



# THE LAW OF ARMED CONFLICT

Command responsibility



ICRC



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## COMMAND RESPONSIBILITY



## AIM

## [Slide 2]

The aim of this lesson is to explain the responsibilities of commanders at all levels in relation to the law of armed conflict.

The following main topics will be covered:

1. An introduction to the subject and definitions of some key terms.
2. The responsibilities of the individual combatant.
3. General responsibilities of commanders.
4. Criminal responsibility of commanders for the actions of subordinates.
5. Operational command.
6. Command in special cases.

1. Introduction & definitions of key terms
2. Responsibilities of the individual combatant
3. General responsibilities of commanders
4. Criminal responsibilities of commanders for the actions of subordinates
5. Operational command
6. Command in special cases

## 1. INTRODUCTION

This lesson will focus on key issues of the law that directly affect you as commanders. This means command at any level. The commander-in-chief of an armed force obviously has overall responsibility, but the section commander and even individual soldiers also have responsibility in relation to the law of armed conflict.

Respect for the law is really a matter of discipline and discipline is a product of good leadership, professionalism and training. Remember, too, that your State has specifically undertaken, in the Geneva Conventions and other instruments of humanitarian law, to ensure, in particular through its commanders, that the law is upheld. The law must therefore obviously be taught, something the States have also undertaken to do in their programmes of military instruction. In the light of a nation's obligation to provide this instruction, ignorance of the law is inexcusable and no defence in the event of violations. It is in peacetime that we have time to consider the law, to teach and to train. Once the fighting has started, it is too late. Just as we teach drills and principles for attack and defence, so as a matter of routine we should cover the provisions of the law so that they become second nature and will not be forgotten or dismissed in the fog and confusion of battle.

As we progress with this lesson, you will see that the key responsibilities of commanders at any level in relation to the law are:

- to study and understand it;
- to ensure their subordinates are trained so that they also have a clear understanding of what can and cannot be done within the law;
- to ensure by means of good leadership and discipline and by issuing unambiguous, lawful orders that the law is always applied;
- never to turn a blind eye to violations of the law. Failure to act (i.e. to prevent or to repress violations) when the law is being flouted cannot be tolerated from any commander. It will result in disciplinary and perhaps even criminal action being taken against you.

GP I, Art. 86

## DEFINITIONS

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These are some of the terms we will be using in this lesson:

**War crimes** – A war crime is any serious violation of the law of armed conflict that entails individual criminal responsibility. Serious violations in non-international armed conflicts are also war crimes. The Statutes and/or jurisprudence of the International Criminal Tribunals

for the former Yugoslavia and Rwanda and of the International Criminal Court all refer to violations of GC common Article 3 and other serious violations derived in particular from GP II.

**Grave breaches** – The most serious war crimes are called grave breaches. They are specifically listed in the Geneva Conventions and Additional Protocol I. They include wilful killing, torture, inhumane treatment, wilfully causing great suffering or serious injury to body or health, the taking of hostages, wilfully depriving a POW or other protected person of the right to a fair and regular trial, and launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects.

GC I, Art. 50  
GC II, Art. 51  
GC III, Art. 130  
GC IV, Art. 147  
GP I, Arts. 11 & 85

This list is by no means exhaustive. It merely illustrates the level of crime we are talking about. For more senior audiences, you may wish to refer to the complete list included in Annex A or copy it as a handout for them to take away.

### JURISDICTION, OR THE OBLIGATION TO REPRESS WAR CRIMES

All States have the right to try or extradite any person alleged to have committed a war crime, regardless of the nationality of the actor, the victim or the place where the act occurred.

States have a duty to try war crimes committed by their troops.

States have a duty to try war crimes committed on their own territory or on territory under their control.

States have a duty to seek out all those allegedly responsible for the commission or who allegedly have ordered the commission of grave breaches and to try or extradite them, regardless of the nationality of the perpetrator, the victim or the place where the conduct took place.

GC I, Art. 49  
GC II, Art. 50  
GC III, Art. 129  
GC IV, 146  
GP I, Arts. 85 & 86

## 2. INDIVIDUAL RESPONSIBILITY FOR COMPLIANCE WITH THE LAW

Every member of the armed forces, whatever his or her rank, has a personal responsibility to comply with the law. Commanders must ensure that it is complied with by others and take action when violations are encountered.

### SUPERIOR ORDERS

**It is no defence to a war crime that the act was committed in compliance with a superior order.**

A soldier who carries out an order which is illegal under the law of armed conflict is guilty of a war crime, provided that he or she was aware of the circumstances which made that order unlawful or could reasonably have been expected to be aware of them.

