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High Command Case: A Study in Staff and Command Responsibility

Less than twenty-five years after the conclusion of the major World War II war crimes trials, international jurists, historians and the general public are not clear as to, nor are they apparently concerned with, the authority, procedure or even the significant legal decisions of the war crimes trials held both in Europe and the Far East following World War II.¹

Even a mere twenty-five years of experience indicates there will be other trials of those accused of criminal acts in war. Such trials, as well as international lawmakers, should well review the German High Command Trial before the United States Military Tribunal at Nuremberg in October 1948. The lessons of this trial may well be the most important of those from any of the trials held following World War II.

The thrust of this trial and its results relate to the authority of commanders of military forces for actions of their troops and their personal responsibility, as well as the responsibility of staff officers in senior staff positions, for actions taken by them or carried on under their direction. As a result of recent developments within the United States, arising from the war in Vietnam, it is worthwhile to review the German High Command Trial and to analyze its relationship to the present state of the law. The legal question of criminal responsibility of military commanders and staff officers who do

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¹"In any event, on such subjects there will be no lack of books and articles in the years to come; indeed the Nuremberg bibliography is already sufficiently impressive." Final Report to the Secretary of the Army on Nuremberg War Crimes Trials Under Control Council Law No. 10, Taylor, Telford, 1949, p. 7. It is interesting that the entire list of books in the UVA Law School Library under the topic "War Crimes" is but twenty-eight volumes of which ten were written prior to Nuremberg and five came from the emotional outburst since 1965 on Vietnam.

not themselves commit personal acts but who order, advise, observe or supervise subordinates who personally kill, maim or treat others inhumanely is not clear. It must be made so in order that our military officers may be guided in their actions.

The determination to punish those responsible for war crimes committed in World War II was decided early on, and in fact, the St. James Declaration of, January 13, 1942 called for action "through the channel of organized justice." This declaration was supported by Roosevelt and Churchill, and the Soviet reply quickly followed that the Nazi leaders must be arrested and tried under criminal law. A year later at the Moscow conference, the Allied Forces published the "Declaration on German Atrocities in Occupied Europe." This was a major step in the development of the War Crimes Program. This declaration provides:

At the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the Free Governments which will be erected therein. Lists will be compiled in all possible detail from all these countries having regard especially to the invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece, including Crete and other islands, to Norway, Denmark, the Netherlands, Belgium, Luxembourg, France and Italy.

....

The above declaration is without prejudice to the case of the major criminals whose offences have no particular geographical location and who will be punished by a joint decision of the Governments of the Allies.

Less than a month later the first trial under this declaration was held at Kharkov where the Soviets conducted a war crimes trial of captured Gestapo men charged with killing Russian civilians.

The major powers early began preparing for war crimes trials. In the United States, The Army Judge Advocate General was made responsible for the collection of information and preparation of these trials. The definition of war crimes was set out in a directive of the Joint Chiefs of Staff as early as 1944, which stated in part "the term 'war crimes' covers those violations of the laws and customs of war which constitute offenses against person or property, committed in connection with military operations or occupations, which outrage common justice or involve moral turpitude."²

The directive went on to provide that the taking of a *consenting part in the commission of a war crime* is also punishable. As for example, "omission of superior officer to prevent war crimes when he knows of, or is on

²J. C. S. 1023/3 (25 Sept. 1944).

notice as to their commission or contemplated commission and is in a position to prevent them."

Within months after the end of the war in Europe further agreement was reached in London, for the establishment of an International Military Tribunal for the trial of those Nazis whose crimes had no geographic location. The proceedings before the International Military Tribunal at Nuremberg which placed twenty-four German defendants on trial before a panel of judges from France, United Kingdom, USSR and the United States was amply publicized in the public press.

Publicity, however, does not substitute for critical analysis and there has not been the analytical attention given to this trial or any of the war crimes trials which might have been expected, particularly when one considers the great attention which has been paid to the other aspects of World War II. Following the initial trial, there was discussion of other trials before this joint international tribunal, but no action was taken.

The remainder of the cases involving war crimes were before national tribunals. The basis for subsequent trials in Europe was found in Control Council Law No. 10, dated December 20, 1945, which agreement provided, or was intended to provide, a uniform procedure for the prosecution of war criminals. Other than the original trial before the International Military Tribunal the effort at uniformity did not succeed.

American and French trials were somewhat systematic and uniform, but in the British Zone war crimes were held before strictly military courts established under the Royal Warrant. Little is known of the war crimes program in the Soviet Zone.

In the American Zone under what was termed Subsequent Proceedings, there were twelve major trials involving one hundred and eighty-four defendants. The cases were tried in groups depending upon the nature of the crimes and the classification of defendants, *i.e.*, Gestapo, judges, High Command.

