER KARSTEN, *LAW, SOLDIERS, AND COMBAT* at xiii (1978).

9. Hints of the doctrine, however, arose in response to atrocities committed during the First World War. In March 1919, in Versailles, the "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" recommended that the German ex-Kaiser be tried as a war criminal because he and others in high authority "were cognizant of and could at least have mitigated the barbarities committed during the course of the war. A word from them would have brought about a different method in the action of their subordinates on land, at sea and in the air." See *Report Presented to the Preliminary Peace Conference*, in 1 *THE LAW OF WAR: A DOCUMENTARY HISTORY* 842, 853-54 (Leon Friedman ed., 1972).

legal acts but with failing to exercise the proper control over his troops such to prevent them.

The doctrine resurfaced shortly thereafter during the Nuremberg trials. In the High Command Case and the Hostage Case senior German officers were charged with neglecting their responsibilities as military commanders and as a result hundreds of thousands of people were killed by troops under their command. In the High Command Case, General Field Marshal Wilhelm von Leeb was held to have not violated his responsibilities as a military commander as the tribunal hearing the case required that General von Leeb actually be aware of the atrocities being committed by his troops—a burden the prosecution could not meet. In the Hostage Case, General Field Marshal Wilhelm List's contention that he was unaware of the atrocities being committed by subordinate troops was rejected because of the reports of atrocities that reached his headquarters.

Later, when American troops unlawfully killed the inhabitants of a small Vietnamese hamlet questions were raised as to how high up the chain of command responsibility should go. U.S. Army prosecutors, however, like the ones in the High Command Case, failed to secure a conviction because they could not conclusively establish that Captain Ernest Medina was aware of the massacre in time to stop it. The doctrine was finally codified by the 1977 Protocol supplementing the four Geneva Conventions of 12 August 1949.¹⁰

II. THE CASE OF GENERAL YAMASHITA

A. *Factual Background*

In the Spring of 1945, American troops invaded the main Philippine island of Luzon. This followed the successful attack

10. The 1977 Protocol supplemented: (1) the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; (2) the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Ship-wrecked Members of Armed Forces at Sea of 12 August 1949; (3) the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949; and (4) the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949. See 16 I.L.M. 1391, 1397 (1977).

at Leyte, fulfilling General Douglas MacArthur's two-year-old promise to retake the Philippines from Japan.¹¹

As American troops advanced on Manila, rumors spread that retreating Japanese soldiers were killing, in tremendous numbers, both Filipino citizens and American POW's. The killings, it was reported, were systematic and orderly. One hundred thousand Filipinos were killed in the fight for Manila alone.¹² Blame for the atrocities quickly fell on the Japanese Supreme Commander in the Philippines, General Tomoyuki Yamashita. He commanded Japan's main fighting force on the island, the 14th Area Army, from October of 1944 until its surrender in the fall of 1945.¹³ Upon gaining full control of the Philippines, an incensed General MacArthur created a special committee, the War Crimes Branch, to look into the allegations. The committee, headed by Colonel Alva Carpenter, formulated the rules and procedures that would govern the trial of General Yamashita before a military commission.¹⁴

A conference in Manila was convened on 14 September 1945 by MacArthur's deputy chief of staff, Major General R.J. Marshall.¹⁵ Joining Marshall were Carpenter and his staff as well as members of MacArthur's military intelligence sections. In addition, Washington sent four representatives from the newly created U.S. War Crimes Office.¹⁶ All agreed that General Yamashita would be the first targeted for prosecution. Marshall's position was that Yamashita should be tried for failing "to exercise proper control over his troops and [permitting] the sacking of Manila," and for "negligence in allowing his subordinates to commit atrocities."¹⁷

11. For detailed discussions on the invasion from a U.S. perspective, see generally ROBERT R. SMITH, *THE WAR IN THE PACIFIC: TRIUMPH IN THE PHILIPPINES* (1963); SAMUEL E. MORISON, *THE LIBERATION OF THE PHILIPPINES: LUZON, MINDANAO, AND THE VISAYAS* (1959). For a Japanese perspective see generally RICHARD L. LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* (1982).

12. SMITH, *supra* note 11, at 307.

13. *See id.* at 88.

14. *See* LAEL, *supra* note 11, at 64-65.

15. *See id.* at 67.

16. Secretary of War Henry Stimson in September of 1944 ordered the creation of the War Crimes Office "so that it could collect evidence on war crimes and coordinate and arrange the arrest, trial, and punishment of war criminals." *Id.* at 66 n.25.

17. *Id.* at 69.

It was noted by Marshall, however, that prosecuting Yamashita on such a theory was without precedent.¹⁸ It had never before been alleged that a military commander was liable for the illegal acts of his subordinates where no evidence was proffered to prove the commander specifically ordered his troops to commit those illegal acts.

Though it lacked precedent, the case against Yamashita was supported by a number of international conventions, as the U.S. Supreme Court would later agree.¹⁹ While none of these conventions specifically enumerate a doctrine of command responsibility, they lend strong support to the argument that commanders may be called to account for the actions of their subordinates. The Fourth Hague Convention of 1907 states that in order for an armed force to be considered lawful it must "be commanded by a person responsible for his subordinates."²⁰ Moreover, Article 43 of that convention requires a military commander, in possession of enemy territory, to "take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."²¹ The Tenth Hague Convention, addressing naval warfare, provides that naval officers "shall see to the execution of . . . the general principles of the present convention."²² The principles of that convention compel commanders to safeguard, to the extent possible, the well-being of those subjected to naval bombardment. The Geneva Red Cross Convention of 1929 calls on "the commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing articles."²³ The articles of that convention require commanders to follow a number of set policies which aid in the treatment of the sick and wounded in battle. Lastly, the Convention on Treatment of Prisoners of War

18. *Id.*

19. *In re Yamashita*, 327 U.S. 1, 13-18 (1946).

20. Annex to the Fourth Hague Convention, Oct. 18, 1907, art. 1, 36 Stat. 2277, 2295.

21. *Id.* art. 43, 36 Stat. at 2306.

22. Adaption to Maritime Warfare of the Principles of the Geneva Convention (Hague, X, Oct. 18, 1907), art. 19, 36 Stat. 2389.

23. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, July 27, 1929, (also known as the Geneva Red Cross Convention (1929)), art. 26, 47 Stat. 2074, 2092.

of 1929 states that “[s]entence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power.”²⁴

Taken collectively these conventions create a basis for the argument that military commanders have an affirmative responsibility to insure that those under their command act in accordance with international legal standards. The doctrine of command responsibility was thus born from a fusion of these conventions’ particular articles.

B. *The Trial*

On 8 October 1945, General Yamashita was formally charged.²⁵ Five U.S. Army generals were assigned to hear the case.²⁶ The charge, composed by Colonel Carpenter, stated that Yamashita:

unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its dependencies, particularly the Philippines, between 9 October 1944 and 2 September 1945.²⁷

To this general charge was added a Bill of Particulars outlining 123 atrocities for which Yamashita was also allegedly personally responsible.

Major Robert Kerr led the prosecution and in presenting its case called hundreds of eyewitnesses. All testified as to the

24. Convention on Treatment of Prisoners of War, July 27, 1929, art. 63, 47 Stat. 2021.

25. The case against General Yamashita is reported at length in 4 LAW REPORTS OF THE TRIALS OF WAR CRIMINALS, (1948) [hereinafter 4 U.N. LAW REPORTS].

26. The five were Major General Russell B. Reynolds, Major General Clarence Sturdevant, Major General James Lester, Brigadier General William Walker, and Brigadier General Egbert Bullene.

27. *Review of the Record of Trial by a Military Commission of Tomoyuki Yamashita, General, Imperial Japanese Army*, JA 201-Yamashita, Tomoyuki, General, Imperial Japanese Army. A.P.O. 500, 26 Dec. 1945 at 1, [hereinafter *Review of the Record*] (report to the Commander-in-Chief, United States Armed Forces Pacific prepared by the Pacific Theater Judge Advocate).

horrific nature of what they saw.²⁸ The prosecution argued this testimony alone was enough to establish that Yamashita violated his responsibilities as a commander. As Major Kerr argued, the atrocities:

were so notorious and so flagrant and so enormous, both as to the scope of their operation and as to the inhumanity, the bestiality involved, that they must have been known to the Accused if he were making any effort whatever to meet the responsibilities of his command. . . .²⁹

Essentially, the prosecution was arguing that the burden of persuasion shifted once they showed that the atrocities were committed on a large enough scale. With few exceptions, the defense did not deny that the atrocities were committed. Thus, it became the defense's burden to prove that Yamashita was unaware of the atrocities or to assert reasons why Yamashita, if he knew of the atrocities, should be excused from the obligations he owed as a commander of troops.

However, on the chance that the commission was not persuaded by this argument, the prosecution also introduced evidence tending to prove General Yamashita's more direct involvement in the atrocities as "distinguished from that incident to mere command."³⁰

On the witness stand, Yamashita admitted to ordering the suppression of guerrillas, leaving the methods employed to the

28. The commission learned:

how Japanese soldiers executed priests in their churches . . . machine-gunned residents in their neighborhoods, and beheaded or burned alive American prisoners of war. It learned of Japanese torture. . . . It learned how one Japanese soldier tossed a baby in the air and impaled it on the ceiling with his bayonet, and how others bayoneted an eleven-year-old girl thirty-eight times. It learned of rape and necrophilia. . . .