This point is of great significance to any soldier. It is a simple point to make but so very much more difficult for soldiers to actually carry out. It means they must refuse a command if they believe it to be unlawful. Surely unflinching loyalty and obedience to superior commanders are fundamental to any armed force. This is true, BUT there is clearly a higher loyalty, to your State and its laws. The duty of all soldiers not to comply with unlawful orders is quite clearly established in international law. During the Nuremberg and Tokyo trials that followed the Second World War, the defence of superior orders, while considered a mitigating factor in relation to sentencing, in no way excused law breakers. The principle has been reaffirmed in modern tribunals such as those set up to deal with war crimes committed in the former Yugoslavia and Rwanda.

If an order is plainly unlawful, you have a duty not to carry it out.

Your commander has a duty not to issue such orders. Indeed, individual soldiers should hardly ever find themselves faced with the dilemma of carrying out unlawful orders because in a professional armed force, with good commanders who know the rules, no unlawful orders should be issued in the first place.

We will now look at general command responsibilities and examine what they imply in actual operations.

### 3. GENERAL RESPONSIBILITIES OF COMMANDERS

Members of the armed forces who have powers of command are under a duty to:

- maintain firm but fair discipline;

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- demonstrate, by their interest and emphasis on training in peacetime and of course their behaviour in battle, that they respect the law (the examples set by commanders are of paramount importance in upholding the law, and poor examples have been the cause of grave breaches of the law in the past, the most vivid instance in recent history being the My Lai massacre during the Vietnam War);

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- make full use of the machinery available to them to investigate and prosecute violations of the law, and make it quite clear to their subordinates that enforcement applies as much to attacking an unlawful target as it does to being absent without leave and that it applies to **ALL** ranks;
- build legal problems into exercises and war games;
- ensure their orders are absolutely clear and not liable to misinterpretation (soldiers are very quick to pick up a remark by a superior. If you don't mean it, don't say it. Beware of remarks made as jokes, as a form of bravado or to impress your subordinates);
- take responsibility for difficult decisions;
- report offenders to superior officers who have the power to discipline them;
- report any violations committed by their side, by friendly forces or by the enemy to a higher authority.



#### RESPONSIBILITY OF STAFF OFFICERS

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Staff officers, though they do not have operational command responsibility, are still criminally liable if they become aware of current or pending war crimes and do not prevent them or fail to report them to their superiors.

## 4. CRIMINAL RESPONSIBILITY OF COMMANDERS FOR ACTS COMMITTED BY THEIR SUBORDINATES

Commanders will be held criminally responsible under the law if:

- they knew, or should have known, that subordinates were going to break the law, i.e. commit a war crime, but did nothing to prevent it;
- they fail to take any action against (punish or report) subordinates who have already committed a war crime.

**A commander therefore cannot use the excuse, "I did not know". Command means just that – being in control and being responsible for what is happening in your command all the time, every time.**

GC I, Art. 49  
GC II, Art. 50  
GC III, Art. 129  
GC IV, 146  
HCCP, Art. 28  
GP I, Arts. 86 & 87

## 5. OPERATIONAL COMMAND

Let us now apply this rule to operational command. We will do this by relating it directly to the phases of battle preparation with which you are all familiar.

As a commander, your starting point for any operation is the **mission**.

Once you have the mission, you make a **battle plan**. To do this you will assess, mentally or in writing, all the factors relevant at the time, such as ground and enemy forces, your own forces, logistics, courses open, etc. Having done this, you decide on the best course of action – your plan is complete.

You then have to pass this plan on to your subordinates, so you will issue **orders**.

Lastly, you have to **control** the engagement.

Throughout this process, a well-trained commander must always, as a matter of almost subconscious thought, take into account the law of armed conflict. You may well wonder, "How can I possibly do that? I have enough on my plate anyway. If I spend so much time on all this law business I'll never get past the starting line". **You can**, because the law in relation to operational command is simple and straightforward. What is more, taking account of the law will also greatly **assist you** in formulating a sound and workable plan. Finally, quite frankly – **you must!**

So let us go back to the beginning and look at the law in relation to the phases of battle preparation.

### THE MISSION OR AIM

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In operations, the task that a unit is required to perform will be defined in orders that the commanding officer receives from higher authority and that frame the mission or aim. The orders will also lay down clear parameters for conducting the operation and are likely to contain details such as the rules of engagement.

There is really only one legal concern here. Is the mission consistent with the law of armed conflict? Is the unit being asked to do something that is unlawful? If there is any room for doubt about the military or legal aspects of the mission, including the rules of engagement, a good commander will seek immediate clarification through the chain of command. So now we have a feasible and legal mission; let us move on to the next phase.

### THE PLAN

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We can sum up the legal aspects involved in the planning process in three points:

- the need for good intelligence;
- the precautions that must be taken;
- the final analysis, or, as it is sometimes called, the “battle appreciation”, where all factors are taken into consideration to ensure that your best course of action based on the tactical situation complies with the law.

