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War Crimes, Crimes against Humanity, and Command Responsibility

Leslie C. Green

THERE IS A TENDENCY TO consider the concept of command responsibility relating to the commission of war crimes and crimes against humanity as a new phenomenon resulting from the Nuremberg Judgment.[1] In fact, even in feudal times it was clearly established that a commander might be liable, equally with the offender, for offences committed by those under his command. There seems to be little doubt that modern international law embodies the principle that, in addition to the individual responsibility of those who may actually perpetrate such crimes, criminal liability will also accrue to any political or military superior who orders, colludes in, condones, or fails to take steps to prevent their commission or repress and punish the actual offenders. This paper explores the application of that principle to actual situations, especially recent experience.

Historical Background

As early as 1439, Charles VII of Orleans, in terms that almost foreshadow Protocol I of 1977 additional to the Geneva Conventions of 1949 and extending certain aspects of humanitarian law relevant to international armed conflicts, promulgated an Ordinance providing:

> 18. The King orders that each captain or lieutenant be held responsible for the abuses, ills and offences committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice. . . . If he fails to do so or covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offence as if he had committed it himself and be punished in the same way as the offender would have been.[2]

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Naval War College Review, Spring 1997, Vol. L, No. 2

It was not, however, until the capture of Napoleon after Waterloo in 1815 that we find an international effort to condemn a leader for what today would be called crimes against peace.[3] The Congress of Vienna had originally declared Napoleon an international outlaw for having invaded France in violation of the 1814 Treaty of Paris, in which he had agreed to retire to Elba. By his escape from that island and his reentry into France with an armed force, the Congress of Vienna declared, Napoleon had "destroyed the sole legal title upon which his existence depended[,] . . . placed himself outside the protection of the law, and manifested to the world that it can have neither peace nor truce with him. . . . [Napoleon has put himself outside] civil and social relations, and that as Enemy and Perturbator of the World, he has incurred liability to public vengeance."[4]

Since Napoleon had been declared an "outlaw," one who had "placed himself outside the protection of the law," the commander of the Prussian contingent of the forces of occupation wished, rather than bring him to trial, to have him shot out of hand. The other powers would not agree to this, and he was handed over to the British, who exiled him to St. Helena.[5]

This decision was made on political, not legal, grounds, but it clearly reflected the view that resort to war in breach of treaty was criminal. This approach was comparable to the medieval attitude toward a knight who had been captured and released on parole but had subsequently broken that parole.[6]

It was at the time of the American Civil War that the first attempt was made to introduce an up-to-date code for the conduct of armies in the field. Drafted by Professor Francis Lieber of Columbia College, New York, and promulgated by President Abraham Lincoln in April 1863 as a General Order to the Army, the Lieber Code was distributed to both the Union and Confederate armies; it soon formed the basis of many other national codes.[7] However, though it contained a variety of articles detailing the duties of a commander, it nowhere suggested that failure of a commander to comply with these instructions, or issuance of orders contrary thereto, was illegal or merited penalty.[8] Nevertheless, the principles actually embodied in the Code and also liability for issuing or executing illegal orders were both confirmed in the celebrated 1865 trial of Confederate Captain Henry Wirz, former commander of the Andersonville, Georgia, prison camp. In that trial reference was made to the "intrinsic wickedness of a few desperate leaders, seconded by mercenary and heartless monsters."[9]

International Action. The first clear indication of an intent on the part of the European powers to draft a generally acceptable code for the conduct of armies in the field was the Brussels Protocol of 1874, which resulted from a conference of fifteen European states convened by Czar Alexander II of Russia.[10] However, while the preamble of the Protocol "declared that the progress of civilization should have the effect of alleviating, as far as possible, the calamities of war; and

that the only legitimate object which States should have during war is to weaken the enemy without inflicting upon him unnecessary suffering," the Project of an International Declaration concerning the Laws and Customs of War annexed to the Protocol made no reference to what the consequences would be if any person disregarded the injunctions embodied in its fifty-six articles.

It was left to the Institute of International Law, an unofficial body of leading scholars in this field, to follow up the suggestion of the Brussels Protocol and draft, at Oxford in 1880, a *Manual on the Laws of War on Land*, which subsequently became the model for the conventions adopted at the Hague Peace Conferences of 1899 and 1907.[11] The Oxford Manual's sole indication with regard to treatment to be accorded to one disregarding its imprecations is to be found in Part III, which is entitled "Penal Sanction":

> If any of the foregoing rules be violated, the offending parties should be punished, after a judicial hearing, by the belligerent in whose hands they are.
> Therefore
> Art. 84. Offenders against the laws of war are liable to the punishment specified in the penal law.
> This mode of repression, however, is only applicable when the person of the offender can be secured. In the contrary case, the criminal law is powerless, and, if the injured party deem the misdeed so serious in character as to make it necessary to recall the enemy to a respect for law, no other recourse than a resort to reprisals remains.
> Reprisals are an exception to the general rule of equity, that an innocent person ought not to suffer for the guilty. They are also at variance with the rule that each belligerent should conform to the rules of war, without reciprocity on the part of the enemy.

While the Manual clearly recognizes the criminal liability of the actual offender against the laws of war, it does not indicate whether this includes the commander who issues an unlawful order, as well as the individual who commits the actual breach of law—quite possibly in compliance with an order. Also, though it asserts the principle, which applies in state practice, that in the absence of an international tribunal an offender is tried in accordance with the provisions of the national law of the state in whose hands he may be, the wording implies that both the belligerent that captured the offender as well as the offender's own state possess jurisdiction. No suggestion is made as to the nature of the tribunal that is to be established, whether a normal criminal court or a military tribunal. All the Manual requires is that the offender be subjected to a judicial process in accordance with the law, however inadequate, of the country under whose control he is at the time of trial.

The Oxford Manual, while it may have been inspired by the Brussels Project and may have truly reflected the military practice of the day, was an unofficial instrument. It remained for Czar Nicholas II to call a further diplomatic conference, which met at The Hague in 1899 and produced the first internationally

agreed instrument in this area. The Convention on Laws and Customs of War on Land was amended at the Second Hague Conference held in 1907; known in its amended form as Hague Convention IV, it remains the basic international instrument to the present day.[12]

The 1907 Convention introduces an article that was absent from the 1899 text: for the first time there is express reference to liability for breaches of international law, although, unlike the Oxford Manual, it does not specify personal criminal liability. In fact, it seems to exclude such liability:

> Art. 3. A belligerent party which violates the provisions of the said Regulations [annexed to the Convention] shall, if the case demands, be liable to pay compensation. *It shall be responsible for all acts committed by persons forming part of its armed forces* [emphasis supplied].

World War I. During and after World War I, all belligerents tried members of enemy forces whom they had captured and charged with offences against the laws and customs of war. But it was as a result of the work of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties established to enquire into the origins of the war that command responsibility became a matter of international concern.[13] The Commission considered that "all persons belonging to enemy countries, *however high their position may have been*, without distinction of rank, including Chiefs of Staff, who have been guilty of offenses against the laws and customs of war or the laws of humanity, are liable to criminal prosecution" (emphasis supplied).

Japan was critical of the suggestion that, for example, Kaiser Wilhelm II might be indicted despite the traditional view that a head of state was immune from prosecution by any state other than his own. Nevertheless, Article 227 of the Treaty of Versailles provided:

> The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. . . . In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality.[14]

It is important to note that the treaty does not talk here of crimes against international law but of "a supreme offence against international morality and the sanctity of treaties," clearly indicating that such a war constitutes a crime. When the German delegation protested the inclusion of this article in the Treaty, the Allied and Associated Powers formally stated that the war was

> the greatest crime against humanity and the freedom of peoples that any nation calling itself civilized has ever consciously committed[,] . . . a crime deliberately against the life and liberties of the people of Europe. . . . [However,] the public arraignment under Article 227 framed against the German ex-Emperor has not a judicial character as regards its substance, but only in its form. The ex-Emperor is arraigned as a matter of high international policy, as the minimum of what is demanded of a supreme offence against international morality, the sanctity of treaties and essential rules of justice. The Allied and Associated Powers have decided that judicial forms, a judicial procedure and a regularly constituted tribunal should be set up in order to assure the accused full rights and liberties in regard to his defence, and in order that the judgment should be of the utmost solemn character.[15]

Once again we see evidence that while the tribunal was to be judicial in character, it was not, in the strict sense of its instructions, instructed to apply any rules of law but simply "to be guided by the highest motives of international policy" in order to vindicate the validity of "international morality." Since the trial never took place, we will never know what contribution it would have made to establishing the criminality of war itself or the liability of a head of state for having resorted to war.

It was not until the end of World War II that any further attempt was made to deal with the illegality of war or the issue of command responsibility.

World War II. As evidence continued to accumulate concerning the atrocities being committed by German forces in occupied Europe, the United Nations (as the Allied powers opposing the Axis were officially known) issued a number of statements indicating their intention of bringing the offenders to justice after the termination of hostilities. Thus, the 1942 Declaration of St. James stated that the Allies "place among their principal war aims the punishment, through the channel of organized justice, of those guilty for these crimes, whether they have ordered them, perpetrated them, or participated in them."[16]

Accordingly the London (Nuremberg) Charter establishing the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis provided that, in Article 7, "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."[17]

Since the London Charter was a constituent instrument of the Tribunal, that body had no power to question the validity of the provision removing the traditional immunity of such persons. The final Judgment, therefore, includes no general comment on this matter.[18] It simply considers the facts concerning each of the accused in order to determine whether he was personally responsible for issuing, or participating in the issuance of, or—knowing of their illegality—forwarded any

orders resulting in the commission of a crime against peace, war crimes, or crimes against humanity—that is to say, the offences over which the Tribunal possessed jurisdiction.

In 1946, at its first session, the General Assembly of the United Nations adopted a Resolution comprising an Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal.[19] This made no specific reference to any particular principle but directed the Committee, which became the International Law Commission, "to treat as a matter of primary importance plans for the formation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal."

It was not until 1991 that the Commission drew up its Draft Code of Crimes Against the Peace and Security of Mankind.[20] In 1950, however, it issued its statement of Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (Principle III): "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law."[21]

Although the Statement is issued under the rubric of Principles embodied in the Nuremberg Charter and Judgment, it is worded in general terms. It would appear that any head of state or responsible government official charged with any act constituting a crime under international law would be denied any right to plead in his favour the immunity he might claim to enjoy under traditional customary law. Since 1945, in fact, this seems to have become an accepted principle of modern international law.

Postwar Trials by National Courts

In addition to the International Military Tribunal at Nuremberg—the tribunal established by General Douglas MacArthur for the Far East was bound by the same type of jurisdictional constraints—a number of offenders were tried by national courts. It is of interest to note the attitude of such tribunals insofar as the concept of command responsibility is concerned.

General Tomoyuki Yamashita, 1946. One of the most important cases heard by a national tribunal was that of General Yamashita, commanding general of the Fourteenth Army Group of the Imperial Japanese Army in the Philippines, serving concurrently as military governor, and formerly commanding general in Singapore and Malaya. Yamashita was tried by a United States Military Commission and charged with having "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 its allies, particularly the Philippines; and he . . . thereby violated the laws of war."[22] Clearly, he was not charged with having personally committed any breach of the laws and customs of war, but with having failed as a commander to carry out his duty under the law of war by ensuring that the troops under his command observed those laws and customs.[23] In other words, the charge is a clear example of command responsibility.

