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# When Things Go Awry: Command Responsibility, Death Marches, and Unforeseeable Circumstances

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## ABSTRACT

Although the events of the past year are in many ways unprecedented, they have resulted in circumstances that are common throughout history. The rise of a global pandemic has led to suffering in many forms, political powers shifting, militant coups rising, and countries facing protests as civil unrest becomes more prevalent. In these uncertain times, political leaders and the role militaries have been even more scrutinized, revealing flaws that might have remained undetected if it was not for circumstances going awry. These current events have caused us to reflect upon incidents of the past when commanders have faced the uncertainty of how to complete their mission. History is wrought with instances in which the commander, despite having a “Plan B,” still fails to succeed in his role, thus resulting in hundreds of thousands of unnecessary lives lost. Specifically, this article focuses on three death marches—The Long Walk of the Navajo, The Bataan Death March, and Holocaust Death Marches—and the international law of command responsibility. In comparing and contrasting these three historic events through the lens of this law, we analyze the imposition of a commander’s criminal liability when unexpected events occur and he or she is called upon to make difficult decisions. In doing so, we also provide a historical backdrop of each commander’s ethical, moral, and tactical decisions, allowing us to explore what else could have been done, and who should be held liable for the actions of the commander’s soldiers. Ultimately, we call on national leaders and military commanders alike to evaluate our uncomfortable contemporary reality, look back in history, and ask themselves one question: am I truly prepared to make the right decisions when things go wrong?

**Keywords:** Command responsibility, Bataan death march, holocaust death march, the long walk of the Navajo, extremism, nationalism, Iraq, My Lai

Wee, sleeket, cowran, tim’rous beastie,  
O, what a panic’s in thy breastie!  
Thou need na start awa sae hasty,  
Wi’ bickerin brattle!  
I wad be laith to rin an’ chase thee  
Wi’ murd’ring pattle!

I’m truly sorry Man’s dominion  
Has broken Nature’s social union,  
An’ justifies that ill opinion,  
Which makes thee startle,  
At me, thy poor, earth-born companion,  
An’ fellow-mortal!

Thou saw the fields laid bare an’ waste,  
An’ weary Winter comin fast,  
An’ cozie here, beneath the blast,  
Thou thought to dwell,  
Till crash! the cruel coulter past  
Out thro’ thy cell.

But Mousie, thou art no thy-lane,  
In proving foresight may be vain:  
The best laid schemes o’ Mice an’ Men  
Gang aft agley,  
An’ lea’e us nought but grief an’ pain,  
For promis’d joy!<sup>1</sup>

<sup>1</sup> Robert Burns, *To a Mouse*, POETRY FOUND., <https://www.poetryfoundation.org/poems/43816/to-a-mouse-56d222ab36e33> (last visited Feb. 15, 2021).



## I. INTRODUCTION

Command responsibility evokes images of a commander who has imbued those under his or her command with principles of military ethics, discipline, and values reflective of the profession of arms. To some extent, this is the glamorized Hollywood version of the sharp-eyed commander, cool under fire, with troops ready for orders, confident in each other, and well prepared for what lies ahead. The screen is filled with strong-willed, handsome, fit, and trim commanders leading their troops in battle, willing to engage their foes.

This is good against evil, forces of light against forces of darkness. The films depict clarity in leadership. There is an absence of grey, there is no nuance, and lose-lose dilemmas do not exist. We, the viewers, demand this clarity. We, the public, demand that *our (italics deliberate) commander* makes the right decision. We do so because we view the commander as an extension of ourselves, reflecting our norms, values, and principles.

The demand for normative behavior is unspoken but clear. We do not feel the need to tell the commander, "Be the best human being you can," because we expect him or her to always make the right decision. After all, the commander is someone we know – our neighbor's son or co-worker's daughter – and we expect nothing but the best from them. They are us; we are them. We are caught off guard and find it difficult to accept the reality that *our* commander or soldier may fail to live up to *our* idealistic expectations.

Were it only so simple.

Anyone who understands military engagement knows reality can best be described as, "uncertainty rules." History offers a stark warning, brilliantly captured by the poet, Robert Burns, with whose words we opened this article. Burns' words are particularly apt for the military commander confronting events best described as unforeseen. In focusing on instances when things go awry, we pay particular heed to Burns' words: "The best laid schemes o' Mice an' Men, Gang aft agley, An' lea'e us nought but grief an' pain, For promis'd joy!"<sup>2</sup>

The relevance of this undertaking could not be more acute. During the past year, then-President Trump, acting in his role as commander-in-chief, requested the use of the military in instances of peaceful protest in the nation's capital. This led

the ten living former defense secretaries to write a letter declaring, "there's no role for the U.S. military in determining the outcome of a U.S. election."<sup>3</sup> Without further examining the actions or motives of President Trump, it is clear that the recent events in the U.S. expose the tenuousness of commonly accepted fabrics that are the essence of society.

Additionally, the world continues to face the effects of the unprecedented COVID-19 pandemic and continued civil unrest.<sup>4</sup> Just weeks after the breach on the U.S. Capitol, a coup arose in Myanmar placing the military back in charge<sup>5</sup>, and it is expected that "75 countries will likely experience an increase in protests" as "socioeconomic fallout from COVID-19 mounts."<sup>6</sup>

There are different means of exploring the consequences of these deeply troubling events: one can ignore them with a shrug of the shoulders, or one can take stock, explore history, and ask what we can learn from past experiences and examples.

We have chosen the second option, believing that learning from history will provide critical markers for commanders confronting dilemmas when things go wrong. We provide stark examples regarding the consequences of commanders who failed to protect the lives of vulnerable human beings for which they were responsible. It is immaterial why they were in the terrible situation in which they found themselves; the blame game is of no consequence or import when considering how commanders played the hand they were dealt.

We focus on three particularly tragic and dark moments that took place under distinct, harsh, almost unimaginable conditions, thereby enabling us to draw conclusions from three different paradigms. While other examples were available, the three we examine provide rich material regarding the actions of commanders and soldiers when matters truly go awry.

The Long Walk of the Navajo, the Bataan Death March, and Holocaust Death Marches represent examples where commanders were severely tested, and ultimately failed. The unexpected circumstances of these marches resulted in dangerous territory when societal norms and mores broke down and an overwhelming power imbalance arose between distinct groups. As a result, each march imposed extraordinary suffering and deprivation on its victims; the

<sup>2</sup> *Id.*

<sup>3</sup> Ashton Carter, et al., *10 Former Defense Secretaries Military Secretaries: Involving the Military in Election Disputes would Cross into Dangerous Territory*, WASH. POST. (Jan. 3, 2021), [https://www.washingtonpost.com/opinions/10-former-defense-secretaries-military-peaceful-transfer-of-power/2021/01/03/2a23d52e-4c4d-11eb-a9f4-0e668b9772ba\\_story.html](https://www.washingtonpost.com/opinions/10-former-defense-secretaries-military-peaceful-transfer-of-power/2021/01/03/2a23d52e-4c4d-11eb-a9f4-0e668b9772ba_story.html); Matt Seyler, *Defense secretaries' letter warning Trump was signed by all in only 2 days*, ABC NEWS (Jan. 5, 2021, 3:06 AM), <https://abcnews.go.com/Politics/defense-secretaries-letter-warning-trump-signed-days/story?id=75036788>.

<sup>4</sup> Tim Campbell & Miha Hribernik, *A dangerous new era of civil unrest is dawning in the United States and around the world*, VERISK PERSPECTIVES (Dec. 10, 2020), <https://www.maplecroft.com/insights/analysis/a-dangerous-new-era-of-civil-unrest-is-dawning-in-the-united-states-and-around-the-world/>.

<sup>5</sup> Alice Cuddy, *Myanmar coup: What is happening and why?*, BBC NEWS (Feb. 9, 2020), <https://www.bbc.com/news/world-asia-55902070>.

<sup>6</sup> See Campbell & Hribernik, *supra* note 4.

events amongst the worst of the worst when considering the actions of commanders and soldiers alike. The challenges confronting the commanders were difficult. However, that cannot be offered as justification for their conduct nor available as a defense by future commanders. The responsibility placed on their shoulders is absolute and any attempt to justify misbehavior because of external conditions must be roundly rejected. This is important when we examine the three examples and lessons learned.

Our focus on these events stems from two concerns. First, that current international circumstances impose unique challenges on commanders and, second, that contemporary strife and conflict potentially place the vulnerable in situations reminiscent of those confronted by the victims of these Death Marches. In focusing on paradigms when circumstances go awry, our intention is to draw attention to the dilemma of imposing liability on a commander in two distinct instances: when the commander is physically present yet loses control of those under him or her and the second, the more complicated and nuanced, when the commander is not present and those under his or her command—albeit their absence—commit heinous crimes.

As we consider the ethical, moral, and tactical decisions each commander made, the analysis will also probe into questions of what else could have been done and who should be held liable for the actions of the soldiers under one's command. The three death marches provide a unique viewpoint in which to undertake this analysis, whose urgency is palpable given domestic and international events alike.

This essay will be divided into the following sections: Section II: Commanders; Section III: The Long Walk, The Bataan Death March, and Holocaust Death Marches; Section IV: History of Command Responsibility; Section V: The Final Word.

## II. COMMANDERS

Commanders and soldiers know what is expected of them. Each has a clear understanding of the task they are to perform, the parameters of their undertaking, and the consequences of failing. In its most pristine form, command responsibility results in the completion of a task in an organized, clear, and precise manner. The commander is trained—at least in the ideal—to explain the mission, to understand each person's role and responsibility, to maintain full control of the unit, and to protect the lives of combatant and non-combatant alike, with the caveat that conflict invariably includes injury and loss of life.