#### Intelligence

Intelligence information is the starting point of any plan. Commanders will be eager to gather as much information as they can to assist them in fulfilling their mission. Certainly, information on the enemy’s strength, location, etc., and on civilian concentrations, protected property, and so on, is of great importance. This information must of course be up to date.



### [ Slide 6 ]

The law is straightforward in this respect, and many of you will remember that it is perfectly legitimate to search for information of military value in enemy controlled areas as long as the soldiers doing so are in uniform and do not conceal their combatant status. In other words, they will be considered spies if they collect the information in a clandestine manner. While espionage is not prohibited by the law, any soldiers captured while operating in this way (i.e. undercover and not in uniform) lose their POW status and can face severe punishment. Reconnaissance patrols, special forces patrols, air reconnaissance and so on are all well within the law.



HR IV, Art. 29  
GP I, Art. 46

What about obtaining intelligence from captured soldiers or civilians?

Again, the law gives clear guidance. Captured soldiers may be tactically questioned, but they are obliged to give you no more than their number, rank, name and date of birth. They must not be tortured or coerced into passing on intelligence information.

Civilians cannot be ill-treated or compelled to give you information either. You can certainly ask for information from both and you might well get it. The point is, don't resort to torture or any form of coercion. You might also wish to consider whether tactical information of this sort is actually worth much to you. Is it accurate? Is it being given out of fear or to mislead you? It might be better to rely on expert intelligence gained in the proper manner through the intelligence system and by trained interrogators.

### Precautions

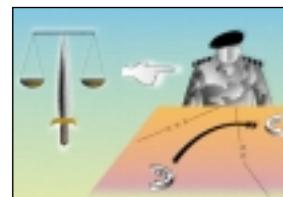
The intelligence process, as well as telling you about the enemy, also lets you know about the precautions to be taken during an operation. You must act accordingly as a matter of routine. Your aim must be to do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection. "Feasible" means that you have to do everything that is practically possible, taking into account all the circumstances ruling at the time, including **both** humanitarian and military considerations. Your choice of means and methods of attack must aim at minimizing civilian casualties and must ensure that you will not decide to launch an attack which may be expected to cause collateral damage which would be excessive in relation to the concrete and direct military advantage anticipated. As you can see, even in the normal process of planning the law comes into play and must influence your final decisions.

HR IV, Art. 23  
GP I, Arts. 57 & 58

## The final analysis

### [Slide 7]

The time has now come for you to make your final decision. You have all the factors any good commander needs to do this. You have the necessary intelligence to avoid hitting an unlawful target. You know what precautions you need to take in order to avoid or at least minimize civilian casualties and damage. On this basis, you can decide what measures can be taken to achieve your mission, while at the same time ensuring you comply with your legal obligations. As you can see, the process is quite simple and logical. The law, as we have said, reflects good military practice and professionalism.



## ORDERS

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### [Slide 8]

The next stage in the business of operational command is to pass your decisions on to your subordinates in the form of orders. These orders must, of course, be practicable and in conformity with the law. They must clearly state the mission and the military details of how it will be achieved. They must include clear rules on how you intend getting the intelligence you need to achieve your aim and comply with the law, e.g. reconnaissance patrols need to be carefully briefed.

The orders must clearly indicate localities and objects to be avoided. They must give exact details for the rapid evacuation of the wounded, for the treatment and evacuation of any POWs, for respect and collection of the dead, including those of the enemy. They must give clear rules of engagement, e.g. orders for opening fire and on the use of particular weapons.

Where relevant, the orders will cover interaction with the civilian population. They may include warnings for civilians not to use certain routes or to take shelter, advice for them to evacuate certain areas such as tactically important parts of a town. Orders might be required to provide for assistance in this evacuation, or concerning liaison with the civilian medical authorities and the joint use of medical facilities. The element of surprise may preclude some such orders, but they must be given wherever feasible.



GP I, Arts. 57 & 58

### CONTROL

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Control is the last step in the exercise of operational command. Its purpose is to ensure that orders are carried out according to the plan.

You cannot just give orders and then relax. Commanders remain responsible throughout for the conduct of their subordinates. They may have to intervene by radio or directly to correct a course of action or to impose their leadership from the front.

We know that a commander will control the battle through a command post, perhaps from a tank, or even on the ground next to his radio operator. Commanders who have trained their troops well should have few problems with breaches of the law. The troops know their job. They know what they can and cannot do. Thanks to clear orders and team work, they know exactly what their commander expects of them.