It must be remembered that there were other trials of war criminals, and the United States, acting alone, tried many cases of lesser individuals for specific military offenses before military commissions. In addition, the German courts have continued to the present day to try individuals for war crimes and atrocities committed by German nationals during World War II. By 1970, German courts had convicted 6,227 of war crimes.³ Only recently did the West German Government extend the statute of limitations for war crimes trials.

³Reply on Federal Republic of Germany, July 9, 1970 to the UN Secy Gen. UN Doc. A/8083 (1970)

Within the American Zone, Control Council Law No. 10 was further implemented by Military Government Ordinance No. 7. This ordinance established the membership of the tribunals, the nature of their operation, qualifications of defense counsel, the procedure for the tribunals and the administrative measures to be taken in connection with these trials. It is not the purpose of this paper to discuss the procedures or the evidentiary aspects of these trials.

The German High Command Trial as it has been named, Case No. 72, was tried before the United States Military Tribunal in Nuremberg at the Palace of Justice beginning on 30 December 1947, and sentence was passed on 28 October 1948. The fourteen defendants before this court included three field marshals, one of whom (Field Marshal Sperrle) was the Commander-in-Chief of Air Fleet Three. The other two were from the Army, both Army Group Commanders—Field Marshal Von Leeb and Field Marshal Von Kuechler. Five full generals were included as defendants who were either Army or Army Group Commanders.

Admiral Schniewind was Chief of Staff of the Naval War Staff and commander of the forces in Norway. The five Lieutenant Generals included a Commander of Rear Area, the Chief of the General Office of the OKW, the Chief of the Department of National Defense of the Armed Forces Operation Staff, and the Judge Advocate General of the OKW. One of the accused, General Blaskowitz, committed suicide before completion of the trial. Field Marshal Sperrle and Admiral Schniewind were both acquitted of all charges.

The term, High Command Trial, is a misnomer, for the High Command might more properly be thought of as the OKW—and not all of the defendants served or were assigned to the OKW. The OKW controlled all matters of inter-service policy, and served as Hitler's staff after he took over as the Supreme Commander of the Armed Forces.

If there can be any criticism of a violation of due process in the trials under the Anglo-American concept of justice, it can be directed to the method of indictment of specific defendants for there were not even the rudimentary safeguards of the grand jury or other limitations on the prosecutorial authority. Instead, as General Telford Taylor states it, "the determination of who should be tried in the American Zone of Occupation under Law No. 10 was the exclusive responsibility of the Chief of Counsel for War Crimes."

He continues—"in determining whom to indict, I had to perform both investigative and semi-judicial functions on my own responsibility." One cannot help but be troubled by a further statement made by General Taylor—those indicted under Law No. 10 were a small minority of those

"individuals against available evidence appeared and probably could be proved guilty of criminal conduct."⁴

In large part, the determination of whom to indict was based upon those under apprehension within a particular zone, though there was provision for transferring prisoners from one zone to another for trial. The efficiency or effectiveness of such transfer was questionable. General Taylor notes that the military case was a merged case as a result of the custody problem.⁵

Field Marshals Von Runstedt, Von Brauchitsch, and Von Mannstein were not joined for the *High Command* cases. This was because these three senior officers were in custody in the British Zone. Von Runstedt and Von Brauchitsch were not tried at all. Von Mannstein was tried by the British in a case which resulted in considerable political discussion. In analyzing these cases and the determination of those to be tried, one cannot help wonder why Von Leeb was the principal defendant in the German High Command case, when in fact Von Leeb retired from active service in 1942 and took no further part in the war.

Was he a defendant only because he was the only well-known Field Marshal in American custody? He had been retired before 1939 and was recalled to duty at the outbreak of the war, and was never believed to have been close to the Nazis or in sympathy with many of their aims. Further, there are grounds for criticism in that the decision to try certain defendants or omit travel was affected in large part by the length of time the prosecuting staff was willing to devote to these trials. Of concern also is the fact that many of the crimes alleged against humanity in counts two and three involved offenses committed, not against American forces or even on the western front, but on the eastern front where only Soviet forces were involved.

The statement of General Taylor that the "responsibility for the selection of defendants . . . was mine alone"⁶ is one which can only cause deep misgivings on the part of those who now look at these trials to determine the fairness of the proceedings. It is questionable whether indictment by information in which the selection of defendants in such an important trial should be left to the determination of a single individual—that individual—the prosecutor.

Further analysis of the list of defendants leads one to speculate that it might well have been better to have separated the case into at least

⁴Taylor, T., *Final Report to Secy of the Army*, USGPO, Washington, Aug. 1949.

⁵*Id.* p. 82.

⁶*Id.* p. 85.

two-one involving commanders who had direct responsibility, and the other for staff officers whose area of responsibility and whose actions leading to indictment were of a far different nature, particularly in view of the quite different legal issues involved. Likewise, the inclusion of the admiral in the German Navy and the field marshal in the German Air Force appear to be an attempt to include them as representatives of all of the armed forces rather than for their "deepest individual responsibility . . . for manifold international crimes committed under the aegis of the Third Reich."⁷

Was the prosecutor who selected the defendants lumping all military persons of the Reich into common criminality? The impression is given that if a senior military officer was not executed by Hitler or convicted by the people's courts as a result of the 20 July affair, then the senior general or flag officer in the German forces became eligible for selection as a defendant in the Nuremberg trials. If there is any lesson to be learned from this highly suspect selection of defendants it might be a requirement to establish a system other than the selection of defendants by the Chief Prosecutor.