LAEL, *supra* note 11, at 83-84.

It also heard testimony that Japanese soldiers were often in intoxicated rages and as a result "men's bodies were hung in the air and mutilated; babies' eyeballs were ripped out and smeared across walls; patients were tied down to their beds and then the hospital burned to the ground." LAWRENCE TAYLOR, *A TRIAL OF GENERALS* 125 (1981).

29. LAEL, *supra* note 11, at 83 (quoting AG 000.5 (9-24-45) JA *Before the Military Commission Convened by the Commanding General United States Army Forces, Western Pacific: Yamashita, Tomoyuki*, at 31).

30. *Review of the Record*, *supra* note 27, at 9.

discretion of the individual commanders.³¹ It was widely accepted that a substantial number of the atrocities were committed in a putative attempt to control Filipino guerrilla activity. To support the argument that Yamashita's order to suppress guerrillas directly resulted in atrocities, the prosecution relied in part on the testimony of one of Yamashita's subordinate officers. Colonel Hideo Nishiharu, in command of the 14th Area Army's police force, the Kempei Tai, testified that he told General Yamashita that there was no time to try suspected guerrillas.³² He stated that the Kempei Tai would "punish those who were to be punished."³³ Nishiharu asserted Yamashita bowed his head in silent approval and, accordingly, during ten days in December 1945 over 600 persons in Manila were summarily executed.

In addition, numerous captured documents were introduced revealing that in many instances the order to kill came from high in the chain of command. The diary of one officer read: "[r]eceived orders, on the mopping up of guerrillas . . . it seems that all men are to be killed. . . . Our object is to wound and kill the men [and] . . . to kill women who run away."³⁴ Captured orders from Colonel Masatochi Fujishige expressed that Japanese soldiers were to "[k]ill American troops cruelly. Do not kill them with one stroke. Shoot guerrillas. Kill all who oppose the emperor, even women and children."³⁵

31. 4 U.N. LAW REPORTS, *supra* note 25, at 22.

32. *Id.* at 19-20.

33. *Review of the Record*, *supra* note 27, at 10.

34. *Id.* The text of a number of illegal orders have been included in their entirety throughout this Note to signify the differences between illegal orders and a commander's failure to act. They have also been included to show their impact on the prosecution.

35. *Id.* Lastly, the prosecution presented the testimony of two brothers, Narciso Lapus and Joaquin Galang, both suspected of collaborating with the Japanese. 4 U.N. LAW REPORTS, *supra* note 25, at 19. Lapus, the private secretary to General Artemio Ricarte, a major Filipino puppet of the Japanese, testified that Ricarte was given orders by Yamashita to "wipe[] out" the whole population of Manila. *Review of the Record*, *supra* note 27, at 10-11. Galang testified that he overheard, and had translated for him, a conversation between Ricarte and Yamashita where Yamashita refused to rescind an order to kill all Filipinos. Cross examination, however, revealed considerable contradictions in their testimony. 4 U.N. LAW REPORTS, *supra* note 25, at 19-21. Moreover, the defense argued the testimony was only given in the hopes that the brothers, held by the U.S. for collaboration, would receive favorable treatment. The brothers were so discredited that the prosecution did not even mention them in its closing arguments. *Id.* at 28-33.

For the prosecution this evidence established a direct link between the atrocities and a dereliction of Yamashita's responsibilities as a military commander. They argued that the violations of the law of war committed by Yamashita's troops were: (1) so extensive in number and dramatic in scope that they must have been wilfully permitted by the accused or (2) were secretly ordered by him. Accordingly, the testimony of the hundreds of eyewitnesses established the first argument while the testimony of Yamashita and the lesser officers, as well as the captured documents, suggested the latter.

Yamashita's defense attempted to sever the connections suggested by the prosecution between the accused and the atrocities.³⁶ To this end, the defense put forward two arguments. First, due to battle conditions and the distance in command between Yamashita and those directly responsible, he was completely ignorant of the atrocities. This first argument rebutted the prosecution's assertion that Yamashita was aware of the atrocities and by failing to prevent them was guilty of a violation of his command obligations. Yamashita's second argument was that the atrocities, when committed, were contrary to his stated orders and wishes. This refuted the prosecution's evidence which linked Yamashita directly to the atrocities.

Yamashita's lack of knowledge was supported by three assertions. First, he claimed that time constraints afforded him no time to consolidate his command. On the stand Yamashita testified that only nine days passed between his assumption of command in the Philippines and the American invasion at Leyte. This brief period afforded Yamashita insufficient time to unify his command. Moreover, Yamashita claimed that the soldiers he commanded were "inferior troops, and there simply was not enough time to bring them up to [his] expectations."³⁷

36. Assigned to Yamashita's defense were Colonel Harry Clarke, Lieutenant Colonel Walter Hendrix, Lieutenant Colonel James Feldhaus, Major George F. Guy, Captain A. Frank Reel, and Captain Milton Sandberg. It is clear, as Yamashita himself acknowledged, that the defense was superbly conducted. Also, Yamashita was allowed to have his former Chief-of-Staff, Lieutenant-General Akira Muto, and Deputy Chief-of-Staff, Major-General Naokata Utsunomiya, aid him in his defense. For more detailed accounts of the defense's strategies as well as criticisms of the Commission, see A. FRANK REEL, *THE CASE OF GENERAL YAMASHITA* (1949); George F. Guy, *The Defense of Yamashita*, 4 WYO. L.J. 153 (1950).

37. REEL, *supra* note 36, at 149.

Also, because Yamashita was so consumed with planning for the defense of Leyte and Luzon, he was unable to make personal inspections.³⁸

Secondly, there was the issue of battle conditions and Yamashita's inability to maintain a command from which to fully oversee all operations. Yamashita claimed that he was "constantly under attack by large American forces."³⁹ He was becoming entrapped on the island. Japanese positions were pounded continually by American planes and Japanese supply ships were routinely sunk as U.S. forces began to take control of the Pacific. Integrated communications collapsed and intercourse between the Japanese forces became extremely difficult. Yamashita testified that the communication systems in place had become "completely disrupted."⁴⁰

Thirdly, at the time the atrocities were committed Japanese soldiers were scattered about the island and command had become decentralized. Considering his dire military situation, Yamashita realized that complete control of all his troops was impossible and, therefore, divided them in an attempt to avoid the wholesale destruction of his army.⁴¹ The army was divided into three separate fighting groups.⁴² Separated, the army could occupy the mountainous regions of Luzon and protract the fighting until the military situation changed in Japan's favor. Yamashita, himself, commanded the Shobu Group (152,000 soldiers) and defended the mountains north of Manila. Lieutenant General Shizuo Yokoyama commanded the Shimbu Group (80,000 soldiers) and defended the mountains south and east of Manila. Lastly, Major General Rikichi Tsukada commanded the Kembu Group (30,000 soldiers) and defended the Bataan Peninsula.⁴³ Because communication between the groups was not feasible, each commander was given virtual military autonomy⁴⁴ and told to prepare for "self-sufficiency [and] independent fighting."⁴⁵ Defense counsel argued that the vast number of

38. *Id.* at 148-49.

39. *Id.* at 148.

40. *Id.* at 148-49.

41. LAEL, *supra* note 11, at 12-14.

42. See SMITH, *supra* note 11, at 12-13, 94-97.

43. *Id.*

44. *Id.* at 87.

45. LAEL, *supra* note 11, at 13 (quoting CMH Translations, *Outline for Operation-*

atrocities were committed by troops in the two groups no longer controlled by Yamashita.⁴⁶

To illustrate this point, the defense discussed with particularity the atrocities committed in Manila. Prior to splitting his army, Yamashita decided not to defend the city. Superior American air and naval power would have meant certain defeat and the one million inhabitants of the city would have "over-taxed" Japanese defenders.⁴⁷ Therefore, prior to leading his group into the mountains, Yamashita ordered Yokoyama to direct the evacuation of Japanese troops from Manila. Yokoyama claimed that he in turn, ordered Colonel Masatocki Fujishige to supervise the evacuation. Yokoyama claimed that he gave Fujishige the same autonomy that had been given to him by Yamashita. Fujishige testified that it was his orders which resulted in the deaths in Manila and that he never informed Yokoyama or Yamashita of the atrocities.⁴⁸

Yamashita did not rest his defense solely on the impossibility of controlling his troops. He also claimed that he had expressly ordered fair treatment of the Filipino people within the ambit of his forces. Yamashita testified:

[c]ertain testimony has been given that I ordered the massacre of all the Filipinos, and I wish to say that I absolutely did not order this, nor did I receive the order to do this from any superior authority, nor did I ever permit such a thing, or if I had known of it would I have condoned such a thing. . . .⁴⁹

The testimony of Yokoyama supported this claim. He testified that Yamashita never ordered the massacre of Filipinos and, in fact, told him "to be fair in all [his] dealings with Filipino people."⁵⁰ The defense's objective was to eliminate the element of personal culpability from the prosecution's case. It attempted to

al Policy for Luzon Island, at 16).

