



Staff Officer Responsibility for War Crimes

“I was just following orders.” Such a defense for immoral acts has picked up a cowardly odor that eclipses any value of obedience. We train soldiers to behave morally in combat and other ambiguous operations, but considerations can be even more complex for planners than for operators. Davidson explains the Byzantine rules for staff officers who might never pull a trigger, push a button or hurt a soul—but be guilty of war crimes nevertheless.

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IN 1945 BRITISH and American bombers devastated Dresden, Germany. On the night of 13 February the Royal Air Force dropped 2,646 tons of bombs—44 percent incendiaries—into the heart of the city. The next day US Eighth Air Force bombers dropped 771 tons—38 percent incendiaries—aiming at Dresden’s marshaling yards.¹ Besides destroying the city’s military industrial capacity and railroad marshaling yards, the aerial attack caused “exceptionally high” civilian casualties and substantial damage to the city’s residential areas.²

The legal justification for these raids has been widely debated; the legal rules affecting aerial bombardment were not codified until after World War II. While some have suggested that “the attack on Dresden might have been illegal,” other commentators consider Dresden to have been a “legitimate military target.”³ Assuming that the most controversial aspects of the Dresden bombings would be considered a violation of the laws of armed conflict if carried out today, what responsibility does the planning staff bear for such an attack?

During the Vietnam War, US soldiers of the American Division massacred hundreds of South Vietnamese civilians near the village of My Lai. Division Commander Major General Samuel Koster and Assistant Division Commander Brigadier General George Young were initially charged, but the charges were later dismissed and the officers were ad-

ministratively punished.⁴ Lower-level commanders were court-martialed. Brigade Commander Colonel Oran Henderson and Company Commander Captain Ernest Medina were acquitted. Platoon Leader Lieutenant William Calley was convicted, but eventually, the Secretary of the Army paroled him. These trials, especially Calley’s, are relatively well-known events and were the basis for books and articles about command responsibility for war crimes and the availability of a superior-orders defense.

However, buried as a historical footnote in that dark chapter of US military history was the recommendation to prosecute several staff officers involved in the operation. Following his investigation of the My Lai massacre for the Army, Lieutenant General William R. Peers and his investigative team made highly unusual and largely unprecedented recommendations. The Peers Commission proposed that charges also be preferred against a number of American staff officers, including the division chief of staff, the brigade operations officer, the task force operations and intelligence officers, and the division chaplain.⁵

Much has been written about war crime responsibility by those who order and commit them, but little has been written about the responsibility of those who facilitate such offenses. US staff officers are the envy of other armed forces. When told to “make it happen,” they overcome any obstacle

to accomplish the mission. Unfortunately, the same qualities that make US staff officers some of the world's best create a potential nidus for perpetuating illegal orders during wartime. Because most officers spend more time as staffers than commanders, discussing staff officer responsibility for law-of-war violations appears particularly germane.

This article discusses both the Allied actions at Dresden and US soldier conduct at My Lai but does not imply an analogy between the two. Each is merely a historical example used to discuss the law of armed conflict as it applies today. Further, this article does not purport to address the Dresden raid's legality under the legal standards of the time.

Nuremberg

After World War II, the victorious Allies tried major Nazi war criminals before an international military tribunal at Nuremberg, Germany. Military courts of the various Allied nations, such as France, Russia, Britain and the United States, tried lesser officials. By 1948 approximately 3,500 Germans had been tried for war crimes; similar trials of another 2,800 Japanese war criminals had been held in the Far East.⁶

The Nuremberg war crimes trials, and others conducted by individual nations throughout Europe and the Far East, defined and formulated international law for war crimes. The legal precedents established at Nuremberg constitute international law and, as such, are part of US law.⁷ Accordingly, the war crimes trials define standards of wartime conduct for US military personnel and for enemy soldiers charged with war crimes by an international tribunal or by a US military tribunal or courts-martial.⁸

In the German High Command trial, 14 high-ranking German officers were prosecuted before an American tribunal for war crimes, conspiracy and crimes against peace and humanity.⁹ The charges included several war crimes, including implementing illegal orders to execute Allied commandos and Soviet commissars and to punish enemy civilians collectively to discourage partisan attacks. This case specifically addressed the issue of staff officer responsibility for war crimes.

