WALKING AWAY FROM NUREMBERG:
JUST WAR AND THE DOCTRINE OF COMMAND
RESPONSIBILITY IN THE AMERICAN MILITARY PROFESSION

By

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On November 20, 1945, in his opening statement as the American Chief Counsel for the prosecution at the International Military Tribunal (IMT) at Nuremberg, United States Supreme Court Justice Robert H. Jackson addressed the issue of whether the legacy of that tribunal would be simple “victor’s justice” or the establishment of principles of international reciprocity in holding individuals accountable for war crimes: “We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well.”¹ The official position of the United States vis-à-vis Justice Jackson’s apocalyptic challenge has been one of steady erosion from a precise affirmative standard for holding individual commanders directly responsible for war crimes.

Many of the principles of Nuremberg era trials have their origin in the U.S. Civil War era *U.S. General Order No. 100*, also known as the *Lieber Code*, that incorporated all the major principles of Augustinian just war doctrine. This project examines the evolution of the concept of command responsibility as U.S. military doctrine from the Lieber Code to the present. The development of military doctrine is considered in the context of contested *weltanschauung* (worldviews) between those who championed contrasting models of military professionalism.

Although the United States Army, after World War II, incorporated a rigorous definition of command responsibility into its preeminent doctrinal manual on the law of war, Field Manual 27-10, the United States failed to hold its own military commanders responsible for dereliction in preventing grave breaches of international humanitarian law during the course of the Vietnam War. ² Subsequently, the United States has consistently refused to ratify international treaties and protocols that would replace the passive standard of command responsibility that the United States has enforced on its own military personnel with the affirmative standards inscribed in other recent international human rights statutes and war crime tribunal charters. Finally, this project will closely examine the relevance of the military doctrine of command responsibility to the national decisions to oppose the ratification of such treaties.

INTRODUCTION

On loan from the U.S. Supreme Court for the purpose of negotiating the London Charter establishing the International Military Tribunal (IMT) and later serving as the tribunal’s first lead prosecutor for the United States, Justice Robert Jackson immediately understood that the trials he had arranged and the theory of his prosecution placed the American military profession in a historical ethical dilemma. In a 1946 article, published in what was then the professional journal of the U.S. Army, Jackson argued that the standards of liability that the IMT was holding as binding on the officers of the former Axis powers were, rather than novel initiatives, inherent in American military tradition and doctrine. Jackson had a formidable task, as many American military officers were concerned about precedents being established and the possibility that this precedent could be used against American commanders in the future. Although the War Department had both initiated the process and crafted the charges, Jackson realized it would be insufficient to portray the charter as just a binding order initiated by a competent and recognized authority. Doctrine usually assumes a longevity that exceeds the tenure of an appointed or elected leadership. Jackson had to present the charter to the American military profession as part of its own tradition. First he had to balance the norms of military obedience to higher authority, especially civilian authority, with the concept that certain orders are by their nature manifestly illegal and should not be executed. Second, he had to address the reality that, although members of the military profession are by definition the managers of violence, they must abide by rules that recognized that the
means that can be utilized in war are not unlimited and that military commanders are liable when the conduct of their subordinates exceed those limitations.

Rather than the old law journal debate over the issue of Justice Jackson’s legal realism, this dissertation is concerned with the relationship between American military doctrine and the Nuremberg precedents over a half-century after Justice Jackson argued his case for their interdependence.¹ Conservative positivist commentators have pointed to the novelty of the Nuremberg process and criticized the “tendency to equate war crimes decisions, or Nuremberg precedents, with the law of war.”² Rather than refute the legal positivist critique of Nuremberg, my purpose is to establish the Nuremberg precedents, their antecedents, and progeny as American military doctrine.

This dissertation examines the development of the concept of command responsibility as official military doctrine from the Civil War era US Army General Order 100, the “Lieber Code” to contemporary U.S. military doctrine. JCS Pub 1, the definitive delineator of official U.S. military terminology, defines doctrine as “fundamental principles by which military forces or elements thereof guide their actions in support of national objectives.”³ Doctrine is distinct from law. While authoritative, a violation of doctrine does not necessarily involve a violation of law. Although doctrine often results in law and law often underpins doctrine, doctrine, unlike law, calls for judgment in its application rather than an automated compliance. Unlike positive law

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based simply on legal jurisdiction, doctrine is based upon a professional consensus, even though the foundation of that consensus is based on an internal institutional validation that is hierarchical and relatively narrow. Unlike law, doctrine is openly historicized in that it “captures the lessons of past wars, reflects the nature of war and conflict in its own time, and anticipates the intellectual and technological developments that will bring victory now and in the future,” making it a test of professional rather than legal competence.  

Just as doctrine is distinct from law, doctrine is also distinct from drill. In a 1966 official doctrinal manual, Virgil Ney drew a distinction between drill manuals and modern military doctrine. He considered early manuals as "doctrine in infancy.” One example of such proto-doctrine was the Regulations or Blue Book that Frederick William von Steuben developed to drill the Continental Army at Valley Forge in marching, weapons fire, and open field battle maneuver. Doctrine proper involves strategic and operational concerns that are for more comprehensive than mere drill. Additionally, doctrine is distinct from unofficial literature, no matter how influential, in that doctrine is usually officially published and may also carry an official imprimatur similar to that found in Catholic theological works signifying doctrinal correctness.

4 “The Army's doctrine lies at the heart of its professional competence.” See Department of the Army, Field Manual 100-5, Operations (Washington: Headquarters, Department of the Army, 1990), 3. This manual described itself as the U.S. Army’s “keystone warfighting doctrine” as it “links Army roles and missions to the National Military Strategy” and describes how commanders are “to think about the conduct of campaigns, major operations, battles, engagements, and operations other than war.”

One benefit of a doctrinal vis-à-vis legal approach to command responsibility is that it avoids the perennial debate between natural law and positive law theorists. Following the views of Hugo Grotius (1583-1645) and the prominent late medieval theologian, Saint Thomas Aquinas, natural law holds that there is an inescapable connection between law and morality. John Austin, legal positivism’s leading historical proponent, countered such natural law theorists by drawing a sharp distinction between law and morality based on (1) the command doctrine, that a law must constitute a threat of sanction, and (2) the doctrine of absolute sovereignty, that a law must be issued from a position of superiority.\textsuperscript{6} Doctrine predates this conflict. Specifically, as an early just war concept, the specific doctrine of military necessity, underpinning command responsibility, predates the natural versus positive law argument and applies a normative criterion directly to the experience of war without any need for any philosophical discussion into the nature of law.

Like law, doctrine is hierarchal. In fact, no two sets of doctrinal publications can be equal in any given circumstance or contingency. This study is only concerned with doctrine that established a foundation for the general operation of an army in which changes in just war doctrine over time would necessitate modifications in subsidiary doctrines and even the doctrines of other military services. Distinctions between doctrinal publications arose out of doctrinal developments starting with the promulgation of (1) the Field Service Regulations early in the twentieth century, (2) the Army Field Manuals developed during the Second World War and utilized during the Cold War, and

(3) the current interservice or “joint” service regulation systems now in the process of supplementing and replacing the separate doctrinal publication systems of separate services. Current official doctrine places such doctrine into two major groups:

Capstone Doctrine: The highest category of doctrine publications in the “hierarchy of publications” that link doctrine to national strategy and the guidelines of other government agencies to include other members of international alliances and coalitions.

Keystone Doctrine: Doctrinal publications that provides the foundation for a series of doctrine publications in the hierarchy of publication.\(^7\)

The focus of this study is on Army doctrine and publications at the expense of the Navy, and later the Air Force, derives from the Army’s traditional role as the major source of both capstone and keystone doctrine. Between the promulgation of *U.S. Army General Orders No. 100* in the Civil War to the belated implementation of the Goldwater-Nichols Department of Defense Reorganization Act of 1986, a process not yet complete, the War Department and, subsequently, the Department of the Army was the proponent agency for national war fighting doctrine in general and the laws of war in particular.

Doctrine is also like law in that it posits a formal norm. Besides formal legal standards, regulations, and military orders, the 1990 edition of *U.S. Army Field Manual 22-100, Military Leadership*, includes traditional organizational values such as doctrine as formal norms. Informal norms include actual operating organizational values, institutional pressures, and personal values. Unlike law, doctrinal norms do not necessarily imply uniformity or constancy. Despite its formal hierarchical structure, the

human world of military leadership and subordination seldom provides for the uncontested development of formal norms. The process of the development of doctrine often is a complicated balancing act between current authoritative policy and past tradition. Norms can be arranged along a continuum from rigidly formal norms such as legal standard (laws, orders, and regulations), semi-formal norms such as basic national values and traditional organizational values, to informal norms such as actual operating organizational values, institutional pressures, and personal values. Formal norms should always trump less formal norms. *FM 22-100* defines a “true ethical dilemma” as existing “when two or more deeply held values collide.”

![Diagram](image)

**Figure 1, From FM 22-100, Military Leadership**

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Conflicts between formal norms and informal norms impact not only on the operational effectiveness of a command, but also on the moral and ethical integrity of its actions. It will be argued that the ethics associated with traditional just war doctrine are formal military norms.

Chapter 1 examines the establishment of the principle that there is an *affirmative official duty to use force or coercion to assist others as predicated and conditioned by the principle of necessity* formally in both capstone and keystone doctrine. This principle of military necessity was established as a formal norm in the military during the Civil War in *U.S. Army General Order 100*, the “Lieber Code.” In many respects, the “Lieber Code” and other nineteenth century writings of Dr. Francis Lieber are a reiteration of the traditional concept of *justum bellum* or just war that originated at end of the fifth century. The work of Lieber is representative of central tenets of traditional just war theory and provides a modern foundation of the concept of military necessity and the related concept of command responsibility for humanitarian conduct during armed conflict. Just over two years after President Lincoln issued the “Lieber Code,” the affirmative mandate placed on commanders to ensure the minimization of human suffering was enforced by a U.S. Army military tribunal during the trial of Confederate Captain Henry Wirz, the commandant of Andersonville Prison, for his failure to affirmatively address the conditions of Union prisoners during the Civil War.

To make the pejorative charges that certain historical developments are regressive relapses to a primitive just war doctrine has been a favorite tactic of conservative critics who have opposed humanitarian initiatives from the Nuremberg Principles to the 1977 Geneva Protocols. Such charges are founded on a lack of knowledge of the core concepts
incorporated in both early just war doctrine and the “Lieber Code.” Some scholars in authoritative positions of doctrine development have even attempted to portray the central just war principle of discrimination, the distinctive treatment of noncombatants, as obsolete.⁹

The present defense of the just war concepts against contemporary charges of obsolesce will be made on the basis of doctrine rather than simplistic interpretations of positive law. *U.S. Army General Order No. 100* was just as much a foundation of doctrine as it was of law. As a representation of a major change in national strategy affecting the conduct of Union forces, it provides the first example of a national operational capstone doctrine. As the initial authoritative basis for a series of doctrinal publications on the laws of war that was binding on all branches of the service, it was the first major historical example of keystone doctrine.

Chapter 2 discusses the developments of U.S. military doctrine between the Civil War and World War II. The influence of foreign models of military professionalism will be examined as a facilitator and inhibitor of the development of uniquely American doctrine. With the development of a formal publication and training system, doctrine was increasingly specialized into distinct fields of capstone and keystone disciplines. As pressures increased to democratize the American military institution and to create a mass

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⁹ See David E. Graham, “The 1974 Diplomatic Conference on the Law of War: A Victory for Political Causes and a Return to the “Just War” Concept of the Eleventh Century” in *Washington and Lee Law Review*, xxxii, (1975), 38, 63, and, William Hays Parks. “Air War and the Law of War.” *Air Force Law Review*. (1990): 1:50. Parks finds the just war principle of discrimination He even went so far as to claim that it was the “fundamental failure of the law of war to acknowledge that the traditional distinction between the combatant and noncombatant was obsolete, and had been for the century preceding World War II.”
army, military doctrine became imbued with societal values more facilitative of the extension of humanitarian norms in warfare.

Chapter 3 outlines the historical development of the concept of command responsibility not just as law, but also as military doctrine. The *Department of Defense Dictionary of Military and Associated Terms* provides three basic official definitions of the command:

1. The authority that a commander in the Armed Forces lawfully exercises over subordinates by virtue of rank and assignment. Command includes the authority and responsibility for effectively using available resources and for the planning the employment of, organizing, directing, coordinating, and controlling military forces for the accomplishment as assigned missions. It also includes responsibility for the health, welfare, morale, and discipline of assigned personnel.

2. An order given by a commander, that is, the will of the commander expressed for the purpose of bringing about a particular action.

3. A unit or units, an organization, or an area under the command of one individual.  

The nuanced, overlapping meanings of command, as an individual noun, a verb, or a collective noun, are often not appreciated by those outside the military and even those within the profession are not aware that command can refer simultaneously to more than just one of these definitions at the same time.

Although the International Military Tribunal in Nuremberg is the best-known historical event in the establishment of individual responsibility for war crimes and crimes against humanity, it had earlier precedents. One involved the 1940 change to the War Department Field Manual 27-10, *The Rules of Land Warfare*. This document

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10 JP 1-02, 82.
doctrinally negated the defense of superior orders for war crimes. Another precedence event was the case of General Tomoyuki Yamashita, who was put on trial, found guilty, and executed for failing in his command responsibility to prevent or punish the killing of civilians and prisoners of war during the Japanese defense against the American reconquest of the Philippines in 1945. The Yamashita conviction is the most striking example of the incorporation of just war doctrine into a Nuremberg era affirmative military ethic.

The U.S. Supreme Court proclaimed this affirmative principle of command responsibility when it upheld Yamashita’s conviction and allowed him to be executed. General Douglas MacArthur, the Commanding General of the U.S. Army Forces in the Pacific, issued a statement confirming Yamashita’s sentence in which he charged the Japanese general with violating the very definition of his profession: “The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is his very essence and reason for his being.” The United States Army incorporated a close approximation of this affirmative standard into its post war doctrinal manual on the Law of Land Warfare, Field Manual 27-10. The major standards of command liability associated with the major war crimes trials during the Nuremberg period will be compared to the principle of command responsibility as incorporated into 1957 edition

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FM 27-10, which still represents current doctrine. The relevant passage from FM 27-10 holds a commander liable:

if he has actual knowledge, or should have had knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.\textsuperscript{14}

Chapter 4 discusses in detail the developments concerning the doctrine of command responsibility during the period of the Cold War in context of ideological changes within the American military profession. After the Nuremberg trials documented the complicity of the German military establishment in the rise of Hitler and the Holocaust, the founders of the new West German Army, the Bundeswehr, rejected the much of the Prussian/ Wehrmacht tradition of military professionalism. Just as it was being thoroughly rejected in Europe, a rehabilitation of the Prussian/ German military tradition was underway in the United States. This rehabilitation first took place outside formal doctrinal publications with the appearance in 1957 of Samuel P. Huntington’s seminal book, \textit{The Soldier and the State: The Theory and Politics Of Civil-Military Relations}.

Eliot A. Cohen, Professor of Strategic Studies at the Paul H. Nitze School of Advanced International Studies, coined the term “normal theory” to describe a model of civil-military relations that rests on a “conception of professionalism” put forward by Huntington that was reinforced by the impact of the Vietnam War on the American military. Written in direct response to criticism of the aristocratic pretensions of some American military leaders in the wake of the Truman-MacArthur controversy,

\textsuperscript{14} FM 27-10, 178-179.
Huntington argued for a functional military aristocracy based on a historical model of development of the American military profession that emphasized the discontinuity between American civil society and an increasingly professional American military culture. Rather than a continuity based on shared democratic values, Huntington argued, in his chapter, “The Military Mind: Conservative Realism of the Professional Military Ethic,” that professional officers maintain a distinctive and persistent weltenschauung (worldview) that molds and influences their contemporaneous attitudes and values. After maintaining that the seeds of a professional military ethic were more resilient in the antebellum Southern culture than in the North, Huntington placed the true cultural reservoir of American military professionalism in the military ethic of nineteenth-century Germany.\textsuperscript{15}

While it would be over twenty-five years before certain aspects of Huntington’s work would be incorporated in formal military doctrine in the so-called Weinberger Doctrine, the neo-Clausewitzian realism, espoused in Soldier and the State, would have hegemonic influence on the American military profession during the Cold War. The major institutional debates affecting its tenets would include the doctrinal initiatives regarding credible expansion of the Nuremberg doctrine of command responsibility into an international enforcement mechanism that would be universally enforceable.

Chapter 5 focuses on the American record of holding its own personnel to the level of command responsibility associated with the Nuremberg precedents. Particularly, the landmark case of Captain Ernest Medina, the commander of the principal company responsible for the My Lai Massacre of March 16, 1968, in Vietnam, will be addressed in the context of the standard of command responsibility associated with his trial. Medina’s case has come to represent one of two principal standards used today to measure issues of command responsibility. The judge in Medina’s trial instructed the jury that a “commander-subordinate relationship alone will not allow an inference of knowledge” and that they must establish that Captain Medina possessed actual knowledge that his subordinates were committing human rights violations. That standard contrasts both with the “Yamashita standard” established in post-WW II war crimes tribunals and the standards on command responsibility found in Additional Protocol I, the Statute of the International Tribunal for Rwanda, the Statute of the International Tribunal for the Former Yugoslavia, and the Rome Statute for the International Criminal Court.

The failure of America to hold its own citizens to the same standards it held out to its defeated enemies was unquestionably demonstrated following the American military’s greatest modern professional catastrophe: the My Lai massacre and its subsequent cover-up. After its revelation in 1970, Chief of Staff of the Army General William Westmoreland responded with a series of initiatives: (1) the appointment of Lieutenant General William R. Peers to head the official Army inquiry into the My Lai Massacre, in which “every command level” in the affected division was implicated in covering up the massacre; (2) directing the Army War College to undertake a study of the contemporary

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state of American military professionalism to address the institutional failures brought to light by the U.S. Army’s problematic conduct of the war; and (3) ordering the establishment of the U.S. Army Vietnam War Crimes Working Group.

Immediately following these negative self assessments carried out in the wake of the My Lai Massacre, the United States participated in diplomatic conferences lasting from 1974 to 1977 concerning the expansion of humanitarian protections afforded non-combatants in international armed conflict. Chapter 6 addresses the result of this process: the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Armed Conflicts (Protocol I), 8 June 1977. In the direct aftermath of the lessons learned from the disaster at My Lai, the United States took the lead in successfully negotiating the inclusion of an affirmative definition of command responsibility in Article 86 of Protocol I. The American delegation at these conferences comprised the author of the current edition of FM 27-10 and former head of the U.S. Army Laws of War Program, Judge Richard Baxter, and his successor, Waldemar A. Solf. Protocol I provided an extension of the Nuremberg precedent regarding the general principle of international humanitarian law concerning the treatment of non-combatants. However, in spite of the Joint Chiefs of Staff (JCS) giving Protocol I its tentative approval at the time of its signing in 1977 and an Army War College study supporting ratification in 1978, the Reagan administration and subsequent administrations have refused to submit it to the United States Senate for ratification.

With the election of Reagan, U.S. policy shifted from supporting an increased standard of command responsibility to policies undermining attempts to establish a more rigorous standard of command responsibility. Official working groups within both the
Department of the Army and the Department of Defense were arranged to document a shift in the position of military professionals in reference to the ratification of the 1977 Protocols. The particular change in the official military position in regard to the 1977 Protocol and the American initiated standard of command responsibility contained within it can only be understood in the context of the general consolidation of a more conservative weltanschauung within the American military profession in the 1980s.

Chapter 6 also addresses the antipathy of the American military profession toward humanitarian operations during the 1990s and its failure to establish a consistent doctrinal base to guide such operations. Since humanitarian military operations possess the highest level of ideological concurrence with traditional just war doctrine, they are the type of military operation that is least in harmony with neo-Clausewitzian realism. The conflicting models of Low Intensity Conflicts (LICs), Operations Other Than War (OOTW) and Peace Operations created a doctrinal chaos that, together with a professional animus toward such operations, led to severely compromised humanitarian deployments to Somalia, Haiti, the Balkans, and the American failure to intervene in the Rwandan Genocide. The promulgation of the Weinberger Doctrine, actually authored by General Colin Luther Powell, symbolized the ascendancy of conservative realism within the American military profession. However, even when doctrinal transformations have strong political backing, they are seldom all encompassing or complete. Doctrine, like law, possesses an institutional memory that sometimes blunts political necessity. The attitudes of the contemporary American military professionals are relevant to understanding the record of American official indifference to noncombatant humanitarian concerns in non-traditional operations. The incongruity of these contemporary American
positions regarding the mandates of humanitarian law cannot be examined outside of the institutional context of developments and changes in organizational core values over time.

The issue of the non-ratification of Protocol I remains of critical contemporary interest as it is directly related to the issues underpinning the Pentagon’s current opposition to the 1998 Rome Treaty establishing a permanent International Criminal Court (ICC). While the United States allowed the incorporation of standards of command responsibility compatible with Protocol I in Article 6 of the Statute of the International Tribunal for Rwanda, and in Article 7 of the Statute of the International Tribunal for the Former Yugoslavia (a tribunal over which a U.S. citizen presides), it continues to actively oppose the establishment of a permanent and independent tribunal that could impose such a standard on American citizens.

Unlike most other works concerned with the geneses of American foreign policies, this study focuses on the leading historical actor in establishing and enforcing humanitarian norms in armed conflict: the American military profession.
Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

-- *General Order No. 100*

During the third year of the Civil War, the War Department issued the *Instructions for the Government of the Armies of the United States in the Field* -- known officially as *General Orders No. 100* and unofficially as the “Lieber Code” – to the deployed forces of the United States Army. In a 1963 edition of the *International Review of the Red Cross*, future World Court Justice Richard R. Baxter called this military order the "first modern codification of the Law of War."¹ Nine years later, retired U.S. Army Brigadier General Telford Taylor, former American chief prosecutor at the Nuremberg war crimes trials conducted under Allied Control Council Law No. 10, noted that *General Orders No. 100*

remained for half a century the official Army pronouncement on the subject, furnished much of the material for the Hague Conventions of 1899 and 1907, and today still commands attention as the germinal document for the codification of the laws of land warfare.²

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The theory of war found in General Order No. 100 is distinct from the three statist philosophies arising in the period following the end of Europe's wars of religion: modern natural law theory; legal positivism; and political realism. The Treaty of Westphalia in 1648 not only ended the Wars of Reformation, but it is also the historical reference point for a model of international relations centered on the early modern European shibboleths of anti-interventionism and non-interference based on a theoretical equality of sovereignty between nation states. Unlike the major schools of thought associated with this Westphalian system, General Order No. 100 marked a return to traditional just war doctrine, a pre-modern and less Eurocentric philosophy of warfare that (1) viewed war as an essentially moral undertaking and (2) that placed affirmative humanitarian obligations on the conduct of a specialized group of individuals, the military.

Origins of General Orders No. 100

Outside of Brussels at Waterloo in June 1815, the wars of the French Revolution came to an end. These wars marked the point of departure from the pre-modern to the modern in warfare. In the general vicinity of the battle, at Ligny, was a soldier in the service of the King of Prussia was lying close to death from wounds he receive during the final allied final pursuit of Napoleon. This wounded soldier, a young Berliner named Francis Lieber, was the future drafter of U.S. Army General Order No. 100.³

After recovering from his near mortal wounds, Lieber went on to unconventional warfare. His attempt to fight alongside Greek irregulars fighting the Ottoman Army was

³ The definitive biography of Francis Lieber remains, although somewhat dated, Frank Freidel's Francis Lieber (Baton Rouge: Louisiana State University Press, 1977). Substantial biographical information is also available in John Catalano's Francis Lieber, Hermeneutics and Practical Reason (Lanham, University
frustrated as a result of the treatment he received from his allies, a disillusioning experience that was shared by many other European volunteers who fought in the Greek War of Independence. Between his bouts of military service, Lieber received a Doctor of Philosophy degree from the University of Jena and spent time in jail for liberal agitation against the increasingly conservative Prussian state. Immigrating to the United States in 1827, he became the Chair of History and Political Economy at South Carolina College, later relocating to Columbia College in New York because of his antipathy to slavery in 1857. He was eventually appointed to a professorship of history, political science, and law. Lieber became one of the founding fathers of both American political science and, although he was never formally trained as a lawyer, American legal studies. His approach to law and politics were based upon the discipline of hermeneutics in the anti-idealistic and anti-rationalistic tradition of the German Protestant theologian Fredrich Schleirmacher and the German historian Wilhelm Dilthey. In fact, he was America's first leading exponent of classical hermeneutics. For Lieber, laws and policies are subject to internal interpretation because they are composed in human languages whose component parts, words, have meanings that vary according to time, place, and the subjective worldview, or weltanschauung, of the original author(s). Lieber's political and legal hermeneutics resulted in a "practical" ethic that contrasts sharply with the extremes of both political realism -- positing an ethical aporia that holds actions of a state, either foreign or domestic, as existing independent of any ethical or considerations -- and

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4 In 1821, Lieber's party of volunteers were not only refused the right to fight the Turks, they were robbed and denied sustenance before escaping their Greek allies turned captors. See Baxter, The International Review of the Red Cross (April 1963), n. 25, 172.
legalism, dismissing the political attributes and implications of law. Lieber was a life-long critic of the conservative regime in Prussia and was a life-long apologist for a revolutionary regime he adopted for his own, the United States. Lieber’s political principles developed, to a large extent, in opposition to Aristotelian principles of John C. Calhoun, the intellectual father of the Confederacy. In reply to the Calhoun’s conservative theory of 'concurrent democracy,' Lieber developed the theory of 'institutional liberty' to explain the superiority of the American conception of nation to that of extreme revolutionary states such as the France, that he had fought against, or reactionary nation-states such as Prussia, that he fought for and then rejected.

Reminiscent of Thomas Paine's role during the Revolutionary War, Lieber became the theoretic apologist of the Union cause during the Civil War, even initiating the discussion that would result in the revolutionary amendments to the Constitution adopted at the end of the war.

By 1863, the Lincoln administration realized the Rules and Articles of War, then in use, were not appropriate for a conflict with an enemy whose sovereignty it refused to

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6 Lieber, *On Civil Liberty*, 270-346. While Calhoun's 'concurrent democracy' stressed the balance of power between minorities and majorities, Lieber's 'institutional democracy' emphasized the balance between individual liberty and social / institutional responsibilities.

recognize. As the eighteenth-century Westphalian system left the responsibility for the implementation of humanitarian concerns, such as the treatment of enemy prisoners, to be worked out between theoretically equal sovereign nation states, the threat that the Confederacy would exploit humanitarian practices under the custom and usages of war, such as granting prisoner of war status, as a defacto recognition of sovereignty was significant.

To resolve this conflict, Lincoln turned to Lieber to draft a "set of rules and definitions providing for most issues occurring under the Law and usages of War." The result was *General Orders No. 100*. As it formed the basis for similar codes in England, France, and even Prussia, it is usually viewed primarily as a legal instrument. The Hague Conferences of 1899 and 1907 incorporated the code’s general provisions. However, it would be a grave mistake to view *General Order No. 100* as only of legal significance. Like the Emancipation Proclamation a year before, it was a military order from a civilian Commander-in-Chief to military commanders conducting current military operations. Since the code remained in effect until it as superseded in 1917 by War Department Document No. 467, *Rules of Land Warfare*, which was greatly influenced by the original, it should also be considered as a foundational document for the development of American military doctrine.

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9 See note 1.

As the first officially promulgated doctrine that addressed the overall conduct of tactical and strategic operations "rather than specialized functions such as simple drill," General Order No. 100 constituted the U.S. military's first capstone doctrine. Rather than being concerned with how to deploy tens of thousands of soldiers to march across open fields in increasingly costly battles, Lieber was concerned with why a state deploys soldiers in the first place. Next to Lieber, the most critical figure in the code's genesis was the General-in-Chief of the Union Armies, Henry Wager Halleck, who was responsible both for selecting Lieber and for heading the military commission tasked with reviewing and approving the code. Hallack was not only the author of the most contemporary of the privately published tactical drill manuals utilized during the war, he was also the author of a major treatise on the laws of war, a work strongly influenced by Lieber's earlier writings. Lieber's close collaboration with General Halleck testifies to General Order No. 100's relevance to the operational art of warfare, such as it existed during the Civil War.

On June 24, 1863, Confederate Secretary of War, James A. Seddon, wrote a letter to Washington rejecting General Order No. 100. Seddon correctly detected the revolutionary tone of Lieber’s code, not only in regard to slavery, but Lieber's central concepts of military necessity and the right of intervention in the affairs of another sovereign state -- or (in Seddon's case) states claiming sovereignty. Seddon attacked the

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11 For a discussion of foundational or "keystone" doctrine, see Introduction, n. 4.

code as an “assertion of dogmas” that were oppositional to the very foundational premises of Confederate authority.¹³

Contrary to sequentialist logic, the justification for major wars changes during their course, especially when their course is exceptionally longer and bloodier than expected. General Order No. 100 represented the shift in Union war objectives from mere statist concern with the preservation of the Union to a revolutionary war of emancipation. To establish a precedence to allow humanitarian protocols without the statist criteria that could be used in support of Confederate foreign policy objectives, Lieber was indeed guilty of resorting to the non-state centered concepts that were considered by Seddon as pre-modern. However, just as “war antedates the state,” as noted by historian John Keegan,¹⁴ efforts to establish normative codes for humanitarian concerns also antedate the state, at least the modern post-Westphalian state. The articles of General Order No. 100 follow with remarkable consistency the central pre-modern principles of Augustinian just war doctrine.

**Augustinian Just War Doctrine**

The principle that there is an **affirmative official duty to use force or coercion to assist others as predicated and conditioned by the principle of necessity** (italics mine) was laid down by the end of the fifth century as the concept of *justum bellum* or just war.¹⁵ The initial western institutional base for just war doctrine was as a moral teaching

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¹⁵ Augustine to Boniface, Letter 189 (6). See Except for the *City of God*, all citations from the writings of Augustine are from *Augustine, Political Writing*, eds. E.M. Atkins and R.J. Dodaro (Cambridge: Cambridge University Press, 2001).
of the leading theologians of the Roman Catholic Church. This sponsorship by a recognized supra-national authority during the period of the doctrine’s greatest influence, gave just war doctrine a universal moral character. Later natural law theory, developing from just war tradition, would share this attribute of universality. However, because just war doctrine predates natural law theory and later legalist paradigms to include the Westphalian concept of the ‘law of nations’ and the 'laws of war,' it remains conceptually distinct from the perennial debate between positive law and natural law theorists over the continuity or discontinuity between law and morality.

Just war finds its classical foundation in the distinction between the usually interchangeable Latin words *lex* (law) and *jus* (justice). Marcus Tullius Cicero (106-43 bce) -- the great civic philosopher of republican Rome -- in his infamous maxim, *silent enim leges inters arma*, argued that law is silenced in war in spite of his continuing to address wars in terms of being either just or unjust. Saint Augustine of Hippo (354-430), the pre-eminent theologian of western Christianity’s first millennium, chose necessity rather than natural law as the moral foundation for any governmental use of force. The problem for Augustine in drafting the central principles of traditional just war doctrine at the end of the fifth century was defining an ethical role for Christian officials in an empire now ruled by Christian, specifically Catholic, emperors. As the political triumph of Christianity had not brought about a change in man’s basic nature, this Christian empire, like its pagan predecessor, required the use of force, or the threat thereof, to maintain itself. *Augustine’s conundrum* (italics mine) consisted of the fact

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16Cicero *Pro Milone* 4, 11. Although, following the Roman practice of *bellum Romanum* or unlimited war, Cicero placed no constraints of the conduct of war, he distinguished a just war from a unjust war as one waged for the sole purpose of repelling or punishing aggression. See *De officiis* 1, 11.
that there was no practical alternative to the requirement for individual Christians to serve in positions of coercive authority. Although Augustine denied the self-defense argument for individuals, he argued for an affirmative obligation to defend others that superseded the pacifism associated with the early Church.  

One of the Army’s leading experts on just war doctrine defined it as the mean between the two extremes of absolute pacifism and political realism. The real demarcation between these categorical positions lies not in a disagreement over the nature of war, but the nature of peace. While just war doctrine is effectively exemplified by the maxim of ‘no peace without justice,’ political realism favors the peace even at expense of justice. Pacifism, on the other hand, denies any such opposition between peace and justice and posits that individuals, by avoiding the passive benefits of injustice, can work for justice as a means to gain peace. Additionally, the pacifist sees war as the ultimate expression of injustice, while -- for the political realist -- all claims of justice must defer to the interests of a sovereign state, usually his own. Just war answers pacifism’s categorical rejection of force by defending the use of force on the bases of the

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18 Class given by Colonel Glenn Weidner, U.S. Army, the last Commandant of the U.S. Army School of the Americas during Human Rights Week in January 1999 and February 2000. Weidner was formerly a student of preeminent just war theoretician, J. Bryan Hehir S.J. while a Fellow attending Harvard’s Center for International Affairs.

19 While leading pacifist theorists --such as Henry David Thoreau, Mahatma Mohandas Gandhi, and Martin Luther King Jr., argued that pacifism required an affirmative requirement for an individual to renounce and forswear the benefits received from unjust state action or commerce with unjust states, such ethical consistency is less stressed among many contemporaries who claim to be pacifists.
categorical value of human life, i.e. the victim’s. Augustine separates just war doctrine from both political realism and pacifism by positing that the desire for peace does not in itself entail any virtue:

*Just as every single human being desires peace in the same way they desire happiness. The love of peace, therefore, is not a virtue. When those who are leading their nations sing the praise of peace they are sincere. They seek war to achieve their peace. Even violent criminals demand peace, if only for themselves. They do not love war; they aspire to an unjust peace.*

Although not a systematic thinker in any modern sense, his positions on the proper conduct of those holding state authority is directly related to the basic philosophical premises of his theology: (1) a selfless love encompassing the altruistic obligation to assist others for their own sake and (2) a human realism based upon what Hannah Arendt -- one of his most famous twentieth century interpreters -- calls a “definite and obligatory equality among all people.” Just as the desire for peace entailed no positive value in itself, love according to Augustine could either be for good or evil and that is why actions responsibly undertaken for the welfare of others entailed a specific form of love, a selfless love or *caritas*. The recourse to the utilization of force in war was not based on a passive acknowledgment of the action of a properly Christian state or a simple license for Christian participation in the official actions of such a state.

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Rather, it was an affirmative requirement of love necessitating an intervention in the affairs of humanity.

Following both the neo-Platonists and the Stoics, Augustine rejects the essentialism of Aristotle that legitimates war and even slavery on the basis of supposed inferior or superior natural attributes possessed by various human groups. The central premise of Aristotle’s *Politics* was that humans are naturally destined from birth to either rule or be ruled, to be slave or free, and that war is justified as a means of determining the essential differences in humanity manifested in higher and lower degrees of virtue.23 Unlike Aristotle, Augustine argued for a unity of a shared human nature based on a sinful disposition to place one’s selfish interests ahead of the interests of others. Augustine’s teachings on just war, like his theology in general, is based on the foundation of human equality. Rather than an equality based on inherent human goodness, Augustine's human realism posited that humankind is inherently flawed and that this metaphysical truth accounts for both the existence of war and the recourse to it. Consequently, the most that can be hoped is “momentary respites” from conflicts, not their end.24 However, despite his pessimistic assessment of human nature, Augustine considered the preservation and betterment of human society as man’s highest calling in the secular realm and that a peace founded on justice -- at least a relative justice -- is possible and only after attaining such justice should a return to a state of peace be celebrated.25

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23 Aristotle *Politics* 1, 3-5.

24 Augustine *City of God* xv, 4.

25 Ibid., xv, 6 & xviii, 2.
Augustine was concerned with Christians serving the state in two basic functions: that of judge and that of a soldier. During the late Roman Empire, both were occupations intrinsically related, the role of soldier (miles) being a more expansive than in contemporary societies where police and military functions are more formally separated. Unlike the latter natural law theorists and political realists, Augustine spoke directly to the executioners of state authority rather than kings or statesmen. Living during the reign of Roman Emperor Theodosius who was championing Augustine's own version of Christianity, Augustine had the integrity to reject the views of many of his Catholic contemporaries who held that wars conducted in defense of such Christian states are inherently just and those conducted by pagan or heretical states inherently unjust. The commonly held belief attributing the holy war ideology of the Crusades to Augustine is not supported in the texts of his writings.26

The 1983 Pastoral Letter of the National Conference of Catholic Bishops, *The Challenge of Peace*, a document drafted under the guidance of the preeminent clerical just war authority, J. Bryan Hehir, S.J., affirmed the centrality of St. Augustine to the establishment of just war doctrine which consists of “eight fundamental principles or criteria.”27

- Just Cause: The central tenet of traditional just war doctrine is Augustine’s dictum that a war is “justified only by the injustice of an aggressor.”28
- Competent Authority: War is both a public and official act involving, to varying degrees, the act of judging the action of others or executing such a judgment under the orders of a superior official.

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26 On the prohibition against self-defense, see Regan, *Just War*, 17. For a critique of the myth of Augustine as the progenitor of holy war ideology, see Markus, “Saint Augustine’s Views,” 10-13.


28 Augustine, *City of God* xix, 7.
• Comparative Justice: The claim of possessing a just cause in war is always relative and, consequently, parties to a conflict need to limit their objectives to the relative gravity of the offense being redressed.
• Right Intention: While the justification of war is aggression or an unjust peace, the objective of war is a just peace.
• Last Resort: Even when necessity demands it, war is a tragedy to be avoided at all costs, save justice.
• Probability of Success: Nothing is more obstructive to the establishment of a just peace than indecisive or ineffective military action.
• Proportionality: The unjust effects of warfare must be compensated for by the actual ends of justice attained by resorting to warfare.
• Discrimination: There is a distinction between combatants and noncombatants and the intentional targeting of the latter is a criminal act, even in an otherwise just war.

Although not in a systematic form, all these major principles of just war doctrine can be found in Augustine. This is because the principles are not distinct, but inherently interconnected. For example, the principle of discrimination is already implied in the preceding criteria such as proportionality. The major just war theorist of the early Cold War period, Paul Ramsey, argued “the justification of participation in conflict at the same time severely limits war’s conduct. What justified, also limited.”

This traditional separation of just war principles into *ius ad bellum* (justice before war) principles and *jus in bello* (justice during war) principles also overlaps. For example, in their pastoral letter, the National Conference of Catholic Bishops classified all just war principles except discrimination as *ius ad bellum*, with the central just war principle of proportionality as an overlapping theme between *ius ad bellum* and *jus in bello* principles. To emphasize that *ius ad bellum* concerns are not set aside once a war is initiated, the leading secular theoretician on just war, Michael Walzer, delimits this

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30 See *The Challenge of Peace*. 
dualism as grammatical rather than linear; an unjust war can be fought justly and a just war and be fought unjustly, thereby becoming unjust.  

This historical development of just war doctrine was more characterized by accommodation than innovation. Augustine and early just war theory is often associated primarily with *ius ad bellum* concerns and late just war theory with *jus in bello* concerns. However, the innovations of *ius ad bellum* principle of just cause introduced by the Church in the eleventh century, such as indulgences for Crusaders and absolution for the fallen find no basis in Augustinian just war doctrine.

Later just war theorists took great pains to avoid the appearance that they were adding anything to Augustine's conception of just war. Even St. Thomas Aquinas (1227-1274), the official philosopher

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31 “War is always judged twice, first in reference to the reasons states have for fighting, second with reference to the means they adopt. The first is adjectival: we say that a war is just or unjust. The second is adverbial: we say a war is being fought justly or unjustly.” Michael Walzer, *Just and Unjust Wars, A Moral Argument with Historical Illustrations*, (New York: Basic Books, 1977), 21.


33 The significant authoritative events in the eleventh century on the conduct of war were the concept of the “Truce of God,” put forward in 1041 by the Abbot Odilo of the great Benedictine motherhouse of Cluny, which called for a cessation of hostilities on Holy Days, the “Peace of God, a call by the Council of Narbonne in 1054 to protect the Church and the poor from the effects of warfare, and finally the preaching of the First Crusade by Pope Urban II (also a Cluniac Monk) at the Council of Clermont on November 27, 1095. While the former two can be seen as an extension of *jus in bello* prohibitions, the later, with its arming of monks and priests, the indulgence giving total temporal pardon of all sin for participants (which would include war crimes committed over the course of the crusade), and a total absolution for those who died in battle finds no foundation in Augustinian just war tenets nor would they be authenticated by incorporation into the tenets of later just war theorists. The slaughter of noncombatants for belonging to another faith (although the defacto crusader principle of discrimination between Christians and non-Christians was not always honored anyway) also finds no basis in writings of Augustus. Crimes against civilians was specifically a concern of later just war theorists writing in response to the sixteenth century Amerindian genocide. In fact, Augustine discounted the entire *ius ad bellum* Cluniac rationale of Urban II, the protection religious pilgrims. Augustine, like the early Greek Church, considered the act of pilgrimage to be of little importance. See Steven Runciman, *A History of the Crusades*, v. 1 (New York: Harper Torchbooks, 1964), 39-40, 86. 107, and 108-109.
of the Roman Catholic Church during its second millennium, admitted to only expanding on principles already found in Augustine.\textsuperscript{34}

Just as in the case of the initiatives following international community’s lack of response to the genocides in 1994 in Rwanda and earlier in Nazi occupied Europe, most major humanitarian initiatives are responses to historic humanitarian disasters. Such was the case for the later just war theorists who responded to the failure of European empires to uphold Augustinian ethics in their conquest and subsequent genocidal actions against Amerindian populations. The Debate of Valladolid in 1550 between the Dominican Bishop of Chiapas, Bartolomé de Las Cases, and the Aristotelian scholar Ginès de Sepúlveda marks the watershed between early and late just war theory. Based on his claim of the natural superiority of Christian Europeans over the pagan Amerindians, Sepúlveda argued that the European conquest was just. Las Cases countered with his famous "Aristotle, farewell" response:

\begin{quote}
\textit{The natural laws and rules and rights of men are common to all nations, Christian and gentile, and whatever their sect, law, state, color and condition, without any difference.}\textsuperscript{35}
\end{quote}

Continuing Las Cases' defense of Amerindian populations, a fellow Dominican, Francisco de Vitoria (1480-1520), and a Jesuit, Francisco Suarez (1548-1617), placed the \textit{jus in bello} criteria of proportionality and discrimination at the center of their writings.\textsuperscript{36} Vitoria, in his \textit{On the Law of War}, associated the attribution of innocence to noncombatants for the first time. Even so, he does not provide them an absolute

\textsuperscript{34} Thomas Aquinas, \textit{Summa theologiae}, II-II.


\textsuperscript{36} Regan, \textit{Just War}, 17-18.
dispensation against the effects of warfare, even allowing innocents to be "enslaved as long as it is not "allowed to go beyond the limits which the necessities of warfare demands." \textsuperscript{37}

The major differences between early and later just war theory is one of emphasis. Just as nothing of Augustine is left out of Vitoria, nothing in Vitoria directly contradicts Augustine. As stated by Father Hehir S.J., "...the logic of the argument from Augustine through Vitoria, Michael Walzer and Paul Ramsey has been the same." \textsuperscript{38} This is primarily the result that each of the just war doctrines components parts suggests the rest of the doctrine.

**Just War Doctrine and Post-Westphalian Legalism**

With rise of the Spanish School of International Law that included Vitoria, Suarez, and Hugo Grotius, the concept of the natural law was reintroduced into just war doctrine. Natural law was added to just war principles without replacing them. The major innovation of natural law theory was that it placed its emphasis of the statist conception of law over the more ethical conception of justice. Although Aquinas is principally known as the father of modern natural law theory and for introducing the ideas of Aristotle in scholastic philosophy, he did not apply either to the concept of just war. Natural law was incorporated into just war theory by his disciple Francisco Vitoria. \textsuperscript{39} Aquinas divided all law into divine or eternal law or *lex divina*, natural law or

\textsuperscript{37} Francisco de Vitoria, *On the Law of War*, 3, 3-4, v. 43. All citations from the works of Vitoria are from *Vitoria, Political Writings*, eds. Anthony Pagden and Jeremy Lawrence (Cambridge: Cambridge University Press, 2001), 319.

\textsuperscript{38} Bryan J. Hehir S.J. “Kosovo, A War of Values and the Values of War” in *America*, v. 180 (May 15, 1999), 17, 7.

\textsuperscript{39} Vitoria, *On the Law of War*, concl, v. 60.
ius naturae, the law of nations or ius gentium, and positive law or lex humana. According to Aquinas, natural law is a rational appreciation of eternal law by human beings.\(^{40}\)

Natural Law was an opportune instrument for theorists responding to the failure of Christian Europeans to apply humanitarian norms in warfare with those who did not share their creed as was clearly demonstrated in both the conquest of the Americas and the Wars of Religion between Catholic and Protestant states culminating its bloodiest chapter, the Thirty Years War (1618-1648). This lack of reciprocity by Europeans in applying humanitarian norms to their enemies of alien cultures and religions finds no bases in Augustine's actual teachings on war. Rather, it was established as precedent during the Crusades and found continued expression in the conduct of the Christian conquest of the Iberian Peninsula, the Protestant English conquest of Catholic Ireland, the destruction of the indigenous populations of the Americas, and, finally, the military and civil violence of the Reformation and Counter-Reformation.\(^{41}\)

In the seventeenth century, Hugo Grotius (1583-1645), a Protestant who advocated religious toleration, in his *On the Law of War and Peace* attempted to secularize just war doctrine utilizing natural law theory. In addition to accepting the claims of Vitoria that the jurisdiction of natural law was universal, he added three major innovations: the relations of states could be judged as if they were individuals; crimes by nations can be addressed the same way as individual crimes; and the reciprocity of malice among nations must be replaced by a reciprocity of trust.\(^{42}\)

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\(^{40}\) Aquinas, *Summa theologiae* I-II. Grotius later combined the law of nations into positive law leaving the division of law into the categories: *lex divina, lex naturalis, and lex humana*. See Grotius in the "Prolegomena" to *De Jure Belli ac Pacis*.

\(^{41}\) In reference to Augustine application of just war criteria to non-Christians, see note 37.

\(^{42}\) Two authors that utilized these four principles to characterize Grotius' contribution to the laws of warfare include Robert A. Kahn, "The Law of Nations and the Conduct of War in the Early Times of the Standing
Grotius' optimistic view of the human condition contrasts with both Augustinian human realism and the political realism of Grotius' contemporary, Thomas Hobbes (1588-1679). Hobbes' infamous work, *Leviathan*, comprised a counter to optimistic premises of Grotian natural law that continues to be posited by legal positivists and political realists to the present. As a result of viewing war -- rather than God's or man's reason -- as the true basis of natural law that results in a human existence where "life is solitary, poor, nasty, brutish, and short," Hobbes preached an absolute preference for peace based an absolute deference to will of a sovereign ruler of a nation state. According to Hobbes, human law is simply a authoritative enactment based upon the "coercive power, to compel equally to the performance" of obligations by individuals to a sovereign who does not in turn answer to other sovereigns, their subjects, or any universal law(s) ascribed to a higher power.

For all their differences, both Grotius and Hobbes influenced and were influenced by the Westphalian statist centered virtues of non-intervention in interstate affairs and non-interference. Writing primarily for statesmen rather than for soldiers, Grotius and Hobbes took different aspects inherent in Augustinian just war theory: justice, in case of the former, and a realistic view of human nature in the later. Successor theorists in the Westphalian tradition such as Cornelius van Bynkershoek (1673-1743), Emmeric de Vattel (1714-1767), and Georg Friedrich von Martins (1756-1821), in various
combinations, blended the natural law concepts of Grotius with the legal positivism and political realism of Hobbes while maintaining the statism of both.  

Grotius is distinct from Hobbes in that he posited a universal maxim for humanitarian norms that would be binding on states regardless of their religious or ideological leaning. It is ironic that the modern concept of natural law, originating partly as a device to deal with European’s failure to act on the basis on humanitarian reciprocity in dealing with populations that they considered alien, is used contemporaneously to justify lack of action by western powers in dealing with humanitarian conflicts, to include non-interference in genocides, in non-western nations. This was exemplified in the 1990s when the western statist emphasis non-interference in the internal affairs of sovereign states was cited most often in reference to humanitarian interventions in nations whose civilization norms could be portrayed not sharing western legalist traditions. Anticipating the contemporary debate on whether universal human rights norms are based on culturally specific western discourse on individual rights vis-à-vis norms emphasizing social obligations associated with many non-western cultures, the universality of the Grotian emphasis on passive legalisms is certainly debatable. In the context of understandable distrust of the religious sanctions so evident in the bloody conflicts of his time, Grotius sought a secular universal norm that would transcend the religious disputes of his time. Grotius utilized the passive injunction of the pagan Roman Emperor Septimius Severus (146-211), “Do not to another what you do not wish to be done to you” rather than the affirmative injunction of the golden rule found in Matthew 7-12,

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46 Kahn, "Law of Nations" 90-100.
“Always treat others as you would like them to treat you.”

In contrast to religiously derived affirmative obligations placed upon combatants in Augustinian just war doctrine, Grotius’ categorical maxim is a passive proscription of actions that cause harm to others, a passivity that would become idiosyncratic to the western legalistic approach to human rights.

In 1758, the Swiss scholar, Emerich de Vattel, published his encyclopedic Droit des gens (1758; tr. Law of Nations, 1760). Vattel emphasized concepts that were directly oppositional to those posited by Augustinian just war doctrine: the concepts of neutrality and of voluntary state action. Neutrality is belief that a state or institution can maintain an unprejudiced relationship to all parties to the conflict. His concept of the “voluntary law of nations” left the final decision on whether to apply humanitarian norms at the discretion of states whose sovereignty Vattel considered absolute.

This Grotian natural law tradition of passive obligations reached its apex in the ‘categorical imperative’ of the eighteenth century German idealist philosopher Immanuel Kant (1724-1804): “Act always in such a manner that the immediate motive or maxim of thy will may become a universal rule in an obligatory legislation for all intelligent beings.”

Rather than comprising a universal norm shared across time and space, the passivity of ethical imperatives of both Kant and Grotius have been characterized as

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49 As quoted by Lieber, Political Ethics, 56.
unique to modern European philosophical and religious thought. In contrast, just war doctrine is based on an affirmative obligation for the care and protection of others acknowledged in various forms by most of the major world religions. Additionally, specific humanitarian norms placed upon combatants as individuals, similar to those articulated by Augustine, are also found in the scriptural and classical ethical codes of almost every major world culture. While the respective weights placed on *ius ad bellum* versus *jus in bello* vary from society to society, these two basic components of the early just war doctrine are not unique to Augustine, Christianity, or the West. However, the western emphasis on the *ius ad bellum* is certainly in part due to greater interest of the post-Westphalian theorists, whether natural law or positivists, in the actions of rulers and statesmen who initiate conflicts over the actions of soldiers who conduct them. By contrast, Islamic law stresses the conduct of war and the mitigation of its “harmful consequences" rather than the just or unjust causes of wars; additionally, many Asian and African religious and ethical codes also emphasize *jus in bello* ethics in the conduct of war.

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50 This was the position of a critic of both Kant’s of Grotius’ ethics, the nineteenth century German philosopher, Arthur Schopenhauer who countered with universal ethic basic the natural foundation of human interconnectedness. As the foremost advocate integrating ancient Indian and modern philosophy, he posited what he considered a truly universal ethic which mandated an affirmative intervention in the affairs as found in the globally shared teaching of Vedic Hinduism, Buddhism, and early Christianity. Schopenhauer tried to further universalize Kant’s passive imperative of *Neminem laede* (Injure no one) into a affirmative imperative of *Neminem laude immo omnes, quantum potes, iava* (Injure no one, on the contrary, help everyone as much as you can). See On the Basis of Morality, 70.