<sup>7</sup> “The U.S. abides by the laws of war...In waging war we do not terrorize helpless non-combatants, if it is within our power to avoid doing so. Wanton killing, torture, cruelty or the working of hardship on enemy prisoners or populations is not justified in any circumstance...the main safeguard against lawlessness and hooliganism in any armed body is the integrity of its officers. When men know that their commander is absolutely opposed to

Furthermore, the commander is expected to be sufficiently resourceful so that when events go “sideways” there is a Plan B and if necessary, a Plan C. In other words, everything is under control and when it is not, the commander knows how to respond to the unexpected while minimizing the harm to those for whom he or she is responsible. At the very least, that is the romanticized version of command responsibility. The commander gives an order, and the soldier performs. The unit continues smoothly—marching and advancing unabated in unison—until the commander can report “mission accomplished.”

However, history shows us that a commander's reaction to a situation is unknown until he or she is in the moment. It is at that time that we see that not all commanders are fit for their position. Even those who have been well-trained, and are seemingly fit to serve, can be overwhelmed in the moment and unable to balance powerful competing interests. Others are psychologically unfit, evil, sadistic, or deeply flawed. Yet they are entrusted with a unit and are responsible for the consequences of its actions.

Despite commonly recognized and understood principles of the international law of armed conflict and international humanitarian law, the innocent have paid a terrible price for the horrific actions of a unit led by an unfit commander.<sup>7</sup> Although unfortunate, international law tolerates instances of collateral damage—when innocent lives are lost notwithstanding a commander's efforts to respect and protect human life while still carrying out the mission—provided it is proportionate and reasonable.

This article will focus on instances in which the mission has not gone as planned and the commander faces the unexpected burden of caring for groups of individuals for whom the commander assumes responsibility as a result of the conflict. These individuals include soldiers who are *hors de combat* – soldiers who are wounded and incapable of fighting, surrendered, or taken prisoner - and civilians.

The word “burden” is used deliberately, albeit with discomfort, for it reflects a negative connotation. In reality, the additional group for whom the commander now bears responsibility is a burden. The commander is responsible for feeding, sheltering, and protecting them despite the fact that he or she is not equipped—logistically, tactically, or strategically—for this responsibility imposed on him or her as a consequence of the conflict.

The true test of command responsibility is in these most dire of circumstances, when things have gone awry. This brings us to the question of how to apply the duty of command responsibility in a paradigm for which there is

such excesses and will take forceful action to repress any breach of discipline, they will conform. But when an officer winks at any depredation [sic] by his men, it is no different than if he committed the act.” UNITED STATES OFFICE OF INFORMATION FOR THE ARMED FORCES, THE ARMED FORCES OFFICER 191-92 (1975).



no preparation, for which staff and command colleges do not train commanders, and which is outside the basic expectations imposed on the commander.

In the context of death marches, failing to properly provide for soldiers who are *hors de combat* and civilians has resulted in tragedy, the consequences of which are searing, both in the moment and for years to come. That is true regardless of whether the “at-risk” human is a civilian or a combatant. Both have placed their lives in the hands of the commander, and both are dependent on the commander to protect them and ensure their safety and well-being.

In the following sections of this article, we have chosen to examine command responsibility in three very different death marches—each with distinct contexts, environments, participants, and purposes. However, there are sufficient similarities --- differences notwithstanding --- that enable comparison and allow us to draw conclusions that apply to all three.

In examining The Long Walk (TLW), The Bataan Death March (BDM), and Holocaust Death Marches (HDM), this article discusses the legal and moral dilemmas in the relevant historical, cultural, and military contexts. Our goal in doing so is to most accurately present the respective narratives so the reader can better understand the setting and dilemmas. There is, of course, risk in doing so as it may be interpreted as presenting the commander in a sympathetic light. We have no intention of doing so. However, we do intend to present the facts and circumstances as they were known to the commander at the time. Otherwise, drawing conclusions and offering lessons learned would be intellectually dishonest.

The question of command responsibility when the lives of unarmed, helpless, and particularly vulnerable individuals are at stake is, tragically, not confined to the three marches we address. While TLW, BDM, and HDM were an unmitigated horror for those forced to march, the importance of the three marches extends well beyond the unimaginable deprivations suffered by the victims. It is for that reason that exploring the legal responsibility of the commander is of the utmost importance and relevance. This is not intended to be a history lesson, as important as that is, but rather to examine a moment in history through the lens of the law and to, then, apply that law to dilemmas today.

### III. THE LONG WALK OF THE NAVAJO, THE BATAAN DEATH MARCH, HOLOCAUST DEATH MARCHES

In this section, we will view the doctrine of command responsibility through the lens of The Long Walk of the Navajo, The Bataan Death March, and Holocaust Death Marches. This first requires a further explanation of what constitutes a death march.

The term “death march” was likely coined after the Holocaust Death Marches after World War II.<sup>8</sup> When viewed in this light, various elements must reflect the circumstances of those marches to be included in our definition. First, there must be a use of force in conducting the march. Second, there must be an existence of harsh conditions inflicted either by those leading the march or as a result of geography and climate. Third, there must be a lack of care for the victims of the march. As will be further discussed below, the marches we have chosen each include these three elements and, despite their differences, provide circumstances under which command responsibility was tested and failed.

Although there are many events under which our analyses could have been applied, we chose to focus on these three death marches because they share similarities in that the preparation and plans have failed in such a way that has resulted in the intentional destruction of life. As the world is currently in an unprecedented state, looking back on these most extreme cases is important to understand the caution a commander must take when the mission has gone awry.

Through the lens of these three historically significant marches, we will compare and contrast whether to impose liability on a commander in two different circumstances. One being when the commander is physically present and the other when the commander is not present. As we consider the ethical, moral, and tactical decisions each commander made, the analysis will also probe into questions of what else could have been done and who should be held liable for the crimes of the soldiers in action.

The discussion of historical context is not a complete history of each of these death marches. Nor is it meant to compare the suffering of the Navajo, Jews, and American and Philippine POW’s. In fact, each group was viewed and treated as less than human, and the pains of these events cannot fully be understood except by those who lived through them. Rather, it is important to understand the historical context under which the marches were conducted as it allows for further analysis of instances in which commanders faced unforeseen circumstances and potential liability for the actions of their subordinates. As we compare the death marches below, we will focus on key events that led up to the march, the location of commanders, the actions of commanders and subordinate soldiers, and finally, the consequences and liability imposed on the commanders.

#### A. The Long Walk of the Navajo

##### 1. Historical Context

The history between early European settlers in America and Native American tribes sheds light on the complexity of the relationship between these parties. It also shows the lengths the settlers went through to annihilate Native American tribes or remove them from their lands and assimilate the population into the settler’s idea of a “self-

<sup>8</sup> I remember Guiora mentioning something about this

sustaining" people.<sup>9</sup> As the settlers moved south and west across what is now the United States, political leaders' enacted legislation to achieve this goal.<sup>10</sup> In 1830, Congress enacted the Indian Removal Act giving the President the authority to "cause any territory . . . west of the Mississippi, . . . to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians" who enter into an exchange treaty.<sup>11</sup>

This ultimately led to the removal of five Native American tribes (the Chickasaw, Choctaw, Creek, Seminole, and Cherokee) from southeastern states<sup>12</sup> to the west of the Mississippi in what is now known as the Trail of Tears. Following the relocation of these Native Tribes, Congress continued to incentivize the reservation system created under the Indian Removal Act and, in 1851, adopted the Indian Appropriations Act. This Act prohibited Native Americans from leaving the reservations without first receiving permission.

During this same period, many American settlers sought to expand to the western territories of the United States and beyond. In pursuit of fulfilling the idea of manifest destiny, the US eventually obtained 500,000 square miles of land after the Mexican American War, stretching "westward from the Rio Grande to the Pacific Ocean."<sup>13</sup> This area included what became the U.S. New Mexico Territory after the signing of the Treaty of Guadalupe Hidalgo in 1853.<sup>14</sup>

American settlers began to populate this territory decades before this treaty was signed.<sup>15</sup> Conflicts between American settlers and Native Americans arose frequently as natives, with good reason, challenged settlers as they laid claim to

the land and objected to attempts to control or subjugate them.<sup>16</sup> Between 1846 and 1861, the Navajo and American settlers had entered into a series of peace treaties. Each party broke promises made in these treaties, causing more unrest and tension. Aggression continued unabated during much of this period and at times broke out into an "all-out war between the Navajos and the U.S. Army."<sup>17</sup>

The relationship between the Navajo and the Americans was anything but friendly. In fact, the Americans viewed the Navajo as an enemy.<sup>18</sup> As written by New Mexico Superintendent of Indian Affairs, James L. Collins, in 1860, "the Navajos . . . are at war with our people, their hostilities never having entirely ceased since the war of 1858. The destruction of life and property that has resulted from this long-continued unsettled condition of the tribe has been immense..."<sup>19</sup>

## 2. The Campaign

In 1861, the Navajos and American settlers agreed to a treaty of peace which was signed by 24 of the 31 Navajo Chiefs and was subsequently ratified by the Senate on February 15, 1861.<sup>20</sup> Months later, the Civil War began and many military leaders in New Mexico were being called back to fight in the war. As these changes were being made, the feud between the Navajo and the American settlers continued to heighten eventually resulting in a Navajo attack on the settlers.<sup>21</sup> shortly after a battle fought by the U.S. military at the border of the New Mexico-Texas territory line.

The settlers viewed this as a breach of the peace treaty entered into only months earlier and became the final act

<sup>9</sup> 2 EDWIN L. SABIN, *KIT CARSON DAYS: ADVENTURES IN THE PATH OF EMPIRE*, 708 (1935) [hereinafter *KIT CARSON DAYS*] ("to take them out of their country, educate the children, so that they will grow up with new ideas; for, on a reservation 'until they can raise enough to be self-sustaining you can feed them cheaper than you can fight them.") (citing Carleton to the adjutant-general, Lorenzo Thomas, Sept. 6, 1863.); JENNIFER DENETDALE, *THE LONG WALK: THE FORCED NAVAJO EXILE* 70 (Paul C. Rosier eds., 2008) [hereinafter *THE LONG WALK*] ("Once relocated, native peoples could begin the process of indoctrination.").

