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YAMASHITA, NUREMBERG AND VIETNAM: COMMAND RESPONSIBILITY REAPPRAISED

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> . . . if you were to apply to them [General Westmoreland and other U.S. generals] the same standards that were applied to General Yamashita, there would be a very strong possibility that they would come to the same end as he did.[1]

The preceding assertion by Professor Telford Taylor, the U.S. prosecutor at Nuremberg after World War II, is a benchmark in the current discussion of war crimes and Vietnam. For the first time, a reputable scholar of moderate persuasion suggested the possibility that American military leaders be tried for their responsibilities in the conduct of the Indochina war. Taylor's book *Nuremberg and Vietnam* became an instant success, and his analogy concerning Yamashita is regularly cited in the debate over the U.S. conduct of the war. Variations of Taylor's Yamashita analogy, often including the word "Nuremberg," are freely bandied about in the more important organs of the American press. This publicity has contributed to widespread belief that a general principle of international law concerning command responsibility was established in the Yamashita case and that application of the so-called Yamashita principle to the Vietnam war would work to the detriment of U.S. leaders.

The popular view of the Yamashita case is well expressed in the following passage from Taylor's book:

> There was no charge that General Yamashita had approved, much less ordered these barbarities and no evidence that he knew of them other than the inference that he must have because of their

> extent . . .. Nevertheless, the tribunal found Yamashita guilty on the ground that he had ". . . failed to provide effective control of his troops as required by the circumstances" and sentenced him to death by hanging.[2]

Unquestioningly accepting this perception of the Yamashita case, many writers and commentators on the Vietnam war would then agree with Taylor's conclusion quoted in the beginning of this article that U.S. military leaders would meet Yamashita's fate if subjected to the standards of his trial.

Most members of the press and the academic community have adopted Taylor's thesis at face value without examining it closely. None apparently have wondered why Nuremberg prosecutor Taylor, responsible for the trial and imprisonment of a large number of senior German military leaders, chose to select as his standard and precedent the result of an American Military Commission in the Far East that was not conducted under international auspices.

The issues arising over "command responsibility" as an international law of war concept can be stated precisely. The popular perception of the Yamashita principle is that it established a rule that a military commander was responsible for the breaches of law committed by members of his command whether or not he personally knew about them. Yet, 2 and then 3 years after the Yamashita case, international military tribunals operating in a judicially restrained atmosphere at Nuremberg articulated a restricted standard of command responsibility which required that a military commander had to be personally derelict to be found guilty.[3] Why has Nuremberg been ignored in the headlines linking My Lai and Yamashita? Can Nuremberg and Yamashita be reconciled?

This paper seeks to examine the concept of command responsibility formulated under the international law of war. Command responsibility concerns the responsibility of a military commander for the actions of his subordinates. Inherent in this discussion is the development of this concept in the Yamashita and Nuremberg trials and then application of the internationally recognized standard to U.S. conduct in Vietnam.

A final preliminary point is that in his recent book Professor Telford Taylor subsumed under the rubric of "Yamashita Case" an argument he had put forward at the Nuremberg tribunals more than two decades ago. His argument of absolute command responsibility was categorically and expressly rejected in the Nuremberg "High Command Case."[4] The Nuremberg section of this study will document that result. Recognition of Taylor's attempt to resurrect a previously rejected argument is important because it indicates the confusion and misunderstandings extant in the field of command responsibility.

At a time when men's lives and reputations are at stake, it is distressing to read as great a denial of legal craftsmanship and law as has been evidenced in Professor Taylor's comment in the introduction to *Nuremberg and Vietnam:*

> For these purposes, the term "Nuremberg Trials" should not be taken as limited to the precise rulings of the Nuremberg courts, but in its broad sense, as standing for all the war crimes trials that followed in the wake of the Second World War, and the ideas they have generated. Today "Nuremberg" is both what actually happened there and what people think happened, and the second is more important than the first. To set the record straight, is, no doubt a useful historical exercise, but sea change is itself a reality, and it is not the bare record but the ethos of Nurem-

berg with which we must reckon today.

Put another way, Nuremberg is not only what was said and done there, but also what was said about it, then and subsequently . . .[5]

As a constitutional lawyer, Professor Taylor knows that such attacks as his must be clearly written. Surely it is a very questionable practice to establish public emotion, rather than precisely reasoned judgments, as formulating the rules of human behavior.

Yamashita Case. On 7 December 1945, an American Military Commission of five general officers, sitting in Manila, Philippine Islands, found Gen. Tomayuki Yamashita, Commanding General of the Japanese 14th Army Group in the Philippines, guilty of failing to discharge his duty by permitting the members of his command to commit atrocities against Americans and Filipinos in the Philippine Islands during the period 9 October 1944 to 2 September 1945 and sentenced him to hang. After ultimate recourse to the Supreme Court of the United States, Yamashita was hanged on 23 February 1946.[6]

The evidence presented to the Military Commission indicated that a significant number of atrocities were committed by members of the Japanese military within a short time interval and under similar circumstances during the dates specified. The 123 specific charges alleged a total of tens of thousands of deaths.[7] General Yamashita contended that most of the atrocities were committed by units or commanders distant from his headquarters, either geographically or in the chain of command, and that he had no knowledge of the atrocities. In its judgment, the Commission accepted certain of the geographical and communications difficulties alleged by the Japanese general but concluded that these problems were not quite as insurmountable as Yamashita contended.[8]

The prosecution built its case upon proving to the Commission that the atrocities had indeed been committed and identifying the perpetrators as individuals or units ultimately subordinate to General Yamashita.[9] The core of the prosecution's contention is contained in the following assertion by the chief prosecutor:

> The record itself strongly supports the contention or conclusion that Yamashita not only permitted but ordered the commission of these atrocities. However, our case does not depend upon any direct orders from the accused. It is sufficient that we show that the accused "permitted" these atrocities . . . . Who permitted them? Obviously the man whose duty it was to prevent such an orgy of planned and obviously deliberate murder, rape and arson—the commander of those troops![10]

Perhaps concerned that the Military Commission would not accept this theory and would require proof of Yamashita's personal involvement, the prosecutor went beyond his stated plan and introduced evidence directly linking Yamashita to the atrocities.[11]

The judgment of the Military Commission appeared to support the prosecutor's contention. The frequently cited part of the judgment which established for legal onlookers the principles under which Yamashita was found guilty reads as follows:

> Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nonetheless, if 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 . . ..[12]

With this statement of principles, the Military Commission then went on to declare to General Yamashita, " . . . that during the period in question you failed to provide effective control of your troops as required by the circumstances."