46. This line of defense, not addressed in the commission's opinion, raises the question of the extent to which military commanders may escape liability by simply giving away command.

47. LAEL, *supra* note 11, at 86.

48. *Id.* at 87.

49. REEL, *supra* note 36, at 149-50.

50. 4 U.N. LAW REPORTS, *supra* note 25, at 21.

show that, despite the vast number of atrocities, the daunting conditions facing Yamashita rebutted the prosecution's claim that he "must have" or "should have" known of them, i.e., Yamashita's claims of ignorance were not only plausible but highly likely. Moreover, these acts were contrary to Yamashita's stated orders.

After the close of arguments on 5 December 1945, it took the commission less than forty-eight hours to find Yamashita guilty. The following is considered by most legal scholars⁵¹ to be the commission's definition of command responsibility:

Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offenses and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.⁵²

The commission also refused to accept Yamashita's claim of ignorance noting that the prosecution succeeded in showing that the crimes were "so extensive and widespread, both as to time and area, that they must either have been wilfully permitted by the accused, or secretly ordered by the accused."⁵³ The commission went on to state that "[c]aptured orders issued by subordinate officers of the accused were presented as proof that they, at least, ordered certain acts leading directly to exterminations of civilians under the guise of eliminating the activities of guerrillas hostile to Japan."⁵⁴ The commission also considered evi-

51. See, e.g., HOWARD S. LEVIE, *TERRORISM IN WAR: THE LAW OF WAR CRIMES* 158 (1993); LAEL, *supra* note 11, at 95; 2 *THE LAW OF WAR: A DOCUMENTARY HISTORY* 1597 (Leon Friedman ed., 1972); REEL, *supra* note 36, at 171-72; Franklin A. Hart, *Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraised*, 62 *U.S. NAVAL WAR C. INT'L L. STUD.* 397, 399-400 (1980).

52. 4 *U.N. LAW REPORTS*, *supra* note 25, at 35.

53. *Id.* at 34.

54. *Id.*

dence that Japanese forces had afforded the Geneva Convention "scant compliance or attention."⁵⁵

Concerning Yamashita's lack of troop inspections the commission was especially critical:

The Japanese Commanders testified that they did not make personal inspections or independent checks during the Philippine campaign to determine for themselves the established procedures by which their subordinates accomplish their missions. Taken at full face value, the testimony indicates that Japanese senior commanders operate in a vacuum, almost in another world with respect to their troops, compared with standards American Generals take for granted.⁵⁶

The commission then concluded:

(1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under [General Yamashita's] command against people of the United States, their allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and non-commissioned officers; (2) That during the period in question [General Yamashita] failed to provide effective control of [his] troops as was required by the circumstances.⁵⁷

A board of review, created by General MacArthur, evaluated the commission's findings, issued its own opinion, and upheld Yamashita's conviction.⁵⁸

C. *In re Yamashita*

The U.S. Supreme Court, in an opinion delivered by Justice Stone, stated, *inter alia*, that the "gist of the charge" leveled against Yamashita was for "unlawful breach of duty."⁵⁹ Thus,

55. *Id.*

56. *Id.* at 35.

57. *Id.*

58. *Review of the Record, supra* note 27, at 27.

59. *In re Yamashita*, 327 U.S. 1, 14 (1946). The Court also addressed the legiti-

the Court was concerned with whether an army commander is duty bound to "take such appropriate measures as are within his power to control the troops under his command"⁶⁰ and whether violations of the law of war that result from the commander failing this duty attach to him personal responsibility. The Court was impressed with the law of war's purpose "to protect civilian populations and prisoners of war from brutality. . . ."⁶¹ This purpose is defeated when an invading commander is allowed to neglect with impunity the protection of civilians and prisoners of war and, accordingly, "the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates."⁶² The Court then addressed with particularity the numerous conventions then existing which supported their conclusions.⁶³

D. *The Commission's Critics*

Commentators, ever since December 1945, have argued over the meaning of the commission's decision. Did the commission believe from the evidence that Yamashita was in fact aware of the atrocities or did the commission find guilt based on constructive knowledge? Or, in the alternative, was guilt based on a theory of absolute liability—that a commander is per se responsible for every act committed by subordinate troops? This discrepancy has led a number of commentators to criticize, and subsequently mischaracterize, the commission's ruling.

macy of the military commission's authority to try Yamashita and the sufficiency of the commission's evidence. The Court concluded that the order by General Styer to establish the commission was lawful as it was sanctioned by Congress in the Articles of War which allowed for "the creation of such tribunals for the trial of offenses against the law of war committed by enemy combatants." *Id.* at 11. The Court then ruled that the evidence used against Yamashita was not reviewable by the Supreme Court. Yamashita claimed that the hearsay and opinion evidence violated Articles 25 and 38's prohibition against such evidence. *Id.* at 18. The Court rejected this argument, holding that Yamashita, as an enemy combatant, could not invoke Articles 25 and 38 as they were only intended to protect members of the United States Armed Forces. *Id.* at 19.

60. *Id.* at 15.

61. *Id.*

62. *Id.*

63. See *supra* notes 19-24 and accompanying text.

Those that believe Yamashita was prosecuted on a theory of absolute liability argue that because the evidence linking Yamashita to the atrocities in their opinion was so weak, the commission must have accepted Yamashita's claim of ignorance. Frank Reel, one of Yamashita's defense counsel and out-spoken critic of the commission, argues that "the condemnation was unjust because Yamashita was held accountable for crimes committed by persons other than himself, crimes committed without his knowledge and, in fact, against his orders."⁶⁴ Author Lawrence Taylor states that Yamashita was not "convicted of ordering the atrocities . . . or even knowing about them. Quite simply, [Yamashita was] convicted on a theory of absolute liability. . . ."⁶⁵ Similarly, Telford Taylor, a U.S. prosecutor at Nuremberg, argues that there was "no evidence that he knew of [the atrocities] other than the inference that he must have because of their extent. . . ."⁶⁶ Dissenting Supreme Court Justice Frank Murphy agreed with these interpretations when he stated that Yamashita "was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him."⁶⁷

An analysis of the conclusions reached by the commission and MacArthur's Board of Review reveal the fallacy of these arguments. They demonstrate that the commission was impressed by not only the volume of the atrocities, but also the more direct evidence linking Yamashita to the crimes. While acknowledging that the judgment never explicitly discussed Yamashita's claim of ignorance, Franklin Hart points to a number of passages in the commission's decision which suggest disbelief in Yamashita's assertions.⁶⁸ A reading of the commission's findings on the captured orders and lack of inspections makes it "difficult to believe that the Military Commission accepted Yamashita's protestations of ignorance."⁶⁹ Passages from the Board of Review's findings go even further in support

64. REEL, *supra* note 36, at 242.

65. TAYLOR, *supra* note 28, at 222.

66. TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 182 (1970).

67. *In Re Yamashita*, 327 U.S. at 28 (Murphy, J., dissenting).

68. Hart, *supra* note 51, at 400-01.

69. *Id.* See also LEVIE, *supra* note 51, at 159-62.

of this position. The board was impressed by the systematic nature of the atrocities and their:

striking similarity of pattern throughout. . . . Almost uniformly the atrocities were committed under the supervision of officers or noncommissioned officers and in several instances there was direct proof of statements by the Japanese participants that they were acting pursuant to orders of higher authorities, in a few cases Yamashita himself being mentioned as the source of the order.⁷⁰

Stating one basis for its decision, the board pronounced that there existed a "deliberate plan of mass extermination which must have emanated from higher authority or at least had its approval."⁷¹ Lastly, the board found that battle conditions in the Philippines were "not so bad as stated by the accused."⁷² These statements are inconsistent with those claiming the commission's decision was based on a theory of absolute liability.

If the commission did not hold Yamashita to an absolute liability standard, then the question remains as to what knowledge standard was employed. The commission is unclear in its judgment and commentators have been correct to question it for this reason.⁷³ Some commentators have characterized the commission's ruling as embracing the notion that Yamashita either "must have known or at least should have known" of the atrocities.⁷⁴ Any "must have known" language confuses the subject as it clouds the line between "should have known" and actual knowledge. This confusion has been the source for much of the criticism of the commission's decision. The commission may, however, be excused for its lack of precision since it was breaking new legal ground in 1945 and the elements of command responsibility were not yet solidified.

For this reason, it is impossible to say with any degree of certainty whether the commission was satisfied that because of

70. *Review of the Record*, *supra* note 27, at 15.

71. *Id.*

72. *Id.* at 16.

73. See Hart, *supra* note 51, at 400; LAEL, *supra* note 11, at 137-41.

74. See LAEL, *supra* note 11, at 141.

Yamashita's position on the island and his proximity to the atrocities he should have known of them or whether the commission was satisfied that Yamashita had actual knowledge of the atrocities.