On behalf of Yamashita it was contended that the effectiveness of the American operations in the Philippines was such that his lines of communication with his troops were so completely severed that it was not possible for him to maintain contact and ensure their compliance with the laws of war. This defence was rejected. The president of the Military Commission declared:

> 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 willfully permitted by the accused, or secretly ordered by the accused. . . .
>
> As to the crimes themselves, complete ignorance that they had occurred was stoutly maintained by the accused, his principal staff officers and subordinate commanders; further, that all such acts, if committed, were directly contrary to the announced policies, wishes and orders of the accused. The Japanese Commanders testified that they did not make personal inspections or independent checks . . . 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.
>
> This accused is an officer of long years of experience, broad in its scope, who had extensive command and staff duty in the Imperial Japanese Army in peace as well as war. Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true of all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or a rapist because one of his soldiers commits a murder or a rape. Nevertheless where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such 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.[24] Should a commander issue orders which lead directly to lawless acts, the criminal responsibility is definite and has always been so understood.

In the light of this reasoning, it is not surprising that the Military Commission before which he was tried found Yamashita guilty and sentenced him to death. Yamashita appealed to the Supreme Court of the United States, primarily contesting the constitutionality and jurisdiction of the Commission.[25] By a majority (Justices Frank Murphy and Wiley B. Rutledge, Jr., dissenting), the Court upheld

the verdict. In the course of its judgment, the Court expressly declined to "appraise the evidence on which petitioner was convicted. We do not consider what measures, if any, petitioner took to prevent the commission, by the troops under his command, of the plain violations of the law of war detailed in the bill of particulars, or whether such measures as he may have taken were appropriate and sufficient to discharge the duty imposed upon him. These are questions within the competence of the military officers composing the commission and were for it to decide."

Despite this disclaimer, Chief Justice Harlan Fiske Stone, on behalf of the majority, stated:

> The question 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. . . . 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. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection.[26] Here 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. . . .

Reference has been made to Justice Murphy's dissent. While this was primarily concerned with the procedure of the Military Commission and Justice Murphy's view that it breached the constitutional right to due process, he raised grave doubts as to the issue of command responsibility in the specific circumstances in which Yamashita found himself at the end of the Philippine campaign. Murphy was of the opinion that the charges lodged

> amount to this: "We, the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. In those respects we have succeeded. We have defeated and crushed your forces. And now we charge and condemn you for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking your ability to maintain effective control. Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so widespread we will not bother to charge or prove that you committed, ordered or condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization

> which we ourselves created in large part. Our standards of judgment are whatever we wish to make them."
>
> Nothing in all history or in international law, at least as far as I am aware, justifies such a charge against a fallen commander of a defeated force. To use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality.

While there may be something to be said for Murphy's comments on the effectiveness of the American campaigns and their consequent disruption of Yamashita's lines of communication, it is submitted that his knowledge of the history of command responsibility is not as complete as he implied. He makes no reference to the attempts to make either Napoleon or Wilhelm II answerable for the waging of aggressive war—an offence that, to some extent at least, may be considered as less horrifying than mass atrocities against prisoners or the civilian inhabitants of occupied territory.[27] Moreover, any serving officer, at least one of field rank, would acknowledge that officers may be assumed to have knowledge of the general behaviour of their troops, especially when that behaviour is consistent and widespread. Nevertheless, it might be pointed out that some of the validity of his criticisms might have been avoided if Yamashita had been tried in Singapore for the acts of his troops that resulted in his being known as the "Tiger of Malaya."

A further criticism of the Yamashita case, particularly during the actual military court proceedings, has been offered, especially by one of the American officers who acted as his defence counsel. He alleges interference by MacArthur himself, based either on ideological grounds or a desire for vengeance.[28]

Brigadeführer Kurt Meyer, 1945. The other post–World War II trial of an individual that is of major significance from the viewpoint of command responsibility was that of Brigadeführer Meyer, conducted by a Canadian war crimes court. He was charged with committing war crimes by inciting and counseling troops under his command, "in violation of the laws and usages of war," to deny quarter to Allied troops, by ordering the killing of Canadian prisoners, and with responsibility for the killing of prisoners of war by troops under his command.[29] Evidence was brought to show that Meyer had read out an order that prisoners be shot, and that an officer or noncommissioned officer was present at the actual shootings. It was also suggested that the scene of the killings was sufficiently close to Meyer's office that he must have been aware that they were taking place. The Judge Advocate (the legal adviser to a British or Canadian court-martial) stated in his address to the court:

> Where there is evidence that a war crime has been committed by members of a formation, unit, body or group and that an officer or non-commissioned officer was

present at or immediately before the time when such offence was committed, the court may receive that evidence as prima facie evidence of the responsibility of such officer or non-commissioned officer, and of the commander of such formation, unit, body or group, for that crime. . . .

An officer may be convicted of a war crime if he incites and counsels troops under his command to deny quarter, whether or not prisoners were killed as a result thereof. It seems to be common sense to say that not only those members of the enemy who unlawfully kill prisoners may be charged as war criminals, but also any superior commander who incites and counsels his troops to commit such crimes. . . . If you find that those prisoners, or some of them, were killed by members of the 25 SS Panzer Grenadier Regiment [which Meyer commanded], you will have to decide whether the accused was responsible for those acts. . . .

The broad question "When may a military commander be held responsible for a war crime committed by men under his command in the sense that he may be punished as a war criminal?" is not easily answered. . . .

The [Canadian War Crimes] Regulations do not mean that a military commander is in every case liable to be punished as a war criminal for every war crime committed by his subordinates but once certain facts have been proved by the Prosecution, there is an onus cast upon the accused to adduce evidence to negative or rebut the inference of responsibility which the Court is entitled to make.[30] All the facts and circumstances must be considered to determine whether the accused was in fact responsible for the killing of prisoners referred to in the various charges. The rank of the accused, the duties and responsibilities of the accused by virtue of the command he held, the training of the men under his command, their age and experience, anything relating to the question whether the accused either ordered, encouraged or verbally or tacitly acquiesced in the killing of prisoners, or willfully failed in his duty as a military commander to prevent, or to take such action as the circumstances required to endeavour to prevent the killings are matters affecting the question of the accused's responsibility. In the last analysis, it is for the Court, using its wide knowledge and experience of military matters, to determine, in the light of the relevant factors and the provisions of the [Canadian War Crimes] Regulations, the responsibility of an accused in any particular case. . . .

The giving of the order may be proved circumstantially, that is to say, you may consider the facts you find to be proved bearing upon the question whether the alleged order was given, and if you find that the only reasonable inference is that an order that the prisoners be killed was given by the accused at the time and place alleged, and that the prisoners were killed as a result of that order, you may properly find the accused guilty. . . . It is not necessary for you to be convinced that a particular or formal order was given but you must be satisfied before you convict, that some words were uttered or some clear indication was given by the accused that prisoners were to be put to death. . . .

Evidence showed that Meyer's troops had been responsible for other prisoner killings, that he knew of the deaths, that at least one noncommissioned officer had been present, and that some killings had taken place near his headquarters. Further, he stated that he knew of and had even seen some of the bodies. The court had little difficulty in finding him guilty.

As if foreshadowing Justice Murphy's lack of knowledge of active service conditions, the Judge Advocate commented upon the obligations and discretionary powers of the members of the tribunal:

> They may draw upon their knowledge of human nature and the common experiences of men in battle, and they may take judicial notice of matters within their general military knowledge and also the laws and usages of war, but insofar as the particular allegations of fact set forth in the charges are concerned, they must disregard . . . any considerations which might affect [their] judgment which is not relevant to this trial. The accused is not to be prejudiced because he is a member of an enemy force and the Court is not concerned with public opinion expressed in the press or with questions of policy or expediency.

The German High Command Trial, 1948. Of all the trials conducted by the American forces of occupation in Germany, one of the most significant was that of a group of senior staff officers of the German armed forces.[31] Inasmuch as Adolf Hitler had been the commander in chief of those forces, one of the main issues confronting the tribunal was that of the responsibility of senior officers communicating orders now alleged to have been palpably illegal. The principle of command responsibility in such circumstances was spelled out in the course of the judgment:

> It is urged that a commander becomes responsible for the transmittal in any manner whatsoever of a criminal order. Such a conclusion this Tribunal considers too far-reaching. The transmittal through the chain of command constitutes an implementation of an order. Such orders carry the authoritative weight of the superior who issues them and of the subordinate commanders who pass them on for compliance. The mere intermediate administrative function of transmitting an order directed by a superior authority to subordinate units, however, is not considered to amount to such implementation by the commander through whose headquarters such orders pass. Such transmittal is a routine function which in many instances would be handled by the staff of the commander without being called to his attention.[32] The commander is not in a position to screen orders to be transmitted. His headquarters, as an implementing agency, has been bypassed by the superior command.
>
> Furthermore, a distinction must be drawn as to the nature of a criminal order itself. Orders are the basis upon which the army operates.[33]. . . Many of the defendants here were field commanders and were charged with heavy responsibilities in active combat. Their legal facilities were limited. They were soldiers—not lawyers. Military commanders in the field with far-reaching military responsibilities cannot be charged under International Law with criminal participation in orders which are not obviously criminal, or which they are not shown to have known to be criminal under International Law. Such a commander cannot be expected to draw fine distinctions and conclusions as to legality in connection with orders issued by his superiors. He has the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly

determined before their issuance. He cannot be held criminally responsible for a mere error in judgment as to disputable legal questions.[34]

It is therefore considered that to find a commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of command and the order must be one that is criminal upon its face, or one which he is shown to have known was criminal.

[In so far as the superior concerned is the commander of occupied territory,] his criminal responsibility is personal. The act or neglect to act must be voluntary and criminal. . . . From an international standpoint, criminality may arise by reason that the act is forbidden by international agreements or is inherently criminal and contrary to accepted principles of humanity as recognized and accepted by civilized nations.[35]

This reference to the patent criminality of the order applies equally to an accused pleading superior orders—which is of course the concomitant of command responsibility—by way of defence or of mitigation of punishment.[36] Of those charged, the air force general and the navy admiral were acquitted of all charges; all others were acquitted of planning or waging aggressive war or conspiring therein but were found guilty of war crimes and crimes against humanity, against prisoners of war and civilians. They were sentenced to varying terms of imprisonment, but all those still in gaol in 1951 were released by order of the United States occupation authorities.

The Cold War Period

Two proceedings in the decades after the Second World War are noteworthy with respect to command responsibility. Both occurred outside the United States, and their rulings are of interest though the trials were outside the familiar pattern of war crimes trials: in one case the court was convened by a defeated, rather than a victorious, state; in the other, no "war crime" or "international crime" in the usual sense was involved at all.

Shimoda v. Japan, 1963. One of the most basic principles of the law of armed conflict is that unnecessary suffering must be avoided. This point has raised numerous questions and allegations relating to the use of the atomic bomb at Hiroshima and Nagasaki, and since then to any possible use of the nuclear weapon.[37] The Geneva Conference responsible for the adoption of Protocol I was concerned with Methods and Means of Warfare (Part III, Section I). Article 35 states as "basic rules":

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.

2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long term and severe damage to the natural environment.

Nonetheless, the Geneva Conference, considering the whole issue of nuclear weapons to be one of disarmament, did not discuss this matter or consider it necessary to include any provision concerning the legality or use of nuclear weapons. In addition, the International Court of Justice, in its Advisory Opinion on this matter, while not directly stating that the weapon was illegal, did consider it to be contrary to the principles of the law of armed conflict relating to the use of weapons—subject, however, to the possibility of the lawful use of the nuclear weapon "by a State in an extreme circumstance of self-defence, in which its very survival would be at stake."[38] In view of this it is useful to refer to a Japanese trial known as the Shimoda case, nearly two decades after the war, in which the Tokyo District Court was called upon to consider the legality of the use of this weapon.[39] The court compared the use of the atomic bomb to that of poison and poisonous gases, and considered that its

> dropping . . . may be regarded as contrary to the fundamental principle of the law of war which prohibits the causing of unnecessary suffering. . . . Since it is not disputed that the act of atomic bombing on Hiroshima and Nagasaki was a regular act of hostilities performed by an aircraft of the United States Army Air Force, and that Japan suffered damage from this bombing, it goes without saying that Japan has a claim for damages against the United States in international law. In such a case, however, responsibility cannot be imputed to the person who gave the order for the act, as an individual. Thus, in international law damages cannot be claimed against President Truman of the United States of America who ordered the atomic bombing, as it is a principle of international law that the State must be held directly responsible for an act of a person done in his capacity as a State organ, and that person is not held responsible as an individual.