For staff officers, generally, the tribunal explained that "[t]he basic criminal offence is in the essential part a staff officer performs in making effective the criminal whole."¹⁰ The tribunal summarized the standard for legal responsibility for war crimes: a staff officer who takes an illegal idea and "puts that idea into the form of a military order, either himself or through subordinates under him, or takes personal action to see that it is properly distributed to those units where it becomes effective, commits a criminal act under international law."¹¹

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The rationale for holding staff members criminally responsible for war crimes was best expressed in the Ministries Case. This trial prosecuted civilian Nazi officials, but the tribunal's logic applies equally in the military context: "if the commanders of the death camps who blindly followed orders to murder the unfortunate inmates, if those who implemented or carried out the orders for the deportation of Jews to the East are properly tried, convicted and punished; and of that we have no question whatsoever; then those who in the comparative quiet and peace of ministerial departments, aided the campaign by drafting the necessary decrees, regulations, and directives for its execution are likewise guilty."¹²

In the High Command trial, the US tribunal discussed criminal responsibility for chiefs of staff. As with other staff officers, the tribunal required some type of positive action before criminal responsibility was attached but also noted that chiefs of staff possess a greater potential for war crimes liability. Their authority to issue orders in a commander's name is "a power which varies widely in practice but which may allow sufficient exercise of initiative and discretion to involve the chief of staff in the commission of offenses under the laws and usages of war."¹³

The tribunal acquitted German General Otto Woehler, chief of staff of the 11th Army, for illegal orders that he knew of but did not transmit to subordinate units and for an illegal order issued by a subordinate staff officer over whom Woehler had no command authority. However, the tribunal did find sufficient connection to an unlawful order for conviction when Woehler signed the directive for the commander.¹⁴ Although he had no direct connection with creating or transmitting the order for the *Einsatzgruppen* (killing squads), Woehler was still convicted because he assigned killing squads to Russian locations with full knowledge of their illegal purpose.¹⁵

However, the tribunal appeared to hold the chief of staff criminally liable for orders issued under his signature only if it was the type of order normally issued by a chief of staff under his own volition and not when his signature was merely a rubber stamp for the commander. In other words, the tribunal did

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not view purely ministerial acts as sufficient positive action to invoke criminal responsibility. As the tribunal noted: "It seems then that a chief of staff may be held responsible for war crimes committed as a result of his orders if such orders are not 'basic orders' such as 'necessarily would be submitted to a commander in chief,' but orders which 'a chief of staff would normally issue of his own volition.'"¹⁶

The US Army used the High Command case to derive the following general responsibility standard for both chiefs of staff and other staff officers: "In general, they were not held responsible for orders of a command nature which went out over their signature unless it was shown that they personally had something to do with initiating, drafting, or implementing the criminal order. Of course, their responsibility with respect to the administration of their own staff departments is the same as that of any other military commander."¹⁷

Notice the suggestion that the US military will hold staff principals or department heads to the higher command-responsibility standard. Staff principals would be criminally responsible for a law-of-war violation their staff sections committed if they ordered an illegal act, had actual knowledge of the illegal activity or should have known of it and failed "to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof."¹⁸

The UCMJ

US military personnel who commit war crimes are prosecuted under the Uniform Code of Military Justice (UCMJ). For staff officers who facilitate criminal activity, a number of punitive UCMJ articles are available to form the basis of a court-martial prosecution. However, the applicable theories for prosecuting a staff officer for war crimes can be grouped into two general categories: knowingly facilitating commission of a war crime and failing to bring a crime to light either by concealing or failing to report it.

