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12

Joint and Command Responsibility in Hong Kong's War Crimes Trials: Revisiting the Cases of Kishi Yasuo and Noma Kennosuke

Nina H.B. Jørgensen[*] and Crystal YEUNG[**]

12.1. Introduction

On 25 December 1941, shortly after the beginning of the war in the Pacific and on a day that would become known as Black Christmas, Hong Kong fell to Japan. Hong Kong's surrender was followed by over three and a half years of Japanese occupation during which civilians and prisoners of war suffered extensive and systematic maltreatment, especially at the hands of the Kempeitai (military police corps). The Emperor of Japan capitulated on 14 August 1945 after atomic bombs were dropped on Hiroshima and Nagasaki. This paved the way for the fulfilment of the Allied promise to hold trials of alleged war criminals in the Pacific as well as the European theatre of the Second World War.[1] Forty-six such trials were held by British war crimes courts in Hong Kong against 123 individual accused.[2] The courts were established pursuant to a Royal Warrant issued on 18 June 1945 which granted broad jurisdiction over violations of the

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1 See, for example, Declaration of the Four Nations on General Security, Statement on Atrocities, 30 October 1943 ('Moscow Declaration') (http://www.legal-tools.org/en/doc/3c6e23/).

2 See Hong Kong War Crimes Trials Collection (http://hkwctc.lib.hku.hk/—exhibits/show/hkwctc/home); Suzannah Linton (ed.), *Hong Kong's War Crimes Trials*, Oxford University Press, Oxford, 2013.

laws and usages of war during conflicts in which Britain had been engaged since 2 September 1939.[3] Regulations for the Trial of War Criminals were annexed to the Royal Warrant and provided the procedural framework for the trials,[4] supported by secondary legislation such as the Instructions issued by Allied Land Forces South-East Asia[5] and the provisions of the British Manual of Military Law 1929 (as amended).[6]

The governing rules and regulations did not specify modes of liability and all charges were brought under the umbrella concept of being "concerned" or "together concerned" in a crime. This formulation of the charges derived from English law and appeared designed to encompass various degrees of involvement in criminal conduct, ranging from aiding and abetting to direct, physical commission of the *actus reus*.[7] The phrase "being concerned in" therefore provided a catch-all charge and the precise degree of participation by an individual accused was expected to emerge at trial and to be reflected in the sentence upon a finding of guilt.

In the face of open-ended charges and few precedents, the British war crimes courts in Hong Kong had to develop their practice in addressing complex cases involving multiple accused or cases of commanders indicted in connection with crimes committed by their subordinates. The focus in this chapter will be on the biggest joint trial, that of Lieutenant Kishi Yasuo and 14 co-accused,[8] and arguably the most significant case of command responsibility, that of Colonel Noma Kennosuke.[9] All 15

3 United Kingdom, Royal Warrant 0160/2498, 18 June 1945, promulgated by the War Office, Army Order 81 of 1945 ('Royal Warrant') (http://www.legal-tools.org/doc/65e2cb/).

4 United Kingdom, Regulations for the Trial of War Criminals Attached to Royal Warrant 0160/2498, 18 June 1945, Promulgated by the War Office, Army Order 81 of 1945 ('Regulations for the Trial of War Criminals') (http://www.legal-tools.org/doc/386f77/).

5 Allied Land Forces South-East Asia, War Crimes Instruction No. 1 (2nd ed.) (as amended) in File WO 32/12197, UK National Archives.

6 Great Britain War Office, Manual of Military Law 1929 (7th ed., Great Britain War Office 1929) (Reprinted December 1939), His Majesty's Stationery Office, London, 1940, as amended in 1936 (the replacement of ch. XIV and in 1944 an amendment to para. 443 of ch. XIV) ('Manual of Military Law 1929').

7 See further Nina H.B. Jørgensen, "On Being 'Concerned' in a Crime: Embryonic Joint Criminal Enterprise?", in Suzannah Linton (ed.), *Hong Kong's War Crimes Trials*, Oxford University Press, Oxford, 2013, pp. 137–67.

8 Trial of Lt Kishi Yasuo and fourteen others, HKWCT Collection, file no. WO235/993 ('Trial of Kishi Yasuo').

9 Trial of Col Noma Kennosuke, HKWCT Collection, file no. WO235/999 ('Trial of Noma Kennosuke').

accused in the *Kishi* case were charged with committing a war crime by "being together concerned in the beating, torture and maltreatment of the inhabitants of Silver Mine Bay district of Lantau and in the killing of nine of the said inhabitants".[10] The prosecution noted in final arguments that it was a "long and arduous case" in part due to the "all-embracing nature of the single indictment" and also "due to the multiplicity of the accused involved".[11] Kishi was convicted of the full charge and sentenced to death by hanging along with two of his co-accused. Nine of the other accused were convicted either in respect of the full or a reduced charge and sentenced to varying terms of imprisonment. Three accused were acquitted. Noma was charged alone with committing a war crime in that he was concerned in the ill treatment of civilian residents of Hong Kong "as a result of which numbers of them died or were unlawfully killed by members of the Japanese Forces, and many others underwent physical suffering".[12] The charge spanned the period from 25 December 1941 to 18 January 1945 while Noma was head of the Kempeitai, "and as such responsible for public order, the control of Kempei personnel, and for the management of places of detention".[13] He was found guilty and sentenced to death by hanging.

This chapter aims to assess the contribution of the *Kishi* and *Noma* cases to the development of principles relating to the use of evidence in joint trials and the doctrine of responsible command. It will be seen that a cautious approach to joint responsibility was taken in the *Kishi* case, avoiding direct reliance on a concept of common intent. In the *Noma* case, the challenge was to identify an appropriate standard for the mental element of command responsibility that would serve to reinforce the purpose of criminalising a commander's failure to prevent or punish international crimes.