<sup>10</sup> There were series of treaties between the US government and Native American Tribes that also played a large role in the eventual adoption of the Indian Removal Act. However, many of these seem to be negotiated with Tribe leaders under coercion or military power or with leaders who did not have the best interest of the tribe in mind. See *Indian Treaties and the Removal Act of 1830*, UNITED STATES OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1830-1860/indian-treaties> (last visited Feb. 15, 2021); Elizabeth Prine Pauls, *Trail of Tears*, BRITANNICA (Nov. 11, 2019), <https://www.britannica.com/event/Trail-of-Tears> (explaining that "a small group of Seminole leaders negotiated a removal agreement in 1832, but a majority of the tribe protested that the signatories had no authority to represent them."). For a history of the Indian Removal Act see *Indian Removal Act: Primary Documents in American History*, LIBRARY OF CONGRESS, <https://guides.loc.gov/indian-removal-act/digital-collections> (last visited Feb. 15, 2021).

<sup>11</sup> Statutes at Large, 21st Congress, 1st Session, <https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=004/llsl004.db&recNum=459> (last visited Feb. 15, 2021)

<sup>12</sup> North Carolina, Florida, Georgia, Alabama, and Tennessee. See *Trail of Tears*, BRITANNICA <https://cdn.britannica.com/18/186318-050-1CC1339A/Routes-statistics-events-Trail-of-Tears.jpg> (last visited Feb. 15, 2021); Pauls, *supra* note 10.

<sup>13</sup> *Mexican-American War*, BRITANNICA (NOV. 10, 2020), <https://www.britannica.com/event/Mexican-American-War>.

<sup>14</sup> New Mexico joins the Union, HISTORY (Feb. 9, 2010) <https://www.history.com/this-day-in-history/new-mexico-joins-the-union>.

<sup>15</sup> See *THE LONG WALK*, *supra* note 9 at 23.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 35.

<sup>18</sup> *Id.* at 23.

<sup>19</sup> 3 J. LEE CORRELL, *THROUGH WHITE MAN'S EYES: A CONTRIBUTION TO NAVAJO HISTORY* 74-75 (1979).

<sup>20</sup> *Id.* at 130. See also LAWRENCE KELLY, *NAVAJO ROUNDUP* 1 (1970) [hereinafter *NAVAJO ROUNDUP*].

<sup>21</sup> See (the attack happened shortly after a battle fought by the U.S. military at the border of the New Mexico-Texas territory line at the beginning of the Civil War).

that pushed the U.S. Military stationed in the territory to action to assimilate the Navajo people and extinguish their culture. Despite the pressure of the Civil War, the United States still viewed the acquiring of western land as key and passed the Homestead Act in 1862. Ultimately, the authority from the Indian Removal Act, when combined with the ideals of the Homestead Act, led the military to the decision to remove the Navajo from their homeland. Together the Navajo and the Mescalero Apaches would populate the reservation of Bosque Redondo.

The campaign to march the Navajo to Bosque Redondo was originally to be conducted by General Edward S. Canby, who was a proponent of the relocation efforts under the Indian Removal Act. However, General Canby was eventually called back east to assist with the efforts of the Civil War.

In his place, Brigadier General James Carleton took charge of the relocation efforts. "Carleton was known by his constituents as the 'Christian general' and a humanitarian who believed that Christian and moral instruction of native peoples would ensure that they would be accepted into American society."<sup>22</sup> He also believed that relocation would be a success and prevent future conflict and on various occasions stated, "we can feed them for cheaper than we can fight them."<sup>23</sup>

To accomplish this goal of assimilation, Carleton created the Bosque Redondo reservation at Fort Sumner. The purpose of Bosque Redondo was experimental. Similar to the reservations in Oklahoma, the Navajo and Mescalero Indian tribes would be grouped into villages and learn the ways of "civilization."<sup>24</sup> To help the Navajo "become white men,"<sup>25</sup> Carleton organized Bosque Redondo with the purpose to "feed and take care of [the Navajo] until they have opened farms and [become] able to support themselves."<sup>26</sup> Carleton had also appointed a chaplain to educate the "Indian children."<sup>27</sup>

However, for Carleton's experiment to begin, the Native Americans had to 'agree' to terms of surrender of their homelands, at the cost of their lives. On June 15, 1863, in response to continued conflict with the Navajo, Carleton, through General Orders No. 15,<sup>28</sup> instructed Christopher 'Kit' Carson to "prosecute a vigorous war against the men of [the

Navajo] tribe until it is considered that they have been effectually punished for their long-continued atrocities."<sup>29</sup>

Carson was well known by both Native Americans and American settlers as he served as a guide to newcoming settlers and as an Indian agent for the U.S. Military.<sup>30</sup> Although he was a soldier for only a short time "he carried . . . orders out with zeal and with a haste that was unusual and a big part of his character."<sup>31</sup> His sense of duty to order was one of his greatest strengths and, at the same time, one of his greatest faults. At times this duty led him to follow an order that would seem to "violate his personality."<sup>32</sup> This sense of duty to order and his extensive knowledge and understanding of the Native American tribes in the western territory made him the perfect officer to complete Carleton's goal.

In a letter to Carson, Carleton attached the Order and explained that "all those Navajo who claimed not to have murdered and robbed the inhabitants must come in and go to the Bosque Redondo where they would be fed and protected until the war (against the Navajo) was over."<sup>33</sup> Additionally, the letter stated that "unless they were willing to do this, they would be considered hostile and would be proceeded against accordingly."<sup>34</sup> As the chosen leader for the campaign, Carson attacked the Navajo land with a scorched earth approach, in an attempt to force surrender. His troops lived on Navajo crops, and what was not needed was burned to the ground. Livestock was either captured for use or killed and left to decay.<sup>35</sup> Trees were also leveled to the ground. These methods used by Carson led the Navajo to believe this was a war of extermination.<sup>36</sup>

Instead of surrender, the Navajo fled to Canyon De Chelly (Tseyi'), a Navajo stronghold in which the people were able to hide from Carson's troops and shield themselves from the desert climate. The Canyon had high walls and the Navajo often used Spider Rock, "a towering needle-like formation," as a place of refuge.<sup>37</sup> The Navajo used yucca ladders to climb to the top of the rock formation and then pull the ladders up so that their pursuers could not capture them.<sup>38</sup> Carson soon realized that his initial approach was unsuccessful, as very few of the Navajo surrendered.<sup>39</sup>

Throughout the first months of the campaign, Carson faced challenges in securing strategic and tactical help, as Carleton

<sup>22</sup> See *THE LONG WALK*, *supra* note 9 at 70.

<sup>23</sup> *NAVAJO ROUNDUP*, *supra* note 20 at 57.

<sup>24</sup> *Id.* Farming, religious teaching and the American way; ("[Carleton was] a man of his time, he followed federal Indian policies for dealing with native peoples, meaning that they should become 'white men.'").

<sup>25</sup> *NAVAJO ROUNDUP*, *supra* note 20 at 57.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *NAVAJO ROUNDUP*, *supra* note 20 at 21.

<sup>29</sup> *Id.*

<sup>30</sup> *THE LONG WALK*, *supra* note 9 at 40.

<sup>31</sup> *Hampton Sides Interview*, PBS 21-31, <https://www.pbsutah.org/file/20547/download?token=weYU EQii> (last visited Feb. 17, 2021) [hereinafter *Sides Interview*].

<sup>32</sup> *Id.*

<sup>33</sup> *NAVAJO ROUNDUP*, *supra* note 20 at 21.

<sup>34</sup> *Id.* 20-21.

<sup>35</sup> *THE LONG WALK*, *supra* note 9 at 43.

<sup>36</sup> *Id.*

<sup>37</sup> *THE LONG WALK*, *supra* note 9 at 42.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

denied some of his requests. For example, Carson petitioned Carleton to compensate Ute Indians who agreed to help in the campaign. As payment for helping the military pursue and trap the Navajo, Carson argued that, as was customary, the Ute Indians expected to keep some of the captured Navajo women and children as slaves. To Carleton's credit, he denied this request and emphasized that "all prisoners must be sent to Santa Fe and ultimately to Bosque Redondo and that there must be no exception to this rule."<sup>40</sup>

Despite decisions such as this, Carleton was not involved in the day-to-day tactical decisions of the troops. In fact, there are very few Navajo stories about Carleton, and most focus on Carson.<sup>41</sup> Stationed back in the New Mexican Territory, Carleton served more as a messenger than a General. He received reports from Carson out in the Navajo homeland and reported these to his command in Washington. Notwithstanding his removed role,<sup>42</sup> Carleton continued to push Carson to advance into Canyon De Chelly to force the Navajo into surrender as winter fell on the region. Carson eventually accepted these orders, but it was not without objection.<sup>43</sup>

In addition to the tactical issues Carson faced, the campaign also brought with it many distractions in the form of disciplinary problems. While Carson's troops were stationed at Fort Canby<sup>44</sup> there were various reports of intoxicated officers, many of whom got into fights, and prostitutes living at the camp.<sup>45</sup> Additionally, while Carson was scouting, the New Mexican officers and the ranking Major Thomas Blakeney – a Major in the Californian Volunteers prior to his request to join the Navajo expedition – did not see eye to eye.<sup>46</sup> Blakeney did not view the campaign the same as Carson did and acted harshly toward the officers he oversaw, and toward the Navajo who came to surrender at Fort Canby.<sup>47</sup>

In addition to these distractions, Carson was often thinking about home.<sup>48</sup> He petitioned Carleton on several occasions to pause the campaign and asked for a leave of absence to visit his family from whom he had been absent for nearly two years.<sup>49</sup> In efforts to push the campaign forward, Carleton assigned volunteer Captain Asa B. Carey<sup>50</sup> to assist in overseeing Fort Canby when Carson was on scouting trips. Additionally, Carleton gave Carson hope that he could return to his family as he would allow Carson to turn authority over to Captain Carey "as soon as [he had] secured one hundred captive Navajo men women and children."<sup>51</sup>

Carleton's push for the campaign to continue was invigorated when he saw the first of the Navajo surrender at Fort Wingate.<sup>52</sup> By this time, Delgadito, an influential Navajo Chief, surrendered with 187 of his people.<sup>53</sup> Delgadito and three other Navajos stayed at Bosque Redondo for a short time before they were sent back to their homeland to convince other Navajos to surrender and to come to Bosque Redondo.<sup>54</sup>

On January 6, 1864, Carson finally departed for Canyon De Chelly.<sup>55</sup> Although heavy snow made travel difficult, Carson's militia entered Canyon De Chelly in two groups and each was successful in communicating with the Navajos who had sheltered in the Canyon.<sup>56</sup> After the initial contact with the Navajo in the Canyon, more Navajo continued to surrender.<sup>57</sup> By late January, Carson reported that there were 500 Navajo at Fort Canby, ready to be transferred to Bosque Redondo.<sup>58</sup>

Carleton was pleased by the results of the raid on Canyon De Chelly and by the efforts of Delgadito.<sup>59</sup> But it is clear from his letters that "he did not anticipate the magnitude of the surrenders which had already begun."<sup>60</sup> The pattern of group surrender continued throughout the rest of the campaign. As the Navajos were notified that American

<sup>40</sup> KIT CARSON DAYS, *supra* note 9 at 712; NAVAJO ROUNDUP, *supra* note 20 at 29-31.