Not all battles go exactly to plan – there is a military saying that quite often “the plan is the first casualty of war”. **Adjustments** may well have to be made by commanders and hasty orders issued over the radio or in person. Subordinates may have to use their initiative. What happens if the commander is killed? Maintenance of momentum is a key principle of war. Hesitation or delay may well lose you the day. So the second-in-command may have to take over and all ranks down the chain of command in the unit will have to use common sense and flexibility to ensure they achieve the original mission within the law of armed conflict.

**Let us look at a few examples to highlight the points we have made so far. Imagine you are commanding your unit on operations.**

While attacking a town, you discover that there is a civilian hospital on the main axis of advance. You had been unaware of its existence, despite your efforts to gain good intelligence. It is clearly marked with the red cross or red crescent (red lion and sun). The area of the building was registered in your orders as a possible defensive fire (DF) task for your supporting artillery battery. The artillery will engage it on a pre-planned and timed fire plan. What should you do?

**Or**

You know that the town has a museum clearly marked and known to all as protected cultural property. Your original orders stated that this building was to be avoided. You first notice a radio antenna on the roof. Then suddenly you come under effective fire from it. Five of your leading platoon are killed. What can you do?

In the first example, a good commander would issue rapid radio orders and cancel the fire mission for the artillery. In the second, he would implement the principle of proportionality and would engage with suitable weapons to neutralize his opponents while trying his best to minimize the damage if at all possible.

GP I, Arts. 51 (5b)  
& 57 (2a(ii) & (iii) & b)

**Let us look at one more example.**

Your leading platoon is approaching its final objective. Suddenly they see their opponents waving white flags. What does this mean? Not necessarily surrender, but maybe the enemy wants to negotiate. Your lead platoon commander shouts to them to send forward men to negotiate and decides to go forward himself with his radio operator into no-man's land to hear what they have to say. As they move forward, your officer and his radio operator are shot down by machine-gun fire. What do you do?

Your opponents have lost their right to protection under the white flag. Obviously military necessity dictates that you now neutralize them. It does not mean you now have the right to issue the illegal order "no quarter", or no survivors. You come back to the law and despite your anger and frustration you contain your feelings and fight on under the rules. That is, as hard as you can, but with due regard for the injured and captured. Remember in all cases such as this that although the law has been broken, you are not justified in overreacting or violating the law yourself. This is an example of an extremely difficult command situation. You must deal with these and similar situations with a cool head and tight control. That is why YOU ARE IN COMMAND.

## 6. COMMAND IN SPECIAL CASES

These sections can be regarded as optional, to be included only as required, e.g. if the students are about to deploy on UN operations or on internal security duties.

Let us now look at some special or more difficult cases before we leave the subject of command responsibility. A conventional operation is in fact reasonably simple for a well-trained commander and his troops. The opponent is definable. The mission is straightforward, e.g. destroy the enemy on hill X. What about less conventional operations, for example, reconnaissance patrols or raids in enemy-held territory? What about United Nations peace-keeping and peace-enforcement operations or internal security operations? We will briefly outline the special problems of command in relation to these operations.

### OPERATIONS IN ENEMY-CONTROLLED TERRITORY

For operations like patrols or raids, higher commanders will need to issue very specific orders tailored to the task. These operations place considerable responsibility on the shoulders of the patrol leaders, junior officers or non-commissioned officers who are operating independently in a highly dangerous environment. Although they are on their own, they must act within the law. Orders here might well cover such additional details as:

**Action on capture** – expected behaviour, e.g. what to do with documents of military value, duty or not to escape, rights if captured, what to say when questioned.

**Action if compromised – let us use an example.** You command a reconnaissance patrol and despite your best efforts to avoid detection, the enemy discovers you. A fight ensues. You kill three of the enemy and capture one who has a minor bullet wound in the arm. What do you do now?

Let's take the same patrol, but this time you are discovered by three passing farmers. You capture them. What do you do with them?

These are real operational dilemmas that any junior commander might face. In both cases, the patrol has obviously been discovered, the sound of shooting may have alerted others. Will the commander abort or cancel his mission, change positions or just lie low and continue later? These are purely tactical decisions. What about the legal aspects? Here the law does give guidance. In relation to wounded soldiers, it states that in unusual conditions of combat which prevent evacuation they should be released and all feasible precautions taken to ensure their safety. Regarding civilians, we know full well that they are protected by the law.

GP I, Art. 41

What are a commander's options in such circumstances? To kill the soldier and civilians would clearly be a grave breach of the law, i.e. a war crime.

To take the civilians with the patrol is obviously impractical. They could, however, be left where they are, perhaps loosely tied up to give the patrol enough time to make a clean break.

As for the wounded soldier, if the patrol decides to abort its mission it might well have the ability to move to a rendezvous position and be picked up by helicopter. In that case, it could take the enemy soldier along, having attended to any wounds. Distance and the severity of the wound will be a determining factor.