The case against General Yamashita has been widely criticized as the victor inflicting revenge on the vanquished. Many commentators believe that Yamashita was held to too high a standard given the surrounding circumstances. However, commentators that adhere to this view fail to consider all the evidence that was offered at trial. There were numerous witnesses and captured documents introduced that contradicted Yamashita's claims of ignorance. There was also substantial testimony which allowed the commission to find that Yamashita played a more direct role in the atrocities. Commentators may disagree with the commission's factual interpretations of the evidence but it is improper to mischaracterize its ruling as embracing a doctrine of absolute liability for military commanders.

III. THE NUREMBERG TRIALS

Of the twelve trials conducted by the United States at the Subsequent Nuremberg Proceedings,⁷⁵ two directly addressed command responsibility. They were the High Command Case and the Hostage Case. Both concerned, *inter alia*, illegal orders which resulted in the deaths of hundreds of thousands and the destruction of tremendous amounts of public and private property. Those that believe Yamashita was held to too high a standard embrace these judgments because of their explicit rejection of absolute commander responsibility and because of their more realistic approach to the practicalities of war. While in neither case were any of the defendants specifically charged with neglecting their command responsibilities, the judgments handed out against them addressed command responsibility and attempted to redefine the knowledge component of the doctrine.

75. The U.S. trials at Nuremberg followed those held by the International Military Tribunal which was responsible for the prosecution of the most notorious war criminals such as Hess and Goering.

In the High Command Case, the tribunal, comprised of U.S. civilian judges, rejected the "should have known" standard. Instead, before finding any commander responsible for the illegal actions of his subordinates the tribunal required sufficient proof of actual knowledge. The commander's knowledge would not be imputed.

The Hostage Case applied a different standard. That tribunal embraced a "should have known" standard, albeit different from the one that some commentators argue was applied in the Yamashita case. This standard was not concerned with the number of atrocities, but instead with the reports of them which reached the commander's headquarters. In essence, the tribunal held that if reports of the atrocities reached the commander's headquarters then he should have knowledge of them. Actual knowledge is not required.

A. *The High Command Case*

In 1947, the United States charged fourteen high ranking German officers⁷⁶ with waging aggressive war, participating in the ill-treatment and murder of thousands of civilians, violating the rights of prisoners of war, and conspiring to commit crimes against peace and humanity.⁷⁷ Pertinent to this discussion is the judgment that was handed down against General Field Marshal Wilhelm von Leeb. He commanded one of three German armies on the eastern front between June 1941 and January 1942. The German eastern front focused on the invasion and subsequent occupation of the Soviet Union. Specifically, von Leeb was accused of implementing the illegal Commissar Order, which called on German officers to kill captured Soviet political officers accompanying troops in the field and the Barbarossa

76. General Field Marshal Wilhelm von Leeb, General Field Marshal Hugo Sperrle, General Field Marshal George Karl Friedrich-Wilhelm von Kuechler, General Johannes Blaskowitz, General Hermann Hoth, General Hans Reinhardt, General Hans von Salmuth, General Karl Hollidt, Admiral Otto Schniewind, Lieutenant-General Karl von Roques (Infantry), Lieutenant-General Hermann Reinecke (Infantry), Lieutenant-General Walter Warlimont (Artillery), Lieutenant-General Otto Woehler (Infantry), and Lieutenant-General Rudolf Lehmann (Judge Advocate).

77. 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 2-5 (1949) [hereinafter 12 U.N. LAW REPORTS]. The facts which follow have been taken from the tribunal's opinion.

Order which denied prisoner of war status to, and resulted in the murder of, captured Russian combatants.

Over the course of the war, the German Armed Forces were controlled by the Oberkommando der Wehrmacht ("OKW").⁷⁸ Hitler was its supreme commander and through it, oversaw the operation of each branch of the military. Directly subordinate to Hitler in the OKW was General Field Marshal Wilhelm Keitel. Orders and military policy emanated directly from the OKW to commanders in the field.

The OKW was divided into a number of different sections. The Wehrmahctsfuehrungsstab ("WFST")⁷⁹ directed all military operations in the field. Command of the army rested with the Oberkommando des Heeres ("OKH"), originally headed by Field-Marshal Walter von Brauchitsch. He, however, was removed when Hitler himself assumed the position in December 1941. The German Army was divided into groups, each comprised of two or more armies. Von Leeb commanded Army Group North.

On 30 March 1941, Hitler convened a military policy conference in Berlin. In attendance were members of the WFST and other high ranking generals from the field, including von Leeb. At this meeting Hitler iterated his aversion for communism and his plans to destroy it.⁸⁰ Also present at the meeting was General Franz Hadler whose notes reveal Hitler's intentions:

Clash of two ideologies. Crushing denunciation of Bolshevism, identified with a social criminality. Communism is an enormous danger for our future. . . . This is a war of extermination. . . . We do not wage war to preserve the enemy.

War against Russia. Extermination of the Bolshevik Commissars and the Communist intelligentsia. . . . Growth of the new intellectual class must be prevented. . . . We must fight against the poison of disintegration. This is no job for military courts.

This war will be very different from the war in the West. In the East, harshness today means leniency in the future.

78. For a detailed discussion of the German Armed Forces from the perspective of a former general who served under Hitler, see WALTER WARLIMONT, *INSIDE HITLER'S HEADQUARTERS 1939-45* (R.H. Barry trans., 1962).

79. Often referred to as the Wehrmacht.

80. See 12 U.N. LAW REPORTS, *supra* note 77, at 23; see also WARLIMONT, *supra* note 78, 160-61.

Commanders must make the sacrifice of over coming their personal scruples.⁸¹

The reaction of a number of generals present was negative. They realized the brutality, as well as illegality, of Hitler's intentions.⁸² Their opinions were expressed to Hitler through Brauchitsch and Keitel, but to no avail. Consequently, on 6 June 1941, Hitler issued the Commissar Order through the OKW. It read:

In the fight against Bolshevism it is not to be expected that the enemy will act in accordance with the principles of Humanity or of the International Law. In particular, a vindictive, cruel and inhuman treatment of our prisoners must be expected on the part of the *political Commissars of all types*, as they are the actual leaders of the resistance.

The troops must realize:

(1) In this fight, leniency and consideration of International Law are out of place in dealing with these elements. They constitute a danger for their own safety and the swift pacification of the conquered territories.

(2) The originators of barbarous Asiatic methods of warfare are the political commissars. They must therefore be dealt with most severely, *at once* and summarily.

Therefore, they are to be liquidated at once when taken in combat or offering resistance.⁸³

The order was directed to the three separate army groups making up the eastern front. At trial, German officers testified that at the beginning of the war, out of the approximately 220,000 Russian troops captured by the Germans, there must have been roughly 2,000 to 2,500 commissars and of these only 96 were executed in accordance with the order.⁸⁴ This figure, however, is controverted as author Eugene Davidson contends that several hundred were killed.⁸⁵

On 13 May 1941, Keitel issued the "Decree on Exercising Military Jurisdiction in the Area of Barbarossa and Special

81. 12 U.N. LAW REPORTS, *supra* note 77, at 23.

82. *Id.*

83. *Id.* at 24.

84. EUGENE DAVIDSON, *THE TRIAL OF THE GERMANS*, 567 (1966).

85. *Id.*

Measures by the Troops," known as the "Barbarossa order."⁸⁶ The order allowed German officers to summarily mete out punishment against civilians and *franc-tireurs*⁸⁷ suspected of acts

86. It read:

The Wehrmacht's application of its laws (Wehrmachtsgerichtsbarkeit) place at *maintaining discipline*.

The vast extent of the operational areas in the East, the fighting methods necessitated thereby and peculiarity of the enemy give the Wehrmacht courts jobs which-in view of their limited personnel-they can only solve during war operations and until some degree of pacification has been obtained in the conquered area if they limit themselves at first to their main task.

This is possible only if the troops themselves oppose ruthlessly any threat from the enemy population.

For these reasons herewith the following is ordered for the area 'Barbarossa' (area of operations, army group rear area, and area of political administration).

I

Treatment of Crimes committed by Enemy Civilians

(1) Until further order the military courts and the courts-martial will not be competent for *crimes committed by enemy civilians*.

(2) *Franc-tireurs* will be liquidated ruthlessly by the troops in combat or while fleeing.

(3) *Also all other attacks by enemy civilians against the Armed Forces*, its members and auxiliaries will be suppressed on the spot by the troops with the most rigorous methods until the assailants are finished. (Niederkaempfen.)

.....

II

Treatment of crimes committed against inhabitants by members of the Wehrmacht and its auxiliaries

(1) With regard to offenses committed against enemy civilians by members of the Wehrmacht or by its auxiliaries, prosecution is not obligatory, even where the deed is at the same time a military crime or misdemeanor.

(2) When judging such offenses, it will be taken into consideration in any type of procedure that the collapse of Germany in 1918, the subsequent sufferings of the German people and the fight against National Socialism which cost the blood of innumerable followers of the movement were caused primarily by bolshevist influence and that no German has forgotten this fact.

.....

III

Responsibility of the Troop Commanders

In so far as they are competent, it is the *personal* responsibility of the troop commanders to see to it:

(1) that all officers of the units under their command are instructed in time and in the most emphatic manner about the principles set out under 'I' above;

.....