Facilitating the war crime. Although staff officers may not have ordered the illegal conduct, they can be prosecuted for aiding and abetting its commission. The law considers one who actively assists in a crime to be just as guilty as the person who or-

ders or commits it. Conviction of the crime aiding and abetting, Article 77 of the UCMJ, requires that the accused "[s]hare in the criminal purpose of design" and either "[a]ssist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist, encourage, advise, counsel or command another in the commission of the offense."¹⁹ The requirement that the accused share in the criminal purpose of the illegal order serves to exclude from criminal responsibility the conduct of those who unwittingly facilitate the crime.²⁰

It is not enough that an officer knew that other staff members were preparing an unlawful directive or that the accused was present at a staff meeting in which the illegal order was formalized into written form; the accused must actually take some affirmative action.²¹ The one exception to the requirement for action is when inaction by a soldier with a duty to act "is intended to and does operate as an aid or encouragement to the actual perpetrator."²² Such a scenario could arise if the commander articulates the desire to follow an unlawful course of action, solicits objections from the assembled staff principals, and receives none although the order is clearly illegal.

Almost any action a staff officer would take to facilitate the war crime that is more than purely ministerial should satisfy the positive action requirement. Such actions include drafting the illegal order or offering technical advice during its creation, providing the illegal idea that leads to an order, actively supervising direct subordinates working on the staff action or implementing the directive knowing it to be against the law.

Whenever a group is involved in committing a crime, prosecutors investigate whether the collective action constitutes a criminal conspiracy. Article 81 of the UCMJ permits a conspiracy to be charged as a crime separate from, and in addition to, the underlying offense. The *Manual for Courts-Martial United States (MCM)* declares, "A conspiracy to commit an offense is a separate and distinct offense from the offense which is the object of the conspiracy, and both the conspiracy and the consummated offense which was its object may be charged, tried and punished."²³

To prove a criminal conspiracy, the trial counsel need only prove that the accused was part of an agreement to commit a crime under the UCMJ, and while that agreement existed, any one of the conspirators took action to achieve the goal of the conspiracy. The action that furthers the conspiracy need not be illegal.²⁴ Conspiracy is a popular charge with prosecutors because of the liberality the law provides prosecutors in proving it. Conspiracy need not take a particular form, and the illegal agreement



Korean refugees move through a mountain pass, January 1951. The facts surrounding the deaths of civilians at No Gun Ri are useful for further examination of practical combat options and war crime responsibility.

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“‘can be silent’ or merely a ‘mutual understanding among the parties’ and ‘need not be expressed but need only be implied to sustain a finding of guilty.’”²⁵ Only two knowing participants are necessary to establish a conspiracy, and only one of the two need be subject to the UCMJ.²⁶

Reporting failures. One of the conclusions Peers drew following his My Lai investigation was that there was widespread failure to report suspected war crimes and civilian casualties, despite numerous directives and standing operating procedures (SOPs) requiring such reports.²⁷ Even more damning was the conclusion that individuals within the task force headquarters took affirmative steps to conceal the massacre, including falsifying logs by changing the locations where civilians were reportedly killed.²⁸ A staff officer involved in concealing a war crime may be prosecuted as an accessory after the fact in violation of Article 78, for misprison of a serious offense in violation of Article 134, or for dereliction of duty in violation of Article 92.

A staff officer may be prosecuted as an accessory after the fact if “knowing that an offense punishable [by the UCMJ] has been committed, he receives, comforts or assists the offender in order to hinder or prevent his apprehension, trial, or punishment.”²⁹ The scope of this UCMJ provision includes action either to conceal evidence or to effectuate the offender’s escape or concealment.³⁰ A conviction

requires more than a failure to report a crime; the accused must actually do something to conceal the misconduct or assist the offender in evading legal liability.³¹ This requirement may be satisfied merely by advising that evidence be concealed or destroyed, by feigning ignorance when questioned or by providing false or misleading information about the war crime to an investigator.³²

This punitive article remains applicable even if someone other than US military personnel commits the war crime, as long as the offense itself would be punishable under the UCMJ if committed by US military personnel.³³ US military personnel could be court-martialed for obstructing an allied soldier’s investigation and prosecution, even if the US military is not involved in the war crime and foreign authorities are handling the entire military justice effort.