The question of time and availability of resources, of course, will ever be present, but it appears not only improper to have excluded certain defendants or included certain defendants, based upon their temporary custody within a particular geographical area in the interest of concluding the proceedings and returning the prosecutorial staff to other pursuits, but determinations based on such logic appear to negate the search for justice and deterrence of others.

The Charges

Counts two and three, the war crimes and crimes against humanity charged against the defendants in the *High Command* case included the responsibility of these defendants, either as commanders who executed the orders, or as staff officers who concurred and drafted the orders. The indictments specifically referred to the so-called Commissar Order, the Barbarossa Jurisdiction Order, the Commando Order, the Night and Fog Decree, the hostages and reprisal orders, murder and ill-treatment of prisoners of war and civilian populations, or their use in prohibited work, the persecution and execution of Jews and other minority groups or groups in the population either in cooperation with the Einsatzgruppen or others, and the plunder, pillage and enforcement of the slave labor program of the Reich.

⁷Letter, BG Telford Taylor to Secy of the Army, 12 May 1948.

The evidence in the case involving these two counts of war crimes against humanity was voluminous and confusing, partly because of the overwhelming nature of the odious actions of the German forces, more particularly on the eastern front, and because of the great number of individuals and units involved. It must have been indeed difficult for the court and the judges to understand and correlate the evidence as it related to individual offenders.

It is interesting to note that the defendant Von Leeb was charged with the issuance of an order before Leningrad during that great siege, that artillery should be used to prevent an escape of the civilian population through the German lines. This was done at the direction of Von Leeb so that the German Infantry should be spared shooting on civilians. No other defendant in this case was involved with this order which was the order of a field commander in a particular situation, one unusual in history and occasioned by the military operations in connection with the long and terrible siege of Leningrad.

The Barbarossa Order and the Commissar Order were by their nature intended to be enforced on the eastern front against the Soviets. The Commissar Order was directed against the political commissars in the Russian Army, allegedly based on the clash of ideologies of Communism and of Nazism. The commissars were to be turned over to the Einsatz commandos security policy and to be taken from the hands of the military. They were in effect not to be treated as prisoners of war, although all those involved—from Von Brauchitsch who issued the order, to the lower commander who passed the order—realized that this was in violation of the standard treatment of prisoners of war so long as they were wearing uniforms and were with the military forces.

Likewise the Barbarossa Order was intended only for application on the eastern front, and limited the military jurisdiction in the Barbarossa area by military commanders over crimes committed by enemy civilians or inhabitants of the area. The Commando Order, on the other hand, was initiated by Hitler following the Dieppe Raid in October 1942 and denied prisoner of war treatment to commandos. It was continued in effect until the Normandy landings. The Night and Fog Decree issued on 7 December 1941 was also directed at the Communist elements but was used throughout all theaters, and directed that non-German civilians be taken to Germany for handling by the Ministry of Justice in Germany.

Only in those cases in which it appeared likely that a death sentence would be passed against the offenders, were the accused to be tried in the occupied territory. The evidence produced at trial on the hostage and

reprisal orders, partisan warfare crimes, the crimes against prisoners of war, were essentially action by these defendants on the eastern front. Likewise there were those cases in which there was cooperation with or knowledge of the action of the SS forces on the eastern front, as well as the alleged looting pillage plunder and spoliation. The same may be said for the mistreatment of civilians, the improper use of prisoners of war, the elimination of ethnic minorities and the evacuation of civilians in connection with retreat of the German Army in the eastern territories.

There is little to be gained by reviewing the voluminous evidence in this case, but it seems well, after twenty years, to take a look at some of the legal issues in the case to determine their relation or relevancy to today. At that trial the issue of the defense of superior orders was much in controversy and continues to be today. Neither the jurists, the commentators, nor the public seem satisfied with the state of the law on this particular subject.

Secondly, we should look at the question of staff responsibility as it was ruled upon in this case. The criminal responsibility of military officers other than the commander is not understood in the military forces, and the resolution of the problem by the military tribunals of World War II bears reconsideration. There are countless other legal questions which cry out for analysis and application but the foregoing were selected as being of particular relevance at this time.

Defense of Superior Orders

One might well believe that the question of defense by virtue of receipt of orders from a superior, could be quickly disposed of by reference to Article 8 of the agreement signed at London on 8 August 1945 by the major powers, for the prosecution and punishment of the major war criminals, which stated in part: "The fact that the defendant acted pursuant to order of his government or of a superior shall not free him of responsibility, but may be considered in mitigation of punishment if the tribunal determines that justice so requires."⁸ This same language is used in paragraph 4b of Article 2 of Control Council Law No. 10 on the punishment of persons guilty of war crimes, crimes against peace and against humanity.