Since this key part of the judgment did not address the question of actual knowledge on General Yamashita's part and because the evidence linking Yamashita to the atrocities has been portrayed as weak, most legal scholars concluded that Yamashita's guilt was based upon his commanding a unit engaged in such widespread atrocities that he should be held responsible for them. It is not clear, however, whether ascription arises from imputation of a constructive knowledge or from a legal concept of absolute responsibility.

In reviewing the Military Commission's judgment, we find that the U.S. generals were impressed by the scope of the atrocities and hence believed that General Yamashita should have known about them or did know and lied about his knowledge. The difference between the two propositions is significant because upon it hinges the question as to whether or not personal guilt must be proved. Unfortunately, the Commission's judgment failed to discuss explicitly whether it accepted or rejected Yamashita's contention of ignorance.

Because of their perception of an absence of credible evidence linking the Japanese general to the proven atrocities, international legal scholars and others have usually asserted that the Commission accepted Yamashita's statement of ignorance. Yet it is equally as credible to assert that the Commission believed Yamashita lied as to believe that it accepted his word.

If we reexamine the judgment we can find sections in which the Military Commission exhibited disbelief at what Yamashita told them and seemed convinced that he ordered or knowlingly permitted the atrocities. Consider this part of the judgment:

> The prosecution presented evidence to show that the crimes were so extensive and widespread, both as to time and area, that they must either have been wilfully permitted by the accused, or secretly ordered by the accused. Captured 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 guerrillas hostile to Japan.[13]

The Commission's comments concerning Yamashita's method of operation displayed considerable incredulity.

> 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 accomplished 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.[14]

The quoted sections of the judgment resulted from the extensive evidence introduced by the prosecution which purported to show that Yamashita knew of the atrocities, ordered some of them, and was headquarterd so close to several of the scenes of infamy that he could not have failed to notice them. Nothing in the questioning by the Military

Commission or in its judgment provides a basis to believe that the generals did not accept this evidence. The evidence linking Yamashita to the atrocities, although often hearsay, was quite specific.[15] When one combines the quantity of such evidence with the judgment, it becomes difficult to believe that the Military Commission accepted Yamashita's protestations of ignorance.

The contention that the Military Commission rejected Yamashita's plea of ignorance is strengthened by paragraphs below which describe how a Board of Review of Army officers in the Pacific informed Gen. Douglas MacArthur that Yamashita's testimony could not be believed.

The review conducted by General MacArthur is an important and previously unpublished part of the Yamashita proceedings. MacArthur's confirmation of the sentence of hanging followed his receipt of a written review which asserted that Yamashita had lied. The Board of Review of five military lawyers, headed by Col. C.M. Ollivetti, the Theater Judge Advocate, prepared a detailed analysis of the record of trial for MacArthur.[16]

First, the review presented evidence of a deliberate Japanese plan of extermination:

> The following evidence indicates a deliberate plan of extermination: most of the atrocities were committed during a short period in February, 1945 . . . and were carried on under the supervision of Japanese officers . . . following the same procedure of concentrating the population of a town or barrio at a convenient place and killing them in an orderly manner . . .. the large scale upon which attempts were made to exterminate the male population of some places . . . and the wanton killing of women and children . . . indicates an intention to wipe out the people of the province. The deliberate destruction of whole towns and barrios was also a part of this plan . . .[17]

In short, the Board of Review perceived a conspiracy to commit genocide directed or abetted by Yamashita.

Second, the Board took special note of evidence which connected General Yamashita with actual knowledge of the atrocities perpetrated. Telford Taylor, who wrote that there was "no evidence that he [Yamashita] knew of them [the atrocities] other than the inference that he must have because of their extent"[18] should be surprised at the amount of evidence presented to the Commission which indicated knowledge.[19] Admittedly, the evidence linking Yamashita to the crimes included a number of instances of hearsay evidence and conjecture. What is important is that the Board of Review apparently believed it and described it to General MacArthur without cautioning him as to its legal validity.[20]

Third, the Board of Review reaffirmed the validity of the concept of command responsibility without addressing the subject of explicit knowledge raised by the defense.

> But since the duty rests on a commander to protect by any means in his power both the civil population and the prisoners of war from wrongful acts of his command and since the failure to discharge that duty is a violation of the Laws of War, there is no reason, either in law or morality, why he should not be held criminally responsible for permitting such violations by his subordinates, even though that action has heretofore seldom or never been taken. The responsibility of the commander to control his troops is well understood by all experienced military men, including accused . . .[21]

Specific aspects of this command

responsibility doctrine were discussed in the review when it faulted the accused:

> Although the attitude of the Filipino civilians was one of increasing hostility, he did not, though in violation of duty investigate their conditions at any time nor did he ever inspect prisoner of war or civilian internment camps, even though one was located at his headquarters . . . At no time did he order, receive any report or acquire any knowledge whatever of any mistreatment or killing of civilians, American prisoners of war or civilian internees by the military police or any of his subordinates.[22]

