The Australia Institute
Research that matters.

War Crimes: Where do Responsibility and Accountability Start and End?

Are Senior Military Commanders Liable and Culpable?

(**Spoiler Alert**: They are accountable, responsible, liable and culpable, though not for the reasons you might expect.)

Allan Behm, June 2025[1]

[1] Allan Behm is Special Advisor at The Australia Institute, Australia's leading independent think tank. Previously, he was Director of the International & Security Affairs program. Between 1985 and 1989, and again between 1996 and 2001, he was responsible for advising on command policy and the policy foundations of Rules of Engagement in the Australian Department of Defence. In this, he worked closely with the Australian Chief of the Defence Force (CDF), Australian Defence Force (ADF) colleagues in the former Strategic Command Division of HQADF (now the Joint Operations Command), and the staff of the Judge Advocate General at the CINCPAC Headquarters, Honolulu.

Abstract

The shameful suggestions that war crimes were committed by Australian soldiers, led by a highly decorated individual against whom accusations of war crimes have been confirmed to a civil standard of proof in the Federal Court of Australia, have brought dishonour to the Australian Defence Force and to the nation. Considering an appeal by the highly decorated individual against the Federal Court justice's decision, the full Federal Court has now determined that he was not defamed when these accusations were published. In a judgement that is as clinical as it is definitive, the justices repeatedly determined that there was no reason to doubt the primary judge's conclusions.

These allegations of war crimes (through 2018 *Sydney Morning Herald* reports and the 2020 Brereton Report) and their subsequent validation to a civil standard of proof (the 2023 Besanko judgment) are a stain on the ADF's integrity and reputation and a direct challenge to Australia's national advocacy of and support for the rule of law. And that the response to these allegations degenerated into brawl over decorations, honours and ribbons is itself a reflection on and an indictment of the nation's military command ethos.

It shows how much is still to be done to resolve the tension between military outcomes, inevitable brutality in the conduct of war, moral purpose at the organizational level and ethical action at the individual level. It reminds us, moreover, how difficult it is to embed ethical standards in the profession of arms – the only profession that can legitimately employ lethal force in the defence of the nation. The promulgation, promotion and monitoring of Rules of Engagement and the ethical principles underpinning them require assiduous attention. Yet that attention was evidently lacking.

It is now imperative that the ADF address the systemic deficiencies in command to ensure that never again do Australian soldiers find themselves accused of war crimes. In this report, Allan Behm outlines the complexities of command and a new way of approaching culpability.

ABOUT THE AUSTRALIA INSTITUTE

The Australia Institute is an independent public policy think tank based in Canberra. It is funded by donations from philanthropic trusts and individuals and commissioned research. We barrack for ideas, not political parties or candidates. Since its launch in 1994, the Institute has carried out highly influential research on a broad range of economic, social and environmental issues.

OUR PHILOSOPHY

As we begin the 21st century, new dilemmas confront our society and our planet. Unprecedented levels of consumption co-exist with extreme poverty. Through new technology we are more connected than we have ever been, yet civic engagement is declining. Environmental neglect continues despite heightened ecological awareness. A better balance is urgently needed.

The Australia Institute's directors, staff and supporters represent a broad range of views and priorities. What unites us is a belief that through a combination of research and creativity we can promote new solutions and ways of thinking.

OUR PURPOSE – 'RESEARCH THAT MATTERS'

The Institute publishes research that contributes to a more just, sustainable and peaceful society. Our goal is to gather, interpret and communicate evidence in order to both diagnose the problems we face and propose new solutions to tackle them.
The Institute is wholly independent and not affiliated with any other organisation.

Donations to its Research Fund are tax deductible for the donor. Anyone wishing to donate can do so via the website at https://www.australiainstitute.org.au or by calling the Institute on 02 6130 0530. Our secure and user-friendly website allows donors to make either one-off or regular monthly donations and we encourage everyone who can to donate in this way as it assists our research in the most significant manner.

The Australia Institute
Level 1, 113 Canberra Ave,
Griffith, ACT 2604

Tel: (02) 61300530
Email: mail@australiainstitute.org.au
Website: www.australiainstitute.org.au
ISSN: 1836-9014

Contents

Introduction

In June 2023, *Sydney Morning Herald* correspondent Chris Masters reported that the Chief of the Australian Defence Force (CDF), General Angus Campbell, had sought to return the Distinguished Service Cross (DSC) awarded to him for his command of the Australian Defence Force (ADF) Middle East operations in 2011.[2] To those who know him, the CDF's actions in seeking to return the DSC were consistent with his character and principles as the nation's most senior military leader, and might reasonably be interpreted as his acceptance of some responsibility and a measure of liability for crimes that may have occurred during his time in command. According to "well-placed sources speaking on the condition of anonymity", the then-Minister for Defence, Senator Linda Reynolds, although initially disposed to accept the CDF's return of his DSC, declined the offer. Why this decision was left to a politician technically outside the chain of command is an interesting question, though not pertinent to a consideration of command responsibility for war crimes. According to the report, the Defence Minister's decision reflected the position of then-Prime Minister Scott Morrison, who was reportedly unhappy at the idea of anyone's medals being revoked and returned. How that unhappiness might have precluded the voluntary return of a service decoration without its revocation, a decision presumably for the CDF or, in this case, the Governor-General, is unknown.