Misprison is concealing misconduct. This provision of law is normally used when aiding or abetting or conspiracy charges would not be applicable.³⁴ The offense reaches not only the concealment of the offense but also action taken to conceal the identity of those responsible for the crime.³⁵ A soldier is not guilty of this crime merely by the “failure or refusal to disclose the serious offense without some positive act of concealment.”³⁶ The act of falsifying a unit log, such as occurred at the Task Force *Barker* headquarters following the My Lai massacre, would be a positive act of concealment. It is not a defense

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to claim that the accused was protecting the unit’s reputation or acting for the good of the service rather than being motivated by a desire to help those who committed the crime.³⁷

Even if a soldier does not try to conceal the offense or hinder an investigation, failing to report a war crime may still be a crime charged under Article 92. If a reporting requirement is contained in a general order or other written regulation, then failing to report the war crime may constitute a crime. If the accused had a duty to report the war crime by virtue of any “treaty, statute, regulation, lawful order, standard operating procedure or custom of the service,” then failing to report the misconduct may constitute dereliction of duty, also in violation of Article 92. Department of Defense Directive 5100.77 mandates reporting any “possible, suspected, or alleged violation of the law of war” through the soldier’s chain of command, the military police, the Judge Advocate General’s Office or the Inspector General.³⁸ Any commander who receives information about a possible war crime must “immediately report the incident through command channels to higher authority.”³⁹ The higher-level commander must request that military investigators initiate a formal investigation and must also submit a report to the chain of command.⁴⁰

The Defense of Superior Orders Applied to Staff Officers

Because the defense of superior orders will likely be raised as a defense for any staff officer accused of committing a war crime, a review of the law on that issue is warranted. Almost universally, the world’s military legal codes grant a presumption of legality to military orders.⁴¹ The military law of the United States also follows this presumption of validity. The Army Court of Criminal Appeals recently stated, “An order is presumed to be lawful. A soldier disobeys an order ‘on his own personal responsibility and at his own risk.’”⁴² The *MCM* contains similar language: “An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate.”⁴³

Orders that are obviously illegal can only be over-

come by this presumption of legality. The *MCM* provides that “a patently illegal order” enjoys no presumption of legality.⁴⁴ To illustrate such an order, the *MCM* offers “one that directs the commission of a crime.”⁴⁵ This language is not particularly helpful because not all orders to commit a crime are clearly illegal. For example, calling in white phosphorous on defenseless civilians *solely* to increase their suffering is unquestionably an illegal act by the forward observer, but the artillery or mortar unit responding to the call for fire and its officers or non-commissioned officers who direct the fire mission may not know, and may not reasonably be expected to know, that the forward observer is committing a war crime.

Rule for Courts-Martial (R.C.M.) 916(d) fleshes out this concept only slightly. The rule states that superior orders are a defense “unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.” US Army Field Manual (FM) 27-10, *Law of Land Warfare*, contains similar language.⁴⁶ In other words, unless soldiers know an order is illegal or should know it is illegal, they may safely follow it. Indeed, R.C.M. 916(d) specifically states that unless the accused knew or should have known of the order’s illegality, “[a]n act performed pursuant to an unlawful order is excused.”⁴⁷

Other nations’ military law generally presumes that an order is lawful and uses similar sounding language to describe orders whose illegality is so clear that they must be refused. This level of illegality has been described as “manifest, outrageous, gross, palpable, indisputable, clear and unequivocal, transparent, obvious, without any doubt whatsoever, or universally known to everybody.”⁴⁸ In the High Command case, the tribunal attempted to clarify the concept by defining an obviously illegal order as one “in evident contradiction to all human morality and every international usage of warfare.”⁴⁹ Clearly, the standard for an obviously or “palpably” illegal order is a high one. There should be no reasonable doubt in any rational person’s mind that the order is against the law, even in the context of armed conflict.