A more likely scenario is that the soldier will be left behind. The patrol should bear in mind the law and do everything it feasibly can to ensure

the wounded enemy's safety. It can arrange a drop in or close to a village on a road where the soldier is likely to be discovered. It can leave behind first-aid material.

Again, commanders are required to balance pure military necessity, i.e. accomplishing the mission or returning the patrol safely to base, against concern for humanity and correct treatment of wounded combatants.

### UNITED NATIONS MISSIONS

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United Nations missions can pose some of the greatest problems for commanders. They can be extremely complicated militarily and politically. The real test of any commander is to know exactly what law applies and ensure orders to subordinates are quite clear. The success of such operations often depends on individual initiative exercised at relatively low levels. The burden of responsibility often rests at platoon commander level and below.

Many of the command responsibilities we have already mentioned continue to apply. Depending on the nature of the mission, however, different command responses will be required.

#### [ Slide 9 ]

**For peace-keeping operations** – The need for neutrality and impartiality in dealing with all sides is vital. There is no enemy. There are no sides. You are there to maintain or help restore peace. Soldiers unused to such operations need careful pre-deployment training and briefing. The use of force now becomes a last resort. This is a major change for soldiers who in the main are trained for conventional operations where massive use of force is required. The rules regarding the use of force only in self-defence will have to be clearly explained.

As stated in the *Secretary-General's Bulletin on International Humanitarian Law*, (see Annex B of the *User's Guide* for this section), which discusses the law's applicability to United Nations peace-keeping forces, the fundamental principles of the law of armed conflict will apply. Your own military law certainly applies, as does human rights law. In addition, commanders will have to acquaint themselves with the laws of the host country, as well as the particular rules laid down by the United Nations headquarters commanding the mission.

**For peace-enforcement operations** – States providing troops for peace-enforcement operations do so on behalf of the international community under the authority of the United Nations Charter. However, each contingent



is bound not only by its own military law but also by any international law of armed conflict treaties its country has ratified. The Geneva Conventions and other instruments of humanitarian law will therefore apply, as will customary international law. In addition, the United Nations has issued specific guidelines on the observance by United Nations forces of the law of armed conflict, namely the *Bulletin* mentioned above.

These operations place great responsibility on commanders at all levels. Although neutrality may no longer be an issue, dealing in an even-handed manner with all sides to the conflict certainly does. The need for an impartial approach remains of paramount importance and should be a feature of all briefings and orders. Rules of engagement will be issued by headquarters and need to be carefully explained to subordinates. The treatment of troublemakers or even captured armed personnel needs to be absolutely clear. Troops will need to know their rights and responsibilities when dealing with humanitarian organizations.

### INTERNAL SECURITY OPERATIONS

This can be used here or included in the section devoted to this level of operations.

#### [ Slide 10 ]

These are operations that fall below the threshold of the law of armed conflict, i.e. even below GC common Article 3. What law is available to guide the commander and how should one approach such operations? Your State's law and your military law will apply. In addition, human rights law comes to the fore and must guide your actions. In practical terms, however, much of what we have already covered still applies. Let us take a typical internal security operation and highlight the key command issues.

The task might be to calm a demonstration which is getting out of control and has the makings of a full-blown riot. Some demonstrators are thought to be carrying small arms, some are equipped with home-made nail bombs and Molotov cocktails (i.e. petrol bombs). A mission not entirely without its problems. Some demonstrators, we know, are armed but they will not be carrying their weapons openly. They will naturally wish to blend in with the civilian demonstrators. These operations can be among the most difficult faced by military commanders and their troops in that they are called on to act somewhere between a soldier and a policeman.



Who is the enemy?

Here the orders and intelligence process have to be first class in order to avoid unnecessary casualties and achieve the aim. There must be clear orders for opening fire, for control of fire, for treatment of civilians. Absolute control during the operation is essential. Things can easily get out of hand. The troops might overreact, or your opponents draw you into breaking the law. It may indeed be their aim to discredit the military and gain publicity or sympathy for their cause.

Good command, control, training and flexibility are the keys to success. Remember, in these situations you are dealing with your own people on your own territory. Obviously they deserve treatment that is no less than that you give an external foe. There is no reason why soldiers trained in the law of armed conflict should not apply its basic principles even at this lower level of violence. In addition, other principles more related to human rights law come into play, such as the need to use minimum force to achieve the aim, the need for restraint, the obligation to use weapons as a last resort. These concepts have to be explained and implemented. The common denominators for any operation remain intact:

- clearly define the opponents and make absolutely sure you distinguish them from innocent civilians;
- use force only as a last resort and only against clearly defined targets;
- respect property, religious centres, hospitals and persons such as medical staff, religious personnel, the wounded and sick. Pay particular attention to the safety of and respect for women, children and the aged.