Notwithstanding the clear and unambiguous language of the International Agreement and the Control Council Law, the question of defense by virtue of superior orders arose again and again in war crimes trials at almost every level, both in Europe and in the Far East. This arose

⁸U.S. Department of State Executive Agreement Series 72.

unquestionably in large part as a result of the writings of Professor L. Oppenheim, a leading authority on international law who was also the co-author of the British *Manual of Military Law*.

In his writings and in the *Manual of Military Law*, Oppenheim expressed the view that "the law cannot require an individual to be punished for an act which he was compelled by law to commit."⁹ This viewpoint also found its way into the United States *Rules of Land Warfare* issued in 1940. The concept of relieving a soldier of responsibility for committing an offense when such an act is done in obedience of superior orders, fits perfectly with the doctrine of the needs of discipline in the armed forces, especially among those who desire the availability of this defense.

This rationale is that an armed force by its nature requires discipline and each subordinate must unhesitatingly obey the orders of his superiors. History is complete with examples of the importance of instant obedience and discipline and of the failure of those armies wherein discipline was lacking. But one can hardly fault the German armies from the middle of the 19th century with lacking discipline, and in contrast to the views of the British manual and the United States manual on this subject, the *German Military Penal Code* provided in Article 47 that one was not required to obey an illegal order and it provided no protection for him should he do so.

Current discussions usually revolve around the problem of alleged difficulty of a soldier in determining the legality or illegality of an order in the heat of battle. Certainly it is no more difficult to determine the legality or illegality of an order than it is during the emotion of a private battle to determine one's right of self-defense. Indeed it may be somewhat easier to determine the legality of an order than to consciously consider the law of self-defense, and still courts have managed to deal with this difficult legal problem throughout the ages. No one has yet suggested that the defense of self-defense should be eliminated simply because of the difficulty of application.

The question of defense of superior orders is not a new one, and it is alleged to have arisen first in the trial of Peter Von Hagenbach in 1474. Von Hagenbach carried out a policy of terror on behalf of Duke Charles of Burgundy in Germany. When Von Hagenbach was captured he was ordered to trial and an ad hoc multi-nation tribunal was established. The plea of Von Hagenbach that he merely acted under the orders of his master, the Duke of Burgundy, was rejected by the Tribunal stating that acceptance of such a defense would be contrary to the laws of God.

This defense likewise did not serve to protect Captain Henry Wirz who

⁹L. Oppenheim, *International Law, A Treatise*, Vol. II, 264-65, (1st ed., 1906).

was tried following the United States Civil War for his mistreatment of prisoners at Andersonville. The issue arose again during the rather tepid war crimes trials conducted following World War I. These trials conducted in German courts were scarcely definitive, because of the obvious reluctance of those courts to convict the German national defendants. Nonetheless, the court did say in the *Llandovery Castle* case that "however, the subordinate obeying such an order is liable to punishment, if it was known to him that the order of the superior involved the infringement of civil or military law."¹⁰

It should be noted that the German courts did rely on Article 47 of the *German Military Penal Code* in reaching this decision. The American view as set out in the work of the leading U.S. military legal analyst, Colonel Winthrop, is quite like that expressed by the German courts in the Leipzig cases.¹¹ Winthrop emphasizes that when the order is apparently regular and lawful on its face, the subordinate need not go behind the order to satisfy himself that the superior proceeded with authority. In is only in those cases of orders "so manifestly beyond the legal power . . . of the commander . . . or of a command so wholly irregular on its face may one presume not to follow it and if he does, he does so at his own peril."

Much has been made of the fact that in 1944 Goebbels announced that "pilots cannot validly claim that as soldiers they obeyed orders. No law of war provides that a soldier will remain unpunished for a hateful crime by referring to the orders of his superiors, if these orders are in striking opposition to all human ethics to all international customs in the conduct of war."¹² By 1942, on the Allied side, Lauterpacht had reversed the position of Oppenheim in his revision of that treatise and urged that the defense be available to the accused only if it was found that the accused had acted under compulsion or legitimate mistake of law.

The various committees and commissions who discussed and considered the trials for war crimes to be held following the end of the war all came to accept this changed position on the Allied side and came around more closely to the position of Article 47 of the *German Military Penal Code*. The Russian view was even more draconian. They expressed the view that "the fact that the accused acted under orders of his superior or of his government will not be considered as justifying the guilt circumstance."¹³

The *High Command* case, like many others, raised this issue of the plea

¹⁰C. Mullens, *The Leipzig Trials* 26 (1921).

¹¹W. Winthrop, *Military Law and Precedence*, 296-97 (2d Fed., 1920).

¹²Greenspan, *The Modern Law of Land Warfare*, 442 (1959).