<sup>41</sup> Jennifer Denetdale Interview, PBS 15, <https://www.pbsutah.org/file/20547/download?token=weYU EQii> (last visited Feb. 17, 2021) (in asked about General Carleton) [hereinafter *Denetdale Interview*].

<sup>42</sup> *Sides Interview*, *supra* note 30 at 29 (explaining that Carleton "ran this campaign from afar.").

<sup>43</sup> NAVAJO ROUNDUP, *supra* note 20 at 68 (Carson's reluctance to undertake a winter campaign had been conveyed to Santa Fe before).

<sup>44</sup> Fort Canby history -

<sup>45</sup> NAVAJO ROUNDUP, *supra* note 20 at 51; see also KIT CARSON DAYS, *supra* note 9 at 712-13. Officers found out Carson could not read told him orders were for other things but all really for whiskey. Carson eventually had his adjutant Lt. Murphy read all orders before signing.

<sup>46</sup> NAVAJO ROUNDUP, *supra* note 20 at 44-51.

<sup>47</sup> *Id.* Three Navajo came to the fort to discuss terms of surrender. There were between 75-100 that were going to surrender with them. Blakeney never interacted with the 75-100 Navajos but, according to claims of subordinate soldiers, ordered

that the three Navajo that came to camp were to be treated as prisoners and to have them killed.

<sup>48</sup> NAVAJO ROUNDUP, *supra* note 20 at 68-69.

<sup>49</sup> NAVAJO ROUNDUP, *supra* note 20 at 68.

<sup>50</sup> *Id.* at 108. Captain Carey ultimately played a large role in surrender at Canyon de Chelly according to Carleton.

<sup>51</sup> NAVAJO ROUNDUP, *supra* note 20 at 69.

<sup>52</sup> THE LONG WALK, *supra* note 9 at 43.

<sup>53</sup> NAVAJO ROUNDUP, *supra* note 20 at 56; THE LONG WALK, *supra* note 9 at 43

<sup>54</sup> NAVAJO ROUNDUP, *supra* note 20 at 111, THE LONG WALK, *supra* note 9 at 43.

<sup>55</sup> NAVAJO ROUNDUP, *supra* note 20 at 97.

<sup>56</sup> NAVAJO ROUNDUP, *supra* note 20 at 97, 102.

<sup>57</sup> NAVAJO ROUNDUP, *supra* note 20 at 107.

<sup>58</sup> NAVAJO ROUNDUP, *supra* note 20 at 109-10.

<sup>59</sup> NAVAJO ROUNDUP, *supra* note 20 at 107, 111.

<sup>60</sup> NAVAJO ROUNDUP, *supra* note 20 at 107.

soldiers did not intend to kill them, they more willingly came forward to join the march to Fort Sumner.<sup>61</sup> As resources were scant and winter was in full swing, the choice to leave their homeland came as a decision of life or death. Many Navajo realized the option was to freeze to death or to accept the fate of surrender and relocation.<sup>62</sup> As a result, approximately 1,200 Navajo refugees surrendered and began the march on the trail of The Long Walk on January 31, 1964.<sup>63</sup>

### 3. The Long Walk

The actual and detailed events of The Long Walk have been recorded inconsistently. While there are very few official records from the US military regarding the tragedies that occurred, some have been supplemented by newspapers in the New Mexico Territory. On the other hand, there are many oral records from the Navajo which have now been recorded. We recognize that stories from both sides contain gaps, truths, and exaggerations.<sup>64</sup> This section attempts to accurately reflect some of the actions that can only truly be understood by those who were forced on The Long Walk.<sup>65</sup>

Among the many atrocities inflicted on the Navajo, the first that should be noted is the physical conditions under which they were removed from their homeland and marched between 250-450 miles to Bosque Redondo.<sup>66</sup> The Navajo were marched in the dead of winter.<sup>67</sup> Many Navajo were not adequately clothed, and the resources collected at Fort Canby and Fort Wingate were depleted quickly due to the mass surrender of the Navajo. As such, many were almost completely naked.<sup>68</sup>

Clothing was not the only thing in lack of supply. As the Navajo were marched, they were given foods to which

they were not accustomed.<sup>69</sup> Many died from dysentery or diarrhea by eating half-cooked bread made of unfamiliar flour, rancid bacon, and green coffee beans, among other foods.<sup>70</sup>

Unfortunately, the soldiers also treated the Navajo as less than human as they marched them to Bosque Redondo. "Women were raped and violated."<sup>71</sup> Groups were forced to march as quickly as possible to Bosque Redondo, at a pace of 10-20 miles a day.<sup>72</sup> Many who could not keep pace with the group, including the elderly and the pregnant, "were taken out of line and shot by the soldiers."<sup>73</sup> These atrocities occurred even though "Americans were under strict orders to treat the Navajos kindly and fairly."<sup>74</sup>

Carleton's soldiers also failed to protect the Navajos from other enemies – including the New Mexican settlers, Mexicans, and other Native American Tribes that lived in the region.<sup>75</sup> As the Navajo were marched through settlements from Fort Canby and Fort Wingate to Bosque Redondo, the New Mexicans harassed the Navajo.<sup>76</sup> Additionally, Mexicans and other Native American tribes raided the refugees for the slave trade.<sup>77</sup> It is unclear how many Navajo died on the road to Bosque Redondo. However, the number of casualties only increased after the Navajo arrived at their 'new home.'<sup>78</sup>

In addition to the atrocities that occurred on the 250-450-mile journey from Canyon De Chelly to Bosque Redondo, the conditions of the reservation added further suffering to the Navajo people.<sup>79</sup> By spring 1864, approximately 6,000 Navajo (5,182 in May) and Mescalero Apaches occupied Bosque Redondo, and by November the number had

<sup>61</sup> NAVAJO ROUNDUP, *supra* note 20 at 97 ("Only the fear of being killed had caused many of them to hold out for this long, and once this fear was removed, the major task of the Navajo expedition would become one of logistics rather than punitive expeditions.").

<sup>62</sup> THE LONG WALK, *supra* note 9 at 48, 59; *see also* NAVAJO ROUNDUP, *supra* note 20 at 97. Carson's troops found several frozen Navajo corpses as they traveled through Canyon de Chelly.

<sup>63</sup> NAVAJO ROUNDUP, *supra* note 20 at 111; THE LONG WALK, *supra* note 9 at 59.

<sup>64</sup> Interview Hampton Sides

<sup>65</sup> THE LONG WALK, *supra* note 9 at 50-53.

<sup>66</sup> Denetdale Interview, *supra* note 40 at 15.

<sup>67</sup> Denetdale Interview, *supra* note 40 at 16; NAVAJO ROUNDUP, *supra* note 20 at 97, 114-16, 133 (soldiers reported frozen feet after walking through Canyon de Chelly).

<sup>68</sup> Denetdale Interview, *supra* note 40 at 16 ("They might just have a piece of fabric to cover their private parts...").

<sup>69</sup> *Id.*; NAVAJO ROUNDUP, *supra* note 20 at 121.

<sup>70</sup> NAVAJO ROUNDUP, *supra* note 20 at 121.

<sup>71</sup> Denetdale Interview, *supra* note 40 at 16.

<sup>72</sup> THE LONG WALK, *supra* note 9 at 57.

<sup>73</sup> Denetdale Interview, *supra* note 40 at 16.

<sup>74</sup> Sides Interview, *supra* note 30 at 28 ("After all, this was an experiment to prove to the Navajos that you can become Christians and farmers and, you know, if you can't even get them to the site without killing them, then this experiment is going to be a failure.").

<sup>75</sup> Sides Interview, *supra* note 30 at 28; THE LONG WALK, *supra* note 9 at 22.

<sup>76</sup> THE LONG WALK, *supra* note 9 at 60.

<sup>77</sup> Sides Interview, *supra* note 30 at 23; THE LONG WALK, *supra* note 9 at 119-20 (When attacked, "the Navajos were in a sufficient force to have resisted." However, they "feared retaliation from Carson's troops if they killed the white men.").

<sup>78</sup> Sides Interview, *supra* note 30 at 28 ("There wasn't enough food. The weather interfered. Navajos froze to death because there weren't enough blankets. They weren't acquainted with the kind of food that they were issued by the American Army. The old and the sickly and the children who were already weakened by this scorched earth policy of Carson got sick, and their constitutions were already depleted so the march took longer and it was harder--took a harder toll on them.").

<sup>79</sup> *See generally* THE LONG WALK, *supra* note 9 at 73 "lack of adequate shelter, the constant shortage of food, the harsh climate, and bouts of epidemic diseases, all of which took their toll."

grown to at least 8,570.<sup>80</sup> Well before this point, the resources at Bosque Redondo had run dry.