What is surprising about this decision is not the finding that the use of the atomic bomb was illegal but its comment concerning the responsibility of President Harry Truman. The decision was rendered after the judgments of both the Nuremberg and Tokyo tribunals, each of which was bound by its convening instrument to accept as a principle of current international law that the official status of an individual, even as head of state or government official, does *not* excuse him from liability if the act for which he was alleged to have been responsible was contrary to international law. In addition, Japan, as a member of the United Nations, might have been expected to accept the views of the General Assembly and the International Law Commission concerning the principles of international law embodied in both the Nuremberg Charter and Judgment. These confirm that such an individual can no longer plead immunity when the charge

relates to a criminal offence against international law (Principle III); since the court held the use of the atomic bomb to be comparable to the use of poison or poison gas, it clearly considered its use to be equally a crime under international law.

It is also remarkable that the court made so much of the illegality of the use of gas, inasmuch as Japan did not ratify the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, until 1970.[40] It can only be presumed, therefore, that the Tokyo District Court was of the opinion that the use of gas or poison was contrary to customary international law and felt the same way about the atomic bomb.

Kafr Qassem, 1959. In October 1956, during the Suez Crisis, a local commander in the Sinai, which had been seized by the Israel Defence Force, announced a curfew affecting a number of Arab villages.[41] Enforcing that curfew, Israeli border policemen serving in the Israel Defence Force (IDF) Reserves fired upon a group of peaceful Arab villagers who were returning to their village, Kafr Qassem, from their fields, completely unaware of the curfew. Forty-three villagers were killed. Three years later the men involved, members of a squad commanded by a Lieutenant Dahan, were brought to trial. They had been complying with an order specifically to shoot to kill, rather than arrest, any person moving outside the houses of the village after curfew. The order had originally been issued by a Major Melinki, who, when asked at the time if the order to kill included women and children, replied there was to be "no sentimentality. . . . The curfew applies to everyone." Melinki stated at the trial that he was only conveying an order from Brigadier S——— (who was subsequently charged, along with the officers responsible for transmitting the command, with issuing a "manifestly illegal" order, contrary to the Israeli Criminal Code, and was found guilty). The Israeli Military Court of Appeal stated:

> D[ahan]'s responsibility for the acts of [these] men derives from his order to fire at the victims which he issued to his unit. . . . This makes D liable for procuring an offence under . . . the Criminal Code. . . . Although D was not present [when the] squad committed the murders . . . he was patrolling in the village, driving his car, and from time to time appeared near the [area from which the firing took place]; he was aware of what was taking place . . . and did not take any measures to stop the killings. Under these circumstances, bearing in mind his authority over [the group], his omission to act to stop the killings is the same as being accessory to the offence. . . . This is a sufficient ground to convict D as an accomplice . . . besides his responsibility for procuring the offence.[42]
>
> . . . A decision to kill a certain person . . . includes, of course, also a decision to kill a number of certain persons. . . . There is no need for the victims intended by the murder to be known to him personally. It is sufficient that he defines them as

a group according to the signs of recognition he attributes to them, which enable their identification. Thus, it is sufficient for this purpose to have a definition stating "all those returning this evening to these-and-these villages." . . . When he gave his order Melinki knew that the returnees to the villages would be exclusively of the Arab race, and we may assume with certainty that had they not been Arabs the order would not have been issued with such severity. . . .

There is no doubt that the death of all the victims who fell at Kafr Qassem was the probable result of Melinki's order, even though as regards some of them, and perhaps most of them, there was no intention of murder in the sense of [the Israeli Criminal Code]. For these reasons we must uphold the conviction for murder.

. . . A reasonable soldier can distinguish a manifestly illegal order on the face of it, without requiring legal counsel and without perusing the law books. These provisions impose moral and legal responsibility on every soldier, irrespective of rank. . . . [A] commander of any rank must consider the morality of the order he issues and also its legality. . . . The commander who issued the original order and not in obedience to any superior, has no claim of justification. . . .

. . . Commanders . . . [are obligated] to give thought in issuing their orders and the higher the rank the greater the thought required of them. Such thought is required so that the orders will not cause illegal and immoral acts, and so that the soldiers will not be led to undermine army discipline [by disobeying orders]. . . . It is the duty of the commander to obey the law at all times . . . and . . . it is the duty of every soldier to examine, according to the voice of his conscience, the legality of the orders issued to be executed against others.[43] . . . The order to kill men, women and children [was] an order to murder, and no claim of justification will avail anyone who gives or executes such an order. . . .

These remarks are fully in keeping with those delivered in the Yamashita, Meyer, and High Command cases, but they extend the level of responsibility lower in the hierarchy. In fact, the wording clearly indicates that the principle of command responsibility properly applies to any member of the armed forces or the political hierarchy enjoying the power to issue orders that are to be obeyed by subordinates.

My Lai, 1968. This is not the place to consider whether, in view of the non-recognition by most countries in the world of the People's Republic of North Vietnam, the conflict in Vietnam was an international armed conflict. It is sufficient that in practice the United States, as a major participant, operated as if the law of war applied, at least that part of it which related to the commission of war crimes. In the event, charges against American personnel were actually brought not on the basis of international law but of the law of the United States and the Uniform Code of Military Justice.

With respect to the problem of breaches of the law in Vietnam, the watershed event was the March 1968 massacre of some two hundred Vietnamese civilians by American soldiers in the hamlet of My Lai. It is usual when dealing with this incident to refer to the case of the platoon leader involved, First Lieutenant

William L. Calley. But he is not really relevant here, since his defence was primarily that he was acting in accordance with the orders of superiors.[44]

More significant is the trial of his company commander, Captain Ernest Medina, who was alleged to have issued the order in compliance with which the massacre at My Lai was perpetrated.[45] Medina held that he only subsequently learned of the outrage but confessed that he decided to hush it up instead of taking steps to report its perpetration or punish those responsible.[46]

At his court-martial, the prosecution failed to prove the intent necessary to establish premeditated murder; the charge was reduced to involuntary manslaughter, and of this Medina was found not guilty. In his charge to the jury, the military judge, Colonel Kenneth Howard, stated that

> as a general principle of military law and custom . . . after taking action or issuing an order, a commander must remain alert and make timely adjustments as required by a changing situation. Furthermore, 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. . . . These legal requirements placed upon a commander require actual knowledge plus a wrongful failure to act. Thus mere presence at the scene 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.

In view of such decisions as those of the Meyer or Kafr Qassem trials, it is difficult to conceive how an officer present at the scene when a breach is being committed could not be aware of that fact. It might even be felt that lack of "knowledge" in such circumstances amounts to a criminal indifference equivalent to a failure to exercise proper command. Moreover, it would appear to run counter to the provision in the United States Army field manual on the Law of Land Warfare, which provides that a superior is responsible if "he has actual knowledge, or should have knowledge, through reports received by him or through other means"—and surely, to an aware superior, presence is among the most significant of "other means."[47]

Before leaving the Medina case, it is helpful to reproduce Colonel Howard's review for the jury of the constituents of Medina's offence:

> In order to find the accused guilty of this offense, you must be satisfied by legal and competent evidence beyond reasonable doubt. . .
> 2. That [the] deaths resulted from the omission of the accused in failing to exercise control over subordinates subject to his command after having gained knowledge that his subordinates were killing noncombatants, in the village of My Lai. . . ;
> 3. That this omission constituted culpable negligence;

> 4. That the killing . . . by subordinates of the accused and under his command, was unlawful.
> You are again advised that the killing of a human being is unlawful when done without legal justification.

The jury duly acquitted Medina.

As a consequence of the disclosures relating to the My Lai incident, a number of senior officers were brought to trial or subjected to investigation, but none was found guilty. Among those investigated but not tried was Major General Samuel W. Koster, the commanding general of the 23rd Infantry Division, of which Medina's company was a part. This proceeding was based on his alleged failure to report known civilian casualties to higher authority and to ensure proper investigation into the My Lai incident.

The decision not to prosecute was reviewed by the Secretary of Defense. As a result of this review, Koster was subjected to a number of disciplinary sanctions, including reversion to substantive rank (his promotion to major general not having yet been made permanent), placement of a letter of censure in his personal file, and withdrawal of his Distinguished Service Medal. Although these punishments and the Secretary's comments on which they were based do not amount to a judicial decision, they may be considered as carrying the same weight in view of the fact that Koster's appeal against them was dismissed by the United States Court of Claims.[48] In the course of a memorandum written at the time of the appeal, the Secretary of the Army expressed the view that

> although free of personal culpability with respect to the murders themselves, [Koster was] personally responsible for the inadequacy of subsequent investigations, despite whatever failures might have been ascribed to his subordinates [including Medina].
>
> A commander, of course, is not personally responsible for all criminal acts of his subordinates. In reviewing General Koster's case, I have also excluded as a basis for administrative action the isolated acts or omissions of subordinates. But a commander clearly must be held responsible for those matters which he knows to be of serious import, and with respect to which he assumes personal charge. Any other conclusion would render essentially meaningless and unenforceable the concepts of great command responsibility accompanying senior positions of authority.

These latter remarks are reminiscent of the comments of the Israeli Military Court of Appeal on the responsibility of senior officers relative to the Kafr Qassem incident.

The Secretary of the Army continued, "There is no single area of administration of the Army in which strict concepts of command liability need more to be enforced than with respect to vigorous investigations of alleged misconduct. . . . General Koster may not have deliberately allowed an inadequate investigation to

occur, but he let it happen, and he had ample resources to prevent it from happening."

The Secretary's memorandum was written in 1972—that is to say, five years before the adoption of Protocol I, which clearly emphasizes a commander's responsibility to investigate and punish.

Sabra and Shatila: The Kahan Report. Israel invaded southern Lebanon in June 1982 (the "Peace for Galilee War"), instructing the largely Christian Lebanese Phalange faction—which had received Israeli arms and training—not to participate in the fighting; if Phalangist misbehaviour occurred, it would be dealt with by the Israel Defence Force. In August the Phalangist leader (and president-elect of Lebanon), Bashir Gemayel, was assassinated, and Israeli forces moved into West Beirut. They agreed that the Phalangists, rather than themselves, would enter the refugee camps at Sabra and Shatila, where, after the Palestine Liberation Organization (PLO) fighting forces had been evacuated from Beirut by an international flotilla, many Palestinian women, children, and old men were seeking refuge. There was some opposition to this proposal among Israeli senior officers who feared a "bloodbath"; but it was eventually settled that the Phalangist forces would enter the camps, having been warned by Israeli commanders not to harm the inhabitants. Nevertheless, the Phalangists carried out a series of massacres of the inhabitants. Eventually, the Israeli authorities established a Commission of Inquiry presided over by the Chief Justice of the Supreme Court, and the Kahan Report was produced.[49]

A number of issues must be commented upon in relation to the legal situation then existing.

The Israeli incursion, though described as the "Peace for Galilee War," was directed against the Palestine Liberation Organization operating from Lebanese soil, not against Lebanon per se. Because of this, Lebanon did not regard the Israeli incursion as a *casus belli*, so there was no form of armed conflict between Israel and Lebanon as such. Israel maintained that the PLO was nothing more than a band of "terrorists" lacking any status in international law. It also argued that Protocol I, with regard to the means of combat or the treatment of prisoners or detainees, was irrelevant since Israel had not ratified it and the PLO had made no declaration of adhesion in accordance with the Protocol's Article 96(3).