Fourth, the disbelief in Yamashita's contention that he knew nothing of the atrocities, the Review Board's belief in the extermination plan thesis, and the credence given the evidence linking Yamashita to the crimes are brought together in the summary section of the review:

> The only real question in the case concerns accused's responsibility for the atrocities shown to have been committed by members of his command. Upon this issue a careful reading of all the evidence impels the conclusion that it demonstrates this responsibility. In the first place the atrocities were so numerous, involved so many people, and were so widespread that accused's professed ignorance is incredible. Then, too, their manner of commission reveals a striking similarity of pattern throughout . . . 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 . . .. All this leads to the inevitable conclusion that the atrocities were not the sporadic acts of soldiers out of control but were carried out pursuant to a deliberate plan of mass extermination which must have emanated from higher authority or at least had its approval . . .. From the widespread character of the atrocities as above outlined, the orderliness of their execution and the proof that they were done pursuant to orders, the conclusion is inevitable that the accused knew about them and either gave his tacit approval to them or at least failed to do anything either to prevent them or to punish their perpetrators.
>
> There was some evidence in the record tending to connect accused even more directly with the commission of some of the atrocities . . .. While, however, it may be conceded that the accused was operating under some difficulty due to the rapidity of the advance of the Americans, there was substantial evidence in the record that the situation was not so bad as stated by the accused . . ..[23]

After the findings and sentence were confirmed by General MacArthur, the defense appealed to the Supreme Court of the United States. Without examining the substantive evidence introduced in the trial at Manila, the Supreme Court ruled that the offense of which General Yamashita was charged constituted a violation of the laws of war:

> The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his

failure to take such measures when violations result. That this was the precise issue to be tried was made clear by the statement of the prosecution at the opening of the trial.

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent . . ..

These provisions plainly imposed on petitioner . . . an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.[24]

In order to reinforce the point that the Court was not examining the evidence with respect to the critical question of responsibility described above, the Court first said, "We do not here appraise the evidence on which petitioner was convicted," and then in a footnote to the same paragraph reiterated, "We do not weigh the evidence. We merely held that the charge sufficiently states a violation against the law of war . . ..[25]

Those who read the Supreme Court's decision and were disappointed with its ambiguous nature and its failure to discuss certain questions raised by the defense should not be surprised to find the ambiguity deliberate. In a letter to the legal historian John P. Frank less than 1 month after the decision, Associate Supreme Court Justice Wiley Rutledge related that the argument over the Yamashita case and its constitutional implications was bitter and deep. Chief Justice Harlan Fiske Stone deliberately omitted whole sections of constitutional argument from the majority opinion because of an inability of the majority to agree on its rationale.[26]

The bitter dissents of Justices Rutledge and Frank Murphy raised severe questions about the fairness of the trial as well as the judicial principles asserted. Murphy and Rutledge questioned the rules of evidence which varied considerably from those used at the time in U.S. courts-martials, the haste of the trial, denial of fifth amendment rights to the accused, and the appropriateness of the charge.[27] In describing the process Murphy charged that:

The trial proceeded with great dispatch without allowing the defense time to prepare an adequate case. Petitioner's rights under due process clause of the Fifth Amendment were grossly and openly violated without any justification. All of this was done without any thorough investigation and prosecution of those immediately responsible for the atrocities, out of which might have come some proof or indication of personal culpability on petitioner's part.[28]

Associate Justice Rutledge attacked the fairness of the trial with equal fervor:

One basic protection of our system and one only, petitioner has had. He has been represented by able counsel, officers of the army he fought . . .. But, as will appear, even this conceded shield was taken away in much of its value, by denial of reasonable opportunity for them to perform their functions.[29]

In referring to the last minute addition of a Supplemental Bill of Particulars alleging 59 additional offenses and the denial of additional time for the defense to prepare their case, Rutledge caustically added: " . . . this wide departure from the most elementary principles of fairness vitiated the proceedings. When added to the other denials of fundamental right sketched above, it deprived the proceedings of any semblance of trial as we know that institution."[30]

To those who would charge unfairness on the basis of the comments above, we would respond that the Supreme Court in its review of the case sustained the proceedings. Although the majority ruled neither on the substance of the evidence nor the question of fairness per se, they held that the offense charged was a violation of the laws of war and that the safeguards of the fifth amendment and the requirements of the Articles of War were not applicable to a prisoner of war charged with war crimes committed prior to his capture.[31] Put squarely, unfairness was upheld.

At this point we should question why legal scholars have asserted that there was "no evidence that he [Yamashita] knew of" the atrocities.[32] The answer appears straightforward. The Military Commission failed to address the question of knowledge explicitly, and the report of the Board of Review was not published. No observer knew what the generals and the various reviewing authorities really believed. This vacuum of understanding was quickly preempted by a very aggressive defense team and one of its members in particular, A. Frank Reel. In the trial at Manila, the hearing before the U.S. Supreme Court in Washington, and the campaign waged in the press both before and after Yamashita's execution, Reel and his comrades leaned heavily on a line of defense which asserted a lack of credible evidence linking Yamashita to the atrocities. These assertions were repeated so often that they became accepted as facts. Associate Justices Murphy and Rutledge incorporated Reel's contentions concerning lack of credible evidence in their sharp dissents and commented on the Government's failure to refute them.[33]

After the trial Reel wrote an interesting account of the Yamashita proceedings which received widespread publicity and is often used as a repository of facts about the trial.[34] In his account Reel proved to his own satisfaction that any evidence which linked Yamashita to the crimes should not have been admitted or was discredited when introduced. Subsequent discussions of the trial have for the most part accepted Reel's views as stated by him and by the two dissenting Supreme Court Justices.[35]

Rutledge's and Murphy's views concerning the fairness of the trial, their views on the lack of evidence linking Yamashita to the crimes, and Reel's unchallenged declarations have colored the popular view of the Yamashita trial. It would be well for us to remember that substantial evidence was introduced which directly linked Yamashita to the crimes. In one instance his own Judge Advocate testified that he had received personal permission from Yamashita to allow the Japanese military police to punish captured Filipino guerrillas without trial.[36] The charge that such evidence could not have been admissible in a U.S. court is irrelevant to our understanding of the meaning of the Yamashita verdict. More importantly, the Supreme Court declined to review the evidentiary rules, and the Military Commission heard evidence under these rules which tended to show General Yamashita knew of the crimes. Hence, the conviction reflected an example of command responsibility in which a commander was convicted for crimes committed by his forces about which he knew and failed to take action or may even have directed.