51 For just war elements in Islamic sources, see Said El-Dakkak, “International Humanitarian Law Lies Between the Islamic Concept and Positive International Law” *International Review of the Red Cross* (1990) p. 101-116. For Buddhist sources: see Rockwood, “Apology of a Buddhist Soldier,” 70-77. Other non-western sources -- such as Hindu texts such as the Mahabharat and Ramaajan, the ethical guidelines of the Hindu Kshatria warrior caste, Sun Tzu’s Chinese classic *The Art of War*, and several African sacred traditions place more on the conduct of war and the mitigation of its "harmful consequences" rather than the just or unjust causes of wars. A review of the 1988 - 1994 volumes of *International Review of the Red Cross* on the international origins of humanitarian law reveals that the emphasis on *ad bellum* is not a universal characteristic of the discussion of the morality and the ethics of violence in war. See especially Professor L. R. Penna’s "Written and Customary Provision Relating to the Conduct of Hostilities and Treatment of Victims of Armed Conflict in Ancient India," (1989) and Mutoy Mubiala’s "African States and the Promotion of Humanitarian Principles" (1989).
In the west, war is a political action of the state. From Aristotle to Lieber, the intellectual analysis of warfare is usually related to the conception of the state holds in the worldview of the analyst. Georg Fredrich Hegel, the eminent statist philosopher of the Nineteenth Century, considered the state as a godlike manifestation of the ethical force of history. Lieber, in his *Political Ethics*, returned to a view of the state as a living or organic institution in that it is composed of living human beings that was shared by Augustine. For both Lieber and Augustine, the existence of a state always involves a certain level of societal consensus on moral and ideological principles that influence the means a given state utilizes to achieve it ends, including war. Considering this shared instrumentalist understanding of the nature of the state and their antipathy to anti-Aristotelian views on ethics – especially on slavery, the theoretical congruence on normative principles in warfare between Lieber and Augustine -- although writing a millennium apart -- is not so surprising. 

The perennial debate between proponents of natural law and legal positivism has not only polarized the discussion of humanitarian norms in war over the last three centuries, it underpins the current debate over the universality of human rights in general. The Westphalian emphasis on law over justice plays into the hands of the advocates of Western exceptionalism who emphasize the West versus East dichotomies to include the western emphasis on (1) individual rights over communitarian obligations and (2)

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52 Hegel’s defined the state as the “concrete manifestation of the “ethical whole” and the “essential being, the unity of the subjective will and the universal.” See *Lectures on the Philosophy of World History*, trans. H.B. Nisbet (Cambridge: Cambridge University Press, 1975; reprint 1984), 93.

53 For Augustine and other classical writers, the basic political unity was the city. “The source of blessedness is not one thing for a human being and another for a city: a city is indeed nothing other than a like-minded mass of human beings.” See Augustine to Macedonis, Letter 155. For Lieber, the state is a society composed of those “who have the same interest and strive unitedly for it.” See *Political Ethics*, 147.
political and civil rights over social, cultural, and economic rights. Critics of the concept of universal norms, such as Samuel P. Huntington, have claimed that the concept of natural law, as one of the unique components of "the rule of law," is one of the "distinguishing characteristics of Western society" and that to apply it to other civilizations is a "universalist pretension." This East-West dichotomy in human rights norms is a false one. Augustinian just war doctrine, in that it is free of either form of Western legalism (either natural or positive) and its emphasis on obligations rather than rights is far more universal than the political legacy of Europe's Westphalian system.

One does not have to look to other cultures and times to find alternatives to Westphalian legalism that follow the basic assumptions of Augustinian just war doctrine. The Protestant theologian Reinhold Niebuhr also argued in favor of Augustinian realism over natural law. Associating the Aristotelian need to find a historical order that conforms to nature, a need that always is compromised by the forces of self-interest, Niebuhr maintained that the "supposed sanctities of the law" are always tainted by ideology. Although he was considered the spiritual father of Cold War era political realism, he also differentiated his realism from the vulgar form of political realism of those who "see only their own interest and failing thereby to do justice to their interest where they are involved in the with the interest of others." Although usually associated

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56 Niebuhr, "Augustine's Political Realism" 132, 134. Niebuhr reached "conclusions about the propriety of war not substantially different from those of traditional just war theorists." See Regan, Just War, 18.
with the views of Catholic theologians, just war doctrine finds other non-Catholic parallels in the teachings on ethics of violence and war as found —for example— in the teaching of such non-Catholic forums as the National Council of Churches.\(^\text{57}\)

**Just War Criteria and General Order No. 100**

Richard R. Baxter, who was the author of the current successor document of *General Orders No. 100*, the current Department of Army, Field Manual 27-1, *The Law of Armed Conflict*,\(^\text{58}\) stated that the Lieber Code was "little more than an amplification of the ideas" Lieber expressed twenty-five years before.\(^\text{59}\) In his 1838-39 *Manual of Political Ethics*, Lieber succinctly summarized traditional just war doctrine:

A war, to be justified, must be undertaken on just grounds—that is, to repel or avert wrongful force, or to establish a right; must be the last resort—that is, after all other means of reparation are unavailable or have miscarried; it must be necessary—that is, the evil to be addressed should be a great one; and it must be wise—that is, there must be reasonable prospect of obtaining reparation, or the averting of the evil, and the acquiescence in the evil must be greater than the evils of the contest.\(^\text{60}\)

Even though Lieber, as lay leader of Anglican Church in America, would certainly have been aware of Augustine's writing he probably did not draw directly on Augustine in either his *Manual of Political Ethics* or in drafting *General Order No. 100*. However, his choice of international law sources indicates the aspects of the laws of war he accepted and those he did not. He was most critical of Vattel; he ignored Hobbes, and

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\(^\text{57}\) For just war doctrine and Protestant denominations, see Regan, *Just War* 19.


\(^\text{59}\) Baxter, *The International Review of the Red Cross* (April, 1963), n. 25, 176.

\(^\text{60}\) Lieber, *Political Ethics*, 446.
he acknowledged Kant. Although the term 'just war' does not appear in Lieber's code, the substance of its 147 articles falls substantially within the eight traditional just war principles. In that it avoids the natural law tenets of late just war theorists and post-Westphalian legalists, the articles of General Order No. 100 are more evocative of the affirmative obligations of human realism of early or Augustinian just war doctrine.

**Just Cause**

The Augustinian requirement that the war must be a response to injustice or aggression is not modified by the existence of the modern territorial state. While General Order No. 100 posits that the object of war lies beyond war in the realm of the political, the political end must be just:

**Article 30:** Ever since the formation and coexistence of modern nations, and ever since wars have become great national wars, as come to be acknowledged not for its own end, but means to attain great ends of state, or to consist in defense against wrong; and no conventional restriction of the modes adapted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions on principles of justice, faith, and honor.

**Article 68:** Modern wars are not internecine wars, in which the killing of the enemy is the object. The destruction of the enemy in modern, and, indeed, modern war itself, are means to obtain that object of the belligerent which lies beyond the war.

Like Grotius, Lieber goes beyond Augustine's requirement that a just peace is war's object in claiming that peace is the normal condition of mankind and "war is the exception." However, there are some injustices that cannot be tolerated either for

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61 Works cited by Lieber include Halleck's *International Law*, as well as Grotius, Bymkershoek, Pufendorf, von Martins amongst many others less known authors on the Laws of War. See Baxter, *International Review of the Red Cross*, no. 26, 224.

62 "Peace is their normal condition, war is the exception. The ultimate object of all modern wars is a renew state of peace," *General Order No. 100*, Article 29. Grotius wrote: …war is undertaken for the sake of peace," *De Jure Belli ac Pacis*, bk. i, chap. 1.
raison d' état or tolerated in the name of peace; one such injustice, for Lieber, was slavery. Lieber must have known that his code's claim that "The law of nature and nations has never acknowledged it (slavery)" contradicted natural law theorists of both the Spanish School of International Law, such as Vitoria, and the notion of natural law posited by Aristotle. As a resident of antebellum South Carolina for two decades, his code's declaratory statement on the institution of slavery bypassed the contemporary debate about the character of slavery. Lieber was well acquainted with the arguments made by his contemporary intellectual rival, John C. Calhoun, to defend the institution on the basis of Aristotelian natural law. Although -- as evidenced by his earlier works and lectures -- no one was better qualified to discuss the precedence, legal or otherwise, on the major causative issue of the American Civil War, General Order No. 100 simply established the 'just cause' of the Union cause, the end of the slave system in the South, as self-evident.

In Lieber's Political Ethics he wrote, "the state is an institution for a distinct moral end." In the context of both his life's work and his code's reference to the American Civil War, the "great ends of state" are never morally neutral.

Competent Authority

Grotius, like Hobbes, spoke of authority in absolute terms of a sovereign power, whose independent actions are not subject to any other power. Lieber's writings on war are dominated by a pre-Westphalian emphasis on those who execute authority rather than

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63 For Vitoria's defense of limited slavery, see note 47. For Aristotle's unlimited defense of slavery, see note 34.

64 Lieber, Political Ethics, 81.

the rights and prerogatives of rulers who were more than likely to be the absolute monarchs Lieber so despised. Lieber, like Augustine, realized soldiers often err in correctly determining who has competent authority over them, the result being a major proximate cause of the wars of their times. Much of Augustine’s views on the military profession are derived from his correspondence with Boniface, a renegade Roman general, in which Augustine counseled to return to a proper allegiance with Rome.  

Lieber watched as thousands of soldiers followed key American military leaders in taking up arms against the United States by bestowing their allegiance to an authority – the Confederacy -- whose competence Lieber challenged. Tragically for Lieber, one of the soldiers who made this mistake in judgment was his own son who died in the great historical referendum on constitutional allegiance known as the American Civil War. One of the major acts of the wartime U.S. Congress was to ensure that such a bloody referendum would never be repeated. During the course of the war, legislation was passed that clearly defined and prioritized the criteria that soldiers must utilize in determining proper competent authority. The oath of office that soldiers take upon entering military service -- pledging allegiance to the Constitution, the President, and their appointed military leadership, in that precise order -- remains in use to this day.  

For Augustine, soldiers were related to the civil judges of his day in that they acted, not as individuals, but upon authority. Individually, as a flawed human being, a judge or soldier can at best be an imperfect instrument of justice. Although it is never a

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66 Augustine wrote to the renegade Boniface that “if Roman Empire provides you with goods things, even if they are ephemeral and earthly (for it is an earthly, not an heavenly, institution and can only provide what is in its power); if then it has bestowed good things upon you, do not return evil for good.” See Augustine to Boniface, Letter 220 (8).

personal act, the unavoidable exercise of the coercive prerogatives of government is always contaminated by personal hypocrisy. Therefore, according to Augustine, all officials are faced with the incongruity of exercising competent, but not credible, authority. 68 Although their official status made soldiers and judges distinct from other human beings, Augustine admonished his fellow civilians that they "must not think that no one who serves as a soldier, using arms for warfare, can be acceptable to God."69

For both Lieber and Augustine, soldiers differed from murderers not merely because their acts were official. Official acts also had to be competent; specifically, they had to be competent in integrating moral and ethical concerns of justice into a professional field of expertise. Lieber went further than Augustine in approving a special sanction for those under arms for acts that would be criminal or sinful if based on personal motivation; he held that soldiers -- owing to the trust bestowed upon them -- must adhere to even higher ethical and moral standards than civilians. In article four, discussing martial law, Lieber posited that the "principles of justice, honor, and humanity-virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.” For both Lieber and Augustine, soldiers were certainly not passive beings simply following someone else’s orders; rather, a soldier’s competence should always be the result of an active and properly understood obligation.

68 See Augustine, Letter to Macedonis (a Catholic official), Letter 153. Augustine’s political writing are peppered with supplications to Christians officials to meditate on their own imperfection in context of their judgment of others by constant referrals to the Gospel passage in which Jesus cautions the would be executioners of the woman caught in adultery: ‘If any of you are without sin, let him be the first to cast a stone at her.’ See Augustine, Commentary on the gospel of John, 33, and On the feast of St. Lawrence, Sermon 302, (7).

69 Augustine to Boniface, Letter 189 (4)
By Lieber and Augustine placing military duties in an *affirmative character* (italics mine) which compels action rather than inaction, the soldier -- as a tool of the state -- is guilty of a “double injustice” if the inaction leads to the harm of those he or she is bound to defend. Therefore, when soldiers commit crimes in the direct performance of their military duties, they are always crimes of omission rather than commission. Such crimes of omission are more grievous than crimes of commission.\(^{70}\)

**Comparative Justice**

The most problematic aspect of the legalistic approach to the establishment of enforceable humanitarian norms in warfare is that of the application of guilt to collective entities. Augustinian just war doctrine does not, as some have claimed, posit that only one combatant can lay total claim to virtuous intent or conduct.\(^{71}\) Virtue and guilt, as determined by imperfect human judges, are imperfectly determined. Unlike Vattel, who argued that the justice of opposing combatants are to "be considered as two individuals disputing on the truth of a proposition; and it is impossible that two contrary sentiments should be true at the same time," neither the Augustine nor Lieber held to either a simplistic or absolutist attribution of justice between the opposing sides of a conflict.\(^{72}\)

On June 1, 498, the pagan citizens of the North African own of Calama engaged in a anti-Christian riot that led to the loss of life. Nectarius, a distinguished pagan Roman official wrote to Augustine asking him to intercede for his fellow townsmen who he

\(^{70}\) Arthur Schopenhauer wrote that “there are actions whose mere *omission* is a wrong, and they are called duties.” He coined the term *doppelte Ungerechtigkeit* or “double injustice” to describe the “non-fulfillment of a obligation” that leads to the injury of another person. See *On the Basis of Morality*, 156.


claimed were not responsible for the act. Augustine counseled his petitioner that he was doing his fellow citizens a disservice by not acknowledging that there are many levels in which individuals are guilty for collective acts and that it might not be possible to “distinguish the innocent from the guilty out of the whole city, but only the less guilty from the more guilty.” Augustine provided three levels of individual complicity in collective acts: those who “lacked the offer to help” to the victims out of fear “were guilty of only a minor sin;” those who “actually committed them are implicated more deeply; and those who instigated them most deeply of all.”

Like Augustine, Lieber did not hold that a just cause should manifest itself as a crusade against evildoers (italics mine) or against collective entities comprised of individuals who were equally guilty for the injustices perpetrated by the collective and, therefore, liable to uniform treatment by the opposing forces. In his code, no loyal citizen of the Confederacy was an innocent entitled to be totally spared from the consequences of the war. General Order No. 100 places all enemy citizens into two major categories: unarmed citizens and armed citizens. The former subdivided further into seven subdivisions, each with separate protections accorded to their life and property:

1. Private Citizens. Noncombatants serving in no official capacity are protected from being “murdered, enslaved, or carried off to distant parts.” (article 22)

2. Magistrates and Civil Officers. Commanding generals are allowed to force oaths of temporary allegiance or to expel those who refuse. (article 23)

3. Slaves. Those formally held in bondage are “immediately entitled to the rights and privileges of a freeman.” (Article 43)

4. Noncombatants Accompanying an Army. Commanders are permitted to confine and process as prisoners of war. (Article 50)

73 Augustine to Nectarius, Letter 91 (9).

74 General Order No. 100, art. 21.
5. Heads of State and Diplomatic Agents. Unless previously granted safe passage, they are to be treated as prisoners of war. (Article 50)

6. Spies. All espionage is punishable by death. (Article 88)

7. Guides. Their treatment varies from no punishment for those forced into service to death for those intentionally misleading a force. (Articles 94-97)

*General Order No. 100* subdivides enemy combatants into nineteen distinct categories, each entailing specific treatment upon capture:

1. Prisoners of War. Soldiers taken prisoner, who have committed no otherwise unlawful acts, are not subject to “punishment for being a public enemy, nor is any revenge (to be) wrecked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilations, death, or any other barbarity.” (Article 56)

2. Deserters. Former soldiers of the U.S. Army, taken in the service of the Confederacy, are to be put to death. (Article 48)

3. Chaplains and Medical Staff. May be treated as prisoners of war either by a commander’s determination of necessity or their own voluntary request. (Article 53)

4. Hostages. Although rarely used in modern war, they are to be treated as prisoners of war. (Article 55)

5. Criminals. Enemy soldiers who have committed crimes against their own forces or people, before being captured, can be punished by their own authorities. (Article 59)

6. Deniers of Quarter. Those have failed to give others quarter are to be denied quarter in turn. (Articles 61-62)

7. Soldiers Captured in the Uniform of Their Enemy. Like spies, such soldiers are also given no quarter. (Articles 63 & 83)

8. Outposts, sentinels, and pickets. Unless it is determined of military necessity, opportunistic firing upon their position is prohibited. (Article 69)

9. Users of Poison. Offenders are to be put to death. (Article 70)

10. Assaulters of the Injured: Offenders are to be put to death. (Article 70)
11. Escapees. While firing upon prisoners in the process of escape is permitted, the attempt is not a crime unless it is part of a general conspiracy. (Article 77)

12. Partisans. Defines them as “soldiers armed and wearing the uniform of their army,” but detached from the main body of the enemy, they are to be treated as prisoners of war. (Article 81)

13. Brigands and Pirates. Soldiers committing acts of private violence are subject to death. (Article 82)

14. Irregulars not wearing uniforms. Armed civilians or insurrectionists, who kill, steal, or destroy infrastructure or materials of the occupying are not entitles to be treated as prisoners of war. (Articles 84-85)

15. War Traitor. Non-enemy personal who provide information to the enemy become an enemy who may be punished by death. (Articles 89-91).

16. Messengers. If in uniform, they are to be treated as prisoners of war. (Article 99)

17. Bearers of a flags of truce. They are to be cautiously admitted. If admitted under false pretenses, they are to be treated as spies. (Articles 104-109)

18. Breakers of Parole. Released prisoners of war, who have violated their voluntary pledge not to engage in future acts of warfare, can be put to death upon recapture. (Article 124)

19. Officers / non-commissioned officers. They are allowed special honors and treatment. (Articles 73 & 127)

General Order No. 100, as it applied humanitarian considerations to an enemy whose legitimacy was not recognized by the United States was an exercise of comparative justice in its entirety. Even though the final article (article 157) defined the “armed or unarmed resistance by citizens of the United States against the lawful movements of their troops” as treason. Nevertheless, all enemy citizens -- whether combatants or noncombatants -- were entitled to certain norms of humanitarian treatment in spite of being expected to bear a higher burden of the war than “manifestly loyal citizens.” (Article 156).
As with Augustinian just war doctrine, the natural law association of non-combatancy with legal innocence is absent from General Order No. 100. Additionally, the sloppy attribution of collective guilt, as defined as holding individuals responsible for the collective actions of organizations or institutions by mere membership without any evidence of an individual act, is also absent.

**Right Intention**

While the justification of war is aggression or an unjust peace, for Augustine the objective of war is a just peace. “Peace ought to be what you want, war only what necessity demands.”\(^{75}\) The hackneyed phrase, “the end justifies the means,” has never been an accurate description of just war doctrine. Rather, just ends justify proportional means. Just war doctrine predates the legalist debate between naturalism and positivism; it also predates the philosophical debate between ethical normativism and ethical consequentialism. Normative, or deontological ethics, is the theory that the efficacy of moral action in reference to formal rules or norms of conduct. Consequentialist or teleological ethical theories stress that it is consequences rather than intentions that determines the correctness of any given action. Both Augustine and Lieber were seminal ethical theorists who argued that actions are only moral when both intention and result are integrated.\(^{76}\)

\(^{75}\) Augustine to Boniface, Letter 189 (6)

\(^{76}\) For both Augustine and Lieber, the basis for ethical action is a selfless love (Augustine, see note 31) or the possession of “sympathy or fellow feelings” for others (Lieber, see Political Ethics, 20) that must be expressed by a constructive engagement with the world as it is rather than as it ought to be. While Lieber admired the universal tone of Kant’s categorical imperative, he dismissed intentionalism, passivity, and otherworldliness of Kant’s ethics when he wrote "Laws and institutions are nothing more than dead forms of words, unless they operate." See Lieber, Political Ethics, 78.
Echoing Augustine, Lieber argued, “wars are not internecine wars, in which the destruction of the enemy is the object;” rather, war is a “means to obtain that object of the belligerent which lies beyond the war.” (Article 68) A just war entered into by competent authority for a just cause can still be fought with unjust intent by either the leadership or the actual participants of a conflict. Soldiers cannot see into the hearts of their leaders. Sometimes, that may be fortunate. However, soldiers can never categorically defer their consciences to higher authority. Except for criminal behavior, a soldiers acts on his (or her) intentions when he is “armed by a sovereign government and takes a soldier’s oath of fidelity, he (then) is a belligerent, his killing, wounding, or other warlike acts are not individual crimes or offenses.” (Article 57) Even if the decision for the soldier to enlist is often coerced, soldiers are partially responsible for justice or injustice of the cause for which they fight at the time they first don their uniforms. Just as the electorate is accountable for the future actions of politicians they supported at the time they dropped their ballots, soldiers are responsible, as far as their understanding and knowledge allows, for historical justice or injustice of the military institution they are joining. Only when soldiers (or the electorate) obtain new information indicating criminality on the part of those whose authority they have previously validated, can they claim to be faced with a new ethical decision.  

The famous case of Yolanda Huet-Vaughn, a U.S. Army Reserve captain who served eight months in prison for refusing to serve in the gulf war, involved a soldier who claimed to refuse to be deployed on the basis of refusing to serve in an unjust war. Her critics emphasized that she accepted a commission and serving actively in the reserves during a period in which the U.S. military was involved in similar operations, albeit on a lesser scale. The Army’s Court of Military Review finally overturned her conviction, ruling that she was denied the opportunity at her trial to present evidence that the gulf war was specifically illegal and immoral. See Colman McCarthy, “Anti-War Doctor Under Fire” in The Washington Post (November 30, 1993), Z12.
stated political and ethical ends of the war. Unfortunately, history is replete with examples of wars lost because national and military leaders who have betrayed this trust have employed military means incongruent with the political and moral ends sought.

**Last Resort**

Even when necessity demands it, war is a tragedy to be avoided at all costs, save justice. Augustine still demanded that no matter how just the cause, those in positions of authority must begin by “bewailing the necessity he is under of waging wars, even just wars.” Augustine naturally argued that it is better to achieve justice without recourse to war. “However, greater glory is still merited by not killing men with swords, but war with words, and acquiring or achieving peace not through war but through peace itself.” Augustine reflected the position found in Sun Tzu’s Chinese classic, written down nine hundred years before: “To subdue the enemy without fighting is the acme of skill.”

However, if a resort to war is justified, it must be successful. Just as all states do not exist in a Westphalian equality, all wars are not equal. If the preferred level of war is no war at all, it follows that larger wars require more justification than more limited wars.

It is clear that the Confederacy, with less material and human resources, would have benefited if both sides resorted to a more “limited” war. The Civil War was fought under the conflicting legacy of two previous wars: the American War of Independence and the Wars of the French Revolution. At the outbreak of the Civil War, the Confederacy styled itself as fighting the second phase of the American War of

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78 Ibid., xix, 7.

79 *Augustine to Darius*, Letter 229 (2).

Independence; the United States styled itself as fighting a limited statist, post-Westphalian war for the preservation of the Union. Unlike the American Revolution, the French Revolution introduced not only warfare that was revolutionary in its ends, but in the level of warfare.

*General Order No. 100* was a testament to the new level of war that the United States government in 1863 was going to resort to, a revolutionary level of war. For that reason, Lieber’s code was categorically rejected by the Confederacy. In limited wars, as in the case of the campaigns of King Frederick the Great of Prussia, the genius of a general utilizing maneuver could win out over an enemy with greater resources or, in the case of wars for independence, belligerent forces could press the war past the threshold of cost an enemy was willing to bear. Unfortunately for the South, no amount of battlefield genius or even the greater human losses suffered by the other side would overcome the political and moral determination of the side with greater material and human resources to resort to more unlimited war.  

In his June 24, 1863 letter to Washington rejecting *General Order No. 100*, Confederate Secretary of War James A. Seddon claimed Lieber's Code was an opportunistic justification by the United States for its resorting to a level and conduct of war he found unacceptable. Seddon could not have failed to appreciate the timing of its release of *General Order No. 100* (starting in May 1863), just as Lincoln was issuing a plan for the southern reconstruction based on the end of slavery and as U.S. Grant was deploying for his forces for his victory at Vicksburg (May 19-July 4) leading to the

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81 In future wars, the United States Army would continue to engage in wars with the advantage of greater material resources than its adversaries, but not always with the moral determination to accept the costs that resorting to war entails. That was not the case for the United States Army in 1863 as it finally started accepting the costs required to win of a war of military attrition.
ascendancy of a commanding general who was willing to expend a revolutionary level of casualties to achieve a revolutionary end. Simultaneously, Robert E. Lee was engaged in his final attempt to win the war by maneuver, resulting in his defeat at Gettysburg (July 1-4) marking the demise of the Confederate effort to win a limited war of maneuver in the face of a conflict that was rapidly becoming a revolutionary war of attrition.\textsuperscript{82}

**Probability of Success**

The central concept of *General Order No. 100* is the doctrine of an affirmative military responsibility based upon, rather than in contradiction with, military necessity. Like Lieber, Augustine understood that a just war cannot bring about justice in defeat and only “when victory goes to the side that had a juster cause (is it) surely a matter of human rejoicing, and the peace is one to be welcomed.”\textsuperscript{83} Augustine also wrote, “Therefore it ought to be necessity, and not your will, that destroys the enemy who is fighting you.”\textsuperscript{84} Nothing is more obstructive to the establishment of a just peace than indecisive or ineffective military action. The most unjust outcome in war -- of which there are numerous contemporary examples -- is one in which neither combatant attains, or is allowed to attain, success.

The doctrine of military necessity is the major conceptual link between Lieber's code and Augustinian just war doctrine. For Lieber, military necessity consisted of two major components: (1) that “no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but (2) the law of war imposes many limitations and

\textsuperscript{82} Letter from James A. Seddon, to Robert Ould, 24 June, 1863. See note 22.


\textsuperscript{84} Augustine to Boniface, Letter 189 (4).
restrictions on principles of justice, faith, and honor.” (article 30). Articles 14-16 are the most cited articles of the code and consist of Lieber's attempt to clarify these two seemingly contradictory themes:

Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war. (article 14)

Military necessity admits of all destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of particular danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God. (article 15)

Military necessity does not admit of cruelty – this is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor for torture to extort confessions. It does not admit of the use of poison in any way, nor wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult. (Article 16).

Proportionality

Even success of a just war does not result in nirvana, only a more just peace. The justness of the peace sought must compensate for the suffering created by the decision to resort to warfare. Augustine wrote that faith must be kept not only with the “friend, for whose sake one is fighting, but “even with an enemy against whom one is waging war.”

85 Ibid., (6).
That faith is violated when the means to attain an end are not commensurate to the end that is sought. Proportionality is impossible in the absence of a recognition of reciprocity in value of life and dignity of the human populations on each side that are affected by the conflict. Proportionality is based upon the humanity of the enemy as being equal to one’s own humanity.

Advances in technology always challenge proportionality. The longevity of General Order No. 100 as official doctrine was likely the result of Lieber’s avoidance of issues related to technology. For Lieber, what is proportional is what is simply what is necessary. “Unnecessary or revengeful destruction of life is not lawful.” (Article 68).

During the Cold War, discussions as to whether the use of nuclear weapons can ever be considered proportional dominated discussions among modern just war theorists. Authoritative decisions regarding proportionality and the utilization of new technologies, at least in theoretically democratic states, are made by civilians. No matter how much weight civilian leaders give to the opinion of military advisors, the decision of the Allies to firebomb cities and resort to nuclear warfare during the Second World War was legally and constitutionally the responsibility of civilians.

**Discrimination**

Out of all the criteria associated with just war doctrine, it is a soldier’s particular function to discriminate between the combatant and the noncombatant. The term

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1 Lieber’s doctrinal longevity is also related to his avoidance of maneuver. Lieber's purpose, in spite of his direct experience of war, was not to provide general of regular forces with tactical and strategic principles to defeat other regular forces in set battles. Although he intended his code to be applicable in all In fact, his code emphasized the very aspects that regular force commanders have always tried to avoid and never have and never will succeed in avoiding, costabulalary function and the handling of irregular forces.

2 See Walzer, *Just and Unjust Wars*, 251-283; O’Brien, “The Challenge of War: A Christian Realist Perspective” in *Just War Theory*, 169-196; Regan, *Just War*, 100-121; and Ramsey, *The Just War*, 211-258. It is ironic that, now that the necessity for such means has diminished, the issue of proportionality and nuclear as all but ceased in being a central concern.
“noncombatant” refers not only to civilians, but also to disarmed combatants and other captives. Writing to a soldier, Augustine wrote, “And just as you use force against the rebel or opponent, so you ought to use mercy towards the defeated or the captive.”

However, just as there is nothing in Augustine or Lieber to attribute innocence to noncombatants and guilt to combatants, there is also no categorical prohibition against actions involving ‘unintentional’ noncombatant casualties. As in the case of military necessity, discrimination – for Lieber – consists of two distinct components.

The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war. (article 21).

Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit. (article 22)

For Lieber, the combatant / noncombatant distinction is a relative one based on a degree of participation of an individual in a war effort. Although the determination of relativity is accomplished by referring to other traditional just war criteria -- specifically comparative justice and proportionality, the intentional, non-incidental murder of a noncombatant is always a crime. The one exception to this rule for Lieber was a limited form of retaliation to be used against a “reckless enemy” who leaves to “his opponent no other means of securing himself against the repetition of barbarous outrage.”(article 27)

Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeed that may demand retribution. Unjust or inconsiderate retaliation removes

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88 Augustine to Boniface, Letter 189 (6).
the belligerents further and further from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine war of savages. (Article 28)

The Legacy of General Order No. 100

The most controversial aspects of Lieber's code include his liberal use of the death penalty for offenses proscribed by the code and his failure to categorically reject the right of retaliation and to deny quarter in cases where quarter is not reciprocated. 89 While the right to quarter was unequivocally standardized in the Hague Conventions, retaliation was not completely outlawed from the law and usages of war until the Geneva Conventions of 1949. Until that time, retaliation was allowed in order to ensure that humanitarian norms would be followed by each side of a conflict on the basis of reciprocity. Despite Lieber’s failure to categorically prohibit retaliation, as he did in the use of torture, the United States Army carried out no retaliatory executions of Confederate noncombatants during the war.

While modern human rights activists may take pause at Lieber’s tentative endorsement of reprisal, his categorical prohibition of the use of torture (article 16) is far in advance of some prominent contemporary civil rights activists and legal scholars as well as the behavior tolerated by the contemporary international community. 90

89 For a discussion on contemporary views of General Order No. 100 on reference to reprisals and denial a quarter, see Theodor Meron, "Francis Lieber's Code and the Principles of Humanity" in The Columbia Journal of Transnational Law (1997), v. 36. 269-274.

General Order No. 100 and International Humanitarian Law (IHL)

Only a year after Lieber’s code was promulgated, the Swiss humanitarian Jean-Henri Dunant drew upon the work of his fellow countryman, Emmeric de Vattel, to found a code based upon the concepts of neutrality and of voluntary state action. The Geneva Convention of 1964 for the Amelioration of the Conditions of the wounded and Sick in the Armies in the Field, based of a draft by Dunant, provided protection of military hospitals and a protocol for medical treatment for wounded soldiers based on reciprocity between opposing armies. Just as Lieber’s code is accepted as foundational in the development of the modern ‘laws of war’ or ‘laws of armed conflict,’ Dunant’s work and his establishment of the International Committee of the Red Cross in 1863 were pivotal to development of the modern conception known as ‘international humanitarian law’ (IHL). The contemporary usage of these terms is more reflective of the institutional affiliation, military in the case of the former and non-government organizations (NGOs) for the later, than one indicating a distinct area of expertise. However, it is possible to discern conceptual distinctions in the development of what would eventually become areas of specialization possessing so much overlapping content that they can no longer be considered independent of the other.

Unlike Lieber who wrote for soldiers, Dunant was concerned with organizing civilians to work cooperatively with military forces to mitigate unnecessary suffering. As a witness to the Battle of Solferino between French and Austrian forces on June 24, 1859, Dunant noted that neither side benefited from the suffering of wounded soldiers left unattended to die on the field. If a neutral entity could provide relief under such

circumstances, why would either side not voluntarily allow the provision of such neutral humanitarian aid? Upon this logic of neutrality and voluntarism, he established the International Committee of the Red Cross. The ICRC’s cherished ideal of neutrality has lost much of its luster following the Rwandan genocide in which the international community voluntarily chose to emphasize neutrality over humanitarianism as 800,000 noncombatants were slaughtered in plain view in 1994.92

Passive obligations easily become supplemental or secondary to obligations considered primary or affirmative. In other words, passive obligations lead to passive execution. Whether one looks at the international response to the 1994 Rwandan genocide or infamous -- but procedurally correct -- ICRC visit to the model Theresienstadt concentration camp during the Holocaust, the twentieth-century provides ample material to those who question the effectiveness of passive virtues of voluntarism and neutrality in establishing humanitarian norms.93 Dunant at least, unlike the leadership cadre of such modern human right non-government organization (NGOs) as Amnesty International and Human Rights Watch, did not look upon the profession of

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93 The ICRC continues to operate to this day under the protocol that it will only inspect confinement facilities upon invitation of national authorities. On June 23, 1944, the Schutzstaffel (SS) voluntarily allowed June 23, 1994, the neutral ICRC to inspect Theresienstadt. On September 27, 1944, Dr. Maurice Rossel, the ICRC delegate, attempted to inspect Auschwitz and was refused by its commandant. A positive effort by the ICRC to press the Third Reich would have violated its protocols. The ICRC now requires an invitation to inspect all confinement facilities within a prison system. See ICRC Action on behalf of Prisoners (Geneva: ICRC Publication, 1 Nov 1977).
arms as an adversary incapable of humanitarian concerns. Both Lieber and Dunant appealed to soldiers’ sense of military honor. For Lieber, however, humanitarian norms could not be associated with passive obligations that busy military commanders could consider supplemental or secondary to other objectives.

Just as it is clear that contemporary commentators like Howard Zinn are clearly outside of Augustinian just war tradition when attributing *absolute* (italics mine) non-combatant immunity to traditional just war teaching, it would not be fair to hold Dunant responsible for the absurdities that have been associated with his conceptual framework in the late twentieth century by those claiming to be his heirs.\(^{94}\) He would have likely found the modern notion that an armed force can claim neutrality even while holding ground on foreign territory as incomprehensible. Despite their disparate approaches to military affairs, both Lieber and Dunant recognized the benefit of engagement with the military profession in the effort to mitigate humanitarian suffering in war and the efficacy of appealing to soldiers’ sense of honor. The anti-military essentialist bias found among the leadership of such modern NGOs as Amnesty International and Human Rights Watch finds its historical base in the Vietnam War era anti-war movement rather than in the influence of Dunant and his ICRC.

The difference in content and emphasis for Lieber and Dunant underlie contrasting, although not necessarily antagonistic, approaches to the end of removing unnecessary suffering in war. The 1863 *General Orders No. 100* and the 1864 First Geneva Convention serve as foundational documents for the two major schools of

\(^{94}\) See Howard Zinn, “A Just Cause, Not a Just War,” in *The Progressive* (December 2001), v. 65, 12.
modern international humanitarian law or the law of armed conflict: the Law of the Hague and the Law of Geneva. As the inspiration for The Hague Convention of 1899 and 1907, General Order No. 100 provides a historical foundation for the affirmative limits placed on conduct of war itself associated with the Law of The Hague. Conversely, Dunant’s convention is the foundation for the more passive and voluntary protections for specific classes of individuals such as the protections afforded wounded soldiers, prisoners of war, and medical personnel traditionally associated with the Law of Geneva.  

The Andersonville Trial

The obligatory discrimination between combatants and noncombatants is the one responsibility that a combatant cannot transfer to a noncombatant. Rather than harming those they are bound by definition to inflict harm upon, soldiers commit war crimes by failing to render protection to those they are legally required to protect. While the murder of a noncombatant may be a very active and voluntary act, it is – insofar as his affirmative obligations as a soldier – an act of omission rather than an act of commission. A soldier does not only have an affirmative responsibility not to violate this most soldierly of all the just war criteria, he has an affirmative obligation to prevent other soldiers from violating it as well. General Order No. 100 in addressing cases of “wonton violence” against noncombatants, to include robbery, pillage, sacking, rape, wounding maiming, murder, posits that “A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.”(Article 44). This requirement to enforce the just war

principle of discrimination is nothing less than the historical foundation of the doctrine of
command responsibility.

Whoever intentionally inflicts additional wounds upon an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so (italics mine), shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed. (Article 71)

Telford Taylor argued that General Orders No. 100 was problematic in that it had “little to say about enforcement of the laws of war, or about the bounds of ‘superior orders’ and ‘command responsibility,’” 96 Whether or not one accepts these principles as inherent or implied in General Orders No. 100, they certainly were central in the immediate post war court-martial of Confederate Major Henry Wirz, the former Commandant of the prisoner-of-war camp at Andersonville, Georgia for conspiracy to “injure the health and destroy the lives of soldiers in the military service of the United States.” 97

During the course of the American Civil War, Henry Wirz was the only soldier tried as a war criminal for failing to adhere to the humanitarian standards contained in General Order No. 100. The simple answer of “victor’s justice” does not sufficiently address the complexity of the decision to try Wirz and not others. Union occupation policies and burnt earth tactics against Southern property and infrastructure have often and inaccurately been compared to modern war crimes. While such practices were novel at the time and condemned by the Confederacy, they were authorized by General Order No. 100 and pale in comparison to permissible actions against enemy infrastructure found

96 Taylor, see Forward to the Laws of War, xvii.

in modern norms of warfare. Despite the ludicrous claims of some apologists of the “lost cause,” there were no My Lai’s perpetrated on the population of the Confederacy during Sherman’s March or anywhere else.\textsuperscript{98} Even American historian Charles Royster's recent brutal depiction of Sherman stresses ""The actions of Sherman's men bore little resemblance to the killing of civilians in twentieth-century war. Few if any writers have contended that Sherman made those mass killings possible or necessary, that twentieth century war would have taken a different course without Sherman's example."\textsuperscript{99}

While the lack of war crimes prosecutions against United States soldiers can be explained in terms of either a lack of evidence of criminal activity or an unwillingness of a sovereign power to hold its own forces accountable for violations of the laws of war, the question why the decision was made to try Wirz for war crimes and not other senior Confederate leaders is more difficult to answer. On May 30, 1863, the Confederate Congress issued a policy allowing the execution of U.S. Army officers commanding black units. Subsequently, on August 12, 1863, Confederate Secretary of War James A. Seddon sent a letter to Lieutenant General Kirby Smith (CSA) initiating the Trans-Mississippi command policy to kill all blacks captured in uniform. Actual executions of

\textsuperscript{98} The most notorious example of falsely comparing Sherman’s March to latter war atrocities is the habeas corpus ruling by Judge Robert Elliot in a district court in Columbus Georgia in which Sherman’s march was used as an historical example to justify his ruling that U.S. Army Lieutenant William Calley should be freed from confinement for the murder, rape, sodomy, and mutilation of over 500 noncombatants at My Lai in Vietnam in 1968. See Michael Bilton and Kevin, \textit{Four Hours in My Lai} (New York: Viking Penguin, 1992), 356. While there was an unquestionable massacre against non-combatants by Federal forces during the period of the Civil War, it was not against citizens of the Confederacy. In November 29, 1864, the Sand Creek or Chivington Massacre involved a slaughter of hundreds of friendly and disarmed Cheyenne Indians in southeastern Colorado Territory by a force of 1,200 Federal militia under Colonel John M. Chivington, a local Baptist minister. Regular Army forces present at the scene refused to participate. Chivington escaped court-martial by leaving Federal service prior to military charges were prepared against him.

African-American U.S. soldiers by Confederate forces occurred on June 7, 1863 at the Battle of Milliken’s Bend (Louisiana) under General Richard Tylor (CSA), April 12, 1864, at the Fort Pillow Massacre (Tennessee) under General Nathan Bedford Forrest (CSA), on April 18, 1864, at the Poison Springs Massacre (Arkansas) under General Samuel Bell Maxey (CSA), April 17-20, 1864, during the Confederate recapture of Plymouth, N.C. under General R.F. Hoke (CSA), June 25, 1864, at the Battle of the Crater (Petersburg, Virginia) under General William Mahone (CSA), and October 2, 1864, at the Battle of Saltville, Virginia under General Felix Huston Robertson, (CSA). When the United States Army discovered that its own soldiers, those of African decent, were being systemically murdered or enslaved upon capture, it chose not to retaliate in kind. Rather, it prudently chose the option of discontinuing the practice of prisoner exchange that disfavored the interest of the manpower and labor starved Confederacy rather than implement its privilege of retaliation under Article 28 of General Order No. 100.

This breakdown of the prisoner exchange led to the creation of one of the least chivalrous realities of the Civil War: the prison conditions that took the lives of 60,194 prisoners of war, 30,218 in Confederate prison camps and 29,976 in camps run by U.S. military authorities. The claim of victor’s justice in the case of Wirz’s conviction and subsequent execution was posited by none other than former Confederate president, Jefferson Davis --originally named as a co-conspirator with Wirz on the original draft indictment and later dropped --who in a series on articles in 1890 claimed that the United

States Government was exclusively responsible for the condition at Andersonville, due to its failure to continue the prisoner exchanges, and that conditions in Confederate camps were no more inhuman than those in the north.\textsuperscript{101} The historian James McPherson, in his seminal \textit{Battle Cry of Freedom}, dismisses the often posited clam of equivalency made after the war in defense of Wirz in reference to conditions of prisoners of war held by the Confederacy and the United States by pointing to the fact that all northern prisons had provided at least some type of shelter from the elements and that the twenty-nine percent mortality rate (13,000 out of 45,000) at Andersonville dwarfed the mortality rates of any northern prison camp.\textsuperscript{102}

While Wirz’s defense attempted to dispute the secondary charge of murder, evidence that Andersonville was a de facto death camp was presented by fellow Confederate officers and even Wirz’s own defense witness, Father (later Bishop) Peter Whelen.\textsuperscript{103} Wirz addressed the primary charge of conspiracy “to impair and injure and to destroy the lives” of U.S. Army prisoners by the first modern use of the defense of superior orders by claiming that as a “subaltern officer (he) merely obeyed the legal orders of (his) superiors in the discharge of (his) duties” and that he could not “be held

\textsuperscript{101} Davis’ articles in \textit{Belford’s Magazine} in January and February of 1890 was cited and summarized by General Norton Parker Chipman in \textit{The Tragedy of Andersonville: Trial of Captain Henry Wirz, The Prison Keeper} (Sacramento, CA: N.P. Chipman, 1911), 19-26. Chipman, the Judge Advocate who prosecuted Wirz, wrote this work, at the behest of the membership of the Grand Army of the Republic, to respond to the Davis articles. Subsequent pro-Confederate claims of moral relativity between U.S. and C.S.A. prison policies and conditions can be found in \textit{Facts and Figures vs. Myths and Misrepresentations: Henry Wirz and the Andersonville Prison} (United Daughters of the Confederacy (UDC) Bulletin of 1921), 29. Subsequently, the Georgia chapter of the UDC proclaimed Wirz a martyr and erected a monument, originally within site of the graves of his victims and is still standing although the Georgia Legislature refused- even at the height of southern anti-desegregation agitation in 1958, using state funds to repair the monument.

\textsuperscript{102} McPherson, \textit{Battle Cry of Freedom}, 706 & 802.

\textsuperscript{103} Chipman, \textit{The Tragedy of Andersonville}, 22.
responsible for the motives that dictated such orders.” Wirz’s defense mirrored the sentiments he expressed in a letter written upon his arrest at Andersonville on May 7, 1865 that he was “only the medium, or may I better say, the tool, in the hands of my superiors.”

In response, General Chipman, Wirz’ prosecutor, argued a theory of command responsibility that anticipated by eighty years the position found in *1945 London Charter* for the establishment of the International Military Tribunal at Nuremberg:

A superior officer cannot order a subordinate to do an illegal act, and if a subordinate obey such an order and disastrous consequences result, the superior and the subordinate must answer for it. General Winder (Wirz’s direct superior) could no more command the prisoner to violate the laws of war than could the prisoner do so without orders. The conclusion is plain, that where such orders exist both are guilty.

Forty-six years later, Chipman admitted that he was directly ordered by the War Department to remove the names of President Jefferson Davis, Confederate Secretary of War James A. Seddon and other high Confederate officials as co-conspirators on the indictment. Besides the obvious political expediency of this order, the case against

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104 House Executive Document (The Andersonville Trial), 706.


106 Text of Article 8 of the *1945 London Charter*: “The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.” This article was applied by the International Military Tribunal and in the subsequent Nuremberg trials to include *The Hostage Case*, *The Einsatzgruppen Case*, and the *Command Case*. See Levie, *Terrorism in War*, 518.

107 House Executive Document (The Andersonville Trial), 773.

Wirz’ superiors was complicated by the death of his immediate superior, General John H. Winder.\textsuperscript{109}

Almost all the major issues generally associated with the American War Crime Program of the Nuremberg era war surfaced during the Andersonville Trial, including claims of victor’s justice and \textit{ex post facto} justice.\textsuperscript{110} The dual concepts of the command responsibility and superior orders were central in the prosecution and defense of Major Wirz. Just as in the case of subsequent prosecutions holding forth a strict level of command accountability for war crimes, some have continued to question the Andersonville Trial in terms of “law.”\textsuperscript{111} It is not the purpose of the present work to present a legal treatise in defense of a stricter level of the command responsibility for war crimes implied in traditional just war doctrine, General Orders No 100, and explicitly posited by the prosecution during the trial. Regardless of the validity of the legalistic criticisms of the Andersonville Trial, \textit{the doctrinal significance of such cases for the American military profession is not diminished} (italics mine). Seven out of eight of the military panel that convicted and sentenced Wirz to be hanged were general officers. The Secretary of War and the President as Commander in Chief upheld both the conviction and sentence. The report of the trial was officially published and distributed by the U.S.

\textsuperscript{109} The other co-conspirators named in the final indictment, John H. Winder (deceased), Richard B. Winder, Joseph Isaiah H. White, W.S. Winder, and R.R. Stevenson were not tried. A similar situation occurred during the prosecution of the perpetrators of the My Lai Massacre in Vietnam after the death of Colonel Frank Barker and the difficulties his death created for the prosecution of Barker’s subordinates (Captain Ernest Medina) and superiors (Colonel Oren K. Henderson, General Samuel Koster, and General George H. Young).

\textsuperscript{110} Although the United States attempted to distribute \textit{General Orders No. 100} to Confederate forces, applying its obligations to a Confederate Officer, after its explicit rejection by the Confederacy (see note 13), is open to criticism by those who claim such a process inherently creates law after the fact of the crime or \textit{ex post facto}.

\textsuperscript{111} As recently as 2000, Peter Maguire in his seminal \textit{Laws and War: An American Story} (New York: Columbia University Press, 2000), 40, called the Andersonville Trial a “dramatic spectacle of vengeance.”
government. Whether are not the definition of command responsibility utilized during the trial was based upon a proceeding comprised of “good law,” it was and is doctrine.

Conclusion

The principle that there is an affirmative official duty to use force or coercion to assist others as predicated and conditioned by the principle of necessity is found formally in the foundational document of the modern laws of war, *U.S. Army General Order 100*. Dr. Francis Lieber utilized the principle of necessity to reintroduce the basic principals of Augustinian just doctrine into *U.S. Army General Order 100*, the foundational document of the modern laws of war. The code’s affirmative obligations to minimize human suffering was enforced by the U.S. Army military tribunal that convicted and sentenced to death Henry Wirz, the commandant of Andersonville Prison, for his failure in addressing the inhuman conditions of Union prisoners during the Civil War.

*U.S. Army General Order No. 100* was also a pivotal milestone in the development of formal military doctrine in the American military profession. As a representation of a major change in national strategy affecting the conduct of Union forces, it provides the first example of a national operational capstone doctrine. As the initial authoritative basis for a series of doctrinal publications on the laws of war that was binding on all branches of the service, it was also the first major historical example of keystone doctrine.

As doctrine, it remains outside of the major traditions arising out of Post-Westphalian legalism: political realism, legal positivism, and the neutral voluntarism associated with 1864 Geneva Convention and the humanitarian law tradition of Dunant and his ICRC. Finally, it was the product of those who possessed direct experience of the
reality of armed conflict; it consisted of an executive order by the commander in chief of the armed forces to his commanding officers in the field; and it was intended to be utilized primarily by operational military commanders rather than a legal manual for lawyers.
CHAPTER 2
THE DOCTRINAL DEVELOPMENT OF THE
AMERICAN MILITARY PROFESSION

I see many soldiers: would that I saw many warriors! “Uniform” one calls what they wear: would that what it conceals were not uniform!¹

-- Frederich Wilhelm Nietszche

Between the Civil War and World War II the process of the development of military doctrine was formalized with the introduction of a formal publication system. The period was characterized by contested visions military professionalism. Those favoring a domestic democratic conception of military professionalism gradually supplanted functionally aristocratic models of an officer corps associated with Prussia and Germany.

Most discussions on the development of the military profession have centered on a presumed “civil-military gap” in values, attitudes, and worldviews that have developed between the military profession and civil society and especially on the political and societal consequences resulting from such a gap. Rather than addressing whether military policies and attitudes are either congruent or incongruent with civil society, this study incorporates the assumption that neither formal nor informal norms are fixed or uncontested. The point of departure for any new military doctrine is the doctrine that it replaces or modifies. The specific subject of the present analysis is the changes and consistencies in the development of American military doctrine in regard to preexisting

doctrine, specifically the evolution of formal doctrine from the promulgation of *General Order No. 100* during the American Civil War to the present.

The development of doctrine provides a historical record of the intellectual foundation of the military profession in the United States. Although certainly affected by external forces and political expediency, military doctrine is an internal system of normative values. Therefore, the well-traveled debate over the models of continuity versus discontinuity between military and civilian professional values is pertinent to the present study only so far as it relates to the refutation of the claim, in the case of competing doctrines, that a particular contested doctrine is an external imposition on the military profession.

**Constitutional Allegiance and the American Military Professionalism**

The doctrinal significance of *General Order No. 100* and the just war precepts contained within it cannot be separated from the constitutional conflict that was contemporaneous with its publication. The American Civil War was a referendum for and by the American military profession on the meaning of allegiance. From 1790 to 1861, the oaths that officers took upon accepting military commissions did not consistently mention the constitution. This changed as the result of the American Civil War ending with a decision in favor of those holding primary loyalty to the federal government and its constitution as opposed to those holding primary loyalty to state governments and their constitutions. This was subsequently formalized by legislation. In 1862, the Radical Republicans controlling the U.S. Congress mandated that an officer’s political allegiance to the constitution was to be unqualified and specified by law. From 1862 onward, the words of the Presidential oath of office found in the U.S. Constitution,
“support and defend the Constitution of the United States,” was incorporated into all official oaths of office to include both the enlisted and commissioning oath still used to this day:2

Officer’s Commissioning: I, ______________, do solemnly swear (or affirms) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will and faithfully discharge the duties of the office on which I am about to enter. So help me God.3

Enlisted: I, ______________, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.4

Evocative of the fifth century just war maxims of St. Augustine exhorting Roman soldiers to examine the moral foundation of their service and conduct, these oaths forced individuals entering military service to personally acknowledge the basis of the authority under which they entered into military service and source of the legitimacy of their actions while in military service. As the oath requires allegiance to a particular constitution, the political and ideological premises of this constitution, especially as it was modified over the course and immediate aftermath of the American Civil War, on the

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2 Edward M. Coffman in his authoritative article on the subject, disputes the contention that the Constitution played a significant role in officers decision to fight for or against the United States and argues that the post war allegiance oaths required by congress were a significant development in both military professionalism and the American civil-military relationship. See Edward M. Coffman, “The Army Officer and the Constitution” Parameters (September 1987), 2-12. Even Samuel P. Huntington, who held that Southern culture was more facilitating of military professionalism, noted “On the one hand, the Southern officer’s political allegiances drew him to the Confederacy; on the other, his professional responsibility drew him to the Union.” See Huntington, The Soldier and the State: The Theory and Politics of Civil Military Relations (Cambridge, Harvard University Press, 1957), 211-212.