If you fail to respect any of the above, you are breaking the law and will soon lose the respect and support of the civilian population, whom it is your duty to protect.

### SUMMARY OF THE LESSON

**Commanders at all levels are responsible for ensuring respect for the law of armed conflict. They will achieve this by knowing the rules that apply to the phases of battle and to different types of conflict. They must then make sure that the troops under their command comply with the law, by clearly demonstrating their interest and emphasis on training in the law in peacetime and by their conduct in operations.**

**Commanders should regard the law as an aid, not a hindrance. If commanders operate within the law, they are protected by their superiors and their State. If they go beyond the law, they are on their own.**

Questions from the class.

## APPENDIX

### Questions from the instructor to the class to confirm the lesson

1. Commanders can be tried for war crimes even though they personally neither committed, directed or ordered the commission thereof. True or false?

Answer: **true**.

### Examples of this:

A. **The General Yamashita trial.** At the conclusion of World War II, the Japanese General Yamashita was tried, convicted and hanged because he "... unlawfully disregarded and failed to discharge his duty as a commander, to control the operations of the members of his command, permitting them to commit brutal atrocities (...) and he (...) thereby violated the laws of war". There was no allegation that General Yamashita either personally committed, directed or ordered the commission of any crimes, yet he was found guilty for failing as a commander to take those steps necessary to halt the atrocities being committed and punish the perpetrators. It is inherent in the nature of command to have control and responsibility over troops and the capability to influence the actions of subordinates.

Source see Supreme court of the United States 327 US 1 (1946)

General Douglas MacArthur, in reviewing and approving the findings of the military tribunal trying Yamashita, had this to say: "This officer of proven field merit and entrusted with high command involving authority adequate to his responsibility has failed this stand: has failed his duty to his troops, to his country, to his enemy, and to mankind; has failed utterly his soldierly faith".

B. The **Queenfish case** also illustrates the point. In 1945 the commander of the United States submarine *Queenfish* torpedoed a Japanese ship which had been granted safe conduct by superior headquarters. Although this information had been received on board the submarine, the commander was unaware of it. The court martial nevertheless found him guilty because he was responsible for the inefficient internal procedures on the submarine which resulted in his not being informed.

2. You receive an order which you know to be illegal, one that calls for the commission of an atrocity or otherwise violates the law of armed conflict. You must nevertheless enforce the order from higher authority and in doing so you will not be held personally responsible for the commission of a war crime. True or false?

Answer: **false**.

If you know that an order is a direct violation of the law and still implement it, you and the individual issuing the order can be held personally accountable.

## EXAMPLES AND CASES

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### Illegal orders / superior orders

#### **The My Lai massacre, Vietnam, 1968**

Lt. Calley was a platoon leader in a United States infantry battalion during the Vietnam War. His company was part of an organization known as Task Force Barker, whose mission was to subdue and drive out the enemy in an area in the Republic of Vietnam known as Pinkville. Before 16 March 1968, this area, which included the village of My Lai, was a Viet Cong stronghold. Lt. Calley's company, C Company, had operated in the area several times. Each time it had suffered casualties by sniper fire, machine-gun fire, mines and other forms of attack. Lt. Calley had accompanied his platoon on some of the incursions.

On 15 March 1968, a memorial service was held for members of the company killed in the area during the preceding weeks. After the service, Capt. Ernest L. Medina, the commanding officer of C Company, briefed the company on a mission in the Pinkville area set for the next day. Intelligence reports indicated that the unit would be opposed by a veteran enemy battalion and that all civilians would be absent from the area. **The mission was to destroy the enemy** (author's emphasis).

There was some argument later in the courtmartial proceedings as to exactly what was meant by the instructions "to destroy". Capt. Medina testified that he instructed his troops that they were to destroy My Lai by "burning the hootches, to kill the livestock, to close the wells and to destroy the food crops". Asked if women and children were to be killed, Medina said he replied in the negative, adding, "You must use your common sense. If they have a weapon and are trying to engage you, then you can shoot back".

## COMMAND RESPONSIBILITY

Lt. Calley, however, testified that Capt. Medina informed the troops they were to kill every living thing – men, women, children and animals, and under no circumstances were they to leave any Vietnamese behind them as they passed through the villages en route to their final objective.

The operation began on 16 March 1968 with interdicting fire. C Company was then brought in by helicopters. Lt. Calley's platoon was on the first lift. The unit received no hostile fire from the village.