What is known is that the CDF, in the light of Justice Brereton's 2020 report that there was credible evidence for allegations that ADF soldiers had committed war crimes in Afghanistan, intended to revoke the Meritorious Unit Citation awarded to the entire Special Operations Group conducting operations between 2007 and 2013, and that consideration would be given to the revocation of other distinguished and conspicuous service awards granted at the time.[3]

Whenever questions of military honours and service decorations are raised, passions quickly run high. In the days leading up to the release of the decision by Federal Court Justice Besanko on former Special Air Services soldier Ben Roberts-Smith's defamation claims, the Returned Services League of Australia and the SAS Association issued a joint press release that was little more than an intemperate attack on the CDF for the

[2] Chris Masters, "Defence chief Angus Campbell tried to hand back his Afghanistan medal but was refused", *The Sydney Morning Herald*, 13 June 2023 https://www.smh.com.au/national/defence-chief-angus-campbell-tried-to-hand-back-his-afghanistan-medal-but-was-refused-20230612-p5dfs6.html

[3] For Justice Brereton's report (redacted), see Department of Defence, *Inspector-General of the Australian Defence Force: Afghanistan Inquiry Report*, 10 November 2020 https://www.defence.gov.au/sites/default/files/2021-10/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf

suggestion that military service decorations be withdrawn.[4] The SAS Association, for instance, blamed the government for the "lethal and under resourced workplace" in which the alleged war crimes occurred. The media release was silent on the question of morality and the law of armed conflict, as it was on the fact that substantial and untaxed combat allowances enticed highly trained SAS soldiers to apply repeatedly for deployment into dangerous war zones, rendering them quasi-mercenaries, and that the atmosphere at "The Fat Ladies Arms" drinking hole – located at Camp Russell, the SAS quarters in Tarin Kowt – was not conducive to model behaviour. The media release missed the point: the issue turns not on the hard work, dedication and even the valour of serving soldiers. It turns on whether a unit award in circumstances where the ADF has acted unmeritoriously is itself merited, whether service in such circumstances can be meritorious, and whether those so decorated can honourably claim the citation when the circumstances were dishonourable.

The CDF and independent Senator for Tasmania Jacqui Lambie, herself a former soldier, had a vigorous exchange of views on the matter during a meeting of the Senate Estimates Committee. The Senator reflected disparagingly and disrespectfully on the CDF, apparently unaware that he had taken steps to have his own award rescinded.[5] That allegations of war crimes (Brereton) and their subsequent validation to a civil standard of proof (Besanko) – a stain on the ADF's integrity and reputation and a direct challenge to Australia's national advocacy of and support for the rule of law – should be reduced to a brawl over decorations, honours and ribbons is itself a reflection on and an indictment of the nation's military command ethos. It is, moreover, a challenge to the legacy of Monash and "Pompey" Eliot, Birdwood and Chauvel, Morshead and Vasey, each of whom did much to preserve individual dignity, corps honour and the integrity of the AIF in the maelstrom of war. It shows how much is still to be done to resolve the tension between military outcomes, inevitable brutality in the conduct of war, moral purpose at the organisational level and ethical action at the individual level. And it reminds us how difficult it is to embed ethical standards in the profession of arms – the only profession that can legitimately employ lethal force in the defence of the nation. The promulgation, promotion and monitoring of Rules of Engagement and the ethical principles underpinning them require assiduous attention. Yet that attention was evidently lacking.

---

[4] RSL Australia, with the Australian SAS Association, "Veterans condemn CDF proposal to strip soldiers of distinguished service medals awarded in the Afghanistan war", 24 May 2023, https://www.rslaustralia.org/latest-news/veterans-condemn-cdf-proposal-to-strip-soldiers-of-distinguished-service-medals-awarded-in-the-afghanistan-war

[5] Matthew Knott, " 'Feeding frenzy': Defence Force chief in stand-off with Lambie over military medals", *The Age*, 30 May 2023 https://www.theage.com.au/politics/federal/feeding-frenzy-defence-force-chief-in-stand-off-with-lambie-over-military-medals-20230530-p5dchx.html

Contemporary Theory of Command

Much has been written, and continues to be written, on command in military operations. The speed of modern communications and the availability of information, together with the proliferation of autonomous systems and the emergence of artificial intelligence, have profoundly changed the operating space within which command is exercised. Notwithstanding the risk of being swamped by information and the options available to the contemporary commander in the exercise of command, the essence of command itself has not changed.

For the Australian Defence Force, in a current doctrinal publication promulgated by then-CDF General Angus Campbell, command is currently defined as "the authority which a commander in the military lawfully exercises over subordinates by virtue of rank or assignment".[6] This definition narrows command to authority over subordinates. This definition betrays a sensitivity to the war crimes allegations that have troubled senior Australian commanders for the past decade or so. The ADF doctrine continues:

> To command is to assume responsibility for taking and saving human lives. It is to direct how human beings will conduct themselves towards each other. It demands moral standards be set and obeyed.

This definition in effect replaced a broader, more encompassing, definition promulgated only six years earlier (2018), which defined command as "the authority that a military member lawfully exercises through rank or appointment to determine what is to be achieved by subordinate forces".[7] The nub of this earlier definition is military purpose – what is to be achieved – rather than the personnel whose task it is – who is to achieve it. So, quite apart from the fact that the new definition is so loose in its expression as to be meaningless (how does one obey a moral standard, for example?),it represents a significant definitional change, since the linear relationship between the commander and those commanded becomes the central driver of command, introducing complex issues of moral responsibility and moral hazard that confuse rather than clarify.