Nevertheless, the Kahan Commission, as well as the government of Israel, persisted in describing the incursion into Lebanon as a "war" and accordingly recognized the basic principles of humanitarian law as applicable. Moreover, the atrocities within the camps had been committed by Phalangists, although that group had certainly been supplied or trained by the Israelis, many of whom knew and warned of the potential dangers of allowing the Phalangists to enter Sabra or Shatila.[50] As regards the superiors whose conduct was under examination, the

most important was Ariel Sharon, minister of defence and a general in the Israel Defence Force Reserve, who had behaved in regard to the whole operation as if he were a commander in the field.

During the hearings of the Commission, a number of senior officers in the IDF gave evidence as to their knowledge of the risks involved or took responsibility for mistakes and "behaving badly."[51] An example is the statement by a Brigadier Yaron, senior infantry and paratroop officer:

> The mistake, as I see it, is the mistake of everyone's. The entire system showed insensitivity. I am speaking now of the military system. . . . The whole system manifested insensitivity . . . nothing else. . . . I did badly. . . . How is it possible that a divisional commander—and I think that applies to the Division Commander and up—how is it possible that a Division Commander is in the field and does not know that 300, 400, 500, or a thousand, I don't know how many, are being murdered here? If he's like that, let him go. How can such a thing be? But why didn't he know? Why was he oblivious? That's why he didn't know and that's why he didn't stop it. . . . But I take myself to task. . . . I admit here, from this rostrum, we were all insensitive, that's all.[52]

General Yaron's acknowledgment of personal responsibility, of an obligation to accept the principle of command responsibility, produced a recommendation from the Commission that he be barred from field command for three years.

It was one thing to recognize the personal responsibility of individual officers, but the issue of the responsibility of Israel itself as the supreme authority of the Israel Defence Force was another matter. While the Commission absolved the state from any direct responsibility—responsibility it might have assigned, for example, in accordance with Article 3 of Hague Convention IV—it commented:

> If it indeed becomes clear that those who decided on the entry of the Phalangists into the camps should have foreseen—from the information at their disposal and from things which were common knowledge—that there was danger of a massacre, and no steps were taken which might have prevented this danger or at least greatly reduced the possibility that deeds of this type might be done, then those who made the decisions and those who implemented them are indirectly responsible for what ultimately occurred, even if they did not intend this to happen and merely disregarded an anticipated danger. A similar indirect responsibility also falls on those who knew of the decision; it was their duty, by virtue of their position and their office, to warn of the danger, and they did not fulfill this duty. It is also not possible to absolve of such indirect responsibility those persons who, when they received the first reports of what was happening in the camps, did not rush to prevent the continuance of the Phalangists' actions and did not do everything within their power to stop them.[53]

Even though Israel had not ratified or even signed Protocol I, its representatives, including one from the Ministry of Defence, were present at the

diplomatic conference at which it was drafted. These individuals, at least, were well aware of the provisions of Articles 86, on "failure to act," and 87, on the "duty of commanders"—which would clearly impose direct, rather than indirect, responsibility on superiors who "knew or should have known."

As regards the responsibility of the government of Israel, the Commission continued, "It may be that from a legal perspective, the issue of responsibility is not unequivocal, in view of the lack of clarity regarding the status of the State of Israel and its forces in Lebanese territory. If the territory of West Beirut may be viewed at the time of the events as occupied territory—and we do not determine that such indeed is the case from a legal perspective—then it is the duty of the occupier, according to the rules of usual and customary international law, to do all it can to ensure the public's well-being and security."

Here, the Commission appears to be adopting the line taken by the Nuremberg Tribunal that Section III of the Hague Regulations annexed to Convention IV of 1907, regarding the powers and duties of a Military Authority over the Territory of the Hostile State (even though, here, Lebanon was not in fact "hostile"), had become part of international customary law and is applicable whenever a state occupies foreign territory in a situation which resembles that of an armed conflict.

"Even if these legal norms are invalid regarding the situation" then existing, the Commission asserted, ". . . as far as the obligations applying to every civilized nation and the ethical rules accepted by civilized peoples go, the problem of indirect responsibility cannot be disregarded. . . . The development of ethical norms in the world public requires that the responsibility be placed not just on the perpetrators, but also on those who could and should have prevented the commission of those deeds which must be condemned." For all intents and purposes, the reference to "ethical rules accepted by civilized peoples" constitutes a paraphrase of the Martens Clause in the Preamble to Convention IV.[54]

Since Minister of Defence Sharon had assumed the role of a supreme commander, it is important to examine the Commission's view as to what responsibility might attach to him.

> [Even if we disregard the fact that the Minister received no direct warning of what might happen,] it is impossible to justify the Minister of Defence's disregard of the danger of a massacre. . . . There was the widespread knowledge regarding the Phalangists' combat ethics, their feelings of hatred towards the Palestinians, and their leaders' plans for the future of the Palestinians when said leaders would assume power. Besides this general knowledge, the Defence Minister also had special reports from his not inconsiderable meetings with the Phalangist heads. . . . In the circumstances that prevailed after [Gemayel's] assassination, no prophetic powers were required to know that concrete danger of acts of slaughter existed when the Phalangists were moved into the camps without the IDF being with them . . . and without the IDF being able to maintain effective and ongoing supervision of their

actions there. The sense of such a danger should have been in the conscience of every knowledgeable person who was close to this subject, and certainly the consciousness of the Defence Minister, who took an active part in everything relating to the war. His involvement in the war was deep, and the connection with the Phalangists was under his constant care. If in fact the Defence Minister, when he decided that the Phalangists would enter the camp without the IDF taking part in the operation, did not think that that decision could bring about the very disaster that in fact occurred, the only possible explanation for this is that he disregarded any apprehensions about what was to be expected. . . .

. . . It was the duty of the Defence Minister to take into account all the reasonable considerations for and against having the Phalangists enter the camps and not to disregard entirely the serious consideration militating against such action, namely that the Phalangists were liable to commit atrocities and that it was necessary to forestall this possibility as a humanitarian obligation.[55] . . . [He] made a grave mistake when he ignored the danger of acts of revenge and bloodshed by the Phalangists against the population in the refugee camps. . . . Regarding [his] responsibility, it is sufficient to assert that he issued no order to the IDF to adopt suitable measures. Similarly, in his meetings with the Phalangist commanders, [he] made no attempt to point out to them the gravity of the danger that their men would commit acts of slaughter.

. . . Had it become clear to the Defence Minister that no real supervision could be exercised over the Phalangist forces that entered the camps with the IDF's consent, his duty would have been to prevent their entry. . . .

. . . Responsibility is to be imputed to the Minister of Defence for having disregarded the danger of acts of vengeance and bloodshed by the Phalangists against the population of the refugee camps, and having failed to take this danger into account when he decided to have the Phalangists enter the camps. In addition, responsibility is to be imputed to the Minister of Defence for not ordering appropriate measures for preventing or reducing the danger of massacre as a condition for the Phalangists' entry into the camps. The blunders constitute the non-fulfillment of a duty with which the Defence Minister was charged.[56]

Notwithstanding its comments concerning Sharon's role as commander, the Commission concluded that he was not in any way responsible for the massacres, since he had been informed that the operation had terminated and the Phalangists had been ordered to withdraw. However, this should not have affected his responsibility, in the light of the knowledge he possessed, for failing to prevent and, once he knew it had commenced, to terminate, the entire incident.

Israel is not bound by Protocol I concerning command responsibility;[57] even so, the Israeli military and political leaders must have been conscious of the fact that its provisions represented the received legal opinion of the time. In any case, it is clear that these comments by the Commission reflect the legal position established in the Yamashita, Meyer, and the Kafr Qassem cases. How the Kahan Commission concluded that Sharon carried no responsibility for his failure, despite his knowledge of the dangers involved and the certainty that a massacre would occur, is difficult to appreciate other than on purely political grounds

—that the Commission feared the effect on the Israeli public were a senior cabinet minister and reserve officer to be held criminally liable for having failed to prevent mass murder. It is submitted that, in light of the Commission's findings, there was enough evidence to indict Sharon for failure as a commander to prevent the commission of war crimes or crimes against humanity, and certainly for offences under the national Criminal Code—though this is not to say that any trial would have found him guilty.

"Black Letter Law"

The earliest intimation that black letter law* had become concerned with the issue of command responsibility is to be found in Article 3 of Hague Convention IV, 1907.[58] This reference, however, is most general in its terms, providing only for responsibility and potential payment of compensation by the state for breaches committed by members of its armed forces. There is no suggestion that a commander will be personally liable for giving an illegal order or failing to deal with a breach committed by someone under his command. The Geneva Conventions of 1929, relating to the wounded and sick and prisoners of war, do not even require the parties to take legislative steps to ensure that their forces comply with their provisions.[59]

The situation changed with the adoption of the Genocide Convention in 1948.[60] This instrument introduced into international law a new "black letter" offence. Genocide is defined in Article 2 as "acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such." By Article 1, this offence, "whether committed in time of peace or in time of war, is a crime under international law which [the parties] undertake to prevent and punish."

An act directed with the "intent to destroy, in whole or in part," a determinate group is not likely to be committed on the individual initiative of a subordinate member of the armed forces. It is an offence that inevitably is initiated as a matter of governmental policy, or is connived at, colluded in, or tolerated by superior authority. As a result, Article 4, giving treaty effect to the principle of command responsibility in its widest connotation, clearly provides that "persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

There is a problem in relation to the enforcement of the Convention and to punishment for breaches. While Article 5 requires states to give legislative effect to its provisions, there is no special tribunal established for the trial and punishment of offenders. Instead, in accordance with Article 6, we see that "persons

* "An informal term indicating the basic principles of law generally accepted by the courts" (*Black's Law Dictionary*, 6th ed., s.v. "black letter law"). It also signifies the actual written law, i.e., statutory law.

charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to the Contracting Parties which shall have accepted its jurisdiction." Insofar as genocide may have been committed by governmental authority within the territory of the local state, it is extremely unlikely that any attempt will be made to bring offenders to trial.

Thus it was alleged that during the conflict in Pakistan that resulted in the establishment of Bangladesh, Pakistani troops committed acts of genocide against East Bengalis, at a time when East Bengal was still part of Pakistan. It stretches the imagination to contemplate the president or prime minister of Pakistan ordering the chief justice to try the commander in chief of Pakistan's armed forces for having allowed such crimes to be committed. When the offender happens to be in the hands of the party offended against (or "adverse party," to use the current description), the problem may not arise; however, jurisdiction under the Convention accrues only if the genocide was committed in the territory of the holding party. In other instances, the accused would have to be tried for war crimes or crimes against humanity, in which case the rules already elaborated regarding command responsibility would operate. As will be seen, in the case of alleged genocide in the former Yugoslavia—though described as "ethnic cleansing"—and Rwanda, special tribunals have been established under authority of the United Nations Security Council.

As to the subordinate who commits genocide, while the Convention refers to "private individuals," a member of the armed forces complying with an order involving this offence would have to plead either that he did not know the act was criminal—hardly a feasible argument—or else, in mitigation of punishment, that he was obeying orders in circumstances that left him no moral choice.

The four Geneva Conventions of 1949, which, together with the Hague regulations, constitute the essential body of the modern law of armed conflict, impose upon the parties the obligation to "provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches" listed in the Conventions and Protocol I, and "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before [their] own courts." A party "may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party, providing such High Contracting Party has made out a prima facie case."[61]

The reference to a choice between local jurisdiction or extradition raises problems. First, since in many countries the head of state is immune from trial in the local courts, and the local law is to apply, it would seem that such an individual would remain immune whatever illegal orders he may have issued. It is equally unlikely that a state would be prepared to hand over its head of state

for trial in another jurisdiction, especially as an increasing number of states now forbid extradition of their own nationals.

While each Convention expressly refers to "grave breaches" specifically identified in the particular Convention, it goes on to provide that "each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches [therein] defined."

This provision, however, refers only to breaches of the four Conventions and makes no reference to offences against the laws and customs of war as they may arise otherwise. However, since the laws and customs of war, including the provisions of the 1907 Conventions, are part of customary law, criminal responsibility is in no way diminished as a result of the silence of 1949. The issue of command responsibility, therefore, remains in respect of such offences in addition to those clearly specified, i.e., grave and other breaches of the Conventions.