12 U.N. LAW REPORTS, *supra* note 77, at 29-31.

87. The *franc-tireurs* were guerilla fighters that did not fall within the Hague

directed against the German Army. More often than not, the punishment was death. In a number of the army groups, the order was viciously carried out.⁸⁸ In addition, the order allowed groups such as the Einsatzgruppen to murder thousands of civilians with impunity.⁸⁹

As did General Yamashita, General von Leeb put forward a two-pronged defense. He claimed both that he was completely unaware of the atrocities committed, and that they contradicted his given orders. It is apparent that von Leeb disapproved of the Commissar Order from the beginning. At the March meeting von Leeb voiced his belief that Hitler's intentions were illegal and contrary to conduct expected of soldiers.⁹⁰ He asked von Brauchitsch to persuade Hitler to change his plans. After the Commissar Order was issued, evidence showed that von Leeb considered the order to be a violation of international law and again asked von Brauchitsch to persuade Hitler to rescind it.⁹¹ Moreover, he discussed his opposition to the order with his subordinates. He also used a Maintenance of Discipline order to lessen, to the extent possible, the effect of the order: "[i]t was clear from the evidence that the accused von Leeb had protested against the order in every way short of open and defiant refusal to obey it."⁹²

As for the Barbarossa Order, evidence established that "apart from a mass liquidation which occurred at Kowno, no liquidations within the accused von Leeb's area of command had been brought to the attention of the accused."⁹³ And when von Leeb was made aware of the killings at Kowno, he immediately took steps to prevent their repetition. Also, the evidence failed to

Convention of 1907's definition of legal combatants. Thus, Hitler felt no obligation to treat them according to the mandates of the convention. See MATTHEW COOPER, *THE NAZI WAR AGAINST SOVIET PARTISANS 1941-44*, 47-48 (1979).

88. See OMER BARTOV, *THE EASTERN FRONT 1941-45, GERMAN TROOPS AND THE BARBARISATION OF WAR 119-29* (1986).

89. The Einsatzgruppen were paramilitary groups supported by the Germans. Their mission was to exterminate "Jews, commissars, and other undesirables, as well as [fight] the partisan bands that plagued the German rear areas." DAVIDSON, *supra* note 84, at 316. In most instances, it was impossible to distinguish them from the regular German Army. *Id.*

90. 12 U.N. LAW REPORTS, *supra* note 77, at 23.

91. *Id.* at 27.

92. *Id.*

93. *Id.* at 31.

establish that von Leeb was aware of the activities of the Einsatzgruppen. The record is also clear that von Leeb had not been afraid to voice his opposition to the Fuhrer's plans on other occasions; at the beginning of the war, von Leeb had openly criticized Hitler's intentions to attack the low countries and France.⁹⁴

Of all the charges leveled against von Leeb the tribunal found him guilty of one, implementing the 'Barbarossa Order,' and for this he was sentenced to three years. In its judgment, the tribunal first addressed warfare and the difficulties commanders face in knowing all the activities of subordinate troops:

Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility. The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means co-extensive. Modern war such as the last war, entails a large measure of de-centralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure.⁹⁵

It then confronted command responsibility and stated that a commander:

has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander-in-Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone.⁹⁶

With this statement the tribunal moved away from the Yamashita judgment. Where the Yamashita commission was more willing to find knowledge from the surrounding circumstances, the High Command tribunal required substantially more. In rejecting the notion that a military commander is "*per*

94. *Id.* at 13.

95. *Id.* at 76.

96. *Id.*

se responsible within the area of his occupation"⁹⁷ the tribunal stated:

There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of International Law would go far beyond the basic principles of criminal law as known to civilized nations.⁹⁸

The tribunal rejected the "should have known" standard. Personal responsibility would not attach without some proof of acquiescence. The fact that the atrocities occurred and that the commander was in a position to know of them, but did not, was not sufficient. As the tribunal pronounced, "the occupying commander must have knowledge of these offenses and acquiesce or participate or criminally neglect to interfere in their commission and that the offenses committed must be patently criminal."⁹⁹ On the question of whether the tribunal would impute knowledge of the atrocities committed by the Einsatzgruppen to the defendants, the tribunal noted that "it is apparent we can draw no general presumption as to their knowledge in this matter and must necessarily go to the evidence pertaining to the various defendants to make a determination of this question."¹⁰⁰

B. *The Hostage Trial*

The trial took its name from the German Army's practice of taking hostages from the local populations of occupied countries to insure against civilian attacks.¹⁰¹ Between September 1939 and May 1945, German soldiers in the countries of Albania, Greece, Norway, and Yugoslavia murdered and enslaved hundreds of thousands of civilians. The Germans' purported aim

97. *Id.*

98. *Id.*

99. *Id.* at 77.

100. *Id.* at 79.

101. The Hostage Case is reported in detail in 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS, 34 (1949) [hereinafter 8 U.N. LAW REPORTS].

was to eliminate the destructive guerilla forces as was seen in the Yamashita and High Command cases. There were also charges that the German Army wantonly destroyed both public and private property for no legitimate military purpose. It was alleged that the soldiers responsible for the atrocities were acting "pursuant to orders issued, distributed and executed" by high-ranking German officers.¹⁰² The indictment against these officers charged that they "participated in a deliberate scheme of terrorism and intimidation wholly unwarranted and unjustified by military necessity. . . ."¹⁰³ The indictment carried the following four counts:

(1) That defendants were principals or accessories to the murder of hundreds of thousands of persons from the civilian population of Greece, Yugoslavia and Albania by troops of the German Armed Forces. . . .

(2) That defendants were principals or accessories to the plundering and looting of public and private property, the wanton destruction of cities, towns and villages, frequently together with the murder of the inhabitants thereof. . . .

(3) That defendants were principals or accessories to the drafting, distribution and execution of illegal orders. . . .

(4) That defendants were principals or accessories to the murder, torture, and systematic terrorisation, imprisonment in concentration camps, forced labour on military installations, and deportation to slave labour, of the civilian populations of Greece, Yugoslavia and Albania. . . .¹⁰⁴

Germane to this discussion is the prosecution of General Field Marshal Wilhelm List. He commanded the German Army during the invasion and subsequent occupation of the Balkan peninsula. Soon after occupation began, attacks on German soldiers by civilian insurgent forces in Yugoslavia and Greece threatened German military stability. In response, on 16 September 1941, Hitler ordered List to suppress the insurgent movement and assigned General Franz Boehme to assist him. Boehme, while remaining subordinate to List, was given the

102. Indicted were Wilhelm List, Maximilian von Weichs, Lothar Rendulic, Walter Kuntze, Hermann Foertsch, Franz Boehme, Helmuth Felmy, Hubert Lanz, Ernst Dehner, Ernst von Leyster, Wilhelm Sediell, and Kurt von Geitner.

103. 8 U.N. LAW REPORTS, *supra* note 101, at 35.

104. *Id.* at 35-36.

“entire executive power” in Serbia.¹⁰⁵ In October of that year, Boehme issued his plans for the suppression of the insurgents. He wanted all males in Serbia suspected of being communists arrested as hostages and if German soldiers were killed the “commanders [were] to decree the shooting of arrestees according to the following quotas: (a) For each killed or murdered German soldier . . . one hundred prisoners or hostages, (b) For each wounded German soldier . . . 50 prisoners or hostages.”¹⁰⁶ On 16 September 1941, the OKW issued a similar order which List distributed to his subordinates.¹⁰⁷ List issued his own order in October:

The male population of the territories to be mopped up of bandits is to be handled according to the following points of view:

Men who take part in combat are to be judged by court martial.

Men in the insurgent territories who were not encountered in battle, are to be examined and-

If a former participation in combat can be proven of them to be judged by court martial.

If they are only suspected of having taken part in combat, of having offered the bandits support of any sort, or of having acted against the

105. *Id.* at 39.

106. *Id.*

107. It read:

Measures taken up to now to counteract this general communist insurgent movement have proven themselves to be inadequate. The Fuhrer now has ordered that severest means are to be employed in order to break down this movement in the shortest time possible. Only in this manner, which has always been applied successfully in the history of the extension of power of great peoples can quiet be restored.

The following directives are to be applied here: (a) Each incident of insurrection against the German Wehrmacht, regardless of individual circumstances, must be assumed to be of communist origin. (b) In order to stop these intrigues at their inception, severest measures are to be applied immediately at the first appearance, in order to demonstrate the authority of the occupying power, and in order to prevent further progress. One must keep in mind that a human life frequently counts for naught in the affected countries and a deterring effect can only be achieved by unusual severity. In such a case the death penalty for 50 to 100 communists must in general be deemed appropriate as retaliation for the life of a German soldier. . . .