What then should we make of the Yamashita case? Telford Taylor's thesis that war crimes trials are what people think happened proves most valid in this trial. Evidence exists to support the belief that both the members of the Military Commission and the Reviewing Authority (General MacArthur) believed that Yamashita knew of the atrocities committed by his forces and either ordered them or, at minimum, knowingly permitted them. Hence the ver-

dict was consistent with the accepted principle of the international law of war that a commander is responsible for those actions which he directed or sanctioned. However, a combination of circumstances established in the Yamashita case a perception of a principle of absolute responsibility. The factors leading to this misperception were: lack of information as to whether or not the Military Commission believed Yamashita; lack of information concerning the basis upon which General MacArthur sustained the conviction and sentence; the ambiguity of certain portions of the Military Commission's judgment; the hearsay nature of the evidence which linked Yamashita to the atrocities; and the manner in which the defense counsel and the dissenting Supreme Court Justices couched the central issue. The defense counsel, the Supreme Court Justices, and legal scholars appeared to believe that the Military Commission accepted Yamashita's protestations of ignorance at face value and convicted him in spite of them. Justice Frank Murphy's description of the action taken against Yamashita, unchallenged in the majority opinion, reflects the view held subsequently by most students of international law:

> He [Yamashita] was not charged with personally participating in acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of members of his command, permitting them to commit the acts of atrocity.[37]

Legal scholars have subsequently accepted the so-called Yamashita principle as Justice Murphy stated it without reconciling it to later trials at Nuremberg or elsewhere.

It should be apparent from the evidence presented that the public perception of a Yamashita principle of absolute command responsibility should be rejected and its use discredited. Contrary to popular belief, substantial evidence was introduced in the trial linking Yamashita to the crimes for which he was charged. Although the evidence might be inadmissible by today's standards, the Supreme Court declined to review the evidentiary rules and thus allowed them to stand. More importantly, the Military Commission accepted the evidence as presented; the judgment gives no reason to believe otherwise. Further, the Board of Review left little doubt that it believed General Yamashita knew of the offenses and hence was guilty under established international law. Thus, the generals who sat in judgment convicted a military commander whose troops committed war crimes and who learned about the atrocities and took no punitive or preventive action. This result clearly conflicts with the various reports of the Yamashita case which usually assert that no credible evidence was found to link the Japanese general with the offenses and then announce a principle based upon that assertion.

The next section of this paper will examine the Nuremberg Subsequent Proceedings which provide a precise and reasonable articulation of command responsibility rendered in an acceptable judicial environment.

The Nuremberg Subsequent Proceedings. The principle of limited command responsibility articulated at Nuremberg is consistent with the command responsibility doctrine cited in the Yamashita case. It is no accident that Telford Taylor selected the word "Nuremberg" for use in the title of a book concerning principles derived from all war crimes trials following the Second World War. To the American public Nuremberg is both synonymous with war crimes trials

and perceived as the accepted standard of such trials. Additionally, the conduct of the trials at Nuremberg evoked less criticism of their fairness and received far more praise for their judicial restraint than did certain of the U.S. Military Commissions in the Far East or the International Military Tribunal for the Far East.[38]

Two types of trials were conducted at Nuremberg. During 1945-1946 the International Military Tribunal at Nuremberg tried the major war criminals including Goering, Hess, Keitel, Speer, and others. Upon completion of this tribunal, the United States, under international auspices, conducted the Nuremberg Subsequent Proceedings; these consisted of 12 trials against major groups of German leaders, including government ministers, justices, diplomats, and others. Two cases against military leaders have relevance for the study of "Command Responsibility": Case No. 7, *U.S.* v. *List et. al.*, "The Hostages case"; and Case No. 12, *U.S.* v. *von Leeb et. al.*, "The High Command case."

"The High Command case" concerned the trial of 14 German Army, Navy, and Air Force leaders for plotting aggressive war and implementing illegal orders such as the "Commissar Order," the "Barbarossa Order," the "Commando Order," and the "Night and Fog Decree." Most of the alleged offenses occurred on the Russian front.[39]

The most prominent defendant in "The High Command case" was Field Marshal Wilhelm von Leeb, who commanded, among other units, Army Group North on the Russian front from June 1941 to January 1942. Von Leeb was charged with war crimes and crimes against humanity through the commission of crimes against enemy belligerents and prisoners of war. Specifically, the Chief Counsel of War Crimes, Brig. Gen. Telford Taylor, charged that Von Leeb: implemented the "Commissar Order" calling for the immediate execution of Soviet political officers captured by German forces; implemented the "Barbarossa" jurisdictional order which called for the execution of captured Russian partisans; and condoned crimes against civilians through the activities of the Einsatzgruppes which operated in the Army Group rear area and were responsible for the execution of thousands of civilians.[40]

Von Leeb put forward a vigorous defense. First, he asserted that he had opposed illegal orders such as the "Commissar Order" and had not disseminated them. Second, he maintained that he had received no reports of executions of Russian soldiers or civilians and that he was unaware of the operations of the Einsatzgruppes, although credible evidence proved that their activities were widespread and notorious.[41]