3 Cited in Coffman, “The Army Officer and the Constitution,” 5.

4 Most officers have taken this oath as an enlisted soldier or a cadet prior to their commissioning.
development of the American military profession is distinct from other contemporary armies who pledged their allegiance to other arrangements of political authority. The formal basis of military allegiance in the United States, in contrast to the major European powers of the day, was also institutional rather merely national in an organic sense. However, the end of the Civil War did not result in a consensus regarding military professionalism and the nature of its historical development. Different interpretations and views on the institutional lessons of the Civil War and the efficacy of using foreign models of military professionalism, specifically that of Prussia, as a model for institutional reform divided those who would have the most influence over the establishment of future military doctrine in America.

The *Prussification* of the American Military Professionalism

The centrality of an individual affirmation of duty in the oaths of political allegiance resulting from the Civil War resonates well with both Francis Lieber’s *General Order No. 100* and the traditional just war doctrines contained within it. This, however, conflicted with the some general assumptions associated with another Prussian, Carl von Clausewitz. American scholars and members of the American military profession have utilized Clausewitz in particular and the Prussian military tradition in general to ground theories of military professionalism that contrast strikingly with the democratic and just war doctrine put forward by Lieber.

It is ironic that the two key individuals associated with such disparate martial legacies at one point shared the same uniform and campaign. Clausewitz, the future author of a book that would serve as scripture for the political realists of late twentieth century American military and diplomatic officialdom, was serving as a staff officer in
the rear guard of the Prussian forces seeking to cut off the French forces trying to reinforce Napoleon at Waterloo. A few miles away, the future author of *General Order No. 100*, Francis Lieber, a Prussian enlisted soldier, lay wounded near death. Many of the philosophic inclinations of Clausewitz were the reverse of Lieber’s. In fact, their contrasting views of the nature of war would mark a key point of divergence between the informal and formal norms of the American military profession.

Clausewitz *contra* Lieber (Political Realism vs. Political Ethics)

Clausewitz is only known to history because the French Revolutionary Army followed the common customs and usages of war of the time in granting him quarter and providing him medical care after he fell wounded in an earlier battle in 1806. Following his recovery and parole, Clausewitz joined Field Marshals August Wilhelm Gneisenau and Gelhard Johann von Scharnhorst in modernizing and reforming the defeated and antiquated Prussian Army. Being the most politically conservative and anti-revolutionary of the Prussian military reformers, Clausewitz discarded his uniform and donned a Russian one in 1812 rather than fight for Napoleon, not returning to Prussian service until his sovereign had discovered the error of his ways by turning on the French Emperor after his defeat in Russia. After his retirement, Clausewitz put down his military insights and observations in a book that, after the Bible, would end up being one of the most selectively read texts in history. In 1832, he died in the midst of a major revision of his seminal *On War*, completing only its first chapter. Although he died in

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6 All references to *On War (Vom Kriege*, 1832) are based on the edition and translation by Michael Howard and Peter Paret (Princeton, NJ: Princeton University Press, 1976), Everyman’s Library 1993 edition. As far as inspiring scholarly textual study, the reception of this new translation of Clausewitz by the post
relative obscurity, the sponsorship of his ideas by Field Marshals Helmuth von Moltke and Colmar von der Goltz in their late nineteenth century efforts to prepare the new nation of Germany for total war turned Clausewitz, for the first time, into a military icon. Clausewitz's influence in Europe rose steadily until this ideal of total war was experienced first hand by Europeans during the First World War.\footnote{Major works of Clausewitz criticism published after World War I include B. H. Liddel Hart, \textit{The Ghost of Napoleon}, (London: Faber & Faber, 1933), J.F.C Fuller, \textit{The Reformation of War}, (London, Hutchinson & Co., 1932), and Generaloberst von Seeckt, \textit{Gedanken eines Soldaten} (Leipzig: v. Hase & Koehler, 1935).}

Aside from the many questionable historical processes for which he has been either blamed or credited, it is fairly incontrovertible that, according to Clausewitz, the nature of war was intrinsically violent, political, unpredictable, and resistant to positivistic scientific systematization. While an in depth comparison of classical Clausewitzian and neo-Clausewitzian theory is beyond the scope of this work, many neo-Clausewitzian writers simply supply critiques of past military actions utilizing relatively opportunistic selections from Clausewitz's lexicon of themes.\footnote{Antulio J. Echevarria reviewed five such comparisons between the works of Clausewitz and the neo-Clausewitzians by Werner Hahlweg, Peter Paret, Michael Howard, Jehuda Wallach, and Ulrich Marwedel and summarized that the neo-Clausewitzians oversimplify Clausewitz into four narrow themes: "1) the uses and limitations of theory; 2) the impact of psychological and moral forces on war; 3) the importance of striving for a decisive battle; and, 4) the superiority of a strategy of annihilation." See Antulio J. Echevarria II, "Borrowing from the Master: Uses of Clausewitz in German Military Literature before the Great War" in \textit{War in History}, 3 (July 1996): 274-92.} Naturally, neo-Clausewitzian writers, by responding to their own \textit{Zeitgeist}, the historical events and conditions of their own times, take Clausewitz's ideas out what was clearly a specific and limited historical context.

For someone with no formal university training, the philosophical influences on Clausewitz were considerable. His posited dichotomy between absolute war and actual

\textit{Vietnam War American military can only be compared to the reception in the English speaking world of the King James Bible in the Sixteenth Century.}
war places him in the idealist tradition of Immanuel Kant and his reification of the nation state reflects the influence of Georg Friedrich Hegel. In that he considered some societies more naturally virtuous than other, Clausewitz was completely Aristotelian in his views on ethical or humanitarian conduct in warfare. For Clausewitz, normative patterns of humanitarian conduct in war were societal rather than professional:

If wars between civilized nations are far less cruel and destructive than wars between savages, the reason lies in the social conditions of the states themselves and in their relationship to one another. These are the forces that give rise to war; the same forces circumscribe and moderate it. They themselves however are not part of war; they already exist before the fighting starts. To introduce the principle of moderation into the theory of war itself would always lead to logical absurdity. The above passage represents the two basic principles of neo-Clausewitzian realism: (1) war itself is amoral in its nature and (2) war is conducted for, by, and in the sole interest of nation states. While Clausewitz discussed the moral nature of war, it was in terms of the non-material aspects such as morale and genius. Unlike Lieber and Augustine, Clausewitz separates justice and morality from warfare. Like Thomas Hobbes, and Niccolo Machiavelli before him, his works are addressed to those working on the behalf of a self interested nation state in a zero sum competition for adjustments in

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The most substantial treatment of the influences of German idealist philosophy on Clausewitz in found in Aron's *Clausewitz, the Philosopher of War*, 223-232. Clausewitz's conception of 'absolute war' has been described a "Platonic ideal" outside any reference to German idealist philosophy. See Howard's *Clausewitz*, 49. While contemporary critics of Clausewitz stress his idealism in his characterization of 'ideal' or 'absolute' war, his contemporary apologists minimize it. See John Keegan, *A History of Warfare* (New York, Knopf, 1993), 16-21 for an example of the former and Bernard Brodie's introductory essay, "The Continuing Relevance of *On War*," to *On War*, 1976 (*Vom Kriege*, 1832), 52-53 for an example of the latter. Clausewitz is not alone among those considered to be political realists that have predilections toward German idealist philosophy. For the influence of Hegelian idealism on Hans Morgenthau, See Michael W. Doyle, *Ways of War and Peace* (New York: W.W. Norton & Company, 1997), 106n.

Clausewitz, *On War*, 84.
the balance of power at the expense of other nation states in which no other justification is required other than that of raison d’État.¹¹

Clausewitz, however, not translated into English until 1873, did not become a formal influence over American military thinking generally until the advent of the Cold War and specifically with the so-called Clausewitzian renaissance after the American military defeat in Vietnam. Therefore, it is historically problematic to apply this “neo-Clausewitzian” Weltanschauung, associated with so many contemporary military analysts and political pundits, as a primary direct influence on the development of American military professionalism in the late nineteenth century.¹² However, since Clausewitz was one of the major reformers of the Prussian military, a short examination of his actual writings is warranted in connection with the general influence Prussian military reform exerted on the development of American military doctrine in juxtaposition to the continuing doctrinal significance of General Order No. 100.

Unlike Lieber, Clausewitz wrote a code for statesmen or heads of states, not only for soldiers, using his direct experience of war to integrate his personal life experiences with selected historical references. Also unlike Lieber, Clausewitz and his Napoleonic contemporaries were fixated on conventional warfare between large regular military formations. On the other hand, the genesis of Lieber’s code, like most doctrinal

¹¹ Doyle, War and Peace, 19-28.

developments, was an effort to address contemporary doctrinal deficiencies. Lieber was specifically tasked to address the aspects of war -- such as constabulary functions and the handling of irregular forces -- that have historically constituted the U.S. Army's most common historical activity, although they are activities that American military professionals have historically tried to avoid or minimize, albeit unsuccessfully.

The strongest consistency between Lieber’s and Clausewitz’s view on war is the supremacy of political over purely military ends. In his most famous dictum, Clausewitz wrote "that war is not merely an act of policy, but a true political instrument, a continuation of political intercourse, carried on by other means."\(^{13}\) In *General Order No. 100*, Lieber appears to have paraphrased Clausewitz: “war has come to be acknowledged not to be its own end, but the means to obtain the great ends of state.”\(^{14}\) This congruity between Lieber and Clausewitz in acknowledging political supremacy over the military does not extend to the self-proclaimed American heirs of Clausewitz. In fact, as the particular form of neo-Clausewitzianism that would take hold in America would turn Clausewitz on his head by advocating a de facto political deference to military ends in policy and, thereby, directly contradict not only Clausewitz, but the tradition of both *General Order No. 100* and the institutionally based political allegiance mandated in the soldiers’ and officers’ commissioning oaths resulting form the Civil War. This reversal of Clausewitz’s position of political supremacy, for the purposes of this study, is one of the primary points of departure between classical and neo-Clausewitzianism.

\(^{13}\) Clausewitz, *On War*, 99.

\(^{14}\) *General Order No. 100*, Article 30.
Emory Upton’s Love Affair with Prussia

Although the popularity of Clausewitz among American military professionals is understandable, its historical reach is limited. Clausewitz did not have a direct individual impact on the development of the American profession during its most important period of development between the Civil War and culmination of World War II. The basing of the impetus of military professionalism in America on Clausewitz, as distinct from basing it on the Prussian military reformers in general, is just bad history. It was not through Clausewitz, but the French Antoine Henri, Baron de Jomini, that Napoleonic strategy was conveyed to America. The reason for this was that Jomini’s writings were clearer and more understandable than Clausewitz’ classic.15 Clausewitz’ influence on the American military between the Civil War and the Second World War can only be taken in conjunction with the nineteenth century Prussian military in general; Clausewitz can at most be considered as an usually un-cited source for a view of military professionalism that has played more of an informal, rather than formal, role in the development of American military professionalism until America’s defeat in Vietnam.

This is at odds with the premier theoretical work of American military professionalism, Samuel P. Huntington’s The Soldier and the State. Huntington argues that modern military professionalism was spawned in post-Napoleonic War Prussia and epitomized by the theories of Clausewitz. Accordingly, prior to this, America could only claim to possess a proto military professionalism and this was to be found mainly in the slave holding south that was embodied in the efforts toward ante-bellum military

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15 Russell F. Weigley noted in The American Way of War that Clausewitz’ writings were, compared to Jomini’s, “difficult, circumlocutory, often apparently self-contradictory.” See The American Way of War, A History of United States Military and Policy (Bloomington: Indiana University Press, 1973), 82 & 211.
professionalism initiated by the policies of Secretary of War John C. Calhoun. The
greatest weakness of Huntington’s historical thesis is the absence of documentation
concerning how the culture of professionalism migrated from Prussia to the United
States.\textsuperscript{16}

As Clausewitz could not be historically credited for the transplantation of military
professionalism from Prussia to the United States, the anointed mantle usually falls on the
shoulders of Major General Emory Upton. After serving as commandant of the U.S.
Military Academy from 1870-1875, Upton was sent by the Secretary of War on a tour of
Europe in search of military organizational models worthy of imitation. Four years after
the conclusion of the Franco-Prussian War and the creation of a new German empire, the
task of locating the \textit{belle of the ball} was hardly difficult. Upton’s admiration for the
Prussian / new German military reinforced his preference for smaller more professional
armies over larger mass armies, a preference developed during his service in the
American Civil War. Consequent to Lincoln’s re-characterization of the war from a
limited war to preserve the Union to a national war of emancipation, Upton was highly
critical of what he considered the deficiencies in the Union Army resulting from the
political interference of civilian leadership and the appointment of non-career officers to
major commands. The preeminent military historian Russell F. Weigley credits Upton
with the ominous distinction of first asserting the requirement for national policy to
conform to military imperatives, rather than the other way around. Weigley wrote that
Upton “argued that all the defects of the American military system rested upon a
fundamental, underlying flaw, excessive civilian control of the military” and that, by

\textsuperscript{16} Huntington’s \textit{The Soldier and the State}, 143-62 & 172-77.
“proposing a military policy that the country could not accept.” Consequently, Weigley credits Upton with causing lasting damage to the Army resulting from the establishment of a model of civil-military relations that emphasized antagonism over accommodation to civilian society.

Upton’s choice of Prussia for a model for military professionalism was not without precedence because the American military already possessed a genuine Prussian heritage since the Revolutionary War. The legacy of Prussia precedes the advent of the Prussian military reformers of the Napoleonic period. In 1778, Frederick William von Steuben arrived at the Valley Forge encampment of the American Continental Army with the assignment, arranged by Benjamin Franklin in Paris, to provide a system of drill and discipline based on a model other than that of the British enemy. Drawing on his service in the army of Frederick the Great, Steuben drafted his *Regulations or Blue Book* that established a uniquely American manual of arms that is nominally utilized to this day. However, Steuben’s legacy was confined to drill and not to general or “keystone” doctrine and his military experience predated the Napoleonic era Prussian military reforms later exalted by Upton.

Upton’s admiration for the Prussian institutions resulting from the reform period was generalized; his writings contain no systematic analysis of the writings of the Napoleonic War era military reformers. Upton’s position on the connection between political ends and military action was the opposite of Lieber and Clausewitz, both sharing the honor of not being cited in his work. Specifically, it was the ideas of Lieber’s

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archrival, John C. Calhoun, which Upton drew as a base for his proposal for an expandable army. In a time of war such an army would be comprised of personnel from the regular army, national volunteers, and the militias who would be “regulars in drill, discipline, and courage” and commanded only by professional soldiers. Taking his own life in 1881, Upton despaired of ever seeing an expandable regular army free of civil interference or his seeing ideas officially endorsed on published by the Army. However, Upton left an unfinished manuscript, posthumously published as The Military Policy of the United States, which was unofficially disseminated among the officer corps. However, it generated enough support and opposition to facilitate the creation of the first official keystone doctrine since the promulgation of General Order No. 100.

One doctrinal specialist who wrote in opposition to Upton was Major Arthur L. Wagner, U.S. Army, an Instructor in the Art of War at the U.S. Infantry and Cavalry School at Fort Leavenworth, Kansas. In 1866, Wagner wrote a study that strongly criticized the Prussian military for ignoring the lessons concerning mass armies during the American civil war. Wagner argued that foreign doctrine, especially Prussian doctrines, must cede precedence to the Republican forms of a distinctly American civil-military relationship. Wagner’s major work, Organization and Tactics, divided the Art of War into two major divisions: (1) strategy, the movement and disposition of an army in a “theater of operations,” and (2) tactics, the movements of soldiers on a battlefield.

18 Weigley, History of the United States Army, 277.


20 For a discussion of foundational or "keystone" doctrine, see Introduction, n. 4.

21 For a discussion of Wagner’s criticism of the Prussian Military tradition, see Kretchik, “Peering Through the Mist,” 88-92.
Calling Upton’s focus on drill and discipline to mind, Wagner felt that “it was not sufficient that an army be composed of intelligent, well-instructed, brave, and obedient soldiers, well armed and equipped;” he also considered drill as “merely one of the means, not the end” of military discipline. 22 Wagner, in that he felt that there are too many diverse elements in war that keeps the art of war from becoming a science based on universal laws, was probably more familiar with the actual writing of Clausewitz than Upton, who believed in the existence of laws that have been in operation throughout American military history. For Wagner, the art of war was a human science rather than an exact science. 23

Wagner’s greatest difference with Upton was on the relative effectiveness and discipline of the republicanized United States Army during the Civil War as compared to that of contemporary professionalized European armies, Wagner favoring the former with Upton favoring the latter. 24 Wagner, unlike Upton, received official endorsement for his doctrinal positions. In 1897, the second edition of Wagner’s Organization and Tactics contained an official imprimatur from the Adjutant-General’s Office and was officially recommended by the Headquarters of the Army for officers undergoing examination for promotion, and contained a preface written by the Commander of the U.S. Infantry and Cavalry School, the direct precursor to the Command and General Staff School. It was

22 Wagner, Organization and Tactics, 2nd ed. (Kansas City, Mo.: Hudson-Kimberly Publishing Co., 1897), 3, 43.

23 Upton, in his criticism that American “have no military policy”, and that “Laws whose operation have been the same in all our wars” can be utilized to systemically achieve the wisest policy possible. See Upton, The Military Policy of the United States, xii. Contrarily, Wagner noted that as “many diverse sentiments can influence the same army,” “knowledge of human nature is half of the science of war.” See Wagner, Organization and Tactics, 46, 49.

24 Wagner, Organization and Tactics, 43-44.
not until twenty-three years after his death that Upton’s *Military Policy of the United States* was officially published by the Army and, even then, only with a tentative endorsement of its contents.

While the works of Upton and Wagner made only modest headway providing a doctrinal foundation for the military profession on land, Captain Alfred Thayer Mahan supplied an intellectual rationale for American naval and foreign policy that would be utilized though the twentieth century. Unlike the Army, the Navy already possessed a functional War College by 1890, the year Mahan, a faculty member of the Naval War College, had his lectures published as *The Influence of Sea Power on History, 1660-1783*. Unlike Upton, Mahan founded his naval worldview on the strategy of Jomini, rather then Clausewitz or other Prussian military reformers, and recommended Great Britain, rather than despotic Prussia, as a historical model for policy as America assumed its role as an imperial world power.\(^{25}\) The contrast between the relative level of professionalism existing between America’s naval and ground forces was clearly demonstrated in America’s first major overseas military intervention.

**Elihu Root and the Birth of Military Professionalism**

A year after America’s sloppy victory in the Spanish American War (1898), President William McKinley appointed Wall Street lawyer Elihu Root to be his Secretary of War to clean up the military mess in the newly acquisitioned Philippine Islands occupied by U.S. Marine and U.S. Army ground forces. From 1899 to 1904, Root conducted the most extensive military reform in American history prior to the reorganization of the military under General George C. Marshall during the Second

World War. He reorganized the administrative system of the War Department and modernized promotions. He carried out many policies envisioned by Upton including the foundation of the War College, creation of a general staff, and increased federal control over the National Guard. Root also was forced to address the fact that Army’s performance in the Spanish-American War and the subsequent Philippine Insurrection (1899-1906) exposed an army in doctrinal crises.

The major activity of the Army since the Civil War had been constabulary functions in the South during Reconstruction and on the western frontier. Morris Janowitz, an early critic of the normal theory of civil-military relations, argued that, although such functions have always been a persistent activity for regular military forces, they have always been a source of doctrinal neglect. With its first regular military action in thirty-four years, the U.S. Army’s performance, while victorious, was disappointing. Despite the U.S. Army’s wealth of historical experience with such operations, American forces were unable to conduct disciplined constabulary functions during the American occupation of the Philippines following the war. The worst incident followed a massacre of 59 Americans at Balangiga on the island of Samar. Marines under the command of U.S. Army General Jacob F. Smith, an officer who had participated in the Wounded Knee Massacre of 1890, engaged in a genocidal riot that left 165 villages burned and thousands of Philippine murdered, the majority of which were clearly non-combatants.


Marine Major Littleton Waller reported that Smith ordered him to kill “everyone over ten years old.” See Maguire, Laws and War, 60.
On February 21, 1903, seven months after the court martial of General Smith for the conduct of his forces on Samar, Root laid the cornerstone of the Army War College in Washington. Root used this occasion to deliver a eulogy for Upton and his quest for greater professionalism of the American military, which included the establishment of Prussian-inspired staff schools and war colleges.28 A year later, Root agreed to the official publication of an edited version of Upton’s *Military Policy of the United States*. However, in Root’s preface to the document, he gave only partial endorsement to Upton’s ideas. After pointing out that many of the Upton’s concerns had already been addressed, Root pointed out that Upton failed “to appreciate difficulties arising from our form of government and the habits and opinions of our people” and that Upton’s views were “colored by the strong feelings natural to a man who had been a participant in the great conflict of the civil war.”29

Root was well aware of great divisions among officers during the Civil War between regular West Point trained officers like Upton and citizen soldiers elected to their commissions by their men or politically appointed. At the center of this controversy was General George McClellan who was first relieved as General in Chief after the failure of the Peninsula Campaign in 1862, later reinstated commander of the Army of the Potomac, and relieved for the final time a few months later after failing to follow up the Union victory at Antietam. The traditional depiction of McClellan’s action and his removal as a controversy over civilian control of the military is misleadingly one-dimensional. While McClellan strongly resented the interference in military affairs by

29 Ibid., iv.
the Republican Congress and President Lincoln, a resentment shared by Upton.

McClellan held his military superiors in the same contempt as his civilian superiors; in particular, he did not hesitate going over their heads to civilians as in the case of Winfield Scott and Henry W. Halleck, his predecessor and successor, respectively, as general in chief.

It was not the military or civilian character of his superiors that McClellan objected to; rather, it was the change in war aims from a smaller more traditionally statist war aim to preserve the Union to a larger ideological war of emancipation. To paraphrase Clausewitz, McClellan would have no part of a war that was the continuation of policies he did not agree with. These policies would soon be definitely expressed in the Emancipation Proclamation and General Order No. 100, the later the initiative of Halleck, his general in chief. 30 While it would be unfair to call Upton a simple McClellanite, Upton clearly shared McClellan’s opposition to the influence of the Lincoln administration and the Republican congress on the conduct of the war. In chapter 25 of his Military Policy, Upton offers sympathetic criticism of McClellan’s civil-military decisions in much the same manner that Huntington would address MacArthur’s actions in Soldier and the State following President Truman firing of that general in 1951. 31 While Upton admitted to McClellan’s making some errors, he definitely did not support the criticism of McClellan by those civil and military leaders

30 While McClellan called President Lincoln a “gorilla,” he called Scott a “perfect incubus” who is either a “dotard or a traitor” and demanded that both Halleck and Secretary of War Stanton be removed after they criticized his conduct toward the enemy. Quoted in McPherson, Battle Cry of Freedom, 360 & 569. Historian James McPherson also emphasized the policy differences over emancipation as being key to the motives of Stanton, Halleck, and Lincoln removing McClellan, see Battle Cry of Freedom, 502-506.

31 Upton, Military Policy. 384-387. For Huntington’s sympathetic approach to MacArthur’s dismissal, see Soldier and the State, 367-389.
holding a constitutional view in reference to civilian control of the military. Additionally, Upton, like McClellan, opposed the change in war aims involving the civil war becoming a larger war of emancipation as was to be clearly defined in General Order No. 100, a document conspicuously unacknowledged and un-cited by Upton.\footnote{Upton wrote: “Since the Rebellion, with a fatuity pregnant with future disaster, we settled down to the conviction that out total neglect of military preparation, our defeats, our sacrifices in blood and treasure, were the predestined features of a war protracted through four long years, in order that the minds of the people might be prepared for the extinction of slavery. These views, so comforting now, were not held during the war.” See Upton, Military Policy of the United States, 385. Article 24 of General Order No. 100 addresses slavery and the war.}

Root, conversely, was acutely aware of General Order No. 100 during his tenure as Secretary of War. In 1901, an American general publicly announced that the insurgents in the Philippines had violated twenty-six articles of the “Lieber Code” and claimed that the United States was justified in not according such belligerents the protections accorded lawful combatants according to the most controversial doctrine contained in General Order No. 100, the doctrine of reprisal. Root did not agree. Although he accepted in general Lieber’s principle that soldiers fighting an enemy, itself engaging in unlawful conduct, may respond in a manner that would not otherwise be sanctioned against an enemy fighting according to the customs of war, Root cabled that the extreme form of retaliation being carried out by American forces in the Philippines was beyond any justification. Both General Jacob Smith and his direct subordinate, Marine Major Littleton Waller, unsuccessfully tried to use the Lieber’s doctrine of retaliation to justify the outrages on the island of Samar during their court-martials. Root was widely criticized for being both too soft and too hard in what he admitted was the superficial war crimes trials of American officers in Manila.\footnote{Upon hearing reports of the exaggerated level of reprisals under General Smith, Root cabled that although soldiers “should occasionally regardless of their orders retaliate by unjustifiable severities . . .} On July 21, 1902, Root
responded to criticism by General Granville Dodge who considered Root’s decision to court-martial American personnel as being based on a naïve understanding of the reality of war:

I think if you could read the testimony in the Waller case (who was tried prior to General Smith and established the evidentiary record subsequently used against Smith) you would change your views. I had very much the same views of the case as you express, but careful examination of the entire record and evidence extremely distressing to me.³⁴

The suspect use of the “Lieber Code” to defend American atrocities in the Philippines by war crimes defendants did not dampen Root’s enthusiasm for General Order No. 100 and its author, Francis Lieber. Five years after the Manila court-martials, Root, as Secretary of State, directed the American delegation to the second Hague Conference to radically expand the reach of laws of war. Root considered the “Lieber Code” as the source that “made possible the success of the Hague Conferences.”³⁵ During the second Hague Conference, Root’s ambition to expand the reach of international law at the expense of traditional prerogatives of the nation state was frustrated by his petit noire, Germany. It was probably Root’s anti-German antagonism that accounts for his partiality for the anti-Prussian Lieber over the pro-Prussian Upton. Root took the occasion of the presidential address at the seventh annual meeting of the American Society of International Law in 1913 to celebrate the fiftieth anniversary of adoption of nothing can justify or will be held to justify, the use of torture or inhuman conduct on the part of the American Army.” In a personal letter to Senator Henry Cabot Lodge, Root criticized the tactic of utilizing the General Order No. 100 to justify the disproportional reprisals in the Philippines. See citations of Root as found in Maguire, Law and War, 62, 66, & 69.


the “Lieber Code.” In his eulogy of Lieber, Root described Lieber as a German whose love of country urged him “to the support of a government which the love of liberty urged them to condemn” in that the “people of Prussia were held in the strictest subjection to an autocratic government of inveterate and uncompromising traditions.”

In Root’s presidential address honoring Lieber, there was nothing of the qualified endorsement so obvious in Root’s eulogy for Upton ten years earlier. Although, as Secretary of War, Root is credited for implementing many of Upton’s recommendations for the professionalizing the American Military, Root kept his distance from the Uptonian celebration of Prussian efficiency and professionalism at the expense of democratic principles. Root closed his presidential address with the following:

> It stirs the imagination that the boy who lay wounded on the battlefield at Namur for his country’s sake and who languished in prison for liberty’s sake and who left his native land that he might be free, should bind his life into the structure of American self-government and leave a name honored by scholars and patriots the world over. If our Society, at once national and international, were about to choose a patron saint, and the roll were to be called, my voice for one would answer “Francis Lieber.”

### The Formalization and Specialization of American Military Doctrine

Except for *General Order No. 100*, the creation of military doctrine in the United States, prior to the twentieth century, was decentralized and informal. Except for the edited doctrinal writing of Emory Upton, and Arthur L. Wagner, doctrinal texts utilized by the American military during the nineteenth century were commercially published, sometimes with and sometimes without an *imprimatur*. As the American military

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36 Ibid., 96. Four years prior in a letter to Andrew Carnegie, called Germany “the obstacle to the establishment of arbitration agreements, to the prevention of war, to disarmament, to the limitation of armaments, to all attempts to lesson the suspicions and alarm of nations toward each other, is Germany, who stands, and as persistently stood since I have been familiar with foreign affairs, against that kind of progress.” Cited in Maguire, *Law and War*, 69.

37 Elihu Root, “Francis Lieber,” 103.
profession underwent formalization and specialization in the early twentieth century, so did American military doctrine.

*Field Service Regulations*

With the publication of *Field Service Regulations* in 1910, the Army under Root’s successor as Secretary of War, William H. Taft, introduced what was to the first formal series of doctrinal publications. This document served simultaneously as a “capstone” publication, officially articulating national war fighting doctrine, and a “keystone” publication, providing a doctrinal base for all other supplemental doctrinal publications.\(^{38}\) This was no product of a single author with an official *imprimatur* indicating official endorsement; the manual was eventually the responsibility of a Field Service Regulations Board charged with drafting a centralized and current warfighting doctrine. It was the first example since the promulgation of *General Order No. 100* during the civil war that a single volume could be described as the official military doctrine of the United States. Seven new editions of the series would be issued between 1908 and 1941 when Field Manual 100-5, *Operations*, would supercede the series. The FM 100-5 series would remain the primary keystone doctrinal series after the creation of the Department of the Army by the National Security Act of 1947 until the end of the twentieth century when the Army’s traditional role as the major developer of keystone doctrine was superceded by the Department of Defense (DOD).\(^{39}\)

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\(^{38}\) Department of War, *Field Service Regulations*; 1905 (Washington: General Staff, 1905). Capstone doctrine is the highest category of doctrine publications in the “hierarchy of publications” that link doctrine to national strategy and the guidelines of other government agencies to include other members of international alliances and coalitions. Keystone doctrinal publications provide the foundation for a series of doctrine publications in the hierarchy of publications. See JP 1-02, *Department of Defense Dictionary of Military and Associated Terms*, 62, 82.

\(^{39}\) This DOD assumption was accomplished under the incomplete and belated implementation of the Goldwater-Nichols Department of Defense Reorganization Act of 1986. In 2001, Field Manual 3-0
Lieutenant Colonel Walter Kretchik of the U.S. Army Command and General
Staff College, a leading expert on the historical development of Army doctrine,
considered the first edition of *Field Service Regulations* as containing the ideas of both of
the major post Napoleonic military theorists, Jomini and Clausewitz, as “transmitted
though the writings of Henry W. Hallack, Emory Upton, and Arthur L. Wagner.”

The legacy of Francis Lieber also figured prominently in the manual. The entirety of article
XII in the first edition of the manual consisted of a reprint of *General Order No. 100.*
However, the *General Order No. 100*’s position in subsequent editions became
increasing peripheral. By the 1914 edition of *Field Service Regulations*, only a summary
of the Lieber’s provisions was included in an appendix entitled “Extracts to from
International Conventions and Conferences.”

In both editions promulgated before and after the experience of the American
Expeditionary Force in the First World War, the *Field Service Regulations* emphasized
decisive offensive operations over passive defensive tactics. The contemporaneous
reaction to the recent experience of static trench warfare in Europe reinforced the
traditional American doctrinal emphasis on affirmative decisive action going back to the
pre-civil war writings of Henry Wager Halleck and also found in the traditional just war
requirement for a high probability of success and the principle of military necessity found
in *General Order No. 100*, of which Halleck was the major sponsor. Major General J. L.
Hines, Acting Chief of Staff, in his preface to the 1923 edition of the *Field Service

formally superceded the FM 100-5 series in conformity with the joint (service) numbering system.
Department of the Army, Field Manual 3-0, *Operations.* (Washington, D.C.; Government Printing Office,

41 Department of War, *Field Service Regulations* (Washington: General Staff, July 1, 1905), 190-204.
Regulations, wrote, “War is positive and requires positive action. All training should, therefore, aim to develop positive qualities of character rather than to encourage negative traits. The basis of training will be the attack.”

However, the 1923 edition was novel in that it posited, in addition to offense, many other timeless and “immutable” principles that could be applied to all proper military operations in all times and places. The doctrinal significance of this new dogma, which corresponded well with the major neo-Clausewitzian theorists of the period, was to resort to universal principles governing warfare that conflicted with the classical Clausewitzian emphasis on the unpredictability of war. Although such general universal principles came under criticism in the doctrinal revolution the American military underwent on the eve of its entry into the Second World War, they regained predominance in the neo-Clausewitzian doctrinal renaissance following America’s defeat in Vietnam. These principles are still found in Army capstone doctrine; the current definitions found in Army Field Manual FM-3 Military Operations, the current successor manual to the Field Service Regulation, consist of:

1. The Objective: direct every military operation towards a clearly defined, decisive, and attainable objective.
2. The Offensive: seize, retain, and exploit the initiative.
3. Mass: concentrate combat power at the decisive place and time.

42 Chief of Staff of the Army, Field Service Regulations, United States Army, 1923 (Washington: Government Printing Office, 1924), iii.

43 Such universal principles, such as the economy of force, were prominent under different names in the prominent World War One era neo-Clausewitzian writers as General Colmar von der Golz (see note 7). See also Weigley, American Way of War, 214.

44 The principles were at the center of Harry Summers’ seminal neo-Clausewitzian critic of American military operation in the Vietnam War. See On Strategy, 1-27.
(4) Economy of Force: allocate minimum essential combat power to secondary efforts.

(5) Maneuver: place the enemy in a position of disadvantage through the flexible application of combat power.

(6) Unity of Command: For every objective, ensure unity of effort under one responsible commander.

(7) Security: Never permit the enemy to acquire an unexpected advantage.

(8) Surprise: Strike the enemy at a time, at a place, or in a manner for which he is unprepared.

(9) Simplicity: Prepare clear, uncomplicated plans and clear, concise orders to ensure thorough understanding.\textsuperscript{45}

In the 1923 edition, unfortunately, the humanitarian significance of the need for decisive action is not openly accentuated in contrast to \textit{General Order No. 100} and earlier versions of the Regulations containing summarized version of \textit{General Order No. 100}. This was in keeping with the concept of the passive humanitarian obligations in war, associated with the influence of the International Committee of the Red Cross, that was gaining in influence at the expense of the affirmative obligations associated with traditional just war doctrine. By 1923, the appendix to \textit{Field Service Regulations} summarizing \textit{General Order No. 100} was finally dropped from the manual. As a false dichotomy between operational decisiveness and humanitarian concerns in war became more accepted, officers would now have to consult more specialized manuals for guidance on the humanitarian norms of war.

Rules of Land Warfare

However, what the general precepts of General Order No. 100 lost in general capstone significance by their removal from Field Service Regulations, they gained in specialized keystone significance. In 1913, Colonel Edwin F. Glenn at the Army War College was tasked to draw up an authoritative and updated doctrinal manual to succeed General Order No. 100.\textsuperscript{46} Entitled Rules of Land Warfare, the manual was to be the first of an authoritative doctrinal series that would apply across separate military services and has yet to be superceded. In its prefix, its integration of Lieber’s doctrinal legacy is categorically affirmed.

It will be found that everything vital contained in G. O. 100 of A. G. O. of April 24, 1863, “Instructions for the Government of Armies of the United States in the Field,” as been incorporated into this manual. Wherever practicable the original text has been used herein, because it is believed that the long familiarity with this text and its interpretation by our officers should not be interfered with if possible to avoid doing so.\textsuperscript{47}

The Department of War issued new editions of Rules for Land Warfare in 1934 and, as Field Manual 27-10, in 1940. The Department of the Army promulgated the current edition of FM 27-10, entitled Laws of Land Warfare in 1956. Although the manual was far more specialized than either General Order No. 100 or the summation of the “Lieber Code” in the early editions of the Field Service Regulations, the new manual was intended as a reference for all professional officers rather than a handbook for lawyers. As the title of the manual from the 1914 to the 1940 edition indicates, the


emphasis of normative “rules” rather than legalistic “laws” that places the manual clearly within the purview of military doctrine rather than mere positive law.

However, over time more and more of international treaty law was incorporated into the manual. Although the 1914 edition did not list the Geneva Conventions of 1868, the Hague Conventions of 1899, or the majority of the Hague Conventions of 1907 as instruments binding on the American military, it fully incorporated an expansive interpretation of the modern theory of customary international law:

In addition to the written rules there exist certain other well-recognized usages and customs that have developed into and have developed into, and have become recognized as rules of warfare. These usages are still in the process of development.  

The 1940 edition added the Red Cross conventions of 1864, The Hague Conventions of 1899, and the additional Geneva Conventions of 1929, to the list of instruments being “in force.” Despite the expanding applicability of international humanitarian law, the most consistent feature of the succeeding editions of the Rules of Land Warfare between 1914 and 1940 remained the verbatim reaffirmations of the major just war doctrines of General Order No. 100 to include the doctrine of military necessity,

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48 *Rules of Land Warfare*, (1914), 13. In its appendixes, the conventions considered binding based on ratification included: (1) Convention III of The Hague, October 18, 1907, relative to openings of hostilities; (2) Convention IV of The Hague, October 18, 1907, respecting the laws and customs of war; (3) Convention V of The Hague, October 18, 1907, respecting the rights and duties of neutral powers and persons in war on land; (4) Convention VIII of The Hague, October 18, 1907, relative to the laying of automatic submarine contact mines; (5) Convention IX of The Hague, October 18, 1907, respecting bombardment by naval forces in time of war; (6) Convention XI of The Hague, October 18, 1907, relative to the right capture in naval warfare; (7) Convention XIV of The Hague, October 18, 1907, prohibiting the discharge of projectiles and explosives from balloons; (7) Table of ratifications and adhesions of the second peace conference at The Hague in 1907; and (8) the International Convention for the amelioration of the condition of the wounded and sick in armies in the field at Geneva, July 6, 1906.

reprisals, and protections of prisoners of war. In other areas, the *Rules of Land Warfare* expanded the protections found in *General Order No. 100*, such as expanded prohibitions on denying quarter, collateral damage, care of prisoners, and care for sick and wounded. The only major area of retreat in the maintenance and extension of the humanitarian norms of *General Order No. 100* was in the area of command responsibility and superior orders. This is not surprising in the era following Secretary of State Robert Lansing’s embrace, at the Paris Peace Conference in 1919, of the pre-war German position that considerations of humanitarian law should be excluded, as actions of state, from consideration in criminal prosecutions. Lansing’s conservative positivistic position flies in the face of the idealistic international pretensions associated with the policies of the Wilson administration. Lansing’s minimalist position would, unfortunately, hold sway until the height of the Second World War.

**The Military Professionalism under the Tutelage of the Legal Profession**

Samuel P. Huntington’s normal model of military professionalism, associated with his classic, *The Soldier and the State*, is grounded on the assertion that between the Civil War and World War I the American military was socially, politically, and physically estranged from the rest of American society. This estrangement developed a balance in civil-military relations that provided military officers the political and social

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50 Verbatim quotations from *General Orders No. 100* found in *Rules of Land Warfare*, (1914), include, but are not limited to: military necessity (articles 11-13); reprisals (articles 380-381); protections of prisoners of war (article 47). In the case of *Rules of Land Warfare*, (1940), see military necessity (articles 23-25) and protections of prisoners of war (article 77d);

51 Relevant articles expanding the prohibitions of *General Orders No. 100* found in *Rules of Land Warfare*, (1914): denying quarter (articles 182-183); collateral damage (articles 172, 184, 212, 217, & 218); care of prisoners (articles 49-64); and care for sick and wounded (articles 105, 108). For the *Rules of Land Warfare*, (1940), see: denying quarter (article 33), collateral damage (articles 26, 34, 45, 50, & 51); care of prisoners (articles 74-76, 81-90); and care for sick and wounded (articles 173-201).

52 Maguire, *Laws and War*, 77.
autonomy needed to develop the American military, for the first time, into a true profession. Huntington designated the modern officer as a professional, in the sense of such well-thought-of professions as physicians and lawyers, due to its possession of the three distinguishing characteristics of *expertise, responsibility, and corporativeness*. An officer’s *expertise* was in the means of warfare, an officer’s *responsibility* is to manage violence, without the distraction of economic incentives, for a client who happens to be the state, an officer’s *corporativeness* resulted from his profession’s collective ability as an “autonomous social unit” to restrict entrance into the profession based on historically derived universal principles.  

Huntington’s premise that the military profession evolved in relative isolation of the external influence of the civil society it was defending conflicts with the well-known “ideal-type” model of professionalism, associated with the works of the eminent sociologist Talcott Parsons that traces professionalism itself back to the aristocratic military hierarchies found in the Middle Ages and classical antiquity. More

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53 See *The Soldier and the State*, 7-18. While the comparison of military officers to physicians and lawyers was flattering to the military profession in late fifties and early sixties, it is less so today. Public opinion polling by Louis Harris and Associates surveys revealed that from 1966 to 1983 the number of American reporting “a great deal of confidence” in the military fell from 62 percent to 35 percent for the military and 73 to 30 percent in medicine. After the Gulf War, according to a Gallop Poll in 1992, the percentage of Americans reporting confidence in the military soared to 67 percent, with the medical profession at 36 percent. Although serviceableness of such statistics for historical purposes is limited, it would not be unwarranted to acknowledge the irony in Huntington’s stringent efforts to obtain for the military profession the admittance into a club of professions whose prestige has now significantly diminished. Physicians and lawyers today would love to have the public approval given the military profession. Harris Poll statistics found in Howard R. Bowen and Jack Schuster, *American Professions* (New York: 1978) p. 30 and cited in Nathon O. Hatch, ed. *The Professions in American History* (Notre Dame: University of Notre Dame Press, 1988) p. 5. For Gallop Poll, see George Gallup Jr. and Robert Bezilla, Religious News Service, “Crises in Confidence,” *The Phoenix Gazette* (May 29, 1993), A12.

54 Talcott Parsons, *The Evolution of Societies* (Englewood N.J.: Prentice Hall, 1977), 191-194. In *The Quest for Authority and Honor in the American Professions, 1750-1900*, Samuel Haber marks a point of departure from both the general professional and military historians previously discussed. Rather than the civilian professions impacting the military, Haber addresses the reverse, the impact of the paternalistic archetype of the English aristocrat and officer on the development of civilian professionalism While Haber
importantly, Huntington’s model conflicts with the historiography of the managerial revolution of the progressive era in general. Recent historians of professionalism in America have framed professionalization as an interdisciplinary / inter-professional historical development. In democratic cultures, many occupations are conceded professional status outside of such rigid formalizations as Huntington’s. The progressive reformers believed that bureaucratic professionals, comprised of scientifically trained experts, served not only the need of the professionals themselves, but also the sustainment of American democracy. This “culture of professionalism” was facilitated by the victory of the more democratic and middle class-dominated North in the Civil War over the more authoritarian and upper class-dominated south and, although it would have conservative consequences, it strived to serve democratic aims. Many military historians have also criticized of Huntington’s model of professional military

recognized that junior officers in the late nineteenth century were involved in discussions closely resembling those of many of the civilian professions, the “officer’s code” still stressed an antipathy for commercial activity and disdain for society in general. Unlike Huntington’s stress on the co-origination military professionalism and attitudes of exclusiveness in the isolated Army forts of the American West, Haber attributes these attitudes of exclusiveness to the aristocratic European heritage, however faded, of the officer corps. See Haber, The Quest For Authority and Honor in the American Professions, 1750-1900 (Chicago: University of Chicago Press, 1991), 200-202.

Nathon Hatch in his introduction to The Professions in American History dubbed professional characteristics, such as Huntington’s, as “clumsy instruments” for interpreting the breadth of professions in American History. Hatch argued that while Americans in general maintained a “love-hate relationship” with role of expert that simultaneously offered upward mobility and protected vested interest and social inequality, in the later nineteenth century middle-class Americans strove to enhance their occupational status to obtain the “respect, power, and financial status” available to those classed as experts. See Hatch, The Professions in American History, pp. 3-6.

Burton J. Bledstein, in The Culture of Professionalism, does not view the culture of professionalism as completely homogeneous and admits that the arrival of the trained professional served both conservative and progressive aims. This emergent middle-class veered away from the eighteenth and nineteenth century disdain of the English gentry toward trade and commerce. This was the budding middle-class observed by Alex Tocqueville in the 1840’s mobilizing and expanding their economic opportunities. Amateurism became “negative and pejorative. The middle-class ideal combined the supposed unemotionalism of the gentleman with the ambition of the entrepreneur. See Bledstein, The Culture of Professionalism: The Middle Class and the Development of Higher Education in America (New York: W.W. Norton & Co., 1976) pp. x-xi, 5, 18, 31, 40, & 92.
devolvement as not incorporating the societal movement toward bureaucratic professionalism of the progressive era. In their view, military professionalism took place in emulation rather than in isolation of other processes of professionalization in America during the progressive era as managerial and business practices strongly influenced young officers pursuing professionalism.  

However, the greatest challenge to Huntington’s norm of autonomous professionalization is the fact that the period of the greatest advances in military professionalism took place under the direct tutelage of celebrated personages of another entirely distinct profession, the legal profession. Between 1897 and the Second World War, eleven of the fourteen serving Secretaries of War were lawyers; the most notable including Elihu Root (1899-1904), future President and Supreme Court Justice Robert A. Taft, and Henry Lewis Stimson (1911-1913 & 1940-1945). For the historian Robert H. Weibe, who argued that late nineteenth century witnessed the beginning of the transformation of American society from the individualized values of small towns and communities to the values of the urban middle-class dominated professional bureaucrats epitomized by the legal profession, nowhere was this transformation better embodied than in the career of the man who served as the Secretary of War from 1899-1903, the Republican statesman Elihu Root. Administering the most important period of the

professionalization of the American military, Root considered professional bureaucracy a necessary instrument to counter the contemporary challenges to a pre-modern system of government.\textsuperscript{58} As Stimson, who served twice as Secretary of War, started his legal career in firm of \textit{Root and Clark}, it could even be claimed that the most critical periods of military professionalization took place under the tutelage of one law firm.

The Re-democratization of the American Military

Not all initiatives regarding the professionalization of the armed forces can be attributed to the tutelage of members of the legal profession. The most eminent reformer of the progressive period, following Root, was Major General Leonard Wood, whose professional training was that of a medical doctor. Serving as Chief of Staff of the Army from 1912 to 1914, mostly under Root’s protégé, Henry Stimson, he embodied Stimson’s vision of an army representing a democratic society rather than a “career of a chosen class.”\textsuperscript{59} Between the immediate years prior to the First World War and the American involvement in the Second World War, a battle was waged between the adherents of Emory Upton and Leonard Wood. In the words of John K. Mahon, America’s preeminent historian of the citizen soldier:

Emory Upton, although long dead, gave the definitive expression to the professional position, and he supplied the ideas to which Elihu Root, as far as it was politically possible, embraced. The most influential spokesman on the other side was Major General Leonard Wood. Wood’s insistence

\textsuperscript{58} Root wrote of the rising professional bureaucracies, “we shall expand them, whether we approve theoretically or not; because such agencies furnish protection . . . [which] cannot be practically accomplished by the old and simple procedure of legislatures and courts.” See Weibe, \textit{The Search for Order, 1877-1920} (New York: Hill & Wang, 1967), vii, viii, & 228. Elihu Root cited on 295-296.

that citizens could be trained in a few months was unacceptable to hard-
core professionals.\textsuperscript{60}

Following Leonard Wood in the non-Uptonian citizen army tradition would be
Brigadier General John McAuley Palmer and finally General of the Army George Catlett
Marshall. The professional models for all three would be characterized by the democratic
ideal of universal military service (UMT) in which citizenship, like in the classical
examples of the Greek and Roman republics, would be synonymous with military
service.

Leonard Wood’s program for democratization was wedded to his plan for the
professionalization of the military based on the insights of the managerial revolution
associated with the progressive period of American history.\textsuperscript{61} However, Wood’s ideas
were at odds with the conception of the citizen soldier championed by the supporters of
the National Guard in which individual state prerogatives and unit cohesion would be
given greater weight than centralized managerial efficiency. For Wood, all
standardizations of training, especially that of officers, had to be controlled by the War
Department. In his first year as Chief of Staff, General Wood oversaw the establishment
of military training camps for college students. By 1916, this initiative would overhaul
the ineffective training of students attending land-grant colleges, as required by the
Morrill Act of 1862, into the modern Reserve Officers Training Corps (ROTC). When
the pool of manpower for recruitment of officers was unable to meet the requirements of
the national army called into existence in the wake of the First World War, Wood

\textsuperscript{60} John K. Mahon, \textit{History of the Militia and the National Guard}, (New York: Macmillan Publishing

\textsuperscript{61} Lane, \textit{Armed Progressive}, 148.
supported the so-called “Plattsburg idea” of opening training camps for older men with professional non-military credentials. This program would provide the foundation of the formal Officer Training Schools (OTSs) established during World War One. As civilian candidates would receive training over several months and then be commissioned, they bear the lasting nickname of “ninety day wonders.”

By the year following the end of the First World War, the U.S. Army was radically democratized by the commissioning of 80,568 line officers. This democratization was of not just quantity, but of representative quality; for the first time, African-Americans recruits were incorporated into the officer training system, some attending segregated and others integrated OTS training camps. Leading this democratized army was General of the Armies, John J. Pershing. Partly as a result of their experience as aides to Pershing during the war, Palmer and Marshall would move further than even Wood in their criticism of Uptonion professionalism.

It was Palmer who provided the concept of the citizen soldier with a firm theoretical foundation. Being both a graduate of West Point and the son of an illustrious citizen-soldier of the Civil War, Major General John McAuley Palmer, he viewed the expandable professional army concept associated with John C. Calhoun and Emory Upton as outdated in the age of national mass armies. As a mere Captain, Palmer assisted Secretary of War Stimson before the war in his attempt to gain support in the military profession for a deployable professionalized citizen army. The result of this effort was the War Department report “The Organization of the Land Forces of the United States.” As a colonel in 1919, Palmer testified before and worked with congress on legislation

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that would be influential in the creation of the National Defense Act of 1920. Like Leonard Wood before him and George C. Marshall after him, Palmer failed to establish a complete national system of universal military training (UMT) which would feed recruits into his democratized citizen army. These ideas were not exclusive to Palmer. During the war these ideas were also championed by the National Association of Universal Military Training whose advisory board included former Secretaries of War Root and Stimson. What made Palmer unique was his belief that the professional Uptonian model of professionalism was not only impractical; it was inconsistent with the “genius of American institutions.” General Palmer wrote:

The forms of military institutions must be determined on political grounds, with due regard to national genius and tradition. The military pedant may fail by proposing adequate and economical forces under forms that are intolerable to the national genius.  

In 1939, the new Chief of Staff of the Army, General George C. Marshall, approved a new version of the army main capstone doctrinal manual, *Field Service Regulations*. Rechristianioned as Field Manual (FM) 100-5, *Operations*, the manual was a watershed event in establishing the ideal of the citizen soldier as a formal norm. The manual called for instilling democratic “symbolic ideals emplaced by tradition and national culture” into American soldiers as basis of their military service. Marshall was a great critic of the neo-Clausewitzian “principles of war” enshrined in the 1923 and later versions of Army capstone doctrine. In 1939 he issued an infantry handbook prepared under his earlier direction that stated “the art of war has no traffic with rules, for the

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infinitely varied circumstances and conditions of combat never produce exactly the same situation twice…”

For Marshall, like Palmer, military operations and organization had to be both pragmatic and accord with democratic institutions.