Wehrmacht in any way, to be held in a special collecting camp. They are to serve as hostages in the event that bandits appear, or anything against the Wehrmacht is undertaken in the territory mopped up or in their home localities, and in such cases they are to be shot.¹⁰⁸

In Serbia, troops under General Boehme's command acted in accordance with his order and a considerable number of civilians were killed.¹⁰⁹ List, like Yamashita and von Leeb, professed complete ignorance of the atrocities. However, in the town of Topola, Boehme executed approximately 2,000 villagers suspected of being Jews or communists in retaliation for twenty-two German soldiers killed. Evidence at trial established that List was made aware of these killings in a communication from Boheme. The communication read: "Execution by shooting of about 2,000 Communists and Jews in reprisal for 22 [German soldiers] murdered. . . ."¹¹⁰ There was also evidence that List was made aware of other atrocities carried out in accordance with the hostage orders. However, List "never himself signed an order for the killing of hostages or other inhabitants, or fixed a ratio determining the number of persons to be put to death for each German soldier killed. . . ."¹¹¹ In addition, a number of the murders that were carried out in List's area of command were committed by units of the S.S. not directly under his command.¹¹²

The judgment of the tribunal found that it is the "duty of the commanding general in occupied territory to maintain peace and order, punish crime and protect lives and property. This duty extends not only to the inhabitants of the occupied territory but to his own troops and auxiliaries as well."¹¹³ The tribunal noted that "[t]hose responsible for such crimes by ordering or authorizing their commission, or by a failure to take effective steps to prevent their execution or recurrence must be held to

108. *Id.* at 39-40.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 69.

account if International Law is to be anything more than an ethical code, barren of any practical coercive deterrent."¹¹⁴

Rejecting List's claims of ignorance, the tribunal was impressed that List was told by subordinates of the reports of the murders by units in the field. The tribunal held that a commander "is charged with notice of occurrences taking place within that territory. . . . If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defense."¹¹⁵ This statement appears to embrace a "should have known" standard. However, it is not the "should have known" standard as it was purportedly applied in the Yamashita case. It was not the number of atrocities which the court recognized as imputing knowledge, but rather the reports which found their way to his headquarters. As the tribunal noted:

The reports made to the defendant List as Wehrmacht Commander Southeast charge him with notice of the unlawful killing of thousands of innocent people in reprisal for acts of unknown members of the population who were not lawfully subject to such punishment.¹¹⁶

C. *Nuremberg Concluded*

With its decision, the Hostage tribunal moved away from the High Command's application of the doctrine of command responsibility. It rejected the stringent requirement that nothing short of actual knowledge would suffice. The Hostage tribunal accomplished this by redefining the "should have known" standard.

If word of the atrocities being committed by subordinate troops reach the commanders via reports filed with headquarters then the commanders should be aware of them and they will be legally recognized as having received them. After imputing knowledge, the tribunal then found that List did not punish those responsible for the atrocities and, further, took no steps

114. *Id.* at 70.

115. *Id.* at 71.

116. *Id.*

to prevent their repetition. Accordingly, it concluded that List's "failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence, constitutes a serious breach of duty and imposes criminal responsibility."¹¹⁷

There must be some means by which the commander is able, if he is fulfilling his responsibilities as a commander, to learn of the atrocities. Black's Law Dictionary defines imputed knowledge as "knowledge attributed or charged to a person because the facts in question were open to his discovery and it was his duty to inform himself as to them."¹¹⁸ This new "should have known" standard will become increasingly more important when command responsibility is applied to the situation in the former Yugoslavia.

IV. COMMAND RESPONSIBILITY SINCE NUREMBERG

A. *The My Lai Massacre*

In 1971, United States Captain Ernest Medina was brought before a military court to answer charges that three years prior, during the Vietnam conflict, he failed to adequately control the men of his company.¹¹⁹ In 1968, in the hamlet of My Lai the men of Medina's company slaughtered hundreds of unarmed civilians—the majority of whom were women, children, and old men. The massacre afforded the United States the opportunity to prosecute one of its own military commanders for failing to control the actions of his men. Again, the central question was to what standard of knowledge would the military tribunal hold the commander. In 1969, Lieutenant General Williams R. Peers was directed to explore the events surrounding the assault on My Lai and determine if any cover-up had taken place. His findings are reported in *The Peers Report*.¹²⁰

Charlie Company arrived in Vietnam in early December 1967. In January 1968, it was assigned to Task Force Bark-

117. *Id.*

118. BLACK'S LAW DICTIONARY 758 (6th ed. 1990).

119. Captain Medina commanded Charlie Company, 1st Division, Second Infantry.

120. The scope of the inquiry included a thorough investigation of the atrocities. For a complete transcript see JOSEPH GOLDSTEIN ET AL., *THE MY LAI MASSACRE AND ITS COVER-UP: BEYOND THE REACH OF LAW?* 29-395 (1976).

er.¹²¹ The task force was created for the purpose of applying pressure on the Quang Ngai Province in South Vietnam, a traditional Viet Cong stronghold. In March, Medina was ordered to assault the My Lai 4 hamlet which was suspected of harboring hundreds of soldiers from the experienced 48th Viet Cong Battalion.

On the morning of 16 March, Charlie Company was flown by helicopter to within a few hundred yards of the hamlet.¹²² With a population of only several hundred the hamlet was comprised of thatched huts and small brick homes.¹²³ Three platoons were engaged in the assault. The company believed this was the first real contact it was going to have with the Viet Cong.¹²⁴ However, upon entering the hamlet, the company took no enemy fire and encountered no resistance. Later, it was thought that the Viet Cong had simply moved out of the hamlet before the U.S. soldiers arrived, tipped off by the shelling commenced just before the assault.¹²⁵

"The killings began without warning."¹²⁶ Harry Stanley, a member of the company, recalled witnessing:

some old women and some little children-fifteen or twenty of them-in a group around a temple where some incense was burning. They were kneeling and crying and praying, and various soldiers . . . walked by and executed these women and children by shooting them in the head with their rifles.¹²⁷

Eighty more were pulled from their homes, huddled together and executed. The killings continued all morning. Dennis Conti, also a member of Charlie Company, explained what he thought happened:

121. *Id.* at 81.

122. *See id.* at 100-02.

123. SEYMOUR M. HERSH, MY LAI 4: A REPORT ON THE MASSACRE AND ITS AFTER-MATH 47 (1970).

124. The company had been on a number of search-and-destroy missions but it had never fully encountered an enemy contingency of considerable size.

125. HERSCH, *supra* note 123, at 46.

126. *Id.* at 49.

127. *Id.* at 49-50.

We were all psyched up, and as a result, when we got there the shooting started, almost as a chain reaction. The majority of us had expected to meet VC combat troops, but this did not turn out to be so. First we saw a few men running . . . and the next thing I knew we were shooting at everything. Everybody was just firing. After they got in the village, I guess you could say that the men were out of control.¹²⁸

The Peers Report estimated that the number killed "was at least 175 and may exceed 400."¹²⁹

As the commanding officer of Charlie Company, Captain Medina was charged with responsibility for the massacre because of his "continuing duty to control the activities of his subordinates where such activities were being carried out as part of an assigned military mission. . . ."¹³⁰ Presiding over the trial was military judge, Colonel Kenneth Howard.¹³¹ Specifically, the prosecution alleged that Medina was "in and about the village of My Lai (4)" and in constant radio contact with his platoons throughout the operation.¹³² The prosecution also contended that at some point in the operation Medina "became aware that his men were improperly killing non-combatants."¹³³ Lastly, the prosecution claimed that after becoming aware of these acts, Medina "declined to exercise his command responsibility by not taking necessary and reasonable steps to cause his troops to cease the killing of non-combatants."¹³⁴

Medina, however, argued that he was not aware of the atrocities committed by his men until it was too late. He contended that he remained with his command post west of the village. He stated that it was his belief that at the time of the assault all the women and children of the village would be out of the hamlet and on their way to market. In addition, as soon as he

128. *Id.* at 51.

129. GOLDSTEIN, *supra* note 120, at 314.

130. 2 THE LAW OF WAR, *supra* note 51, at 1731.

131. Two colonels, two lieutenant colonels, and one major adjudged the general court martial.

132. 2 THE LAW OF WAR, *supra* note 51, at 1731.

133. *Id.*

134. *Id.*

became aware of the killings, Medina testified that he ordered an immediate cease fire.¹³⁵

Pertinent to this discussion is Colonel Howard's charge to the court. On the issue of command responsibility Howard gave the following instruction:

a commander is also responsible if he has *actual* knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of war. You will observe that these legal requirements placed upon a commander require actual knowledge plus a wrongful failure to act.

Howard then proceeded to discuss how proximity to the atrocities impacts on the doctrine.

Thus mere presence at the scene without knowledge will not suffice. That is, the commander-subordinate relationship alone will not allow an inference of knowledge. 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.¹³⁶

As was seen in the High Command Case, there would be no imputing of knowledge. Not surprisingly, Medina was found not guilty.