The Australian approach to command, moreover, needs to be seen in the context of international approaches to the topic. One of the more accessible studies of command concepts was undertaken by the US RAND Corporation in 1999 on behalf of the Pentagon. I used this publication in advising the CDF on command issues in mid-1999

---

[6] Australian Defence Force, *ADF Philosophical Doctrine*, "Command", 2024, p. 2. https://theforge.defence.gov.au/sites/default/files/2024-01/ADF-P-0%20Command.pdf

[7] Australian Defence Force, "ADF Concept for Command and Control of the Future Force", 2018, p. 10. https://theforge.defence.gov.au/sites/default/files/adf_concept_for_command_and_control_of_the_future_force_v.1_signed.pdf

when Australia was leading the international military peacekeeping operation in East Timor, INTERFET. That operation entailed complex issues of command over multi-national forces (with differing command and cultural dynamics and traditions) in a UN-mandated peacekeeping deployment in an international environment.

In the RAND publication, consistent with the standard US Joint Chiefs of Staff definitions, command is defined as: "The authority vested in an individual of the armed forces for the direction, coordination, and control of military forces".[8] Command and control together attract a more extended definition.

> The exercise of authority and direction by a properly designated commander over assigned forces in the accomplishment of the mission. Command and control functions are performed through an arrangement of personnel, equipment, communications, facilities and procedures which are employed by a commander in planning, directing, coordinating, and controlling forces and operations in the accomplishment of the mission.[9]

And to complete the conceptual framework for command, the command-and-control *system* constitutes "the facilities, equipment, communications, procedures, and personnel essential to the commander for planning, directing, and controlling operations of assigned forces pursuant to the missions assigned".[10] There are several internal qualifications buried in these expanding definitions. The key point to note, of course, is that command is essentially the operation of a military system for the purposes of war.

Consistent with command as "the operation of a military system", the RAND study lists the key elements underpinning the exercise of command.

- Time scales that reveal adequate preparation and readiness, not just of the concept but of the armed forces tasked with carrying out that concept.
- Awareness of the key physical, geographical, and meteorological features of the battle space – situational awareness – that will enable the concept to the realized.
- A structuring of forces consistent with the battle tasks to be accomplished.
- Congruence of the concept with the means for conducting the engagement.
- What is to be accomplished, from the highest to the lowest levels of command.
- Intelligence on what the enemy is expected to do, including the confirming and refuting signs to be looked for throughout the coming engagement.

---

[8] Carl Builder, Steven Banks and Richard Nordin, *Command Concepts: A Theory Derived from the Practice of Command and Control* (Santa Monica: RAND, 1999), p. xiii and 11 https://www.rand.org/pubs/monograph_reports/MR775.html

[9] *loc.cit*.

[10] *loc.cit*., and p. 12.

- What the enemy is trying to accomplish, not just what its capabilities and dispositions may be.
- What the concept-originating commander and his forces should be able to do and how to do it, with all of the problems and opportunities – not just the required deployments, logistics, and schedules, but the nature of the clashes and what to expect in the confusion of battle.
- Indicators of the failure of, or flaws in, the command concept and ways of identifying and communicating information that would change or cancel the concept.
- A contingency plan in the event of failure of the concept and the resulting operation.[11]

This checklist articulates the systemic and systematic nature of command. While individual soldiers and other support personnel ultimately exercise the agency that gives effect to the exercise of the commander's authority, the focus of command is the system, not the individual. For all the care and attention that a commander might focus on the logistics system, for instance, the fact that an individual piece of equipment becomes unserviceable is well beyond the commander's control. If, however, the logistics system and the many equipment types that it comprises fails, the commander is answerable and accountable. Command has failed because the system has failed. So too has the commander at a personal level. The commander should foresee breakdowns in the system.

Does that mean that the commander must know everything that is going on both outside the within the system to be commanded? The RAND Corporation's examination of command theory is silent on "reason to know", otherwise referred to as "the law of command responsibility", a concept much examined in the aftermath of the allegations of torture at Abu Ghraib in Iraq and, more recently, in the context of the Brereton Report on allegations of war crimes by Australian special forces in Afghanistan. In an important analysis of Brereton's recommendation not to conduct further investigations into the responsibility of Australian commanders for themselves failing to investigate suspicious behaviour of special forces troops in Afghanistan, Aaron Fellmeth and Emily Crawford define the law of command responsibility. "The law of command responsibility makes a commander **criminally** (my emphasis) responsible for crimes committed by forces under his or her effective authority and control if the commander knew or, owing to the circumstances at the time, had reason to know that the forces were committing or were about to commit such crimes, yet failed to take all necessary and reasonable measures to prevent or repress the commission of the acts".[12] The

[11] *op.cit.*, pp. xv-xvi

[12] Aaron Fellmeth and Emily Crawford, " "Reason to know" in the international law of command responsibility", *International Review of the Red Cross (2022)*, 104 (919), p. 1225 https://international-

operable word here is “criminally”. While clearly there is a difference between a commander’s direct involvement in war crimes committed by others and the commander’s possibly negligent supervision of forces assigned, the question of whether the commander **should have known** has come to dominate international consideration of a commander’s responsibility, liability and culpability for war crimes, at least since WW2. While the history is compelling, and the adoption of moral responsibility as an integral element of command seemingly inevitable, this paper suggests that **criminal** responsibility for the unknown crimes of subordinates represents a misperception that reflects a misunderstanding of the nature of military command in armed conflict. More of that later.