The harsh conditions of the Long Walk were magnified at Bosque Redondo as disease spread, already rationed food was rationed more, and soldiers continued to harass the women.<sup>81</sup>

As Navajo kept entering the reservation, Carleton soon realized he was not prepared for what was to come. However, he stayed optimistic in his reports, stating that "If they can feed themselves, you can send in even 10,000."<sup>82</sup> However, General Carleton's experiment to civilize the Navajo began to fall apart. The land on which Bosque Redondo was established was not fit for farming, and with the poor conditions, Navajos began to escape from the reservation to return to their homeland.<sup>83</sup> In 1867 the Navajos refused to plant. Eventually, in 1868, after many investigations of Bosque Redondo, a treaty was signed which allowed the Navajo to return to their homeland. The treaty was signed on June 1, 1868, and Navajos "streamed back to Navajo country."<sup>84</sup>

#### 4. The Aftermath

In the end, Carleton's experiment failed, and "his exploits, impressive as they were to the people of New Mexico, were much less so in the East where the heroes of the 'big war' held the limelight."<sup>85</sup> The War Department in New Mexico was reduced to a military district, and by the time the treaty releasing the Navajo was signed, Carleton was no longer in command.<sup>86</sup> His subsequent career was no longer distinguished as he was reassigned to regular duty following his time in New Mexico.<sup>87</sup>

Carson was assigned as supervisor at Bosque Redondo in 1864.<sup>88</sup> He requested a transfer from this position on at least three occasions before his transfer in September of that same year.<sup>89</sup> Carson went on to serve as Carleton's field representative to the Plains Indians and finally was assigned to the command of Fort Garland in Colorado before he resigned in 1867.<sup>90</sup>

Neither Carleton nor Carson was prosecuted or tried for the events that took place as a result of the forced march and experiment at Bosque Redondo. In fact, Carson was promoted to Brigadier General in 1865, in part for his role as leader of the Navajo campaign.<sup>91</sup> The tragedy is that there were officers who were punished or dismissed for much less than the crimes committed against the Navajo.<sup>92</sup> Ultimately, the lack of a strong influence of the doctrine of command responsibility, along with the general attitude of American settlers to Native American tribes, resulted in Carleton and Carson being free from liability from the actions of the Long Walk and relocation to Bosque Redondo.

## B. The Bataan Death March

### 1. Historical Context

Beginning in Fall 1941, before the attack on Pearl Harbor, the United States began to rush planes, cannons, tanks, and men to the Philippine Islands.<sup>93</sup> Japan was becoming a major force and "America's chief antagonist in the Pacific."<sup>94</sup> In the middle of World War II, the Japanese Empire sought to expand its influence in Asia and decided to attack the Western bases in the Pacific.<sup>95</sup> The attacks would focus on the British in Singapore, the Dutch in the East Indies, and the Americans in the Philippines.<sup>96</sup> According to the orders from General Gen Sugiyama, two-star General Tomoyuki Yamashita, two-star General Hitoshi Imamura, and Lieutenant General Masaharu Homma, respectively, were to lead these attacks.<sup>97</sup>

Although the Japanese Imperial Army was also bogged down in battle across the barren flats in China, many troops were pulled to complete the orders of the Imperial General Staff.<sup>98</sup> The Japanese quickly initiated the plans for their initial attacks. By December 10th, the Imperial Army completed its bombing of Pearl Harbor, Clark Field, and other US bases in the Philippines, and attacked British warships in the South China Sea.<sup>99</sup> In the proceeding months, the Japanese would commit some of the most

<sup>80</sup> THE LONG WALK, *supra* note 9 at 75, 49.

<sup>81</sup> *Sides Interview*, *supra* note 30 at 28 ("[T]he soldiers found out that they could sleep with some of the Navajo women because they were starving and needed money essentially.")

<sup>82</sup> NAVAJO ROUNDUP, *supra* note 20 at 143.

<sup>83</sup> NAVAJO ROUNDUP, *supra* note 20 at 163 ("Beginning in the spring of 1865, more Navajos escaped than surrendered or were captured and the monthly census reports [at Bosque Redondo] showed a steady decline in the population.")

<sup>84</sup> NAVAJO ROUNDUP, *supra* note 20 at 168.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 169.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 170.

<sup>91</sup> *Id.* at 169-70.

<sup>92</sup> NAVAJO ROUNDUP, *supra* note 20 at 120. For example, Captain Barbey was arrested and asked to resign after succumbing to his weakness for alcohol. See also 72 Eben Everett arrested as a result of a drinking problem

<sup>93</sup> MICHAEL NORMAN, TEARS IN THE DARKNESS 12 (June 9, 2019).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 55.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 56-57.

<sup>99</sup> Brian John Murphy, *Japan's Pacific Blitz*, AMERICA IN WWII (Dec. 2006), <http://www.americainwwii.com/articles/japans-pacific-blitz/>.

horrific war crimes as they marched approximately 75,000 US and Filipino soldiers along the Bataan Peninsula.<sup>100</sup>

Before discussing the details of the events that occurred as the Japanese invaded the Philippines, it is important to understand the philosophy of the Japanese military. The Japanese Imperial Army indoctrinated its soldiers with three core doctrines critical to understanding the manner of its engagement with foreign soldiers and civilians.

## 2. Japanese Military in WWII

The first doctrine traced its roots back to the Samurai warriors who, as legends told, were “indomitable even in defeat, virtuous even in [the] most vicious moments, and most of all faithful – faithful to family, ancestors, and to the feudal lord.”<sup>101</sup> Summarized by the Japanese word Bushido, this became the basis for ethical training in the military and contributed to the rise of Japanese nationalism and the “strengthening of civilian morale in . . . World War II.”<sup>102</sup> This idea of loyalty ran strong through the military even to the point of self-sacrifice. In the *Hagakure*, a book teaching principles of Bushido, it reads “Bushido or the way of the warrior means death. Whenever you confront a choice between two options, simply choose the one that takes you more directly to death.”<sup>103</sup> As such, to the Japanese infantry (hohei),<sup>104</sup> to lose one’s life – while a tragedy – was a showing of one’s loyalty to his family and his nation.<sup>105</sup>

Due to the idea that self-sacrifice was the greatest form of loyalty, “surrender was . . . apostasy.”<sup>106</sup> Prior to WWII, General Sadito Araki stated that “Retreat and surrender are not permissible in [the] Army. . . To become captive of the enemy by surrendering after doing their best is regarded by foreign soldiers as acceptable conduct. But according to our traditional Bushido, retreat and surrender constitute the greatest disgrace and are actions unbecoming to a Japanese soldier.”<sup>107</sup> This disgrace did not stop at the soldier but cast shame on “all those who had ever shared his name, living or dead.”<sup>108</sup> As such, the Japanese infantry understood that war meant victory or death.

The second doctrine was that “absolute obedience is imperative in the army and that neither criticism nor protest is allowed.”<sup>109</sup> To “hammer” this principle into

first-year privates, officers often used force to discipline those who acted outside of given orders.<sup>110</sup> Many first-year privates were “beaten till their teeth fell out or eyes swelled shut or they lost their hearing.”<sup>111</sup> The treatment of these new soldiers became a cycle across the Imperial Army. Once they were promoted to senior privates, they became bullies to the fresh conscripts. This ultimately produced “2,287,000 men who had been savaged to produce an army of savage intent.”<sup>112</sup>

The third doctrine that played a large influence in Japanese Nationalism was that the Japanese were “second to none.”<sup>113</sup> While based on the same ideals of Bushido, this doctrine reflects the ultimate actions of the Japanese towards the US soldiers and Philippine soldiers and civilians. The Japanese were taught to hate their enemy.<sup>114</sup> As discussed in more detail below, the Japanese hate for the enemy was clear in their actions. Even after the American and Philippine soldiers had surrendered, the Japanese rationalized that they were not yet prisoners. Rather, they argued that “these men are still the enemy and we are in a war” and as such, they had to kill them.<sup>115</sup>

Given the context of the Japanese desire to become a superpower in Asia and the societal, ethical, and military training described above, the events of the Bataan Death March, while not justified, can be better understood. Japanese soldiers had a heightened duty to their families and nations which could only be fulfilled by obedience to orders that came out of disdain for the POW on the Bataan Peninsula. With this in mind, we turn back to the Japanese invasion in the Philippines and the ensuing atrocities that took place by order (or lack of order) of Imperial Army leaders.

## 3. The Fall of Manila and the March

The Japanese troops continued to act swiftly following the initial bombing on Clark Field and other American bases on December 8, 1941. By December 22, 1941 (the first day of the Japanese invasion) Philippine and American troops were already backpedaling and General MacArthur was relocating to the US Military outpost on Corregidor.<sup>116</sup> By January 2, 1942, the Japanese had raised their flag in Manila.<sup>117</sup> Over the next three months, the forces

<sup>100</sup> History.com Editors, *Bataan Death March*, HISTORY (June 7, 2019), <https://www.history.com/topics/world-war-ii/bataan-death-march>.

<sup>101</sup> NORMAN, *supra* note 92 at 79.

<sup>102</sup> Kenneth Pletcher, *Bushidō*, BRITANNICA (Sep. 9, 2019), <https://www.britannica.com/topic/Bushido>; IRIS CHANG, *THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II* (Dec. 1991).

<sup>103</sup> NORMAN, *supra* note 92 at 81.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 101.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> NORMAN, *supra* note 92 at 79.

<sup>110</sup> *Id.* (“This was the ultimate purpose of slapping.”).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* This is not unique to the Japanese.

<sup>115</sup> *Id.* at 212 (Japanese soldiers discuss killing POW’s at the Pantangan River.).

<sup>116</sup> *Id.* at 49.