There were no reasoned judgments in the Hong Kong proceedings and the analysis that follows is based on the presentation and treatment of the law and evidence by the parties, the verdict delivered and the review of the judge advocate. Comparisons with contemporaneous cases and

[10] Trial of Kishi Yasuo, Judge Advocate's Report, slide 4, para. 1 of document.

[11] Trial of Kishi Yasuo, Prosecution Closing Speech, slide 541, p. 515 of document.

[12] Trial of Noma Kennosuke, Judge Advocate's Report, slide 4.

[13] *Ibid*.

modern jurisprudence are drawn where appropriate but a full discussion of the current state of the law is beyond the scope of this chapter.

12.2. Joint Responsibility in the Case of Lieutenant Kishi Yasuo and 14 Others

The *Kishi* trial began on 28 March 1946 and was the first war crimes case to be heard before the British courts in Hong Kong. It concerned a massacre of local Chinese in the Silver Mine Bay district of Hong Kong's Lantau Island, which was under Kishi's command, just days after the Japanese emperor's capitulation but before Japan's formal surrender. In retaliation for an attack by Chinese guerrillas, Kishi's men, initially in his absence, raided several villages, burning and looting and carrying out arrests. The captives were beaten and several were then beheaded by Kishi and others in a punitive campaign lasting about a week.[14] At trial, Kishi admitted executing three villagers, claiming self-defence, while his subordinate, Matsumoto, admitted giving orders to kill two further villagers but also claimed self-defence or sought to justify his actions as preventative measures. Another accused, Uchida, admitted killing two villagers but asserted that he was acting on Matsumoto's orders. The remaining accused argued that they were not present at or in any way concerned in executions and/or maltreatment, or that the alleged maltreatment did not occur.

The trial presented the first opportunity to test the application of Regulation 8(ii) of the Regulations for the Trial of War Criminals. Regulation 8(ii), which reflected a recommendation of the United Nations War Crimes Commission for joint trials where crimes had been committed collectively by groups, formations or units, provided as follows:

> Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as prima facie evidence of the responsibility of each member of that unit or group for that crime.
>
> In any such case all or any members of such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court.

[14] Trial of Kishi Yasuo, Prosecution Opening Speech, slide 607, para. 22 of document.

In its opening speech, the prosecution argued that the actions forming the subject-matter of the charge were the "concerted actions of the members of the KISHI Unit".[15] The prosecution went on to say that the accused were "charged in this indictment with the result that having acted jointly and severally in the perpetration of these murders and cruel treatment of the villagers they must one and all accept the natural consequences of their actions by which nine of the inhabitants of Lantau Island met a sad, cruel and untimely death".[16] The prosecution returned to this theme in closing arguments, stating that "the execution of […] all these villagers […] was not a one man show"[17] and that each accused "was concerned in varying degrees of culpability, some playing a more active part than others, some acting with more enthusiasm" in the beating and maltreatment which resulted in the deaths of at least nine villagers.[18] Without being explicitly referenced, Regulation 8(ii) appeared to provide a centrepiece for the prosecution's case. It was argued that

> all the evidence before this court tends to prove that the cruelty, maltreatment, the torture and finally the murder of the unfortunate islanders was not the action of any one individual, however big a part he played in this crime, but was in actual fact the concerted action over a period of one week of a group of individuals belonging to one unit who acted jointly in the continued maltreatment of the civilian inhabitants in their custody and which group or unit having jointly and severally [*sic*] are thus jointly and severally responsible for the natural consequences of their actions which in this case was the cruel and untimely death of nine of the inhabitants of the said Lantau Island.[19]

Placing emphasis on the assistance and moral support provided within Kishi's unit, the prosecution elaborated that belonging to the same unit was "sufficient to support the Prosecution's contention that [the members] were together acting jointly and severally and must for this reason accept full responsibility for the actions of their group".[20]

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15 *Ibid.*, slide 607, para. 23 of document.

16 *Ibid*.

17 Trial of Kishi Yasuo, slide 548, p. 522 of document, see *supra* note 11.

18 *Ibid.*, slide 549, p. 523 of document.

19 *Ibid.*, slide 550, p. 524 of document.

20 *Ibid.*, slide 551, p. 525 of document.

The arguments of the prosecution go further than treating Regulation 8(ii) simply as an evidential rule applicable to joint trials and hint at a theory of common purpose, though this was never openly brought forward. The 1929 Manual of Military Law contained a section on responsibility for crime based on "common intent" as follows:

> If several persons combine together for an unlawful purpose or for a lawful purpose to be effected by unlawful means, each is responsible for every offence committed by any one of them in furtherance of that purpose, but not for any offence committed by another member of the party which is unconnected with the common purpose, unless he personally instigates or assists in its commission. Thus, if a police officer goes with an assistant to arrest A in a house and all the occupants of this house combine to resist the arrest, and in the struggle the assistant is killed, the occupants are responsible. But if two persons go out to commit theft and one unknown to the other puts a pistol in his pocket and shoots a man the other is not responsible.[21]

While the prosecution appears to suggest that all of the accused in the *Kishi* case should be treated either as principals to the nine killings, or at least "concerned in" those killings on the basis of their participation in a common design, this implicit contention remained unexplored. It is furthermore not evident that the court accepted the possibility that all members of one unit acting in concert could be held fully liable for the actions of the group. Indeed, the charge was severed so as to individualise culpability, with certain accused being held responsible for the full extent of the crimes and others being exonerated from the accusation of involvement in the killings. The observations of the judge advocate make it clear that the degree of culpability was reflected in the sentences, with only Kishi, Matsumoto and Uchida being given the death penalty. The judge advocate also notes it was a long case in part due to the need to hear sufficient evidence to establish individual acts of torture and maltreatment against

[21] Manual of Military Law 1929, para. 17: this paragraph featured in the *1914 Manual of Military Law* (89 para. 18) in identical terms save the first phrase which referred instead to "several persons" going out with "a common intent to execute some criminal purpose". The notion of "common intent" was known to United States military law as well, see United States War Department, *A Manual for Courts-Martial, Courts of Inquiry and of Other Procedure under Military Law*, Government Printing Office, Washington, DC, 1917, p. 34, para. 69.

those who were found guilty.[22] While it was logical to hold a joint trial of all those accused of involvement in a single series of events, the court did not appear to make significant advances in the use of evidence against multiple, jointly charged accused, or in the development of legal principles concerning joint participation. The concept of "common intent", which may be seen as a precursor to the modern notion of joint criminal enterprise, was available to the Hong Kong courts but remained dormant in the *Kishi* case.