In effect, Von Leeb presented a defense that had many elements in common with that of General Yamashita. How was it received? The prosecution's closing arguments in the Von Leeb case were reminiscent of the prosecution arguments at Manila in the fall of 1945. In respect to Von Leeb himself, the prosecution, under Taylor's direction, charged:

> The prosecution suggests that these so-called "defenses" are miserable fabrications, and that the record proves incontrovertibly that the Commissar Order was distributed and carried out within von Leeb's Army Group, with von Leeb's knowledge and resulted in the outright murder of numerous prisoners of war . . .. Whether von Leeb himself passed the order to the Fiftieth Corps, or whether, knowing that the Sixteenth Army would pass the orders to them, he took no action to prevent this, seems to the prosecution a totally academic question . . .. von Leeb's testimony that he did not learn of the reports concerning the shoot-

ings of commissars pursuant to the order is totally incredible.[42]

In its judgment the tribunal examined closely the evidence directly linking Von Leeb with crimes against enemy belligerents or prisoners of war and found him not guilty of executing Red army soldiers within his area, not guilty of the murder or slave labor recruitment of civilians in his area, not guilty of the pillage of public and private property, and not guilty of criminal conduct in the siege of Leningrad. What is signficant about this finding is that Von Leeb was found not guilty of the first two charges even though credible evidence was presented that such criminal activities occurred within his Army Group area. The court found Von Leeb guilty of implementing the "Barbarossa" jurisdiction order which specified execution for certain types of Russian guerrillas captured. He was sentenced to 3 years in prison, given credit for pretrial confinement, and released at the end of the trial.[43]

In its judgment rendered on Von Leeb and his codefendants, the court dealt rather specifically with the subject of command responsibility:

> Modern war such as the last war entails a large measure of decentralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander in Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.[44]

Later the tribunal stated explicitly that, "... the commander must have knowledge of these offenses and acquisesce or participate or criminally neglect to interfere in their commission and that the offenses must be patently criminal."[45]

In dealing with its judgment on Von Leeb, the tribunal categorically rejected the prosecution's arguments and said:

> The evidence suggests that criminal orders were executed by units subordinate to the defendant and criminal acts were carried out by agencies under his command. But it is not considered under the situation outlined that criminal responsibility attaches to him merely on the theory of subordination and overall command. He must be shown both to have had knowledge and to have been connected with such criminal acts either by way of participation or criminal acquiescence.[46]

Additionally, the court further stated in another part of the Von Leeb judgment:

> While he [von Leeb] had the right to issue orders to his subordinates concerning such matters, he also had the right to assume that the officers in command of those units would properly perform the function which had been entrusted to them by higher authorities, both as to the proper care of prisoners of war or the uses to which they might be put.[47]

The cases of Von Leeb's codefendants are not of concern here since those who were found guilty of crimes against enemy belligerents or prisoners of war faced overwhelming evidence which linked them to both knowledge and direction of such crimes. No real doubt exists that a commander who directs illegal acts against civilians or prisoners of war or who knows of such acts by troops under his command and fails to take proper action bears criminal responsibility.

A second Nuremberg trial which offers insights into the issue of command responsibility was the trial of Wilhelm List and others, commonly known as the "Hostages Case." Field Marshal Wilhelm List and 11 other German officers were brought to trial during the Nuremberg Subsequent Proceedings on the charge that they had committed war crimes and crimes against humanity. The charges reflected the cruel and bloody reprisals, including the shooting of hostages, that the German generals had inflicted on the populations of Greece, Yugoslavia, and Albania. All but two of the defendants were found guilty in varying degrees.[48]

The case affirmed the principle of the responsibility of the commander for the actions of his forces. On the other hand, specific evidence was introduced linking knowledge of the atrocities, as well as direction in some instances, to the defendants. Defendants in this case were unable to prove ignorance since lesser officials regularly reported all reprisals to the senior commanders. Several of the defendants were found not guilty of implementing the "Commissar Order" within their units although cases of its implementation were proven. The prosecution lost on such charges when it was unable to link the defendants with direct knowledge of the crimes.[49]

The implications of the Nuremberg Subsequent Proceedings for the issue of command responsibility are impressive. In a series of trials conducted under international auspices, panels of U.S. civilian judges, operating in a more judicial atmosphere than that which prevailed in Manila in 1945, rejected the doctrine of absolute command responsibility apparently established in the Yamashita case and established more limited and reasonable standards concerning a commander's responsibility for the actions of his command. The negligence of the commander had to be "personal." Knowledge of the crime had to be shown. The civilian judges at Nuremberg seemed better able than the generals at Manila to acknowledge the difficulties of discipline in unusual situations, the reliance of a commander on his subordinates, and the breadth and scope of activities under the control of senior military commanders.

Vietnam. Telford Taylor's allegations against General Westmoreland and other U.S. military commanders are based upon the underlying assumption that war crimes committed by U.S. forces have been so numerous that U.S. military leaders should have known of them and hence prevented them. This allegation has been stated more explicitly by others.[50]

How can the U.S. military leaders reply? This is a question which every military professional must be able to discuss. A reply to this question might proceed on two different planes. First, the number of criminal or unlawful acts committed by U.S. forces would not seem as widespread to a U.S. general as they would to a Telford Taylor or a Richard Falk because many of the acts considered unlawful by Taylor or Falk might be considered legal under international law. Second, U.S. military leaders could establish a vigorous affirmative defense through demonstration of the command policies, command briefings, individual briefings, and punishments rendered against perpetuators of unlaw-

ful acts. Each of the two planes will be briefly presented.