The Australian Criminal Code, which essentially follows the language of the *Rome Statute*, lays out the essential features of the Australian legal approach to command.[13] Section 268.115 establishes the criteria for criminal responsibility in terms of failure to exercise proper control, recklessness, failure to take all reasonable measures, conscious disregard of relevant information, and failure to act within the span of control. These elements are open to wide interpretation, especially by those who have little more than a passing familiarity with the nature and demands of warfare. Indeed, the imprecise and subjective nature of the criteria betrays at best an incomplete understanding of how the machinery of war operates and of the “fog” and “friction” (to use Clausewitz’s terms) that characterises the conduct of war. In a perceptive statement, Crawford and Fellmeth note that “seeking a perfect correlation between the commander’s intentions and the resulting crime is counterproductive”.[14]

The lure of a false analogy between international criminal law and municipal criminal law may lead to inadequate and inapplicable law. But more dangerously, it may lead to law that is not based on and aligned with the nature and demands of command. Crawford and Fellmuth are correct in their opinion that the Brereton Report “does a further disservice to the LOAC, the victims of ADF war crimes and the reputation of the SOCOMD by exonerating officers who, having the authority and responsibility to protect Afghans from war crimes by soldiers under their command, chose to look the other way”.[15] But, as I argue below, not for the reasons they identify.

---

review.icrc.org/sites/default/files/reviews-pdf/2022-06/reason-to-know-in-the-international-law-of-command-responsibility-919.pdf

[13] For a comprehensive analysis of command responsibility, see Emily Crawford and Aaron Fellmeth, “Command Responsibility in the Brereton Report: Fissures in the Understanding and Interpretation of the ‘Knowledge’ Element in Australian Law, Melbourne Journal of International Law, vol. 23, 2022, https://law.unimelb.edu.au/__data/assets/pdf_file/0007/4360075/Crawford-and-Fellmeth-unpaginated.pdf

[14] art.cit., p. 24.

[15] art.cit., pp. 24-5.

At the core of contemporary command theory is a linear relationship between those exercising command and those subject to command – between the commander and the commanded. If a combatant commits a war crime and is liable and culpable for that crime, the commander is also liable and culpable. On this view, the commander is vicariously liable for the actions of those subject to command by virtue of the commander's **personal** responsibility. Really?

The Beginning of History

The quest for clarity around the meaning of "command" and its exercise, command responsibility and accountability, the protection of the individual rights of combatants "under command", and the relationship between military commanders and their political leaders, is a recent phenomenon. In the many military campaigns and wars that littered Europe during the past five centuries or so, not to mention the wars of conquest waged by the colonial powers, etiquette and respect for human life on the battlefield was practically non-existent. Captives were either slaughtered or enslaved, and the enemy wounded, if they were lucky, were delivered the *coup de grâce* – execution to put them out of their misery. The 1859 carnage of the battle of Solferino, a turning point in the second Italian War of Independence, was horrendous. Roughly 300,000 troops, the Austro-Hungarians on one side and the Franco-Italian forces on the other, were committed to a day-long battle in which thousands died and tens of thousands were wounded.

Both sides shot and bayonetted prisoners and the wounded. And although the casualties were not on the industrial scale that distinguished the American Civil War or the trench warfare of WW1, they nonetheless prompted the young Swiss humanitarian Jean-Henri Dunant to begin a campaign for the humane treatment of prisoners that led ultimately to the Geneva Conventions and the establishment of the International Committee of the Red Cross. With the arrival of codified humanitarian law to define the ethical and moral dimensions of armed conflict between states, military leaders and their political masters were now required to address the ethical and moral dimensions of command in the physical conduct of warfare, especially on the battlefield. The horrific slaughter of WW1, where commanders sent their troops to certain death and prisoners were summarily shot by both sides, began to overwhelm both the civilian and military imaginations. The question of what constituted a lawful command and what might constitute a war crime attracted the attention of civilian and military leaders alike.

But a theory of command and subordinate ethical rules of engagement remained more a preoccupation of Staff Officers than of leaders caught up in the hurly-burley of military action. General Sir John Monash, for example, was far less preoccupied with

the philosophy of command than with clarity in the design, architecture and delivery of victory. He was less focused on the ethics of war than on war as a complex system. Ethical behaviour and moral values were simply part of the complexity. Monash, reflecting on his experiences as Corps commander in WW1, wrote:

> A Corps Commander, even during times of comparative inactivity so far as field operations are concerned, has, if he takes his work seriously, a pretty handful of anxieties and perplexities; for, even if he is so fortunate as to have an experienced Administrative Staff (as distinct from his Fighting Staff) the mere administration of his command involves an amount of supervision, a degree of personal handling of a multitude of troublesome and difficult questions, and a continuous pre-occupation with problems of improving efficiency and economizing man-power which are, to say the least, of formidable proportions. Upon these duties, which never abate, even during fighting periods, you must superimpose the rarer, but stupendously more important task of attempting to plan and direct victorious operations against the enemy.[16]

Monash saw his command role as corporate, organisational and systemic. For him, it was the military enterprise – the military system in its complexity, dimensions and variety – that delivered victory or suffered defeat. He was naturally as alert to the moral hazard that was inextricably part of the exercise of command that sent soldiers to sure death as he was to the ethical collapse represented by breaches of the Law of Armed Conflict and any war crimes that troops under his command might commit. But his preoccupation as commander had to be the system in its entirety, and that preoccupation was the key to his success as both operational planner and force commander.