12.3. Command Responsibility in the Case of Colonel Noma Kennosuke

The concept of a commander's responsibility for war crimes committed by troops under his direct command was recognised long before the Second World War;[23] however, the applicable legal principles were underdeveloped at the time of the Hong Kong war crimes trials. Most of these trials had been completed when the International Military Tribunal for the Far East ('IMTFE') delivered its judgment, expanding on the law in this area.[24] According to Article 7(3) of the Statute of the International Criminal Tribunal for the former Yugoslavia, which reflects the modern notion of command responsibility, criminal responsibility for a commander arises if he knew or had reason to know that the subordinate was about to commit such acts (as war crimes) or had done so *and* he failed to take the

[22] Trial of Kishi Yasuo, slide 7, para. 5 of document, see *supra* note 10.

[23] In 1625 Hugo Grotius wrote that "he who knows of a crime, and is able and bound to prevent it but fails to do so, himself commits a crime […] unless he punishes or surrenders the guilty party". Hugo Grotius, O*n the Law of War and Peace*. *De Jure Belli ac Pacis*, trans. A.C. Campbell, London, 1814, book II, ch. 21, sec. 2, para. 2.

[24] See International Military Tribunal for the Far East ('IMTFE'), Indictment, Count 55, which charged high Japanese government and military officials with failing to take adequate steps to secure the observance and prevent breaches of conventions and laws of war in respect of prisoners of war and civilian internees (http://www.legal-tools.org/doc/59771d/); and IMTFE, *Prosecutor v. Araki et al.*, Judgment, 1 November 1948 (http://www.legal-tools.org/doc/3a2b6b/). See also B.V.A. Röling and C.F. Ruter (eds.), *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946–12 November 1948*, 2 vols., APA-University Press, Amsterdam, 1977, ch. IX, p. 1144

necessary and reasonable measures to prevent such acts or to punish the perpetrators.[25]

Re Yamashita was the first international trial in which a military commander was charged with disregarding and failing to discharge his duty to control the operations of his troops by "permitting them to commit" war crimes.[26] The legal charge and factual pattern in *Re Yamashita* were similar to that of *Noma* and shed light on two features of command responsibility which were reflected in both cases. First, the United States Military Commission sitting in the Philippines found that General Yamashita Tomoyuki, as the commanding general of the 14th Army Group of the Imperial Japanese Army in the Philippines during the war in the Pacific, was under a duty to take appropriate measures within his power to control troops under his command and prevent acts which violated the laws of war. The failure to fulfil this duty would potentially render him personally responsible when violations resulted. This echoes the charges of war crimes against Noma which were also primarily framed as crimes arising out of omissions.[27] Second, the US Military Commission asserted that in certain circumstances, a "failure to discover [criminal conduct]" could also lead to criminal liability. If "in certain circumstances" includes "receiving prior warnings", the language chosen by the Military Commission supports the prosecution's claim in the case of *Noma* in that the accused had "distained to follow up warnings he received [of crimes committed by his troops]".[28] Ultimately, the vague formulation of the knowledge re-

[25] United Nations, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted 25 May 1993 by resolution 827 (1993), last amended 7 July 2009 by resolution 1877 (2009), Art. 7(3) (http://www.legal-tools.org/doc/b4f63b/). The International Criminal Court's definition of command responsibility under Article 28(a) of the Rome Statute differs in two respects. First, instead of "knew or would have reason to know" the *mens rea* standard is "knew or owing to the circumstances, should have known". Second, instead of "failing to prevent or punish", a commander is liable for "failing to prevent or submit the matter to the competent authorities for investigation and prosecution". Rome Statute of the International Criminal Court, adopted 17 July 1998, entry into force 1 July 2002 (http://www.legal-tools.org/doc/7b9af9/).

[26] *Re Yamashita*, 327 U.S. 1 (1946), reprinted in United Nations War Crimes Commission ('UNWCC'), *Law Reports of Trials of War Criminals*, vol. 14, His Majesty's Stationery Office, London, 1948, pp. 3–4.

[27] Trial of Noma Kennosuke, Charging Documents, slide 16, p. 8 of document. See also Prosecution's Opening Statement, slide 487, p. 479 of document.

[28] Trial of Noma Kennosuke, Prosecution's Closing Statement, slides 719–20, pp. 713–14 of document.

quirement in *Re Yamashita* brought about a long-standing debate on the standard of knowledge required for command responsibility as it is uncertain whether the Military Commission required commanders actively to find out about their subordinates' crimes.[29] The case at least underlined that actual knowledge would satisfy the *mens rea* requirement. These factors are pertinent in *Noma* as it was alleged by the prosecution that Noma was responsible because he failed to prevent war crimes or punish troops under his control despite possessing both actual and constructive knowledge of the repeated occurrence of such crimes.