Unfortunately, there is no inclusive list of clearly illegal orders, and an illegal order in one context may become legal in another. Some acts are so clearly wrong that they cannot be justified. For example, an order to engage in mass rape is patently illegal.⁵⁰ In addition to violating Article 120 of the UCMJ, the International Committee of the Red Cross declared rape a war crime. The US Department of State and the United Nations Tribunal have prosecuted rape crimes committed in the former Yugoslavia.⁵¹ An order not to report a suspected war

crime within proper military channels would also be clearly illegal.

Military case law offers at least two wartime examples of patently illegal orders, both of which involved unlawfully killing noncombatants. In *United States v. Calley*, an American infantry lieutenant was convicted of murdering “22 infants, children, women, and old men, and of assault with intent to murder a child of about 2 years of age.”⁵² At trial, Calley had unsuccessfully defended his actions, arguing that he merely carried out his company commander’s orders.⁵³ In upholding Calley’s convictions, Judge Quinn, writing for the US Court of Military Appeals, found the order “to kill infants and unarmed civilians who were so demonstrably incapable of resistance to the armed might of a military force as were those killed by Calley is palpably illegal. In the stress of combat, a member of the armed forces cannot reasonably be expected to make a refined legal judgment and be held criminally responsible if he guesses wrong on a question as to which there may be considerable disagreement. But there is no disagreement as to the illegality of the order to kill in this case. For 100 years, it has been a settled rule of American law that even in war the summary killing of an enemy who has submitted to, and is under, effective physical control, is murder.”⁵⁴

In *United States v. Griffen*, Staff Sergeant Walter Griffen, an infantryman assigned to the 1st Cavalry Division, was convicted of murdering a Vietnamese detainee. Following a direct order from his platoon leader to execute the detainee because he was suspected of being a member of the Viet Cong, Griffen and another soldier marched the hand-tied detainee to a river embankment and shot him several times with M-16 rifles. During the trial, Griffen testified that he heard the company commander order the platoon leader to kill the Vietnamese detainee. The platoon leader gave Griffen a direct order to carry out the company commander’s order. Griffen believed the order was legal because a prior platoon leader was relieved when a detainee escaped, and Griffen believed the detainee posed a threat to his platoon’s safety. Upholding Griffen’s murder conviction, the appeals court noted that the detainee was not trying to escape, was bound, unarmed, unresisting and posed no apparent threat to Griffen or his unit. Finally, addressing the defense of superior orders, the court found the platoon leader’s order to be “palpably illegal on its face,” observing, “it is difficult to conceive of a military situation in which the order of a superior would be more patently wrong.”⁵⁵

Returning to a Dresden-like scenario, assume that a modern-day air staff planned an operation in which the targeting objective was primarily the

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morale of the civilian populace that ultimately caused levels of civilian casualties and property damage disproportionate to the anticipated military advantage and that staff members were charged with a war crime.⁵⁶ Could the staff officers successfully defend superior orders? If the staff knew the aerial bombardment was to specifically target civilians as part of a terror campaign to break the civilian populace’s morale, superior orders should not be an available defense.

Before World War II, it was generally recognized that deliberately killing civilians was prohibited. Unfortunately, no international convention specifically addressed aerial bombardment. In the 1920s, an international legal commission assembled in The Hague and proclaimed, “Aerial bombardment destined to terrorize the civilian population, or to destroy or damage private property which has no military character, or to wound noncombatants, is prohibited.”⁵⁷ The resultant draft Hague Rules of Air Warfare were never adopted.⁵⁸ Also not legally binding, a 1938 Resolution of the League of Nations Assembly sought to outlaw intentional aerial bombardment of civilian populations.⁵⁹

Today, the legal prohibitions on such attacks are clearer. FM 27-10 specifically notes that “customary international law prohibits launching of attacks (including bombardment) against either the civilian populace as such or individual civilians as such.”⁶⁰ Further, Protocol I to the Geneva conventions provides that a “civilian population shall not be the object of attack” and that “acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”⁶¹ Protocol I also prohibits “indiscriminate attacks,” those that by their nature, target military objectives and civilians without distinction, including bombardments that treat separate military targets within a populated city or town as a single target area.⁶²