What are the unlawful acts charged against the United States? The charges include: excessive use of aerial and artillery firepower resulting in the unnecessary death of civilians, unlawful relocation of South Vietnamese civilians, wanton destruction of property, and torture and murder of prisoners of war.[51]

The first line of defense of a U.S. military leader against charges of widespread criminal activity in Vietnam is to assert that many of the acts branded unlawful by the "war crimes publicists" are acts which are legally defensible under the U.S. Government's interpretation of the international law of war. What is not understood by most of the public and is ignored by many of the military's detractors is that the number of criminal acts committed by U.S. forces is a function of how one addresses four specific issues: the international legality of the U.S. presence in Vietnam, the independence of the Saigon regime, the intent of the U.S. military commanders in implementing certain courses of strategy and tactics, and the reasonableness of the reply to a charge of conducting certain "unlawful acts" that the acts were indeed lawful. Telford Taylor acknowledged part of this matrix of issues in *Nuremberg and Vietnam.*[52]

The legality of the American presence and the independence of the Saigon regime place the legal relationship of the U.S. forces to the South Vietnamese citizens on a considerably different basis than that which would obtain if the U.S. forces were occupying South Vietnam following an invasion. The position that the U.S. Government can offer on this issue is at least as strong as the position of the Government's detractors. Persuasive briefs which a reasonable man should find believable have been written supporting the U.S. position.[53] Acceptance of the reasonableness of the legality of the U.S. intervention and the independence of the Saigon regime strengthens considerably the already strong legal defense of civilian relocation, for example. The citizens of a cobelligerent do not enjoy the same protections from their allies that the civilians of an occupied nation should expect from the occupier. A country's power to relocate its inhabitants in order to prosecute a war is virtually unlimited.[54] The lack of clamor concerning extensive relocation activities in Kenya and Malaya is mute evidence of international acceptance of such practices. One has to recognize only that the United States has a reasonable legal defense of its intervention, without accepting that defense, in order to undercut certain of the war crimes charges. Relocation activities may also be defended by recourse to the "Hostages case" at Nuremberg wherein the tribunal declared that the inhabitants of occupied territories may be relocated in order to prosecute antiguerrilla campaigns.[55]

Intent is perhaps the major consideration in the question of the use of airpower and artillery. If the United States intended to use air and artillery to terrorize the peasantry or for reprisals, as Neil Sheehan charges, then such use would probably be illegal.[56] On the other hand, a military commander may legally employ air and artillery firepower against a populated area from which he is receiving fire or which is offering armed resistance.[57] It is unfortunate but not illegal if the commander unintentionally erred in his judgment about the size of the force he faced and caused excessive civilian casualties. Precise estimates of enemy strength are extraordinarily difficult in fighting guerrillas in or near villages. Two snipers armed with Russian AK47 automatic rifles can sound like a platoon, thereby causing an opposing platoon commander to decide he needs

fire support to neutralize the enemy opposition.

The natural tendency of battlefield commanders is to take steps to avoid excessive casualties to their own units through the employment of all firepower means available to them. Admittedly, such practices can produce counterproductive results in guerrilla wars, but it is international legality and not effectiveness of counterinsurgency practices with which we are concerned. This tendency to minimize battlefield casualties results, to some extent, from the responsibility felt by American leaders to account to the American public for the lives of their sons. Lest anyone assert that manifestations of this tendency in Vietnam are evidence of racist attitudes toward "inferior peoples," one need only recollect the extravagant artillery and tactical airpower the United States employed against the Germans in Western Europe in 1944-1945.

In their concern with civilian casualties, the media representatives have lost sight of the fact that international law provides only the most rudimentary protections to civilians caught in the midst of combat operations. Although civilians enjoy an immunity from direct attack, it is not an absolute immunity. The law of war acknowledges that the killing and wounding of civilians is often an incidental aspect of the lawful conduct of military operations. Incidental injury to civilians is not unlawful so long as it does not violate a mandatory rule of the law of war, is justified by the rule of necessity, and the suffering caused is not disproportionate to the military advantage gained.[58] Even the more recent Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War specifically recognize the limited nature of the immunity enjoyed by the civilian population.[59] As Telford Taylor puts it, "The death of an infant in consequence of military operations . . . does not establish that a war crime has been committed."[60]

The important point is that an informed and objective observer, viewing the battlefield, would not perceive as many unlawful acts as Richard Falk might see. The informed and objective observer would understand the intent behind many of the actions that others might consider unlawful and the specific context within which they occurred. Hence, it is a Procrustean feat to charge that the military leaders are guilty of war crimes because so many war crimes took place that they must have known of them and perhaps ordered them. Battlefield actions which in Richard Falk's view are criminal may seem lawful and necessary, even if tragic, to the knowledgeable officer.

It must be noted that the previously described defense of the military is asserted only within an admittedly narrow framework of international law since it is within this framework that the military's critics purport to operate as they accuse the United States of war crimes. The paper does not attempt to reply on the more transcendent moral plane.

The second part of the reply of the American military leader to the charge of war crimes would be to assert the number of actions taken to prevent war crimes. General Westmoreland, General Abrams, and the entire military chain of command can establish an active defense by demonstrating the steps taken in war crimes prevention—a case which none of the German or Japanese generals could argue. Space limitations preclude full development of the U.S. defense, but the outline will be sketched. The Vietnam participant can expand this from his own experience.

From the early days of the buildup of U.S. ground forces, the American command in Saigon took strong, active steps to minimize civilian casualties. The command action proceeded along three dimensions; (1) command policies

passed through the chain of command, (2) briefings for the individual soldier, and (3) investigation of apparent unlawful acts and punishment of perpetrators. Perusal of the Military Assistance Command Vietnam (MACV) files indicates that minimization of civilian casualties, treatment of enemy prisoners, and the rules of engagement which govern firepower use were major concerns of the U.S. commander. The records of the commanders' conferences held by General Westmoreland contain periodic warnings to this effect.[61] The policies and rules of engagement have been declared "virtually impeccable" even by Telford Taylor[62] and were eulogized by a representative of the International Committee of the Red Cross who pronounced the MACV policy for the handling of POW's, " . . . a brilliant expression of a liberal and realistic attitude."[63] Commanders' conferences down to division level usually included similar admonitions concerning civilian casualties, handling of POW's, and the rules of engagement.