On entering the village the platoon encountered only unarmed, unresisting men, women and children. The villagers were rounded up into collecting points. Lt. Calley testified that at this point Capt. Medina ordered him over the radio to "waste the villagers". Lt. Calley further testified that he obeyed the orders because he had been taught the doctrine of obedience throughout his military career. Capt. Medina denied ever giving such an order.

Lt. Calley subsequently carried out and was found guilty of the acts described below.

He told Pfc Paul D. Meadlo, who was guarding a group of 30 to 40 old men and women and children, "You know what to do". He then left. On his return, he asked Pfc Meadlo why the people were not yet dead. Meadlo replied he did not know that Lt. Calley had meant that they should be killed. Lt. Calley declared he wanted them dead. He and Pfc Meadlo then opened fire on the group, until all but a few children remained alive. Lt. Calley then personally shot these children. He expended 4 or 5 magazines from his M-16 rifle in the incident.

Lt. Calley and Pfc Meadlo then moved from this point to an irrigation ditch on the east side of My Lai. There they encountered another group of civilians being held by several soldiers. Pfc Meadlo estimated that this group contained from 75 to 100 persons. Lt. Calley stated, "We got another job to do, Meadlo". He ordered the group into the ditch and then he and Pfc Meadlo opened fire on them. Although ordered by Lt. Calley to shoot, Pfc James J. Dursi refused to join in the killings, and specialist Four Robert E. Maples refused to give his machine gun to Lt. Calley for use in the killings. Lt. Calley admitted that he fired into the ditch, with the muzzle of his weapon within 5 feet of people in it. He expended between 10 to 15 magazines of ammunition on this occasion.

With the radio operator, Private Charles Sledge, Lt. Calley moved to the north end of the ditch. There, he found an elderly Vietnamese monk, whom he interrogated, struck with his rifle and then shot in the head.

Lt. Calley admitted interrogating and striking the monk but denied shooting him. He also denied that he had shot at a child running away from the village.

Lt. Calley based his defence on superior orders, on ignorance of the laws of war and on the fact that it was his honest belief that there were no innocent civilians in the village.

The court martial found Lt. Calley guilty of the above offences. He was dismissed from the army and sentenced to confinement at hard labour for 20 years. The second part of the sentence was subsequently overturned. **In summing up the case, Judge Quinn had this to say: “Whether Lt. Calley was the most ignorant person in the United States Army in Vietnam, or the most intelligent, he must be presumed to know that he could not kill the people involved there”** (author’s emphasis).

*Source: H.S. Levie (ed), International Law Studies, Documents on Prisoners of War, Naval War College, R.I.; Naval War College, Vol. 60, Document No. 171, 1979, pp. 804-811.*

### **The Intifada, 1988**

In January 1988, one month into the Intifada uprising against occupation of the West Bank and Gaza Strip, Col. Yehuda Meir ordered troops under his command to round up twenty Palestinian men from Hawara and Beita, two Arab villages in the West Bank, bind them with handcuffs and blindfolds, and break their bones. The unit commander reporting to Col. Meir passed on the order to his troops, but told them he did not require them to comply. Some soldiers refrained from doing so, but others carried out the order with such zeal that they broke their truncheons. The Israeli Defence Minister at the time publicly spoke of the need to “break the bones of Intifada rioters”. The Israeli High Court of Justice subsequently ruled unanimously that Col. Meir should be tried in a special military tribunal for torture, intentionally causing bodily harm, grievous assault – all grave breaches of the Geneva Conventions – and unbecoming conduct. “These actions outrage every civilized person, and no lack of clarity can cover it up”, Justice Moshe Bejski said. “Certainly, if the order is given by a senior officer, that officer must be aware that the morality of the Israeli Defence Forces forbids such conduct.” Following the High Court’s decision, Col. Meir went on trial before a special military tribunal in Tel Aviv in April 1991. He was found guilty, demoted to the rank of private and deprived of his colonel’s pension.

*Source: N. Bar-Yaacov in Crimes of War: What the public should know, R. Gutman & D. Rieff (eds.), W.W. Norton & Co., New York/London, p. 98.*

## ANNEX A

### WAR CRIMES

The list below is taken verbatim from the Rome Statute of the International Criminal Court. For ease of reference, the same article and paragraph numbers are used as in the Statute.

Certain provisions are marked in bold for the sake of clarity, as are certain crimes not mentioned by the Statute but included in Protocol I of 1977 additional to the 1949 Geneva Conventions.

#### CRIMES WITHIN THE JURISDICTION OF THE COURT

Article 5

**The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:**

- (a) the crime of genocide;
- (b) crimes against humanity;
- (c) war crimes;
- (d) the crime of aggression.

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

#### GENOCIDE

Article 6<sup>1</sup>

**For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:**

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (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;
- (e) forcibly transferring children of the group to another group.

<sup>1</sup> This article is applicable in peacetime as well as during armed conflict.