Noma was both *de facto* and *de jure* commandant of the Kempeitai, responsible for maintaining civilian order in Hong Kong by carrying out military police functions while also assisting in war operations.[30] The prosecution maintained that from the time of the Japanese invasion of Hong Kong to the time Noma was relieved of command in February 1945, he inspired a policy of ill treatment of civilians amounting to violations of the laws and usages of war. These violations were classified into three categories:

> 1. The mismanagement of places of detention, inasmuch as prisoners were overcrowded, starved, tortured and refused medical attention with consequent suffering and deaths accruing as a result of all these contributing factors.
> 2. Illegal executions.
> 3. The mass deportation of civilians from Hong Kong [which] began in 1942 or 1943 and carried on throughout [the] Accused's term of office.[31]

Sixty witnesses were called to substantiate the allegation that Noma "with certainty and beyond the limit of contrary argument" was criminally liable "1) Where he orders criminal acts [committed by his subordinates] and 2) Where he knows of them, and either permits them, or fails to take adequate measures to prevent their continuance".[32] The prosecution added

[29] It has been argued that the Military Commission simply believed Yamashita either knew of the atrocities committed by his troops, or that he must have known in the circumstances. See William H. Parks, "Command Responsibility for War Crimes", in *Military Law Review*, vol. 62, 1973, p. 77, quoting the Military Commission's written opinion.

[30] Trial of Noma Kennosuke, Testimony of Col Noma Kennosuke, transcript 321, slide 338, p. 330 of document.

[31] Trial of Noma Kennosuke, slide 720, p. 714 of document, see *supra* note 28.

[32] *Ibid.*, slide 719, p. 713 of document.

that, as a projection of the second basis for liability, warning of wrongdoing and a failure to investigate also incurs criminal liability.[33]

It is worthwhile to note that questions of effective control and failure to prevent/punish were not contested for the most part. In regards to the former, it was undeniable that Noma, as its head, had command and control of the Kempeitai in Hong Kong.[34] On the topic of prevention/punishment, counsel for the defence recounted several incidents where Noma meted out severe punishment when he came to know of offences committed by his subordinates.[35] It was thereby argued that Noma would have prevented/punished crimes committed by his subordinates if only he had been made aware of them. The real argument, therefore, lay in the *mens rea* in relation to the alleged crimes, which was the heart of the legal dispute between the prosecution and defence.[36] In light of this, the question directed at the court was whether there were violations of the laws and usages of war and, if so, whether the accused knew of them or failed to discharge his responsibility to follow up on warnings. As the legal debate in Noma's case centred on his knowledge of the crimes committed by his subordinates, the focus here will be on the second basis for liability raised by the prosecution.

In explaining how Noma was "concerned in" the alleged violation relating to the mismanagement of places of detention by gendarmes under his control, the prosecution introduced several arguments based on witness testimony, to establish that Noma knew or at least "recklessly disregarded" proof of warning of the crimes.[37] First, the prosecution submitted that Noma retained actual knowledge of torture at places of detention. Colonel Kanazawa testified that Noma's superior, Governor General Isogai Rensuke, repeatedly admonished Noma following complaints re-

33 *Ibid*.

34 Noma agreed that he was "quite capable of taking charge of the Hong Kong Gendarmerie". Trial of Noma Kennosuke, transcript 356, slide 373, p. 365 of document, see *supra* note 30.

35 Trial of Noma Kennosuke, transcript 329, slide 346, p. 338 of document, see *supra* note 30.

36 Counsel for the defence submitted that because Noma had no knowledge of his troops' crimes, he cannot be said ever to have "committed such offences, be they of commission or omission, as those for which he is blamed in this trial". Trial of Noma Kennosuke, Defence's Closing Statement, slide 716, p. 710 of document.

37 Trial of Noma Kennosuke, slide 720, p. 714 of document, see *supra* note 28.

ceived about the misconduct of gendarmes and torturing of prisoners.[38] Edward David Sykes testified that Noma stood by and watched for "about seven to ten minutes" as he [Sykes] was given the electric torture and that to do so, Noma had to have come through another room where people were being given the aeroplane torture.[39] The prosecution claimed that Sykes's account, if true, "would have put the Accused on enquiry as to the practices of his underlings".[40] Counsel for the defence flatly refuted the latter piece of evidence. Noma himself also denied ever having seen an instance of these inhuman practices and insisted that "if anyone [of the gendarmes] tortured suspects they would be severely punished".[41]

The prosecution claimed that in addition to actual knowledge of the gendarmes' conduct in torturing prisoners, Noma possessed what amounted to knowledge by inference. By presenting a procession of witnesses who described ceaseless persecution and suffering, the prosecution contended that there existed a calculated policy of sustained cruelty which "lasted throughout the Accused's term of office and the area under his jurisdiction [a part] of which were within a few miles of his own HQ".[42] In its submission, the prosecution presented and relied on circumstantial evidence. For instance, it suggested that the "screaming and wailing night and day" by prisoners being interrogated in the Supreme Court would have been heard by Noma in his nearby office which was in the same building. The prosecution further stated that an officer of normal intelligence upon hearing such sounds would have been moved to seek the cause.[43] In his defence, Noma replied that he "frequently had to leave his office during the day" and denied that any cries were audible to him.[44] His

[38] Trial of Noma Kennosuke, Prosecution Witness No. 8, slide 40, p. 34 of document. See also Prosecution's Closing Statement, slide 721, p. 715 of document on the first witness statement by Colonel Kanazawa.

[39] Trial of Noma Kennosuke, Prosecution Witness No. 29, slides 148, 164, pp. 140, 156 of document.

[40] Trial of Noma Kennosuke, slide 721, p. 715 of document, see *supra* note 28.

[41] Trial of Noma Kennosuke, transcript 336, 338, slides 353, 355, pp. 349, 347 of document, see *supra* note 30.

[42] Trial of Noma Kennosuke, slide 722, p. 716 of document, see *supra* note 28.

[43] *Ibid*.