¹³Dinstein, *The Defense of Obedience to Superior Orders in International Law*, p. 113, (1965).

of superior orders as the defense. This was particularly so in view of the reference to the Barbarossa Order, the Commando Order, the Night and Fog Decree, the Prisoner of War Orders, and the Commissar Order, all of which originated with the OKW and allegedly by direction of Hitler himself. On several occasions, the defendants admitted that they believed or recognized the orders, or certain of them, were in violation of international law, and attempted to excuse their rejection of Article 47 on the basis of the fact that because these orders were issued by Hitler, the orders somehow were above the law and therefore in some fashion became legal orders.

The tribunal said in part, it would be in utter disregard of reality . . . to say that only the state . . . can have guilt and that no guilt can be attributed to its animate agents who devise and execute its policies. . . . "The defendants in this case who received obviously criminal orders were placed in a difficult position but servile compliance with orders clearly criminal, for fear of some disadvantage or punishment not immediately a threat cannot be recognized as a defense. To establish the defense of coercion or necessity in the face of danger, there must be a showing of circumstances such that a reasonable man would apprehend that he was in such eminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong. No such situation has been shown in this case."

The Tribunal, however, did direct itself to the problem of responsibility for passing on illegal orders. It said, "It is urged that a commander become responsible for the transmittal in any manner whatsoever of a criminal order. Such a conclusion this Tribunal considers too far reaching." The Tribunal went on to note the importance of orders to the discipline principle of a military organization and further, that the soldier or commander has the right to assume that the orders of his superior in his state are in conformity with international law.

The Tribunal noted that the defendants were soldiers and not lawyers (an argument which continues to surface over and over again). Therefore, they may not be expected to have been able to delineate too carefully the legality or illegality of certain of the orders which were transmitted. "It is therefore considered that to find a field commander criminally responsible . . . 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 he should have known as criminal."

In the High Command Trial, there were related to the defense of superior orders, questions of responsibility of superiors for acts ordered by their subordinates or acts ordered by their superiors to be carried out by the

subordinates. This question has arisen most specifically in the recent cases arising out of the incident at My Lai. In his instruction to the court, Colonel Reid Kennedy, Military Judge in the *Calley* case, gave the following instruction to the court, after determining that the order to kill unresisting Vietnamese was an illegal order:

The question does not rest there, however. A determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it. Soldiers are taught to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends upon obedience to orders. On the other hand, the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders.

The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.¹⁴

Colonel Kenneth A. Howard, presiding Military Judge in the case of the *United States v. Hutto* gave a similar instruction:

In determining the issue of obedience to orders, you are further advised that an enlisted member, the same as any other member of the United States Army is not and may not be considered, short of insanity, an automaton, but may be inferred to be a reasoning agent who is under a duty to exercise moral judgment in obeying the orders of a superior officer.¹⁵

The present policy position of the United States Army states in part:

a. The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.

b. In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal. At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders (*e.g.*, UCMJ, Art. 92).¹⁶

¹⁴United States v. Calley, a GCM convened per CMAO 70, Hqs. Ft. Benning (1969).

¹⁵United States v. Hutto, a GCM convened per CMAO 37, Hqs. 3d US Army (1970).

¹⁶Field Manual 27-10, U.S. Army, July 1956.

Clearly, the Nuremberg Trials and more particularly the decision in the *High Command* case (as well as in the *William List* case, wherein the same plea was raised) have had their effect upon the acceptance and state of the law relating to defense of superior orders as we find it in 1970. It is likely that those who may be accused of war crimes in the future will seek anew to utilize the defense of superior orders, but certainly international law precedent will weigh even more heavily against such a plea in the future.

In those incidents in which the order is manifestly illegal on its face, or wherein a reasonable man should have known that the order was illegal, the plea of superior orders will not suffice to absolve one from guilt in connection with the war crimes. Superior orders may continue to serve a mitigating purpose and weigh on sentence, and clearly they weigh heavily upon the factual determinations by the laymen of a jury or court-martial, and for this reason alone the plea will continue to be raised in the future.

Responsibilities of Officers Other Than Commanders for Commission of War Crimes

Defendants in the *High Command* case included not only military commanders but staff officers. These defendants included the senior staff officers on Hitler's personal staff in the OKW, as well as Chiefs of Staff of corps and higher headquarters on the eastern front. Criminal responsibility for war crimes of staff officers differs considerably from that of a Commander. This again is another reason for confusion and difficulty of understanding in the joint trial as it was convened in the *High Command* case.

The term "war criminals" is generally agreed to include persons who have committed war crimes themselves or who have aided, abetted or encouraged the commission of war crimes. The leading World War II case on the responsibility of commanders for acts of their subordinates was that of General Yamashita, who was tried by a United States Military Commission in Manila very quickly after the war ended in 1945. The conviction was appealed by Yamashita directly to the United States Supreme Court, which delivered its judgment in February 1946.