## CRIMES AGAINST HUMANITY

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Article 7<sup>2</sup>

**For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:**

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation or forcible transfer of population;
- (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) torture;
- (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) enforced disappearance of persons;
- (j) the crime of apartheid;
- (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

## WAR CRIMES

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**For the purpose of this Statute, “war crimes” means:**

Article 8

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (i) wilful killing;
- (ii) torture or inhuman treatment, including biological experiments;
- (iii) Wilfully causing great suffering, or serious injury to body or health;

<sup>2</sup> Crimes against humanity may be committed during an armed conflict or in time of peace.

- (iv) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (vi) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) unlawful deportation or transfer or unlawful confinement;
- (viii) taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

- (i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (iii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (vi) killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- (vii) making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (viii) the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

- (x) subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) declaring that no quarter will be given;
- (xiii) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) pillaging a town or place, even when taken by assault;
- (xvii) employing poison or poisoned weapons;
- (xviii) employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
- (xxi) committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (xxiii) utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- (xxiv) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

- (xxv) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- (xxvi) conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) **In the case of an armed conflict not of an international character**, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

- (i) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (ii) committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) taking of hostages;
- (iv) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

- (i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

- (iii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (v) pillaging a town or place, even when taken by assault;
- (vi) committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
- (vii) conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
- (viii) ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- (ix) killing or wounding treacherously a combatant adversary;
- (x) declaring that no quarter will be given;
- (xi) subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xii) destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

### ADDITIONAL GRAVE BREACHES NOT MENTIONED IN THE STATUTE

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GP I provides that the following acts constitute breaches if they are committed wilfully, in violation of the relevant provisions of the Protocol, and cause death or serious injury to body or health:

- launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive collateral civilian damage;
- making non-defended localities and demilitarized zones the object of attack.

GP I, Art. 85 (3 c & d)

GP I also provides that certain other acts are grave breaches when committed wilfully and in violation of the Geneva Conventions or GP I, in particular:

- unjustifiable delay in repatriating POWs or civilians.

GP I, Art. 85 (4)(b)

### ANNEX B

#### DEFENCE TO WAR CRIMES CHARGES

##### ACCIDENT

**The fact that death or damage was caused by accident may be a defence.**

If the death of a protected person or damage to protected property resulted from a mistake, the malfunctioning of a weapon, an accident (for example, if you intended to target an enemy combatant but the bullet went astray and you hit a civilian instead), a ricochet, or the accidental discharge of your personal weapon, that might be a defence, **the reason being you did not intend to hit the civilian**. The necessary wilful intent is not present. This is an issue of fact for a tribunal to determine. If the tribunal considers that death, damage or injury may have been caused by mistake, the accused would be entitled to acquittal on that charge, unless he or she is judged to have acted recklessly.

##### DURESS

Persons accused of war crimes are entitled to plead that they acted under duress. They might, for example, have felt an immediate and

real fear for their own lives or been under the threat of continuing or imminent serious bodily harm to them or another person. This would be the exception rather than the rule, as it would be very difficult to prove. It would not be sufficient, however, that they were threatened with subsequent disciplinary or punitive action if they failed to commit the act in question, although in such circumstances the threat may be considered in mitigation of punishment.<sup>3</sup>

### IGNORANCE OF THE LAW

Ignorance of the law is no defence, but if the law is unclear, the accused should be given the benefit of the doubt or awarded only a nominal punishment.

### MISTAKE OF FACT

**Mistake of fact is a defence if it negates the mental element required for a crime.<sup>4</sup>**

So, for example, if a tank troop commander is ordered to fire at an enemy command post in a particular building and he does so, on the basis of all available up-to-date intelligence, believing that it is a command post but it later turns out that, unbeknown to him, it was a school, he would not be guilty of a war crime because he did not intend to attack a school.

### SUPERIOR ORDERS

**Superior orders are no defence to war crimes charges but may be taken into account in mitigation of punishment.<sup>5</sup>**

### MILITARY NECESSITY

A person accused of war crimes cannot plead military necessity, unless the act in question relates to the breach of a rule which stipulates that military necessity may be taken into consideration.

*3 Statute of the International Criminal Court, Art. 31, para.1(d). The judgement of 7 October 1997 of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the Erdemovic case held that duress was not an absolute defence to war crimes.*

*4 Statute of the International Criminal Court, Art 32*

*5. Art. 33 of the Statute of the International Criminal Court states, however, that superior orders do not relieve a person of criminal responsibility unless:*

*a. the person was under a legal obligation to obey orders of the government or the superior in question;*  
*b. the person did not know that the order was unlawful; and*  
*c. the order was not manifestly unlawful.*



# LAND