There is no indication that Monash, or any other senior military commander of whatever stripe during WW1 saw himself as a kind of policeman preventing or prosecuting individual soldiers for crimes committed in war. There were many Courts Martial to deal with those charged with moral turpitude, including murder of fellow enlistees or draftees, desertion and cowardice (even if the charges were due to mental illness, "shell shock" or PTSD as it would now be described). On the evidence available, the idea that a military commander would be vicariously liable for the "crimes" committed by troops under his command would have seemed preposterous. Not only was there no

[16] Sir John Monash, "Leadership in War" (unpublished paper) quoted in Warren Perry, "General Sir John Monash: A Glimpse at His Career and Methods of Command," *Australian Army Journal* (January 1974), p. 38 https://researchcentre.army.gov.au/sites/default/files/aaj_296_jan_1974.pdf

agreed criminal code or international convention governing personal conduct in war, but the expression "international criminal law" did not exist until 1952.[17]

The despondency and gloom that enveloped the global community in the aftermath of WW1 led to the apportionment of blame and guilt for the catastrophe that had befallen Europe. The Treaty of Versailles determined that Germany was solely responsible (in the German text, "guilty") for the war (Art 231), that the Kaiser was morally responsible for the war, having offended "against international morality and the sanctity (sic) of treaties" (Art 227). The Treaty also required Germany to bring "persons accused of having committed acts in violation of the laws and customs of war" before military tribunals (Art 228). Initially, over nine hundred political, military and naval leaders were identified for prosecution. Germany refused to extradite them for prosecution by the Allied Powers, insisting on prosecutions under German jurisdiction. By May 1920, this list had been whittled down to forty-five against whom the German government was prepared "to institute penal proceedings before a supreme court at Leipzig".

If the intention of the Allied Powers was to establish an internationally credible process for attributing responsibility and culpability for war crimes, the 1920-21 Leipzig trials were in fact a fiasco. A dozen or so soldiers and junior officers were arraigned on various criminal charges under German law. The trials quickly turned into farce: while most of those charged were found not guilty, those few found guilty were given short custodial sentences in civilian prisons (to add to their shame). Very little turned into nothing, and while this lamentable result could be ascribed to the immaturity of the international legal frameworks as they related to armed conflict and disunity among the Allied Powers, the more significant problem was political and structural. So long as the Allied Powers – the victors – could allocate blame and claim massive reparations, liability and culpability for war crimes was a second order issue. War, as Clausewitz famously wrote, is the continuation of politics by other means. And when politics – in this case, to shift and allocate blame and to punish – dresses in the robes of the law, confusion and corrupted impartiality are an almost inevitable result.[18]

---

[17] The term first appears in the *ICRC Report on the Word of the International Committee of the Red Cross, 1 January to 1 December 1952,* noted in Antoon De Baets, "The View of the past in international humanitarian law (1860-2020", *International Review of the Red Cross* no. 920-921, November 1922 at https://international-review.icrc.org/articles/the-view-of-the-past-in-ihl-920

[18] The British government commissioned a Parliamentary Report on the Leipzig trials. It is as remarkable for what it does not say about the trials as for its meticulous record of the charges and the narrative. See *German War Trials*, Report of Proceedings before the Supreme Court in Leipzig, with Appendices (London, HMSO, 1921) at https://ihl-databases.icrc.org/en/national-practice/report-proceeding-supreme-court-leipzig

The Middle of History

The cataclysmic war that provided the sequel to "the war to end all wars" ended in Germany's capitulation and total defeat. It saw force-on-force war crimes on an almost industrial scale by Germany and Japan (as well as the unmentioned war crimes committed by the allied powers), and the murder of civilians numbering into the millions. The Holocaust remains an underlying motivating force in international relations today. The enormity of the crimes committed initiated major developments in international humanitarian law as a central component of national strategy – at least for those who might lose a war – and was a driving force in the creation of what is now called "the international rules-based order". But more than that, it brought into sharp focus the relationship between the decisions of political leaders and military commanders and the actions of those who carry out their orders and commands. And that, in turn, brought an even sharper focus the relationship between the accountability, responsibility, liability and culpability of commanders for crimes committed by those under command.

Livy's "woe to the vanquished" (*vae victis*) was the relentless leitmotif of the postwar prosecutions, executions and incarcerations of war criminals.[19] Entire libraries have been written on the precedents set by the Nuremberg trials and the somewhat less dramatic Tokyo trials of Japanese war criminals. But what set both the Nuremberg and Tokyo trials apart from any historical precedent was the role of the media in presenting the macabre theatre of recrimination and retribution. They were in every respect show trials: not only was politics dressed in the robes of the law, but the law itself became a belated instrument of war as defeated politicians and generals stood on the gallows. Moreover, the fact that Nuremberg had been itself symbolic of the rise of Nazism, the very location of the tribunal hearings underscored the symbolism of Nazism's annihilation. The tribunal consisted of three American judges, a British President of the tribunal and one other British judge, and two judges from France and the Soviet Union. To the victor the spoils.

Altogether, there were thirteen Nuremberg tribunals. In the only trial conducted by the four allied powers acting as the International Military Tribunal, twenty-four of the most senior leaders of the Third Reich faced judgement. Three were acquitted, not for reasons of inadequate evidence but because of procedural deadlock between the judges. Twelve (including one tried *in absentia*) were sentenced to death, ten executed (one committed suicide on the eve of his execution) and four to incarceration for periods ranging from ten to twenty years. The other twelve Nuremberg tribunals were convened by the US alone, engaging only US prosecutors, the most formidable of which

[19] Titus Livius, (trans. D. Spillan), *Ab Urbe Condita*, V, 48 https://www.gutenberg.org/files/19725/19725-h/19725-h.htm#book5

was Benjamin Ferencz who prosecuted some of those who operated the mobile death squads, the *einsatzgruppen* managed by the SS (*Schutzstaffel*). Between them, 177 were tried, of whom 142 were convicted: 25 were sentenced to death, the rest receiving prison sentences of ten years to life.