<sup>117</sup> *Id.* at 65.

barricaded themselves in the Bataan Peninsula. However, due to the number of Japanese troops and the lack of resources, American and Philippine forces surrendered on April 9, 1942.<sup>118</sup>

“Within hours of the surrender, 14<sup>th</sup> Army Headquarters realized its estimates, and thus plans, were worthless.”<sup>119</sup> American and Philippine soldiers were everywhere coming from “roads, in the hills, [and from] jungle trails.”<sup>120</sup> By the afternoon of the 9th, the defeated soldiers had been gathered at assembly points along the Old National Road.<sup>121</sup> Most were in poor physical condition, as they had already been rationing food, and many had contracted diseases.<sup>122</sup> While being lined up, the soldier’s valuables were taken from them. Those that refused to give up their possessions were punished: some had their fingers cut off for refusing to give up their rings, others were beaten or killed. It suddenly became clear to the American and Philippine soldiers that from that point on “anything [could] happen.”<sup>123</sup>

The physical abuse that the Japanese soldiers took as first-year privates became a method by which the Imperial Army forced compliance on the prisoners as they marched. A soldier was beaten for looking in a direction he was not supposed to; walking too slow or too fast, or not at all; talking to another soldier; and at times, for nothing at all. The beating eventually became normal for some. As the soldiers made their way from the bottom of the peninsula up the Old National Road, they were not given water and were fed very little – and what they were fed was old rice, most of the time it had maggots in it. In the hot humid weather, many died of hunger and fatigue. Others who had trouble keeping up with the group were shot or bayoneted and pushed to the side of the road.<sup>124</sup>

Even others were killed for no reason at all except that they were the enemy. Among the brutal acts committed by the Imperial Army was the mass execution of American and Filipino soldiers at the Pantingan River.<sup>125</sup> Beginning in the morning of April 12, 1942, these soldiers were lined up and leashed to each other with telephone wire.<sup>126</sup> Throughout the day, Japanese soldiers (both by volunteer and by order) killed approximately 400 prisoners.<sup>127</sup> The remaining 1,200 soldiers were sent to march, like the rest, up the Old National Road and continue to receive abuse from their captors.

When the prisoners were allowed to stop, they were crowded into empty buildings or barbed-wire enclosures “so tightly that they had little room to sit or lie down.”<sup>128</sup> Only a third of the men who passed through certain checkpoints got food “for the Japanese, chronically undersupplied, habitually unprepared, and stoically indifferent to the distress of the men who were their sworn enemies, simply could not, or would not, feed them.”<sup>129</sup> So many of the soldiers had dysentery and other diseases and ended up in excrement or vomit. With each day, the surrounding area smelt of lavatories and dead bodies as the Japanese forced their prisoners up the Old National Road.

Unfortunately, the horrors of the march did not end quickly for those who survived. The Japanese placed the remaining of the surrendered soldiers into work camps where they continued to be tortured and mistreated. Soldiers were transferred from project to project, reconstructing roads and bridges that were destroyed by the initial attacks.

As American troops began to invade the Philippines, the soldiers were placed on boats – laid like sardines in areas of the boat with only one door which was often closed. The only relief was when US troops finally defeated Japan on the Philippine island and were able to invade Japan. Lieutenant General Homma and General Yamashita were among those in the chain of command that were convicted of the crimes that occurred in the Philippines during WWII.<sup>130</sup>

## C. The Holocaust Death Marches

### 1. The March to Nowhere

The Holocaust Death Marches have been called the “march to nowhere.” In the same vein, the phrase “death march” was not used at the time of the marches, but rather has come to define the particular period in the Second World War and applied to a specific paradigm in the War. The marches started in a known place, the camp gate, but had no known destination, much less any plan how to get “there.” Similarly, these were not marches in the traditional military context, albeit directed by military commanders who were accustomed to military discipline, command, and structure.

<sup>118</sup> *Id.* at 154 (unconditional surrender the largest in American history – 76,000 – will you treat them well? We are not barbarians (153)).

<sup>119</sup> *Id.* at 163.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 164.

<sup>122</sup> *Id.* at 161 (soldiers “told themselves that disease and hunger had defeated them, not the Imperial Japanese Army. . .”).

<sup>123</sup> *Id.* at 166.

<sup>124</sup> *Id.* at 177. death on the road to nowhere

<sup>125</sup> *Id.* at 203.

<sup>126</sup> *Id.* at 203.

<sup>127</sup> *Id.* at 203.

<sup>128</sup> *Id.* at 188.

<sup>129</sup> *Id.* at 187

<sup>130</sup> *Id.* at 344-45 (noting that “Hideki Tojo, war minister and priminister for most of the war. . . and Lieutenant Masaharu Homma, former commander of the 14<sup>th</sup> Imperial Army; conqueror of the Philippines” were listed in the top eleven on “Japan’s political panjandrum.”).

Until camp commanders decided to leave the camp, they imposed their will on a static, stagnant, dying population deprived of any sense of humanity and decency. Regardless of the extraordinary weakness, commanders then led the victims on a physical undertaking for which they were overwhelmingly unprepared on every conceivable level. Above the physical challenge of walking in weakened condition, there was the terrible cold to contend with whilst dressed in the barest of clothes. Those forced to march were left as is – most without shirts or shoes. The harshness of the conditions was magnified (understatement) as the cruelty of the commanders was unabated by those begging for food or water and those who were unable to keep pace were executed.

This accurately reflects the terrible reality whereby Jews, who had been held in camps (primarily concentration and labor), were forced to march by their Nazi commanders as the Russian Army was approaching, in late 1944. The circumstances were clear. The tide of the war had significantly turned against Hitler's forces and it was increasingly obvious to most, perhaps absent the Nazi leadership, that the end was near. It was only a matter of time before the two forces would pinch the German army.<sup>131</sup> The meeting at the Elbe River, in May, 1945, was, in retrospect, inevitable given the pace with which the two forces moved.

While the military success was impressive, albeit costly in human lives and material, it led to an unintended consequence. The Jews were still held captive by the Nazi's -- primarily, but not exclusively in Poland where the death camp Auschwitz-Birkenau was located. As the Red Army was advancing from the east, German camp commanders were faced with a single dilemma. What was to be the fate of the prisoners who were held in these camps?

The options were limited, as the mere existence of the Jews was evidence of the horrors of the Final Solution (Hitler's plan to exterminate the Jewish people). What excreted the dilemma was that camp commanders were largely left to their own accords, as the central German command had broken down.<sup>132</sup> Therefore, the fate of the surviving Jews, whose situation was beyond dire, was in the hands of local camp commanders whose primary concern was two-fold: first, their own survival, and second, to destroy the evidence of their actions.

These death marches reflect a paradigm whereby commanders had absolute control over two distinct population groups: soldiers and the civilians. While the Jews had no idea where they were being taken, the same also held true in many cases for the soldiers. The Jews had intimate knowledge of the commander's cruelty and viciousness based on their camp experience and were

forced to march were subject to the exclusive, and absolute, control of the same commander. Absent execution or escape, there was no Plan B other than to continue walking.

The German soldiers also had a justifiable fear as to their fate if they encountered Red Army troops, given the horrific war crimes committed by the Germans after Operation Barbarossa (invasion of Russia, June 1941). However, their fear was, perhaps, lessened by the view that Jews were a commodity to be bartered to the Russians in exchange for their freedom and the ability to seamlessly re-integrate into the civilian population. The march had to continue, however, without knowing if a "deal" could be struck between particular Nazi commanders and Russian troops, were they to meet.

## 2. BOR Labor Camp

The BOR Labor Camp in Siberia serves as an example of the horrific conditions and actions of the commanders during these marches. COL. Maranyi oversaw this camp in a particularly cruel manner. Despite the fact that BOR was a work camp, prisoners were whipped to death on various occasions.<sup>133</sup>

Camp Commander Maranyi started the march from the gate of the BOR camp in early September 1944. Although there was no end point, the intent of Commander Maranyi was to massacre the Jews upon crossing into Hungary, where the prisoners originally came from. The victims of the camp, and the walk to come, did not know this and it is unclear if the soldiers knew this. Maranyi however, never reached Hungary. As was later recorded:

Nearly 4,000 Hungarian Jews who had been conscripted into forced labor since 1941 were led on a death march towards Hungary from the Bor mines in Yugoslavia, where the labor camps were concentrated, on this date in 1944. About 1,300 of them were shot or killed by exhaustion enroute; the others were deported to Germany, where the great majority were murdered. A second death march of 2,500 Jews began soon after; several hundred of these liberated by Tito's partisans. Yugoslavia had been occupied and divided up by German, Hungarian, Italian, and Bulgarian armed forces. The death marches were a panicked Nazi response to a massive Soviet 1944 summer offensive which overran the Nazi concentration camp of Majdanek and led to international exposure of Germany's genocidal activities. SS chief Heinrich Himmler then ordered all prisoners in concentration camps to be evacuated toward the interior of the Reich. According to the Holocaust Encyclopedia, SS guards had strict orders to kill prisoners who could no longer walk or travel. As evacuations depended increasingly

<sup>131</sup> Allied forces were progressing aftermath of the Normandy invasion (June 1944) and the Russian army had made significant advances.

<sup>132</sup> By late 1944-early 1945

<sup>133</sup> Tamas Csapody, *Labour Servicemen At Bor: Chapters From The History of the Bor Labour Camp* <https://bhiweb.files.wordpress.com/2011/12/summary2011-11-09.pdf>.

on forced marches and travel by open rail car or small craft in the Baltic Sea in the brutal winter of 1944-1945, the number who died of exhaustion and exposure along the routes increased dramatically. . . . Thousands of prisoners died of exposure, starvation, and exhaustion.<sup>134</sup>

Tito's freedom fighters ambushed the march, in Nitzsh, Serbia, killing many of the guards (not the commander) and setting the Jews free. This account is important from our perspective due to the depravity and deprivation imposed on the Jews during the march. Those actions are Maranyi's responsibility, regardless of the preparation and training the soldiers or Maranyi had prior to the march. The decision to leave the camp was Maranyi and he, therefore, assumed responsibility for those forced to leave BOR and participate in the march.

#### IV. HISTORY - COMMAND RESPONSIBILITY

The legal doctrine of command responsibility imposes an extraordinary duty on a commander; the phrase, "command is lonely" captures its essence. Command is not a democracy. Rather decisions on how to proceed rest solely with the commander and are a matter of discretion, practicality, capability, and resources. These decisions in the past have led to much bloodshed and turmoil as commanders face unforeseen circumstances in combat. To understand the imposition of duty and liability that comes from international law, this section will summarize the history of the doctrine of command responsibility and explain the intricacies of the law as it stands today.