Colonel Howard's interpretation of command responsibility, however, was not consistent with the U.S. Army manual, *The Law of Land Warfare*. It notes that:

when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander con-

135. *Id.*

136. *Id.*

cerned. The commander is also responsible if he has actual knowledge, or *should have knowledge*, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.¹³⁷

A number of commentators have criticized Colonel Howard because of the appearance that since Medina was a U.S. soldier a different set of rules was applied. By applying the High Command Case precedent instead of the Hostage Case precedent, Colonel Howard virtually guaranteed Medina's acquittal. Many criticize Howard for apparently holding a member of his own army to a lesser standard than that applied to General Yamashita. Those that defend Colonel Howard point to studies conducted at the time which undermine the principles by which war criminals were judged at the end of Second World War. Many studies support the notion that a number of complex factors work to transform otherwise decent people into murderers.¹³⁸

B. *The 1977 Protocol*

In 1977, a field of international delegates amended the 1949 Geneva Conventions of 12 August 1949¹³⁹ and, for the first time, specifically addressed the doctrine of command responsibility.¹⁴⁰ Once again, the question of knowledge was debated. Clearly, it would not be absolute liability; that notion, following Yamashita, was categorically rejected by all subsequent trials dealing with the issue. Would the amendment contain a "should have known" standard like the one possibly applied in the Yamashita case or like the one in the Hostage Case? Or would the conferencees reject all "should have known"

137. LAEL, *supra* note 11, at 127-28 (quoting THE LAW OF LAND WARFARE (FM-27-10) 178-79 (Government Printing Office 1956) (a U.S. Army Field Manual)) (emphasis added).

138. These factors include: the death of close comrades, continuous shelling and constant contact with the enemy. See LAEL, *supra* note 11, at 132-33.

139. See *supra* note 10.

140. The conference's work is reprinted in its entirety in 16 I.L.M. 1391 (1977).

logic and require actual knowledge? Or would the conference allow for some combination of the different positions?

The conference opted for the Hostage Case precedent. Two proposed amendments, one sponsored by the U.S. delegation to the conference, were rejected because of their overly broad "should have known" language. The first stated that military commanders would be responsible for the illegal acts of a subordinate "if they knew or should have known that he was committing or would commit such a breach and if they did not take measures within their power to prevent or repress the breach."¹⁴¹ This logic is consistent with the Yamashita decision. Knowledge would be imputed from surrounding circumstances and the position of the accused. Similarly, the rejected U.S. proposal provided that responsibility would attach "if [the military commanders] knew or should reasonably have known in the circumstances at the time that [a subordinate] was committing or was going to commit such a breach. . . ."¹⁴² This also reflects too broad a proposition as again knowledge could be satisfied even in the absence of any evidence which would place the accused in a position where he could have learned of the atrocities. The amendment which was finally codified read:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.¹⁴³

The similarities between this amendment and the judgment in the Hostage Case are readily apparent. The tribunal in that

141. HOWARD LEVIE, PROTECTION OF WAR VICTIMS: PROTOCOL 1 TO THE 1949 GENEVA CONVENTIONS, 4 VOLS. (1979-81).

142. *Id.*

143. DIPLOMATIC CONFERENCE ON REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICT: Text of Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) adopted by the conference on June 8 1977, art. 86, n.2, 16 I.L.M. 1391, 1429 (1977). *See also*, art. 87.

case charged notice of the atrocities because of the reports that crossed von Leeb's desk. Accordingly, the amendment states that commanders will be charged with notice if they "had information which *should have* enabled them to conclude"¹⁴⁴ that atrocities were committed. However, while both reject the notion that only actual knowledge will suffice, the Hostage Case standard and the 1977 Protocol are open to two strikingly different interpretations. The former, imputing knowledge from "reports made to the commander" arguably requires proof of a careful record-keeping general staff archiving incriminating documents. The latter can be read to permit the introduction of widely published press accounts of the atrocities. This distinction will become extremely important to the discussion of command responsibility in the former Yugoslavia.

The 1977 conference chose the Hostage standard over the others because of its fairness. Actual knowledge, as was seen in the High Command Case and the My Lai court martial, presents a standard nearly impossible to meet. It requires that prosecutors prove awareness. Certainly, the commander is not going to admit to knowledge. Moreover, the only persons that would be in a position to know for certain whether the commander had knowledge are his immediate subordinates. Certainly, they will not be quick to implicate their commanding officer. All these factors make proving knowledge extremely difficult, if not impossible. Therefore, a more realistic approach is to impute knowledge where the commander was in a position to know of the atrocities.

V. YUGOSLAVIA

A. *Factual Background*

The atrocities occurring in the former Yugoslavia easily rival those committed during the Second World War by soldiers of the 14th Area Army in the Philippines and the soldiers of the German Army in Russia and on the Balkan peninsula. The Bosnian government has gathered evidence of forty-two alleged mass murders and at least twenty mass graves.¹⁴⁵ The govern-

144. *Id.* (emphasis added).

145. Leonard Doyle, *Germans Hold Serb 'War Criminal'; Former Restaurant Owner*

ments of Serbia and Croatia claim similar numbers. In September of last year, it was widely reported that the conflict in the former Yugoslavia had claimed 200,000 lives and left another two million homeless.¹⁴⁶ There are innumerable stories of murder, torture, rape, and mutilation. Often, the victims are civilian women and children. There also exist hundreds of detention camps where a substantial number of the atrocities are being committed.¹⁴⁷

Cherif Bassiouni, former chairperson of the United Nations Commission on War Crimes in the former Yugoslavia, had a staff of fifty working to catalog all of the reports.¹⁴⁸ The commission was set up to collect and analyze evidence of the atrocities.¹⁴⁹ Pursuant to Article 11 of the *Statute*¹⁵⁰ eleven judges, each from a different country, were elected by the General Assembly in September to hear the cases. Jurists were chosen from Australia, Canada, China, Costa Rica, France, Italy, Malaysia, Nigeria, Pakistan, and the United States.¹⁵¹ In August

Charged With Taking Part in Genocide Against Bosnian Muslims, THE INDEPENDENT, Feb. 15, 1994, European News Page, at 8.

146. See *Retreating Army Leaves Area Devastated*, CALGARY HERALD, Sept. 18, 1993, at A12; *Researchers to Document Bosnian War Crimes*, THE LEGAL INTELLIGENCER, Sept. 1, 1993, at 27; *Nightline* (ABC television broadcast, Aug. 5, 1993). The most recent reports say the number killed is approaching 250,000. *NBC Nightly News* (NBC television broadcast, Feb. 20, 1993).

147. The United Nations Commission on War Crimes has listed 393 such camps. *Researchers to Document Bosnian War Crimes*, THE LEGAL INTELLIGENCER, Sept. 1, 1993, at 27. Survivors of these camps report seeing "men beaten to death, shot in the back, and burned alive." Alan Elsner, *U.S. Says 70,000 May Be Held in Yugoslav Camps*, REUTERS LTD., Jan. 6, 1993. There are allegations of mass executions and torture. *Id.* It is also reported that men are being forced to sodomize their sons and watch their daughters raped. See *Researchers to Document Bosnian War Crimes*, THE LEGAL INTELLIGENCER, Sept. 1, 1993, at 27.

148. Flynn McRoberts, *At De Paul, War is Waged Against Balkan Atrocities*, CHI. TRIB., Nov. 21, 1993, at C1.

149. The commission's other members are Christine Cleiren, a criminal law professor from the Netherlands, Sophie Greve, a court of appeals judge from Norway, Keba Mbaye, a former World Court judge from Senegal, and William Fenrick, a Canadian expert on war crimes. See Anthony Goodman, *Venezuelan Prosecutor Gets Key U.N. War Crimes Post*, THE REUTER EUR. BUS. REP., Oct. 21, 1993.

150. *Report of the Secretary-General supra* note 3, at 1177-78.

151. They include Antonio Cassese, a former professor of international law at Florence University and former chairman of a number of European Human Rights committees. He was elected president of the Tribunal in late November. Elected vice-president was Elizabeth Odio Benito, Costa Rica's minister of justice. The other members of the tribunal are Gabrielle Kirk McDonald, a federal judge in Texas; Michel Abi-Saab, an Egyptian law professor; Rustam Sidwha, a former Pakistani Supreme

of 1994, Richard Goldstone, a South African judge, was named chief prosecutor. As of the beginning of February 1995, Goldstone had already brought one indictment against a Serbian detention camp commander and was promising more.¹⁵² It is reported that Goldstone anticipates the trials beginning by late March or early April of this year.¹⁵³ There should not be any shortages of suspects. As of April 1993, the United Nations War Crimes Commission, then headed by Polish Prime Minister Tadeusz Mazowiecki, had a list of more than 1,000 suspects.¹⁵⁴ Those listed include Serbian President Slobodan Milosevic, and the leader of the Bosnian-Serbs Radovan Karadzic as well as his military chief General Ratko Mladic.¹⁵⁵ Also pegged are Manojlo Milovanovic, commander of the Serb Army in Eastern Bosnia, and General Milan Gvero, a Serbian political officer accused of masterminding the policy of "ethnic cleansing."¹⁵⁶ In addition, there are numerous lower-ranking officers that have been identified. One is the notorious warlord Xelko Rashatoric who commands an 800-man Serbian paramilitary unit.¹⁵⁷ He is a former ice cream salesman known to his followers as Arkan and is accused of murdering hundreds of Bosnians and Croats and playing a role in the ethnic cleansing. Other reports cite camp commanders and their assistants as being responsible for a large number of the atrocities.¹⁵⁸

Court judge; Jules Deschenes, former chairperson of a commission to find former World War II war criminals living in Canada; Li Haopei, an advisor to China's Foreign Ministry; Lal Chand Vohrah, a senior high court judge from Malaysia; Sir Ninian Stephen, a former governor-general of Australia; Adolphus Godwin Karibi-Whyte, a Nigerian Supreme Court justice; and Claude Jorda from France, replacing Le Foyer de Costil who asked to step down. *Australian May Become U.N. War Crimes Prosecutor*, REUTERS, Jan. 28, 1994.