Overall, of the almost 4000 cases investigated by the Nuremberg process, fewer than 500 cases involving just over 1600 defendants went to trial. Of those found guilty, 200 were executed and fewer than 300 were given life sentences. By 1951, a combination of factors, extending from German popular concerns relating to the fairness of the Nuremberg process, broader concerns regarding the legality of the process and the robustness of some of the evidence (the Soviet Union allegedly fabricated evidence to demonstrate that Germany had conducted the Katyn Forest massacre of Polish officers, for example) and the need to re-industrialise Germany by re-employing imprisoned industrial leaders persuaded the US High Commissioner for Germany, John McCloy, to commute many of the Nuremberg sentences. With the exception of the unfortunate Rudolf Hess, early punishment gave way to speedy rehabilitation.

The post-war trials in Asia were of a different character. The International Military Tribunal for the Far East (IMTFE) was established under US leadership, with judges and prosecution teams drawn from the signatories to Japan's instrument of surrender: three American judges were appointed, and one each from Australia, Canada, China, France, India, the Netherlands, New Zealand, the Philippines and the UK. Verdicts were reached by majority rather than unanimity – not an insignificant matter since the judges of India, France and the Netherlands tended to take dissenting views, usually reflecting the principle *nulla poena sine lege* – no crime without law, tantamount to the assertion that the charges against Japanese military commanders accused of war crimes were not founded in law to which those commanders were subject. Nine Japanese political leaders, eighteen military leaders and one academic were indicted. Charges against the academic were dropped on mental incapacity grounds, and two of those indicted died. The remaining defendants were found guilty, seven being sentenced to death and sixteen to life imprisonment. A number of the surrender instrument signatories (New Zealand excepted) conducted separate war crimes trials under the general auspices of the IMTFE, executing over 900 defendants.

Perhaps the most controversial of the trials involved General Tomoyuki Yamashita, who faced a military tribunal in Manila. Convened under the authority of General Douglas MacArthur, the Commander-in-Chief US Army Forces (Pacific Theatre), the US Military Commission consisted of six senior US military officers. None of them, as far as can be ascertained, was legally qualified. The Commission did appoint six legally qualified officers to Yamashita's defence team. The trial, and its subsequent appeal to the US Supreme Court, has been much analysed and its conduct and outcomes extensively evaluated.

The appointment of the Military Commission followed standard US Court Martial procedures. In the view of the US Supreme Court, the trial was lawful, and its conduct authorised by the political branch (i.e. The Executive) of government, by military command, by international law and usage, and by the terms of surrender entered into by Japan. The Supreme Court found that "the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and he may be charged with personal responsibility for his failure to take such measures when violations result". This has been termed "The Yamashita Standard" or "The Yamashita Principle" ever since.

A key part of the Supreme Court's majority judgement leading to its establishment of the "Yamashita Standard" was the Court's decision to constrain its role. The Court decided not to appraise the evidence provided to the Military Commission nor the manner in which it conducted its proceedings. In effect, the majority view of the Supreme Court was that the Military Commission was not reviewable by the civil courts. In that view, Yamashita was unable to call upon the protections of US law. There was no higher appeal against the Commission's verdict: the Commission alone created what is now considered by many to be customary international law. Whether the verdict of a US Military Commission is translatable into customary international law is, at the very least, moot.

Jurisprudential considerations underpin matters of procedure, process, evidence, admissibility and the legal protections available to mediate self-incrimination and vicarious liability, especially after the fact. How is the defendants' liability for the commission of crimes about which they "should have known" to be determined, especially if, for reasons beyond their control, they did not in fact know what they could not know? And if the conduct of the Military Commission is so hurried that it denies sufficient time for the defence to gather information and to identify witnesses, and its processes so freewheeling that hearsay evidence (including unsubstantiated statements attributed to dead persons) is admissible, the accuracy of its findings and the safety of its verdicts become questionable at least and unsafe at worst. Like hearsay evidence, the probative value of testimony attributed to dead persons is nil.

The verdict, sentence and penalty imposed on Yamashita represent an extension of so-called negative criminality (criminality through omission) into the world of capital crimes attracting capital punishment. So the question must be asked: if, as the US Supreme Court determined by majority judgement, Yamashita's conviction was just, would the same principles apply to American, Australian or British commanders accused of similar war crimes by reason of their oversight, neglect or omission? By the same standard, should the senior Australian officers exercising higher command

functions in Afghanistan on behalf of the CDF – considering that they were physically located in the United Arab Emirates – be held to the same standard for war crimes committed by Australian military personnel as was General Yamashita for war crimes committed by forces over which he was unable to exercise command (and may not even have had command assigned)?

The answer must be a resounding no, because the Yamashita standard is itself inherently fragile, reflecting a triumphant *ius in victoria* (or perhaps *ius victoriae*) rather than a robust *ius in bello* that meets internationally agreed and enforceable standards. The Yamashita standard is little more than the politics of victory dressed in the robes of a confected legality. Its application to Australian high command, or American high command for that matter (were the US party to the Rome Statute of the International Criminal Court) would see Australia and America hoist on their own petard, literally.

