

If the high commander who orders, permits or condones the commission of an atrocity were permitted to escape punishment for lack of the machinery with which to judge him, for consistency's sake all perpetrators of such atrocities should be permitted to escape also. Certainly civilization is a growing thing. In former times murder, rape, robbery, pillage, looting and all the other events which we have come to know as war crimes were considered as legitimate warfare. Is anyone to rise and say that civilization is wrong to have branded such acts as illegal? Will anyone say that perpetrators of such acts should be permitted to escape punishment? No, we believe all will agree they should be punished adequately, even by death if their offenses are sufficiently serious--not because they are representatives of a defeated adversary, but to serve notice upon all nations and individuals that future offenders will be punished.

After the trial by the International Military Tribunal for the Far East, the Nuremberg and other trials in European countries, the Yokohama and other trials by military commissions of Allied nations throughout the world, members of any nation at war in the future will be unlikely to commit, order, permit or condone such offenses without thinking most seriously of the possible criminal consequences.

Potential leaders of nations may discount the action taken by the tribunals condemning persons for plotting aggressive war but who can believe they will disregard the punishment of perpetrators of atrocities? To doubt that countless persons in any future war will escape death, brutality, rape, robbery and violence because of the action taken by the victorious nations after the last war in seeking out and bringing to justice war criminals of that war is to say: Man does not progress, neither does he reason. It is true, of course, that there will be cases of offenses committed by irresponsible persons or by men in the heat and passion of battle. No law can prevent that.

It is not within the province of this Tribunal to comment on the action of the United States Supreme Court taken in the cases of General Yamashita and Lieutenant General Homma. Suffice it to say, its decision is the precedent, as certainly is not the dissenting opinion in the Homma case. Their lives were not forfeited because their forces had been vanquished on the field of battle but because they did not attempt to prevent, even to the extent of issuing orders, the actions of their subordinates, of which actions the commanders must have had knowledge.

However, the precedents of those cases and cases of other tribunals have been carefully studied and followed by this Tribunal in arriving at findings on command responsibility. The Tribunal considers the essential elements of command responsibility for atrocities of any commander to be:

1. That offenses, commonly recognized as atrocities, were committed by troops of his command;
2. The ordering of such atrocities.

In the absence of proof beyond a reasonable doubt of the issuance of orders, then the essential elements of command responsibility are:

1. As before, that atrocities were actually committed;

2. Notice of the commission thereof. This notice may be either:

a. Actual, as in the case of an accused who sees their commission or who is informed thereof shortly thereafter; or

b. Constructive. That is, the commission of such a great number of offenses within his command that a reasonable man could come to no other conclusion than that the accused must have known of the offenses or of the existence of an understood and acknowledged routine for their commission.

3. Power of command. That is, the accused must be proved to have had actual authority over the offenders to issue orders to them not to commit illegal acts, and to punish offenders.

4. Failure to take such appropriate measures as are within his power to control the troops under his command and to prevent acts which are violation of the laws of war.

5. Failure to punish offenders.

In the simplest language it may be said that this Tribunal believes the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must be punished.

In determining the guilt or innocence of an accused, charged with dereliction of his duty as a commander, consideration must be given to many factors. The theory is simple, its application is not. One must not lose sight of the fact that even during the accused's period as Commander-in-Chief of Yokosuka Naval District, his nation had already begun to lose battles, its navy and, indeed, the war. The climax was being reached. His duty as a commander included his duty to control his troops, to take necessary steps to prevent commission by them of atrocities, and to punish offenders. His guilt cannot be determined by whether he had operational command, administrative command, or both. If he knew, or should have known, by use of reasonable diligence, of the commission by his troops of atrocities and if he did not do everything within his power and capacity under the existing circumstances to prevent their occurrence and punish the offenders, he was derelict in his duties. Only the degree of his guilt would remain.

As to the criticism that the victorious governments have defined certain offenses to be crimes "ex post facto," a careful analysis of the types of offenses punished will show such is not the case. For centuries, murder, rape,