In response to the new non-isolationist foreign policy objectives contained in Roosevelt’s “Four Freedom’s” address to Congress, Marshall’s primary task upon his appointment as Chief of Staff was to create a nation in arms to meet both the contingencies of an armed peace or eventual war. Like Leonard Wood before him, Marshall understood that a mass citizen army had to be led primarily by professionalized citizen officers. In 1940, on the twenty-fifth anniversary of Leonard Wood’s original Plattsburg camp in upstate New York, Elihu Root, Henry Stimson, and retired Brigadier General Palmer met to draw up a plan for a national military draft that would follow as close as possible to their cherished vision of universal military service. Palmer took the plan to the new Army Chief of Staff, General Marshall. In the face of congressional opposition, President Roosevelt passed the Selective Service Training Act of 16 September 1940. Requiring all men between twenty-one and thirty-five to register for one year of military service, it was the closest approximation to the concept of universal military training that would ever be achieved in the United States. In order to implement what was to be the most democratized military deployment in American history, Roosevelt called Stimson back to serve a second term as Secretary of War to work with Marshall.


66 Weigley, History of the United States Army, 426.
Marshall was willing to move much further than Leonard Wood or even Secretary Stimson from the Uptonian conception of professional officer class. For Marshall, it was common sense that an experienced noncommissioned officer (NCO) in the infantry was far more a military professional than a civilian manager of a bank. The selective service act would provide a constant pool of recruits for officer candidacy, far better than the training camps for businessmen in the World War I era Plattsburg type camps. However, Marshall was confronted with an even more determined resistance to his ideas on democratizing officer candidacy than he had faced with his doctrinal reforms. When Stimson was on the verge of instituting OTS style “training camps for the sons of the rich without going thru the draft,” Marshall informed Stimson that he considered it “a colossal mistake” that would have to be done without him:

I went to Mr. Stimson and told him I had done my best and said the entire staff with me on this. ‘I will tell you now I am going to resign the day you do it.’

In 1941, two months before the Japanese attack on Pearl Harbor, General Omar Bradley, the Commandant of the first Officer Candidate School (OCS), read a letter by Marshall for the commissioning ceremony of the schools first graduates. The letter encapsulated the ideal of a non-Uptonian professionalized citizen army. In this Army, although there may not be a Napoleonic marshal’s baton found in every trooper’s rucksack, there was a possible gold lieutenant’s bar nesting under every gold sergeants strip. The words read out to the new lieutenants clearly followed the model fist

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conceptualized by General Palmer and it was this philosophy of democratized military profession that Marshall had put his career on the line to ensure its establishment.

Our Army differs from all other armies. The very characteristics which make our men potentially the best soldiers in the world can be in some respects a source of weakness. Racially we are not a homogeneous people, like the British for example, who can glorify a defeat by their stubborn and dogged discipline. We have no common racial group, and we deliberately cultivated individual initiative and independence of thought and action. Our men are intelligent and resourceful to an unusual degree. These characteristics, those qualities may be, in effect explosive or potentially destructive in a military organization, especially under adverse conditions, unless leadership is wise and determined and unless the leader commands the complete respect of his men . . . Your class is the first of what I believe will be the finest group of troop leaders in the world.68

A truly democratized Army not only had to be lifted out of class-consciousness, it had to look to be more representative of American society in other major aspects as well. While the Army would remain racially segregated under Marshall during the Second World War, the positions of leadership available to African-Americans would be greatly expanded, especially in aviation. The integration of the American military after the war under President Truman, who was greatly under Marshall’s influence, was the only logical next step. Marshall also expanded the role of women in the Armed forces, both commissioned and enlisted, by his support of the Women's Army Auxiliary Corps, to include granting them military status in 1943. Also during Marshall’s tenure as Chief of Staff, the first Catholic priest served as chief of the Chaplain’s Corps.

68 General Marshall’s address to the first Officer Candidate School (OCS) class in October 1941 as read by its commandant, General Omar Bradley, and witnessed by the author’s late farther standing in formation with the other graduates. Reprinted in Selected Speeches and Statements of General of the Army George C. Marshall, ed. Major H. A. DaWeed (Washington: The Infantry Journal, 1945), 175-177.
Conclusion

The major developments of U.S. military doctrine between the Civil War and World War II were influenced by foreign models of military professionalism. The Prussian model—a general staff corps and officer professional development incited a debate among American military theorists that left a distinctive imprint on the development of American military doctrine. With the development of a formal publication system, doctrine was increasingly specialized into distinct fields of capstone and keystone disciplines. After the Spanish-American War, pressures increased to democratize American military institutions and to create a mass army. While in conflict with earlier functionally aristocratic conceptions of military professionalism, supporters of a democratic conception of professionalism imbued the military with societal values facilitative of the extension of humanitarian norms in warfare.

When Marshall was sworn in as Chief of Staff on the day Hitler invaded Poland starting the European phase of World War II, the Army comprised less than 200,000 men. By the time Marshall left that office in 1945, the Army numbered over 8,000,000. Marshall knew that the Army organization that he experienced for most of his career, an expandable professional army, would not return after the war. Although the Uptonian dream of a functional military elite officer corps was far from dead, Marshall’s concept of the professionalized citizen-soldier provided the doctrinal and intellectual foundation of the modern American Army.

In the fifth century, Saint Augustine appealed to Christians that military service was not forbidden to them and they should conduct themselves under arms in an individual affirmation of shared Christian ethics. Generals Palmer and Marshall held that
American military professionals should conduct themselves under arms as individuals affirming shared democratic ethics. As in Augustinian just war doctrine, the focal point of professionalism resided in the individual soldier or commander. The enforcement mechanism to ensure that this individual affirmation would be consummated in actual military policies with the expansion of the principle of individual and command responsibility during the course of World War II.
CHAPTER 3
COMMAND RESPONSIBILITY AND
THE MEANING OF NUREMBERG

The commander is responsible for everything his unit does or fails to do.

-- Field Manual 71-100¹

Duty requires each of us to accept responsibility not only for our own actions, but also of those entrusted to our care.

-- Field Manual 100-1²

The World War II era American War Crimes Program established a standard of command responsibility as part of a wider American war crimes policy. The central tenets of command responsibility and superior orders was first initiated as a change in military doctrine and was later imposed by U.S. Military tribunals on defendants of the defeated axis powers. After receiving international validation, these standards were then reincorporated back into U.S. military doctrine. This entire process was planned and administered members of the American military profession in the U.S. War Department.

In the U.S. military, the word “command” has two separate definitions that are simultaneously both distinct and overlapping. First, command is simply the authority that a military commander “lawfully exercises over subordinates by virtue of rank or assignment” and, secondly, it is also a “unit or units, an organization, or an area under the

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command of one individual.”

The individuals assigned to a command are collectively and reflexively associated with the person of the commander. The word “responsibility” also shares two major distinct, yet reflexive, definitions. Responsibility is both the “quality or state” of being a responsible moral agent and it is “something for which one is responsible.” Additionally, command responsibility includes both a superior’s liability for the commission of a war crime by a subordinate and a defense by a subordinate that such as crime was the result of the compliance with “superior orders.”

Both branches were central in the court martial of Major General Jacob Smith during the Philippine Insurrection (1899-1906). In 1901, General Smith was court-martialed and then forced to retire for the conduct of his operations against noncombatants on the island of Samar that year. Smith unsuccessfully argued that the acts of his command were permissible acts of retaliation under General Orders No. 100, still in effect at the time. Later his subordinates also argued, unsuccessfully, that their actions were permissible under the concept of superior orders.

The future Nobel Peace Prize recipient, George Catlett Marshall, while serving as a lieutenant in the Philippines, noted that gratuitous reprisals against the civilian population of the Philippines were widespread and that, in his opinion, many more

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3 Department of Defense, Joint Publication 1-02, s.v. “command.”

4 Webster’s Seventh New Collegiate Dictionary (1965), s.v. “responsibility.”

5 Leslie Greene, one of the leading military law scholars in the field, posits that the legal concept of command responsibility also falls within two branches: (1) the responsibility of a commander who directly orders a subordinate to commit a breach of the law of armed conflict or whose “conduct implies that he is not adverse to such a breach being committed;” and (2) the defense by a subordinate that “violations were the result of “compliance with superior orders.” See “Command Responsibility in International Humanitarian Law,” Transnational Law & Contemporary Problems, (1995), 5, & 319-320.

6 During this conflict, U.S. Army troops acting in the self-interested, self-regulated mode of the irregular carried out two notorious acts of atrocity. Over one million Philippine citizens died during many as a consequence of the indiscriminate brutality of retaliatory counterinsurgency operations by the U.S. Army.
soldiers should have been arrested and court-martialed besides Smith and his immediate subordinates.⁷ Forty-three years later, as Chief of Staff of the Army, this officer would be in position to extend and formalize the concept of command responsibility that would allow prosecution of military personnel regardless of claims of superior orders. On November 14, 1944, the War Department, under his signature, issued Change 1 to its Field Manual 27-10, *The Rules of Land Warfare* (1940):

> Liability of offending individuals and organizations who violate the accepted laws and customs of war may be punished therefore. However, the fact that the acts complained of were done pursuant to an order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished.⁸

**Command Responsibility Before Nuremberg**

This change in military doctrine supplanted the previously existing American policy positions concerning responsibility for war crimes as established at the end of World War I. Drawn up by the American delegation under the leadership of Secretary of State Robert Lansing, the American reservations to proposed war crimes trials at the Paris Peace Conference in 1919 articulated an unqualified defense of the principle of sovereign immunity. Lansing and his team also rejected the Allied attempt to hold the German Kaiser accountable for provocation of the First World War and violations of the laws and customs of war by German forces during the course of the war. Concerned over the politicized utilization of legal innovations by the Allied powers at the expense of the

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defeated powers, the general tone of the American dissent was couched in the conventional language of conservative legal positivism that included a general distrust of any movement toward establishing an international regime of war crimes prosecution based on the enforcement of consistent reciprocal standards and jurisprudence between nations.9

For example, the American Memorandum of Reservations noted that there were “two classes of responsibilities, those of a legal nature and those of a moral nature. Accordingly, legal offenses were liable for trial by legitimate tribunals” and moral offenses, “however iniquitous and infamous and however terrible in their results” were outside the jurisdiction of judicial action and “subject only to moral sanctions.” In direct contrast to the natural law / just war perspective of Francis Lieber and General Orders No. 100, Lansing held that the “laws and principles of humanity vary with the individual, which, if for no other reason, should exclude them from the consideration in a court of justice” and that “there is no fixed and universal standard of humanity.” Specifically, the American delegation opposed the “doctrine of negative criminality” that held individuals liable who “abstained form preventing, putting an end to, or repressing, violations of the laws and customs of war.” Finally, the concept that an international tribunal could have jurisdiction for the prosecution of war crimes was categorically rejected:

The American representatives know of no international statute of convention making a violation of the laws and customs of war – not to speak the laws or principles of humanity – an international crime, affixing a punishment to it, and declaring the court that has jurisdiction over the defense.10

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9 For a detailed description of the U.S. reservations to the “Commission on the Responsibility on the Authors of War and the Enforcement of Penalties,” see Maguire, Law and War, 76-78.

10 Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on the Responsibility,” April 1, 1919. See “Commission on the Responsibility of the Authors
The Origins of Nuremberg

The American war crimes program, initiated in the final year of the Second World War, represented not only a transformation in American policy, but also a mechanism to link that policy to international norms. The 1907 Hague Conventions restricted the application of the “laws, rights, and duties of war” only to formations “commanded by a person responsible for his subordinates.” However, according to the view of legal positivists, military commanders could only be held responsible under the domestic laws of their own country. The 1928 Kellogg-Briand Pact criminalized the resort to aggressive war. As it ratified by the U.S. Senate, it certainly created a challenge to Secretary of State Lansing’s conservative legal positivism at the Paris Peace Conference. However, it still contained no enforcement mechanism that could be applied to citizens of other nations. Notions of command and individual responsibility, without a credible threat of punitive sanctions imposed by enmities other than those benefitting from criminal behavior, provides little solace to the victims or potential victims of war crimes or aggression. Because legal positivism cannot address the possibility that a nation state can be a criminal enterprise, it cannot provide credible redress for criminal acts of state.

The first systematic and operationally binding international standard that placed the individual perpetrators of state actions under the jurisdiction of tribunals, other than those administered by the authorities of the very state for whose benefit the criminal acts were perpetrated, was initiated by a directed change to standing American military

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doctrine. Penalties placed on individuals for non-compliance with international standards would be imposed on the citizens of the defeated powers by the multilateral action of the victorious states by overturning one of the central tenets of legal positivism. Most importantly, the victorious powers would claim they themselves would be bound, henceforth, by same universalistic standards they were imposing on the citizens of other nations.

This revolutionary change in American policy was generated in the midst of the greatest inter-departmental power struggle in the U.S. government during the course of the Second World War. This conflict, which would come to be known as “The Great German War on the Potomac,”\textsuperscript{12} did not result from a policy fight between Lansing’s successors at the State Department and the War Department. Rather, it was the result of Secretary of War Henry L. Stimson’s and Assistant Secretary of War John J. McCloy’s opposition to Treasury Secretary Henry Morgenthau’s plans for a Carthaginian peace, which was intended to economically “castrate the German people,” as well as Winston Churchill’s initial position in favor of the summary executions of some German leaders.\textsuperscript{13} With the State Department taking a passive position in the dispute between Stimson and Morgenthau, the Department of War was at first isolated in pushing for a reconstruction of Germany rather than its dismemberment.

To set an example for the re-legitimization of the rule of law in Germany, Stimson’s policy was to cultivate Germany as a future strategic ally by utilizing the very


\textsuperscript{13} Quotation from Morgenthau diaries, reel 2, box 6, 19 August 1944 as cited in Arieh J. Kochaw, Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment, (Chapel Hill: University of North Carolina Press, 1998), 81.
trials established to deal with German war criminals. It is hardly surprising that Germany’s future role as a bulwark of democratic constitutionalism against both Nazism and Communism, which would play a pivotal role in the west’s victory in the Cold War, was not obvious to the many critics of Stimson’s position. While the coming of Cold War may have been foreseeable to some American officials, the role of a divided Germany whose border would serve as the military and ideological pivot of Europe was hardly a certainty in 1944. Even those who would eventually champion a central role for Germany in the Cold War, either as a unified neutral or a divided Germany with its western portion integrated into the western alliance, voiced concerns that the American War Crimes Program was an impediment, rather than an asset, to that process. While Stimson’s policies toward Germany may have been proven sound with the benefit of the post Cold War hindsight, the American War Crimes Program constituted one of the most controversial and criticized policies of the immediate post war period.

Stimson was initially assisted by Army Chief of Staff Marshall and Judge Advocate Maj. Gen. Myron C. Cramer in his efforts to fight back Morgenthau’s plan for

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14 Melewyn Leffler, America’s most prominent contemporary historian of the early Cold War, places early 1946 as the point in which leading U.S. official reached the consensus that “defined the Soviet Union as the enemy,” effectively marking the start of the Cold War well after the initiation of the American War Crimes Program. See A Preponderance of Power: National Security, the Truman Administration, and the Cold War, (Stanford: Stanford University Press, 1992), p.100.

15 Reinhold Niebuhr, one of the fathers of Cold War realism, warned that moving beyond the holding of individuals responsible for “crimes against commonly accepted standards of humanity” would lead to the dismissal of the program as vindictive “victor’s justice,” as in the case of the discredited Morgenthau Plan to deindustrialize Germany. Niebuhr’s concerns over the more controversial aspects of the Nuremberg process would be addressed in the inclusion of the Articles 10 – 12 protections against guilt by association in the 1949 Universal Declaration of Human Rights. See Niebuhr, “Victors’ Justice,” in Common Sense, (January 1946), 6-9. Another of the realist theorists of the early Cold War, George F. Kennan, was more categorically dismissive of the American War Crimes Program in preferring that “the Allied Commanders had standing instructions that if any of these men (the Nazi leaders) fell into the hand of Allied Forces they should, once their indent be established beyond doubt, be executed forthwith.” Kennan argued that it was impossible for trials to undo crimes of such magnitude and that the inclusion of Soviet Judges who carried out Stalin’s purges “was to make a mockery” of any constructive purpose the trials could attempt to attain. See Kennan, Memoirs 1925-1950, (New York: Bantam Books, 1969), 274.
a draconian peace and Churchill’s preference for summary executions. In his diary, Stimson wrote that it was “very interesting to find that Army officers have a better respect for the law in those matters than civilians who talk about them and are anxious to go chop everybody’s head off without a trial or hearing.”

The first product of the effort was the November 11, 1944 draft “Memorandum for the President from the Secretaries of State, War, and Navy” prepared by the Army lawyer Lieutenant Colonel Murry C. Bernays under the direction of John McCloy. The memorandum only preceded by four days the publication of Change 1 of 15 November 1944 to War Department Field Manual 27-10, *The Rules of Land Warfare* issued under Marshall’s signature. The November 11 memorandum included what critics and defenders would claim to be the most legally innovative part of the initiatives that were put forward by the Department of War in establishing the foundations of the Nuremberg trials. These “Bernays’ additions” included (1) the concept of a criminal conspiracy to wage aggressive war and (2) the concept of criminal-organizations, a novel and controversial initiative to collectively try the SS and other entities of the Third Reich legally responsible for war crimes.

Unlike the November 11 “Bernays’ additions,” which would be long delayed by the indifference of the other departments and lack of clear guidance from the President, Marshall’s change to FM 27-10 was effective immediately and did not attract interdepartmental and inter-allied opposition. The repudiation of the defense of superior orders and the standard of command responsibility found in the change to FM 27-10

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constituted the third major element, along with “the Bernays additions” in what would become the “Nuremberg Ideas” associated with the War Department war crimes initiatives sponsored under the leadership of Secretary Stimson.18

The initiatives of this “Stimson Group,” with the addition of the concept of crimes against humanity, had been discussed without much official notice in the deliberations of the United Nations War Crimes Commission (UNWCC), which had started meeting in London on October 20, 1943. Even after the November 1, 1943, Moscow Conference Declaration by Roosevelt, Churchill, and Stalin of allied intentions to prosecute individuals Germans responsible for war atrocities, the UNWCC provided not much more than a platform to pacify the concerns of occupied governments in exile in reference to accountability for Axis outrages on their respective populations and territories. By the end of 1944, both the British and American representatives to the UNWCC had left the process. Sir Cecil Hurst resigned over the British Foreign Office’s opposition to a war crimes tribunal established by treaty. Herbert C. Pell, the American representative, was forced out when his position became unfunded due to his disagreement with the State Department over his support for including prewar crimes against German Jews under the jurisdiction of any proposed allied war crimes tribunal.19

Aided by the public outcry following the public revelation of the December 17, 1944, massacre of seventy American POWs at Malmedy, Belgium, during the Battle of

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18 “The Bernays Additions” and “the Nuremberg Ideas” are phrases utilized by General Telford Taylor, the Chief American prosecutor following Justice Jackson’s return to the Supreme Court, as indicating an association with those proposals initiated by the “Stimson group” of planners in the War Department. In the present work, these terms will mark a demarcation of the core concepts comprising the American War Crimes Program from concepts arising from other sources. See Taylor, Anatomy of the Nuremberg Trails, 35, 39, & 639.

19 Kochavi, Prelude to Nuremberg, 118 & 161.
the Bulge by members of the First SS Panzer Regiment, the Stimson group in the War Department succeeded in obtaining an interdepartmental consensus on central points of War Crimes policy resulting in the three secretaries’ agreement (War, State, and Justice Departments) of 22 January 1945. The War Department still failed in both obtaining the formal approval of President Roosevelt and in overcoming opposition to formal trials by the British Foreign Office. With the U.S War Department arguing for an extension of current international law and the British foreign office objecting to war crimes trials on traditional positive legalistic grounds, the resulting respective American and British positions were 180 degrees reversed from the positions taken in the immediate aftermath of World War I. Even though British opposition was slightly counter-balanced by the support of General Charles de Gaulle, President of the interim government of France, the impasse over war crimes policies was not broken until after Roosevelt’s death on April 12, 1945. Eight days later, President Truman ordered that the American War Crimes Program, as articulated in the three secretaries’ agreement, be acted upon as the stated policy of the United States. Truman then succeeded in convincing one of the most influential officials of the New Deal, Supreme Court Justice Robert H. Jackson, to serve as his Representative and Chief Counsel for war crimes in the final negotiations for the trials and also to serve as the Tribunal’s first U.S. Chief Prosecutor.20

With the appointment of Jackson, the discussion of war crimes trials reverted back to the international arena with the War Department personnel supporting Jackson’s leadership of the American effort. An important addition to Colonel Bernays and the Stimson group was Major General William J. Donovan, head and founder of the Office of

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Strategic Services (OSS). General Donovan brought the resources of the American military intelligence to relieve Jackson’s acute shortage of evidentiary documentation. On June 26, 1945, Truman, Stalin, and Churchill (later to be replaced by Clement Attlee) met at the Potsdam Conference outside Berlin. Concurrently, American, British, French, and Soviet delegations met at Church House in London to finalize the London Charter on the International Conference on Military Trials, which later came to be generally known as the Nuremberg Charter. The pressure to have a general agreement in place prior to the adjournment of the Potsdam conference pushed the representatives toward a consensus.

While detailed description of the London conference is beyond the scope of this work, a few relevant factors on the resulting charter should be noted. The electoral defeat of Churchill and the Conservatives in Britain broke the American / British impasse on holding war crimes trials. Now the greatest challenge to the American policy came from the Soviet delegation. The London Conference called for the creation of an International Military Tribunal (IMT), with judges serving from each of the major European allied powers appointed to try the “major war criminals of the European Axis.” Jackson was well aware of the problems relating to having Soviet participation on a tribunal in the aftermath of the Stalinist purges and the Nazi-Soviet Pact. Jackson’s assistant and successor, Brigadier General Telford Taylor, called the presence of Soviet judges as the “biggest wart” of the IMT.\(^{21}\) The central point of contention between Jackson and the Soviets was over the wording of principles. Jackson called for the text to emphasize universal reciprocity rather than victors’ justice. When the Soviets insisted that only the crimes of the “European Axis” were of concern to the trials, Jackson wrote to the

President in Berlin on June 6 arguing that no agreement was better than sacrificing principle on this issue:

If certain acts of violations of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us. Therefore, we think the clause “carried out by the European Axis” so qualifies the statement that it deprives it of all standing and fairness as a juridical principle.\footnote{See Robert H. Jackson, \textit{International Conference of Military Trials}, (Washington DC: Government Printing Office, 1947), 104-105.}

Despite his lack of success of convincing the Soviets on this point, Jackson was successful in gaining eventual Soviet agreement on many other issues. The charges that would be brought against twenty-one defendants in the first trial of the Nuremberg process were condensed into four major counts: (1) planning crimes against peace; (2) initiation of or waging of crimes against peace; (3) war crimes; and (4) crimes against humanity. The initiatives of the Stimson group fared well in the outcome of the London Conference. Although the \textit{Bernays Additions} would be restricted only to crimes against peace for individual defendants, repudiation of the defense of superior orders as found in Marshall’s change to FM 27-10 were clearly articulated in articles 7-8 of the London Charter:

\begin{quote}
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.

Article 8. The fact the a Defendant acted pursuant to order of his Government of a superior shall not free him from responsibility, but may be considered in mitigation of the punishment if the Tribunal determines that justice so requires.\footnote{The Charter of the International Military Tribunal reprinted as Appendix A in Taylor, \textit{Anatomy of the Nuremberg Trials}, 645-653.}
\end{quote}
On October 10, 1945, the representatives of the United States, France, Britain, and the Soviet Union signed the "Charter of the International Military Tribunal" in Berlin. The signatures were, respectively, Robert H. Jackson, Francois de Menthon, Hartley Shawcross, and R. Rudenko. Twenty-Four individuals were named in the indictment signed in Berlin.

The International Military Tribunal and the Nuremberg Principles

Although the major precedents of command responsibility are usually associated with later Nuremberg trials under Allied Control Council Law No. 10 that followed the trial of the major leaders of the Third Reich, the issue of the defense of superior orders was also central in the International Military Tribunal (IMT) held in Nuremberg between November 20, 1945 and September 30, 1946. The four major military defendants at the IMT included Field Marshal Wilhelm Keital, Hitler’s ranking officer in the Wehrmacht; General Alfred Jodl, Hitler’s Chief of Staff; Admiral Erich Raeder; and Admiral Karl Doenitz, the successive commanders of the German Navy.\(^{24}\)

All four unsuccessfully articulated the principle of absolute obedience to superior orders in their statements before the tribunal. In his statement given before his sentence was read on August 31, 1946, Admiral Raeder categorically argued that a refusal to follow orders was a political act that infringed upon the political neutrality he associated with military professionalism:

\(^{24}\) Hermann Goering and Ernst Kaltenbrunner, while holding military rank, are not included in this list of major military defendants because of the former’s extensive non-military role as the secondary head of state for the Third Reich and the latter’s role as a penal administrator and executioner of the Final Solution were primarily non-military in function.
If I have incurred guilt in any way, then this was chiefly in the sense that in spite of my purely military position I should perhaps have been not only a soldier, but also up to a certain point a politician, which, however, was in contradiction to the entire tradition of the German Armed Forces.25

The military defendants rejected the most relevant historical example of officers resisting Hitler’s authority. Under cross-examination, General Jodl categorically condemned the July 20, 1944 conspiracy by General Staff German officers led by Colonel Claus Schenk Graf von Stauffenberg to assassinate Hitler. Jodl stated that the plot was the “blackest day which German history has seen as yet and will probably remain so for all times.” He went on to explain the military code of ethics that governed his conclusion:

Judge Owen J. Roberts: Why was it such a black day for Germany?
Because someone tried to assassinate a man whom you now admit was a murderer?

General Jodl: Should I—at a moment when I am to be blown up in a cowardly, insidious manner by one of my own comrades, together with many opponents of the regime—should I perhaps approve of it all? That was to me the worst thing that happened. If the man with a pistol in his hand had shot the Fuehrer and had then given himself up, it would have been entirely different. But these tactics I considered most repulsive to any officer. I spoke under the impression of those events, which are actually among the worst I know, and I maintain today what I said then.

Judge Roberts: I do not want to argue with you, but do you think it is any more dastardly than shooting those 50 American soldiers who

25Final Statement of Admiral Raeder on 31 August 1946, Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946, Blue Series, vol. 22 (Buffalo: William S. Hein & Co, 1947; reprint 1995), 391. For the subtlety of the position on obedience held by major leaders of the Third Reich, see also Speech of Reichsfuehrer-SS Heinrich Himmler at Posen 4 October 1943, translation of Document No. I 919-PS, Nuremberg Trial, translated by Carlos Porter: “If anybody believes that a command is based on mistaken perceptions on the part of a superior or on mistaken information, it is matter of course, that he—that is, every one of you—has the duty and the responsibility to speak out, stating his reasons manfully and truthfully, if he is convinced that they mitigate against the command. But once the Superior or Reichsfuehrer SS is involved—in most cases, it the Group Leadership Corps which is concerned—or, even, the Fuehrer, has decided and has given an order, it must be carried out, not just to the letter and to the text, but in keeping with the intent."
landed in the north of Italy to destroy a military target, shooting them like dogs?

General Jodl: That also was murder, undoubtedly. But it is not the task of a soldier to be the judge of his commander-in-chief. May history or the Almighty do that.26

Jodl then articulated his view of the ethical professional code of a soldier:

And as for the ethical code of my action, I must say that it was obedience-for obedience is really the ethical basis of the military profession. That I was far from extending this code of obedience to the blind code of obedience imposed on the slave has, I consider, been proved beyond all manner of doubt by my previous testimony. Nevertheless, you cannot get around the fact that, especially in operational matters of this particular kind, there can be no other course for the soldier but obedience.27

Field Marshall Keitel, in turn, appeared to have some regret over his decision to serve according to the principle of absolute obedience to orders in his pre-sentencing statement. When asked how he would responded if placed in the “same position again," he answered that he “would rather choose death than to let (himself) be drawn into the net of such pernicious methods." In one of the most credible statements of remorse given by a defendant before the IMT, he admitted that German military honor had been compromised under the Third Reich:

I believed, but I erred, and I was not in a position to prevent what ought to have been prevented. That is my guilt. It is tragic to have to realize that the best I had to give as a soldier, obedience and loyalty, was exploited for purposes which could not be recognized at the time, and that I did not see that there is a limit set even for a soldier's performance of his duty. That is my fate.28

27 Ibid., 5 June, 1946, 383.
28 Final Statement of Field Marshal Keitel on 31 August 1946, Ibid., vol 22, 377
Military professionals were especially interested in the case of Admiral Doenitz. Although a fanatical Nazi who was appointed by Hitler as the head of state prior to his suicide, Doenitz’s role in the war was seen as the most operationally military of the defendants before IMT. An argument for considering the Allied aerial bombing and use of the atom bomb, which disproportionately resulted in civilian casualties, as war crimes has been made, indicating that the American War Crimes Program was no more than just victor’s justice.\(^{29}\) However, the defendants of the defeated powers were at least not charged with specific crimes that were identical to Allied policies, except for Admiral Doenitz who was charged for waging submarine warfare in the exact manner of the Allies. While this was technically allowed by the London Charter which forbade the use of \textit{tu quoque} (hypocrisy of the prosecution) in the tribunal, Doenitz’s lawyer, Otto Kranzbuhler, a former German naval officer and lawyer, succeeded in obtaining the cooperation of American Admiral Chester Nimitz and the British Admiralty to respond to interrogatories that the submarine tactics in question, refusing to rescue survivors, was also a Allied practice. The success of Kranzbuhler and Nimitz in avoiding a conviction of Doenitz on this specific charge was the high water mark for the ethical integrity of the Tribunal.\(^{30}\)

The tribunal found all four military defendants guilty of following and disseminating a particular illegal order, “The Commando Order,” which mandated the executions of enemy commandos. Following Article 23 of the Hague Convention, the

\(^{29}\) One of the better arguments for considering Allied bombing campaigns as war crimes is found in John W. Powers. \textit{War Without Mercy, Race and Power in the Pacific War}, (New York: Pantheon, 1986), 37-41.

Tribunal held that commando operations were a legitimate military tactic giving its participants protection as POWs if captured. Keitel and Jodl were convicted on all counts and were hanged by American soldiers. Raeder was convicted on all counts except crimes against humanity (count 4) and was given a life sentence. Doenitz was convicted of planning, preparing, initiating, and conducting a war of aggression (count 1), but not participating in a conspiracy to plan, prepare, initiate, and conduct a war of aggression. Doenitz was also convicted of war crimes (count 3), but not crimes against humanity (count 4). Although three of the four were found guilty of counts stemming from the Bernays Additions, only those major military defendants found guilty of “crimes against humanity” under the principle of command / individual responsibility were executed.\(^{31}\)

On December 11, 1946, seventy-one days after the IMT handed down its sentences, the newly born UN General Assembly affirmed the Principles of International Law recognized by the Charter of the Nuremberg Tribunal that included the U.S. War Department’s thesis on superior orders and command responsibility:

**Principle I:** Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.

**Principle II:** The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

**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.

**Principle IV:** The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

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\(^{31}\) Taylor, *The Anatomy of the Nuremberg Trials*, 559-570.
Principle V: Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI: The crimes hereinafter set out are punishable as crimes under; international law:

**Crimes against peace:** Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

**War crimes:** Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

**Crimes against humanity:** Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Principle VII: Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principles VI is a crime under international law. 32

The Yamashita Precedent

The most noted of the Nuremberg era trials, insofar as the standards of command responsibility are concerned, was undertaken outside of the formal structure of the London Charter. The trial of Japanese General Tomoyuki Yamashita was contemporaneous with the IMT and was referenced in the subsequent trials in Europe authorized under the Allied Control Council’s Control Law No. 10. It is still the most referenced standard of command responsibility to this day. On October 8, 1945, two days before the London Charter was signed in Berlin, General Yamashita was arraigned

32 Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal. Adopted by the International Law Commission of the United Nations, 1950:
by a military tribunal consisting of veteran American general rank officers under the
direct authority of General Douglas MacArthur as the Supreme Commander Asia Pacific
(SCAP). Yamashita was put on trial for his ‘command responsibility’ in failing to
prevent or punish the killing of civilians and prisoners of war during the Japanese defense
against the American reconquest of the Philippines in 1945. Yamashita’s forces were
responsible for killing 8,000 civilians, committing 500 rapes and other atrocities in and
around Manila. Although these forces were under his formal command, his defense team
argued he did not have effective control of these forces as the result of his inability to
communicate orders or receive reports from these forces, which was directly the result of
the actions of American forces in disrupting his command infrastructure. The tribunal
charged that Yamashita “unlawfully disregarded and failed to discharge his duty as
commander to control the operations of members of his command, permitting them to
commit brutal atrocities against people of the United States and of its allies and
dependencies.”

The American Military Commission trying Yamashita addressed the defense
claim that successful American operations had virtually severed Yamashita’s
communication with his subordinates by a broadly defined standard of command
responsibility that that held that a commander’s duty to act is an affirmative positive
obligation:

Clearly, assignment to command military troops is accompanied by broad
authority and heavy responsibility. This has been true of all armies
throughout history. It is absurd, however, to consider a commander a
murderer or rapist because one of his soldiers commits a murder or a
vicious rape. Nevertheless, where murder and rape and vicious,

33 Military Commission Convened by the Commanding General United States Army Forces, Western
revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.\(^\text{34}\)

This most rigorous of all standards of command responsibility, known as the “Yamashita Precedent,” was a complete formal repudiation of the pre-World War II American legal position that “neither knowledge of commission, nor ability to prevent is alone sufficient” to convict a leader or commander for the crimes of his subordinates.\(^\text{35}\)

Upon the defense’s appeal to the Supreme Court, the standard was explicitly affirmed in the wording of the majority in upholding Yamashita’s conviction and sentence of execution based on a breach of an active, rather than a passive, command obligation:

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\text{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 violation which it is the purpose of the law of war to prevent. Its purpose is 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. Hence the law of war presupposes that its violation is to be avoided through the control of operations by commanders who are to some extent responsible for their subordinates.}
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This is recognized by the Annex to the Fourth Hague Convention of 1907. Article I lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be “commander by a person responsible for his subordinates.”\(^\text{36}\)

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\(^\text{35}\) Quoted from the position articulated by Secretary of State Lansing at the Paris Peace Conference in 1919, see Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on the Responsibility,” April 1, 1919. See “Commission on the Responsibility of the Authors of the War and On Enforcement of Penalties, by Secretary of State Robert Lansing and Legal Advisor James Brown Scott” in The American Journal of International Law, 14 (January – April 1920), 127-149.

In the minority dissent, Supreme Court Justice Loren E. Murphy accepted the defense’s claim that “nowhere was it alleged that the petitioner personally committed any of the atrocities, or that he ordered their commission, or that he had any knowledge of the commission thereof by member of his command” and that the positive obligation of “failing to take action” was without prior legal precedence.”

Justice Wiley Rutledge in his supporting dissent argued that there is no precedence for imputing “mass guilt” to individuals in cases “where the person is not charged or shown actively to have participated in or knowingly to have failed in taking action to prevent wrongs done by others.”

General MacArthur confirmed Yamashita’s sentence to be hanged and issued a statement that articulated the ethical professional obligation of command responsibility in keeping with the general anti-positivist tone of the American War Crimes Program. It is worthwhile repeating MacArthur’s words, words that should be familiar to any American soldier:

The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is his very essence and reason for his being. When he violates this trust, he not only profanes his entire cult but threatens the very fabric of international society. The traditions of fighting men are long and honorable. They are based upon the noblest of human traits—sacrifice.

Trials Under Control Council Law No. 10

On December 20, 1945, thirteen days after General Yamashita’s sentencing, the Allied Control Council Law No. 10, established the basis for "the prosecution of war

37 Ibid, Murphy minority opinion reprinted in Friedman, Documentary Hist, 1613.

38 Ibid, Rutledge minority opinion, reprinted in Friedman, Documentary Hist, 1613, -1623.

criminals and similar offenders” following the charges as previously outlined in the London Charter establishing the IMT. Justice Jackson’s deputy, General Taylor took over as chief U.S. prosecutor during this next phase of the trials. During the war, Taylor served as a military intelligence officer and was one of the leading experts of the organization of the German armed forces during the war. Taylor had the support of the Military Governor, General Lucius Clay, and Allied High Commissioner, John McCloy, who agreed with Stimson’s view of the trials as integral to the construction of a new democratic Germany. These military trials, unlike those to be established in the Far East following the Yamashita trial, focused on trying military leaders for straightforward war crimes and avoided the more novel aspects of the IMT associated with the Bernays Additions such as conspiracy to wage aggressive war and membership in criminal organizations. Between 1945 and 1949, the United States prosecuted twelve major trials under Control Council No. 10. Two trials, the High Command Case and the Hostage Case, left important legal and historical precedents regarding the concept of command responsibility.

The German High Command Case (United States v. Wilhelm von Leeb et al)

Between December 30, 1947 and October 28, 1948, Field Marshal Wilhelm von Leeb and thirteen other general officers were tried on four counts: Crimes Against Peace; War Crimes; Crimes Against Humanity; and Conspiracy to Commit Crimes Charged on Other Counts. Von Leeb, the senior defendant, served as the Commander in Chief of Army Group North on the Russian Front until he resigned on January 16, 1942 to protest Hitler’s interference with the conduct of his command. The charges against von Leeb included participating in a plan or conspiracy in implementing the Commissars Order, an
illegal order for German forces to execute Soviet Commissars and other Soviet Communists Party officials. Von Leeb was acquitted of this charge not only because he was able to demonstrate that he did not disseminate the order, but that he openly opposed it. Like Yamashita, von Leeb’s defense argued that he was unaware of the criminal actions carried out by his subordinates. Accordingly, the tribunal ruled that criminal responsibility does not attach to a commander “merely on the theory of subordination and over-all command.”

Although the Tribunal in this case qualified and somewhat narrowed the range of indirect command responsibility associated the Yamashita Precedent in that it held that “it recognized that the responsibility is not unlimited,” it also provided a more nuanced and detailed description of the affirmative duties placed on a commander. The Tribunal ruled that a commander “cannot set aside or ignore by reasons of the activities of his own state within his area” because he is “the instrument by which the occupancy exists.” The Tribunal also held that the care required for the civilian population in the area under the control of a commander is “analogous” to the protections that a commander must provide for combatant prisoners of war. In summary, a commander either “must have knowledge” or be held criminally negligent in failing to prevent crimes committed by his subordinates. Although von Leeb was not found guilty under the principle of command responsibility for the execution of the Commando Order, he was found guilty of

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40 Opinion and Judgment of United States Military Tribunal at Nuremberg in United States v. Wilhelm von Leeb et al (hereinafter the German High Command Case), 1948, reprinted in Friedman, Documentary Hist., 1456.
knowingly disseminating a similar order, the Barbarossa Jurisdiction Order that ordered German forces to summarily execute civilians.\footnote{Ibid., 1449-1451.}

*The Hostage Case* (United States v. Wilhelm List et al)

If the German High Command Case can be viewed as moving away from the standard of command responsibility associated with the Yamashita Precedent, the Hostage Case undertaken between July 15, 1947 and February 19, 1948 should be viewed as moving the standard back in the direction of Yamashita. Field Marshal Wilhelm List and eleven other defendants were charged with both direct and indirect responsibility for the executions of thousands of civilians in Greece, Yugoslavia, Norway, and Albania from September 1939 to May 1945, executions that were held to be “unjustified by military necessity.”\footnote{Opinion and Judgment of the United States Military Tribunal at Nuremberg in United States vs. Wilhelm List et al reprinted in Friedman, *Documentary Hist*, 1303.} Unlike the *High Command Case*, the Tribunals ruling on command responsibility was written in response to the prosecution successfully making its case that the defendants claim of ignorance of the crimes committed in their area of responsibility by their subordinates was not credible. In reference to the major defendant, Field Marshal List was shown to have been aware of killings of civilians by his forces and failing to take any disciplinary actions or preventive steps to avoid similar acts in future. List also claimed that many of the crimes were committed by forces, while in his area of operations, not under his direct command. The ruling clearly upheld the concept of indirect subordination:

(List) contends further that many of these executions were carried out by units of the SS, the SD, and local police units which were not tactically subordinated to him. The evidence sustains this contention but it must be
borne in mind that his capacity as commanding general of an occupied area, he is charged with the duty and responsibility of maintaining order and safety, the protection of the lives and property of the population, and the punishment of crime. This not only implies a control of the inhabitants in the accomplishment of these purposes, but the control of other lawless persons or groups. He cannot escape responsibility by a claim of a want if authority. The authority is inherent in his position as commanding general of occupied territory.\textsuperscript{43}

The defense claimed that List was not responsible for the illegal reprisal orders that were neither issued by his superiors nor signed under his hand. The Tribunal responded by ruling that an officer is bound only by lawful orders and “one who distributes, issues, or carries out a criminal order becomes criminal if he knew or should have known (my italics) of its criminal character.”\textsuperscript{44} Similarly, in contrast to claims based on legal positivism and political expediency, the Tribunal reaffirmed the central just war principle of military necessity. Although it acknowledges the customary international law in current use during the period in question that allowed the taking of hostages, the Tribunal argued that the degree of retaliation against the civilian populations by forces under the defendants command, sometimes reaching a ratio of 100 civilians for every German soldier killed by a partisan, were criminal due to a lack of proportionality. Rather than shooting hostages “as a last resort,” the defendants were shown to have conducted a “campaign of intimidation and terrorism as a substitute for additional troops. The judgment of the Tribunal specifically noted that “the German theory of expediency and military necessity (\textit{Kriegsraeson geht vor Kriegsmanier}) surpassed what was allowable under established rules of international law” and reasserted

\textsuperscript{43} Ibid., 1324.

\textsuperscript{44} Ibid., 1323.
what it considered a correct definition of military necessity. Echoing *General Orders No. 100* and Augustinian Just War theory, it ruled that:

Military necessity has been invoked by the defendants as justifying the killing of innocent members of the population and the destruction of villages and towns in occupied territory. Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent civilian inhabitants for the purpose of revenge or the satisfaction of a lust to kill.45

**Competing Standards of Command Responsibility**

Although command responsibility was perhaps contemporaneously one of the least controversial tenets of the Nuremberg Principles, there was not one uniform standard utilized throughout the Nuremberg era trials. The IMT was limited as to providing such a standard by need to simultaneously prosecute senior civilian government leaders and senior military personnel whose professional responsibility under the Third Reich, often could not be neatly categorized into military, police, and non-coercive government functions. One legal scholar, L.C. Green, noted that the IMT was “only concerned with command responsibility in the most indirect fashion, holding the accused liable for having been parties to their framing, or for issuing or passing on of orders which were of general application.”46 However, the IMT did assist the later trials under *Allied Control Law No. 10* by determining in advance the criminality of specific

45 Ibid., 1325, 1318-1319.
German military orders. Unlike the IMT, the later trials were not hampered by the most controversial provisions of London Charter, those associated with the Bernays Additions that hold individuals responsible for the crimes of collective human entities. Fortunately, the issue of membership of criminal organizations was made superfluous by the Allies’ administrative program of denazification.

The Yamashita trial is still the most well known and authoritative of the Nuremberg era trials due to the validation given it by a majority ruling of the U.S. Supreme Court that upheld its jurisdiction and directly acknowledged the concept of an affirmative command responsibility. Consequently, the Yamashita Precedence was cited as authoritative in the subsequent trials under Allied Control Law No. 10. The significance of the “Yamashita Principle” has, however, been a source of debate between legal scholars. On one side, in the writings of General Taylor, the former U.S. Chief Prosecutor of the subsequent Nuremberg trials, Captain Frank Reel, Chief Counsel for General Yamashita, and Antonio Cassese, the former chief justice of the International Tribunal for the Former Yugoslavia, have held that the Yamashita Precedent represented an authoritative, clear, and unambiguously affirmative standard of indirect command responsibility. Other conservative legal scholars claim the Yamashita Trial has been misinterpreted as a standard of strict liability or absolute theory of command responsibility that is

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derogatorily defined as holding commanders responsible for their subordinate’s actions regardless of the circumstances or preventive actions undertaken by commanders.¹⁴⁸

Following the revelation of the My Lai Massacre of March 16, 1968 during the Vietnam War and the subsequent failure of the United States in holding its own officers to the same standard it held officers of defeated nations in World War II, both Taylor and Reel compared the Yamashita Precedent to the lesser standards applied to American officers in Vietnam. Later, Justice Cassese based his view of the Yamashita precedent squarely on the working supposition that Yamashita was convicted for crimes for which “he had been kept entirely in the dark” and “could have done little to stop.” Cassese utilized the phrase of ‘indirect (command) responsibility’ in describing the Yamashita precedent rather than in the “emotive” term of “absolute” and defined it as the responsibility of military commanders “for crimes by forces under their command (or at least under their control), if they have done nothing to prevent or have not taken steps to punish these crimes.”⁴⁹

One of the most authoritative critics of the strict liability standard, William Hays Parks, argued that many consequent lessons about command responsibility drawn from the Yamashita case are false and attributed to an “ill-worded opinion prepared sua sponte by the lay court,” which consisted of a military jury of five American generals, “none of whom were lawyers.” High Command and Hostage cases, according to Parks, rejected the strict liability theory associated with the Yamashita. Parks also noted that the High


⁴⁹ See note 43 and Cassese, Violence and Law, 84-85.
Command and Hostage has a “greater value” as “the product of judicial minds rather than lay jurors.” Parks, now serving as the head of the Department of the Army’s Operational Law Division, also holds that Reel’s facts were based on popular or bad history and points to the utilization of the word “permitting” in the statement of charges against Yamashita as implying that the tribunal believed Yamashita had knowledge of the crimes charged. In his view, the Yamashita Precedent is widely misunderstood and that the conventional belief that Yamashita was condemned for offenses of which he had no knowledge is erroneous. 50

The differences between the Nuremberg era standards of command responsibility have also been utilized to document substantial societal and cultural biases to explain inconsistencies between trials of Europeans and those of Asians. As the Yamashita standard was again utilized in the subsequent conviction of another Japanese general, Masaharu Homma, who was executed on April 3, 1943 for his responsibility for the atrocities that occurred during the Bataan Death March, Ann Marie Prevost has claimed that the higher standard of command responsibility utilized against the Japanese military personnel represents the application of a double standard based on racial and cultural prejudice. 51

While it is the purpose of this study to make a legal argument as to the correct legal precedence to be ascribed to the Nuremberg era war crimes trials, a few


observations cannot be avoided. First, whether or not one accepts the factual record provided by the Yamashita’s defense counsel or not, it is clear that no other Nuremberg era trial was reviewed at a higher level of validation. Secondly, the U.S. Supreme Court, in both the majority and minority reports, clearly acknowledged that Yamashita was charged with crimes committed by his troops, rather than any crime committed by his own person, regardless of whether or not he had knowledge or ordered those crimes.  

Thirdly, for the purpose of official doctrinal development, the fact that the military panel that tried Yamashita was composed of general officers who were veteran combat commanders and not narrow legal professionals reinforces rather than delimits the significance of the precedence as a formal military professional norm in contrast to a mere legal standard. And, finally, even if the German High Command Case can be said to represent a less rigorous standard of command responsibility, the Hostage Case ruling moved back in the direction of Yamashita toward the “known or should have known” standard that is now associated with current American military doctrine.

**International Validation and Codification**

The influence of the American War Crimes Program influenced every aspect of the establishment of post-war international institutions. In 1946, the UN General Assembly affirmed the Principles of International Law recognized by the Charter of the Nuremberg Tribunal. Later, other post war international agreements were undertaken to formalize positions on various problems that were addressed in the preparation and conduct of the Nuremberg era war crimes trials. As many of the crimes prosecutable

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under the London Charter occurred prior to declaration of war and were actions by
governments against their own citizens, the 1949 Geneva Conventions codified the
universality of certain central tenets of international humanitarian law to be applied
regardless of the state of belligerency involved. Articles 1-3 to the four Geneva
Conventions, also known as the *common articles*, bound all belligerents to apply, as a
minimum, the affirmative obligations of the common articles at all times and in “all
circumstances” to include any “declared war or of any other armed conflict,” regardless
of whether a state of war is recognized by the other party, and in all cases of occupation,
whether the occupation is resisted or not. These obligations constituted a core list of
prohibitions in Common Article Three associated with the treatment of “persons taking
no active part in hostilities” to include both captured and wounded combatants and
noncombatants. The prohibitions include:

- a. Violence to life and person, in particular, murder, mutilation, cruel
treatment and torture.
- b. Taking of hostages.
- c. Outrages upon the personal dignity, in particular, humiliating and
degrading treatment.
- d. The passing of sentences and carrying out executions without previous
judgment pronounced by a regularly constituted court affording all
judicial guarantees which are indispensable by civilized peoples.

With the advent of the global calamity of World War II, non-combatants now
comprised the vast majority of casualties in warfare. Accordingly, an entire convention,
the Fourth Geneva Convention, was established for the protection of civilians to include

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53 Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the
Field (Geneva I), August 12, 1949, arts 1-3, in International Committee of the Red Cross, The Geneva
Conventions of August 12 1949, (Geneva: ICRC Publications), 23-24; Convention for the Amelioration of
the Condition of the Wounded and Sick in the Armed Forces at Sea (Geneva II), August 12, 1949, arts 1-3,
reprinted Ibid., 51-53; Convention Relative to the Treatment of Prisoners of War (Geneva III), August 12.
1949, arts 1-3, Ibid., 75-76; Convention Relative to the Protection of Civilians Persons in Times of War
the total prohibition on the taking of hostages (Article 33). However, unlike the Common Article Three prohibitions, the Fourth Convention provided no significant advancement in the protection of noncombatants. This was particularly in reference to protections from the aerial bombardment and other tactics utilized by the victors of the war. Also, like other treaties resulting from the initiatives of the International Red Cross (ICRC), the 1949 Geneva Conventions only listed the responsibilities of states (High Contracting Parties), leaving standards of individual and command responsibility to be addressed elsewhere.

The Nuremberg experience in prosecuting crimes against humanity in reference to the extermination of millions of minorities by the Third Reich, regardless of the state of belligerency in effect at the time of the offense, had a direct impact on development of Human Rights Law. Unlike the Geneva Conventions, the 1948 United Nations Genocide Convention, which the United States did not ratify until 1988, directly addressed both indirect and direct criminal responsibility.

Article 1: The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish (italics mine).

Article 2” In the present Convention, genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such;

(a) Killings members of the group;
(b) Causing serious bodily harm to members of the group;

54 Ibid., 283.

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(d) Forcibly transferring children of the group to another group.

Article 3: The following acts shall be punishable:
(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide

Not all provisions of the American War Crimes Program received the same level of international validation. The concept of criminal-organizations as originally included in the Bernays Additions was one of the more controversial aspects of the London Charter in that it set precedence for guilt by association. Because the administrative denazification program superceded it, individual Germans were not prosecuted for merely belonging to a criminal organization, even though these organizations included such infamous groups as the Schutzstaffel (SS), Sicherheitsdienst (SD), and the Geheime Staatspolizei (Gestapo).