The End of History: A Systems Approach to Command

There is a long jurisprudential tradition that immorality lies at the centre of criminality. There is no doubt that immorality thrives in the anarchy of war, whether it is the theft of the effects of the slain or the desecration of their corpses, whether it is the foreseen deaths of non-combatants as "collateral damage" or the murder of prisoners. But the question that arises is whether the immorality of an individual perpetrator is causally, essentially, legally or morally related to the authority of the commander. In the Abrahamic tradition, the sins of the father are not visited upon the child (Deuteronomy 24:15, Ezekiel 18:20, though Ezekiel seems to have a bet each way in 34:7, and Surah 35:18), nor does the father bear the child's burden of guilt. Yet we tend to get wrapped around the axles created by the binaries (good-evil, moral-immoral, intentional-unintentional) that are so often employed to characterise personal behaviour. "Ought" and "should" come into play both to cauterise each opposing element of the contradiction and to then resolve the fundamental antinomy. So we rely on nostrums like "It is wrong not to know what we should and could know" (*non scire quod scire debemus et possumus culpa est*) which sound momentous, but which are so conditioned by what might be feasible or possible as to lose any effective meaning. In an important essay in *The Columbia Law Review* in 1943, with WW2 still raging and the Supreme Court years away from the Yamashita appeal, Jerome Hall noted that "insofar as legal rules rest on moral culpability, they must be confined to volitional

misconduct".[20] As he wrote, "widespread incompetence [can be seen] without the slightest taint of moral culpability".[21]

Mr Chief Justice Harlan Stone delivered the majority opinion of the US Supreme Court following its consideration of the Yamashita appeal. In delivering their dissenting opinions on both the legality of the Military Commission's hearings and the justice of its verdict and sentence, Justices Murphy and Rutledge went to the heart of the US Constitution and its place in the defence of the fundamental rights of all who find themselves subject to US law. Justice Murphy wrote:

> War breeds atrocities. From the earliest conflicts of recorded history to the global struggles of modern times, inhumanities, lust, and pillage have been the inevitable by products of man's resort to force and arms. Unfortunately, such despicable acts have a dangerous tendency to call forth primitive impulses of vengeance and retaliation among the victimized peoples. The satisfaction of such impulses, in turn, breeds resentment and fresh tension. Thus does the spiral of cruelty and hatred grow.
>
> If we are ever to develop an orderly international community based upon a recognition of human dignity, it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness. Justice must be tempered by compassion, rather than by vengeance. In this, the first case involving this momentous problem ever to reach this Court, our responsibility is both lofty and difficult. We must insist, within the confines of our proper area, that the highest standards of justice be applied in this trial of an enemy commander conducted under the authority of the United States. Otherwise, stark retribution will be free to masquerade in a cloak of false legalism. And the hatred and cynicism engendered by that retribution will supplant the great ideals to which this nation is dedicated.[22]

Justice Murphy proceeds to the nub of the matter. Reflecting on the total defeat of Yamashita's forces and the destruction of any capacity for him to maintain effective control, Murphy records the systematic crushing of the entire Japanese offensive and defensive systems.

---

[20] Jerome Hall, "Interrelations of Criminal Law and Torts: I", *Columbia Law Review*, Vol. XLIII, no. 6 (September 1943), p. 778

[21] loc.cit.

[22] In re Yamashita, 327 U.S. 1(1946), Mr Justice Murphy dissenting https://supreme.justia.com/cases/federal/us/327/1/

> To use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice, or to military reality.
>
> International law makes no attempt to define the duties of a commander of an army under constant and overwhelming assault, nor does it impose liability under such circumstances for failure to meet the ordinary responsibilities of command. The omission is understandable. Duties, as well as ability to control troops, vary according to the nature and intensity of the particular battle. To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations. Such calculations become highly untrustworthy when they are made by the victor in relation to the actions of a vanquished commander. Objective and realistic norms of conduct are then extremely unlikely to be used in forming a judgment as to deviations from duty. The probability that vengeance will form the major part of the victor's judgment is an unfortunate but inescapable fact. So great is that probability that international law refuses to recognize such a judgment as a basis for a war crime, however fair the judgment may be in a particular instance. It is this consideration that undermines the charge against the petitioner in this case. The indictment permits -- indeed compels -- the military commission of a victorious nation to sit in judgment upon the military strategy and actions of the defeated enemy, and to use its conclusions to determine the criminal liability of an enemy commander. Life and liberty are made to depend upon the biased will of the victor, rather than upon objective standards of conduct.

In supporting Justice Murphy's conclusions with respect to the substance of Yamashita's alleged crimes, Justice Rutledge commented that both the constitution and conduct of the US Military Commission were invalid and deficient.

Yet neither of the dissenting judges got to the heart of command and command responsibility, nor to Yamashita's responsibility for the command **system** of which he was in charge. Even when it had been annihilated by US forces, the Japanese **system** remained Yamashita's responsibility. But his responsibility was not criminal. It was operational and corporate, analogous to the responsibilities of Corporate Chairpersons and their Boards for the operations of their companies, even in the face of routs on the stock exchange or in the market or the misconduct of employees. In the terms employed by Hall, cited above, the US Supreme Court was dealing with the difference between criminality and tort. The Supreme Court majority missed the opportunity to find Yamashita guilty as the failed owner and operator of the Japanese command system but not guilty by virtue of personal criminal liability and therefore not subject to the death penalty for the commission of crimes, even vicariously.

The Justices concluded their dissent with the ringing words of Thomas Paine. “He that would make his own liberty secure must guard even his enemy from oppression, for if he violates this duty he establishes a precedent that will reach himself.” Ironically, Paine ended up an outcast, politically irrelevant and socially isolated. And the deeper irony is that modern commanders of victorious forces may find themselves subject to exactly the same rules of customary international law designed to punish the vanquished.

Where To?