A second aspect of U.S. policy concerns the briefs received by individual soldiers. Each soldier arriving in Vietnam received from his unit a briefing concerning the rules of engagement, attitudes toward civilians, and the handling of prisoners of war. More importantly, he was issued two small wallet-sized cards called, "Nine Rules" and "The Enemy in Your Hands." The "Nine Rules" stressed the necessity to maintain a humane attitude toward the Vietnamese people. "The Enemy in Your Hands" reiterated in simplified terms the provisions of the Geneva Convention concerning the handling of prisoners of war. Many commanders of combat units regularly inspected their commands to ensure retention of these cards.

Finally, one must take note of the punitive aspects of U.S. policy. MACV's policy required investigation of all allegations of unlawful acts and courts-martial where appropriate. During the period 1965 to 1971, investigated allegations of war crimes or of offenses of violence against Vietnamese nationals resulted in the conviction of 176 U.S. Army personnel and 22 sentences of life imprisonment to members of all services.[64] Some of the more sensational press stories about atrocities have resulted from evidence introduced at courts-martials. The fact that individuals were court-martialed for the offenses was underplayed in the rush to describe "current military practices."[65]

Conclusion. What conclusions can be drawn from this analysis? First, the legal realities of the Yamashita case differ considerably from the public perception. Contrary to references in recent books and articles, the Yamashita case did not establish a standard of absolute command responsibility wherein a commander could be held criminally liable for the actions of his command even if he was ignorant of their transgressions or was unable to influence them. The Military Commission which tried General Yamashita heard evidence which directly linked him to the knowledge of offenses committed by his troops. On the basis of this evidence, the Commission found Yamashita guilty of failing to control his subordinates. The case represents a reasonable standard of command responsibility which states that a commander can be held liable for the actions of his troops if he knows of them or blatantly ignores them and fails to take appropriate action.

The Nuremberg Subsequent Proceedings provide a clearer example of limited command responsibility consistent with this paper's view of the Yamashita case. The Court in the "High Command case" was quite explicit in its rationale. The judgment stated that dereliction must be personal and knowledge must be shown in order to convict commanders for the offenses committed by their command. In view of the judicious and

restrained nature of the Nuremberg trials and the expansive rationale offered by the court, why is it that the war crimes publicists feel compelled to apply their version of the Yamashita case to U.S. conduct in Vietnam? The teachers and students of international law need to reconsider such actions.

The war crimes trials examined in this paper offer a reasonable and fairly unambiguous standard concerning command responsibility under the international law of war. A commander is responsible for the actions of his subordinates. He is required to take steps to prevent war crimes, to halt their continuation when he discovers them, and to punish the wrongdoers. He would be found guilty if he knew of crimes committed by members of his command or had reason to know of them and failed to take the requisite action. The tribunals left unanswered the degree of efficiency required from the commander in preventing war crimes, in discovering information about them, and in punishing wrongdoers. In many ways, this is the core issue between the U.S. generals and their accusers concerning Vietnam. The generals probably wish they had been more efficient in preventing unlawful actions. The accusers seem to be demanding perfection. Resolution of this dilemma lies in the question of "intent."

The Falks and the Sheehans seem to forget that culpability in war crimes often hangs on "intent." The legal defense available to U.S. leaders combined with a genuine demonstrated intent to minimize civilian casualties provides a defense of such strength that it strains the imagination of a knowledgeable observer to visualize any senior U.S. military leader being convicted under the Nuremberg precedent for U.S. practices in Vietnam.

Three conclusions emerge. First, the so-called Yamashita principle does not exist legally. Second, the Nuremberg trials established a standard of command responsibility which demands proof of personal negligence or personal participation. Third, the U.S. military actions in Vietnam are backed by a solid defense of policy, deeds, and intent.

FOOTNOTES

1. As reported by Neil Sheehan in "Taylor Says by Yamashita Ruling Westmoreland May Be Guilty," *The New York Times*, 9 January 1971, p. 3:1.
2. Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Chicago: Quadrangle Books, 1970), p. 182.
3. United Nations War Crimes Commissions, *Law Reports of Trials of War Criminals* (London: H.M. Stationery Off., 1947-1949). See volume VIII for the "Hostages Case" and volume XII for the "High Command Case." (Hereafter referred to as *UN Law Reports.)*
4. See footnotes 42, 43, 46 and 47 *infra.*
5. Taylor, p. 13-14.
6. See *UN Law Reports,* v. IV, for a complete discussion of the Yamashita case.
7. *Ibid.*, p. 4-6.
8. *Ibid.*, p. 34-35.
9. *Ibid.*, p. 17.
10. *Ibid.*, p. 84.
11. *Ibid.*, p. 19-20.
12. *Ibid.*, p. 35.
13. *Ibid.*, p. 34.
14. *Ibid.*, p. 35.
15. *Ibid.*, p. 19-20. See also footnote 20 *infra.*
16. General Headquarters, U.S. Army Forces, Pacific, Office of the Theater Judge Advocate, *Review of the Record of Trail by a Military Commission of Tomoyuki Yamashita, General, Imperial Japanese Army,* 26 December 1945. (Hereafter referred to as *Review.*)
17. *Ibid.*, p. 64-65.
18. Taylor, p. 91-92.