The 1948 United Nations Universal Declaration of Human Rights (UDHR) also contains principles that effectively mitigate some of the more controversial aspects of the Nuremberg era trials. In reference to guilt by association, Article 10 required that anyone “charged with a penal offence” as a right to a public trial and, in lieu of a public trial, Article 12 required that no one shall be subjected to “attacks upon his honor and reputation. In relation to the Nuremberg era defense claims of ex post facto justice, Article 11 of the UDHR states: “No one shall be held guilty of any penal offense on

account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed.\textsuperscript{57}

Perhaps the greatest validation of the Nuremberg process took place in Germany itself. By August 31, 1955, the U.S. Army held over 281 German war criminals in custody. While the documented record reveals a liberal parole policy which led to the release of 87\% of prisoners held by the U.S. Army by 1955 at the behest of the government of Konrad Adenauer, the Nuremberg era trials laid the foundation for the West German government’s role in convicting over 992 German war criminals between 1958 and 1985 following the resumption of its sovereignty.\textsuperscript{58} In 1954, Justice Jackson pointed to the significance of the fact that, “despite German dislike of the (Allied) war crimes trials, Western Germany has embodied in the Bonn Constitution its most basic principles.”\textsuperscript{59}

\textbf{The Other Nurembergs.}

In this present study, it is standards of individual and command responsibility, rather than definitions of aggressive war, that constitute the central meaning of Nuremberg. However, no in-depth study of Nuremberg era American War Crimes Program can succeed without also acknowledging the existence of the other competing legacies of Nuremberg. Two major contenders for consideration as Nuremberg’s central


\textsuperscript{58} Maguire, \textit{Law and War}, 270, 285. This author reserves judgment as the so-called liberality of the Nuremberg and West German process until it can be compared to the record of contemporary war crimes programs currently underway at the present time.

\textsuperscript{59} Justice Jackson’s introduction to the revised edition to Whitney R. Harris, \textit{Tyranny of Trial, The Trial of the major German War Criminals at the End of World War II at Nuremberg, Germany, 1945-1946}, (Dallas, Southern Methodist University Press, 1954; revised editions, 1982, 1995, and 1999), xxxvii.
legacy are the outlawing of aggressive war and the rejection of the tradition of legal positivism.

Of the three types of crimes listed in Principle Six of the Charter of International Military Tribunal, standards of individual and command responsibilities in reference to war crimes and crimes against humanity have been incorporated in the four 1949 Geneva Conventions, the Convention for the Prevention and Punishment of the Crime of Genocide, 1977 Protocols additional to the 1949 Geneva Conventions, the charters for International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC).

Comparatively, the charge of crimes against peace, also known as planning or waging an aggressive war, associated with the Bernays Additions, has received far less formal international validation as an enforceable element of international law. However, the crime of aggression has not been forgotten by historians and other analysts of the Nuremberg era trials, especially in regard to scholars formally outside of the military profession.

Former Secretary of War Stimson, writing in Foreign Affairs in January 1947, admitted that the charge of crimes against the peace was the most controversial and novel aspect the American War Crimes Program. Nevertheless he argued that the Nuremberg era trials “affirmed the central principle of peace – that the man who makes or plans to

\[\text{A generalized call for the “effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace” is found in Article I of the Charter of the United Nations, T.S. No. 993, signed on June 26, 1945. The General Assembly on December 4, 1977 adopted the following definition of aggression: “Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations as set out in this Definition.” See General Assembly Resolution 3314, GAOR, 20th Session, Supp. No. 31, at 142, U.N. Doc. A/9631 (1974).}\]
make aggressive war is a criminal” and this is a standard that places an obligation upon
the American government to apply, in turn, on its own citizens.\footnote{Henry L. Stimson, “The Nuremberg Trial: Landmark in Law,” \textit{Foreign Affairs} (January 1947), 189.} One has to look at the
Kellogg-Briand Pact of 1928 and the \textit{jus ad bellum} doctrine of traditional just war
d doctrine to find the pre-Nuremberg precedents for this charge. Yet, neither of these
sources provided sufficient precedence for the adherents of legal positivism to accept the
charge of aggression as valid law.

Brigadier General Taylor, in an addendum in his \textit{Final Report to the Secretary of
the Army}, dated 15 August 1949, noted that the most common objection of contemporary
critics of the Nuremberg trials was that “the act of planning or waging aggressive war
cannot be considered a crime because there is not single authoritative definition of
aggressive war.”\footnote{Taylor, “Nuremberg Trials: War Crimes and International Law,” reprinted as Appendix B of \textit{Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council No.10}, (Washington: Department of the Army, 15 Aug 1949.)} Taylor tried to address the concerns of the critics of the charge by
noting that all eight of the defendants at the Internal Military Tribunal convicted of
conspiracy to wage aggressive war were also convicted for war crimes and/or crimes
against humanity and that in the subsequent trials in Germany, the charge failed against
all military defendants.\footnote{Ibid., 221 and Taylor, \textit{Anatomy if the Nuremberg Trials}, 629. In the former, Taylor noted that the
Internal Military Tribunal for the Far East, unlike the trials under Control council Law No. 10, convicted
twenty-five Japanese defendants for crimes against peace.} The lack of such an authoritative definition in contemporary
international humanitarian law was reiterated over half a century later in the final text of
the 1998 Rome Statute of the ICC that included the caveat that, even though the Court
has jurisdiction over the crime of aggression, it would not exercise such jurisdiction until the crime has been further defined.\textsuperscript{64}

While crimes against peace have played a minimal role in American military doctrine, it often a central theme for civilian critics of a governmental decision to utilize military force for the ends of state, especially when humanitarian concerns are included in a political justification of a particular military action. The result is a lack of a shared reference in the discussion of what are in fact divergent Nuremberg legacies. Nevertheless, even the narrowly focused discussion of the impact of Nuremberg on military doctrine and professionalism must also include clear delineation between these competing legacies.

Some critics, by considering the central premise of the Nuremberg trial as the outlawing of wars of aggression, understandably have declared the American War Crimes Project a failure and a “fallacy.” Eugene Davidson followed this position when he argued that the Kellogg-Briand Pact “was invoked at Nuremberg as the legal cornerstone of the charges of committing war in violation of treaties.” In mentioning the outbreak of the civil war in Greece, he declared that in “the real world of hard events the dissolution of the principles enunciated at Nuremberg began even before the start of the trial (IMT).”\textsuperscript{65}

Kranzbuhler, the defense council for Admiral Doenitz and one of the most detailed and nuanced detractors of the Nuremberg project, argued eighteen years later


that “Nuremberg was conceived, and can only be understood as, a revolutionary event in the development of international law.” In spite of the presence of Soviet jurors, he considered the program trials as consisting of political trials in which a democratic system sat in judgment of a dictatorship. Kranzbuhler recognized two particular aspects of the trials legacy as revolutionary: (1) the attempt to find a legal basis for the crime of aggression in the Kellog-Briand Pact and (2) the challenge to accepted legal premises that an individual “owes primary allegiance to the state” to whom he is subject. While he points to the continuing inability of the international community in defining aggression as evidence for the failure of the former, he recognized the latter was in certain cases the “necessary development” of law, specifically in the case of holding individuals as responsible for Crimes against Humanity in spite of its being a “crime of government.”

In 1948, Quincy Write, in his editorial comment in the *American Journal of International Law*, wrote that both the assumptions of the London Charter of the IMT and the later Charter of the United Nations are “far removed” from the underlying assumptions of positive law. The positivist view holds that it is only the sovereign state that is subject to international law. The two central tenets of legal positivism, (1) the command doctrine, for a law to be a law, it must be posited by someone with authority who has the power to impose sanctions for non-compliance, and (2) the doctrine of absolute sovereignty, holding that the highest body capable of executing such authority is the nation state, were articulated in the nineteenth by John Austin. In 1975, Stanley L. Paulson, a scholar of the philosophy of law, called the rejection of both the defense of

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superior orders and the tribunal’s imposition of \textit{ex post facto} laws as a clear-cut rejection of classical legal positivist doctrines.\footnote{During the trial Professor Hermann Jahrreiss, a defense council, argued form the positions associated with legal positivism, while Sir Hartley Shawcross, the Chief British prosecutor, and Justice Jackson, the Chief American prosecutor argued for positions associated with natural law theory, for the former, and legal realism, for the later. See Stanley L. Paulson, “Classical Legal Positivism at Nuremberg,” in \textit{Philosophy and Public Affairs}, vol.4-2 (Winter, 1975), 68}

In fact, it would be fair to say that legal positivism, as understood at the time, was the real defendant at Nuremberg. Six of those that sat in the dock at the IMT were some of Germany’s leading lawyers. One of the most senior, Hans Frank, the governor general of Poland where the vast majority of extermination programs were carried out, never tired of praising the “majesty of law” over the course of his National Socialist career. Later, sixteen leading German judges were tried under the Allied Control Law No. 10.\footnote{There were six lawyers sitting in the dock at the IMT alone. Besides Hans Frank, former President of the Academy of German Law, other leading members of the Third Reich’s profession of law included Wilhelm Frick, the father of the legal concept of race, Hans Frank, the former Minister of Justice for Bavaria, Constantin von Neurath, Ernst Kaltenbrunner, and Artur Seyss-Inquart. For Frank’s declarations in regard to “the majesty of law,” see Eugene Davidson, \textit{The Trial of the Germans, An Account of the Twenty-two Defendants before the International Military Tribunal at Nuremberg.} (Columbia, University of Missouri Press, 1966; reprinted 1997), 441. One of the trials held under Allied Control Law No. 10, was the "Justice Case" in which fourteen leading members of the Nazi judicial system were tried for crimes against humanity and the legalization of extermination.}

Although this study offers a narrowly focused analysis of historical developments, such as the Nuremberg principles, on the creation of military doctrine, it is nearly impossible to discuss the Nuremberg era American War Crimes Project without addressing the central issues underlying much of the existing scholarship on the subject. The centrality of such concepts as the outlawing of aggressive war and the rejection of the tradition of legal positivism, just discussed, is unavoidably prominent in the existing legally centered scholarship on Nuremberg because these issues have been so central to the \textit{weltanschauung} of the legal scholars who are responsible for the majority of that scholarship. For example, scholars associated with the peace movement cannot be
expected to comment on any aspect of Nuremberg without the influence of their “wider logic” of the view that Nuremberg was primarily a failed attempt to outlaw aggressive war. In the same way, it is not surprising that conservative legal positivists and others concerned with preserving state sovereignty to view Nuremberg, which was in their view an historical anomaly, to be more questioning of the overall legal significance of the trials.\textsuperscript{70}


In July 1956, the Department of the Army issued its latest edition of Field Manual 27-10 (FM 27-10), \textit{The Law of Land Warfare}. This edition constituted a comprehensive revision of the War Department’s 1940 edition of FM 27-10 in that it incorporated material from the four 1949 Geneva Conventions and from the Nuremberg era American War Crimes Program. The manual starts from a basic understanding of the laws of war as the limits placed on combatants to protect noncombatants and combatants alike from “unnecessary suffering,” the preservation of the “fundamental human rights” of the same, and facilitation of the restoration of peace. Following the London Charter, it divides crimes under international law into: (a) crimes against peace, (b) crimes against humanity, and (c) war crimes. Following the language of the Genocide Convention, it expands such crimes to include “conspiracy, direct incitement, and attempts to commit, as well as complicity” as punishable offenses. It is the prevention of war crimes that is

of particular concern to military professionals and the new manual directly refers to the Grave Breaches of the Geneva Conventions of 1949 as a comprehensive list the offenses that can be defined as war crimes.\textsuperscript{71}

The manual was primarily the result of the efforts of Major Richard Baxter, a military lawyer. Baxter was appointed as an American negotiator at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts (1974-1977), which led to the negotiations that resulted in the two Protocols Additional to the Geneva Conventions of 12 August 1949 (hereafter referred to as the 1977 Protocols I and II). Baxter was later to be selected to serve as a justice for the World Court at The Hague. In a draft copy of the Field Manual, Baxter acknowledged his incorporation of the standard command responsibility associated with the \textit{Hostage Case} and the \textit{Yamashita Precedent}.\textsuperscript{72} The passage in the final version of the manual on the “"Responsibility for the Acts of Subordinates” provides a clear description of an affirmative standard of both direct and indirect command responsibility:

In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. This, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility


\textsuperscript{72}Major Mark S. Martins, USA, while Deputy Director, Center for Law and Military Operations at the Judge Advocates General’s School, Charlottesville, VA, noted the direct reference in a draft copy of FM 27-10 that “the language of the command responsibility standard proposed and ultimately adopted for the Army’s field manual was based on the court’s judgment against List (\textit{Hostage Case}) as well as on \textit{In Re Yamashita}.” See Martins, “War Crimes” During Operations Other Than War: Military Doctrine and Law Fifty Years After Nuremberg—And Beyond,” \textit{Military Review} 149 (summer 1995), note 42 at 154. Major Richard Baxter’s Draft of FM 27-10, para. 8.8A (1 Mar. 1954). Copy was on file with the library of The Judge Advocate General’s School, United States Army, Charlottesville, Virginia). As a result of a Freedom of Information Act request for the document, the chief librarian reported that this document was lost as a result of flooding in 1999 and believed destroyed.
arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have had knowledge (italics mine) from reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.”

Conclusion

On the Fiftieth Anniversary of Nuremberg, a conference was held at the Judge Advocate General’s School, United States Army, Charlottesville, Virginia, entitled “Nuremberg and the Rule of Law: A Fifty Year Verdict.” Major Mark Martins, U.S. Army, the deputy director of the center, in a paper presented on 18 November, 1995, noted that, although “no definitive list of Nuremberg principles will ever command unanimous academic support,” the trials of military personnel displayed a conservative focus on the more traditional war crimes charges and “Nuremberg’s chief contributions to the preexisting body of international criminal law were in setting a standard by which commander’s could be held responsible for the war crimes of subordinates (and in) rejecting the defense of military necessity and superior orders....” The more “novel criminal theories” of membership in criminal organizations and criminal conspiracy to wage an aggressive war, associated with the Bernays Additions, have yet to be incorporated into official military doctrine.

In 1946, Justice Jackson wrote an open letter, published in the leading professional journal of the U.S. Army, discussing the effect of the Nuremberg trial “on the profession of arms.” In recognizing that the “armed services are naturally concerned

73 FM 27-10 (1956), 178-179.
as to what we are driving at in Nuremberg,” Jackson reminded them that the ideas of Nuremberg “did not originate among theoreticians of the legal profession,” rather they “originated in the War Department.” Specifically, the central tenets of command responsibility and superior orders started as a change in military doctrine, imposed by members of the U.S. military in U.S. Military tribunals with U.S. soldiers carrying its capital sentences, received international validation, and then was reincorporated back into U.S. military doctrine.

Jackson was a legal realist in the tradition of Oliver Wendell Holmes, an approach to law that held that the laws were not mere rules, but a result of an active, creative, and sometimes expedient process undertaken in the public’s interest. Jackson’s purpose in his open letter to the American military profession was to convince them that there was nothing foreign to the U.S. military in what was created at Nuremberg. The tragedy for the American military profession is that, to date, the Nuremberg era “known or should have known” standard of command responsibility has never been successfully applied to an American defendant who has been or is presently a member of that profession.

As claimed by Jackson, the standards of command responsibility imposed by senior officers of the United States Military on officers of the Axis Powers cannot be attributed to external influences. The fact that contemporary critics challenged the legitimacy of the Nuremberg era tribunals with the charge that the Department of War’s legal creation was an example of victor’s justice magnifies, rather than mitigates, any later charge of institutional hypocrisy if the victors subsequently fail to hold their own.


76 See Martins, “War Crimes” During Operations Other Than War,” 182.
standards to their own officers in later conflicts. The American War Crimes Program represented an unqualified shift in American war crimes policy. In the aftermath of the First World War, American policy reflected a conservative approach that emphasized legal positivism and statist concerns over sovereignty. After the Second World War, American war crimes policy was drafted by the Department of War rather than international lawyers on loan to the Department of State from Wall Street.

With the American War Crimes Program, the military profession can be said to have regained control of the issue. The major standards of command liability associated with the major war crimes trials during the Nuremberg period were present in “if he has actual knowledge, or should have had knowledge” language of the 1957 edition FM 27-10, which still represents current doctrine. The standards of command responsibility associated with the American War Crimes Program were drafted by the military, executed by the military, and codified for the military. The American military profession had made its bed.

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77 After the Second World War, American policy, as with the earlier historical example of the Civil War era “Lieber Code,” emphasized command and control issues that were more relatable to the worldview of military commanders than to the worldview of international lawyers. After World War One, American policy was drawn up by the Department of State, after World War Two, as with the example of the Andersonville Trial after the Civil War, it was planned and executed by the Department of War.

78 FM 27-10, 178-179.
Democracy can be defended only by democrats. ¹
Theodor Blank.

Despite what Herr Blank had to say, a democratic state is better defended by a professional force than by democratic force.²
Samuel P. Huntington

Formal institutional policies of the war and post-war period had immediate application in the military environment of the early Cold War. The American military profession was more integrated into America society and culture than ever before. It was during this triumphant period of institutional standing that some American intellectuals, both military and civilian, would look to foreign models to resolve the inevitable civil-military tensions arising from the establishment of America’s first permanently standing military establishment. Competing models of civil-military relations were directly tied to the institutional self-image and chosen worldview of American military professionals. The institutional legacy and authority of the Nuremberg era American War Crimes Program did not conform to the competing worldviews equally. Especially as the Prusso-German model of civil-military relations was being rejected in Germany and was being embraced in the United States, the authority of Nuremberg era trials was itself standing in the docket of judgment.

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¹ Cited in Huntington, Soldier and the State, 123.
² Ibid.
On 25 July 1950, four years, six months and five days after American soldiers executed his order and placed a noose around the neck of Japanese General Tomoyuki Yamashita, General of the Army Douglas MacArthur was still serving as the Supreme Allied Commander in the Pacific. The forces under his operational control were now in the midst of fighting a new war on the Korean Peninsula. Over the past month, American forces were in full retreat as the North Korean Peoples Army (NKPA) pushed them into the southernmost tip of Korea, the Pusan Perimeter. In attempting to create a viable line of defense against a superior enemy, U.S. Army personnel evacuated 500 to 600 villagers from their homes in the villages of Im Ga Ri and Joo Gok Ri and then drove them down a riverbank. The next morning, after being held overnight without shelter, they were searched, then directed down railroad tracks toward the town of No Gun Ri as retreating columns of American troops passed by. According to the January 2001 Department of the Army Inspector General Review of the incident, American personnel then ordered an air attack on the unarmed villagers, killing approximately 100 with aerial bombing and machine gun fire. The survivors of the aerial attack were then driven by American ground forces into two railroad tunnels. Over the next four days, American personnel, firing into both ends of the tunnels, killing approximately 300 more villagers.  

Just as in the case of Japanese forces under Yamashita during the American liberation of the Philippines, MacArthur’s subordinate commanders were facing a chaotic situation that included extremely degraded communications. As with Yamashita, the levels of command with knowledge of the massacre could not, with certainty, be determined. Unlike the case with Yamashita, the massacre at No Gun Ri had a singular

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3 Department of the Army Inspector General No Gun Ri Review (January 2001).
character that was not indicative of a wider or systematic lawlessness by adjacent units and the number of victims was in the hundreds instead of the thousands. However, no contemporary comparisons between No Gun Ree and Manila are to have been found because, until the Associated Press broke the story on September 29, 1999, the cover-up of the criminal action at No Gun Ri had been successfully maintained for forty-nine years.

In the half decade between Yamashita’s execution and the massacre at No Gun Ri, the American War Crimes Program, consisting of trials in Germany and in Japan, had run their course. Although it is impossible, due to lack of evidence, to make a determination as to whether MacArthur or his subordinate commanders could be found criminally liable for No Gun Ri, it certainly does not point to a rigorous reporting and prosecution of war crimes by MacArthur’s subordinates. This inconsistency between official American words and actual American behavior was the first indication of what would become a chronic problem of internal consistency for the American military profession in holding its personnel to the same standards it held foreign military to personnel at Nuremberg.

The Nuremberg Principles, largely the product of the American War Department, received international validation by a United Nations General Assembly resolution in the very same month as the No Gun Ri massacre. This resolution also directed the establishment of the International Law Commission to "formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal" that would eventually lead to the incorporation of a standard of command responsibility for war crimes into an international treaty, 1977 Protocol I to the
Geneva Convention. Unfortunately, the United States would eventually decide not to ratify this treaty and, consequently, American personnel would not be held to the single universal standard of command responsibility it contained.

**Formal and Informal Norms: A Civil - Military Dilemma**

The National Security Act of 1947 reorganized the National Military Establishment from the historical bi-polar structure of the Departments of War and the Navy into the triangular structure consisting of the Departments of the Army, Navy, and Air Force operating under the umbrella of the Department of Defense. The Department of the Army inherited the task of revising both the capstone doctrinal publications of the Army, such as Field Manual 100-5, which linked military operations to national strategy, and the keystone subject-centered doctrinal publications utilized across the services for a specific subject. One such keystone publications was the 1956 edition of FM 27-10, *The Law of Land Warfare*, containing the Nuremberg era affirmative standard of command responsibility as a formal norm.\(^5\)

While ten editions of FM 100-5 would be issued between 1945 and 2000, the 1956 edition of FM 27-10 would remain in effect into the next century. Consequently, FM 27-10 would remain unchanged over the course of dramatic revolutions in war making doctrine throughout the early Cold War. During the Eisenhower Administration, the U.S. Army adapted the “Pentamic concept” of operating on a nuclear battlefield in

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\(^5\) Like the War Departments 1940 version of FM 27-10 and 1941 and 1944 versions, the first Department on the Army editions maintained the distinction between capstone doctrine, publications reflecting the highest authoritative doctrinal guidance reflecting the military component of national / international alliance
support of national security policy of massive retaliation as articulated in the 1956 and 1958 editions of FM 100-5. The Kennedy years saw the introduction of a dual Army role in both conventional and non-conventional warfare associated with the 1962 FM 100-5 in support of a national policy of flexible response.⁶

While it may appear counter-intuitive that there was no doctrinal linkage in linking the Laws of War to the peculiarities of nuclear and unconventional war, updating FM 27-10 was not included in the development of national capstone doctrine. While the absence of changes gave FM 27-10 an aura of timelessness and universality, it may have also led some operationally minded military professionals to regard the Laws of War as a field of knowledge not directly relevant to the operational art of warfare, leaving it as the mere specialized discipline of military lawyers and law school academics.

While estranged from national capstone doctrine, FM 27-10’s authority as keystone doctrine was without question. Although a Department of the Army publication, FM 27-10 also functioned as the Department of Defense’s keystone law of war publication, with the other military departments issued service-specific law of war doctrinal manuals deferring to the Army manual on issues of ground warfare and military occupation. While the Department of the Navy issued a naval service specific doctrinal strategy, and keystone doctrine, reflecting subject specific foundational doctrine to which other subject area publications defer, by issuing publishing two separate publication series.

⁶ Kretchik, Peering Through the Midst, 154-162.
manual as early as 1944, the newly created Department of the Air Force would not issue its own manual until 1976.  

The settling of formal professional norms in official doctrine does not, however, necessarily trump the influence of less formal factors on professional behavior and world-views. Unlike formal doctrine, informal cultural, societal, and cultural norms affecting the opinions of members of the military profession toward the Nuremberg project in the early years of the Cold War remained fluid. As the contemporary public reaction to the Nuremberg trial became influenced by political partisanship as Senator Joseph McCarthy and other conservative Republican came out publicly against the trials, the generally conservative officer corps, however apolitical, could not remain completely unaffected by the public debate. Even completely non-political factors cannot avoid triggering informal professional attitudes. For example, the presence of civilian judges on the tribunals, which were otherwise run by American military personnel, provided an excuse for military professionals to look upon the rulings as norms derived from sources external to the profession of arms.  

The breadth and scope of unofficial negative military reactions to Nuremberg would be hard to quantify as military attitudes and opinions are not determined by plebiscite. However, unofficial opinions can be weighed by their presence in

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8 Lieutenant Colonel P.F. Gault, a military lawyer writing in a civilian law review, questioned the ability civilian judges serving on military tribunals to deal with issues of military professionalism. See Gault, P.F. “Prosecution of War Criminals” Journal of Criminal Law and Criminology, 36 (September-October 1945), 180-83.
authoritative semi-official and unofficial publications. At the time of the sentencing at the International Military Tribunal (IMT) in Nuremberg and the Yamashita Tribunal, the editors of the *Army and Navy Journal* criticized the Tribunal for initiating the novel legal proposition “under which professional soldiers, sailors and airmen shall be convicted as criminals on the mere grounds of membership in High Command or General Staffs.”

General of the Army and Army Chief of Staff Dwight David Eisenhower publicly acknowledged the authority of the IMT after reports appearing to indicate ambivalence on his part surfaced toward the trials. Justice Jackson, in his response to the criticism by the editors of the *Army and Navy Journal*, not only responded on the pages of that journal, he published his substantive defense of the trials, “The Significance of the Nuremberg Trials to the Armed Forces” in *Military Affairs*, a journal associated with the War College and the Army Command and General Staff College.

**The Post-War Civil-Military Relationship**

Military officers were also exposed to criticism of Nuremberg by non-military officials and foreign policy theorists, especially those associated with early Cold War political realism. George F. Kennan, a State Department official assigned as a lecturer at the National War College, was categorically dismissive of the American War Crimes Program. Preferring that “the Allied Commanders had standing instructions that if any of

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10 During a tour of liberated Europe with newsmen, Eisenhower clarified earlier statements attributed to him may have indicated a luke-warm position on his part toward the trials. See Bosch, *Judgment on Nuremberg*, 172.

these men (the Nazi leaders) fell into the hand of Allied Forces they should, once their intent be established beyond doubt, be executed forthwith,” Kennan argued that it was impossible for trials to undo crimes of such magnitude and that the inclusion of Soviet Judges who carried out Stalin’s purges “was to make a mockery” of any constructive purpose the trials could attempt to attain.¹²

Civil-military influences do not go just in one direction. If the 16.5 million Americans who served in World War II could be said to have democratized the armed forces, their influence also transformed American civil society as they returned to it as veterans. In contrast to Europe and Japan, the experience of World War II and Holocaust did not set off a reaction against to everything military within the United States. The American Jeffersonian individualistic tendency of suspicion toward governmental authority and institutions was, if anything, diminished after the war. In fact, Americans seemed more comfortable with governmental institutions than ever before, especially the military. The American Historian William H. Whyte, Jr, in an article appearing in Fortune magazine in 1952 entitled “Groupthink,” noted a major shift in American popular values from a libertarian distrust of institutions toward deference toward them. Less than seven years after American judges and soldiers placed nooses around the necks of German and Japanese officers for carrying out orders (later deemed unlawful), he noted this shift in American values from admiration for rebellion against the status quo to respect for individual submission to systems and institutions. This dilemma for Whyte was best exemplified by Herman Wouk’s (year) novel, later to be made into a major film, The Caine Mutiny, in which a group of young Navy officers, just vindicated by a court

¹² Kennan, Memoirs, 274.
martial for their action relieving an incompetent superior officer, are depicted lamenting their decision.\textsuperscript{13}

It was in the midst of this unique post-war harmony between American citizens and governmental authority that America experienced its greatest civil-military controversy since the Civil War. The Truman-MacArthur controversy during the Korean War highlighted the issue of military obedience and civilian control of the military from a new perspective. After being fired as Supreme Allied Commander by President Truman for exceeding his authority, MacArthur articulated a theory of military obedience that extended the range of when it is permissible to disobey orders beyond the Nuremberg principle of not obeying criminal orders. Allowing a military commander to question civilian authority that went against a military commander’s personal assessment of the national interest, MacArthur argued that military personnel’s “allegiance and loyalty to those who temporarily exercise the authority of the executive branch of government” should be secondary to their allegiance to “the country and its constitution” and that military members must be free to “speak the truth in accordance with conviction and conscience.”\textsuperscript{14} As MacArthur was replaced by less controversial and better-disciplined officers, such as Lieutenant Generals Matthew B. Ridgeway and James Van Fleet, the Truman-MacArthur controversy continued to divide Americans both in and out of uniform.


The American military historian, T. Harry Williams, in a 1952 article, “The Macs and the Ikes: America’s Two Military Tradition,” argued that the so-called Truman – MacArthur debate was just a contemporaneous manifestation of a historical conflict between two irreconcilable “traditions” of civil-military relations in America. The one accepting direct civilian control of the military, exemplified by the Generals Eisenhower and Marshall, he termed “the Ikes;” and the ones that do not, exemplified by Generals MacArthur and McClellan, he termed “the Macs.”\footnote{T. Harry Williams, “The Macs and the Ikes: America’s Two Military Traditions,” \textit{American Mercury}, LXXV (October 1952), 32-29.} Williams’ concern over recurrent historical episodes of the insubordination by leading members of the American military profession would be echoed by other eminent military historians. Russell F. Weigley, in his \textit{Military History of the United States} notes that MacArthur and his defenders exploited American “misgivings over limited war” to undermine the Truman administration.\footnote{Weigley, History of the United States Army, 517-519.}

\textbf{The Normal Theory of American Military Professionalism}

Williams’ thesis of an internal division between various leaders of the American military profession initiated the greatest debate on the proper civil-military relationship since the American Civil War.\footnote{For Huntington’s critique of the Williams’ thesis, see \textit{The Soldier and the State}, 367-373.} Eliot A. Cohen, Professor of Strategic Studies at the Paul H. Nitze School of Advanced International Studies, coined the term “normal theory” to describe a model of civil-military relations that rests on a “conception of professionalism” put forward in 1957 by Samuel P. Huntington in \textit{The Soldier and the State}. 

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\footnote{T. Harry Williams, “The Macs and the Ikes: America’s Two Military Traditions,” \textit{American Mercury}, LXXV (October 1952), 32-29.}

\footnote{Weigley, History of the United States Army, 517-519.}

\footnote{For Huntington’s critique of the Williams’ thesis, see \textit{The Soldier and the State}, 367-373.}
Distributed to officer candidates in an edited form and remaining on the U.S. Army Chief of Staff’s Professional Reading List for over half a century later, *The Soldier and the State* represents the most widely accepted paradigm of American military professionalism during the Cold War. As a result, Huntington’s book provides an archetypal example of a publication that is both unofficial and yet authoritative.

Huntington’s book was a direct response to Williams’ article on the Truman – MacArthur controversy that made a case for a conflict model of American military professional development in which major military leaders either conformed to a democratic or an aristocratic military tradition. In contrast, Huntington argued for a consensus model for the development of the American military profession in which discontinuity lies between American civil society and an increasingly professional American military culture. In his chapter, “The Military Mind: Conservative Realism of the Professional Military Ethic,” Huntington argues that professional officers maintain

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a distinctive and persistent *weltanschauung* (world view) that molds and influences their contemporaneous attitudes and values. Huntington, a former Coordinator of Security Planning for the National Security Council, is the Eaton Professor of the Science of Government and Director of the John M. Olin Institute for Strategic Studies at the Center for International Affairs at Harvard University. Throughout his scholarly career, Huntington has articulated various philosophies related to essentializing the differences between peoples and nations in the contemporary language of political conservatism, changing his intellectual foundations to keep pace with changes in the historical currents of American conservative thought. His more recent post-cold war writings include his 1996 work, *The Clash of Civilizations and the Remaking of the World Order*, which provides a post Cold War model of global conflict that emphasizes civilizational markers between peoples. Similarly, his 2004 book, *Who Are We? The Challenges of American Identity*, offers a rather straightforward defense of an American nationalism based on ethnic and religious homogeneity. Unlike these later works, *The Soldier and the State* emphasizes the centrality of ideological differences that were typical of the American intellectual and academic currents of the early years of the Cold War.  

His claim of an autonomous worldview possessed by American military professionals fit well into the general intellectual current prevalent across post-war American society. He was a contemporary of Harvard historian Louis Hartz, the leading proponent of the conservative “consensus” school of American political history. Hartz’s

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The seminal *The Liberal Tradition in America* had appeared just two years before *Soldier and the State*. Huntington, in *Soldier and the State*, undertook to portray American society as possessing a persistent ideological base. Like Hartz, Huntington interpreted American political thought as inherently liberal in the conservative Lockean sense of the term. For a liberal democracy like America to be adequately defended, Huntington argued that its liberalism, which included a deep-seated antimilitarism, had to be counterbalanced by institutions comprised of individuals possessing the *weltanschauung* of conservative-realism, such as a professional officer corps.  

Along with conservative Hartzian consensus views of American political history, another academic tendency prevalent in post-war academia was the ascendancy of the “relativistic, social view of man” inspired by anthropologists like Ruth Benedict. This interpretation holds that individuals systematically internalize beliefs and norms of the social and cultural systems in which they operate. This approach fits nicely with William Whyte’s conception of the post-war organizational man deferring his individual beliefs to a wider “Groupthink.” Whyte maintained that three interrelated ideas sustained this “groupthink” manifestation: (1) the relativity of morals and ethics, (2) the prominence of the need for group harmony in the selection of behavior and opinions, and (3) the utilization of scientific methods for the study of ethics. Huntington’s 1957 reduction of the proper *weltanschauung* of a military officer to an abstraction he called “the military mind” is an ideal illustration of an hybrid blend of a conservative interpretation of American political history with the cultural relativism of post war social theory.

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22 Huntington, *The Soldier and the State*, 79.

To Huntington, the military mind is equated with the possession of a conservative realism that “emphasizes the permanence, irrationality, weakness, and evil in human nature. It stresses the supremacy of society over the individual and the importance of order, hierarchy, and division of function. It stresses the continuity and value of history. It accepts the nation state as the highest form of political organization and recognizes the continuing likelihood of wars among nations states.”

Huntington then asserts a model of civil-military relations that complements his essentialized distinction between military professionals and their civilian superiors in which a so-called “objective civilian control” of the military, which maximizes military professionalism by minimizing civilian interference, is preferable to a so-called “subjective civilian control,” which maximizes civilian control by constitutional methods. To do this, Huntington is forced to turn the famous axiom “war is nothing but a continuation of political intercourse by other means” on its head. I have already defined this revisionist interpretation of Clausewitz as neo-Clausewitzian in that it inverts Clausewitz’s axiom into it opposite, “political intercourse is nothing but a continuation of war by other means,” or, in other word, making foreign policy contingent on military policy,

The most internally inconsistent aspect of Huntington’s model is the proportion of the American military that it excludes. Not only are members of the Federal Reserve and National Guard forces expunged, non-commissioned officers and technical officers are

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24 Huntington, The Soldier and the State, 79

25 Huntington frankly admits his concept of “objective civilian control” of the military is extra constitutional. Huntington is critical of constitutional allegiance because it represents “cutting loose from the safe grounds of objective civilian control,” which is achieved by establishing “a distinct class of specialists in the management of violence,” and “rendering them politically sterile and neutral.” See Ibid., 80-85.
counted among the ranks of the non-professionals. In other words, the vast majority of those who spend the greater portion of their professional lives in the American Armed Forces are counted out.26 Huntington’s views were antithetical to the value that American military leaders during the Second World War, especially Marshall, placed in enlisted and non-commissioned officers.27

The ethical criteria placed on individual members of the profession of arms found both in traditional just war doctrine, *General Orders No. 100*, and the mandated constitutional allegiance mandate by Congress after the Civil War are all extraneous to Huntington’s conception of a civil-military relationship, which he simply conceives as an association between a professional whose expertise just happens to be the management of violence and a client who just happens to be the state.28

The Rehabilitation of the Wehrmacht and the *Re-Prussification* of the American Military Profession

The most controversial aspects of Huntington’s “normal theory” of military professionalism is that, one decade after the Nuremberg trials, it generally displaced the democratic ideal of the citizen soldier exemplified by General of the Army Marshall to one associated with the military traditions Prussia and Germany. Specifically, it challenged the basic Nuremberg principle prohibiting the defense of superior orders except as mitigation. The disobedience of a soldier, in which Huntington cited the

26 Huntington also classed those not involved in the direct application of violence such Quartermaster and Intelligence officers, as lacking the *expertise* of the line or combat arms officers. See *The Soldier and the State*, 7-18.


28 Ibid., 55-58.
example of the July 20, 1944, conspiracy by senior German officers to assassinate Hitler, automatically transfers the actor from the realm of military ethics to the realm of the political. In a case where a soldier is asked to engage in genocide, Huntington provides the maxim: “As a soldier, he owes obedience; as a man, he owes disobedience.” Like General Alfred Jodl in the defendant’s bench at the IMT in Nuremberg, Huntington placed the July 20 conspirators against Hitler beyond the pale of military professionalism. This is not to imply Huntington had any sympathy for war criminals. Rather, it simply points out the two oppositional visions of the military professional ethic, the one held by Huntington and the one that the United States and its Allies held out to the military leaders of the defeated Axis.  

Recognizing the “tragedy of professional militarism” in Germany, Huntington argued “no other officer corps achieved such high standards of professionalism, and the officer corps of no other power was in the end so completely prostituted.” However, Huntington went far beyond the qualified statement of General Eisenhower that the Wehrmacht had not “lost its honor“ despite the crimes of many of its leaders or even Justice Jackson’s declaration that the “Wehrmacht was a far more decent organization than the more Nazified formations” such as the SS.

The most authoritative historical critique of the German military profession, published in the early years of the Cold War, was that of Brigadier General Telford

29 Huntington, *The Soldier and the State*, 77-78

30 Ibid., 98.

31 For Eisenhower’s position, see Bosch, *Judgment on Nuremberg*, 174, and for Jackson’s see *The Significance of Nuremberg*, 14,
Taylor. Prior to serving as the chief U.S. prosecutor in the Nuremberg era trials of numerous German officers, Taylor served as the lead military intelligence officer specializing in studying the command structure of the Wehrmacht during the war. In his 1952 encyclopedic history of the German military leadership, *Sword and Swastika: Generals and Nazis in the Third Reich*, Taylor portrayed Germany’s prewar and wartime military leaders as lacking the moral discipline to protect their own traditions and choosing to become, themselves, a pillar of the Third Reich” in the “perpetration of atrocities that beggar description.”°

Taylor dismissed the claim that military leaders are “mere janitors of the military machine” with no interest in the political ends of state policy. Rather, the historical lesson of the German military’s failure to stand up to Nazism is to be found in the “cardinal tenet of republicanism that the military are servants of the state, not an autonomous caste.” For Taylor, it was not the military defendants at Nuremberg such as Field Marshal Keitel, but General Ludwig Beck the other General Staff conspirators in the July 20, 1944 who gave their lives in the attempted assassination of Hitler who stood on the right side of military professionalism. Taylor ends his work by quoting Beck”

> History will indict the highest leaders of the Wehrmacht with bloodguilt if they do not act in accordance with expert and statesmanlike knowledge and assurance. Their duty of soldierly obedience finds its limits when their knowledge, conscience and responsibility forbid the execution of the order. ³³

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³³ Ibid., 370 & 373.
Huntington was far from the only American scholar to challenge negative portrayals of the professionalism of the Wehrmacht, such as Taylor’s. In 1936, General Albert Coady Wedemeyer, who would later serve on the war plans division in the War Department during the World War II and later succeed Joseph Stilwell as commander of the U.S. forces in China, attended the prestigious Kriegsakademie in Berlin for two years as an exchange student. He became acquainted with officers who later took part in the July 20, 1944, plot to kill Hitler, including Claus Graf von Stauffenberg and General Ludwig Beck, then serving as Oberkommando der Wehrmacht. In his final year in Germany, Wedemeyer was assigned to command Wehrmacht antitank battalion in annual maneuvers. Wedemeyer was very impressed with German General Staff system and other German doctrines, which he documented in a 147-page report:

Throughout the instruction at the Kriegsakademie and based upon my observations while serving with troops on maneuvers, I have been impressed with the thoroughness with which the military as a whole is being trained to seize and maintain the initiative. An aggressive spirit is being inculcated in the leaders of all grades.  

This report received a favorable notice by General Malin Craig, the Army chief of staff, Brigadier General George Marshall, then serving as chief of the War Plans Division, and Secretary of War Stimson, who brought it to the attention of President Roosevelt. Wedemeyer served as a conduit for German historical doctrine, especially that of Clausewitz, to American military and scholarly professionals both before and after his

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34 Memorandum, Captain A.C. Wedemeyer for the Adjutant General, 3 August 1938, Subj: German General Staff School, NARA RG 165, G-2 Regional Files--Germany (6740), Washington National Record Center, Suitland, Md.
In a 1947 article, scholars Edward A. Shils and Morris Janowitz asserted that the wartime officer leadership retained its neo-aristocratic social organization as compared to the SS whose officers who came mainly from the middle class and who based their esprit de corps on nationalism and devotion to the Nazi cause. Colonel T. N. Dupay, U.S. Army, Ret., one of America’s most prolific military historians and head of the Historical Evaluation and Research Organization (HERO), published research that claimed the Wehrmacht displayed a combat effectiveness of 10 percent superiority over other Allied armies in general during the World War II and 30 percent over British and American forces in the early years of the war. In his book *A Genius for War: The German Army and General Staff, 1807-1945*, Dupay was convinced that the cause of Wehrmacht effectiveness was the fact “that the German Army, uniquely, discovered the secret of institutionalizing military excellence” and that military was simply the “instruments of policy and the creators of the aggressive aims of their government.”

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37 Dupuy, book *A Genius for War: The German Army and General Staff, 1807-1945*, (New York: Prentice-Hall, 1977), 2, 5, & 309. This positive view of the Wehrmacht also found an outlet in American popular culture with the release of the 1965 film *The Battle of the Bulge,* by Warner Brothers. Made with substantial assistance from the U.S. Army, the film depicts a fictional account of a handsome apolitical professional Wehrmacht officer in command of the armored spearhead during the Ardennes Counteroffensive, the last German offensive in the western theater. In addressing the sensitive issue of the execution of American POWs at Malmedy in Belgium, this paragon of Huntingtonian virtues is shown lecturing his military superior on how war crimes are militarily disadvantageous because they stiffen enemy resolve. His superior responds by placing the blame for any atrocities on the presence of SS formations in the battle area. In actual fact, the officer who led the armored spearhead during the Ardennes Counteroffensive was Waffen SS General Josef "Sepp" Dietrich, who was tried as a war criminal for issuing the orders that led to the Malmedy massacre. The Hollywood rehabilitation of the historical record of this specific campaign and massacre symbolically illustrates the American rehabilitation of the
What is ironic about all these American germanophilic sentiments is that they were formally opposed by the modern German Army, the *Bundeswehr*. Theodor Blank, the first defense minister of the Federal Republic of Germany and an unlikely father of a professional army, was an anti-Nazi labor leader drafted into the *Wehrmacht* for six years during which he earned a battlefield commission and the Iron Cross First Class for bravery. As head of a planning committee of liberal reformers known as the *Amt Blank* (which in 1955 became the Federal Republic’s Defense Ministry), he provided a legislative foundation of a democratic army that was based on political integration.\(^{38}\)

The Wehrmacht veterans leading the new army possessed personal experience of the rapidity with which the hyper-professional German Army exchanged in August 1934 its sworn allegiance to democratic constitution of the Weimar Republic to personally sworn servility to Hitler. The loyalty of the post-war *Bundeswehr* was to be based itself on *Innere Führung*, or “inner allegiance,” of a soldier to the democratic and constitutional principles of the republic. The army was to be organized on the basis of *Inneres Gefüge*, or the “inner structure,” of a “democratic army” trained in the lessons of “the Third Reich, the 20\(^{th}\) of July 1944, and Nuremberg” to ensure the demand for strict civil control of the military is met. These doctrines of *Innere Führung*, and *Inneres Gefüge* were formal military doctrine formulated in the early 1950s by General Count

Wolf von Baudissin and were distinctly and intentionally in opposition to the Prussian civil-military tradition so dear to many American military scholars.\textsuperscript{39}

Huntington took issue with Blank’s assertion that “democracy can only be defended by democrats.” Along with its external critics (i.e. Huntington), \textit{Innere Führung}, and \textit{Inneres Gefüge} had to contend with a right-wing opposition within Germany itself. Early resistance to General Baudissin was led by the SS veteran, General Otto Ernst Remer, over the symbolic significance of the July 20 plot to \textit{Innere Führung}. Remer was the officer responsible for arresting the plotters. He then served as a subordinate under Sepp Dietrich in the Battle of the Bulge and became a leader of the neo-nazi movement after the war.\textsuperscript{40} In the latter 1960s and early 1970s, General Ulrich de Maizière and General Eberhard Wagemann fought off a “military counter-reformation” initially spearheaded by the conservative Defense Minister, Franz Josef Strauss. Despite successive conservative governments from 1982 -1998, \textit{Innere Führung} remains the conventional orthodoxy of the armed forces of today’s united Germany.\textsuperscript{41}

The relationship of the Wehrmacht to the Third Reich, its conduct during the war, and its continuity, or lack thereof, with Prusso-German military tradition become a central issue in the \textit{Historikerstreit}, or historians’ controversy over German national

\textsuperscript{39} Ibid., 98-99 & 122 & 123. Theodor Blank as cited in Huntington, \textit{the Soldier and the State}, p. 123.

\textsuperscript{40} Remer was convicted in October 1992 for publicly denying the Holocaust, a crime in Germany and died in exile in Spain on October 4, 1997. 

identity in the Federal Republic. Many German and other European scholars painted an even darker picture of the Wehrmacht than General Taylor. Omar Bartov in his *Hitler’s Army: Soldiers, Nazis, and War in the Third Reich* effectively debunked any claim that the Wehrmacht had possessed any pretense of distinctiveness in regard to the execution of the Final Solution, whether that distinctiveness is based on class or tradition. Bartov also demonstrated that there was tenability to the broadly accepted belief that the Wehrmacht maintained its fighting effectiveness and discipline through the worst wartime conditions, including retreat, due to its maintaining its prewar traditions of military professionalism, especially within the officer corps. To the contrary, Bartov argued that the Wehrmacht was “the army of the people and a willing tool of the regime,” especially in regards to carrying out the Final Solution on the Eastern Front. In fact, he argues that Nazi ideology in fact legitimized the barbarism on the Eastern Front along with an unprecedented use of disciplinary terror, including thousands of punitive executions, of German soldiers.

In Germany, just as in the United States, public sentiment often clashes with formal doctrine. Between 1995-1999, the Hamburg Institute for Social Research rekindled public debate on the issue in a historical exhibition on the crimes of the Wehrmacht, *Vernichtungskrieg: Verbrechen der Wehrmacht, 1941-1944*. In November of 2001, about 3000 neo-Nazis held a rally to protest the exhibit’s arrival in Berlin. The

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neo-Nazis chanting "glory and honor to German soldiers" were confronted with over 1500 counter-demonstrators. A bomb exploded outside an earlier showing of the exhibit in the city of Saarbruecken in 1999 and was blamed on right-wing extremists.44

While the appreciation of certain aspects of Prusso-German military tradition, such as the general staff system, should not be taken as an endorsement of the Word War II era Wehrmacht, the Prusso-German military tradition has received markedly different treatments on either side of the Atlantic. In fact, there was a switching of legacies between the German and the American militaries during the second half of the twentieth century. In the United States, the emphasis on George Marshall’s conception of the “citizen soldier” was superceded by a renewed appreciation, at least informally, of the military professional caste, even in the context of a Prusso-German caste of merit. In the Federal Republic of Germany, the aristocratic legacy ending with the Wehrmacht was deliberately and formally exchanged for the ideal of a democrat in uniform. Both exchanged usable histories with the legacy of the Nuremberg era war crimes given a separate weight by each of the competing weltanschauung.

Army Doctrine and the Vietnam War

The legacy of the Wehrmacht sparked two separate historical debates: one in Germany, where the central question concerned what military traditions and doctrines can be an appropriate part and a usable history for the armed forces of a democratic state; and the other in America, where the issue was the proper model of civil-military relations in the conduct of ongoing military operations and when is it appropriate for a commanding

general to second guess civilian authority. At Nuremberg, the question of obedience concerned obeying illegal orders. In the Truman-MacArthur controversy, the issue of obedience concerned obeying the orders of civilians.

While American military professionals in Europe played out set-piece tank battle scenarios on old Wehrmacht training grounds, recovering their equipment in old Wehrmacht motor pools, and returning their troops to old Wehrmacht barracks, the myth of the Wehrmacht lived on. Along with the conflicts between official and unofficial models of civilian control over the military profession, it was part of the cultural baggage that the American military took with it to Vietnam. Actually, veterans of the Wehrmacht preceded American forces to Vietnam. Three years after MacArthur was relived of command, over 1600 veterans of the Wehrmacht were among Gen. Henri Navarre’s forces as they were overrun by Vietminh forces under General Vo Nguyen Giap’s at Dien Bien Phu in Northern Vietnam on May 7, 1954.45

As America’s intervention Vietnam escalated, two American armies with two separate doctrines deployed to Vietnam. Besides a European focused mechanized army, the Kennedy administration ordered the creation of an American counterinsurgency capability. The Kennedy doctrine of “Flexible Response” was a reaction to the confining doctrine of “Massive Retaliation” of the Eisenhower years that limited the capability to respond to threats other than by the utilization or threat of the utilization of nuclear forces. The new policy was officially inaugurated with President Kennedy’s National

45 10, 000 of 70,000 French soldiers who served in the First Indochina war were veterans of the Wehrmacht or Waffen SS. Included are ethnically German French citizens who were drafted into the Wehrmacht after the fall of France and German speaking volunteers to the French Foreign Legions. See Sebastian Fellmeth, “Frankreichs Stalingrad,” in Die Zeit, (April 3, 2003), 11.
Security Action Memorandum (NSAM) 2, the 1962 edition of FM 100-5, and the expansion of the Special Warfare Center (SWC) at Fort Bragg.\footnote{Andrew F. Krepinevich, \textit{The Army in Vietnam}, (Baltimore: John Hopkins University Press), 27-55.}

An informal presentation of the new doctrine appeared in General Maxwell Taylor’s book, \textit{The Uncertain Trumpet}.\footnote{General Maxwell Taylor, \textit{The Uncertain Trumpet}, (New York: Harper and Bros., 1959), 39-40.} Later serving as Chairman of the Joint Chiefs of Staff between 1962-1964, Taylor was critical of the narrow “professional officer” and called for a realist version of military professionals closer to General George Marshall’s citizen-soldier than Huntington’s prusso-germanic narrow military professional. Although defining military service in terms of just war doctrine, Taylor accepted that, in most instances, “an officer has little choice but to assume the rightness of a governmental decision involving the country in a war” and “if his side wins, he knows that there will be few charges of injustice saved from the vanquished; if he loses, the victors, following the precedent of Nuremberg.”\footnote{By Taylor’s definition, “a just war may be one waged for a just cause that can be achieved no other way; one capable of producing a better peace than the one existing before the war; one waged in self-defense or for legal rights; one to protect the nation’s natural right; one with a high probability of producing of producing more good consequences than bad for the human race; or one conducted non-aggressively in accordance with the United Nations Charter.” See General Maxwell Taylor, “A Do-It-Yourself Professional Code for the Military,” in \textit{Parameters, Journal of the US Army War College}, X-4, (December, 1980), 12-13. See also “A Professional Ethic” in \textit{Army} (May 1978), 18-21.}

counter-insurgency experts like Sir Robert Thompson and General Edward Lansdale, U.S. Air Force, or the fictional depiction of Lansdale-like characters in the novels of Graham Green, *The Quiet American*, and William E. Lederer and Eugene Burdick, *The Ugly American*, represented both the idealizations and caricatures of an early Cold War warriors winning third world hearts and minds to the third way of democracy between the extreme of Stalinism and colonialism.\(^{50}\)

In spite of the counterinsurgency initiatives of the Kennedy era, the majority of the leadership of the U.S. Army maintained its historical hostility to constabulary and counterinsurgency operations -- even though the U.S. Army had extensive experience in fighting such wars. This resulted in a Army ill prepared to fight a counterinsurgency war or properly deploy unconventional forces\(^{51}\). By the time Kennedy was assassinated, Army Special Forces Alpha Team deployments had been limited to training indigenous tribal militias such as the Montagnards of the Central Highlands of Vietnam. Lansdale-like clandestine operators had been superceded by uniformed professionals flying in helicopters as advisors in air-mobility operations of the Army of the Republic of Vietnam (ARVN). By 1961, Taylor along with Kennedy’s National Security Council aid, Walt W. Rostow, returned form Vietnam with an assessment that the conflict should be regularized to the point of sending an 8,000-man task force to support ARVN


operations.\textsuperscript{52} On March 8, 1965, the first regular ground forces landed at Da Nang, the first of 2.5 million.