[44] Trial of Noma Kennosuke, transcript 334, slide 351, p. 343 of document, see *supra* note 30.

counsel also claimed that there was considerable noise from outside traffic which obscured Noma's hearing range.[45]

The prosecution then turned to Noma's own testimony as further proof of his knowledge of the mismanagement of the places of detention. On the issue of torture, the prosecution emphasised that Noma himself said: "I was worried for it [torture] and I looked for it and I did not find such things. […] I visited stations to look for instruments of torture but couldn't find any".[46] On the issue of overcrowding, the prosecution stated it was dubious Noma did not notice the cells were over capacity since he inspected them about once a week. Also, as Noma claimed he received reports of all arrests made, he would have known, through numerical calculation, that the cells were inadequate to hold all the prisoners. Regarding the final point which was on the issue of a lack of food and medical supplies, the prosecution alleged that Noma could not have reasonably failed to investigate whether his medical facilities were adequately available to detainees. To support this inference, it highlighted a request by the Chinese Peoples' Council ('CPC') for hospitalisation of the prisoners which Noma responded to by saying the hospitalisation matter "will be considered".[47] On the other hand, the arguments submitted by the defence were primarily based on the ground that the evidence of the witnesses called by the prosecution were neither credible nor accurate and did not bear up under close scrutiny.

In the end, it is uncertain how much weight the court placed on the prosecution's submission that Noma possessed actual knowledge of the

[45] Trial of Noma Kennosuke, slide 723, p. 717 of document, see *supra* note 28.

[46] Trial of Noma Kennosuke, slide 723, p. 717 of document on Noma's statements and evidence, see *supra* note 28. Transcript 376, slide 393, p. 385 of document on the first witness statement by Kanazawa, see *supra* note 30. Noma likely made the statement to show he was neither negligent nor reckless in failing to acquire knowledge of his subordinates' crimes.

[47] Trial of Noma Kennosuke, slide 725, p. 719 of document, see *supra* note 28. In assessing how much weight the court placed on the CPC's request to establish Noma's knowledge of the first allegation, the *Boškoski and Tarčulovski* case is of value. There, the Trial Chamber held that information from outside of the commander's own organisation can constitute information that gives rise to knowledge. Although Boškoski was not a military commander, the ICTY Statute does not distinguish between the duties of military and civilian superiors. Therefore, it is applicable as a comparison to *Noma*. International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Trial Chamber, Judgment, 10 July 2008, IT-04-82-T, para. 1 ('Boškoski and Tarčulovski Judgment') (http://www.legal-tools.org/doc/939486/).

mismanagement of places of detention considering the defence's claims that much of the evidence given by the prosecution witnesses was "full of false and exaggerated stories".[48] While it seems unlikely that Noma failed to "find any evil" despite the claims in his own testimony that he was alive to the possibility of torture of the prisoners,[49] the court's verdict in respect of this allegation may also have been grounded on knowledge derived from matters of inference. Indeed, the jurisprudence from *ad hoc* tribunals and the International Criminal Court today would support the notion that constructive knowledge is sufficient to give rise to criminal liability under command responsibility.[50] In the case of *Prosecutor v. Delalić et al.* ('*Čelebići*'), the Trial Chamber held that "depending on the position of authority held by a superior […] the evidence required to demonstrate actual knowledge may be different".[51] However, in *Prosecutor v. Aleksovski*, the Trial Chamber held that while a superior position *per se* is a significant indicium for actual knowledge, there can be no presumption of such as it could automatically entail guilt which comes too close to making liability under command responsibility strict.[52] This indicates that the court would likely not have held that Noma had actual knowledge solely by virtue of his position as commandant. Separately, the Trial Chamber in *Čelebići* is of value in speculating as to the court's approach in assessing the circumstantial evidence in the case of *Noma*. In *Čelebići*, it was decided that indicia such as "the location of the commander at the time", "the number of illegal acts" and "the geographical location of the acts" can help determine whether or not a commander must have known about the acts of his subordinates.[53] Applied to the case

[48] Trial of Noma Kennosuke, Defence's Closing Statement, slide 685, p. 679 of document. See also Prosecution Witness No. 18, slide 88, p. 80 of document.

[49] Trial of Noma Kennosuke, slide 723, p. 717 of document, see *supra* note 28. See also transcript 376, slide 393, p. 385 of document, *supra* note 30; and slide 492, p. 484 of document, *supra* note 27.

[50] For example, see ICTY, *Prosecutor v. Zdravko Mucić, Esad Landžo Hazim and Zejnil Delalić*, Trial Chamber, Judgment, 16 November 1998, IT-96-21-T, para. 393 ('Čelebići Trial Judgment') (http://www.legal-tools.org/doc/6b4a33/).

[51] *Ibid.*, para. 428.

[52] ICTY, *Proseuctor v. Zlatko Aleksovski*, Trial Chamber, Judgment, 25 June 1999, IT-95-14/1-T, para. 80 (http://www.legal-tools.org/doc/52d982/).

[53] A list of 12 indicia of knowledge was provided in the Final Report of the Commission of Experts. The Commission of Experts was tasked to collect evidence of violations of humanitarian law within the former Yugoslavia. See Čelebići Trial Judgment, para. 386, *supra* note 50.

of *Noma,* this would suggest that Noma would have at least constructive knowledge regarding the torture taking place in the Supreme Court.

In alleging that Noma was concerned in illegal executions carried out by his subordinates, the prosecution raised three incidents which it claimed would point to the accused's knowledge. First, the prosecution addressed the testimony of Tsang Pei-Fu who claimed to have heard, while working in the prison of the Western Gendarmerie, that reports of illegal executions were sent to gendarmerie headquarters.[54] The prosecution contended that this hearsay evidence was corroborated by Noma's own affirmation that he received daily reports as to the progress of interrogations.[55] In the prosecution's view, this meant that Noma should have also received a report when action was taken "to eliminate an undesirable element" as that would remove the need for further interrogation. A more notable submission made by the prosecution revolved around the defence's cross-examination of Rampal Chilote. Chilote testified that following his arrest, a gendarme took him to a high official to request permission for Chilote's execution to which the high official responded "no, no, Indian can't be shot".[56] The prosecution held that Chilote's claim was again substantiated by Noma who referred to the episode in his testimony and said he "scolded" the gendarme for even asking for such a stringent measure.[57] While the witness was obviously not executed, the prosecution used the incident to illustrate that if executions without trials were as outlandish of an idea as Noma claimed them to be, the request would not have been raised in the first place. Surprisingly, the most unfavourable evidence to Noma in this allegation was volunteered by Noma himself. In his testimony, Noma asserted that after unsuccessfully protesting against an order by his superior to unlawfully execute some guerrillas, he "ordered [his] district commanding officer to execute these people on the spot".[58]

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54 Trial of Noma Kennosuke, Prosecution Witness No. 28, slide 144, p. 136 of document.