Command is too critical an element in the effective performance of a defence force to be reduced to linear binaries. Nor is it to be reduced to a set of moral platitudes and sentimental nostrums such as “servant-leadership”, “walking the talk”, “integrity in action” and “modelling morality in war”. Commanders are not spiritual directors, and even less are they chaplains. Commanders provide purpose and direction to one of the most complex and demanding systems yet invented – the system that wages war. They are responsible for the lawful employment of lethal force against adversaries and aggressors whose purpose is to destroy the citizens and communities that constitute the state. And with the arrival of communications and information overload and the subsidiary technologies designed to reduce that burden – AI and autonomous systems – command has become the military version of the traditional body-mind problem. While morality, for good or ill, is always part of any human system, it informs direction rather than effect. And when morality breaks down, it is because direction has broken down: effect (such as war crimes committed by individuals) is merely symptomatic of a breakdown in direction and control, a consequence of breakdown rather than the cause of moral turpitude and the ensuing legal consequences for those exercising command.

Yet, as Anthony Gray points out in an important and well researched essay in the UNSW Law Journal, the issue of a superior officers’ liability for the actions soldiers ostensibly under their authority and control remains untested in the Australian legal system.[23] Gray details a series of substantial conceptual difficulties with the theoretical and practical aspects of accessorial liability, vicarious liability, liability for a breach of duty which the commander is owed (which sounds like the Tax Office being liable for an

[23] See Anthony Gray, “The Doctrine of Command Responsibility in Australian Military Law”, UNSW Law Journal, vol 45 (3),)ct0ber 2022, pp. 1251-1287 https://www.unswlawjournal.unsw.edu.au/wp-content/uploads/2022/10/Issue-453-10-Gray.pdf

unpaid tax, but there we are), and *sui generis* liability attaching to the peculiarities of command itself.

If all of this sounds like casuistry, it probably is.

The challenge for modern jurists, as for commanders themselves, is to understand command not as transactional with respect to results – a linear relationship between cause and effect – but as empowering the systemic performance that generates results – an organic relationship between the elements that organise and deliver armed force. As Gray summarises the current situation in Australia, liability and culpability revolve around the commander's personal negligence and a general responsibility for the actions of subordinates. But Gray's penetrating analysis of the Australian legal environment within which command liability and culpability for war crimes should be judged actually reveals that command is itself incompletely and insufficiently understood.

If, as Monash implied, the superimposition of the rarer but stupendously more important task of planning and directing victorious operations against the enemy demands ownership of the war machine itself, the commander who fails to rise to that task is responsible for that failure. Is the commander criminally liable and culpable? No, unless the failure is intentional and wilful. Is the commander administratively liable for failure? Yes, by virtue of the fact that the war machine, the system the purpose of which is to deliver victory and which the commander administers and operates, has failed.

Senior Commanders are Accountable, Liable, Responsible and Accountable for War Crimes

The shameful suggestions that war crimes were committed by Australian soldiers, led by a highly decorated individual against whom accusations of war crimes have been confirmed to a civil standard of proof, have brought dishonour to the Australian Defence Force and to the nation. In dismissing the highly decorated individual's appeal against this finding, the full Federal Court has now determined that he was not defamed

when these accusations were published. In a clinical and definitive judgement, the full Federal Court dismissed all grounds of appeal.[24]

At the local level, war crimes evidently represent both a failure of personal morality by the perpetrator(s) and of moral leadership by those who are directly in command. In the clouded and confused circumstances of Afghanistan, the boundaries between personal, local and higher command levels – and just how much information might have been available at each of these levels – are yet to be determined. Former Major-General Brereton, as well as the investigative journalists Chris Masters and Nick McKenzie who chronicled the secretive – perhaps better described as out of control – habits of the SAS troops in Afghanistan, identified the elitist and self-contained practices of the SAS contingent in Afghanistan's Oruzgan province.[25] They were essentially self-accountable, maintaining a code of silence that excluded their more senior officers and deployment commanders. And the isolation of the senior commanders was exacerbated by their remote location at the Al Minhad air base in the United Arab Emirates, 1700 kilometres from Kabul. The wonders of modern communications notwithstanding, nothing can replace the hands-on eyes-on relationship between senior commanders and their troops.

If "war is the continuation of politics by other means", as Clausewitz wrote, then politicians are ultimately accountable and responsible for the decision to commit the nation to war. Some would argue that Australian governments should be accountable for the decisions to commit forces to Iraq and Afghanistan, and to admit responsibility for the consequences of those decisions. As the agents of government, military commanders are then accountable and responsible for how they implement the government's direction and how they conduct military operations. Just as they can reasonably claim the kudos for victory, so too they must admit liability for failure and defeat. And, what is more, they are culpable for the systemic breakdown of their war machines and for the misconduct, if any, of their forces. But it is important here to distinguish between shouldering the blame for negligence and the loss of systems control and admitting a "*mea culpa*" for moral turpitude. In this more precise sense, senior commanders are administratively culpable for their negligence in allowing the breakdown of control systems that may lead to war crimes, but are not vicariously or morally culpable for the criminality that war crimes represent.

---

[24] See Federal Court of Australia, Roberts-Smith v Fairfax Media Publications Pty Limited (Appeal) [2025] FCAFC 67 at https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2025/2025fcafc0067

[25] See, for instance, Nick McKenzie, Chris Masters and Anthony Galloway, "Arrogance and impunity: Inside the 2012 SAS deployment to Afghanistan", *The Age*, 20 November 2020 athttps://www.theage.com.au/national/arrogance-and-impunity-inside-the-2012-sas-deployment-to-afghanistan-20201118-p56fu6.html

Now that the full Federal Court has found against the appellant's claims in the defamation matter, there is now no doubt to a civil standard of proof that the SAS soldier involved did carry out the actions reported by the investigative journalists and reviewed by a senior legally qualified military officer. It is now imperative that the ADF address the systemic deficiencies in command to ensure that never again do Australian soldiers find themselves accused of war crimes. A Royal Commission into command failure in Afghanistan would assist the ADF immeasurably in this task.