Although there were numerous "fair trial" questions involved, the decision of the United States Supreme Court related only to the jurisdiction of the military tribunal and did not consider the legal questions involved in the trial itself. General Yamashita was accused "while commander of the armed forces of Japan . . . (to have) unlawfully disregarded and failed to discharge his duties as commander to control the operations of the mem-

bers of his command, permitting them to commit brutal atrocities and other high crimes."¹⁷

In dicta, the Supreme Court of the United States said: "It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or the efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent."¹⁸

The court in the *High Command* case discussed the questions of the responsibility to commanders and stated that "criminality does not attach to every individual in this chain of command. . . . There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part." There may also be criminal responsibility by a commander for passing to his subordinates the orders of his superiors which are, in fact, criminal orders.

Not in every such case, however, will the commander be held automatically responsible, and the Tribunal in the *Von Leeb* decision declared that, within certain limitations, the commander "has the right to assume that the orders of his superiors and the state which he serves . . . are in conformity with international law." Such orders, said the court . . . , must be one . . . "criminal upon its face, or one which he is shown to have known as criminal."

Notwithstanding the limitations and restrictions of the law, it is clear that the responsibility for the commander, not only for his own acts, but for those committed by his subordinates, even perhaps without his knowledge, may be an onerous burden which may result in his indictment as a war criminal.

The case of the staff officers differs from that of a commander and although the general rule in the military services is that the commander is responsible for the actions of his troops and he alone bears this responsibility, in law this statement is not totally correct. This was the rule, at least, insofar as it was interpreted by the war crimes trials and in particular in the *High Command* case. Those staff officers who were convicted included General Warlimont, who was the Deputy Chief of the Armed Forces Operations Staff and Deputy to Field Marshal Jodl, and Lieutenant General Reinecke, Chief of the General Armed Forces Office (Allgemeines Wehrmachtamt).

General Reinecke held this position from December 1939 until the end

¹⁷Trial of General Tomoyuki Yamashita, US Military Commission, Manila.

¹⁸In re Yamashita, 327 US1 (1945).

of the war and his responsibilities were administrative and executive rather than operational. One of the most important sections in his office was the Office of Chief of Prisoner of War Affairs, until it was transferred to the SS supervision in October 1944. Also indicted was Lieutenant General Lehmann, who headed the Armed Forces Legal Department from 1938 until 1945. This department was charged with legal matters and the preparation of opinions to all three branches of the armed services, although the legal staffs of the three forces were not subordinate to him.

Another staff officer, although not assigned to the OKW staff, was Lieutenant General Woehler, who served as Chief of Staff of various corps and army groups from 1939 to 1943, and thereafter was given command of a Corps and later of an Army. Many of the matters with which he was charged involved the period during which he was not a commander but a Chief of Staff.

The evidence and the arguments do not indicate that there was discussion or concern about any difference in the responsibilities of staff officers in the German Army, as differentiated from those responsibilities of staff officers in other armies. The unusual nature and preeminent position of the German general staff which has been the subject of much writing and discussion in military circles, does not provide any answer to their responsibility nor indicate any difference in burden. It is obvious that the United States prosecutor considered a German staff position to be similar to the positions of staff officers under the American military organizational structure.

And, indeed, the responsibilities with which these individuals were charged, related clearly to the kind of staff operations that a similarly placed senior official in the U.S. Army might find himself responsible for. The accused Reinecke was indicted and found guilty largely as a result of his activities as Chief of the staff office responsible for prisoner of war affairs. It was his control and responsibility over these affairs within the Reich that was the basis for the charges against him.

General Reinecke issued the overall directives to the prisoner of war camps within his jurisdiction with which they were bound to comply. These directives were always issued by order of his superior, Field Marshal Keitel, but the evidence was abundantly clear that Reinecke did not merely pass on the orders of his superior, but in fact, was the policy maker in this field. General Reinecke and his subordinates inspected the prisoner of war camps and he was fully aware of the murders in those camps and the deplorable conditions therein.

The evidence in the case clearly indicated that General Warlimont, as

Chief of the Section of National Defense under the OKW, had taken a substantial part in the preliminary and final phases of drafting of the Commissar Order, the Barbarossa Jurisdiction Order, the Commando Order, the Night and Fog Decree, and the Hostage Order. Also, the evidence showed that he played an active part in the formulation of policy of inspiring the German population to murder allied flyers by lynch law. Major legal questions were involved in the Barbarossa Jurisdiction Order and the Night and Fog Decree.

In both cases the accused Lehmann took an important part in drafting these orders making suggestions and giving legal opinions thereon. He took only a minor part so far as the evidence showed, in a small immaterial change in the wording of the Commando Order. The evidence shows that General Woehler, as Chief of Staff of the Eleventh Army, issued an order in pursuance of the Barbarossa Jurisdiction Order. There is evidence that he knew of the receipt and enforcement of the Commando Order in the army for which he was Chief of Staff, but that he had no participation in the transmittal of the order to the subordinate units, and the court noted that he had no command authority over subordinate units nor any executive power.