The doctrine of command responsibility has come to form relatively recently. Although its roots trace back through military history, few instances of imposed liability were recorded before the end of World War II. Before WWII, individual countries imposed liability on commanding officers through their own military codes. In the United States, the application of this law was eventually adopted in 1863 as General Order No. 100 or the Lieber Code. Article 71 of the Code "provided for punishment of any commander ordering or encouraging the intentional wounding or killing of an already 'wholly disabled enemy,' whether that commander belonged to the 'Army

of United States, or. . . an enemy captured after having committed his misdeed."<sup>135</sup>

Eventually, nations began to recognize and call for a uniform law that would apply to all participating in war. In 1907, the Fourth Hague Convention set restrictions, laws, and customs for war on land. Executed by forty-one nations, Article 1 of the Annex established that an armed force must be "commanded by a person responsible for his subordinates." Additionally, Article 43 established that a commander of a force occupying enemy territory "shall take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."<sup>136</sup> However, this lacked a comprehensive application as war continued.

At the conclusion of World War I, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties "recommended the establishment of an international tribunal appropriate for the trial of crimes relating to the war."<sup>137</sup> This was followed by demand of the Allies for the trial of 896 war criminals pursuant to Article CCXXVIII of the Treaty of Versailles.<sup>138</sup> Despite these actions following WWI, there was continued pressure to adjust international law to meet the new challenges that arose during the years of World War II.<sup>139</sup>

Since WWII, the following events have defined the standards by which commanders are responsible for crimes that were committed in the course of war. First, the case of *In re Yamashita*, which aggressively applied the doctrine of command responsibility to convict General Tomoyuki Yamashita. Second, the Nuremberg trials which include proceedings that provide varying applications of command responsibility. Third, the trial of Captain Medina in response to the My Lai Massacre, which failed to convict Captain Medina under this doctrine and, instead, placed liability on the platoon leader. And fourth, the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), which provide venues for the prosecution of war crimes on an international level.<sup>140</sup>

<sup>134</sup> Lawrence Bush, *September 17: Death March from the Bor Mines*, JEWISH CURRENTS (Sep. 16, 2016), <https://archive.jewishcurrents.org/september-17-death-march-from-the-bor-mines/>.

<sup>135</sup> William H. Parks, *Command Responsibility For War Crimes*, 62 MIL. L. REV. 1, 7 (1973).

<sup>136</sup> *Id.* at 11.

<sup>137</sup> *Id.*

<sup>138</sup> The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in *violation of the laws and customs of war*. Such persons shall, if found guilty, be

sentenced to punishments laid down by law. . . . The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having *committed an act in violation of the laws and customs of war*, who are specified either by name or by the rank, office or employment which they held under the German authorities. Only 12 were tried and 6 convicted (only one under command responsibility). Parks, *supra* note 127 at 13.

<sup>139</sup> Guenaël Mettraux, *Command Responsibility in International Law - The Boundaries of Criminal Liability for Military Commanders and Civilian Leaders*, UNIV. OF LONDON - THE LONDON SCHOOL OF ECON. AND POL. SCI. L. DEP'T 13 (Jan. 2008).

<sup>140</sup> *Id.* page 16.

First. On October 29, 1945, General Tomoyuki Yamashita was charged under the doctrine of command responsibility for his role in the Battle of Manila. Despite the lack of precedent, the commission convicted General Yamashita by characterizing the failure of a commander to control his troops as negligence.<sup>141</sup> To reach this conviction, the tribunal found that “failure to exercise proper control over [ones] troops” and “allowing subordinates to commit atrocities” constituted a breach of duty.<sup>142</sup>

In the trial, the prosecution argued that “once the atrocities were shown on a large enough scale” the burden was on the defendant to prove that he “was unaware of the atrocities or assert reasons why [he] should be excused from the obligations he owed as a commander.”<sup>143</sup> The defense argued that Yamashita was not aware of the atrocities for various reasons. He asserted that the high pressures he faced as American Troops began to attack the Philippine islands prevented him from making personal inspections on each soldier in his command. Additionally, the Japanese communications systems had been “completely disrupted” and, as such, General Yamashita had reorganized his troops and given complete autonomy of command to Generals Yokoyama and Tsukada to oversee operations of the Shimbu Group (80,000 soldiers) and Kembu Group (30,000 soldiers), respectively, while he oversaw the Shobu Group (152,000 soldiers).<sup>144</sup>

Despite these efforts to distance himself from the crimes committed by his troops, the commission ultimately held that “where murder and rape and vicious, revengeful actions are widespread offenses and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.”<sup>145</sup>

The commission’s holding has been criticized as imposing a theory of absolute liability on those in command.<sup>146</sup>

However, the evidence offered at trial contradicted Yamashita’s claims of ignorance which opened the door for this aggressive standard of mens rea to be applied.<sup>147</sup> Regardless of the criticisms and justifications of the outcome, this case expanded the scope and provided a binding precedent for the doctrine of command responsibility.

Second. As Yamashita’s trial was ongoing, the Nuremberg Trials commenced in Germany in an attempt to hold the leaders of the Third Reich responsible for their actions. The Nuremberg Trials are a series of proceedings that set forth a new precedent by taking then existing laws, codified treaties, and customary rules of engagement “and applying them to . . . prosecuting the Third Reich.”<sup>148</sup> With the creation of the London Charter<sup>149</sup> and Control Council Law No. 10, the International Military Tribunal (IMT) and National Military Trials (NMT) conducted proceedings that directly addressed command responsibility.<sup>150</sup> Two notable cases include Case No. 12 at the NMT, *United States v. Wilhelm von Loeb, et al.* (often referred to as the High Command Case)<sup>151</sup> and Case No. 7 at the NMT, *United States v. Wilhelm List, et al.* (often referred to as the Hostage Case).<sup>152</sup>

These proceedings resulted in different applications of the doctrine of command responsibility. In the High Command Case, the tribunal determined that the mens rea required to impose liability under the doctrine of command responsibility should be actual knowledge. In other words, the highest-ranking officer had to know of the acts that were being committed and fail to do anything to stop them. As a result, some of the Officers of the High Command Case received minimal punishment.<sup>153</sup>

The tribunal in the Hostage Case applied a different mens rea standard, namely the ‘should have known’ standard. In coming to rely on this standard, the tribunal noted that the finding of illegal reports at headquarters was enough

<sup>141</sup>

<sup>142</sup> Christopher N. Crowe, *Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution*, 29 U. RICH. L. REV. 191, 196 (1995).

<sup>143</sup> *Id.* at 198

<sup>144</sup> *Id.* at 201.

<sup>145</sup> *Id.* at 203.

<sup>146</sup>

<sup>147</sup> *Id.* at 206-08. The standard used to determine mens rea was a ‘should have known’ standard – the commission determined that the circumstances were so widespread that Gen. Yamashita should have known and should have stopped the crimes committed by his soldiers.

<sup>148</sup> Ann B. Ching, *Evolution of the Command Responsibility Doctrine in Light of the Celebici Decision of the International Criminal Tribunal for the Former Yugoslavia*, 25 N.C. J. INT’L L. & COM. REG. 167, 172-73 (1999).

<sup>149</sup> Enumerates crimes over which the Nuremberg tribunal would have jurisdiction. These crimes included three broad categories: “Crimes Against Peace, War Crimes, and Crimes Against Humanity.” *Id.* at 172.

<sup>150</sup> Crowe, *supra* note 134 at 208.

<sup>151</sup> Case No. 12 at the NMT, *United States v. Wilhelm von Loeb, et al.*

<sup>152</sup> Case No. 7 at the NMT, *United States v. Wilhelm List, et al.*; Telford Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law No. 10*, Washington D.C., 15 August 1949 (Buffalo, N.Y.: William S. Hein & Co., Inc., 1997); see also, Whitney R. Harris, *Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II at Nuremberg, Germany, 1945-1946*, revised edition (Dallas: Southern Methodist University, 1999).

<sup>153</sup> Crowe, *supra* note 134 at 214 (“Of all the charges leveled against [General] von Leeb the tribunal found him guilty of one, implementing the ‘Barbarossa Order,’ and for this he was sentenced to three years.”).

to impute the knowledge to the ranking officer.<sup>154</sup> By applying this standard, it was ultimately held that “the commanding general in occupied territory [held a duty] to maintain peace and order, punish crime and protect lives and property.”<sup>155</sup> The tribunal further noted that “those responsible for such crimes by ordering or authorizing their commission, or by a failure to take effective steps to prevent their execution or recurrence must be held to account.”<sup>156</sup>

Third. The doctrine of command responsibility was, once again, applied differently in the prosecution of Captain Medina for his role in the My Lai Massacre.<sup>157</sup> Captain Medina was charged with responsibility for the massacre because he had a “continuing duty to control the activities of his subordinates where such activities were being carried out as part of an assigned military mission.”<sup>158</sup> However, the standard of command responsibility applied in *In Re Yamashita* “was not applied in the U.S. Army court-martial of Captain Ernest Medina.”<sup>159</sup> Rather, the court found him not guilty because he lacked ‘actual knowledge’ of the initial actions of his troops and “ordered an immediate cease fire” when he became aware of their actions.<sup>160</sup>

Captain Medina was among 14 people who were charged with crimes relating to the incident. However, there was only one, Lieutenant Calley, who was convicted.<sup>161</sup> At the appellate level, the court navigated its decision by touching on the underlying principles of Command Responsibility. The court stated that

Soldiers are taught to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends upon obedience to orders. On the other hand, the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a

machine, but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders. The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.<sup>162</sup>

Ultimately, Captain Medina was held to a lower standard of liability under the Uniform Code of Military Justice (UCMJ)<sup>163</sup>, rather than the international standard discussed above.<sup>164</sup> Due to the inconsistent application, there has been debate over whether the doctrine of command responsibility was correctly applied in Captain Medina's case.<sup>165</sup> However, despite its critiques, this case again shows the inconsistency in outcome when the law of command responsibility is applied.