55 Trial of Noma Kennosuke, transcript 328, slide 345, p. 337 of document referring to exhibit H, see *supra* note 30.

56 Trial of Noma Kennosuke, Prosecution Witness No. 42, slide 253, p. 245 of document.

57 Trial of Noma Kennosuke, slide 726, p. 720 of document, see *supra* note 28. See also transcript 338, slide 355, p. 347 of document, *supra* note 30.

58 Trial of Noma Kennosuke, slide 727, p. 711 of document, see *supra* note 28. See also transcript 350, slide 367, p. 359 of document, *supra* note 30.

The court's affirmative verdict as to Noma's culpability clearly indicates that it was unconvinced there existed an absence of knowledge in the accused of the illegal executions. In *Prosecutor v. Orić*, the Trial Chamber concluded that actual knowledge of crimes committed, or about to be committed, was an indicium that the accused had reason to know about the crimes committed thereafter.[59] Transplanted to the case of *Noma*, this means that as long as Noma received a single report that showed his subordinates carried out illegal executions, he would possess information sufficient to give rise to constructive knowledge of subsequent illegal executions. By similar reasoning, a gendarme's request for Noma's permission to carry out an illegal execution would put him on notice of such parallel unlawful conduct thereafter. While it is unlikely that the court in the case of *Noma* was of the view that *any* lack of adherence to international humanitarian law would compel a commander to become extra prudent, it could have held that Noma was compelled to know under the circumstances since a close nexus in time and scope was present in the illegal executions. Nevertheless, what really incriminated Noma was his own confession that he ordered the illegal executions of guerrillas. This cemented actual knowledge of the violation and could not be defended via the superiors orders defence since the defence applies only if an order was not obviously unlawful.

The prosecution labelled mass deportation "a well authenticated war crime against humanity"[60] and, in alleging Noma's knowledge of the unlawful deportation scheme that existed under his command, the prosecution called upon several witnesses.[61] The testimonies of those witnesses were recounted in an attempt to demonstrate that the gendarmerie resorted to the law of the jungle in carrying out its duty of rounding up evacuees. The prosecution went on to say that while these testimonies alone could serve to impute knowledge in Noma, they were unnecessary to confirm the charge since proof of actual knowledge could be derived in statements made by Noma himself. First, the prosecution held that Noma openly admitted that "the persons deported were mostly beggars and vagrants" as

[59] ICTY, *Prosecutor v. Naser Orić,* Trial Chamber, Judgment, 30 June 2006, IT-03-68-T, para. 550 ('Orić Trial Judgment') (http://www.legal-tools.org/doc/37564c/).

[60] Trial of Noma Kennosuke, slide 727, p. 721 of document, see *supra* note 28.

[61] Trial of Noma Kennosuke, Prosecution Witness No. 50, slide 292, p. 284 of document.

opposed to persons facing deportation as a punishment after trial.[62] Second, the prosecution claimed that Noma's attention was specifically brought to the violation when the governor instructed him "to do some rectifications" following an incident whereby the CPC requested the gendarmerie to "be more careful in collecting evacuees and not arresting people who were not appointed to be evacuated".[63] In that incident, Noma acknowledged the governor's instructions and responded that he would "instruct his district commanders to be just as careful as before".[64]

The sheer number of testimonies regarding the gendarmes' impunity in respect of rounding up evacuees likely played a major role in the court's final decision as to Noma's culpability. At any rate, the court would have at least determined that the governor's admonishment and the CPC's request should have alerted Noma to his gendarmes' conduct. By way of comparison, it was held in the *Roechling* case[65] that "it is [a commander's] duty to know what occurs in his organization, and lack of knowledge, therefore, can only be the result of criminal negligence".[66] This inferred concept of a strict "duty to know" was later ruled out in *Čelebići* by the Appeals Chamber[67] which instead followed the practice dictated in military manuals such as the US Army Field Manual, stating a commander "should have had knowledge, through reports received by

62 Trial of Noma Kennosuke, slide 728, p. 722 of document, see *supra* note 28. See also transcript 379, slide 396, p. 388 of document, *supra* note 30.

63 Trial of Noma Kennosuke, slides 728–29, p. 722–23 of document, see *supra* note 28. See also transcript 343, slide 360, p. 352 of document, *supra* note 30.

64 *Ibid*.

65 *The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Herman Roechling and Others*, Judgment on Appeal to the Superior Military Government Court of the French Occupation Zone in Germany, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, vol. XIV, United States Government Printing Office, Washington, DC, 1949, appendix B.

66 *Ibid.*, appendix B, p. 1106.

67 The Appeals Chamber also held that the accused had actual knowledge in *Roechling* since "Roechling […] had repeated opportunities during the inspection of his concerns to ascertain the fate meted out to his personnel, since he could not fail to notice the prisoner's uniform on those occasions". ICTY, *Prosecutor v. Zdravko Mucić, Esad Landžo Hazim and Zejnil Delalić*, Appeals Chamber, Judgment, 20 February 2001, IT-96-21-A, para. 239 (Čelebići Appeals Judgment) (http://www.legal-tools.org/doc/051554/).

him or through other means".[68] However, the Appeals Chamber in *Čelebići* interpreted "in possession of [reports]" and "[reports] available to" to mean that it was not necessary for a commander to have actually been acquainted with information in order to have constructive knowledge.[69] In other words, a commander need not have read or heard an oral report as long as he had the opportunity to do so. This means that the difference between what constitutes a "duty to know" in *Roechling* and *Čelebići* would not have affected Noma's *mens rea* in this case since Noma had warnings made available to him and would therefore be culpable regardless of the test.