Although the accused Woehler denied knowledge of the murder of members of the civilian population, to the number of over ninety thousands, when he was Chief of Staff of Eleventh Army, the evidence clearly indicates that he did know of these executions, and in fact, initialed documents proving his knowledge. In addition he made certain assignments of the location of Einsatzgruppen units. Evidence further shows that when he was Chief of Staff of the Eleventh Army, he issued orders pertaining to the recruitment of forced labor, and later when he was the commander of the Eighth Army, there was illegal use of civilians by units subordinate to him.

In view of the findings of guilty against the four above defendants who were not commanders, and therefore did not fall under the legal rule relating to the responsibility of commanders, it would be well to determine under what legal theory they were held responsible and received sentences by the court.

In the ordinary course of events, the staff officer even at the highest level is well insulated from abuse or the threat of trial as a war criminal. Reading from the experience of the United States in the Vietnam conflict, the main thrust of the criticism and almost the only personal attack has been on General Westmoreland for the period during which he was the Commander in Vietnam, and not for his subsequent service as Army Chief of Staff since the spring of 1968. No allegations have been directed at the officers

who were on his staff in Vietnam, nor at the senior general officers in the Pentagon hierarchy.

This is not to say that charges have not arisen out of the Vietnam War for the actions of staff officers, for in truth, charges were brought against several staff personnel as a result of the My Lai massacre. The Chief of Staff of the Americal Division was charged with suppressing evidence of the affair, and the same charge was brought against the Task Force operations officer. More to the point was the initial additional charge against this G-3 major, of committing a war crime by preparing the order for the operation which included tasks allegedly in violation of the law of war. Although this charge was dismissed early, it is interesting that such a charge would arise so like those involving the staff officer defendants in the *High Command* case.

The action taken shows that the responsibility of staff officers may continue to be litigated, and war crimes trials of the future will not be limited to the actual perpetrator of the crime or his commander, but others who are alleged to have aided and abetted in the offense may be indicted. Our concern is to determine what combination of situations and facts may result in the trial of staff officers. We need not concern ourselves with acts personally committed by such individuals, nor with those cases in which they may be charged with violations of military orders or regulations of their own state. This analysis will be limited to actions or acts done in pursuance of one's function as a staff officer. These functions are delineated in FM 105-5 as follows:

The staff provides information to the commander and supplies him with advice and estimates when and as required. The staff prepares plans and converts the commander's decisions into plans and orders that go to all subordinate elements for planning or execution. As authorized by the commander, the staff supervises the execution of these plans and orders and takes the necessary action to insure that the commander's intentions are carried out. Staff officers must always remember that the command mission and the commander's responsibilities are the bases for all their actions. In handling the details in their assigned areas of interest, staff officers must never forget that they are the means to accomplish the mission—not ends in themselves.¹⁹

The responsibility of a staff officer is not to order, not to decide, not to command, but to advise, to supervise, to implement. Historically, to paraphrase Von Moltke, commanders, except for the uniquely great leaders, need advisers. But the staff is advisory only, and the power and authority and honor and glory go to the commander. With power and honor goes responsibility for failure, and in international law with power goes criminal responsibility for illegal acts of subordinates ordered executed, or which

¹⁹Field Manual 101-5, Dept. of Army, "Staff Organization and Procedures," June 1968.

should have been prevented. Such is not the case with the staff officer, clever and brilliant though he may be.

In the *Hostage* case, the two Chiefs of Staff included therein as defendants, Foersch and Von Gudner, both of whom were acquitted. The Tribunal found it legally impermissible to hold a Chief of Staff liable for the acts of subordinates of his commander, and opined that such defendants could not be held responsible for the outcome of his commander's orders which he approved from the point of view of form and issued in the name of the commander. That Tribunal noted that the position of Chief of Staff provides no immunity but that the responsibility of such a person for war crimes must be judged upon the facts of the case.

The tribunal trying the *High Command* case noted the decision as to the staff officers in the *Hostages* trial and agreed that the findings in the previous trial were sound, but the facts therein were not applicable to any defendant in the *High Command* case. The significant legal ruling in the *Hostage* case was that a Chief of Staff cannot be held guilty of crimes of omission as the commanding general may be, for the failure to properly exercise command authority is not the responsibility of the Chief of Staff. If the duty of the Chief of Staff were to keep his commander informed of activities in the field, it would be a duty imposed by military law of the nation and not one existing under international law.

Thus, in the words of the Tribunal, only positive action can make a Chief of Staff guilty. He must be a participant in the criminal orders or in their execution in order to become criminally responsible for criminal acts occurring within the command. The tribunal in the *High Command* case referred to General Woehler and pointed out that criminal acts or neglect of a Commander-in-Chief are not in themselves to be so charged against the Chief of Staff, who has no command authority nor is he a bearer of executive power. Those orders, however, which would normally be issued by the Chief of Staff without consulting the Commander-in-Chief and which are illegal are then the responsibility of the Chief of Staff.