152. Wilbur G. Landrey, *The Search for Justice in Bosnia is a Difficult One*, ST. PETERSBURG TIMES, Jan. 20, 1995, at 2A.

153. *Id.*

154. Adrian Lithgow, *Generals of Genocide; 'Nuremberg' War Crimes Trials for Serb Army Chiefs*, ASSOC. NEWSPAPERS LTD., Apr. 18, 1993, at 1.

155. *United Nations: Eight Judges for War Crimes Court Elected*, INTER PRESS SERVICE, Sept. 16, 1993.

156. Lithgow, *supra* note 154.

157. See Catherine Field, *Ice-cream Man Becomes Warlord; Arkan Talks Democracy But His Mood is Aggressive*, THE GAZETTE (Montreal), Jan. 2, 1993, at A12.

158. See Paul Lewis, *U.S. Aide Sees Nations Hindering Balkan Tribunal*, THE N.Y. TIMES, Jan. 18, 1994, at A10.

B. *Command Responsibility in Yugoslavia*

Paragraph 3 of Article 7 of the *Statute* provides:

The fact that any [illegal acts were] committed by a subordinate does not relieve his superior of criminal responsibility if he knew or *had reason to know* that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.¹⁵⁹

As the debate over command responsibility has focused on the essential question of knowledge, an interpretation of "had reason to know" becomes crucial. On its face, the language of the statute appears to accord with the 1977 Protocol which requires that commanders "knew, or had information which should have enabled them to conclude in the circumstances at the time" that atrocities were being or were about to be committed. Both the *Statute* and the protocol apply a liberal standard which will impute knowledge if the commander was in a position to learn of illegal acts committed by subordinates.

However, one could argue the *Statute's* "had reason to know" is merely a reversion to the pure "should have known" standard. In other words, the United Nations Tribunal could satisfy the knowledge requirement by simply establishing that a vast number of atrocities were committed.

A reading of the United States' proposal to Secretary-General could provide a resolution to these two conflicting interpretations.¹⁶⁰ Boutros-Ghali, in drawing up the *Statute* was required to consider "suggestions put forward . . . by Member states."¹⁶¹ The U.S. proposal on command responsibility provided that:

An accused person is also individually responsible if he or she had actual knowledge, or *had reason to know, through*

159. *Report of the Secretary-General, supra* note 3 (emphasis added).

160. See U.S. proposal, art. 11(b) at 5 (on file with the *University of Richmond Law Review*) [hereinafter U.S. Proposal].

161. S.C. Res. 808, *supra* note 1, at para. 2.

*reports to the accused person or through other means, that troops or other persons subject to his or her control were about to commit or had committed such violations, and the accused person failed to take necessary and reasonable steps to prevent such violations or to punish those committing such violations.*¹⁶²

The *Statute* apparently adopted the proposal almost verbatim. The changes incorporated are relatively insignificant. The language in the U.S. proposal, "through reports to the accused person", reflects a standard similar to the one applied in the Hostage case and the "through other means" expands the U.S. proposal to the extent permitted by the 1977 protocol. However, Boutros-Ghali perhaps recognizing the redundancy of the phrase excised it from the *Statute* leaving only the more encompassing liberal standard "had reason to know." The U.S. proposal lends credible evidence to an interpretation of Article 7, paragraph 3 which encompasses both the 1977 Protocol and the ruling in the Hostage Case.

Concerning the *Statute's* applicability to suspects in the former Yugoslavia, it is clear that knowledge sufficient for the doctrine has already been admitted to by a number of the military commanders. Due to the extensive news coverage of the conflict, many foreign journalists have been playing the role of messenger. Unlike the Japanese and German generals at the end of the Second World War, commanders in the Balkan conflict such as Radovan Karadzic, have been interviewed by the foreign press and those interviews have been recorded.¹⁶³ In a number of instances, they are admitting knowledge of the atrocities and their control over the troops. Given the liberal standard adopted by Article 7, paragraph 3 of the *Statute*, the prosecution should be able to use these admissions to prove the knowledge component in a command responsibility prosecution.

The following is an exchange that occurred between Sam Donaldson and Karadzic on *Nightline*:

162. U.S. proposal, art. 11(b) at 5 (emphasis added).

163. See generally *This Week With David Brinkley* (ABC television broadcast, Mar. 21, 1993) [hereinafter *Brinkley*].

Sam Donaldson: Why, sir, are your forces shelling Srebrenica? Why are they shelling Sarajevo? Why are they killing women and children and old men, and why are there snipers killing people, including international journalists?

Mr Karadzic: Well, concerning these questions, as well as ethnic cleansing, I will tell you official figures of International Red Cross, there are many more Serbian refugees than Muslim and Croatian together.¹⁶⁴

Statements such as these made to Karadzic and other leaders establish the knowledge element essential for a prima facie case sufficient to charge those leaders under the command responsibility doctrine.¹⁶⁵

Karadzic has also made other incriminating statements to the foreign press. Over a year ago he dismissed allegations of atrocities noting that "there weren't even enough Serbian soldiers inside Bosnia to perpetrate these deeds on such a scale."¹⁶⁶ Further, in response to a rebellion by Serbian troops, it was

164. *Nightline* (ABC television broadcast, Mar. 21, 1993) (transcript on file with the *University of Richmond Law Review*) [hereinafter *Nightline*].

165. Additionally, Karadzic on at least two occasions acknowledged that he controls the soldiers committing these acts. In the following excerpt from the 21 March *Nightline* interview the Bosnian-Serb leader did not refute Donaldson's claims that Karadzic controls the troops.

Donaldson: Well, what about my question, sir? Why are you shelling those two towns I mentioned?

Karadzic: Well, I will-

Donaldson: Why are you killing those people?

Karadzic: If you allow me, I'll tell you. Many more Serbs have been killed by Muslim snipers than Muslims by Serbian shells.

Id. Moreover, in an interview with David Brinkley, Karadzic, citing the differences between himself and Adolf Hitler, admitted that control of the Bosnian-Serb army is centralized.

Brinkley: What is the difference between what you have been doing there and Adolf Hitler?

Karadzic: Well, it's hard to say. We have unified command for the army, [and] for the police. . . .

Brinkley, *supra* note 163. Also, Mladic, Bosnian Serb Commander, admitted that the Serbian army is controlled by a central command. He stated, "Now, more or less, we control everything. But if somebody attack [sic] us we may lose unified command and control and there's going to be chaos with more killing, and more destruction." *World News Tonight* (ABC television broadcast, May 6, 1993) (transcript on file with the *University of Richmond Law Review*).

166. Bill Schiller, *Bosnians Recall Horror of Rape by Serb Troops*, THE TORONTO STAR, Jan. 4, 1993, at A1.

reported that Karadzic promised officers that if they returned they would not be punished for their roles in war crimes.¹⁶⁷ This statement is clearly violative of the *Statute's* mandate which requires that commanders "punish perpetrators" of war crimes. It was also reported that Arkan also denies any role in the war crimes and dismisses threats that he will be put on trial.¹⁶⁸

VI. CONCLUSION

The history of command liability for the war crimes of subordinates varies according to the proof of knowledge of the illegal acts that is required by the tribunal passing judgment. Since the inception of the doctrine in 1945, each prosecution has turned on this issue. The commission in the case of General Yamashita failed to state explicitly its requisites for knowledge. The tribunal in the High Command Case applied a very strict standard requiring proof of actual knowledge. The tribunal in the Hostage Case moved away from stringently requiring actual knowledge and applied a "should have known" standard. If reports of atrocities reach the commanders' headquarters then they will be charged with knowledge.

The court martial of Captain Medina reverted back to the strict standard of the High Command tribunal. Finally, the 1977 Protocol focused the discussion and codified a standard similar to that applied by the tribunal in the Hostage Case. Where the Protocol differs, however, is in its liberal standard allowing knowledge to be proven where commanders "had information which should have enabled them to conclude" that subordinates were committing atrocities. The Statute of the International Tribunal has followed this lead. It holds that the knowledge requirement may be satisfied if the commander knew or had reason to know of the atrocities.

The list of persons yet to be indicted should be long. As those indictments are handed down, many should be charged with failing their commander responsibilities as some of the persons

167. *U.N. Names 11 to War Crimes Panel; Serbian Leader Says Peace Plan Near*, THE HOUSTON CHRONICLE, Sept. 18, 1993, at A24.

168. Field, *supra* note 157.

already accused of war crimes have made statements which show that as commanders of soldiers they are not fulfilling their responsibilities as required by international law.

Christopher N. Crowe