As increasing organizational chaos overtook the American military during the Second Indochina War, many critics of the military policies of the Kennedy and Johnson administrations turned again to the legacy of the Wehrmacht as a positive example of an effective fighting force. During the war, the soldier-scholars Richard Gabriel and Paul Savage compared the conditions faced by the German Wehrmacht in World War II, which they claimed remained an effective and cohesive fighting force until it was completely overrun, to those faced by the U.S. Army in Vietnam.\textsuperscript{53} General William E. Dupuy, U.S. Army, who would later take over the U.S. Army’s Training and Doctrine Command (TRADOC) in July 1973, had come to admire the Wehrmacht’s efficiency as a combat commander in World War II.\textsuperscript{54} He incorporated some German tactical doctrine in the 1968 edition of FM 100-5, the first post-Vietnam overhaul of Army doctrine. Dupay also started the tradition at the U.S. Army Command and Staff College (CGSC) and U.S. Army War College (USAWC) of intensive study of the Wehrmacht’s retrograde operations on the Eastern Front to provide lessons learned that could be applied to

\textsuperscript{52} Robert J. McMahan, \textit{The Limits of Empire: The United States and Southeast Asia Since World War II}, (New York: Columbia University Press, 1999), 110.


\textsuperscript{54} At the time of his retirement debriefing, he noted “I really was impressed with the fact that we saw the German soldier only on very rare occasions, nor were we able to suppress him very well. So the first lesson I learned was that he was a master at field craft – at cover and concealment. Later, when I looked at his positions, I was impressed by the way he picked up positions where his body and head were protected from frontal fire yet he was able to defend his position no matter what we threw at him.” See Officer Debrief: Interview with Gen. William E. Dupuy by Lt. Cols. Bill Mullen and Les Brownlee, 26 March, 1979, v-v, reprinted as \textit{Changing an Army: An Oral History of General William E. Depuy, U.S. Army Retired}, (Carlisle Barracks, Pa.: U.S. Army Military History Institute, 1986), 194.
operations in defense of Central Europe from an attack by superior Soviet and Warsaw Pact forces, a tradition which lasted up to the end of the Cold War. At the War College, the superiority of the German General Staff Corps over American staff models is still a popular subject for military studies thesis projects.\(^{55}\)

However, if there was one element of Wehrmacht operations on the Eastern Front that had a direct relevance to the American experience in Vietnam, it was how NOT to conduct constabulary and counterinsurgency operations amidst a hostile population whose language and culture is alien to the intervening forces. The dark example of the Wehrmacht’s counterinsurgency efforts seemed to have escaped the notice of one of its most devoted students, General William Dupuy, who was assigned as Director of Special Warfare in the Office of the Deputy Chief of Staff for Operations and Plan in 1964 and later, after returning from two assignments in Vietnam, Special Assistant for Counterinsurgency under the Chairmen of the Joint Chiefs of Staff in 1967. America would go to war in Vietnam as if it was the first conflict in history that featured the difficulties of facing partisan irregular tactics. This historical amnesia would exacerbate problems such as discriminating between combatants and noncombatants, which were experienced by superior regular military forces operating in the midst of a hostile civilian population.

Conclusion

The early years of the Cold War was a period of profound ideological changes within the American military profession. Just as the founders of the new West German Army, the Bundeswehr were rejecting the Prussian/Wehrmacht tradition of military professionalism, it underwent a rehabilitation in the United States. While it would be over twenty-five years before certain aspects of Huntington’s work would be incorporated in formal military doctrine in the so-called Weinberger Doctrine, the neo-Clausewitzian realism would have hegemonic influence on the American military profession during the Cold War. It would not only affect the decision to “regularize” combat operations in Vietnam, it would underpin the lesson’s learned process during and after the war. Most importantly, as far as the present project is concerned, it was ideologically antagonistic to the Nuremberg era doctrine of command responsibility. As part of the conflict between formal and informal norms would materialize under fire in Vietnam, it would be present when the American military profession would face the challenge of holding up the principles of the Nuremberg era American War Crimes Program to its own officers.
CHAPTER 5
COMMAND RESPONSIBILITY AND
THE MY LAI MASSACRE

“I don’t think that what is done to a jap hanged in the heat of vengeance after World War II can be done to an American on an imputed theory of responsibility.”

F. Lee Bailey¹

While any wider examination of the historical significant Vietnam War must unavoidably include the of *ius ad bellum* premises that American leaders used to justify their decision to go to war, any analysis of the institutional breakdown of the American military profession during the period cannot avoid a *jus in bello* ethical consideration of American military tactics employed in general and incident of the My Lai Massacre in particular. The Vietnam War left the American military with two conflicting standards of command responsibility, a doctrinal standard and a standard representing the latest legal precedent. The Vietnam era failure of America to hold its own citizens to the same standards it held out to its defeated enemies has contemporary consequences that includes the U.S. possession of a unilateralist legal precedence concerning command responsibility that conflicts not just with its military doctrine, but also with a developing international consensus in humanitarian law.

By Spring 1968, conventional doctrine and forces had largely pushed aside what General William Dupuy called Kennedy’s and General Maxwell Taylor’s counterinsurgency “fad.”² Conventional American ground forces, rather than specialized

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² Officer Debrief: Interview with Gen. William E. Dupuy, 40.
counterinsurgency forces, were in the process of mopping up after their tactical victory
during the Tet Offensive over both regular North Vietnamese Army (NVA) and Viet
Cong forces and were now in the process of taking the war to those areas of South
Vietnam friendly to or under the control of the Viet Cong. Much of what remained of the
more covert specialized Landaleian counterinsurgency operations was conducted by
Army Special Forces Alpha Teams in remote tribal areas and by Operation Phoenix under
the CIA Station Chief William Colby. Regular forces of the Army had now taken over
the bulk of the counterinsurgency effort. The American military increasingly relied on
superior firepower, rather than winning hearts and minds, to win the war. In the words of
one of the leading military analysts of the American defeat in Vietnam, Andrew F.
Krepinevich: “The Army ended up trying to fight the kind of conventional war that it was
trained, organized, and prepared (and that it wanted) to fight instead of the
counterinsurgency war it was sent to fight” even if the Army’s preferences “maximizes
the chances of killing civilians.”

Developed for conventional and nuclear environments, rather than
counterinsurgency, the standardized conventional tactical operation had become the
deployment of airmobile light infantry forces, which was usually characterized by
airlifting and insertion of non-mechanized conventional infantry units into a combat zone
by UH–1 Huey helicopters. Aimed at depriving enemy units of support areas, these
“search and clear operations” had become the norm in anti-insurgency operations by both
the ARVN and American forces.

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One such operation in the wake of the Tet Offensive was Operation Muscatine, which began on 26 January 1968. The purpose of this operation was to isolate areas of Viet Cong support. Named after its commander, Lieutenant Colonel Frank Barker, the units assigned to Task Force Barker were tasked to eliminate the base of support of the 48th Viet Cong Battalion around the provincial capital of Qua Ngai, a coastal city in the central highlands. The operation would have been dismissed as rather routine except for an assault on a village labeled on American maps as My Lai-4 on March 16, 1968. Although the village included family members of the local Viet Cong forces that operated in the area, no military or insurgent personnel here found in the village and the American forces sustained no casualties except for one self-inflicted injury. The summary findings of the official Department of the Army investigation documented mass murder (between 175 and 400) including “individual and group acts of murder, rape, sodomy, maiming, and assault on noncombatants” (italics mine).⁴

Although the “then existing policies and directives” in Vietnam were clear as to the Laws of War in relation to the safeguarding of non-combatants and prisoners of war, soldiers in the units involved had not been adequately trained in the Geneva Conventions. The report also found that a criminal cover-up had occurred at “every command level within the Americal Division.” Even command chaplains failed in their obligation to report the truth by sitting on the statements made by a scout helicopter pilot who tried to

halt the massacre and who flew several villagers to safety, Warrant Officer Hugh Thompson.\(^5\)

The cover-up would hold for over a year. In the summer of 1968, a Major Colin Luther Powell was assigned as the deputy assistant chief of staff for operations in the 11\(^{th}\) Light Infantry Brigade of the Americal Division for his second tour of Vietnam. One of his first tasks was to write a response to the Military Advisor Command Vietnam (MACV) commander, General Creighton Abrams, in reference to charges made by a Specialist Tom Glen, claiming that members of the Americal Division had openly discussed violating MACV directives and the Geneva Conventions in reference to treatment of Vietnamese civilians. In his cursory response in defense of his superiors, Major Powell, the future Chairman of the Joint Chief and Secretary of Defense, wrote: “In direct refutation of this portrayal (Specialist Glen’s charges) is the fact that relations between Americal soldiers and the Vietnamese people are excellent.” The cover-up finally fell apart in the spring of 1969 when another soldier, Ronald Ridenhour, sent a letter to his congressman and sent many copies to other members of congress and the press. This time no future Chairman of the Joint Chiefs of Staff and Secretary of State was able to avoid, intentionally or by naiveté, the inconvenient truth.\(^6\)

After commanding American forces in Indochina from 1965 to 1968, Westmoreland was appointed to the Army’s senior position where he would serve his

\(^5\) In addition to training received during basic training, Charlie Company personnel received the at least one MACV supplemental briefing since their arrival in country. Ibid., 320, 316, 320, 334, & 337.

final tour of duty before retirement, from July 1, 1968 to June 30, 1972, as Chief of Staff of the United States Army. Considering the uncomfortable fact that he was in command in Vietnam in March 1968 when the My Lai massacre took place, Westmoreland was surprisingly supportive of the subsequent investigations and was responsive to the dark issues it raised in relation to the Army’s conduct of the war. During his command in Vietnam, Westmoreland stated that he received nothing but routine reports from the Americal Division in reference to its operations in Quang Ngai province in March 1968. He initially responded with disbelief to the claims made by Ronald Ridenhour, a former soldier who had written his congressman about the massacre. But once the Army Inspector General’s investigation substantiated Ridenhour’s reports, Westmoreland never equivocated on the issue of the moral responsibility of those in command who failed to prevent and later covered up the massacre. For Lieutenant Calley, the only officer the Army succeeded in convicting for the massacre, Westmoreland felt “compassion but no sympathy.”

In November 1969, General Westmoreland appointed Lieutenant General William R. Peers to head the official Army inquiry into the My Lai Massacre. Westmoreland’s choice of Peers, who was not a West Point graduate and who had career experience in nontraditional warfare, gave the investigation greater credibility than it might have had otherwise. Peers had direct command experience in insurgent and guerrilla operations in Burma between 1943 and 1945 and covert operations with the OSS in China and Korea before being assigned to the CIA in 1949. Peers stood in stark contrast to many of the

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senior officers, such as Generals Fred C. Weyend, Edward C. Meyer, and William E. DePuy, who were assigned to counterinsurgency operations and planning in the Office of the Joint Chiefs during the Vietnam War period even though they did not possess a background in counterinsurgency operations. Westmoreland provided Peers with the authority he needed to carry out a competent investigation. Immediately prior to appointing Peers, Westmoreland successfully resisted pressure, originating in the Nixon White House, for a watered-down investigation. Westmoreland personally informed Peers that he had called General Alexander Haig, who was the Special Assistant to the President, to his Ft. Myers home to relay an ultimatum to the White House to back off the My Lai investigation or, if “resistance did not cease,” Westmoreland would take the issue directly to the President under his charter as Army Chief of Staff.\(^8\)

Westmoreland received the explosive finding of the “Peers’ Commission” report on March 17, 1970. As if the grisly accounts of United States Army personnel committing depraved acts of “rape, sodomy, and maiming” before murdering their victims was not enough, the report revealed that these acts occurred in one of the most supervised company-level operations in American military history. General Peers implicated twenty-eight officers from the ranks of 2nd Lieutenant to Major General, in covering up the massacre, the most senior officer, Major General Samuel W. Koster, serving as Commandant of West Point at the time of the report’s release. Most damning of all, the Peers report listed pre-existing and ongoing attitudes among commanders and staff that contributed to the massacre and its cover-up. These included a "permissive

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attitude toward the treatment and safeguarding of noncombatants,” a climate of racial animosity toward the Vietnamese, and a pervasive willingness of officers to commit perjury in order to protect their superiors.\(^9\)

**My Lai, the Peers Commission, and American Military Justice**

Although the Nixon Administration received numerous requests to establish a special or presidential committee to investigate and prosecute the American war criminals, the U.S. Army was given the chance to validate the integrity of its judicial process and failed. Two individuals, Lieutenant William Calley and Sergeant David Mitchell, were charged respectively with murder and intent to murder following the completion of an initial Inspector General investigation and the initiation of a Criminal Investigation Division (CID) inquiry in June of 1965. By the time the findings of the Peers Commission had been announced, charges were preferred against two more company grade officers, including Calley’s company commander, Captain Ernest Medina, and additional five enlisted men. By this time, of the thirty-three soldiers implicated by the Army in the massacre, nineteen were already civilians. The first official American failure to adhere to its own Nuremberg era precedents was a national rather than specifically military one as neither Articles 18 and 29 of the Uniform Code of Military Justice was utilized to return these civilians to uniform for court martial nor did the U.S. Congress have the political will to pass enabling legislation to try them as civilians.\(^10\)

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\(^10\) Bilton & Sim, *Four Hours in My Lai*, 320, 329, 381-384.
The Investigation Subcommittee of the Committee of the Armed Services of the House of Representatives held hearing on My Lai concurrently with Pears’ investigation. Rather than facilitate the Army investigation, the committee chaired by F. Edward Hebert chose to use its authority to obstruct the application of military justice. Army pilot Lieutenant (later Captain) Hugh C. Thompson, former Army Specialist Lawrence Colburn, and Specialist Glenn Andreotta, who was killed in action twenty days after the massacre, were crew members of a H-23 reconnaissance helicopter. On the day of the massacre they tried to stop the killings while they were in process, removed what civilians they could from the path of the rampaging American forces, and reported the crime to their superiors. Testifying before the Subcommittee on April 17, 1970, Thompson and Colburn, who were now the chief prosecution witnesses for the government, were intimidated and browbeaten on every detail of their testimony before the committee. Rather than the massacre itself, Congressman Herbert and the committee’s legal counsel’s were fixated on (1) the possibility that Thompson ordered Colburn to shoot American soldiers if they continued killing women and children, (2) the possibility that the level of hostile fire cited on awards processed for Thompson, Colburn, and Andreotta, initiated after the death of the latter, may have exaggerated, and (3) baseless suggestions that Thompson might be at fault for initiating the massacre by popping the wrong colored smoke grenade to mark the location of civilians needing evacuation.  

However, when Captain Medina provided what he later admitted to be perjured testimony, claiming he was not aware that a large number of civilians were

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killed on the day of the massacre or of the existence of an investigation immediately after
the massacre, he was treated with the utmost deference by Hebert and the committee. With Congress, the White House, southern governors, the American Legion, the Veterans
of Foreign Wars, and American public opinion turning against the idea of prosecuting
Americans for war crimes, the Army was on its own in trying to uphold its doctrinal
standards by pursuing prosecutions for My Lai. The first court martial, that of Sergeant
David Mitchell, was compromised by the Hebert Committee’s refusal to release
declassify the testimony of Thompson and other aviators who were testifying before it
and, therefore, ended in an acquittal.

Lieutenant Calley and the Defense of Superior Orders

On November 20, 1970, three days before Mitchell’s acquittal, Lieutenant
Calley’s court-martial was convened at Fort Benning, Georgia. His defense would be
simple: Calley, the baby-faced butcher who did not understand what all the fuss was
about, claimed he had permission to kill civilians. The defense theory was simple: the
denial of history, precedence, and doctrine as if there never had been were Nuremberg era
war crimes precedents and as if the doctrine in FM 27-10 did not exist. His claim of
superior orders incriminated another defendant and witness, his commander. This claim
became the central issue of fact at his trial. The military judge, Lieutenant Colonel Reid
W. Kennedy, while not accepting that defense met the burden of demonstrating that

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12 Ibid., 53-84. Later, upon hearing of lieutenant Lt. Calley’s conviction, Congressman Herbert would
remark that “it is a terrible to let Cassius Clay walk the streets of America, while William Calley, who was
trying to do his duty, is incarcerated.” Quoted in Mark D. Carson, “F. Edward Hebert and the
Congressional Investigation of the My Lai Massacre,” XXXVII-1, Louisiana History, (Winter 1976), 73.

13 Bilton & Sim, Four Hours in My Lai, ,340-344.

14 Ibid., 329.
Calley had indeed received an illegal order from his commander, Captain Medina, dismissed the defense’s theory of the case by instructing the jury that Calley could not be relieved of responsibility even if the existence of such an order was proven:

Soldiers are taught to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends on obedience to orders. On the other hand, the obedience of a soldier is not the obedience of automations. 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 orders is one (of) 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.  

The American military profession at least was able to uphold one of the major legal precedents of the Nuremberg era to one of its own officers: superior orders is no defense. Calley was sentenced to life imprisonment for premeditated murder. After this first successful trial arising out of the My Lai massacre, the Army was subjected to pressures, mostly from outside the military profession, to limit or stop further My Lai prosecutions. The subsequent failure to convict other subordinate soldiers and the lenient treatment, by the Nixon and Ford Administrations and the Federal courts, of Calley, who ended up serving only 3 ½ months in a military prison, was not merely an embarrassment for the profession, but for the nation. Herbert Rainwater, the national commander of the Veterans of Foreign Wars (VFW) after Calley’s conviction even made the statement: “There have been My Lais in every war. Now for the first time in our history we have

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15 Instructions from the Military Judge to the Court Members in the United States vs. First Lieutenant Calley, Jr., reprinted in Friedman, War Crimes: A Documentary History, 1722.
tried a soldier for performing his duty.”

A study on American public opinion by the sociologists Herbert Kelman and Lee Lawrence, found seventy percent of the American public disapproved of the Calley conviction following his trial. Considering it was the reaction to the Malmedy Massacre of seventy American servicemen by the leadership of the American Legion and the American in 1944 that facilitated the political support for the establishment of the American War Crimes Program after World War II, rather than the murder of over eleven million noncombatants by the Axis, American have shown a consistent disposition to weigh the worth of lives of non-Americans vis-à-vis the lives of Americans. American military professionals have always had to be on guard against allowing this ugly aspect of the American character to significantly effect the their profession. At least in the case of the United States, there is one exception to the precept that a nation’s armed forces should be a reflection of the society it protects.

It is to the American military profession’s credit that those most outraged by My Lai and the leniency shown to Calley were not members of the peace movement or politicians or even such future human rights luminaries as the sitting governor of Georgia, Jimmy Carter, who defended Calley, but soldiers in uniform. Those who voiced their outrage included: Captain Hugh Thompson, who placed his crew between the murder and the victims and threatened to shoot Calley; inspector general Colonel William C. Wilson and Lieutenant General William R. Peers, who exposed the cover-up; and


Captain Aubrey Daniel, Calley’s prosecutor, who publicly denounced President Nixon’s interventions in Calley’s favor. In the end, the relief Calley eventually received from his sentence was the result of administrative actions by civilian officials, first the President and then the Secretary of the Army. The uniformed military could at least point to the integrity of some of their comrades in uniform in not allowing the superior orders defense. However, this would not be the case as far in the successfully holding an American officer to the same standard of command responsibility as that associated with the Nuremberg era war-crimes trials.

Captain Medina's Responsibility

In August 1971, five months after the conviction of Calley, two courts-martial were convened to try Calley’s commanding officer, Captain Medina, and the former commander of the 11th Brigade of the Americal Division, Colonel Oran K. Henderson. The trials were held simultaneously, with the former at Fort McPherson in Georgia and the later at Fort Meade in Maryland. Between these officers in the chain of command was Lieutenant Colonel Frank Barker, the commander of Task Force Barker who was killed in a helicopter crash four months after the massacre. Rather than a conspiracy protecting General Westmoreland and President Johnson, it was the death of Barker that left the evidentiary gap that impeded further prosecution up the chain of command. Barker remains a missing and mysterious link in understanding the operation and the sequence of events in which the massacre took place. Although command helicopters of two higher commanders in the chain of command flew above his, he was the

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19 Captain Hugh Thompson, U.S. Army Ret, interviewed by author during Human Rights Week at the U.S. Army School of the Americas on January 23, 1999; Colonel William C. Wilson, “I had Prayed to God That This Was Fiction...,” American Heritage, (Spring 1983), 63; General Peers, USAWC Oral History, 41; and for Captain Daniel’s public denunciation, see “The Captain Who Told The President Off” in Newsweek, (April 19, 1971), 19.
counterinsurgency mastermind of Operation Muscatine who gave only informal briefings and left no paper trail. Medina claimed it was Barker who ordered him to “destroy the village, to burn the houses, to destroy the food crop that belonged to the Vietcong, and to kill their livestock.” The Bravo Company Commander, Captain Earl A. Michles, responsible for another platoon taking part in the massacre, was also deceased. Medina denied Barker had ordered him to kill civilians. In fact, Medina testified before the Hebert Commission that as “far as Colonel Barker’s attitude toward the South Vietnamese, he always wanted us to treat them with proper respect, and to respect them as human beings.”

As a result of the prosecution’s inability to verify Medina’s testimony concerning his orders from Barker, no direct responsibility for an illegal order for the massacre itself could be applied to any officer higher in the chain than Captain Medina.

Unfortunately, it would be the court-martial of Medina that would define the contemporary standard of command responsibility, at least as far as the standard successfully imposed on an American citizen is concerned. The Peers Commissions findings concerning Medina, as the sole surviving direct subordinate of a task force commander whose orders were a subject of dispute, were the most comprehensive of any individual involved. The findings included, like those for Barker, Henderson, and others above him in the chain of command, Medina suppressing evidence and, like Calley and those below him, directly ordering and even engaging in criminal acts. As the senior commander remaining continually on the ground, Medina was held responsible by the commission for planning, ordering, and supervising “the execution by his company of an

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unlawful operation against inhabited hamlets in Son My Village which included the destruction of homes by burning, killing of livestock, and the destruction of crops and other foodstuffs, and the closing of wells; and impliedly directed the killing of any person there.”  

By the time of his arraignment, most of these specifics had been dropped against him by what the prosecution claimed to be the custom of dropping lesser charges to concentrate on greater charges.  

The Chief Prosecutor in the Medina case, Colonel William G, Eckhardt, would later write that at the time of the trial the prosecution did not believe that Medina, during his briefing to his company the night prior to the operation, “intentionally ordered his men to kill, unarmed, unresisting, noncombatants.” Rather, Colonel Eckhardt conceived Medina’s role in the as a “classic case of command criminal responsibility” in which Medina had “actual knowledge” that his men were killing unresisting noncombatants and that he had the “communications ability” to stop it. For three hours, Medina was in an area less than ten square kilometers wide in direct proximity with his troops. According to the prosecution’s theory of the case, Medina refused to face the obvious evidence of a one sided firefight, i.e. a massacre of noncombatants, by his soldiers because of his loyalty was to his career instead of his duty.

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22 Mary McCarthy, Medina, 59.

23 Colonel Will G. Eckhardt later described his theory of the case as follows:

During these particular three hours, Captain Medina remained on the outskirts of the village. No evidence placed Captain Medina at the scene of any of these killings. The incident occurred in dense jungle growth. However, since the area involved was approximately ten thousand square yards, the size of five footballs fields, the prosecution’s position was that Captain Medina knew precisely what was transpiring and that he had the ability to issue orders stopping the slaughter and to seek help in controlling his men. In short, the prosecution felt that he had actual knowledge (italics mine) that unarmed, unresisting, noncombatants were being killed by
Along with two military attorneys, Medina was represented by the flamboyant and theatrical F. Lee Bailey. The defense’s theory of the case contended that Medina stayed out of the village because of tactical necessity and that he “never became aware of the misconduct of his men until too late.” Further, “upon suspecting that his orders were being misunderstood and improper acts occurring, he ordered his men to cease fire (and that he) never saw any evidence of suspicious or unnecessary deaths until immediately prior to the cease fire order.”

The most critical precedent-setting event of the trial was the instructions the military judge would give regarding the law concerning what standard of command responsibility the panel (jury) would utilize in considering guilt. The Prosecution Brief on the Law of Principles quoted directly from current military doctrine, specifically the paragraph of FM 27-10 on “the Responsibility for the Acts of Subordinates” in which the known or should have known standard was articulated. In complete contradiction of men under his command. The evidence was clear that he had the communications ability to stop this carnage. He had two basic choices. He could have taken affirmative action, for example, issuing orders or seeking help to control his men. Seeking assistance would, of course, have reflected poorly on his military leadership ability. The other course of action would be to remain silent and hope that the incident would be relatively insignificant and would not be discovered. Apparently, he chose his military career over the lives of unarmed, resisting, noncombatants who were being slaughtered by his troops within earshot. His crime, in the prosecution’s eyes, was abandoning his command responsibility on the battlefield.

24 The military judge, Colonel Kenneth Howard, summarizing the evidence for the defense in United States v. Captain Medina, C.M. 427162 (A.C.M.R. 1971) as cited in Ibid., 34.


Military commanders may also be responsible for war crimes committed by their subordinates. When troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have had knowledge (italics mine) from reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.
the Nuremberg era precedent, the Military Judge instructed the jury that it must establish that Captain Medina possessed “actual knowledge.”

Although the prosecution had indeed believed that Medina “knew precisely” what was taking place while the massacre was still in process, Medina’s acquittal cannot simply be understood as a failure of the prosecution to present sufficient evidence. The military judge’s instruction retains the value of precedence regardless of the jury’s determination of guilt. The elimination of the phrase “should have known,” included in both FM 27-10 and the Opinion and Judgment of the United States Military Tribunal at Nuremberg in the Hostage Case, created a new legal standard. In the case of the latter, the phrase “should have known” related to the ability of a commander or staff officer to comprehend the illegal character of an order and the likelihood that dissemination of a criminal order resulting in criminal acts.

Unlike the Hostage Case, the Medina precedence creates the possibility that American military commanders in future operations could avoid being held negligent even in cases where the obvious outcomes to military orders or permissive command

26 Instructions from the Military Judge to the Court Members in the United States vs. Captain Ernest L, Medina., reprinted in Friedman, War Crimes: A Documentary History, 1732:

In relation to the question pertaining to the supervisory responsibility of a Company Commander, I advise you that as a general principle of military law and custom a military superior in command is responsible for and required, in the performance of his command duties, to make certain the proper performance by his subordinates of their duties as assigned by him. In other words, 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 about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to ensure compliance with the law of war. You will observe that these legal requirements placed on a commander require actual knowledge (italics added) plus a wrongful failure to act. Thus mere presence at the scene without knowledge will not suffice. That is, the commander-subordinate relationship alone will not allow an inference of knowledge. While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or about to commit atrocities.


28 Opinion and Judgment of the United States Military Tribunal at Nuremberg in United States vs. Wilhelm List et al reprinted in Friedman, Documentary Hist, 1323.
climates could be predicted. A year after Medina’s trial, one legal analyst wrote that the “actual knowledge test, in the context like My Lai, is an invitation to see and hear no evil.”

Both Medina and Henderson were, for short periods, on the ground at My Lai in the direct proximity of a ditch filled with hundreds of victims after receiving a radio inquiry into possible executions of civilians. If Medina and Henderson had intentionally avoided looking down into the ditch to avoid seeing what they suspected was there, their act of cowardice was rewarded by Judge Howard’s a new standard of command responsibility that no longer held them to a “should have known” criteria. In an article in the New York Times that same year, the American Chief Prosecutor in the Hostage Case, then retired Brigadier General Telford Taylor, argued that the actual knowledge requirement in the military judges instructions to the jury was a directed order for Medina’s acquittal, which in fact took place on September 22, 1971.

On December 17, 1971, Colonel Henderson was also found not guilty of being a party to the cover up and of lying to the Peers Commission. In America’s newspaper of record, this last My Lai trial ended in the midst of well deserved mockery of the inability of careerist officers to recall the actions and statements of their superiors and peers. However, there are also many other factors to consider in mitigation of failures of the later My Lai trials: the compromising of witnesses by testimony and arrangements made in the earlier trials; witnesses compromised by shrewd legal maneuvers in trial or while


awaiting trial, especially in the Medina trial; and, most importantly, the death of key members of the command, such as Task Force commander Colonel Barker.

There are also other factors that cannot be excused, such as the greater likelihood of a defendant being acquitted by a jury of his so-called peers with whom he shares such distinguishing characteristics as rank, race, region, and, above all, nationality. Any officer with combat experience was likely to feel some sympathy for Medina and Henderson in a number of areas: (1) the wretched intelligence briefing by the Task Force intelligence officer, Captain Eugene M. Kotouc, indicating that Vietnamese noncombatants would magically disappear from the hamlet when the clock struck 7 AM; (2) that Medina and Henderson may have been briefed by Barker that, against all Army doctrine, the task force was about to engage a VC battalion larger in size than the attacking American forces; and (3) that the company had suffered a casualty, albeit a single casualty, in the days prior to the operation. It takes more than just a small amount of courage for officers to turn their heads to look, or admit to looking, into ditches containing bodies that demonstrate to them the extent in which they had completely lost control of their subordinate forces during a combat operation.

Considering the lack of successful convictions based on command responsibility in the My Lai trials, the U.S. Army’s decision not to acquiesce to General Taylor’s call for the convening of a special war crimes tribunal, as in the Nuremberg era trials, was obviously a mistake. When asked during an Army War College Oral History Program interview prior to his retirement if he thought Army’s legal effort had adequately

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enforced his Commission’s findings, General Peers mourned the fact that so many offenses listed in his report were never brought to trial and dealt with administratively:

I think they (the administrative actions) were totally inadequate. These sentences were so mild, that in a way it simply says that we don’t like this kind of activity but in a way condone it. I believe the Army Corps, the Officers Corps, and the NCO Corps and the American public would have been better satisfied if those people had been brought to trial. Now, if they were found not guilty that is one thing, but I am not sure they would have been found not guilty. And I think it would have provided a much better precedent for something that may happen in the future. Now that we have this precedent, I would ask, if we have another conflict, what the hell are we going to do with the people who commit war crimes or related actions?

When asked whether the Army put its “best foot forward” in the individual cases that made it to trial, Peers responded he did not feel that the Army did not adequately man either the prosecution teams or the members of the court martial itself, especially in consideration the defense had lawyers of the caliber of F. Lee Bailey with major staffs to support of the defense’s case.33

The most fundamental legacy of the My Lai trials was the severance of the doctrinal standard of command responsibility from the contemporary legal precedent associated with the Medina court-martial. Nowhere is the significance of this discontinuity better expressed than in the racist comment of Medina’s attorney, F. Lee Bailey: “I don’t think that what is done to a jap hanged in the heat of vengeance after World War II can be done to an American on an imputed theory of responsibility.”34

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33 Peers felt that even in the assignments of active duty officers, the case was stacked against the prosecution. In his USAWC debrief, Peers used the example of the Henderson trial where “you have a Major, a fine officer, but a young officer not near as experienced as Rothblatt and the lieutenant colonel from JAG that were defending Henderson.” So I do not think the Army put its best foot forward. I think they could have assigned much stronger individuals ion teams and I am not exactly pleased with the composition of some of the court-martials. I think they could have put on a more representative kind of people there – people that could have understood went on in warfare and not necessarily service support kind of individuals.” USAWC Senior Leader Oral History, LTG Peers, 33-36.

The Taylor Thesis

On January 6, 1971, Dick Cavett introduced an unusually serious guest on his television talk show that was usually known for light-hearted banter with celebrities. This guest was a very somber Telford Taylor. In the wake of the convening of the Calley’s court-martial two months earlier, General Taylor stated, in reference to a book he just authored, *Nuremberg and Vietnam: An American Tragedy*, that if Dean Rusk, Robert McNamara, McGeorge Bundy, Walt Rostow, and General Westmoreland were tried for war crimes under the same standards applied in the case of General Yamashita, they would likely “come to the same end.” Carried the next day in the *New York Times*, the quote became a critical weapon to those claiming that the United States intervention in the Second Indochina War was criminal.\(^35\)

Through the course of the My Lai trials, Taylor authored one book and wrote three opinion editorials for the *New York Times* that addressed the Vietnam war in general and My Lai in particular in the context of the Nuremberg era war crimes trials. His first article, printed on January 10, 1970, discussed the wider conduct of the war, especially the bombing campaigns, and discussed the concept of command responsibility in the context of the Yamashita standard. He accepted the premise of the Yamashita’s defense as articulated in the U.S. Supreme Court ruling that Yamashita, as a commander, was condemned to death “not for what himself did, but for failing to give and enforce orders to check the excesses of his troops.” His second article, on November 21, 1970, came out on the fourth day of the trial of Calley, which went unmentioned in the text of

the article. In this article, Taylor had gained access to an extremely abridged release of the Peers Report. He also noted the environment and assets available to the American command in Vietnam were far more favorable than what was experienced by the German Army in occupied Europe while facing conditions that were “not totally dissimilar to those prevailing in Vietnam” and called for the creation of special military tribunals to try the My Lai cases so as to insure that Americans accused of war crimes are handled in the same manner as foreigners were handled by Americans in the Nuremberg era trials. His 1970 book, *Nuremberg and Vietnam: An American Tragedy*, provides a more detailed exposition of themes addressed in his earlier articles. After a two-year break, Taylor followed up with a final *New York Times* article. Printed on February 2, 1972, after the acquittal of Captain Medina, Taylor addressed the general failure of the My Lai prosecutions in enforcing the standard of command responsibility found both in Army doctrine and the Nuremberg era war crimes trials. 36

However, it was not in his articles, book, or even in the numerous panels on the war in which he participated or chaired that Taylor articulated the so-called “come to the same end” thesis. This “Taylor” thesis consisted of the belief that General Westmoreland and other officials in the Johnson Administration would be found guilty of war crimes if held to the Yamashita standard of command responsibility. The thesis was based on a poorly summarization of a statement attributed to Taylor by Neil Sheehan in a January 9, 1971 *New York Times* article under the caption of “Taylor Says by Yamashita Ruling Westmoreland May Be Guilty.” Neil Sheehan interviewed Taylor after being granted

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pre-broadcast access to a screening of a taped episode of Dick Cavett Show. Sheehan interviewed Taylor for the New York Times article that would appear on the day on which the evening broadcast of the Dick Cavett show was scheduled to be aired.

Sheehan misleadingly summarized Taylor’s statement vis-à-vis Westmoreland in the first line of the article as follows:

Telford Taylor, former Chief prosecutor at the Nuremberg trials, has declared that Gen. William Westmoreland, the Army Chief of Staff, might be convicted as a war criminal if war crimes standards established during World War II were applied to his conduct of the war in Vietnam.

However, later in the article Sheehan paraphrases the Cavett - Taylor dialogue as follows:

Taylor: Well I certainly suggest very strongly in the book, and would be quite prepared to say it a little more explicity, that if you apply to the people you’ve mentioned (or to the high commanders at Nuremberg) like General Westmoreland, if you were to apply to them the standards that were applied in the trial of General Yamashita, there would be very strong possibility that they would come to the same end as he did.

Cavett: Then you imply they would be found guilty?

Taylor: Could be found guilty. It was not the purpose of the book to say that “X” is guilty, or “Y” is guilty or “Z” is guilty. That’s for some court to decide if you have the evidence there and look at it. But it is the function of the book to say that these principles were applied before and if you applied them now, such and such results might follow. And the American people (italics mine) cannot face thier own past and cannot face the principles that they laid down and applied to Germans and Japanese unless they’re to have the principles work the other way.  

It is obvious from both Taylor’s actual words in the Cavett interview and his published writings that he never tried to put forward a factual case against Westmoreland. Taylor’s actual words, in reference to My Lai specifically or the conduct of his command

of U.S. ground forces in Vietnam in general, never directly equated the words or actions of General Yamashita during the American liberation of the Philippines to Westmoreland’s conduct in Vietnam. In fact, in his 1970 article, Taylor admitted lacking any detailed knowledge of the My Lai Massacre, itself having been “obscured by the fog of war.” In fact, Taylor characterized the military directives issued by Westmoreland’s command on the humanitarian treatment of the Vietnamese as “impeccable.” In his book, Westmoreland is scarcely mentioned by Taylor except to make to separate and distinct points: (1) Westmoreland certainly possessed superior assets to monitor and supervise the activities of his forces than Yamashita and (2) Taylor associated Westmoreland with the strategy of utilizing massive firepower, a violation of the just war doctrine of proportionality, in the conduct of the war. The tone and thesis contained in the headline and introductory statement of his 1971 New York Times article on Taylor is probably a fare representation of the view of Westmoreland held Sheehan, who would later become nationally famous as the journalist associated with the publication of the Pentagon Papers, than the view of Westmoreland held by Taylor.

It was only after the end of the trials that he made a direct comparison between the conduct of Yamashita and that of an American officer; that officer was Captain Medina. Even then, Taylor never claimed to be making or putting forward a formal

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40 In Sheehan’s *A Bright Shining Lie*, his 1988 blockbuster epic on the war, Westmoreland is depicted in an uncomplimentary manner. For Sheehan, while it was Lieutenant General William Dupuy who was the “main architect of the building and deployment” of the American military machine in Vietnam and the mastermind of America’s destructive tactics of “prodigious firepower” and failed strategy of “attrition,” Westmoreland was its the unimaginative and self-deluded executioner. See Sheehan, *A Bright Shining Lie: John Paul Vann and America in Vietnam*, (New York: Random House, 1988), 10-11, 16, and 558.

legal argument. As a full professor of international law at Columbia University, he could have chosen from any number of prestigious law reviews as the medium for his views. Instead, he chose the medium of newspaper op-eds and current affairs publishing to make a non-legalist, ethical challenge regarding the conduct of the war to the nation at large. The massive law review articles and legal dissertations written in response to a misleadingly phrased newspaper headline was an obvious literary example of asymmetrical warfare (italic mine) that missed the target of Taylor’s central non-legalistic argument. Thirty years later, the mass of legal articles and dissertations that were generated in response to Taylor’s so-called thesis suggests the intensity of public debate crossed over into the professional discourse of the legal profession. After thirty years’ distance, it is far easier to appreciate the changes in General Taylor’s attitudes toward the war, from general support prior to 1965 to his later criticism of the overuse of firepower by the United States, as very nuanced and moderate for the period.

In his 1970 book, Taylor recognized the important distinction between the competing interpretations of the legacy of the Nuremberg trials. While dismissive of some of the more radical legal theories associated with Nuremberg, he was tolerant of the fact that the Nuremberg legacy includes “both what happened there and what people think happened” and that the latter can be at times more prominent than the former. Taylor was specifically critical of the so-called “Nuremberg defense,” a defense claim that a soldier can refuse military service on the ius ad bellum argument that the war was manifestly aggressive. He also doubted that a “judicial decree” could be utilized to nullify the legal resort to military actions by the President and U.S. Congress. As a

result, more radical critics of American policies, such as Princeton’s eminent legal scholar, Richard A. Falk, considered Taylor’s “minimalist indictment” of America’s involvement in Vietnam as too conservative.⁴³

Criticism of Taylor by conservatives was far less deferential and at times bordered on linguistic hysteria. Waldemar A. Solf, chief of the International Affairs Division of the Office of the Judge Advocate General of the U.S. Army, was Taylor’s most ferocious critic. The functional successor of Richard Baxter as far as developing official Army doctrine on the Laws of War, Solf, in an unofficial law review in 1972, charged that Taylor’s so-called thesis against Westmoreland and other officials elevated “Professor Taylor to the status of a first magnitude star among scapegoat mongers” and that there were so many demonstrable errors of law and contradictions” in Taylor’s (pre-1972) writings that Taylor “thereby forfeits the opportunity to assume a place” among those qualified to discuss “what international law really is.”⁴⁴

In his response to Taylor, Solf noted that any comparison between the Yamashita and the My Lai trials had to address the procedural discontinuity between a special military commission, in the case of the former, and a military court martial, in the latter case. If it can be shown that military commissions are weighted against defendants and military courts martial are more weighted in the interests of defendants, it is fair to point out possible ethnocentric, racist, or national biases implicit in utilizing one for the trial of foreign defendants of another race and another for the trial of one’s own nationals. Solf

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called Taylor’s call for fairness in trying the My Lai defendants before a special military tribunal a “nostalgic preference for Post World War II procedures.” Solf noted three major distinctions between military commissions and courts martial: “procedural limitations, exclusionary rules of evidence, and due process standards” associated with court martial. This placed Yamashita in the position of being just a passive victim of bad timing in not being granted the same procedural protections later given to American officers tried by the United States. Solf was the first of many legal critics of Taylor who associated Taylor’s criticism of the outcome of the Medina trial with a so-called “absolute liability” standard or secondary liability standard. These critics utilized the concepts of Substantive standards or norms, related to formal legal precedents, and Procedural standards or norms, related to the less rigorous demands placed upon the Nuremberg era prosecutors. This had the effect of playing down the significance of the contrasting instructions concerning the standard of command responsibility given by the respective judges in the Yamashita and Medina trials.45

In summary, the attempt to attribute categorical support for a theory of absolute command responsibility to General Taylor, based on his war time writings, is a classical example of the "straw man" fallacy in which one posits a counterfactual description of one’s opponent’s position (the straw man), attacks it, and proclaims victory as the real position of one opponent remains untouched.

45 Under Article 102 of the 1949 Prisoner of War Convention, which required that prisoners of war “can be validly sentenced only if the sentence and been pronounced by the same courts and according to the same procedure as in the case of members of the armed forces of the Detaining powers.” See Solf, Ibid., 61-64. Arguments to find in the Medina trial a refinement or liberalization of jurisprudence can be found in Robyn Campbell, “Military Liability For Grave Breaches of National and International Law: Absolute or Limited?” (Ph.D. dissertation, Duke University, 1974), 180-214 and Major Bruce D. Landrum, The Yamashita War Crimes Trials: Command Responsibility Then and Now,” Military Law Review, Vol. 149 (November 1995) 289-301.
Yamashita v. Medina, Subjective Criteria

Another authoritative critic of Taylor was Solf’s successor as America’s top doctrinal authority on the law of war. William Hays Parks ascended to the dual leadership of both the offices the Law of War Branch of the Department of Defense and the International and Operational Law Division of the Office of the Judge Advocate General of the Army immediately prior to Ronald Reagan gaining the White House. A retired Colonel in the U.S. Marines, with combat experience in Vietnam, Parks marked his entrance to the profession of law with his 1973 thesis, “Command Responsibility for War Crimes,” which challenged General Taylor’s characterization of the Yamashita precedent. Except for classifying the My Lai Massacre as an “aberration” in the first sentence, Parks undertook to challenge the concept of absolute command liability that he associated with Taylor, among others, without utilizing the My Lai trials as a comparison. Unlike other contemporaneous critics of Taylor who used the straw man of ‘absolute’ liability, it is to Parks’ credit that he did not attempt a justification of the Medina acquittal trial in terms of the Yamashita precedent.

While Parks was critical of the dominance of non-lawyers in the Yamashita trial, as a former combat officer he appealed to what he considered the sentiments common to the combat arms in his writing. In his thesis, Parks utilizes a non-legalistic tactic of laying out subjective criteria to determine whether or not a commander possessed a sufficient “means of knowledge” for war crimes, a criteria more likely to be appreciated by officers with combat command experience:

(a) The rank of the commander.

(b) The experience of the commander.
(c) The training of the men under his command.
(d) The age and experience of his men.
(e) The size and experience of his staff.
(f) The comprehensiveness of his duties.
(g) The “sliding probability ratio” of unit-incident-command.
(h) The duties and complexities of the command by virtue of the command held.
(i) Communications abilities.
(j) Mobility of the commander.
(k) Isolation of the commander.
(l) Composition of the forces within the command.
(m) Combat situation.46

Parks utilized these criteria to make a case that Yamashita was not held to an absolute standard of liability as a commander and could well have been convicted under the standards of the later Hostage and High Command Cases. However, if one were to use these criteria to compare the words and actions of General Yamashita and those of Captain Medina at My Lai, General Taylor’s specific claim that Medina was held to a completely different legal standard than that to which Yamashita was held, or any other Nuremberg era defendant, appears obvious. 47

(a-b) RANK AND EXPERIENCE: General Yamashita was proclaimed a national hero for his capture of Singapore from the British. He was the commander of Japanese forces in Manchuria prior to being given command of the Philippines. Captain Medina was an experienced soldier who came up

from the ranks after excelling as a Non Commissioned Officer (NCO). He graduated fourth in a class of two hundred at Officer Candidate School and the men of his company respected him. His company was considered the best in the battalion.

(c-d) **THE TRAINING, SIZE, AND EXPERIENCE OF HIS COMMAND:** Ten days before Yamashita’s arrival in the Philippines on October 20, 1944, the United States began its reconquest by a decisive victory in the Battle of Leyte Gulf. Half of the forces Yamashita assigned to the campaign were killed. Yamashita described the soldiers of his “Army Group” as poorly trained with low morale. The size of Yamashita’s forces were approximately 100,000 personnel. In contrast, Medina’s command consisted of 105 men on the day of the massacre. Charlie Company was considered average and differed “little from the Army as a whole.” Two days prior to the massacre, a patrol member stepped on a mine killing one NCO and injuring two other soldiers. On that same day his soldiers murdered an unarmed wounded woman, an act Medina failed to report or act upon. Numerous soldiers of Medina’s command reported that Charlie Company had stopped the practice of taking prisoners, military or civilian, well prior to My Lai.

(e) **THE SIZE AND EXPERIENCE OF HIS STAFF:** In the later trial of Admiral Toyoda, the Army Group under Yamashita was noted has only being capable of a “limited command function” as a result of Toyado, as the senior officer in charge of the defense of the Philippines, having removed the Japanese theater staff from Luzon prior to Yamashita’s arrival. In contrast, at My Lai, the division, task force, and battalion commanders were all physically present in helicopters above their company. The My Lai Massacre was one of the most supported and supervised operations of its type in the history of the American warfare.

(f) **THE COMPREHENSIVENESS OF HIS DUTIES:** As Yamashita felt his command, scattered across hundreds of miles of terrain, incapable of decisive action, he ordered the evacuation of Manila, an action opposed by his subordinate commanders who were simultaneously questioning his authority for the order. In contrast, Medina’s mission was to “make contact and destroy” enemy forces in one specific location. However, the forces of the 48th VC Battalion, approximately 500 personnel, were falsely reported by intelligence to be at My Lai.

(g) **THE “SLIDING PROBABILITY RATIO” OF UNIT-INCIDENT-COMMAND:** When U.S. forces landed on Luzon on January 9, 1945, the Japanese forces, refusing to surrender the capital of Manila engaged in murdering and torturing between 60,000 and 100,000 civilians. Medina’s 105 soldiers murdered between 300 and 500 unarmed old men, women, and children in four hours. While the scale of the operations are not in any way comparable.
Each soldier under Medina killed three to four times the average number of civilians that the soldiers in Yamashita’s army group killed.

(h) THE DUTIES AND COMPLEXITIES OF THE COMMAND: The Philippines were written off by the Imperial Headquarters by the time Yamashita took command. Yamashita’s counterattack to enable the forces in Manila to withdrawal failed and by March all Japanese forces in the city had been killed. In contrast, the American forces at My Lai received no hostile fire from the village and sustained no casualties except for one self-inflicted injury.

(i) COMMUNICATIONS ABILITIES: Yamashita’s communication with the forces in Manila was lost immediately upon the landing of U.S. forces on Luzon. In contrast, Medina maintained company command post position with his radioman in a direct physical proximity of My Lai 4 for the entire four-hour duration (except for when he entered the village proper to have lunch with his men).

(j) MOBILITY OF THE COMMANDER: Yamashita was held up in a remote mountain region until he surrendered on August 15, 1945. His supplies were low and dispersed throughout the island. In contrast, Medina’s company conducted the state of the art air-mobile operation made famous in the Vietnam War.

(k) ISOLATION OF THE COMMANDER: As opposed to Yamashita, Medina’s forces could not approach anything resembling the isolation of Yamashita as his three higher echelon commanders tried to avoid colliding with one another directly overhead of his company.

(l) COMPOSITION OF THE FORCES WITHIN THE COMMAND: Yamashita possessed an Army Group with virtually no naval or air support. Medina possessed an infantry company with artillery, helicopters gunships in direct support, and had massive the air support assets available to be tasked.

(m) COMBAT SITUATION: Yamashita conducted retrograde operations without control of the air or functional communications. In contrast, Medina conducted a search and destroy operation that was standard for American ground forces in Vietnam.

It becomes obvious from the facts presented in the comparison utilizing Parks’ own ‘subjective criteria’ that Yamashita would not have been sentenced and hanged by Captain Medina’s jury if he wore the same uniform as Medina. One does not have to be a lawyer to appreciate Taylor’s obvious conclusion. The contrast between these two
trials is not the result of differing interpretations of legal sufficiency. Rather, it is a simple example of the lack of consistent institutional moral standards over time. The results of the official My Lai investigations and the subsequent failure to convict any officers on the basis of command liability demonstrate that the United States government failed to adhere to the standard of command indirect responsibility affirmed both at Nuremberg and at the trial of General Yamashita.

The Legacy of My Lai Massacre

It is not the reaction of lawyers, military or otherwise, that is central to an analysis of the doctrinal response to My Lai. Rather, it is the actions of senior members of the military profession. If one were seeking a comfortable and undemanding last tour of duty before retirement, serving as Chief of Staff of the United States from the period of July 1, 1968, to June 30, 1972, would hardly be a tempting choice. After commanding American forces in Indochina from 1965 to 1968, Westmoreland was appointed to the Army’s senior position.

Post My Lai Professional Reform, An Attempted Return to Just War

Only three days after his staff completed its review of the Peers report, Westmoreland directed the Army War College Commandant, in a memorandum dated April 18, 1970, to initiate a study in response to “several unfavorable events” that brought into question the “state of discipline, integrity, morality, ethics, and professionalism of the Army.” Westmoreland specifically requested the development of a concise and understandable “Officer’s Code” to enable officers to recognize and resist institutional pressures that could compromise their integrity. Officers at the Army War College

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completed the report in less than 90 days. After extensive interviews with company
grade officers at various training installations, the study’s authors bluntly concluded that
within the Officer Corps there was a “strong, clear, and pervasive” perception that a
barrier existed between the ideal values of military service and the actual and operative
values of military leaders. 49

The group of officers who administered the 1970 Army War College study had
been selected by the Department of the Army for grooming for eventual service as
general officers. Although they found that the West Point Cadet Code of Duty-Honor-
Country was “espoused” by officers at all levels, this choice group of officers found it
necessary to draft an more affirmative and comprehensive Officer’s Creed to reaffirm the
principle of “selfless” service:

I will give to the selfless performance of my duty and my mission the
best that effort, thought, and dedication can provide.

To this end, I will not only seek continually to improve my knowledge
and practice of my profession, but I will exercise the authority entrusted
to me by the President and the Congress with fairness, justice, and restraint,
respecting the dignity and human rights (author’s emphasis) of others and
devoting myself to the welfare of those placed under my command.

In justifying and fulfilling the trust placed in me, I will conduct my private
life as well as my public service so as to be free both from impropriety and
the appearance of impropriety, acting with candor and integrity to earn the
unquestioning trust of my fellow soldiers—juniors, seniors, and associates—
and employing my rank and position not to serve myself but to serve my
country and unit.