The lacuna with regard to breaches of the law other than those arising under the Conventions was to some extent remedied by Article 85(5) of Protocol I, 1977: "Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes."[62] Since grave breaches are thus a subdivision of the wider concept of war crimes, it may be presumed that no distinction can really be drawn as between them and nonspecified war crimes, so that the law in every respect—including that concerning state, individual, and command responsibility—embraces all breaches, whether of customary law or of the Conventions and Protocol.

Enforcement of the law and the obligation to deal with breaches is covered by the Protocol on both the level of the state and that of the individual commander. Article 86 is concerned with "Failure to Act":

> 1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
> 2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal 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.

Neither this article nor any other provision of the Protocol indicates how a superior is to "know" that one of his subordinates is "going to commit such a breach"—for, as has been long established in Anglo-American common law, "Only God and the devil know the mind of man!"

Article 87 is expressly concerned with the "Duty of Commanders":

> 1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol.
> 2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
> 3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that the subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions and of this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

While there is no direct provision in articles 86 and 87 concerning the direct responsibility of a commander issuing an illegal order, it cannot be doubted that if he is obligated to prevent the commission of an illegal act by those under his command and is also liable for failure so to do or for failing to "prevent, suppress and report," he is of necessity liable if he orders the commission of such an illegal act. To assist him in avoiding the issuance of an illegal order the Protocol provides (in Article 82) that "the High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject."

There is no indication of the level of ability of such advisers or of the level of command to which they are to be attached. However, it is intended that while they need not be legal practitioners, they should at least be acquainted with the law of armed conflict, particularly as it is envisaged that they will be competent to give instruction on at least the Conventions and Protocol. It is also fairly clear as a matter of military practice that such advisers will probably not be attached at lower levels of command, nor are they likely to be found with forces actually in the field, or be engaged in small-patrol activity.[63] The requirement that parties to the Protocol should have such advisers attached at all times should ensure that a sufficient sense of trust will be created between the commander and his adviser, who will almost certainly be far junior to him in rank, to lead the commander to take such advice seriously.[64] As to the responsibility of the commander, should he fail to give due consideration to the advice tendered by his adviser and give an order despite a warning that it is illegal, if he is brought to trial for issuing such order or for action taken in accordance therewith, he will find that the

potential to argue ignorance or *raison de guerre* is minimal and that any plea he may put forward in mitigation is also likely to be rejected.

The Draft Codes

In 1946, in its first session, the UN General Assembly instructed a committee (that would ultimately become the International Law Commission) "to treat as a matter of primary importance plans for the formation . . . of a general codification of offences against the peace and security of mankind, or of an International Criminal Court."[65] This task took far longer than had been anticipated. It was not until 1991 that the Commission was able to agree upon a Draft Code of Crimes Against the Peace and Security of Mankind.[66] The most obvious of these crimes is aggression, which is an offence resulting from a policy decision made at the highest level. It is not one that can be committed by a subordinate, although as a member of the armed forces of an aggressor state such subordinate may be "guilty" of assisting in its commission. However, no direct criminal responsibility can be attributed to him, for he is not in any way a party to the decision to wage such war and thus lacks the necessary *mens rea* (guilty purpose) to ground criminal liability. Really, therefore, the subordinate has no role in the commission of this crime, though he will remain liable in respect of any other crime in which personal responsibility is an ingredient.[67] Generally speaking, the public view would be that all crimes against the peace and security of mankind are dependent on policy decisions and are not the type of offence of which a subordinate—even an officer of field rank—is likely to be guilty.

Notwithstanding, the Draft Code (Article 3) does in fact affirm personal liability upon the individual: "An individual who commits a crime against the peace and security of mankind is responsible therefor and is liable to punishment."

Article 12 reinforces the idea that crimes against the peace and security of mankind are in fact likely to be the result of some higher body's instruction. It emphatically confirms the principle of command responsibility, virtually reproducing the terminology of Article 86 of Protocol I: "The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit [such a crime] and if they did not take all feasible measures within their power to prevent or repress the crime."

The Draft Code does, however, introduce an innovation with regard to war crimes, one that clearly runs counter to the decision of the Tokyo District Court in the Shimoda case relevant to the immunity of a head of state deciding to employ an "illegal" weapon. By Article 22(2)(c) of the Draft, the use of unlawful weapons

constitutes an "exceptionally serious war crime" amounting to a crime against the peace and security of mankind. In light of the 1996 advisory opinion of the International Court of Justice on the "Legality of the Threat or Use of Nuclear Weapons," the use of such a weapon would almost certainly be incompatible with the law of armed conflict unless employed "by a State in an extreme circumstance of self-defence, in which its very survival would be at stake."[68] If used in other circumstances, the nuclear weapon would probably constitute an "illegal weapon," and as such its use would be an "exceptionally serious war crime," rendering the "commander" who ordered its use guilty of a crime against the peace and security of mankind. Assuming the Draft to have been good law in 1945, and unless it were accepted that the American decision to employ this weapon against Hiroshima and Nagasaki was based on a threat to "the very survival" of the United States, or, presumably, its allies, there is little doubt that President Truman would have been guilty of an offence under this Code.

The reference to "exceptionally serious" war crimes requires some comment. Since all war crimes are amenable to punishment, and even "grave breaches" are considered to be war crimes, one may question why this new term has been introduced. It has been suggested that "the word 'exceptionally' is designed to eliminate from the class of grave breaches those offences that may have been labeled 'grave'" somewhat lightly and perhaps overzealously, "such as 'unjustifiable delay in the repatriation of prisoners of war or civilians.'[69]. . . Truly, such delay creates almost unbearable hardship and suffering. In that respect, it constitutes a frightening breach of the obligations under the Protocol, but it is hardly suitable as the factual basis for criminal prosecution against individual persons."[70]

The decision to delay repatriation is clearly one made at the highest level. It would involve, in accordance with the Protocol, criminal responsibility on the part of the political or military commander responsible for instituting such a policy. Therefore, it is difficult to agree that an act which "creates almost unbearable hardship and suffering [and] constitutes a frightening breach of the obligations under the Protocol" should carry any less individual criminal responsibility than other war crimes, whether they constitute grave breaches or not.

Perhaps the real criticism to be made of these suggestions is that introducing the term "grave breaches" or "exceptionally serious war crimes" in addition to the generic "war crimes" produces a tendency to minimize the gravity of those offences not endowed with a specific condemnatory label. It should also be noted here that a number of governments (including those of Australia, Switzerland, the United Kingdom, and the United States) have "generally expressed misgivings concerning the new concept of 'exceptionally serious' war crimes."[71]

As to an international criminal code, the International Law Commission adopted in 1994 a Draft Statute for an International Criminal Court.[72] The

Statute does not contain an international criminal code, but Part 3, dealing with the jurisdiction of the Court, comes close. Article 20 assigns the Court jurisdiction for the crimes of genocide, aggression, serious violations of the laws and customs of armed conflict, crimes against humanity, and "exceptionally serious crimes of international concern."

The first thing one notices in connection with this enumeration is that the Court, if established, will possess jurisdiction only over serious war crimes, regardless of whether they fall within the boundaries of "exceptionality." The term "serious" would indicate that the Draft Statute sees a gradation among such breaches of the laws and customs of war, so that the "lesser" war crimes would continue to fall within the jurisdiction of national military tribunals. As an example, perhaps, we might take the instance of rape, a breach of the law of armed conflict.[73] However, if such an act has been perpetrated as a matter of policy and there are numerous victims, then rape would become a "serious violation" in the terms of the Draft Statute, as it has in the case of the hostilities in the former Yugoslavia. An even clearer example of command responsibility in regard to this type of offence may be seen in the case of the foreign "comfort women" conscripted in World War II to serve Japanese troops by way of forced prostitution. During 1995 and 1996 a series of apologies and an offer of compensation were made on behalf of the Japanese government, recognizing responsibility at the highest levels—although criticism has arisen because the Emperor himself has not issued such an apology, whereas all wartime activities of the Japanese were attributed to the Emperor's personal authority.

There is nothing in the Draft Statute dealing with either the issue of command responsibility or that of immunity based upon office. Nevertheless, since the Court is to have jurisdiction over both genocide and aggression—which, as has already been argued, can only be committed by executive decision—it follows that any person accused of these offences would be denied the right to plead his official position to secure immunity. Moreover, as regards the other offences falling within the Court's jurisdiction, the rules already expounded make it clear that command responsibility would operate. This is particularly significant in view of the fact that the jurisdiction of the Court extends over serious violations of the laws and customs of war as well as over offences arising from listed treaties. Its Annex specifies the grave breaches of the four Geneva Conventions as well as of Protocol I, thus bringing within its jurisdiction all significant breaches of both the customary and conventional law of armed conflict.

Non-International Conflicts

In accordance with customary international law, non-international conflicts, whether they constitute rebellions, revolutions or civil wars, do not fall within

the purview of the law of armed conflict, unless the interests of third parties are so directly threatened (as happened during the American Civil War, or as it affected neutral shipping in the Mediterranean during the Spanish Civil War in the 1930s) as to warrant the granting of some measure of belligerent rights to the parties or their assertion by third states.[74] Moreover, by Article 2(7) of the Charter of the United Nations, that organization has no right to "intervene" in matters essentially within the domestic jurisdiction of a state unless international peace and security is threatened and the Security Council decides that it must take action under Chapter VII of the Charter.

Since non-international conflicts are not within the purview of the law of war, it is difficult to speak, other than in the most non-technical fashion, of war crimes being committed during such disturbances. This does not mean, however, that acts which during an international armed conflict would amount to war crimes might not today be condemned as genocide or crimes against humanity when committed in a non-international setting.

In such hostilities, because of the ideologies so often involved, it is frequently the case that atrocities are committed that are far worse than those perpetrated during an international armed conflict. With the increasing interest in the protection of human rights since 1945, public opinion has veered toward some measure of support for controlling the atrocities committed in such conflicts. Moreover, after 1945 it became clear that the greater powers, while not prepared to engage in conflict among themselves, were perfectly willing to support "client" groups engaged in hostilities within a foreign territory; they sought thereby to solve their own economic and ideological conflicts through surrogates.

The first attempt to create black letter law in regard to non-international conflicts is found in Article 3 common to all four Geneva Conventions. While not imposing any direct obligation upon the parties, the Article indicates a minimum of principles which "in the case of armed conflict not of an international character occurring in the territory of one of [them], each Party to the conflict shall be bound to apply." Since there is no obligation to enact this principle into national legislation, any breach of the provisions of the Article would merely give another party to the particular Convention a right to bring an action for breach of treaty. Not only is this the case, but nowhere in the Conventions is violation of the obligations imposed during a non-international conflict deemed to be a grave breach. However, to the extent that any infringement of the minima established by Article 3 amounts to genocide or a crime against humanity, the lacuna just cited would lose its significance, and, as has become clear from the statutes establishing the ad hoc tribunals for the former Yugoslavia and Rwanda, the principle of command responsibility would apply.

In any case, with the adoption of the Additional Protocols to the 1949 Geneva Conventions in 1977, the situation changed.[75] A major development in the entire

law of armed conflict was effected by Article 1(4) of Protocol I. Many of the conflicts arising after 1945 were directed by groups in colonies seeking to overthrow their colonial masters. Often these groups, claiming to be acting in the name of self-determination, operated as national liberation movements and found "protectors" among existing states, prepared to support them with arms, finances, or advisers. Frequently, too, these groups were organized like military formations, wearing identifiable marks and operating under military-style command and discipline.

The provisions of the Protocol apply to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations among States in accordance with the Charter of the United Nations."[76] For such a "people" to become bound by the provisions of the Protocol it must, in accordance with Article 96(3), make a formal declaration, addressed to the Swiss government as depositary, undertaking "to apply the Conventions and the Protocol in relation to [the] conflict [and by so doing assume] the same rights and obligations as those which have been assumed by a High Contracting Party."