Fourth. In addition to the varying methods by which the doctrine has been applied, the ICTY and the ICTR have also played a significant role in further expanding the reach of the doctrine of command responsibility. The ICTY was created, and its statutes were adopted, by the U.N. in 1993. The ICTY clarified Protocol I by setting forth more objective standards of *actus reus* and *mens rea*.<sup>166</sup>

The ICTY further defined its *mens rea* standard of “knew or had reason to know,” signifying that the “United Nations believed it to be the generally accepted rule for holding commanders responsible for the acts of subordinates during international armed conflicts.”<sup>167</sup> Although there was initial inconsistency in the application of this standard at the trial level, the decision of the appeals

<sup>154</sup> *Id.* at 218.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Crowe, *supra* note 134 at 220.

<sup>158</sup> *Id.* at 222.

<sup>159</sup> Michael L. Smidt, *Yamashita, Medina, and beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 187 (2000).

<sup>160</sup> Crowe, *supra* note 134 at 222-23.

<sup>161</sup> Lt. William Calley charged for My Lai massacre, HISTORY (Nov. 16, 2009), <https://www.history.com/this-day-in-history/calley-charged-for-my-lai-massacre>.

<sup>162</sup> *United States v. William L. Calley, Jr., Lieutenant, U.S. Army*, 22 U.S.C.M.A. 534 (Dec. 21, 1973). Found at [https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/US/My\\_Lai\\_Calley\\_Military1\\_Appeal\\_Judgement\\_21-12-1973.pdf](https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/US/My_Lai_Calley_Military1_Appeal_Judgement_21-12-1973.pdf) and <http://www.internationalcrimesdatabase.org/Case/1131#>.

<sup>163</sup> The UCMJ is [US] federal law, enacted by Congress. The UCMJ defines the military justice system and lists criminal

offenses under military law. See *The Uniform Code of Military Justice (UCMJ)*, MILITARY.COM, <https://www.military.com/join-armed-forces/the-uniform-code-of-military-justice-ucmj.html> (last visited Feb. 23, 2021).

<sup>164</sup> Smidt, *supra* note 151 at 198. When explaining why he chose the UCMJ standard, “Judge Howard concluded: [I]f the commander gains actual knowledge and does nothing, then he may become a principal in the eyes of the law in that by his inaction he manifests an aiding and encouraging support to his troops, thereby indicating that he joins in their activity and wishes the end product to come about.”

<sup>165</sup> Crowe, *supra* note 134 at 224; William George Eckhardt, *My Lai: An American Tragedy*, Part II.D (2000); Smidt, *supra* note 151 at 199.

<sup>166</sup> Ching, *supra* note 140 at 184 (explaining that the statute requires more objective ‘necessary and reasonable measures’ rather than ‘all feasible measures within his power.’ It also implemented a standard of knowledge as the *mens rea* requirement – ‘knew or had reason to know.’)

<sup>167</sup> Smidt, *supra* note 151 at 208.

Chamber in the case of *The Prosecutor v. Delalic et al* (better known as the *Celebici* case) clearly explains this standard. The court in *Celebici* established that, to be liable for actions of subordinates, “the commander must have some information available to him, which puts him on notice of the commission of unlawful acts by his subordinates.”<sup>168</sup>

The ICTR has also broadened the scope of command responsibility. While nearly identical to the ICTY statute, the ICTR has also applied the doctrine of command responsibility in a civilian party context.<sup>169</sup>

Ultimately, the doctrine of command responsibility is an area of international law that will continue to see development as conflict arises.<sup>170</sup> However, the purpose of this article is not to predict the future of the doctrine. Instead of this theoretical approach, a practical approach that looks beyond the language and formation of the current law has encourages future discussion to determine what else can be done when commanders are faced with unforeseen circumstances and who should be held liable for the crimes of the soldiers in action.

## V. THE FINAL WORD

What have we learned and where do we go from here?

Contemporary domestic and international tension points suggest we are entering a period of changing norms, mores, and values. A casual glance at the newspaper makes that clear. Political calculations suggest a rise in nationalism, if not extremism; the ready willingness to target vulnerable communities which endangers those devoid of protection. The targeting of immigrants, much less refugees and asylum seekers, is a reality highlighting tension points between three distinct actors: military commanders, politicians, and the vulnerable. The meeting between the three is where the proverbial “rubber hits the road.” In the three examples discussed in this article we have highlighted the consequences when politicians create an environment granting commanders extraordinary wiggle room to exercise discretion and judgement. As we have demonstrated in all three examples, the consequences were fateful to those left to the “care” of the commanders.

The commanders—American, Japanese, and German—conducted themselves in a manner not befitting those entrusted with the care of the innocent. The Native American’s forced to march from their homes were, in

essence, subject to internal deportation; the American and Philippine soldiers were Prisoners of War; and the Jews forced to march were innocent civilians, notwithstanding the Nazi regime’s intention to destroy European Jewry. The commanders we examined failed as commanders. Of that, there is no doubt.

Whether they were inherently evil or whether they reflect the “banality of evil” is not the question.<sup>171</sup> Rather, there are two questions of importance. First, whether politicians and national leaders have learned from the past and fully internalized the consequences of creating environments in which commanders or soldiers are not held accountable for breaching their duty of care to the vulnerable? And second, is the training received sufficient to ensure that when commanders face instances “when things go wrong” the events described in this article do not repeat themselves? What serves as a powerful lesson, as uncomfortable as it may be, is My Lai.

We would be remiss were we not to direct the reader to what we learned from the actions of a particular US military unit conducting a military operation in a hamlet in South Vietnam. While dismissing the actions of commanders in The Long Walk, the Bataan Death March, and Holocaust Death Marches may be tempting, examining Lt. Calley and others serves as a sobering reminder regarding the consequences of poor training, abysmal leadership, and an utter paucity of morality and ethics. There is great danger in casually dismissing My Lai as an example of a “few bad apples”; doing so instinctively excuses the commander, establishing a paradigm of tolerating what must not be tolerated. Commanders under the stress of combat make decisions and tolerate behavior that reflects, albeit on a smaller scale, what we have examined in the three examples. Nevertheless, when we consider the actions of Lt. Col. Nate Sassaman we must take pause regarding how commanders conduct themselves when things do, indeed, go wrong.

In January 2004, soldiers of the 3rd Combat Brigade, based at Ft. Carson in Iraq, forced two Iraqis to jump “from an embankment into the [Tigris River], where one of them apparently drowned.”<sup>172</sup> Despite the efforts to cover these actions, word came out and “the soldiers involved . . . face a variety of charges, some carrying maximum sentences of 10 years in prison.”<sup>173</sup> Despite his role as the units commander, “Lt. Col. Nathan Sassaman, known for his aggressive approach to battling insurgents in Iraqi cities such as Balad and Samarra, told his men to mislead

<sup>168</sup>

<https://www.globalpolicy.org/component/content/article/163/28306.html>; Appeals Chamber, December 17, 2004.

<sup>169</sup>

<sup>170</sup> A comparison for the current statutes and the standards they apply can be found at *International Criminal Law Guidelines: Command Responsibility*, CASE MATRIX NETWORK 27 <https://www.legal-tools.org/doc/7441a2/pdf/>.

<sup>171</sup> As articulated by Hannah Arendt in her observation of the Eichmann trial. Cite.

<sup>172</sup> David Kelly, *Officers Urged Lies in Abuse of Iraqis*, L.A. TIMES (July 31, 2004, 12:00 AM PT), <https://www.latimes.com/archives/la-xpm-2004-jul-31-na-soldiers31-story.html>.

<sup>173</sup> *Id.*

investigators.”<sup>174</sup> Testifying before a military court, Sassaman explained, “I said something to the effect of ‘Don’t talk about the water’”.<sup>175</sup> In addition to Sassaman’s orders to suppress these actions “another officer, Capt. Matthew Cunningham, warned the soldiers to corroborate one another’s stories.”<sup>176</sup> In explanation of his response:

Sassaman said he covered up the facts because the soldiers assured him that the Iraqis had managed to get out of the water. “I thought no harm, no foul if these people walked away,” he told the court. “I said the soldiers needed to be punished. I had hoped it would be done at my level in a nonjudicial way.” He said he also feared that insurgents would use the episode to discredit his battalion, which had aggressively pursued them -- in one case, taking part in 36 combat operations in 48 hours. “Samarra is not the city of the good Samaritan,” said Sassaman, a former West Point quarterback. “It’s Dodge City. The [insurgents] were killing us in the information war, and this would be a reason to seize on this. It could drag all the good work we did down the toilet.”

Another officer, Capt. Matthew Cunningham “said forcing the Iraqis into the water was an effort to punish the curfew violators by making them wet and miserable. ‘I believe it was a bad decision,’ he said. ‘But it was a tactical mistake, not a criminal mistake. . .’”<sup>177</sup> “In his closing argument, the prosecutor, Capt. Tom Schiffer, said there was no question the Iraqis were thrown into

the river and in fact, he said, there was evidence that [one of the soldiers] had been involved in a similar incident in Balad.”<sup>178</sup>

While it would be an exaggeration to suggest lessons have not been learned since The Long Walk, Bataan, and the Holocaust, it would be false comfort to suggest history does not repeat itself. In that spirit, our analysis leads us to the following conclusions: First, dismissing My Lai and Lt. Col. Sassaman as aberrations is “fool’s gold.” Second, the need to train and re-train commanders and soldiers in how to respond when things do not go according to plan has never been greater. Third, the confluence of heightening nationalism, extremism, and racism is combustible.

These three, together and individually, leave us with but one final thought. Things can, and often do, go awry. The burdens imposed on commanders demand we recognize the fragility that separates choosing right and choosing wrong when these circumstances arise.

It is for that reason that we call on national leaders and military commanders alike to evaluate our uncomfortable contemporary reality, look back in history, and ask themselves one question: am I truly prepared to make the right decisions when things go wrong?

History would suggest an uncertain answer.

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* (“The story they wanted told was that two Iraqi curfew violators were picked up on Jan. 3 and later released by the Tigris River.”).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

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