12.4. Critique of *Noma* and Remarks on the Development of the Law

There is a conventional understanding in the military that a commander should be responsible for the actions of subordinates in the performance of their duties.[70] At the same time, while convention often informs the law, it does not always give rise to legal decrees. The cross-examination of Noma offers a glimpse into his personal perspective of responsible command. Noma was asked: "You thought it was fair to punish people for offences committed by their subordinates when they did not even know the things were being done?" He replied: "They should be punished because they had to supervise their subordinates". He was then asked: "And the man who does not supervise his subordinates correctly deserves punishment, is that right?" Noma answered: "That is correct".[71] Noma's responses illuminate that he believed a military commander should be conscientious in observing the conduct of his subordinates and diligent in exercising control over them with the failure to do so resulting in possible moral and legal responsibility.

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[68] United States, *Field Manual 27-10, The Law of Land Warfare*, Department of the Army, 18 July 1956, as modified by Change No. 1, 15 July 1976.

[69] Čelebići Appeals Judgment, para. 239, see *supra* note 67.

[70] The first time the notion of command responsibility was recognised internationally was in the trial of Peter von Hagenbach by an *ad hoc* tribunal in the Holy Roman Empire. The accused was convicted of crimes which he, as a knight, was deemed to have a duty to prevent. See Parks, 1973, p. 5, *supra* note 29. The first attempt to internationally codify the principle of command responsibility was in the Hague Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, Art. 1 (http://www.legal-tools.org/doc/fa0161/).

[71] Trial of Noma Kennosuke, transcript 355, slide 372, p. 364 of document, see *supra* note 30.

It should be acknowledged that Noma's case was decided at a time when the doctrine of command responsibility was still emerging under international law. Yet, the accused was invariably charged through the elements of this incipient principle. As such, in evaluating the justness of the verdict, a pertinent question is whether criminal responsibility based on the principle of command responsibility was a fair burden to impose upon *Noma* in the momentous context of international crimes and with respect to the particular situation in Hong Kong at the relevant time. Judge Frank Murphy raised a forceful dissenting judgment in *Re Yamashita* in this regard, stating:

> There was no serious attempt to charge or to prove that he [Yamashita] committed a recognized violation of the laws of war. He was not charged with personally participating in the acts of atrocity, or with ordering or condoning their commission. Not even knowledge [actual knowledge] of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. […] The established principles of international law afford not the slightest precedent for such a charge. This indictment, in effect, permitted the military commission to make the crime whatever it willed.[72]

This part of Judge Murphy's dissent has a certain resonance as a criticism of the verdict in the *Noma* case. For instance, the charge of being "concerned in" war crimes was framed atypically as it suggested complicity via an omission, namely the dereliction of duty, rather than positive acts. This legal construction was not well established in international law at the time of the trial. Further, in line with the above analysis of his alleged violations, with the exception of one case of illegal execution, it was unlikely that the prosecution succeeded in proving beyond a reasonable doubt that Noma had actual knowledge of the crimes committed by his subordinates. Yet, in both *Noma* and *Re Yamashita*, although the prosecution did not directly establish that the accused were aware of atrocities committed by their respective troops, the court found that they incurred liability by the mere fact that the atrocities committed by their troops were of a wide-

[72] *Re Yamashita*, pp. 26–41, see *supra* note 26.

spread and pervasive nature.[73] However, this is where the factual similarities between the two cases end. In assessing whether the principles of fairness, justice and due process were present in *Noma*, an important difference with *Re Yamashita* must be noted. Yamashita was the commander of an army "totally destroyed" by the superior power of the United States[74] and it was "while under heavy and destructive attack that his troops committed many brutal atrocities and other high crimes".[75] Since Yamashita assumed command in the midst of battle, he claimed he was never able to assert actual control over his subordinates. On the other hand, the atrocities committed by Noma's subordinates could not be said to have been carried out in the fury of combat and were, in almost all circumstances, acts which remained within Noma's effective control. On the face of the facts, it appears highly probable that if Noma had fully discharged his duties as a responsible commander, he would have been able to substantially reduce, if not eliminate, the ill treatment of civilians in Hong Kong. Therefore, Judge Murphy's dissent, regardless of its persuasiveness, cannot coherently be applied to the case of *Noma*.

According to *Čelebići*, it is not enough to ask if a commander had knowledge of a crime committed or about to be committed by his subordinate.[76] To allow criminal liability under command responsibility to attach to a commander, the commander must possess knowledge of "specific elements of the crime".[77] It is not an easy task to prove the existence of actual knowledge of the specific elements of a crime and, to do so in *Noma*, the prosecution would have to bring forward evidence to show that

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73 For *Re Yamashita,* per judgment delivered by the president of the Commission, see *ibid.*, p. 14. For *Noma,* see Trial of Noma Kennosuke, slide 491, p. 483 of document, *supra* note 27.

74 *Re Yamashita*, p. 27, see *supra* note 26.

75 *Ibid*.

76 Čelebići Trial Judgment, para. 393, see *supra* note 50.

77 After the First World War the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties recommended establishing an international tribunal to try individuals for ordering, or, with knowledge thereof and with power to intervene, abstaining from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war. While the proposed tribunal was not established in the end, the Commission stipulated that under the rules of the tribunal, "specific knowledge" would have been required to hold military commanders liable for command responsibility. See International Law Commission, *Historical Survey of the Question of International Criminal Jurisdiction*, United Nations, New York, 1949, UN doc. A/CN.4/7/Rev.1, p. 7.

the accused had knowledge of both the *actus reus* and *mens rea* of his subordinates when they committed the crimes. While the *actus reus* could be logically inferred, the prosecution would likely have failed in establishing with certainty that Noma knew of his subordinates' culpable state of mind when engaging in the crimes. The Appeals Chamber in *Prosecutor v. Krnojelac* illustrated just how difficult it is to prove actual knowledge of a subordinate's *mens rea* in this regard.[78] The question in that case was whether Krnojelac, as a detention camp commander, knew of incidents of torture committed within his camp. Although it was established that Krnojelac witnessed and even knew of beatings, the prosecution was unable to prove that the commander knew they were being carried out "for one of the purposes provided for in the prohibition against torture" and as such could not be said to have actual knowledge of torture being committed by his subordinates.[79] Such an analysis supports the conclusion that Noma's actual knowledge of the allegations of mismanagement at places of detention and the unlawful deportation of Hong Kong civilians was likely repudiated by the court. However, the court could still have found him liable through constructive knowledge as it is recognised in international law today.