Problems arise, however, when other High Contracting Parties or the entity against which the group is conducting its hostilities refuse to recognize it as a national liberation movement and insist on treating its members as traitors or terrorists.[77] However, once the Protocol operates in respect of such a conflict, all the rules, including Articles 86 and 87, respecting failure to act and the duties of commanders, come into operation.

More significant, perhaps, is Protocol II.[78] This instrument is designed to deal with the protection of victims of non-international conflicts and, according to Article 1, seeks "to develop and supplement Article 3 common to the Geneva Conventions" of 1949, introducing some measure of humanitarian control in what were previously conflicts completely unregulated by law. However, it is made clear that it "shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts" (Art. 1[2]). This, of course, opens the door for an authority against which such a conflict is being directed to argue that it is nothing more than a local "skirmish." This seems to be the case with most of the conflicts being waged in Latin America, as well as in Chechnya, which the Russian government has contended is nothing more than a local effort to break away from the Russian Federation. Further, as if to facilitate such a contention, by Article 3:

> 1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate

means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
2. Nothing in this Protocol shall be invoked as a justification for intervention, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

This, of course, does not preclude the Security Council from deciding that the conflict in question amounts to a threat to international peace. If it does so, despite the provision on non-intervention in the Protocol and in Article 2(7) of the Charter, it may well decide to take action—as it has done, for example, in Somalia, Rwanda, and Bosnia.

Protocol II makes no provision for the treatment of violations, other than requiring properly conducted proceedings for "the prosecution and punishment of criminal offences related to the armed conflict"—thus showing more concern with the protection of offenders being tried than with the prevention or prosecution of breaches (Art. 6[1]). Nor does it purport to bring a non-international armed conflict within the purview of the law relating to international conflicts. As a result, the law governing war crimes does not apply, even though both participants may use this term to condemn acts committed by the adversary and proceed to try offenders in the local tribunals accordingly, charging them with offences described as war crimes. Nevertheless, to the extent that such offences amount to genocide (as they may well do in a non-international conflict) or crimes against humanity, the normal rules will apply, including those relating to command responsibility.

It is appropriate here to comment upon the current approach to "crimes against humanity." This concept was introduced into international law as a result of atrocities committed by Germany during the Holocaust and the occupation of Europe in World War II. It constituted one of the crimes within the jurisdiction of the International Military Tribunal at Nuremberg.[79] By the Tribunal's interpretation of the relevant provision of the London Charter, crimes against humanity had to be committed as part and parcel of the crime against peace or incidental to war crimes in the traditional sense of that term. In other words, despite the separate classification of the offence, this rubric did not introduce any new "crime" into general international law.[80]

With the increasing emphasis on the importance of human rights and their protection, particularly after the adoption of the Universal Declaration of Human Rights in 1948, and in light of increasing evidence of crimes committed against civilian populations for a variety of reasons in a multitude of countries, it became popular to talk of "crimes against humanity" in a general fashion and to apply the term loosely to such activities. This development has been recognized and

formulated in the Interim Report of the Commission of Experts established pursuant to Security Council Resolution 935 (1994) to examine grave violations of international law in Rwanda, including possible acts of genocide:[81]

> "Crimes against humanity" as a legal category is not as clear in content or legal status as "genocide" or breaches of the Geneva Conventions or Protocols additional thereto. A certain level of ambiguity in the content and legal status of "crimes against humanity" derives partly from its formulation in the Nuremberg Charter and partly from the way it was interpreted by the Nuremberg tribunal. . . .
>
> If the normative content of "crimes against humanity" had remained frozen in its Nuremberg form, then it could not possibly apply to the situation in Rwanda . . . because there was not a "war" in the classic sense of an inter-State or international armed conflict.
>
> However, the normative content of "crimes against humanity" . . . has undergone substantial evolution since the end of the Second World War.
>
> First, even the Nuremberg Tribunal itself had established that "crimes against humanity" covered certain acts perpetrated against civilians. Indeed, "crimes against humanity" as a normative concept finds its very origins in "principles of humanity" first invoked in the early 1800s by a State to denounce another State's human rights violations [particularly as regards freedom of religious worship] of its own citizens.[82] Thus, "crimes against humanity" as a juridical category was conceived early on to apply to individuals regardless as to whether or not the criminal act was perpetrated during a state of armed conflict or not and regardless of the nationality of the perpetrator or victim.
>
> Secondly, the content and legal status of the norm since Nuremberg has been broadened and expanded through certain international human rights instruments adopted by the United Nations since 1945. In particular, the Genocide Convention of 1948 affirms the legal validity of some of the normative content of "crimes against humanity" as conceived in . . . the Nuremberg Charter, but does not overrule it. The International Convention on the Suppression and Punishment of the Crime of Apartheid refers to apartheid as a "crime against humanity."[83]
>
> Thirdly, the Commission of Experts on the former Yugoslavia, established by the Security Council in its resolution 780 (1992) has stated that it considered crimes against humanity to be: "gross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the conflict, as part of an official policy based on discrimination against an identifiable group of persons, irrespective of war and the nationality of the victims."[84] This view finds support in the writings of publicists.

The Commission adopted this language as its own.

Ad Hoc Tribunals

When conflicts broke out in the former Yugoslavia after the end of communist rule in that country, and also in Rwanda after the death in somewhat suspicious circumstances of its president, atrocities on a massive scale, amounting in some cases to genocide, became common. There was strong feeling among politicians

and the public alike that regardless of any arguments relating to domestic jurisdiction or national sovereignty, some measure of international intervention should ensue to bring, to the extent possible, order back to the chaos. It seemed especially urgent to terminate the violence because it was largely directed against civilian populations, possessing ethnic or religious characters different from those of the groups attacking them.

What made the Yugoslav situation even more pressing was the knowledge that it was occurring in the Balkans, which for generations had been considered the tinderbox of Europe, where ethnic and similar hatreds have been endemic for centuries. Moreover, there was evidence that large numbers of Muslim "volunteers" from fundamentalist Islamic countries were joining the forces of the Bosnian government, which represented the Muslim majority in the region. As to Rwanda, there was general fear that the Tutsi government would wreak frightful vengeance on its former Hutu rulers, especially as it was indicated that some fifty thousand or more were being held for trial. It was felt that with the breakdown of civil government and with the hatreds that had long existed between the two tribes, summary rather than judicial process would be the order of the day.

In the case of the former Yugoslavia, problems regarding classification of the conflict arose. As the country broke up into its constituent parts, hostilities broke out among Croatia, Bosnia, and Serbia. For all of these, once the entities were recognized as independent states the international law of armed conflict came into operation, as between combatants. In Bosnia, however, local Serbs, at one time assisted actively by Serbia, took up arms against the local government, as did local Croats, while breakaway Muslim groups also began hostilities against the Bosnian authorities. While all claimed to be partisans of the entity with which they were ethnically affiliated or sought to join territory under their control to that entity, the conflicts between them and the Bosnian authorities were non-international ones. Therefore, they were governed by Protocol II, which had been ratified by the former Yugoslavia. As a humanitarian and not a political instrument, Protocol II, together with the 1949 Conventions and Protocol I, was binding on all Yugoslavia's constituent parts, whether regarded as successor or seceding states.

Evidence soon began to accumulate that atrocities were being committed on an extensive scale. There was also evidence that large, identifiable groups were being expelled from their places of residence or massacred in the name of "ethnic cleansing," which seemed to be a more acceptable term than genocide. Moreover, the presence of fundamentalist Muslims raised the spectre of a change in the ethnic balance in the entire region and also increased the risk of "official" interference by third states.

The United Nations Security Council, having received evidence from the respective Commissions of Inquiry of the situations in the former Yugoslavia and Rwanda, decided to establish ad hoc tribunals with the task of trying those responsible for the commission of grave breaches, war crimes, and crimes against humanity.

The Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the former Yugoslavia since 1991 possesses jurisdiction over grave breaches of the 1949 Conventions, the laws or customs of war, genocide, and crimes against humanity.[85] There is no specific mention of the 1977 Protocols, but since these were "additional to" those instruments and are part thereof, this silence is of no significance.[86] By specifically detailing the offences just mentioned, the Statute indicates that these constitute the substance of "international humanitarian law." The Tribunal was created for the sole purpose of dealing with offences against this system, and Article 1 simply states, "The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute."

The personal jurisdiction of the Tribunal is restricted to "natural" persons (i.e., human beings). The basic principle of noncriminality of the state as such is preserved, with action lying against those who act in its name. Individual criminal responsibility is dealt with in Article 7:

> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime [listed in the Statute], shall be individually responsible for the crime.
> 2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
> 3. The fact that any of the acts . . . was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Insofar as a defendant might offer the excuse of compliance with superior orders, the Statute permits this to be "considered in mitigation of punishment if the International Tribunal determines that justice so requires."

This article clearly reflects the law as it is found in the practice of international and national tribunals, as well as in the various international agreements that have been entered into since the end of World War II. By generalizing the term "international humanitarian law" and referring to the entire territory of the

former Yugoslavia, the Court is saved the need to consider in excessive detail arguments distinguishing what happened in the course of a conflict which could be regarded as international, from what took place only in those aspects of the conflict which were non-international. Nonetheless, the issue was raised as a preliminary point by the defence in the case of Duško Tadić, who had been arrested in Germany and subsequently handed over to the ad hoc Tribunal in accordance with Article 9(2) of the Statute.[87] Furthermore, arguments as to these aspects of jurisdiction and the particular law that might be applicable would have been obviated if the charges lodged against individual defendants had been restricted to genocide or crimes against humanity or international humanitarian law without further specification. There can be no dispute that war crimes fall within these classifications, which are now recognized as governing the conduct of all persons in time of conflict or of peace.

As a matter of procedure, the prosecution section of the Tribunal is authorized to issue indictments based on prima facie evidence in its hands and in the light of such evidence as it may specifically secure. Should the Tribunal uphold the indictment, it is to issue a warrant of arrest, which, in accordance with the decision of the Security Council establishing the Tribunal, would be of international validity. From the point of view of command responsibility, the indictments against Milan Martić, Radovan Karadžić, and Ratko Mladić are of interest.

Martić, a Croatian national and "president of the self-proclaimed Republic of Serbian Krajina (RSK)," gave orders to attack three Croatian cities, including Zagreb; the victims were "civilians protected by the laws and customs of war." The charges were, therefore, that he was in breach of the "laws and customs governing the conduct of war" as well as of specific articles of the Statute.

Karadžić, a Serbian, held the rank of general in the "Bosnian Serb armed forces" and was commander of the Bosnian Serb army. He was also president of the Serbian Democratic Party in the former Socialist Republic of Bosnia and Herzegovina and, as such, was the most powerful official in the party. He became president of the Bosnian Serb administration in Pale. Moreover, the indictment charged, he "has acted and been dealt with internationally as the president of the Bosnian Serb administration in Pale. In that capacity, he has, inter alia, participated in international negotiations and has personally made agreements on such matters as cease-fires and humanitarian relief that have been implemented."

Mladić had been a corps commander in the Yugoslav People's Army in Croatia and had commanded Yugoslav forces of the Second Military District that became the Bosnian Serb army. He assumed command of the army of the Bosnian Serb administration. In this capacity he negotiated agreements related to cease-fire and prisoner exchange, the opening of Sarajevo airport, access for humanitarian aid convoys, and sniping. All these agreements were implemented, indicating Mladić's powers of control.