By practicing physical and moral courage I will endeavor to inspire these
qualities in others by my example. In all my actions I will put loyalty to the
highest moral principles and the United States of America above loyalty to
organization, persons, and my personal interests. 50

49 For the three day turnaround between Westmoreland’s receipt of the Peers Report and his order for the
Army War College study see Cincinnatius, Self Destruction, The Disintegration and Decay of the United

50 U. S. Department of the Army. Study on Military Professionalism, U.S. Army War College, (Carlisle
It is significant that these officers, the majority of whom commanded American forces in Vietnam, were clearly convinced of the need to include a categorical affirmation to protect human rights in the oath they believed should be added to the standard code of conduct. Unfortunately, the Department of the Army never promulgated the oath.

In July 1970, one month after personally testifying before the House of Representatives’ Armed Services Investigating Subcommittee on the My Lai incident, Westmoreland held a stormy meeting with the Army’s disbelieving top leadership to discuss the findings of the Army War College’s Study on Military Professionalism. The most striking and central conclusion of the study, which exposed the Army’s leadership to scrutiny, was that there was “no direct evidence that external fiscal, political, sociological, or managerial influences” were causative factors in the Army’s fall from professional grace. After a heated discussion, it was decided not to release the damning study to the public.51

In the remaining months of 1970, more troubling disclosures on Laws of Wars violations by United States Army personnel in Vietnam appeared in the press. A criminal investigation of the murder of an alleged Vietnamese double agent involving a Special Forces Group was conducted on Army Colonel Robert B. Rhealt. The investigation was brought to the attention of the media by a civilian defense lawyer. In another incident, television interviews of the most decorated veteran of the Korean War, Lieutenant Colonel Anthony B. Herbert, broadcasted his claim that he was relieved of his duties as

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an Inspector General in Vietnam for reporting on the mistreatment of enemy prisoners. With these new scandals on top of My Lai, Westmoreland ordered the Deputy Chief of Staff for Personnel, Lieutenant General Walter T. Kerwin, Jr., to organize the United States Army Vietnam War Crimes Working Group, which eventually analyzed 246 separate allegations related to the conduct of the war. In his memorandum to Kerwin, Westmoreland ordered an examination of all the Department of the Army procedures for handling war crime allegations. Included in that mandate was a review of the adequacy of the Army’s definition of war crimes and a determination if any modifications were necessary in the military, inspector general, and legal structures. The selection of Lieutenant General Kerwin was, however, a potential embarrassment, since the very war crime directive that was in force at the time of the My Lai massacre bore his signature.

Starting in the early 1970s, criticism of the soundness of the Army as an institution became pervasive in academia. Following the lead of the Army’s own Study on Military Professionalism, civil and military scholarly analyses emphasized a crisis in Army professionalism. British Lieutenant General Sir John Winthrop Hackett, perhaps the greatest non-American fan of the American military tradition, delivered a lecture in October 1970 at the U.S. Air Force Academy that provided an alternative model in the


53 Memorandum for LTG Kerwin, DSCPER from Westmoreland 29 Nov 71 and MACV Dir. 20-4, 18 May 68, MACJA Inspections and Investigations for War Crimes, For the Cdr. byChief of Staff Walter T. Kerwin, Jr., MG USA USAWC, Military History Research Collection, William C. Westmoreland Papers. Carlisle Barracks, Pennsylvania.

debate over military professionalism. The cadets listening to Hackett were probably well aware that they were aspiring to a profession that had already lost much of society’s faith in its integrity. In contrast to Huntington’s model of professionalism as developed in *Soldier and the State*, Hackett made a critical distinction between the military and other professions. Where other professionals – in law, medicine, or business, for example -- can achieve expertise and behave in a collegial manner while, at the same time, being selfish, cowardly, and false, “what the bad man cannot be is a good sailor, soldier, or airman.” Hackett’s speech concluded by invoking the fundamental importance of the ethical dimension in military institutions: “The highest service of the military to the state may well lie in the moral sphere.”

Unfortunately, this post My Lai military reformation did not survive Westmoreland’s tenure as Army Chief of Staff. The Army Chiefs of Staff who succeeded Westmoreland began openly criticizing the Peers Commission report on My Lai. General Edward C. Myers, in his memoir *Who Will Lead* (1995), cast doubt on the judgment of the “so-called Peers Board” for its readiness to publicly “point the finger of indictment all the way up to the division commander, General Koster.” Although General Koster was never indicted, despite the recommendation of the Peers Commission, he was forced to resign in disgrace from his subsequent assignment as

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Commandant of West Point. General Bruce Palmer, who took over as acting Army Chief of Staff at Westmoreland’s retirement, charged that the “so-called” Peers report “lacked objectivity and balance” and was “considered by many observers to be highly improper.” Palmer asserted that the Peers Commission had taken on the guise of a “star chamber,” denying witnesses the benefit of cross-examination or access to legal counsel.\textsuperscript{58}

During the Army’s soul-searching of the early 1970s, America had not yet been definitively defeated in Vietnam. Westmoreland and the authors of the \textit{Study on Military Professionalism} were willing to be quite critical about the Army. After America had reached the inescapable conclusion that we had been defeated, however, the call for ethical reform faded and Army professionals again turned to a disciple of Carl von Clausewitz to provide a modal for the future of their profession.

\textbf{Post-Vietnam Revisionism}

Colonel Harry G. Summers, one of our leading commentators on military affairs until his death in 1999, was a lecturer at Fort Leavenworth when news of the My Lai massacre first broke in 1969. Years later, he remembered his reaction when he first heard of the atrocities: “What they ought to have done with Calley and Medina was to have hung them, then drawn and quartered them, and put their remains at the gates of Fort Benning, at the Infantry School, as a reminder to those who pass under it of what an infantry officer ought to be.”\textsuperscript{59} Summers had no sympathy for the likes of Lieutenant William Calley and his company commander Captain Ernest Medina, the two officers in

\textsuperscript{58}General Bruce Palmer, Jr., \textit{The 25-Year War, America’s Military Role in Vietnam}. (Lexington: Univ Press of Kentucky, 1984) p. 86.

command at the scene of the My Lai massacre. Yet Summers’ subsequent analysis of the war proved to be extremely influential in reframing the debate on Vietnam to shift attention away from the idea of My Lai as an ethical failure.

Summers’ rise to prominence as a spokesperson on military issues began when he took over the Vietnam lessons learned course at the U.S. Army War College in Carlyle, Pennsylvania. By the early 1980s, interest in the class had been waning and enrollment was becoming sparse. Summers set a new tone by replacing the critique of military failure with a more upbeat approach emphasizing our military’s tactical superiority in Vietnam and then attributing the actual American defeat to civilian strategists. Probably, more than any other scholar and commentator of military affairs in the post-Vietnam period, Summers furthered the accommodation of the U.S. military to its defeat in Southeast Asia. By shifting the major blame to civilian strategic errors, the military establishment finally had a welcomed opportunity to run away the type of analysis that focused on specific military failures such as My Lai.

Summers and former Army Chief of Staff General Fred C. Weyand were co-authors of *Vietnam Myths and American Military Realities*; an officially sanctioned study issued by the Department of the Army and intended to incorporate the definitive lessons of the Vietnam War into strategy assessment. Summers subsequently developed the theme into his book, *On Strategy: A Critical Analysis of the Vietnam War* (1982). There, the author admits that mistakes were made by the armed forces in Vietnam. He argues, however, that the war was lost because of the military’s deferral to civilian leadership on war strategy. If only the military had been allowed to fight the Vietnam

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War the way it wanted to, his argument goes, the U.S. would have been victorious. That interpretation coincides with the theory of military professionalism advocated by Samuel P. Huntington and other realists that called for the separation of military and civilian authority. In this perspective, it is not difficult to dismiss the My Lai massacre as “an aberration,” which is precisely what Summers does.  

The influence of this Vietnam War revisionist school began to push aside any significant effort to displace the Huntingtonian model of professionalism that still had never managed to attain the imprimatur of official doctrine. The important messages of the 1970 Army War College study of professionalism and the Peers Commission report on My Lai were left behind as blame for the defeat in Vietnam shifted from how the ground war was conducted to the civilian policy makers. The ethical disintegration of the officer corps and the darkest day of the Army’s history – March 16, 1968 – receded into memory. Summers’ views expressed at a 1994 Tulane University conference on the My Lai massacre illustrate the trend. After admitting that the war was fought with “great stupidity,” and practices like the body-count were “barbaric,” Summers insisted, in keeping with revisionist logic, that the war “was driven from Washington . . . driven from Washington!”

If the Army could deny responsibility for how the war was fought, it was well on its way to marginalizing the significance of a moral disaster such as the My Lai massacre. The debate over how the Vietnam War was lost became increasingly fixed on the

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decisions made to engage the Army in the first place. At two major conferences held at the Fletcher School of Law and Diplomacy in 1973 and 1974, the focus drifted away from the military toward civilian politicians and society. Discussions involved questions such as cultural clashes between Americans and Vietnamese, and the soon-to-become mantra of post-Vietnam revisionism; namely, that the civilian leadership lacked clearly defined goals in Vietnam. The My Lai massacre, according to one conference participant, Brigadier General S.L.A. Marshall, was not only an aberration in scope, but also an aberration in kind. Marshall measured that exception against the regular sacrifice of American soldiers’ lives in the interests of avoiding civilian causalities.

Another major revisionist was General Palmer. Aside from his harsh criticism of General Peers, Palmer was in many ways a softer revisionist than Summers. Palmer’s *The 25-Year War*, published just two years after Summers’ *On Strategy*, is critical of the trend to place blame solely on America’s civilians leaders for what went wrong in Vietnam. Palmer denounces Army leadership for deficient training and orientation for soldiers on the Geneva Conventions and on the kind of war they would face in Vietnam. Unlike Summers, Palmer does not blame the defeat on civilian leadership’s emphasis on

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65 Edward N. Luttwak, a well known critic of Vietnam War revisionism, argues in *The Pentagon and the Art of War* (1985) that interference from civilian officials was of “only a most superficial scope.” He also asserts that the Army not only fought the war it wanted to fight, it fought the way it did more for the purposes of organizational convenience than for military success (*The Pentagon and the Art of War*, New York: Touchstone, 1985, pp. 23-27 and 41-42).
counterinsurgency operations, as opposed to conventional warfare. The corollary to Summers’ extreme revisionist perspective, of course, is the depiction of the My Lai massacre as the unfortunate but predictable outcome of throwing soldiers into unconventional, confusing situations where there is difficulty identifying the enemy. Yet even if the ahistorical argument that it was new or unusual for soldiers to operate in those kinds of circumstances was valid, the focus on strategy and pitting the military’s choice of conventional warfare against the civilian government’s counterinsurgency framework displaces the fundamental ethical issue. Whatever kind of war soldiers are waging, killing babies and raping women does not constitute legitimate military conduct.

The revisionist thesis of America's tactical inviolability in Vietnam even has a "revealed" mythology to support it. In the introduction to On Strategy, Summers describes a conversation in 1975 in Hanoi with North Vietnamese Army Colonel Nguyen den Tu. Summers writes that when he told the Vietnamese colonel "you know you never defeated us on the battlefield." Tu replied, "that may be so, but it is also irrelevant." But retired U.S. Army colonel David Hackworth gives a different version of that exchange in his 1989 book About Face. There, Tu is quoted correcting Summers’ recollection ten

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67 Andrew F. Krepinevich, one of the major critics of the revisionist, “no more Vietnams” school of thought, documents the great lengths that Army leaders went to resist what they considered President Kennedy’s counterinsurgency “fad.” The Army preferred “to fight the kind of conventional war that it was trained, organized, and prepared (and wanted) to fight instead of the counterinsurgency war it was sent to fight” (The American Army in Vietnam (Baltimore: Johns Hopkins University Press, 1986, p. 271). Krepinevich, a retired major, was assigned to the Executive Secretariat of the Office of the Secretary of Defense in the mid-1980’s. His argument is somewhat undermined by the fact that those chosen to lead the Army’s counterinsurgency effort, like Generals Edward Meyer and William DePuy, lacked background in the discipline of counterinsurgency operations. Officers with that training and experience, such as General Edward Lansdale, Roger Hilsman, Major General Rosson, General Yarborough, and General Peers, played less substantial roles in the so-called counterinsurgency “kick” (see The American Army, pp. 5-7, 70-74, and 270-275).
years after the fact by stating that the U.S. Army was "routed militarily" and that tactical rather than strategic failures were "the main cause that led to the tragic U.S. defeat."\textsuperscript{68}

In 1977, the Department of the Army published its next version of Field Manual 100-5. The manual promoted very conventional doctrine of "active defense" that signified the return of the defense central Europe as the center of gravity for the U.S. Army. Prepared to fight a conventional war consisting of slow elastic withdrawal toward the Rhine, the new Army doctrine emphasized mechanized conventional operations in support of NATO forces that were expected to defend against a potential attack of Warsaw Pact conventional forces possessing three to one force ratio superiority in conventional forces. The era of anti-insurgency and irregular force structures was over, at least doctrinally.\textsuperscript{69}

**Conclusion**

Michael Walzer, in his \textit{Just and Unjust Wars}, the most quoted and authoritative contemporary work in on just war theory, ever since its publication in 1977, persuasively argued that soldiers “are not responsible for the overall justice of the wars they fight; their responsibility is limited by the range of their own activity and authority.” The responsibilities of officers, on the other hand, are “unlike anything in civilian life.” For Walzer, My Lai could have no social, environmental, or realist justifications. In Walzer’s contemporary conception of “just war” theory, My Lai was not just a mere indicator that there was something wrong with the \textit{ius ad bellum} premises that American leaders used to justify their decision to go to war. Rather, it was an indicator of institutional

\textsuperscript{68}Hackworth, \textit{About Face}, p. 817.

breakdown of *jus in bello* military ethics.\(^{70}\) Tragically, with the end of the military draft in 1973, an increasingly conservative military leadership found other excuses for the American military failure in Vietnam other than a breakdown in institutional ethics.

The Vietnam War left the American military with two conflicting standards of command responsibility, a doctrinal standard and a standard representing the latest legal precedent. The Medina Standard, far from representing better law, has not received international validation. Rather, the standards approximating those associated with the Yamashita Trail, the Hostage Trial, and FM 27-10 have been incorporated in *Additional Protocol I, the Statute of the International Tribunal for the Former Yugoslavia* (ICTY), the *Statute of the International Tribunal for Rwanda* (ICTR), and the *Rome Statute for the International Criminal Court* (ICC).

The Vietnam era failure of America to hold its own citizens to the same standards it held out to its defeated enemies has contemporary consequences. The maintenance of a defacto unilateralist legal precedence concerning command responsibility does not mitigate the concerns of America’s traditional allies over the rising tide of American unilateralism. With the scandals related to the improper handling of detainees by U.S. military authorities in Quantomino, Afghanistan, and Iraq, the U.S. Army is again dealing with incidents that, like My Lai, are neither “aberrations,” nor are they characteristic representations of the American Military Professional. Rather than brushing up on their Clausewitz, those undertaking who are undertaking corrective action probably could benefit more from a review of the *Peers Report* and the *1972 Army War College Study on Military Professionalism*.

If there is a bright side to My Lai, it is that the military, as it looked at the Vietnam War itself, got the message and said you cannot ever let this happen again in the United States Military.

William Hays Parks

Over the course of the decade and a half following the end of the Second Indochina War, the U.S. military profession underwent doctrinal and organizational revolutions as it reassessed the nature of its association with American civil society and its image of itself. Specifically, the attitudes of official and military authorities toward developments in international humanitarian law underwent a substantial transformation as documented by the sequential negotiation, endorsement, and later rejection of the Additional Protocol (Protocol I) to the Geneva Conventions of August 12, 1949 [hereinafter cited as Protocol I]. While adjustments to formal keystone doctrine related to the laws and customs of war remained relatively nuanced and subtle, the negotiations and evaluations of Protocol I signified a transformation in formal norm for that period.

Both the wider reorientation of capstone doctrine as represented in the 1982 and 1986 editions of FM 100-5 and the growing official American antagonism toward developments in international humanitarian law were expressed in the language of a conservative weltanschauung realism that grew among American military professionals

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in the wake of America’s defeat in Vietnam. Clausewitzian realism, the preference for
Prussian military structures, and a distrust of civilian decision makers were, to be sure,
nothing new for the American military officers. Yet, attitudes once held informally, now
entered formally into official policy for the first time on a major scale. The development
of keystone doctrine concerning the laws and customs of war cannot be separated from
the dynamics of the changes affecting capstone doctrine.

The Department of the Army, as the direct successor to the Department of War,
continued in its role as the traditional entity responsible for the development of inter-
service doctrine, specifically “keystone” doctrine upon which the other services would
establish their own supplemental doctrines. Following the American military withdrawal
from Vietnam, the 1956 edition of Army Field Manual 27-10, Law of Land Warfare,
continued to be the keystone publication on the laws of warfare in effect. On November
5, 1974, the Department of Defense issued DoD Directive 5100.17 designating the
Secretary of the Army as the Executive Agent for the administration of the DoD Law of
War Program. Formalizing the primacy of the Department of the Army for law of war
matters organizationally as well as doctrinally, the bulk of the document concerned
assigning responsibilities and implementing guidance within the Department of Defense.
The central policy statement of the DoD directive stated, “The Armed forces of the
United States will comply with the law of war in the conduct of military operations and
related activities in armed conflict, however such conflicts are characterized.”2 This
statement reflected continuity within the military in accepting a broad expansive
interpretation of the applicability of international humanitarian law.

(November 5, 1974), 1-8.
Although a specific task was not addressed in DoD Directive 5100.17, the negotiation and review of international treaties on the laws of war / humanitarian law would be a major activity of the personnel tasked under the DoD Law of War Program and assigned component services offices. However, beginning with the first session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts [hereinafter cited as Geneva Diplomatic Conference], which met in Geneva, Switzerland, February 20, 1974, diplomatic negotiations would be a major activity of the personnel tasked under the DoD Law of War Program and assigned component services offices.

**U.S. Negotiations at the Diplomatic Conference in Geneva**

The third common article to the Geneva Conventions of 1949, for the first time, imposed universal prohibitions and affirmative responsibilities on combatants regarding the protections of non-combatants. However, by the end of the 1960s, it had become apparent that civilians still comprised a disproportionate portion of the victims of contemporary conflicts and that revisions and/or additional conventions were required to provide a more effective regime of protections for noncombatants. Consequently, the United Nations General Assembly, in 1969, passed two resolutions requesting the Secretary General to undertake a study to identify areas of international humanitarian law, relative to the protection of civilians, to be revised or expanded. This action was undertaken in the midst of the Second Indochina War and the final wars of national liberation across Africa against Portugal, the remaining major European colonial power.³

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In order to protect its traditional subject area prerogatives, the International Committee of the Red Cross (ICRC) decided to draft additional protocols to the 1949 Geneva Conventions and to convene an international conference to modify and affirm them. At the XXIst Convention of the Red Cross in Istanbul, in 1969, the United States agreed to the ICRC initiative. At two meetings of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflict [hereinafter cited as Conference of Government Experts], the basic provisions of the 1907 Hague Regulations and 1949 Geneva Conventions were updated and expanded to address the experience of international and domestic conflicts since the end of the Second World War.

Richard R. Baxter, the author of the 1956 edition of FM 27-10 and future World Court Justice, represented the United States at the Conference of Government Experts. Assisting Baxter was Waldemar A. Solf, Chief of the International Affairs Division, Office of the Judge Advocate General of the Army, and Baxter’s functional successor as the Department of the Army’s doctrinal authority on the laws of war. These meetings resulted in two draft Protocols to the Geneva Conventions of 1949: Draft Additional Protocol (Protocol I) to the Geneva Conventions of Aug 12, 1949, Relating to the Protection of Victims of International Armed Conflicts and Draft Additional Protocol (Protocol II) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.4

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The Diplomatic Conference met in four sessions between 1974 and 1977. The American delegation was led by State Department Legal Advisor George H. Aldrich and assisted by Baxter along with eight additional representatives, seven of whom represented either DoD or the component military services. Besides Solf, who served in combat as an artillery officer in World War II, the latter included Brigadier General Walter D. Reed, future Judge Advocate General of the Air Force, and Major General George S. Prugh, who served under General Westmoreland as the MACV Staff Judge Advocate from 1964 to 1966 and was currently Army Judge Advocate General. The typical lawyer is employed in administrative and criminal law, rarely experiencing combat and having, at best, an avocational knowledge of the law that governs combat. However, in view of the military membership of Ambassador Aldrich’s team, it would be hard to imagine a more authoritative and imposing delegation.\(^5\)

The most controversial issues addressed by the Diplomatic Conference related to the application of Protocol I to wars of national liberation, which were taken up during

\(^5\) As MACV Staff Judge Advocate during the war, Prugh was successful in persuading the Government of South Vietnam to view the insurgency in the south as an international conflict and, consequently, grant Geneva prisoner of war status to Viet Cong and North Vietnamese soldiers. This came about to stop the retaliatory mistreatment of American prisoners in the north for the condition inside a South Vietnamese prison camps, such as the tiger cages at Con Son Island, which remained in operation for most of the duration of the conflict. During the period when he attended the first two sessions of the conference, Prugh was in the midst of issuing the major law of war after action review of the Vietnam conflict, \textit{Law at War: Vietnam 1964-1973}, Vietnam Studies series, (Washington: Government Printing Office, 1975). In 1980, Prugh and Westmoreland, both retired, would coauthor a major legal brief that did not avoid the “dark side of the record” of the breakdown of military law, for which they were both personally responsible. In particular, it gave a damning assessment of the Army’s failure to prosecute successfully the perpetrators of the My Lai Massacre. See “Judges in Command: The Judicialized Uniform Code of Military Justice in Combat,” \textit{Harvard Journal of Law and Public Policy}, v. 3, (1980), 57-63. For a discussion of Prugh’s role in leading the effort to normalize the treatment of enemy POWs, see Colonel Fred L. Bunch’s review of Stuart Rochester and Fred Kiely’s \textit{Honor Bound} in \textit{Military History Review}, v. 163, (2000), 151-152.
the session.⁶ From the beginning of the process to leading the drafting of the Protocols at the ICRC Istanbul conference in 1969, the United States agreed to support the ICRC effort with “considerable misgivings.” The conference was divided between the major Western states on one side and socialist and emerging states on the other. Besides the obvious ideological polarization of the international community at the height of the Cold War, the experience of war in the Third World led the United States to a very different outlook than that of developing nations. In the *Report of the United States Delegation*, Aldrich recognized the fundamental conflicting interests between nations whose military effectiveness relies on “technology, modern equipment and firepower,” such as the United States, and developing countries more dependent on mere manpower to achieve their military ends. Even though he viewed the conference as “more of a hazard than an opportunity,” Aldrich felt that an acceptable outcome could be attained as the conference plenary sessions were to be run on a consensus basis (requiring a two-thirds supermajority) by which the major areas of “North-South” disagreement would be precluded from the final instrument.⁷

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⁶ The conference organization divided the delegates into three major committees: Committee I was assigned to review and modify the draft provisions dealing with general issues of applicability and execution of each protocol; Committee II was assigned to evaluate expand, clarify, and modify the draft provisions dealing with humanitarian relief, civil defense, and treatment of the sick and wounded; and Committee III was assigned in reference to the provisions associated with restriction on methods of warfare and the protection of non-combatants. See Michael Bothe, Karl Partsch, and Waldemar Solf, *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, (Martinus Nijhoff Publishers: The Hague, 1982), 4.

⁷ Of course, Ould Dada did not refer to the independence forces in Western Sahara his forces were presently fighting. *Report of the United States Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law*, Fourth Session (Submitted to the Secretary of State by George Aldrich, Chairman of Delegation, September 8, 1977), [hereinafter cited as *U.S. Delegation Report*], 28-29.
North / South Debate, Just War Doctrine, and Amended Article 1

Issues relating to the status and representation of national liberation organizations and the controversy of whether Protocol I should apply to wars of liberation dominated the first session. By early 1974, traditional colonialism was in its death throes as Portuguese rule in Angola, Mozambique, and Guinea Bissau collapsed. President Ould Dada of Mauritania set the tone of the session with an opening speech that included remarks in favor of national liberation groups in general and the conflicts in Palestine and Southeast Asia in particular. Only a few months prior to the conference, the United Nations General Assembly adopted Resolution 3103 that defined armed resistance to colonial rule, alien occupation, and “racist regimes” as international armed conflicts requiring the application of the Geneva Conventions. It was, therefore, not surprising that the nations that supported this resolution would support similar language in an international instrument, such as the Protocols, which would be enforceable.

The United States delegation also brought the baggage of America’s particular experience of Third World insurgencies with it to the conference. General Reed observed, “the Vietnam War had a particularly disproportionate effect on the first session.” The hostile atmosphere was clearly apparent as the North Vietnamese


delegation introduced a provision to prohibit methods used by the U.S. in the war, such as use of napalm and defoliants, free fire zones, and an expansive use aerial bombardments. The U.S. delegation kept the refusal of the North Vietnamese to afford full prisoner of war status to U.S. prisoners in mind as it supported codification of provisions to ensure the full granting of prisoner of war status to all prisoners, regardless of the characterization of the conflict by the party holding them. The American delegation was voted down by the committee majority on several issues: the decision to invite members of national liberation movements, such as the Palestine Liberation Organization (PLO), to participate (except for voting); the invitation to the Provisional Revolutionary Government of South Vietnam (PRGSV); and, most importantly, the decision by the majority of states to recognize wars of national liberation as international armed conflicts requiring the application of both Protocol I and the 1949 Geneva Conventions. Not surprisingly, at the end of the first session, Ambassador Aldrich considered the likelihood of American accession to the protocol as threatened.11

The Protocols were not intended to supplant the Geneva Conventions, but to extend and direct their reach. As such, they would lack the foundational weight of the four 1949 Geneva Conventions, even if the Protocols were to be universally ratified. Additionally, from the beginning, it was foreseen that Protocol I would be considered more authoritative than the more novel second Protocol. The reasons that Protocol II has been relatively ignored in comparison to Protocol I is that the latter extends applicability of the common article three of the Geneva Conventions of 1949 in reference to grave

breaches, which is considered the most fundamental protections of international humanitarian law concerning the protection of noncombatants. This is why the North / South debate over extending humanitarian law to wars of liberation took place during the negotiations of Protocol I rather than Protocol II. The tendency to apply the more authoritative standard when possible or when in doubt was drawn from the de Martens Clause found in the 1899 Hague Convention.\textsuperscript{12}

According to Baxter, the delegations of the United States and its allies were not prepared for the determined support by developing nations for the inclusion of wars of national liberation as conflicts covered by Protocol I.\textsuperscript{13} When Argentina, Honduras, Mexico, Panama, and Peru submitted an amended Article 1, it was approved by a vote of 70 to 21 along a North vs. South polarization. Article 1(4) explicitly conferred protections on “peoples (who are) fighting against colonial domination and alien occupation and against racist regimes (apartheid) in the exercise of their right of self-determination.”\textsuperscript{14} The American opposition consisted of submitting a position statement that argued that treating wars of national liberation as international armed conflicts introduces just war doctrine into modern international law. The American position

\textsuperscript{12} This trigger is drawn from the de Martens Clause that appeared in the preamble to the 1899 Hague Convention (II) whose purpose was to extend protections to civilians in cases not addressed by current humanitarian law. It was later associated with Protocol I’s "principles of humanity" that prohibits any unnecessary violence against soldiers and, especially, civilians. See J. Pictet, Development and Principles of International Humanitarian Law, (Martinus Nijhoff: Dordrecht / Geneva, 1985), 62. For a discussion of de Martens Clause in context of the American negotiation of the Protocols, see remarks of Waldemar Solf at the American Red Cross – Washington College of Law Workshop on Customary Law and the 1977 Protocols Additional to the 1949 Geneva Conventions summarized in The American University Journal of International Law and Policy, 2:401 (1987), 483.


statement utilized the term *bellum iustem* in the derogative sense of being an inferior concept compared to the more modern (and Western) laws of war by attributing to just war tradition a lack of impartiality of treatment toward the victims belonging to the side of lesser justice (the side in opposition to the national liberation movements).\(^\text{15}\)

Following the first session of the conference, many articles were published in various law journals that commented on the first session in general and on amended Article 1 in particular. Three members of the American delegation also published articles as private citizens.\(^\text{16}\) Baxter, in a 1975 article, explained the rationale of the U.S. delegation’s tactic in utilizing the specter of the protocol resurrecting just war doctrine. Baxter described the U.S. action in opposition to the amended Article 1 in terms of a thesis put forward by Georges Abi-Saab in an article published two years before the first session of the conference. A Professor of International Law at the Graduate Institute of International Studies in Geneva, Abi-Saab argued that non-state actors should be regarded as an international entity under the UN Charter when it or those it represents are denied self-determination. As such, liberation movements have a valid *ius ad bellum* claim for resorting to armed action and are likewise then bound by *jus in bello* restrictions on their own operations.\(^\text{17}\)

While admitting that insurgencies, such as those contemporaneously being directed against Portugal, may follow Abi-Saab’s logic, Baxter countered that the


struggles between domestic minority groups and majority groups, such as in South Africa, Rhodesia and Israel/Palestine, did not because they were not directed against foreign occupying powers. Additionally, to be considered international conflicts, he held that such national liberation groups to become parties to the Geneva Conventions of 1949. Except for the example of Algeria, none of the resistance groups in question had formally done so at that time. Consequently, granting such groups rights under the conventions would represent a declarative affirmation of the justness of their cause and the requirement of impartiality in treatment of victims associated with the modern laws of war would be compromised. It was this problematically attributed issue of the lack of impartiality in treatment in just war doctrine that would be utilized as a point of demarcation between the modern laws of war and just war by those defending and those challenging the Protocols.

Baxter used the term *bellum iustum* instead of *ius ad bellum* in his article in response to Abi-Saab and, by doing so, created a false opposition of concepts. Baxter, along with his fellow delegates who also wrote articles for law journals in 1974 and 1975, had engaged in a liberal use of *jus in bello* terminology, such as the just war principles of military necessity, distinction, and proportionality, in describing the delegation’s positions during the session. These *jus in bello* concepts are just as much a part of just war doctrine as the *ius ad bellum* concept of just cause that Baxter was addressing. When he wrote, “the idea of just war has in the past been productive of some of the worst offenses against victims of war,” Baxter was likely referring to the crusades of the

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18 Baxter, “Humanitarian Law;” 13-18
Middle Ages and the religious wars generated by the Reformation rather than the
traditional just war doctrines laid down by St. Augustine in the fifth century.  

The only modern affirmation of the *ius ad bellum* principle is the United Nations
Charter itself. Articles 2(4), prohibiting the use of force in a “manner inconsistent with
the Purposes of the United Nations,” and 51, on the “right to individual self defense,”
have been recognized by many authors as a modern codification of the “just cause”
principle of traditional just war doctrine. The codification of the right not to recognize
the humanitarian rights of specific individuals serving in so-called “unjust causes”
received no codification in the UN Charter, the Geneva Conventions of 1949, the 1977
Protocols, U.S. General Orders 100, or Augustinian Just War doctrine. It is, however, to
be found in the actual behavior of individual states. North Vietnam’s treatment of
American prisoners in the 1970s serves as an example, as does U.S. treatment of
detainees in the current so-called war on terror.

Although the United States and its Western allies would eventually agree to the
inclusion of amended Article 1, the delegation report noted a number of actions during
the final session introduced to address Western concerns. The Preamble to the Protocol,

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20 Baxter’s cited source for his use of the term, “just war,” is the late Colonel G.I.A.C. Draper, the UK
delegate to the conference. Draper lamented the interdependence of the *ius ad bellum* and the *jus in bello*
because he believed stress on the former undermined compliance and rationalized noncompliance with the
latter. See Draper, “The Development of International Humanitarian Law” in *International Dimensions of
On use of just war terminology to describe U.S. negotiating positions: Aldrich listed humanity and military
necessity, as two of three major precepts that were widely shared between the U.S. and other delegations,
the third precept being sovereignty, which is not usually associated with just war doctrine; and General
Reed listed “Principle of Distinction” and “Rule of Proportionality” as central rules addressing the content
of the negotiations. Aldrich, 13 and Reed, 23-25.

(New York: Routledge, 1997), 407-412. For discussion of UN Charter as modern codification of just war
echoing Article 153 of U.S. General Order 100, acknowledged a distinction between the application of the Protocol’s humanitarian provisions and the recognition of the legitimacy of a party’s resort to arms. Article 96 mandated that no special status in regard to *jus in bello* obligations would be given to liberation groups. In other words, they could have “no rights without corresponding obligations.”

The question of whether national resistance movements would be allowed to sign the Final Act resulted in the adoption of a compromise formula that allowed national liberation forces to sign the Final Act on a separate attached sheet to the final instrument under a clause that stipulated, “it is understood that the signature by these movements is without prejudice to the positions of participating States on the question of precedent.” Aldrich asked for the article to be adopted by consensus, but Israel asked for a vote. The Final Act was then adopted by 87 votes in favor, one nation voting against it, Israel, and 11 abstentions, the United States included.

Later, writing in support of ratification of the Protocols in 1985, Solf would use more precise language to sum up the American delegation’s initial “just war” concerns. Solf listed four concerns related to the introduction of *ius ad bellum* into modern law: (1) Article 1(4) introduced a specifically *ius ad bellum* subjective element that could conflict with the more specifically *jus in bello* neutral and objective standards associated with modern international law; (2) this change of emphasis could allow the forces on the so-called “just side” of the conflict to not respect the *jus in bello* “prohibitions and restraints of humanitarian law; (3) equal application of protections of civilians in all conflicts,


23 Bothe et. al., *New Rules for Victims of Armed Conflicts*, 8-9 and CDDH/SR 36, 33-64.
regardless of the justness of any one side, would be threatened; and (4) the “non-state parties” in whose behalf Article 1(4) was submitted are “not likely to have the resources to fulfill their *jus in bello* obligations” anyway. The American position entailed a rather absolute interpretation that refused to recognize the common sense understanding that the principle of reciprocity is always to some degree compromised by the reality that the treatment of protected persons and prisoners is dependent upon the resources available to captors or occupying powers. In any conflict, the principle of reciprocity places the side with more resources in a position of deciding whether to provide better protection to protected persons associated with the other side or accept that its own protected persons will be treated according to the lowest “shared” common denominator. Two questions must be asked, whether the side with more resources will allow itself to be answerable to other parties in regard to its treatment of protected persons and, should standards be codified on the basis of the ability of the weakest party, in material resources, to comply with them? The operating principle of just war is that with power comes responsibility and it follows that unequaled power should entail unequaled responsibility.

Solf was aware of the irony that he was a delegate of a nation founded by military leaders who also utilized badly uniformed “part-time combatants” who also would readily blend into the noncombatant population between engagements. He was also aware that with the adoption of *U.S. Army General Order No. 100* during his country’s Civil War, the attitude of the U.S. Army toward the irregular had changed. The U.S. military’s attitudes toward the tactics of Viet Cong (PRGSV) irregulars had much in

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common with the U.S. military’s attitudes toward irregular Confederate formations a century earlier.\textsuperscript{25} Solf recognized that greater protections against the actions of regular forces affecting civilians in irregular conflicts would naturally be sought by “governments and authorities that employ guerrilla warfare,” just as it was natural for the United States to emphasize the difficulties in distinguishing between enemy combatants and noncombatants in such conflicts. Finally, Solf characterized the delegation’s eventual acquiescence to Article 1(4) as merely the “Western willingness” to accept the symbolism of the justness of wars of liberations against “racist regimes” because Article 1(4) was, “for all practical purposes a dead letter.” Solf believed the article "would never be implemented” because the targets of the article, Israel and South Africa, were not likely to become parties to the Protocol anyway. Additionally, other nations were not likely to admit the “colonial domination, and alien occupation and racist regimes” could ever be applied to them and Article 1(4) would end up being nothing more than a historical footnote.\textsuperscript{26}

However, what is a “dead letter” in the operation of a treaty is not necessarily a “dead letter” in regard to engendering American domestic support for a treaty. After the passage of the final act, the leading members of the American delegation became active in support of the signing and ratification of the Protocols by the United States.

\textsuperscript{25} The American delegation’s concern over the introduction of subjective \textit{ius ad bellum} criteria was shared by other western delegates and even Jean Pictet, the leading ICRC authority on the Geneva Conventions and Protocols. See Gardam, \textit{Non-Combatant Immunity as a Norm}, 83 and remarks of the United Kingdom delegate to the conference, Colonel Draper, at CDDH/1/SR. While the opposition to the ratification of Protocol I would outlive the official pariah status American officials and policy held out to the Democratic Republic of Vietnam, the PRDSV, the Palestine Liberation Organization, and the National African Congress, the political impact of contemporary American Foreign Policy officials’ attitudes should not be underestimated.

\textsuperscript{26} Solf, “A Response to Douglas J. Feith,” 268 & 287,
Unfortunately, as far as the issue of wars of liberation was concerned, the damage was done. The poor utilization of just war terminology by Baxter and other members of the legal profession, whose direct knowledge of the sources of just war theory could be limited, is understandable. However, the utilization of imprecise terminology facilitated the creation of a derogatory just war “black legend” that would be used by conservative critics of Protocol I in their opposition to the ratification. One of the earliest critics was Captain David E. Graham, a U.S. Army lawyer, who argued that the U.S. acceptance of amended Article 1 would “hasten the world’s return to the eleventh century” and maintained that the nations representing the majority at the Geneva Diplomatic Conference had revived the concept of the just war” in order to discredit existing international law as largely a product of the Western World. Later supporters of ratification, even those with a far better understanding of Augustinian just war doctrine, would still be haunted by the specter of a return to “medieval *ius ad bellum*” when in fact, there was no major treatise on just war written between Augustine’s in the fifth century and Aquinas’ re-articulation of Augustine’s doctrine in the thirteenth century.

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27 As traditional just war doctrine predates modern international law, Graham’s argument derogatively places these so-called “newly evolved states” on an evolutionary scale on par with our, the West’s, dark ages. While one can find in Baxter writings traces of the American Cold War establishment anti-revolutionary worldview, one does not find any social devolutionary anti-third world chauvinism. Rather, Baxter’s central point is that the application of *ius ad bellum* principles to internal conflicts is considered novel by many authoritative sources. This concern over the creation of legal innovations was, in fact, shared by the supporters of amended Article 1 who wanted Protocol I to be applied to wars of liberation instead of the completely novel Protocol II. For the claim that Protocol I represented a return to the eleventh century, see David E. Graham. “The 1974 Diplomatic Conference,” 38 & 63. In another contemporaneous article, Baxter discusses the novelty of specifically *ius ad bellum* provisions to internal conflict outside the direct context of Protocol I. See Baxter in John Norton More, ed. *Law and Civil War in the Modern World* (Baltimore: Johns Hopkins University Press. 1974), 518-536.

28 Quote from Gardam, *Non-Combatant Immunity*, 97. Gardam, like the present author (see Chapter 1), recognized the principle of non-combatant immunity and can be traced to Augustine. See. Gardam, *Non-Combatant Immunity*, 5.
The *ius ad bellum* aspect of Article 1(4) was far from the only aspect of just war doctrine of relevance to Protocol I. In his statement to the final plenary session of the conference, Aldrich, while making no mention of issues surrounding Article 1(4), stated that his “delegation believes the conference can take satisfaction in having achieved the first codification of the customary rule of proportionality” and in “setting minimum, humanitarian standards that must be accorded to anyone who is not entitled to better treatment.”

The central just war doctrine of proportionality has always been associated with the related doctrine of discrimination that includes the modern principle of noncombatant immunity. Article 51, the Protection of the Civilian Population, lists noncombatant protections that include not being the intended “object of attack,” not being subjected to an indiscriminant attack resulting from the inability to direct an attack at a legitimate military target, and not being the subject of a reprisal attack. Like earlier codifications of noncombatant protections in humanitarian law and just war theory, these protections are not absolute. As legitimate targets are almost never completely free of noncombatants, the weighing of the principles of proportionality, involving collateral damage, and the principle of decisive action, involving the military worth of the target, still must be made. The question of whether the rigorous standards found in the Protocol places too much weight on noncombatant immunity at the expense of military

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decisiveness and, thereby, placed too great a burden on superior forces has been a subject of much discussion and scholarship in both favor of and in opposition to Protocol I.  

Command Responsibility and Protocol I

The controversial issue of standards of command responsibility was not actively discussed until the fourth session. The two Conferences of Government Experts meeting in 1971 and 1972 prepared three major articles to address the concept of an affirmative command responsibility: draft Article 76, Failure to Act (final Article 86), draft Article 77, Superior Orders, and draft Article 74, Repression of Breaches (final Article 85). The wording of the second paragraph of the draft article followed the text of the affirmative standard of command responsibility associated with the Hostage case and FM 27-10 (See Chapter 3).

The fact that a breach of the Conventions or of the present Protocol was committed by a subordinate does not absolve his superiors from penal responsibility if they knew or should have known (italics mine) that he was committing or would commit such a breach and if they did not take measures to prevent or repress the breach.

In the discussion on Article 86, it was noted that the article did not create a new law and that it codified customary law established by the Charter of the International Military Tribunal at Nuremberg and the Yamashita case. However, the Syrian delegate put forward an amended version that removed the “or should have known” Hostage Case wording from the second paragraph as too vague and agreement was reached by replacing “or should have known” with “knew, or had information, which has enabled


31 CDDH/1; I, Three, 24 and Levie, Protection of War Victims, v.4, 302.
them to conclude in the circumstances at the time."\textsuperscript{32} The West German delegate to the conference considered the new language as a more rigorous standard than even the Yamashita case in that it included a subjective requirement of being able to conclude the future actions of subordinates.\textsuperscript{33}

Draft Article 77, Superior Orders, was discussed next. As the United States had successfully applied this principle in the trial of one of its officers during the Vietnam War (See Chapter 5), the American delegation could negotiate from a position of credibility. However, a number of nations argued that to codify provisions against following superior orders would undermine military discipline. A compromise was put forward to restrict the application of the article only to grave breaches. The U.S. delegation considered that concept already a part of customary law and refused to support the compromise. With the U.S. delegation in opposition, the amended article failed to obtain the required two-third majority in the session’s plenary session.\textsuperscript{34}

The U.S. delegation responded to the defeat of Article 77 by putting forward a new article to clarify the duties of military commanders vis-à-vis their subordinates. Listed as Committee Article 76\textsuperscript{bis}, Duty of Commanders, the American proposal not only required commanders to prevent, suppress, and report grave breaches committed by their forces, it required, “commensurate with their level of responsibility,” commanders to ensure their subordinates are aware of the provisions protecting noncombatants, to initiate steps to prevent violations where they are likely, and to initiate penal proceeding

\textsuperscript{32} CDDH/I/74 and Levie, Protection of War Victims, v.4, 306.

\textsuperscript{33} Bothe et. al., New Rules for Victims of Armed Conflicts, 525 and CDDH/I/SR.61, 53-54.

\textsuperscript{34} Delegation Report, 3-4.
against violators. The American article was passed without opposition and was redesignated as Article 87 in the final instrument.\textsuperscript{35}

Unlike the American position on failed draft Article 77, the United States could not claim that it had itself enforced this more rigorous standard of command responsibility on its own officers. Regardless of this discrepancy, the American delegation successfully pressed for the expansion of the principle of command responsibility. Unlike the debate over Article 1(4), the United States, in this instance, was pushing for an expansionist rather than a minimalist interpretation of provisions of humanitarian law.

The U.S. Military Evaluation of Protocol I

After Ambassador Aldrich signed the final act in Geneva on June 9, 1977, the next step toward ratification was to prepare for the signing of the Protocols by the United States six months later. According to Solf, the Protocols were “closely scrutinized by the military services and by the Joint Chiefs of Staff (JCS), as well as the Ministries of Defense of our allies.”\textsuperscript{36} Aldrich argued that the Secretary of Defense and the JCS had approved the delegates’ positions papers throughout the conference and that any defects found in further review of the Protocols were “curable by means of understandings or reservations.”\textsuperscript{37}

While the level of Pentagon participation in the evaluation of the Protocols has been a matter of debate, the U.S. Department of Defense Law of War Working Group

\textsuperscript{35} Ibid.

\textsuperscript{36} Solf, “Response to Douglas Fieth,” 265.

undertook a cursory analysis of the Protocols in late October that involved the JCS, the service staffs of each of the services, and the worldwide regional commands over a two-week period. Upon review of the working group’s assessment, the JCS, in executive session on November 2, 1977, approved a decision memorandum in support of signing, under the understanding that a more thorough military analysis of the Protocols would be undertaken prior to the decision by the executive to refer the Protocols to the U.S. Senate for ratification.38

Prior to the U.S. signing of the Protocols on December 12, 1977, a North Atlantic Treaty Organization (NATO) staff level review resulted in a determination that the provisions of the Protocols would not significantly degrade NATO operations. Except for the subject of reprisals, NATO’s political and legal experts succeeded in addressing interpretive differences regarding the Protocols among member states.39 In the late

38 One official, William Hays Parks, Solf’s successor, credits the intervention of General Alexander Haig, then the Supreme Allied Commander Europe (SACEUR), with pushing through the JCS approval with the misleading claim that “signing doesn’t mean anything and has no binding effect.” Parks claimed that Haig’s action was a result of his friendship with Ambassador Aldrich. According to Parks, the “U.S. delegation unilaterally made the decision to sign and ratify” and then went on to prepare documents supporting its decision. The quote of General Haig by Parks is not cited. See Parks, “Air War,” 88-89. Parks, who participated in this working group as Head of the Law of War Branch in the International Law Division of the Navy Judge Advocate General, argued that there were military concerns related to the protocols that were raised in the meetings of the working group that were not contemporaneously addressed to the satisfaction of some members of the group. The author requested the records of the working group, DAJA-1A 1980/6084, the Ad Hoc Law of War Working Group. Mr. Parks, now serving as head of the U.S. Army Operational Law Division (as functional successor to Solf, reported that his office had destroyed the records of this group as part of an office move. Parks claims that these destroyed files were significant because they documented that there was significant military dissent regarding the signing of the Protocols by the United States. See Parks letter to author, (August 2, 2001). This author must accept Mr. Parks’ characterization. On the face of it, Parks position appears inconsistent with his statement in a 1978 article that the Protocols, however, “were the subject of detailed review (italics mine) by the Department of Defense and Joint Chiefs of Staff prior to their signature.” See “The 1977 Protocols to the Geneva Convention of 1949,” in Naval War College Review, 31-2 (Fall 1978), 25.

39 U.S. Declaration made upon signature included the understanding that provisions of the Protocol were “not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons” and that, in reference to Article 44, Combatants and Prisoners of War, paragraph 3, The Protocols and the Law of War that the phrase "military deployment preceding the launching of an attack" means any movement toward a place from which an attack is to be launched." International Committee of the Red Cross, State Parties...
1970s, even future critics of the Protocols described the Protocols rather benignly as “not being without fault,” but also as an overdue codifying of customary law on proportionality. Nothing indicated the ferocious neoconservative assault on the Protocols that would follow the election of Ronald Reagan. \(^{40}\)

**U.S. Army War College Study of Protocols**

On August 5, 1978, Lieutenant General E. C. Meyer, then Deputy Chief of Staff for Operations and Plans (later Army Chief of Staff) issued a directive to the Strategic Studies Institute of the U.S. Army War College to “examine the protocols with a suspense date of November 30, 1978. On October 18-19, subject matter experts from throughout the services attended a workshop to clarify and discuss the Protocols’ provisions in order to provide impact guidance on specific articles and their potential effects on land / air operations, joint operations, and coalition warfare, in addition to identifying areas of interest for doctrinal development. \(^{41}\)

The group was specifically charged with recommending reservations and understandings that could be submitted to the U.S. Senate by the executive branch with the overall executive recommendation on ratification. Besides the U.S. understandings expressed at the time of signature, the study recommended only one formal understanding relative to the ratification process. This understanding concerned the need

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for encryption equipment on medical evacuation aircraft (possibly prohibited by Article 28 of Protocol I). Nineteen other possible understandings for further analysis were referred to the Army Chief of Staff with the recommendation that changes in training and doctrine were necessary in order to ensure successful integration of the designated articles of the Protocols into U.S. military operations. Included in discussion of the latter were pragmatic recommendations that emphasized the increased difficulty to prevent “intermingling of military and civilian activities” and to “separate and protect civilians on the modern battlefield.” One solution found in the report was the introduction of the word “feasible” in specific articles dealing with combat operations (Articles 41, 42, and 44). The report also addressed the weighing of the growing U.S. emphasis on force protection with the more traditional norm of minimizing civilian casualties. The report endorsed rather than re-introduced reservations already put forward by the U.S. delegation at the Geneva Diplomatic Conference, such as the reservation concerning the articles dealing with reprisals (Articles 51-56) to ensure that the United States reserves the right to reprisal in the specific incidences where:

... massive and continuing attacks directed against the civilian population, to take reprisals against the civilian population or civilian objects of the State perpetrating these illegal attacks for the sole purpose and only to the extent necessary to end illegal attacks. These measures shall not include any of the actions that are otherwise prohibited by the Geneva Convention of 1949 or this Protocol.42

Despite the participation of future opponents of ratification, the report’s overall assessment of the Protocols was favorable. While acknowledging that the main effects of Protocol I related to national strategy and plans, it considered the probable impact on the

42 U.S. Army War College Study, (quote on 26), 15, 25-32.
common combat soldier as negligible. Overall, the report considered the major advances of “added protections provided the civilian population, extended entitlements of Prisoner of War status irregular combatants, increased protection for medical transportation aircraft, and a number of the prohibitions on the methods and means of combat” as positive features. However, the primary concern of the authors of the report lay elsewhere. The study was completed with the participation of American military professionals who were mostly veterans of World War II and the early Cold War. This generation of officers and officials tended to be functioning internationalists, as compared to the generation of officers who experienced their initial service in Vietnam. It is, therefore, not surprising that as the major “general concern for the military,” the report addressed the consequences of non-ratification from an internationalist perspective:

For the United States, a nation that has participated willingly, fully, and competently in Protocol development and refinement, it appears that the greatest significance of the Protocols will be at the national level, where ratification will express U.S. goodwill and intentions. In light of the U.S. leading role in their development, U.S. failure to eventually ratify the Protocols might tend to denigrate U.S. credibility and lesson our present or future influence in the world.43

Department of Defense Review of Protocol I

The next and what ended up to be the final stage in the review of Protocol I was the Department of Defense Law of War Working Group review that was initiated and directed by William Hays Parks under his dual role as the Special Assistant for Law of War matters and the Chief of the Law of War Branch (Department of Defense Law of War Program), and the International and Operational Law Division of the Office of the Judge Advocate General of the Army. Parks was critical of what he called the

43 Ibid., (quote on 10), vii, 5 - 8.
“chameleonic” approach of the U.S. proponents of the Protocol and accused the American delegates at the Geneva Diplomatic Conference of changing their interpretation of the meaning of some provisions to facilitate U.S. military approval of the Protocol.\textsuperscript{44} Parks started the process of a military reevaluation of the Protocols by issuing a memorandum on June 19, 1980, to the effect that the “work accomplished to date was not regarded as constituting a military review of the 1977 Protocols” and in 1982, convened a “Worldwide Military Operations review” in order to carry out a “responsible military review of the 1977 Protocols.” \textsuperscript{45}

This second military review of Protocol I was not competed until May 3, 1985, well into the second Reagan Administration. The final product was a 110-page document without a table of contents or summary attached. The working group classified each article of Protocol I and grouped them as containing provisions that were too categorical, too ambiguous, or already included in existing law. As each of the three groupings weighed against any need for ratification, the result was predictable, formal understandings to thirty-one articles with many articles falling under multiple understandings. In even the critical area of command responsibility and criminal liability, where it was the American delegation at the Geneva Diplomatic Conference that initiated the effort toward the codification of an expanded (italics mine) principle of applicability, the review suggested an understanding on its applicability in regard to Apartheid practices in South Africa. However, the most striking features of the report are

\textsuperscript{44} Parks, “Air War and the Law of War,” note 283 on 89-90.