In contrast, if the staff believed the Dresden attack was legal because it targeted the city’s military industrial capacity and railroad marshaling yards but the raid was later deemed illegal because the

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military advantage was grossly out of proportion to the carnage the bombardment generated, then superior orders could be a legitimate defense. The order to plan and execute the attack might not have been so obviously illegal to the air staff that it would be charged with knowing the raid was illegal.

Like any other area of the law, real-world scenarios inevitably fall into that gray area between what is clearly permitted and what is clearly prohibited. In the context of armed conflict, the line separating what is clearly prohibited shifts and becomes blurred. Conduct considered illegal during peacetime or in a civilian context may be permitted during wartime. The circumstances surrounding the conduct determines its legality; for staff officers, as well as lower-level commanders and their forces, they may not know all the facts that led to the order. This uncertainty is made even more vexing by two conflicting maxims of military law.

First, the military teaches *almost* unquestioning obedience to military orders and enforces its disciplinary requirements through its military justice system. Conversely, that same justice system stands ready to punish soldiers for following clearly illegal orders, expecting them to be rational, reasoning individuals. The US war crimes tribunal rejected the defense of superior orders and convicted various members of the Nazi *Einsatzgruppen* for murdering almost a million civilians in Russia and said, "the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery."⁶³ As one legal commentator explained, "To expect the soldier in combat to evaluate whether his superior's order is justified, on pain of severe punishment if mistaken, would often be unfair. Such evaluation will frequently require knowledge of considerations beyond his awareness. If the law requires him to make an independent legal judgment whenever he receives an order, it also risks eliciting his disobedience to orders that appear wrongful from the soldier's restricted perspective but which are actually justified by larger operational circumstances."⁶⁴

Recently, the press reported a potential war crime that involved US forces killing civilians during the

Korean conflict. The official investigation of the No Gun Ri incident is complete, and the facts surrounding those deaths allow us to further examine war crime responsibility. The incident also highlights why the government should be held to such a high standard before it may punish a soldier, and a staff officer in particular, for war crimes committed in response to superior orders.

It is clearly illegal to line civilians up against a wall and kill them. Conversely, it is clearly proper—indeed encouraged—to engage enemy soldiers who are attacking your position. Less clear is the correctness of firing on enemy soldiers who attack friendly positions, or attempt to infiltrate them, while using civilians as human shields. Clearly, the enemy soldiers are committing war crimes, but what options are legally available to repulse such an attack? Further, if the tactical situation becomes desperate—as it was in Korea before the Inchon landings—and enemy misconduct becomes pervasive, can a high-level commander legally order friendly forces to engage enemy soldiers attempting to infiltrate US lines using civilians to mask or shield their approach? Can a staff officer legally implement or transmit the order?

To answer those questions, lawyers or judge advocates would perform legalistic mental gymnastics, such as alternative courses of action—stay or withdraw, engage with sharpshooters rather than automatic fires or employ tear gas. They would measure the various options against the general principles of the law of war relative to proportionality, military necessity and unnecessary suffering. They could consult FM 27-10 and possibly the Geneva and Hague conventions for guidance, and eventually arrive at a legal conclusion. However, line officers and their supporting staffs rarely have that level of legal training or adequate legal resources, will not always have access to a military lawyer and cannot be expected to independently engage in complicated legal calculus. Further, when operating under the conditions frequently associated with sustained combat operations—fatigue, fear, confusion and limited access to facts—determining whether an order is "palpably" illegal may be difficult. Indeed, trained judge advocates do not always agree on all legal issues involving war crimes, even when presented with identical facts.

The US military has one of the most aggressive bodies of staff officers in the world. The US military has trained its staffs to breach obstacles; commanders expect a positive attitude, and they reinforce it through peer pressure, evaluation reports, awards and promotions.