Both Karadžić and Mladić were charged with genocide; crimes against humanity; shelling, unlawful confinement, and deportation of civilians; and destruction of sacred sites. The individual counts against them were clearly based on the principle of command responsibility, since they included such terms as "by their acts and omissions; facilities [wherein atrocities were committed] were staffed and operated by military and police personnel and their agents, under the control of. . . ; under the control and direction of . . .; knew or had reason to know that subordinates . . . were about to kill or cause serious physical or mental harm to Bosnian Muslims and Bosnian Croats with the intent to destroy them . . .; individually and in concert with others planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution."[88]

In addition, they were charged with seizing a number of United Nations peacekeepers and holding them as hostages. This action was not of a type to have been decided upon by a local commander but would have been a result of policy made at higher levels.

It appears that allied military personnel in the field will apply the principle of command responsibility, at least insofar as it applies to political leaders. In September 1996, a British patrol, part of the Nato Implementation Force (or IFOR) in Bosnia, was escorting two Serb police armoured vehicles in Banja Luka when a civilian mob tried to overturn one of the British vehicles. The patrol received support from the Bosnian Serb military and police, but it later reported Serb Interior Ministry officials as having been extremely hostile. The IFOR commander thereupon warned the Bosnian Serb Acting President of the gravity of the situation and insisted "that she take responsibility for her police and the actions of her people."[89]

Generally speaking, the Statute of the Ad Hoc Tribunal for Rwanda is in the same terms as that for the former Yugoslavia.[90] Among the first to be brought before this Tribunal was Jean-Paul Akayesu, the former mayor of Taba, who had fled to Tanzania and, in accordance with the terms of the Tribunal's Statute, had been extradited from there to stand trial. He has been charged with genocide, murder, and crimes against humanity arising from the massacre of local Tutsis. While the charges against him include personal killing, he is also alleged to have given the orders which led to the massacre; exhorted the Hutu militia to kill Tutsis; ordered the murder and mutilation of pregnant women; and in general to carry prime responsibility for what happened—a clear application of the principle of command responsibility.[91]

Since war crimes and grave breaches of the Geneva Conventions and Protocol I are themselves almost invariably crimes against humanity, it may well be that

as a result of the jurisprudence stemming from the activities of the ad hoc tribunals for the former Yugoslavia and Rwanda, we will witness a lessening of the significance of the concept of war crimes as such. The exceptions might be such "minor" offences, such lesser examples of perfidy, as going into action wearing the insignia of the opponent, or offences against property as distinct from protected persons.

Internationally Authorized Operations

When the United Nations or, as in the case of Bosnia, Nato authorizes action of a peacekeeping or peace-enforcing nature, there is, strictly speaking, no adversary against whom the laws of war may be applied or enforced. However, the forces deployed are clearly on active service, and their conduct is regulated by rules of engagement propounded by their own commands as well as the organization under whose auspices the operation is conducted. This means that the normal rules regarding criminal liability of both the soldier in the field and his superiors operate. If nothing else, the organization's forces would be subject to the rules of international humanitarian law, including, as a minimum, those embodied in the Geneva Conventions as extended by Protocol I.

Serious problems arose concerning the conduct of members of the Canadian Airborne Regiment as part of United Nations troops in Somalia.

This is not the place to consider whether this unit, in view of its training and disciplinary record when at home, should ever have been sent on this type of operation. What concerns us is the fact that a number of unarmed Somali civilian youths alleged to have been trying to infiltrate Canadian camp lines with intent to steal were in fact killed, supposedly while fleeing; in one instance a captive was severely tortured and then murdered. It was maintained that the incidents followed instructions from a superior to provide a "lesson" which would deter other Somalis from thieving, while another officer had issued an order "to abuse" those who were seized, to achieve the same end.

Regardless of the legal nature of the operations, any soldier in the field should have known that an order to "abuse" a military prisoner of war or a civilian detainee would be illegal and not to be obeyed, while any responsible officer would know that this is an order that should never be given.[92]

A series of courts-martial ensued, involving those directly responsible for the torture and death of a detainee, officers who had issued the relevant orders, and noncommissioned officers who had been aware of what was happening but took no steps to terminate it. (Evidence given at trial showed that one of the latter did advise the torturers to take care not to kill their victim, though his warning was not effective.) The regiment was disbanded, not for its activities in Somalia but in light of events that indicated it was poorly disciplined and badly trained and

that its officers and noncommissioned personnel were gravely deficient in carrying out their responsibilities.

During the subsequent judicial commission of inquiry it was alleged that members of the Canadian government as well as senior officers had suppressed information, indulged in a cover-up, and altered official documents, leading ultimately to the resignation of the minister of defence. The Chief of the Defence Staff (who resigned soon after) pleaded ignorance or forgetfulness. One of his senior staff officers, on the other hand, although maintaining that he had not known of what was happening, acknowledged that as a senior officer he was responsible for the illegal actions of those under his command.

Reunification and the Berlin Wall

Although not concerned with armed conflict, a series of trials in the Federal Republic of Germany after reunification with the Democratic Republic also raised issues of command responsibility. In accordance with the constitution of the Federal Republic, all citizens of the two Germanys are considered to be citizens of that Republic and consequently subject to its laws. This is not the place to discuss the international or internal implications thereof.[93] Nonetheless, it should not be overlooked that both the Federal and the Democratic Republics had been members of the United Nations, membership of which is open only to independent sovereign states, and that they had entered into bilateral and multilateral treaties without challenging each other's competence as an international entity to do so. Nor had either asserted during such relations that the legislation of the one would be enforceable against the nationals of the other.

After reunification, the Federal Republic brought Erich Honecker, who had been the head of state of the German Democratic Republic from 1976 to 1989, to trial. Completely ignoring his status in the legal hierarchy of the GDR at the time of the alleged offenses, the FRG charged him with criminal responsibility for having issued orders that resulted in deaths and injuries to East Germans seeking to escape by way of the Berlin Wall. It was alleged that these orders amounted to crimes against all the principles of humanity.

This was an argument that would seem difficult to sustain, since every state is entitled to pass legislation or issue executive orders regulating the manner in which its citizens may depart. They may even forbid such departure, as was done in Stalin's Soviet Union or in the United States during the Joseph McCarthy period (although the latter case merely involved cancellation of passports and no suggestion was ever made that the rules would be enforced by means likely to cause death). The fact that the right to depart one's country is embodied in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights does not give the individual any enforceable right

which, if infringed, would ground criminal responsibility on the part of the superiors responsible for preventing such departure. That being so, it becomes difficult to appreciate the basis for alleging that Honecker's orders amounted to crimes against humanity. Honecker was in fact discharged by the court, and all charges were withdrawn because of his terminal cancer condition. He was permitted to leave Germany and join his family in Chile—where it developed that his cancer was not as immediately lethal as had been feared.[94]

Despite the manner in which the Honecker case was finalized and the criticism of the FRG for seeking to enforce its laws against officials of the former Democratic Republic, Heinz Kessler, who had been defence minister, and other members of the East German Defence Council were tried and given custodial sentences for having helped to frame the shoot-to-kill policy enforced at the Wall. In 1996, six former East German generals were tried for implementing these orders and were found guilty of manslaughter in eleven border incidents and of attempted manslaughter in five other cases. It was alleged that they had played a key part in securing and reinforcing the East German border with minefields and automatic shooting devices, causing over eight hundred deaths. The judge held that the shooting of unarmed defectors in pursuit of the administration's policy violated human rights—even though he accepted that the accused "did not create or establish the East German border regime, but . . . supported the system in which they were very small cogs."[95]

It would appear therefore that, whether or not for political reasons and the need to satisfy public opinion, as was argued, the German federal courts are prepared to consider the East German policy of killing defectors seeking to cross the Wall a crime against humanity and to impose personal responsibility on superiors—even those who were only "very small cogs" in the chain of command.

The account given here of legal practice, both in internationally agreed instruments and in judicial decisions, clearly indicates that the principle of command responsibility, as well as that of individual liability, is fully recognized in both international and national law. This is so whether the alleged offense has been committed in an international or non-international conflict, as well as when state authorities have taken such action in a purely internal situation.

Notes

1. Her Majesty's Stationery Office [hereafter HMSO], cmd 6964 (1946); and *American Journal of International Law*, vol. 41, 1947, p. 172.

2. For Protocol I of 1977 (to which the United States is a signatory but not a party and applies those of its rules that are in accord with customary law), "International Armed Conflict," Arts. 86, 87, 1125 *United Nations Treaty Series* [hereafter *UNTS*], 3; and Dietrich Schindler and Jiří Toman, *The Laws of Armed Conflicts* (Dordrecht, Netherlands: Martinus Nijhoff, 1988), p. 621. Charles VII's ordinance cited in Theodor Meron, *Henry's Laws and Shakespeare's Wars* (Cambridge: Cambridge Univ. Press, 1993), p. 149, fn. 40.

3. See London Charter, 1945, 82 *UNTS* 280; and Schindler and Toman, p. 911, Art. 6(a).

4. United Nations War Crimes Commission [hereafter UNWCC], *History of the United Nations War Crimes Commission* (London: HMSO, 1948), p. 242, note 1(c).

5. This was Field Marshal Gerhard von Leberecht von Blücher. For a fuller account of the treatment of Napoleon, see UNWCC, p. 242.

6. See Maurice H. Keen, *The Laws of War in the Late Middle Ages* (London: Routledge, 1965), chap. 2.

7. "Instructions for the Government of Armies of the United States in the Field," General Orders 100, 24 April 1863; and Schindler and Toman, p. 3. See also Richard R. Baxter, "The First Modern Codification of the Law of War: Francis Lieber and General Orders No. 100," *International Review of Red X*, vol. 3, no. 25, 1963, p. 171; and Donald A. Wells, ed., *An Encyclopedia of War and Ethics* (Westport, Conn.: Greenwood, 1996), s.v. "General Orders 100," by Donald A. Wells.

8. Sir Thomas Erskine Holland, *The Laws of War on Land* (Oxford: Clarendon Press, 1908), pp. 72–3.

9. Wirz had commanded the Andersonville, Georgia, prison camp where over thirteen thousand Federal prisoners died; he was hanged in Washington, D.C., in 1865. House of Representatives Executive Document No. 23, 40th. Cong., 2d Sess., 1865.

10. Schindler and Toman, p. 25.

11. Ibid., p. 35.

12. Ibid., p. 63.

13. Commission Report, 19 March 1919, *American Journal of International Law*, vol. 14, 1920, p. 95. On command responsibility, see, e.g., Leslie C. Green, "War Crimes, Extradition and Command Responsibility," in Leslie C. Green, *Essays on the Modern Law of War* (Dobbs Ferry, N.Y.: Transnational Publishers, 1984) [hereafter *Essays*], chap. 10; W. Hays Parks, "Command Responsibility for War Crimes," *Military Law Review*, vol. 62, 1973, p. 1; and Shabtai Rosenne, "War Crimes and State Responsibility," in Yoram Dinstein and Mala Tabory, eds., *War Crimes in International Law* (The Hague: Martinus Nijhoff, 1996), p. 65.

14. British and Foreign State Papers, vol. 12, p. 1; and Supplement, *American Journal of International Law*, vol. 14, 1920.

15. UNWCC, p. 240.

16. "Punishment for War Crimes," in UNWCC, p. 89, para. 3.

17. 82 *UNTS* 280; Schindler and Toman, p. 911.

18. *American Journal of International Law*, vol. 41, 1947, p. 172.

19. Resolution 95 (I); and Schindler and Toman, p. 921.

20. *International Legal Materials* [hereafter *ILM*], vol. 30, p. 1584.

21. Year Book of International Law Commission, vol. 2, p. 374; and Schindler and Toman, p. 923.

22. UNWCC, *Reports of Trials of War Criminals*, vol. 3, pp. 1, 3.

23. See Hague Convention IV, 1907, Art. 1: "The High Contracting Parties shall issue instructions to their land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention." For the law applicable today, see Protocol I, 1977 (Schindler and Toman, p. 521), Art. 43: "The armed forces of a Party to a conflict shall consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates. . . . Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict." Art. 87 deals explicitly with the "duty of commanders"; see below, under "Black Letter Law."