19. *Review*, p. 71-73, 81.
20. *Ibid.*
21. *Ibid.*, p. 78.
22. *Ibid.*, p. 74.
23. *Ibid.*, p. 81-83.
24. *In Re Yamashita*, 327 U.S. 14-16.
25. *Ibid.*, p. 17.
26. John P. Frank, *Marble Palace, the Supreme Court in American Life* (New York: Knopf, 1958), p. 136-137.
27. *In Re Yamashita.*
28. *Ibid.*, p. 40.
29. *Ibid.*, p. 45.
30. *Ibid.*, p. 61.
31. *Ibid.*, p. 13-23.
32. Taylor, p. 91-92.
33. *In Re Yamashita* at 28, 34, 47, 53-55.
34. A. Frank Reel, *The Case of General Yamashita* (Chicago: University of Chicago Press, 1949).
35. Taylor, p. 91-92. See also Homer Bigart, "Medina's First Juror Tentatively Accepted as Mylai Court Martial Opens," *The New York Times*, 27 July 1971, p. 5:1; Peter Braestrup, "Jury Head Selected for Medina Trial," *Washington Post*, 27 July 1971.
36. *UN Law Reports*, v. IV, p. 18-20; *Review*, p. 71-73.
37. *In Re Yamashita* at p. 28.
38. John A. Appleman, *Military Tribunals and International Crimes* (Indianapolis: Bobbs-Merrill, 1954).
39. See *UN Law Reports*, v. XII for an analysis of "High Command Case." The case is reported in detail in Germany (Territory under Allied Occupation 1945—U.S. Zone) Military Tribunals, *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Nuremberg October 1946-November 1949* (Washington: U.S. Govt. Print. Off., 1951), v. X and XI. (Hereafter referred to as *Trials of War Criminals.*)
40. *Ibid.*, v. X, p. 29-37, 44-47, 125-138.
41. *Ibid.*, v. X, p. 1090-1101.
42. *Ibid.*, v. XI, p. 333-334.
43. *Ibid.*, v. XI, p. 553-563, 695, 698.
44. *Ibid.*, v. XI, p. 543-544.
45. *Ibid.*, v. XI, p. 545.
46. *Ibid.*, v. XI, p. 555.
47. *Ibid.*, v. XI, p. 558.
48. See *UN Law Reports*, v. VIII, for an analysis of the "Hostages Case." The case is covered in detail in *Trials of War Criminals*, v. XI.
49. *Trials of War Criminals*, v. XI, p. 1269, 1275.
50. See the discussions contained in Edwin Knoll and Judith McFadden, eds., *War Crimes and the American Conscience* (New York: Holt, Rinehart and Winston, 1969).
51. Neil Sheehan, "Should We Have War Crimes Trials?" *The New York Times Book Review*, 28 March 1971, p. 1-3, 30-34; Lawrence C. Petrowski, "Law and the Conduct of the Vietnam War," Richard A. Falk, ed., *The Vietnam War and International Law* (Princeton, N.J.: Princeton University Press, 1969).
52. Taylor, p. 131, 133-134, 146, 177.
53. As examples, consider: John Norton Moore, "The Lawfulness of Military Assistance to the Republic of Vietnam," *American Journal of International Law*, January 1967, p. 1-34; Leonard C. Meeker, "Viet-Nam and the International Law of Self Defense," *Department of State Bulletin*, 9 January 1967, p. 54; Roger H. Hull and John C. Novogrod, *Law and Vietnam* (Dobbs Ferry, N.Y.: Oceana, 1968).
54. Article 4 of the 1949 "Geneva Convention Relative to the Protection of Civilian Persons in Times of War," (TIAS 3365), *U.S. Treaties, etc.* (Washington: U.S. Govt. Print. Off., 1956), v. VI, pt. 3, p. 3520 (hereafter referred to as "Geneva Civilian Convention") states: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."
55. *Trials of War Criminals*, v. XI, p. 1249-1250. In addition, article 49 of the 1949 Geneva Civilian Convention states: " . . . the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand."

56. Sheehan. "Should We Have War Crime Trials?"

57. Lassa F.L. Oppenheim, *International Law: A Treatise,* 7th ed., H. Lauterpacht, ed. (London: Longmans, Green, 1952), v. II, p. 346, 525; *Trials of War Criminals,* v. XI, p. 541, 1253-1254.

58. W. Solf, "A Response to Telford Taylor's Nuremberg and Vietnam: An American Tragedy," *University of Akron Law Review,* v. V, no. 1, p. 49-50.

59. International Committee of the Red Cross, *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population* (Geneva: 1956).

60. Taylor, p. 135.

61. See *Report of the Department of the Army Review of the Preliminary Investigation into the My-Lai Incident,* March 1970, p. 9-14, 9-15, (hereafter referred to as the *Peers Report*) for discussions of command emphasis. For example, at the commanders conference at Nha Trang on 24 October 1965, General Westmoreland cautioned his subordinates about minimization of civilian casualties at four different points in his remarks as he discussed: indoctrination of U.S. troops, issuance of the "Nine Points" card, the report of a board formulating Rules of Engagement, and the use of prudence in the employment of naval gunfire support. This set of remarks was characteristic of those used at other commanders conferences.

62. Taylor, p. 168.

63. Gardner M. Haight, "The Geneva Convention and the Shadow War," *United States Naval Institute Proceedings,* September 1966, p. 47.

64. An informal review of records of trial by general court-martial and those special courts-martial authorized to adjudge a bad conduct discharge received by the U.S. Army Judiciary as of approximately 1 June 1971 reveals that from 1965 to the date of the survey, 176 U.S. Army personnel had been convicted of offenses in which the victim was identified as a Vietnamese. At the time of Calley's conviction, the New York Times News Service reported that Calley was the 22d U.S. serviceman sentenced to life imprisonment for the premeditated murder of a Vietnamese civilian. See also statistics at Solf, p. 67.

65. See Daniel Lang, *Casualties of War* (New York: McGraw-Hill, 1969) which also appeared in the 18 October 1969 issue of *The New Yorker.* Book reviews and accounts of this tale of rape and murder seldom mentioned the fact that the tale was told from the court-martial records. See Taylor, p. 134.