Unfortunately, this system also contains a number of inherent flaws. The verbal commander's in-

tent may metamorphose into an entirely different creature by the time it is staffed and funneled down to the user-unit level. There are few checks in place to correct a misinterpretation of commander's intent by a chief of staff or senior staff member who generates a staff action based on what he or she believes the commander would have ordered, if asked.

Further, the staff system provides little incentive for staff officers who stand up and question the legality of an order from their commander or staff section leader. It takes a lot of courage to question a staff action, particularly when there might be a plausible explanation or justification for a legally questionable order. Staff officers rarely have all relevant facts and, except for staff principals, may not know the commander's concerns, intent or justification. Staff officers who object to a questionable

order and are later proven wrong risk losing the confidence of peers and superiors, and may hinder their career progression. Except in cases of the most obvious law-of-war violations, staff officers should rely on their superiors' competence and professionalism and assume their orders conform to the law.

Generally, staff officers are not held to the same high standard as commanders. Except for the requirement to report a suspected war crime, staff officers aware of unlawful conduct will not be held criminally liable without affirmatively participating in it. Further, unless an order is clearly illegal, staff officers may safely follow it even if the order is later determined to be unlawful. The law governing staff officer responsibility for war crimes should, and does, reflect the real-world operating environment and a military staff's practical limitations.

NOTES

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43. *Ibid.*, para 14c(2)(a)(i).
44. *Ibid.*
45. FM 27-10, 182.
46. *MCM*, Rule for Courts-Martial 916(d), II-110.
47. Osiel, 952.
48. *Ibid.*
49. Roy Gutman, *A Witness To Genocide* (New York: MacMillan Publishing Co, 1993), 64; Linda A. Malone, "Forgotten Victims: Responsibility Under Law for Systematic Sexual Violence Toward Women During Warfare," *William & Mary Lawyer* (1995), 12-13.
50. *Ibid.*, 14; "Serb Pleads Innocent to Rape Indictment," *Atlanta Journal Constitution*, 29 August 1998, A11; "Bosnian War Crimes Panel Finds Commander Guilty In Rape Case," *The New York Times*, 11 December 1998.
51. 48 C.M.R. (1973), 19 and 21.
52. *Ibid.*, 25.
53. *Ibid.*, 29.
54. 39 C.M.R. (1968), 586, 588 and 590.
55. *Ibid.*
56. At least one objective of the aerial bombardment of Dresden was to break the morale of the German civilian population. See CPT Steven P. Gibbs, "The Applicability of the Laws of Land Warfare to US Army Aviation," *Military Law Review* (1976), 25, 51; Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), 261; Guenter Lewy, *America In Vietnam* (New York: Oxford University Press, 1981), 413.
57. Walzer, "World War II: Why Was This War Different?" 94.
58. Gibbs, 55. At least one legal commentator believes that the rules generally reflected existing customary international law. Other commentators say that Gibbs' conclusion is not supported by State practice in World Wars I or II.
59. LTC William J. Fenrick (Canadian Army), "The Rule of Proportionality and Protocol I In Conventional Warfare," *Military Law Review* (1982), 91 and 96.
60. FM 27-10, (change 1, 1976), 4, para 40.
61. "Protocol Additional to the Geneva Conventions of 12 August 1949;" "Relating to the Protection of Victims of International Armed Conflict (Protocol I)," reprinted in DA Pam 27-1-1, *Protocols to the Geneva Conventions of August 1949* (Washington, DC: GPO, September 1979), article 51(2). While the United States is not a State Party to Additional Protocol I, it considers this provision a correct statement of law.
62. Protocol I, article 51 (4); *Operational Law Handbook* (Falls Church, VA: Judge Advocate General's School, 2000), 5-2; Joel Greenberg, "Civilians, Illegal Targeting Of," *Crimes Of War* (New York: W.W. Norton & Co, 1999), 85.
63. Lippman, 21.
64. Osiel, 968.

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