24. This became extremely important in relation to charges brought against Radovan Karadžić, Ratko Mladić, and others by the ad hoc International Criminal Tribunal for the Former Yugoslavia; see below, under "Ad Hoc Tribunals."

25. *Yamashita v. Styer*, 327 US 1 (1946).

26. See, now, Geneva Conventions, 1949, III (Prisoners of War), Arts. 127–30, and IV (Civilians), Arts. 144–7 (Schindler and Toman, pp. 475–6, 546–7, respectively).

27. While the Nuremberg Tribunal held aggressive war to be "the supreme international crime . . . in that it contains within itself the accumulated evil of the whole" (*American Journal of International Law*, vol. 41, 1947, pp. 172, 186), it nevertheless sentenced to death only those who were also found guilty of war crimes or crimes against humanity. Those found guilty only of waging aggressive war were given jail terms.

28. According to some commentators, the Yamashita process was adversely affected by comments made, and the attitude taken, by General Douglas MacArthur. See, e.g., A. Frank Reel, *The Case of General Yamashita* (Chicago: Univ. of Chicago Press), pp. 76, 85–6, 193–6, 204, 234–6). Reel was a member of the Yamashita defence team.

29. UNWCC, *Reports*, Abbaye Ardenne Case, vol. 4, p. 98. The extracts quoted are drawn from the unpublished transcript in the Canadian Record Office, at pp. 840–5.

30. These were based on British Regulations and promulgated by Canadian Order in Council, P.C. 5831, 30 August 1945.

31. *U.S. v. Von Leeb and Others*, 1948, Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10, p. 486; and UNWCC, *Reports*, vol. 12, pp. 73–7.

32. This was the basis on which Kurt Waldheim, former Secretary-General of the United Nations and president of Austria, contended that he was not personally responsible for documents that he had certified and transmitted during his Wehrmacht service as an administrative intelligence officer in occupied Salonika in World War II.

33. This was the ground on which Lassa Oppenheim, author of the leading work in English, *International Law*, (London: Longmans, Green), vol. 2, and his various editors (until the fifth edition, revised) maintained that superior orders constituted a legitimate defence to a war crimes charge—rejecting the decision of the German Landsgericht in the Llandovery Castle case (1921); John Cameron, ed., *The Peleus Trial* (Edinburgh: Hodge, 1948), App. IX.

34. Schindler and Toman, p. 621; and see below, under "Black Letter Law." (However, in accordance with Article 82 of Protocol I, 1977, the potential for a field commander to plead ignorance of the law has been limited somewbat, since legal advisers are now required to be attached to military units.)

35. It is a virtual paraphrase of the "Martens Clause," found in the Preamble to Hague Convention IV (Schindler and Toman, pp. 63, 70): "The inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience."

36. See, e.g., Leslie C. Green, "Superior Orders and the Man in the Field," in *Essays*, chap. 3. On superior orders generally, see Yoram Dinstein, *The Defence of "Obedience to Superior Orders" in International Law* (Dordrecht: Sijthoff, 1965); Leslie C. Green, *Superior Orders in National and International Law* (Leyden: Sijthoff, 1976); and Nico Keijzer, *Military Obedience* (Alphen aan den Rijn, Neth.: Sijthoff, 1978).

37. *Japanese Annual of International Law*, 1964, vol. 8, p. 212; and *International Law Review* [hereafter *ILR*], vol. 32, p. 626. "Unnecessary suffering" is not a subjective concept but refers to damage or suffering over and beyond that absolutely necessary to achieve the desired military objective.

38. "Legality of the Threat or Use of Nuclear Weapons," 8 July 1996, General List No. 95. On the principles of the law of armed conflict, paras. 85 and 86, the Court further stated: "In the view of the vast majority of States as well as writers there can be no doubt as to the applicability of humanitarian law to nuclear weapons. . . . The Court shares this view" (para. 97).

39. *Shimoda et al. v. Japan* (1963), 8 *Japanese Annual of International Law* 1964, pp. 212, 235; 32 *ILR* 626, 634, 635.

40. *League of Nations Treaty Series* [hereafter *LNTS*], vol. 94, 1929, p. 65; and Schindler and Toman, p. 115.

41. *Melinki v. Chief Military Prosecutor*, reprinted and translated in "Kafr Qassem: A Civilian Massacre," *Palestine Year Book of International Law*, vol. 2, 1985, p. 69.

42. Some of the comments in the paragraph are reminiscent of the Judge Advocate's summing-up in the Meyer trial.

43. The court stated: "The distinguishing mark [by which the conscience should be guided] of a 'manifestly unlawful order' should fly like a black flag above the order given, as a warning saying 'Prohibited' . . . not unlawfulneas discernible only by the eyes of legal experts, . . . but definite and unnecessary unlawfulness appearing on the face of the order itself, the clearly criminal character of the acts ordered to be done, unlawfulness piercing the eye not blind nor the heart stony and corrupt."

44. *U.S. v. William L. Calley* (1973), U.S. Court Martial Appeals, vol. 22, p. 534, *Court Martial Reports*, vol. 48, p. 19.

45. *U.S. v. Medina* (1971), Court Martial 427162, *Appeal Court Martial Reports*, 1971.

46. Today, by Protocol I, 1977, Art. 87, there is a direct duty of commanders to suppress, report, and puniah hreaches of the Geneva Conventions or the Protocol, that is to say, of the law of armed conflict.

47. U.S. Army Dept., *The Law of Land Warfare*, Field Manual [FM] 27-10 (Wasbington, D.C.: 1956), para. 501.

48. Secretsry of the Army, Memorandum of Explanation to the Secretary of Defense, 23 March 1971, reprinted in *Koster v. United States*, 685 F.2d 407, 410, 414 (1982).

49. "Final Report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut" [hereafter Commission Report], 7 February 1983, 22 *ILM* 473. See also Leslie C. Green, "War Crimes, Extradition and Command Responsibility," *Israel Yearbook of Human Rights*, vol. 14, 1984, pp. 17, 39–53; and Weston D. Burnett, "Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders at Shatila and Sabra," *Military Law Review*, vol. 107, 1985, p. 71.

50. Commission Report, pp. 476–8.

51. See, e.g., statement hy the Chief of Staff, Commission Report, ibid.

52. Ibid., p. 493.

53. Ibid., pp. 496–7.

54. In its latest form, this appears in Protocol I, Art. 1(2) as: "In cases not covered by this Protocol or other international agreements, civilians and combatants remain under the protection and authority of the principles of

international law derived from established custom, from the principles of humanity and from the dictates of the public conscience."

55. Martens Clause in the Preamble to the Hague Convention IV, 1907; Schindler and Toman, p.63.

56. Commission Report, pp. 502–3.

57. Arts. 86, 87, Schindler and Toman, p. 672.

58. Schindler and Toman, p. 63.

59. Ibid., pp. 325–64.

60. Ibid., p. 231.

61. Ibid., pp. 373-478; I (Wounded and Sick), Art. 49; II (Wounded, Sick and Shipwrecked), Art. 50; II (Prisoners of War), Art. 129; and IV (Civilians), Art. 146.

62. Schindler and Toman, p. 689.

63. The implication that they might be so involved seems to be included in the United States "Lesson Plan" annexed to Dept. of the Army, A Subj. Scd. 27-1, 8 October 1970, "The Geneva Conventions of 1949 and Hague Convention IV of 1907."

64. For some of the problems relating to the role of legal advisers, see Leslie C. Green, "The Role of Legal Advisers in the Armed Forces," in *Essays*, chap. 4; and Gerald Draper, "The Role of Legal Advisers in the Armed Forces," *International Review of Red X*, vol. 18, 1978, p. 6.

65. Resolution 95(I); Schindler and Toman, p. 291.

66. 30 *ILM* 1584.

67. Cf. U.S. decision in *Parker v. Levy* 417 U.S. 733 (1974) upholding the decision that no member of the U.S. forces could refuse to obey an order on the basis that it related to a conflict—Vietnam—in which the defendant claimed the United States was illegally engaged.

68. Paras. 95–7, 8 July 1996, 35 *ILM* 809, 829–30.

69. On "light and overzealous labeling," see Christian Thomuschat, "Crimes against the Peace and Security of Mankind," in Dinstein and Tabory, eds., p. 45; see, also, e.g., comment by Maj. Gen. A.P.B. Rogers, in his *Law on the Battlefield* (Manchester: Manchester Univ. Press, 1996), that "the less technologically advanced states sometimes see the law of war as an instrument for emasculating the mighty" (p. 2). For "unjustifiable delay," see Protocol I, Art. 85(4)(b).

70. Thomuschat.

71. Ibid., p. 47, note 18.

72. 33 *ILM* 258.

73. See, e.g., Protocol I, Art. 76(1): "Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault."

74. For the U.S. Civil War, see, e.g., *The Prize Cases*, 67 U.S. 635 (1863). For the Spanish Civil War, see the Nyon Agreement, 1937, Schindler and Toman, p. 887.

75. Protocol I (international), Protocol II (non-international), in Schindler and Toman, pp. 621, 689, respectively. Neither Protocol has been ratified by the United States, although Protocol II was submitted to the Senate several years ago. (No action has yet been taken.)

76. Self-determination is "enshrined" in Art. 1: "The Purposes of the United Nations are . . . (2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." The Declaration is found in *General Assembly Resolutions*, 1970, Res. 2625 (XXV).

77. In UN practice, to be accepted as a national liberation movement the group in question must be recognized as such by the regional arrangement existing in the area. This means that such a group as the Irish Republican Army is never likely to achieve such status, for the possibility of its being recognized by either the Council of Europe or Nato is remote. The same is true of most of the groups fighting against "non-democratic" authorities in Latin America.

78. Schindler and Toman, p. 689.

79. London Charter, Art. 6(c): "namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

80. See, e.g., Egon Schwelb, "Crimes against Humanity," *British Yearbook of International Law*, vol. 23, 1946, pp. 178, 205.

81. Security Council Doc. S/1994/1125, 4 October 1994, pp. 23–5.

82. See, e.g., Leslie C. Green, "International Law and the Control of Barbarism," in R. St. J. Macdonald et al., *The International Law and Policy of Human Welfare* (Alphen aan den Rijn, Neth.: Sijthoff, 1978), p. 239, and "The Role of Law in Establishing Norms of International Behaviour," *Israel Yearbook of Human Rights*, vol. 17, 1987, p. 149.

83. 1973, 13 *ILM* 50.

84. This seems to have been taken from an interim report, since the wording does not appear in Security Council Doc. S/1994/674, 17 May 1994. But it amounts to a summary of paras. 84–6 of the Final Report.

85. 32 *ILM* 1192; Arts. 2–5.

86. Thus, during the combat between the coalition forces and Iraq in the Gulf, most of the principles of Protocol I were applied, even though many of the parties, including the United States, the leader of the coalition, had not ratified it. See Colin Powell [Gen., USA], "Conduct of the Gulf War," Final Report to Congress, 1992, App. O, in 31 *ILM* 615.

87. Appeal Chamber decision in *Prosecutor v. Tadić*, 35 *ILM* 32, 53, and 48.

88. All quoted material concerning these two accused is extracted from the indictments.

89. *Times* (London), 6 September 1996.

90. 33 *ILM* 1598.

91. *New York Times*, 27 September 1996.

92. See, e.g., Leslie C. Green, "The Man in the Field and the Maxim *Ignorantia Juris Non Excusat*," and "Superior Orders and the Man in the Field," in *Essays*, chaps. 2, 3.

93. See, e.g., Leslie C. Green, "Die Bundesrepublik Deutschland und die Ausubung der Strafsgerichtlicher Sicht," *Humanitäres Völkerrecht*, no. 1, 1992, p. 32 (trans. as "The German Federal Republic and the Exercise of Criminal Jurisdiction," *Toronto Law Journal*, vol. 43, 1993, p. 207).

94. *Times* (London), 13 January 1993.

95. *Times* (London), 11 September 1996.

Ψ

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