\textsuperscript{45} Ibid., 90-93. See note 38.
its total lack of acknowledgement of any previous review, namely the U.S. Army War College Study, or the understandings by the U.S. delegation at the time of signing.  

Although Parks denied that his working group labored under any assumption against ratification, the comprehensiveness of the report’s rejection of the Protocol would have made any attempt to salvage the Protocol by another branch of the executive that tried to address the working group’s concerns impossible. This left challenging the Department of Defense’s effort almost in its entirety as the only remaining option. This was unlikely as the Protocol had ferocious critics at both the State Department, in the person of Abraham Sofaer, the successor to Ambassador Aldrich, and in the Defense Department, in the person of Douglas Feith, Deputy Assistant Secretary of Defense for Negotiations Policy. The entire report was simply attached as an enclosure to a two-page memorandum to the Secretary of Defense from General John S. Vessey, Chairman of the Joint Chiefs of Staff. The Chairman’s attached memorandum listed the following problems as outweighing any advantage to the United States from ratification:

1. Some nations may reject the U.S. nuclear understanding.
2. Guerrillas, in many situations, would be granted a higher legal status than regular forces.

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46 Department of Defense, Department of Defense Working Group Review and Analysis of Protocol I Adopted by the Diplomatic Conference on International Law, I-51-99, (1987), [hereinafter Law of War Working Group], 5-89. It was in regard to an American position regarding the non-applicability of the articles to the “apartheid” policies in South Africa that a reservation was recommended for Articles 85-87. See Ibid., 83-85.


48 Sofaer was at that time architect of the Reagan administration’s non-recognition of the International Court of Justice’s (ICJ) judgment that the U.S. pay Nicaragua more than a billion in reparations for the illegal mining of that country’s harbors in 1984.
3. It would eliminate most uses of reprisals, even as a deterrent against the humanitarian violations by an enemy.
4. The level of protection given to civilian persons and property would impede military operations and result in indecisive, and therefore unjust, results.
5. Attacks against infrastructure targets, such as dams, dikes, and nuclear power stations would be “unreasonably restricted.”
6. Article 1(4) and other articles would introduce “political criteria” into humanitarian law.
7. The restrictions on operations in urban areas were “ambiguous.”
8. Soviet Block countries may not reject the Article 75 fundamental guarantees given to persons “who do not benefit from more favorable treatment” under the Protocol.49

Behind many of the points of divergence between the U.S. Army War College study and the Law of War Working Group was the latter’s insertion and stress on the allegation that Article 1(4) would introduce a “just cause” principle into humanitarian law. The report’s first four pages put forth an argument that the protocol would only be binding to Western nations because third world and socialist nations would deny prisoner status depending on the lack of “justice of the cause for which they fight.”50 Between the finalization of the report on May 3, 1985, and January 29, 1987, when President Reagan finally sent a letter of transmittal on the Protocols to the U.S. Senate, Feith would cut his neoconservative teeth by writing a barrage of articles in opposition to the ratification of Protocol I that emphasized the so-called just war provision of Article 1(4).51 The White House letter, formally recommending the ratification of Protocol II and explaining why


Protocol I was not being referred to for advice and consent, mirrored the neoconservative argument against the Protocol.

…Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war. One of its provisions, for example, would automatically treat as an international conflict any so-called “war of national liberation.” Whether such wars are international or non-international should turn on objective reality, not on one’s view of the moral qualities of each conflict. To rest on such subjective distinctions based on a war’s alleged purposes would politicize humanitarian law….

Accusations of a politicized review process within the Pentagon reflecting the foreign policy priorities of the Reagan Administration, especially concerning South Africa and Israel, came from many quarters. The *American Journal of International Law*, between 1987 and 1991, became the forum for both those who criticized the decision and those who defended it. Hans Peter Gasser, a senior ICRC humanitarian law authority, criticized the lack of any legal argument in the U.S. decision against ratification and the “unprecedented” language of the White House letter that injected “political and partisan controversy” into the process. Ambassador Aldrich argued that “President Reagan’s decision resulted from misguided advice that exaggerated certain laws in the Protocol” and misconstrued a humanitarian and antiterrorist instrument as one that could give aid and comfort to terrorists. The inability of the administration to recognize the difference between basic principles and the claims of a few states and organizations in the Middle East and elsewhere that the Protocol lent support to their policies, led the United States to disingenuously adhere to a minority characterization of

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the Protocol that was rejected by the vast majority of nations that had signed it. Sofaer defended the President’s decision by framing it as a stand against Third World states that, by underwriting the causes of the Palestine Liberation Organization and southern African “liberation movements,” had chosen “not to respect our strong views and those of our European Allies.”

The American decision against ratification did not create a North / South or East / West split as envisioned by Sofaer, but a split in the Western Alliance as 162 nations became parties to Protocol 1. Although Parks and Sofaer undertook an effort to dissuade allied nations from ratification, nearly all of America’s major Atlantic / Pacific rim allies later became parties to the Protocol, while America remains a non-party in the company of Sudan, Somalia, Iran, Afghanistan, and Israel. By 1993, the pretense that the military review of Protocol I was based on the merit, or lack thereof, of its provision as international law, was dropped by the one anti-ratification official remaining in his position during the Clinton Administration. Parks, in a book review, admitted that the “principal reason for the Reagan administration’s decision against ratification of Additional Protocol I was political” and that the new status of the Palestine Liberation Organization and African National Congress in talks with Israel and the South African


54 The level of this official effort to dissuade America’s allies is a matter of dispute. For a discussion of the effort in regard to Australia, see Gardam, Non-Combatant Immunity," 160 & n. 185; Parks, “Book Review” in George Washington Journal of International Law & Economics, v. 28 (1994), 207 and “Air War and the Law of War,” 222.
government allow for a reevaluation of the “negative values” of Article 1(4) and other articles in the Protocol.\textsuperscript{55}

In 1997, with the deaths of Baxter and Solf and the retirement of Generals Prugh and Reed, Ambassador Aldrich noted that it was the “the passage of time” and the replacement of the team he led in negotiating Protocols with “skeptics and individuals with different political agendas” that was the major factor in the failure of the ratification effort. Even with the passage of time, the support for the Protocol by authoritative experts had to be addressed and played down by those opposed to ratification. Parks, for example, pointed out that no member of the American delegation to the Geneva Diplomatic Conference “had dropped a bomb in anger in the quarter century preceding the conference” to explain the delegation’s willingness to incorporate a higher threshold of proportionality and noncombatant immunity into the Protocol than what might have been the case if the delegation had been staffed with personnel with more professional experience in aerial bombardment.\textsuperscript{56}

A Neo-Clausewitzian Critique of International Humanitarian Law

It was not just a matter of replacing individuals as much as it was of replacing one generation’s professional outlook and worldview with another. Ten years had passed between the American signing of Protocol I and President Reagan’s final decision not to


\textsuperscript{56} Aldrich, “Comments on the Geneva Protocols,” in International Review of the Red Cross, n. 320 (October 31, 1997), 508 –510. Parks in “Air War and the Law of War” portrayed the negotiations conducted by Baxter, Solf, Prugh, and Reed as being compromised by their lack of experience with technology and strategy of aerial bombardment. See “Air Power,” 79 & n, 261.
submit it for ratification by the U.S. Senate. During this period, the U.S. Army
underwent a revolution that was celebrated as the great American Military Renaissance of
the 1980s when disillusioned Vietnam veterans turned wizened sages, such as Colin
Powell, Barry McCaffrey, and Norman Schwartzkopf, and then rebuilt an all-volunteer
professional army that achieved Clausewitzian glory in the Gulf War in 1991.\textsuperscript{57}

An example of process in which Clausewitzian realism finally achieved the status
of formal military doctrine is found in the career of Parks, who served as the leading
doctrinal expert on the laws of war in both the Departments of the Army and Defense for
the entirety of three presidential administrations and now into a fourth.\textsuperscript{58} The study of
Parks’ career and opinions affords the student of U.S. policy an opportunity to observe,
over an extended period, the negotiations by one high level non-politically appointed
official between official policy, collectively and authoritatively derived, and private

\textsuperscript{57} For a hagiographic narrative, see James Kitfield, Prodigal Soldiers: How a Generation of Officers Born

\textsuperscript{58} The author first made the acquaintance of Parks at the author’s court martial in 1995 for various charges
related to the attempt by the author, as the counterintelligence general staff officer for the multi-national
forces during Operation Restore Democracy in Haiti, in September 1994, to conduct an unauthorized
census of political prisoners held by the defacto government of Haiti. Colonel Parks was called as an expert
witness for the government to refute the author’s expert witness testifying in support of a justification
defense of an affirmative duty under international humanitarian law. Park’s description of his position and
doctrinal decision-making history made in the process of qualifying as an expert witness led the author to
the idea of this project to engender public discussion of the formal and informal process of doctrinal
development and those associated with it. During this testimony, Parks admitted to holding the unofficial
rank of “the old fox” in the area of the law of war. His official duties up to that time included: the review of
weapons systems for compliance with international provisions for the Judge Advocate General of the Army
and U.S. Special Operations Command; the legal review of the law of war treaties and other international
agreements that have included the review of the Hague Convention of 1954 for the protection of cultural
property in war time, the 1981 Conventional Weapons Convention, and most importantly, the “new”
review of 1977 Additional Protocol I; serving as Army representative on U.S. delegations to law of war
negotiations in Geneva, Hague, Vienna, and the United Nations; and serving as a lecturer of international
law at the Judge Advocate General School, all four of the war colleges, the Industrial College of the Armed
Forces, the Armed Forces Staff College, and as an adjunct professor at the George Washington National
Law Center. See testimony of Colonel William Hays Parks, U.S. Marines (Retired), 12 May 1995, United
States v. Rockwood, 1998, WL 47532, 2 (official trial transcript as attached to the record held by the Army
Court of Criminal Appeals).
opinion formed by cultural, institutional, and personal experience. The fact that an officer or a non-elected high civilian official is in a position to carry out policies he or she happens to be in ideological agreement with is not necessarily an indicator of a professional conflict of interest, although, in a democracy, policy should at least have the appearance of bearing executive or legislative authority. The correspondence between Parks’ private and official positions, such as his published personal opposition to the concept of international humanitarian law in general and Protocol I in particular, indicate his preeminence in his field of expertise for more than a quarter of a century.  

Parks utilized the story of an encounter between his predecessor and a senior ICRC official as a point of departure for a detailed neo-Clausewitzian critique of Protocol I, in particular, and international humanitarian law as a concept envisaged by the ICRC, in general. During the 1971 Conference of Government Experts, Solf discussed the tension between the American desire to increase noncombatant protection and the American concern with the difficulty in identifying legitimate noncombatant activities in modern warfare. The late Jean S. Pictet, the senior ICRC authority on international humanitarian law, was reported by Solf to have replied, “If we cannot outlaw war, we can make it too complex for the commander to fight”! One does not have to be a Clausewitzian realist or any other type of realist to appreciate the condescending anti-military essentialism contained in such a remark. Solf, a World War II combat veteran,

59 For Parks unofficial elucidation of his Clausewitzian concerns in regard to the Protocol, international humanitarian law and the ICRC, see “Air War and the Law of War.”
never published an account of this encounter, but passed the story on to his young successor. 60

Parks accused the ICRC, in substituting the term “law of war” with “international humanitarian law” in its twentieth century treaty codifications, of having “borrowed a page from the Marxist-Leninist lexicon” in order to blacklist anyone that resisted the adoption of ICRC rules as being anti-humanitarian. Parks, as a combat veteran who had engaged in the self-avowedly un-humanitarian act of killing “at ranges as close as three meters,” considered the use of the term “humanitarian” for the legal conduct of military operations as “singularly inappropriate.” Like many of his generation, Parks was a self-proclaimed disciple of Clausewitz who considered the great Prussian’s words as “timeless and (of) greater value today than they were when they were written 150 to 200 years ago.” For Parks, the main problem with Protocol I was its relation to the Clausewitzian tenet of friction in war. The ICRC by its “unrealistic interpretations of the Just War principle of proportionality” and its obsession with limiting aerial bombardment created friction by limiting the natural tendency of war to expand to its natural maximum intensity. 61

The ICRC, in general, has been criticized for its overemphasis on the principles of proportionality and discrimination (noncombatant immunity) at the expense of the principle of probability of success (decisiveness). Even from the perspective of just war doctrine, given historical examples of the suffering of noncombatants caused by the many indecisive wars experienced in the third world both during and after the Cold War, it can

60 Comment attributed to Mr. Pictet by Solf and quoted by Parks in “Air War and the Law of War,” 75.

61 Ibid., 64, 72 at n .245, 81, & 182.
be argued that undermining military decisiveness places noncombatants at greater, not lesser, risk. On the other hand, it is very hard to view the neo-Clausewitzian celebration of wars unlimited by friction as a balanced alternative in a nuclear era. Parks’ solution was to divorce the law of war conceptually from the ICRC and its antimilitary ideology of international humanitarian law. The result was a new legal discipline Parks christened “Operational Law.” Parks devised the term in 1980 for two reasons: (1) after the American defeat in Vietnam, the military instruction of international law had been noted as ineffectual in the Peers Report; and (2) many combat arms officers were under the impression that international law, as they understood it, had kept them from winning the war in Vietnam. By including all legal aspects connected to military operations, the term avoided value laden terms that would turn off military professionals.62 The negatives of creating a new terminology are obvious: an increase in the insulation of military professional vis-à-vis other professionals in general and from the humanitarian law and human rights community in particular.

Clausewitzian Realism as Formal American Military Doctrine

In the 1980s and 1990s, it was not unusual to see students at the U.S. Army Command and General Staff College (CGSC) carrying beautifully bound copies of Clausewitz under their arms as they went from class to class like monks carrying their breviaries. Parks’ choice of the term “operational law” for his neo-Clausewitzian enterprise to sever the laws of warfare from international humanitarian law was calculated to complement such Clausewitzian mantras as “operational art.” Officially defined, “Operational art is the use of military forces to achieve strategic goals through

the design, organization, integration, and conduct of strategies, campaigns, major operations, and battles.” Or in simple non-Clausewitzian speech, it is the skill and competence of military command.

Over the course of the 1980s, three milestones documented the establishment of Clausewitzian realism, for the first time, as a formal norm for the American military profession: (1) the introduction of a new capstone doctrine, (2) the organizational restructuring of the U.S. military, and (3) a new model of civil-military relations relating to the decision to deploy military forces.

First, the new capstone doctrine was introduced in the 1982 and 1986 editions of FM 100-5. Known as the doctrine of AirLand Battle, it represented a doctrinal change in emphasis away from the tactics and strategies associated with active defense and close battle, which focused on firepower, to those associated with a deep multi-echelon offense, which put a greater emphasis on maneuver and interservice or joint operations.

In the 1980s, the NATO strategy for the defense of central Europe (West Germany) consisted simply of a limited conventional blocking capability against a Warsaw Pact thrust across Germany with a guarantee of a nuclear strike when the Soviets approached the Rhine River. The main purpose of the force on force bloodletting that was expected to take place in the Fulda Gap and the northern German plain was to steel the allied political resolve to execute the nuclear trigger that was the true basis of the

63 JCS Publication No. 1, s.v. operational art.


NATO deterrent. This became a problem for the Americans driving their new M-1 tanks and M-2/M-3 armored vehicles around the old Wehrmacht training ranges who were now wedded to a doctrine that was more operationally “artsy” than dying in place. The U.S. Army had worked out the kinks of its new doctrine for the defense of Europe in the new National Training Center (NTC) deep in the uninhabited Mojave Desert at Fort Irwin, California, a place where the friction of war, especially concerning the presence of a civilian population, could be kept at a minimum.

The second milestone in the formalization of Clausewitzian realism in the 1980s was the realization of a “Prusso-German” inspired reorganization of the American military by the Goldwater-Nichols Department of Defense Reorganization Act of 1986. It replaced the convoluted system of administrative authority by the service chiefs with a centralized management process through the Chairman of the Joint Chiefs of Staff. Although the Chairman and service chiefs remained outside the formal chain of command, the Chairman was designated as the principal military advisor to the president, National Security Council, and Secretary of Defense. The formal operational chain of command was restructured to have the four unified commanders reporting directly to the Secretary of Defense and then to the President via the National Military Joint Operations Center (NMJOC) in the Pentagon. It was not the Prussian General Staff Corps, but it was a major, and needed, step in that direction without formally challenging the constitutional provision for actual civil control of the military.

Finally, the most neo-Clausewitzian of all the initiatives of the 1980s was the Weinberger Doctrine in opposition to humanitarian interventions. In a speech at the National Press Club on November 28, 1984, Secretary of Defense Caspar Weinberger
argued that civilian leaders should meet six major tests before committing U.S. forces to any overseas combat mission.

1. Is the mission vital to U.S. interests?
2. Have sufficient resources been allocated to guarantee victory?
3. Are the objectives clearly defined?
4. Will commitment be politically sustained?
5. Will there be a sufficient guarantee of the American public’s commitment to the operation?
6. Have other options been exhausted?

The Weinberger or Powell Doctrine (after Colin Powell, the sitting Chairman of the Joint Chiefs of Staff, who was also a protégé of Summers), comprised a list of demands of civilian leadership unprecedented in history. This doctrine had its intellectual origins in neo-Clausewitzian theorists such as Summers.66

In spite of the doctrine, the U.S. military became engaged in operations that clearly did not meet Weinberger / Powell tests: first in Operation Restore Hope in Somalia, then in Operation Restore Democracy in Haiti, and then in various operations in the Balkans.67 All these operations were conducted under Chapter VII, Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, of the UN Charter, as was utilized by UN Security Council at the start of the Korean War, rather than Chapter VI, the Pacific Settlement of Disputes, which was usually, associated with “blue helmet” UN observer missions. However, both “humanitarian purists” at the UN


67 The author served as a strategic intelligence offer in support of Operation Restore Hope and a counterintelligence staff officer in support of Operation Restore Democracy.
and Clausewitzian realists like Summers interjected the inappropriate model of traditional peacekeeping operations to undermine the doctrinal rationale for these operations.\textsuperscript{68}

On October 7, 1994, Summers testified before the Committee on Armed Services, United States House of Representatives, against the ongoing deployment of a United States military task force to Haiti as violating the principles of Presidential Decision Directive 25, the Clinton Administration's policy on multilateral peace operations. PDD 25, Summers argued, was a restatement of the preconditions laid out by the Weinberger Doctrine concerning the limitations that the civilian leadership of the Armed Forces should observe, “before America commits forces to combat overseas.”\textsuperscript{69}

In March 1996, U.S. forces under the command of Admiral Leighton Smith, Commander of NATO’s Southern Command and the Implementation Force (IFOR) in Bosnia, stood passively by as Bosnian Serb forces took advantage of the evacuation of 70,000 residents of the Serbian section of Sarajevo, of which thirty thousand were forced from their homes by violence or threats of violence by fellow Bosnian Serbs, to burn that section of the city to the ground. As the Bosnian government sent its “antiquated fire-fighting equipment into the city,” state of the art fire fighting equipment stayed in the U.S. controlled military compounds. All requests for IFOR assistance were ignored.\textsuperscript{70}

Richard Holbrooke, President Clinton’s chief negotiator responsible for the Dayton


\textsuperscript{69} Statement by Colonel Harry S. Summers Jr., U.S. Army (retired) before the Committee on Armed Services, United States House of Representatives, 170\textsuperscript{th} Congress, Federal Document Clearing House Congressional Testimony, October 7, 1994, Friday.

Agreement that led to the transfer of the sector to Bosnian Government control, called the

American military commander’s inaction contrary to the President’s intent:

However, in the wake of Vietnam and Somalia, the military had a
tremendous aversion to using its force beyond a very limited mission. And they call this mission creep. And it really inhibited us and the great crisis; the greatest tragedy came in the 90 days after Dayton when the military simply refused to do anything except the narrowest articulation of its own mandate…. NATO forces stood by. The NATO commander and American admiral refused to take the fire trucks out of the barracks. He refused to do anything to stop the burning until the very last minute, when he did too little too late…. And people who were there are ashamed at what they saw that day. And I think there's no excuse for it. I'm sure what I'm saying now is going to provoke some reaction on the part of the commanding officers in Sarajevo, British and American and French, but I have to tell it the way I saw it, and this was not what the President of the United States or his senior civilian advisers had in mind. And they had the authority. These military men had the authority to arrest the arsonists and put out the fires. They simply chose not to do so.  

The passive performance of IFOR in Bosnia does not stand alone. The initial phase of Operation *Restore Democracy*, eighteen months before in Haiti, was criticized in the major official professional journal of the U.S. Army, *Military Review* (July-August 1997), and by the U.S. Army War College Strategic Studies Institute.\(^71\) *Operation Restore Democracy* began in September 1995 with the wrenching internationally televised images of soldiers, with tears streaming down their faces, being forced by their superiors, incorrectly it turned out, to stand by as noncombatants were beaten and even bludgeoned to death. The dead Haitian lying before these tearful soldiers only gave a hint of the 800,000 noncombatant Rwandans massacred over the previous three months


and placed in mass graves as U.S. military aerial intelligence platforms flew overhead providing detailed reports of the daily progress of the genocide to both the Pentagon and the UN. The hysterical reaction of the American public to televised scenes of a couple of American bodies being dragged through the streets of Mogadishu in Somalia in the fall of 1993 is not a sufficient explanation for the dishonorable American official inaction in Rwanda, Haiti, or Bosnia.

After the end of the Cold War, one of the problematic legacies of AirLand Battle doctrine was in its character as the extreme manifestation of the U.S. Army’s 200-year-old refusal to provide a sufficient doctrinal base for constabulary operations. Morris Janowitz, in the conclusion of his essential *The Professional Soldier* (1960), insisted, “the worth of the military profession has been deeply rooted in the importance of its non-military functions.” The obvious importance of operations that fall somewhere between full combat operations and police duties, which Janowitz classifies as “constabulary,” is not belied by the fact that they have been more frequent in the history of the Armed Forces of the United States than full combat operations.

In the 1982 edition of FM 100-5, the amount of space provided such operations was a mere four pages. They were similarly ignored in the 1986 edition and were not incorporated into FM 100-5 until the 1993 edition that replaced Clausewitzian AirLand Battle doctrine with a doctrine that addressed “what the Constitution and U.S. Code Title 10, Section 3062 demanded of the Army: to fight and win wars and perform every other mission that the civilian leadership assigned.” This effort came too late and was too

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74 Kretchik, “Peering Through the Mist,” 201-208.
disorganized to affect the unsuccessful American interventions in Haiti and Rwanda in 1994. In Haiti for example, planners were confused as to which doctrines to apply to the operation order: the Military Operations Other Then War (MOOTW) concept in the 1993 edition of FM 100-5; the concept of Military Operations in Low Intensity Conflict (MOOTW) found in the 1990 publication of FM 100-20; or the new ultra anti-Clausewitzian concept Peace Operations found in the new FM 100-23 (1994).75

The operational experience of the 1990s consisted of failed, or at best, marginally successful operations carried out for humanitarian purposes. America’s lukewarm military efforts in Operation Restore Hope (Somalia, December 1992), Operation Restore Democracy (Haiti, Fall 1994), as well as America’s abject failure to make a responsible effort to prevent the recurrence of the practice of genocide in the former Yugoslavia and Rwanda, demonstrated a lack of political will on the part of the Clinton White House and tolerance of failure for these specific operations by military leaders. It was not until the American led NATO war in Kosovo in 1999 that American and NATO prestige was imperiled enough to ensure that the mounting political price of another indecisive military engagement was too high to bear, even if the mission was merely humanitarian.

Conclusion

While formal capstone doctrine underwent substantial changes over the last quarter of the twentieth century as neo-Clausewitzian realism was formalized in U.S. military doctrine for the first time, formal keystone doctrine has remained relatively

constant in comparison. The 1956 edition of FM 27-10, *The Law of Land Warfare*, remains the operating manual doctrine on the law of armed conflict. For the past twenty-four years, Parks has been tasked to draft an updated manual. This manual will be published under the new Joint Doctrine Publication System, which will apply to all services and will eventually supplant all Field Manuals. Parks has been working with his counterparts in “English-speaking nations and some of our NATO allies” to reach a consensus on doctrine in spite of America’s unique position in not ratifying Protocol I. As of this writing, this undertaking has yet to be accomplished, for good or ill.  

However, Department of Defense Directive 5100.77, *The Department of Defense Law of War Program*, has undergone subtle changes in this period that are probably indicative of the changes to be expected in the new joint manual. The 1974, post My Lai, edition of the directive expanded humanitarian principles from narrow legal norms focused on declared norms toward a professional military ethic encompassing all military operations affecting noncombatants. “The Armed Forces of the United States will comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized.” The 1998 edition of the manual interjected a notable qualification in that the law of war will be complied with during “all armed conflicts, however such conflicts are characterized, and with the *principles and spirit* (italics mine) of the law of war during all other operations.” This more minimalist

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wording reflects Parks’ expert testimony in the trials of Noriega and this author that
Geneva Conventions did not “technically” apply to Operation Just Cause in Panama in
1989 and Operation Restore Democracy in Haiti in 1994.\textsuperscript{79}

In the direct aftermath of the U.S. failure to apply the Nuremberg era standards of
command responsibility in the trials following the massacre disaster at My Lai, the
United States took the lead in successfully negotiating the inclusion of an affirmative
definition of command responsibility in Article 86 of Protocol I. The more rigorous
standard of command responsibility was not specifically a major issue in the Department
of Defense’s and Reagan administration’s overturning of the Army War College
recommendation for ratification. However, the tendency in America’s recent
contribution to the development of international humanitarian law position, limiting the
applicability of international humanitarian law in general, narrowed the actions for which
a commander, or at least an American commander, could be held liable. The general
consolidation of a more conservative \textit{weltanschauung} within the American military
profession in the 1980s affected U.S. military capstone doctrine in general and
professional attitudes toward the concept of international humanitarian law in particular.
The promulgation of the AirLand Battle doctrine, the Goldwater-Nichols Act, and the
Weinberger Doctrine documented the formal codification of conservative realism in
American military doctrine. Despite these developments, the 1957 FM 27-10 and the

1992). In the former, the military judge gave instructions to the jury in reference to Parks’ claim. In the
latter, the court ruled against Park’s claim in concluding General Manual Noriega had a legitimate claim as
a POW in that certain provisions of the Geneva Conventions were enforceable in Panama.
affirmative Nuremberg era standard of command responsibility contained within it remains the official keystone doctrine concerning the law of armed conflict.
“We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well.”

Supreme Court Justice Robert H. Jackson 1

In the fifth century, Augustine individually addressed military professionals on the proper or “just” conduct of their profession without deference to the concepts of either political realism or legal positivism. Many modern authorities echo Augustine’s antagonism to mere legalism or the mere “sovereignty” of the state as foundations for the proper conduct of armed conflict. World Court Justice Richard Baxter, the author of FM 27-10, *The Law of Land Warfare*, lamented the “triumph of legalism over humanitarianism” in the contemporary discussions of international humanitarian law and Antonio Cassese, the president of International Criminal Tribunal for the Former Yugoslavia (ICTY), used the term *leidige Troster*, or “irritating comforters” to describe the influence of practitioners of political realism on the development of international humanitarian law. 2

Rather than coming out of the tradition of legal positivism or political realism, many of the principles of the Nuremberg era trials have their origin in the first modern codification of the laws of war during the U.S. Civil War in *U.S. General Order No. 100*

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that incorporated all the major principles of Augustinian just war doctrine. Despite the
continuities and discontinuities, the development of American military doctrine has been
represented by the history of contested **weltanschauung** (worldviews) between those who
championed functionally aristocratic models of military professionalism and those that
championed democratic models. The basic assumptions of Augustinian just war doctrine
and *U.S. General Order No. 100* continue to retain their influence in the Nuremberg era
standard of command responsibility found in FM 27-10.

By his allusion to “drinking from a poisoned chalice” utilized in his opening
statement as the American Chief Counsel for the prosecution at the International Military
Tribunal (IMT) at Nuremberg, United States Supreme Court Justice Robert H. Jackson
addressed the issue of whether the ethical legacy of that tribunal would more than a
historical example of “victor’s justice.” The official position of the United States vis-à-
vis Justice Jackson’s apocalyptic challenge has been in general one of steady erosion
from a precise affirmative standard for holding individual commanders directly
responsible for preventable grave breaches of international humanitarian law to one of
general equivocation on the applicability of international humanitarian law, especially in
cases were such international standards apply or may be applied to an American citizen.

Keeping in mind that, in a civil democracy, military leaders do not directly make
decisions on national policy to include war crimes policy, the degree of political
deference to the influence of the military profession on issues of war and security by
civilian political leaders continually fluctuates over time. Accordingly, such political
deference cannot provide a consistent base to undertake an internal assessment of the
American military profession’s historical constancy to the Nuremberg era standards of
command responsibility. However, the manner by which the military profession plans to implement national policy in the context of its own evolving institutional norms does provide a rather constant reference point to over time to apply an analysis as to whether American military profession had kept faith with its own historical doctrinal values.

While current national policy can not be placed entirely on its shoulders, taking note of the military profession’s systematic failure to hold its own soldiers to the standards of command responsibility its membership has historically imposed on military personnel of its defeated adversaries is both just and fair. The United States failed to hold its own military commanders responsible for dereliction in preventing and repressing grave breaches of international humanitarian law during the course of the American participation in the Vietnam War. The standards applied to American defendants involved in the perpetration and cover-up of the My Lai massacre fell short of the standards that Jackson and his contemporaries held up to German and Japanese officers immediately after the cessation of hostilities in World War II. Particularly, in the landmark case of Captain Medina, the military judge instructed the jury to utilize a must have known, that they must establish that Captain Medina possessed actual knowledge that his subordinates were committing human rights violations, in order for him to be held criminally liable as a commander. That standard contrasts both with the should have known standards established in post-WW II war crimes tribunals and contemporary standards on command responsibility found in the 1977 Additional Protocol I to the Geneva Conventions, the Statute of the International Tribunal for Rwanda (ICTR), the Statute of the International Tribunal for the Former Yugoslavia (ICTY), and the Rome Statute for the International Criminal Court.
In the direct aftermath of the U.S. failure to apply the Nuremberg era standards of command responsibility in the trials following the massacre disaster at My Lai, the United States took the lead in successfully negotiating the inclusion of an affirmative definition of command responsibility in Article 86 of Protocol I. While the standard of command responsibility was not central in the Department of Defense’s and Reagan administration’s overturning of the Army War College recommendation for ratification, the American reversal documented a conservative trend in limiting the applicability of international humanitarian law in general for which a commander could be held liable.

While the United States supported the incorporation of standards of an affirmative command responsibility concurring with the Nuremberg era standards into Protocol I, in Article 6 of the Statute of the ICTR and in Article 7 of the Statute of the ICTY, it continues to oppose the ratification of treaties or the establishment of permanent and independent tribunals that could lead to the imposition of such a standard on American citizens. Unlike U.S. decisions in reference to Protocol I, the official U.S. position on the subsequent ad hoc tribunals and the Rome Treaty establishing the international Criminal Court (ICC) was not primarily based on military doctrinal analysis and is, therefore, beyond the formal reach of this dissertation.

Despite both internal and external currents, the 1957 FM 27-10 and the affirmative Nuremberg era standard of command responsibility contained within them remains the official keystone doctrine concerning the law of armed conflict. Minimalist standards of command responsibility have yet to be formally incorporated in American keystone military doctrine. This rigorous definition of command responsibility remains
doctrinally authoritative even as other doctrinal guidance documents reveal a subtle trend toward the acceptance of a more relaxed standard.

Jackson’s famous jeremiad was not merely directed at the future governmental policies of the United States or the other wartime allies in general, it also pointed a righteous finger at the very institution he noted was the most responsible for planning, operating, and carrying out the judgments of the World War II era American War Crimes Program, the American military profession. Even when such a doctrinal foundation, as in the case of command responsibility standard found in FM 27-10, is widely promulgated and has received clear political backing, doctrine is seldom all encompassing or complete. Nevertheless, doctrine, like law, possesses an institutional memory, a memory that may hopefully survive the ideological agendas of both political necessity and positive law. The simple and common sense military principle mandating that *military commanders have an affirmative duty to protect the civilians and prisoners in the territory their forces occupy or control and that this mandate extends to all military operations* remains tenuously in effect as official U.S. policy. Disappointingly, it is only as military doctrine, rather than legislated positive law or declared national policy, that its official status continues to be validated.
APPENDIX
CONTEMPORARY STANDARDS OF COMMAND RESPONSIBILITY

Sinful man hates the equality of all men under God and, as though he were a God, loves to impose his sovereignty on his fellow men. He hates the peace of God which is just and prefers his own peace which is unjust.

Augustine\(^1\)

St Augustine’s conundrum consisted of positing the justice of imperfect men to take up arms in defense of others in spite of the biblical injunction of “Judge not that ye be not judged …”\(^2\) This Augustinian angst finds contemporary resonance in official apologies for the failure by the international community in addressing recent genocides and other crimes of impunity. On June 30, 1995, the president of the International Committee of the Red Cross (ICRC), Cornelio Sommaruga, issued the first apology for that “institution's moral failure with regard to the Holocaust, since it did not succeed in moving beyond the limited legal framework established by the States.”\(^3\) Two weeks later, Serb army and militia units captured the Bosnian town of Srebrenica and proceeded to conduct a mass execution of more than 8,000 Moslem men and boys. Only a year before, the Rwandan genocide, involving more than 800,000 noncombatants, was undertaken in full view of the United Nations and U.S. intelligence assets. In 1999, UN Secretary-General Kofi Annan signed two fact-finding reports accepting responsibility.

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1 Augustine, *City of God*, 454.

2 Matthew 7:1 KJV (King James’ Version). For an outline discussion of St. Augustine’s writings on just war doctrine, see Chapter 1.

for the UN's and the international community’s failures in Rwanda and Bosnia. In the case of Rwanda, the Secretary-General admitted that, in 1994, the UN and the entire global community “failed to honor” the obligation it undertook after World War Two to “prevent and punish” the crime of genocide and, in the case of Bosnia, the UN should have taken "more decisive and forceful action to prevent the unfolding horror." Even the United States issued a fleeting apology for its failure to respond to “actionable intelligence” clearly indicating a developing genocide in Rwanda. On a trip to Rwanda in 1998, President Bill Clinton accepted responsibility for the United States not doing what “we could have and should have done to try to limit what occurred in Rwanda in 1994.”

The impotence of the international community in the face of genocide made it strikingly evident that the establishment of truth commissions or other procedures short of actual criminal prosecutions of violations of international humanitarian law would not sufficiently repair the loss of standing in world opinion of the United Nations, the United States, and the other major military and economic powers. Three tribunals were created to address the issue of enforcement. Two of the tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), also known as the ad hoc tribunals, addressed past and current crimes for a specific geographic region over a specific time span. The third tribunal, the

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International Criminal Court (ICC), was established by the Rome Treaty of 1998 to address future crimes on the basis of an international reciprocity of application. The preamble of the Rome Treaty recalled that it is “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” The court would only take jurisdiction if, in future conflicts, a state proved it did not have the integrity or competence to do so. One such historical example was the unsuccessful record of the United States in prosecuting cases of war crimes committed by its personnel in Vietnam.

The *ad hoc* Criminal Tribunals

The text of the articles on individual responsibility, ruling out the defense of superior orders and the standard command reasonability to be applied, is identical for both tribunals. Specifically, language closely approximating the Nuremberg era “known or should have known” language was incorporated in Article 7(3) of the Statute of the ICTY and Article 6(3) of the Statute of the ICTR. Also, the provisions on superior orders, which failed to make it in Protocol I, were incorporated into Article 7(4) of the Statute of the ICTY and Article 6(4) of the Statute of the ICTR:

3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she 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.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.  

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Thus far, the tribunals have been successful in a number of prosecutions under these provisions. In the Celebici decision, the ICTY successfully prosecuted the Bosnian Serb administrator of the Celebici prison camp, Zdravko Mucic, for the systematic rape of women and other crimes by his subordinates under the theory that "the crimes were so frequent and notorious" that Mucic’s claims of ignorance could be dismissed. In the Blazkic decision, the ICTY found Croatian Colonel Tihomir Blazkic guilty for having known or having had reason to know that subordinates were preparing to commit crimes against noncombatants, that he had not taken the necessary and reasonable measures to prevent these crimes, and, after such acts occurred, that he had failed to report and punish the subordinates concerned. Additionally, command responsibility, for the first time, applied to heads of states/governments. While the trial of the former Yugoslav President Slobodan Milosevic at the ICTY is still under way, the ICTR successfully prosecuted the former prime minister of Rwanda, Jean Kambanda, for genocide and crimes against humanity and he is now serving a life sentence for crimes committed by his subordinates.

The presence of an American judge and an American prosecutor serving with the ICTY is problematic, especially in reference to enforcing a standard of command


responsibility that the United States has never successfully enforced against American citizens. The participation of Americans lends credence to the positions of some of the ad hoc tribunals’ critics. One such critic, former U.S. Attorney General Ramsey Clark, has argued that the ICTY and ICTR “are inherently discriminatory, evading the principles of equality in the administration of justice,” unlike the ICC that was “created by treaty” and whose jurisdiction is universal.\footnote{Letter from Ramsey Clark to UN Secretary General Kofi Annan in reference to “The Trial of Slobodan Milosevic, Former President of the Federal Republic of Yugoslavia Before the International Criminal Tribunal for the Former Yugoslavia,” (February 12, 2004), posted online by The International Committee to Defend Slobodan Milosevic (ICDSM) at http://www.icdsm.org/more/rclarkUN1.htm, accessed on November 4, 2004.} Fortunately, the ICC has instituted protections against defendants being prosecuted or judged by citizens of a nation that does not hold itself bound by the very provisions that form the basis of a prosecution.

The International Criminal Court (ICC)

The genocidal conflicts in Rwanda and the Balkans renewed interest in a 1953 UN draft statute for a standing permanent international tribunal. The onslaught of the Cold War destroyed the possibility of obtaining the consensus needed to negotiate a final statute and proceed with the establishment of a permanent war crimes tribunal. However, fifty years later, the Cold War was over and foreign nationals were again sitting in docks awaiting judgment according to the rules first crafted by American officials in the War Department during World War II. The United States put forward no objection as the Nuremberg era standards on individual and command liability for war crimes found their way into the charters of both ad hoc criminal tribunals.

There was a great deal of consistency between the provisions in the Rome Statute for an International Criminal Court and the provisions of the ICTY and ICTR. In Article 33 of the Rome Statute, Superior Orders and Prescription of Law, the prohibition of a
defense based on superior orders was maintained. Article 28, Responsibility of Commanders and Other Superiors, applied two distinct standards of responsibility: one specifically for military commanders and another for civilians holding authority over military or police formations. For the former, military officers officially assigned to a command position were liable if they “either knew or, owing to the circumstances at the time, should have known that the forces under their command were committing or about to commit” war crimes. For the latter, an even more rigorous standard applied in cases where a civilian “superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.”

One major distinction between the ad hoc tribunals and the ICC was that the Rome Treaty placed, for the first time, American citizens in jeopardy of being held to the same standards of command responsibility that American judges have applied and are at present applying to foreigners. If the United States had ratified the Rome Treaty establishing the ICC, the lack of American constancy in the application of standards of command responsibility between trials of American citizens and foreign nationals would have been resolved. As in the case of Protocol I, conservatives would oppose ratification of the Rome Treaty. However, this time, the opposition would be more overtly political and venomous.

Just as in the case of the Geneva Diplomatic Conference and the Geneva Protocols of 1977, the UN General Assembly adopted a resolution on December 19,

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12 Article 33 made an exception to the prohibition of the defense of superior orders in cases that concurrently met all three of the following tests: (1) the accused was “under a legal obligation to obey orders,” (2) the accused “did not know that the order was unlawful,” and “the order was not manifestly unlawful.” *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9* (July 17, 1998), at http://www.un.org/law/icc/statute/romefra.htm, accessed November 4, 2004.

David J. Scheffer, the ambassador-at-large for War Crimes Issues during the second Clinton administration, led the American delegation. The American attempt to reserve for itself, either directly or through the Security Council, a right to veto the jurisdiction of the court over American citizens failed. However, as in the case of Ambassador Aldrich’s delegation at the Geneva Diplomatic Conference, Scheffer was able to negotiate subsequent provisions that would at least partially address the legitimate American concerns that its military personnel would be disproportionally targeted for prosecution due to the American material capability and willingness to support international humanitarian operations. Article 8 of the statute specified that the court would only deal with serious and systematic violations of the law of war rather than isolated incidents; Article 15 dealt with the concern that the statute could create “an international Ken Starr,” prosecuting American citizen out of political ideological zeal and was addressed by the requirement of a standing three-judge pre-trial panel that would have to approve the initiation of an investigation by the ICC prosecutor; and Article 16 allowed the Security Council to vote for a renewable twelve-month postponement, actually granting a “de facto” veto to permanent members of the Security Council.\(^\text{13}\)

\(^{13}\) Hearing Before the Subcommittee on International Operations of the Committee on Foreign Relations of the United States Senate, 105th Cong. 2nd. Sess. S. Hrg. 105-724, (1998) (statement of David Scheffer,
Despite the inclusion of these provisions, the United States voted against the final adoption of the Rome Statute of the International Criminal Court on July 17, 1998. Unlike the military review of Protocol I, the opposition to the ICC was carried out on the floor of the U.S. Congress. In a hearing of the Senate Foreign Relations Committee on June 23, 1998, Senator Jesse Helms, the committee’s ultra-conservative chairman, laid out a five-point plan of opposition to the ICC:

1. Withdrawal of U.S. troops from any country that ratifies the ICC.
2. Mandating that the executive branch veto any Security Council referral of any case to the ICC.
3. Blocking of funding to the ICC by any international organization of which the U.S. is a member.
4. Renegotiation of status of forces agreements and extradition treaties to proscribe host nations from complying with extradition requests by the ICC involving American war criminals.
5. Prohibiting any U.S. military personnel from being engaged in any humanitarian or regional action that may fall under the jurisdiction of the ICC.\(^\text{14}\)

Despite subsequent U.S. efforts, the Rome Treaty went into force on April 30, 2001, after the sixtieth country ratified it. Again, the United States stood apart from its traditional allies who ratified the treaty and stood in the company of Sudan, Yemen, North Korea, Iran, and Israel, which did not. In one of the last political efforts of his career, Helms, with the assistance of Tom Delay in the House of Representatives, pushed his program through Congress. This legislation, misleadingly entitled the American

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Service-members' Protection Act of 2002 (ASPA), was not simply a rejection of the Rome Treaty; it was a plan for the immobilization of the operations of the ICC. Just as arch neoconservative Douglas Feith worked with Abraham Sofaer in opposition to the 1977 Geneva Protocols during the Reagan Administration, Feith, appointed as undersecretary of defense for policy by President George W. Bush in July 2001, worked with John R. Bolton, undersecretary of state for arms control and international security, to undermine the operation of the ICC. Unlike the case of the Protocol I, where the position of the United States was to respect its allies’ adoption of the protocols where it was even willing to accept some articles as international customary law, the ASPA in effect drafts the entire U.S. government as an agent to penalize nations that did not sign Bilateral Immunity Agreements (BIAs) that acknowledges the immunity of American personnel charged with war crimes from extradition to and prosecution by the ICC.  

Command Responsibility and the Abu Ghraib Investigations

On February 7, 2002, President Bush had signed a memorandum that documented his determination that detainees associated with al Qaeda were not to be protected under the Geneva Conventions. The so called GTMO standards subsequently developed by civilian lawyers in the White House and Justice Department caused “extensive debate” among military subject experts in the Pentagon and component services where there was a decided preference for a more conservative interrogation methods outlined in pre 9-11 Army doctrine, FM 34-52: Intelligence Interrogation. Unfortunatley, detainee operations

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at Guantanamo became an operational model for the treatment and interrogation of
prisoners worldwide, regardless of the status of the prisoners and executed with far less
oversight than was available at Guantanamo.\textsuperscript{17} While the presidential memorandum and
other orders regarding the treatment of detainees did not authorize the acts depicted in the
photos of abuse at Abu Ghraib, it may have sent an informal message that indicated that
the national command authority was more concerned with minimizing the application of
the laws of warfare than of extending their application.\textsuperscript{18}

In February 2004, the ICRC presented a report to American officials that
documented systematic abuse of prisoners of war and other detainees by American
military personnel in Iraq. The most serious of the ICRC findings was the charge of
“brutality against protected persons upon capture and initial custody, some causing death
or serious injury,” and the “excessive and disproportionate use of force against persons
deprived of their liberty [that] result in death or injury” during latter periods of
confinement.\textsuperscript{19}

After an enlisted soldier, Army Specialist Joseph M. Darby, discovered and
turned over evidence (photographs) of the sexual degradation and other systematic abuse
of detainees, which initiated an inspector general’s investigation, and after this evidence
found its way to a \textit{60 Minutes} broadcast on April 28, 2004, the American ground forces

\begin{itemize}
\item \textsuperscript{17} “Unclassified Executive Summary,” report of Vice Admiral Albert T. Church entitled \textit{Review of
Department of Defense Detention Operations and Detainee Interrogation Techniques} [hereinafter cited as
the Church Report], (April, 2005), 11-21. See also FM 34-52, \textit{Intelligence Interrogation}, (Washington,
\item \textsuperscript{18} Independent Panel Review, 2-17.
\item \textsuperscript{19} \textit{Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces
of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest,
Internment, and Interrogation}, (February 2004), 3. Posted on web by GlobalSecurity.org at
\end{itemize}
commander, Lieutenant General Ricardo Sanchez, appointed Major General Antonio Taguba to conduct special investigations (Article 15-6) into the reports of abuse. The “Taguba Report” confirmed “numerous incidents of sadistic, blatant, and wanton criminal abuses” at the Abu Ghraib Confinement Facility between October and December of 2003.\(^\text{20}\)

After a public uproar both in Western countries and the Arab world, a four-member panel, led by former Secretary of Defense James R. Schlesinger, assisted by former Secretary of Defense Harold Brown, found that both the commandant of the 800th MP Brigade, Brigadier General Janis Karpinski, and the commandant of the 205th MI Brigade, Colonel Thomas Pappas, “either knew, or should have known (italics mine), abuses were taking place and taken measures to prevent them.”\(^\text{21}\) The Independent Panel Review cited “both institutional and personal responsibility at higher levels” for the failure of military personnel to maintain proper discipline, which resulted in the failure of whole units to follow known standards. The report emphasized how the legalistic efforts to limit the application of Geneva Conventions in regard to one group of detainees, the so-called illegal combatants, resulted in the denial of humanitarian treatment to those clearly under the protection of the conventions.

Finally, in April of 2005, Naval Inspector General, Vice Admiral Albert T. Church released an unclassified summary of the Review of Department of Defense Detention Operations and Detainee Interrogation Techniques. The focus of the “Church


\(^{21}\) Independent Panel Review, 43.
Report” was to “determine whether DoD had promulgated interrogation policies or guidance that directed, sanctioned or encouraged the abuse of detainees.” While the report found no relationship between command policies and the criminal abuse of prisoners, it failed to adequately address responsibility for a command climate that led to 121 substantiated victims of detainee abuse, including six deaths, in Guantanamo, Afghanistan, and Iraq in February 2002 and September 2004. As of September 30, 2004, disciplinary action had been taken against 115 American service members to include 15 summary and nine general courts-martial. By its extremely narrow focus on written directives, the “Church report” points the reader toward a very narrow must have written the order standard of command responsibility so as to hold individual commanders liable for such a widespread climate of impunity among soldiers spread out across three countries and two hemispheres an impossible task.22

Whether or not the February 2002 presidential memorandum and other Guantanamo-derived policies facilitated a climate of impunity that spread to other operational regions, one must ask what type of climate has been facilitated by the historical tendency of the United States (1) to be in constant opposition to new codifications of the law of warfare; (2) to be out of alignment with the closest allies as to what provisions of law of warfare to apply to multinational operations; (3) to have no action on the part of the legislative and executive branches of government in drafting legislation that would allow the prosecution of American civilians, to include former military personnel, for war crimes; and (4) to continue to refuse to hold one’s own

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22 Church Report, 13, 21.
citizens liable for standards of command responsibility while contemporaneously holding a higher standard for the prosecution of foreign nationals.

While the command climate in Guantnamo, Afghanistan, and Iraq may have revealed factors internal to the American military profession, such as a historical disposition to set a low priority on humanitarian concerns and a professional bias against international humanitarian law, the initiatives that led directly to abuses via Guantnamo were, however, derived from external civilian sources. If the road to Abu Ghraib went via Guantnamo, the road to Guantnamo appears to have started not at the Pentagon, but in a clique of conservative lawyers in the Department of Justice and the White House with little or no military input.\(^\text{23}\)

Regardless of the tone of past equivocations taken by Department of Defense Law of War Program and the Army’s International and Operational Law Division on the application of international humanitarian law on U.S. operations, nothing in U.S. doctrine authorizes soldiers to commit human rights violations of the type documented at Abu Ghraib Prison in Iraq. It is very tempting to point to Abu Ghraib as the logical consequence of the present thesis: that the American military profession slowly “walked away” from the very standards of command responsibility that it was historically responsible for developing. However, the most significant internal indicator for the military profession, to which this thesis can be fairly applied, will be in the prosecution,\(^\text{23}\)

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\(^{23}\) In the months after 9-11, an interagency task force to include 34 year-old John C. Yoo, White House Staff, met under the leadership of Alberto F. Gonzales, White House Council, and the Vice President to overhaul domestic and international law for the war, with, according to a serialized New York Times Report, little or no input from military lawyers. See Tim Golden, “After Terror, the Secret Rewriting of Military Law,” *New York Times*, (October 24, 2004), A-1.
or lack thereof, of the military intelligence and military police commanders directly responsible for the conduct of their subordinates in Abu Ghraib prison and elsewhere.
LIST OF REFERENCES

Official Governmental Sources


United States House of Representatives. 40th Congress, 2nd Session, House Executive Document (The Andersonville Trial), Vol. 8, n. 23 (1865), 1-808.


*Instructions for the Government of Armies of the United States in the Field* (1863), originally published as *General Orders No. 100*, War Department, Adjutant General's Office, 24 April 1863


United Nations, North Atlantic Treaty Organization, and Non-Government Organizational Sources


Oral Interviews / Investigational Correspondence


Trials

Prosecutor v. Delalic, Mucic, Delic, and Landzo (Celebici Judgment). Case No. IT-96-21-T.

Prosecutor v. Jean Kambanda, Case no.: ICTR 97-23-S.


United States v. Wilhelm List (The Hostage Case), 1948.

United States v. Wilhelm von Leeb (German High Command Case), 1948.


Selected References


Blumenson, Martin. Breakout and Pursuit. Washington, D.C: Center of Military


——. *One Morning in the War. The Tragedy at Son My.* New York, Coward, McCann, 1970.


_____."Democracy And Armed Forces: Reforming Civil-Military Relations.” *Current.* (February 1, 1996).


_____."Exchange on Civil-Military Relations.” *The National Interest,* No. 36 (Summer 1994).


_____. *Nuclear Weapons and Foreign Policy*. New York, Published for the Council on Foreign Relations by Harper, 1957


Lafeber, Walter. America; Russia, and the Cold War, 1945-1971. New York: John


Niebuhr, Reinhold, “Victors’ Justice,” in *Common Sense*, January 1946..


——. *Statesmanship or War*. Garden City: Doubleday, 1927.


_____."The Global Reach of Human Rights." *House Counsel* 32 (Fall 1997).


_____."Terrorism and the Law." *Foreign Affairs* 64(Summer 1986): 906.


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