The court, however, did not clearly delineate wherein the Chief of Staff received any authority to issue orders, if in fact he can ever do so. It certainly can only be on some theory of the quasi-authority of a non-commander to issue orders, that one can find that those acts by General Reinecke and General Warlimont, which resulted in their sentences to life imprisonment, can be founded.

What then are the lessons for a staff officer? The matters for which he may be held criminally liable are solely his personal and direct acts done knowingly in aid or assistance to a specific violation of international law. If his authority like that of defendant Reinecke is complete, and the issuance

of an order is in fact an evidence of his policy uninhibited by his superiors, all responsibility for the orders published is his. Passing along the continuum, the law will extend criminal responsibility to an adviser who performs substantial planning of policy and is instrumental in drafting and promulgating internationally illegal orders as did Warlimont.

The observer begins to note the tenuousness of the theory on the aider and abettor, however, as one continues along the continuum, to the criminal responsibility imposed on the legal adviser Lehmann, who took no part in the policy-making decision, and who was limited to legal advice and suggestions concerning policy and legal drafting. This was no military judicial officer personally passing judgment and sentence as did the Japanese judicial officers in the *Sawada* and *Hisakasu* cases in the Far East.²⁰

Although there was some evidence of suggestions for revision of policy guidance, it appears the defendant Lehmann was convicted for his failure (omission) to emphasize the illegality of the orders being drafted and prevent their issuance. This comes much closer to returning the staff officer full circle to the responsibility of a commander—*e.g.*, as the lawyer should have known the order was contrary to international law, he should not, in any way, have participated in its preparation.

Is the lawyer held to a higher standard of conduct because his profession should have had a higher standard of knowledge? If this is not the analysis then a secretary who did know that the order was contrary to international law could be indicted for typing the order, for without the typist the order would fail of promulgation. Indeed the typist may well be more important to distribution of an order than a legal drafter. This appears to be an extremely difficult burden on the lawyer staff officer. When the court says:

The orders and directives which form the subject matter of the prosecution's case against Lehmann were conceived, drafted and carried out in execution of criminal purposes and designs. In general, Lehmann played only a supervisory part or no part at all in the third step—the carrying out. It is not claimed that he personally gave orders to shoot Russian civilians on suspicion or that he physically transported Night and Fog defendants into Germany and isolated them from the outside world. But without the general orders which Lehmann had drafted and issued, not a single individual order could have been given. . . . At the very least, Lehmann, by lending his technical advice and legal skill to these vicious schemes, became an accessory before the fact to murder. What he did fits perfectly into the classical definition:

‘An accessory before the fact is one who, though absent at the commission of the felony, procures, controls or commands another to commit said felony, subsequently perpetrated.’

²⁰Law Reports of Trials of War Criminals, Vol. V, VN War Crimes Commission, 1948. Trial of LTG Sawada and Three Others, U.S. Mil. Comm. Shanghai, Case No. 25. Trial of General Hisakasu and Five Others, U.S. Mil. Comm. Shanghai, 1946, Case No. 33.

One can only muse that such a test could be applied to many far removed from the scene.

As to Warlimont, Reinecke and even Woehler, all as staff officers were additionally required to supervise execution of the orders with which they were concerned. Not so Lehmann, even by the words of the Tribunal. From this analysis, this writer can only conclude that the decision as to defendant Lehmann was bad law, or at least not in consonance with the standards by which other defendants were judged.

Conclusion

The lack of analyses of the war crimes trials of World War II is to be regretted. Within a quarter of a century events have occurred on the international scene which call for a better grasp of the law and procedure of those trials. How much better might the treaty makers and jurists, both national and international, be able to cope with present day allegations of war crimes had those precedents been studied.

Each case could have provided its bit to the more complete understanding and consequent solution of this difficult area. There are those like Colonel G. Draper who deny the trials serve as a deterrent to these violations of the international law of war. But whether there be judicial proceedings or intensive education, the world must look to these events of the past for knowledge to resolve the future.

The *High Command* case itself with its rather strange combination of defendants and its procedural shortcomings, nonetheless provides an insight into several of the problem areas which have already concerned the legal profession and which are sure to rise again in a warring world. Counsel in their arguments and submissions, and the Tribunal in its decisions and opinions, provide us with material upon which to draw for a more adequate and satisfactory proceeding on another occasion. The legal problem posed by defense or superior orders was not finally settled by the *High Command* case and it will not be laid to rest with the appellate decisions of the *My Lai* cases.

But this case adds to our fund of knowledge. The case is more nearly unique in its discussion of the criminal responsibility of staff officers, and for that reason alone deserves consideration. Both issues are worthy of attention by legal scholars as well as military philosophers, for with a more complete understanding, the relation of commander and subordinate and commander and staff will be strengthened. By clarifying these relationships the commander and staff concept can be made more effective both in law and practice.