In *Prosecutor v. Boškoski*,[80] the Trial Chamber ruled that media reports and a report by Human Rights Watch regarding one single event was enough to give rise to constructive knowledge by declaring that in such circumstances, a commander "had reason to know" a matter required further investigation.[81] Under this view, Noma almost certainly had in his

[78] ICTY, *Prosecutor v. Milorad Krnojelac*, Appeals Chamber, Judgment, 17 September 2003, IT-97-25-A ('Krnojelac Appeals Judgment') (http://www.legal-tools.org/doc/46d2e5/).

[79] *Ibid.*, para. 155.

[80] Boškoski and Tarčulovski Judgment, see *supra* note 47.

[81] *Ibid.*, para. 527. This view is also supported in the *High Command* case where the US Military Tribunal stated a commander is charged with notice of occurrences which take place within [occupied] territory and that where he has received reports of crimes and he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence. The takeaway here is that if a commander has received 'reports' alluding to crimes committed by his subordinates, he cannot be protected from liability for command responsibility by pleading he had no 'actual knowledge' due to his dereliction of duty. See US Military Tribunal at Nuremberg, Military Government for Germany, *United States v. Wilhelm von Leeb et al.*, Judgment, 27–28 October 1948, reprinted in UNWCC, *Law Reports of Trials of War Criminals*, vol. 7, His Majes-

possession information of a nature which indicated a need to investigate. In ensuring that his subordinates were discharging their duties properly, Noma said he ordered his various district command officers to "cooperate with the Commandant as if they were one heart and one body […] which meant reporting frequently as to their personal circumstances to their superior officers".[82] The witness, Captain Yatagoi Sukeo, verified that Noma had instructed the district command officers to know everything which took place within their districts and report the matters back to him.[83] Noma also claimed to have had actual "intimate knowledge of [my subordinates'] duties".[84] He maintained that the district command officers reported to him daily and on the occasions where any serious incidents had occurred, the matter had to be reported immediately to the commandant, regardless of the time of day. He further mentioned that another way to inquire into the methods of the district command officers was through seeking information from the lower staff of the gendarmerie and through rumours.[85] Finally, Noma said that since he had some doubts his subordinates reported the true facts to him, he stressed strongly that the reports made to him must be sincere. According to the 1929 Manual of Military Law, the duty of investigation requires deliberation and the exercise of temper and judgment.[86] Given Noma's military training, academic background in law and apparent good intentions, it is hardly likely that his investigations, if conducted attentively, failed to decipher information which could give rise to constructive knowledge of his troops' crimes.

Reference may also be made in this context to the International Law Commission's work on a draft Code of Crimes against the Peace and Security of Mankind which states that "the superior incurs criminal responsibility even if he has not examined the information sufficiently or, having examined it, has not drawn the obvious conclusions".[87] Since Noma testi-

ty's Stationery Office, London, 1949, p. 88 ('High Command Judgment') (http://www.legal-tools.org/doc/c340d7/).

82 Trial of Noma Kennosuke, transcript 326, slide 343, p. 335 of document, see *supra* note 30.

83 Trial of Noma Kennosuke, Defence Witness No. 2, slides 404–5, pp. 396–97 of document, see *supra* note 30.

84 Trial of Noma Kennosuke, transcript 327, slide 344, p. 336 of document, see *supra* note 30.

85 Trial of Noma Kennosuke, transcript 328, slide 345, p. 337 of document, see *supra* note 30.

86 Manual of Military Law 1929, ch. 4, para. 31, see *supra* note 6.

87 International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the work of its fortieth session,

fied to be a watchful and alert military commander, it would not be inappropriate to assume that the reason behind his alleged lack of knowledge was actually a wanton and immoral disregard of reported information and observed conduct amounting to acquiescence. Indeed, acquiescence was later held by the US Military Tribunal in the *High Command* case to meet the *mens rea* requirement of command responsibility in certain circumstances.[88]

The Appeals Chamber in *Prosecution v. Strugar* held that "sufficiently alarming information putting a [commander] on notice of the risk that crimes might subsequently be carried out by his subordinates and justifying further inquiry is sufficient to hold a superior liable".[89] The *Noma* case may be seen to set an early precedent for the notion of "alarming information" described in *Strugar*. In his testimony, Noma stated that one of the goals of the gendarmerie was to gain the trust of the public. Accordingly, he took two measures to achieve this goal. He installed letter boxes to follow the public opinion of the population so as "to know every complaint" and he took significant measures in monitoring the activities of his subordinates.[90] However, Noma claimed he did not receive any complaints about torture or very many letters at all in the letter boxes. He suspected that this was because the district command officers failed to report to him letters which were unfavourable to them. As a result of the initiative's lack of success, Noma discontinued the complaints system. The question that would have come to the court's mind at this point is whether the lack of complaints and Noma's suspicion of his subordinate's dishonesty constitute information which should have put him on inquiry of the risk that crimes may be committed. This in turn would have depended on whether the information should have enabled Noma to conclude that he needed to make further inquiries to affirm or discredit the information. The court's finding of Noma's guilt could very well have been founded, at least partially, on answering this question affirmatively. In fact, this deduction would be supported by the Appeals Chamber in *Čelebići* where

9 May–29 July 1988, *Yearbook of the International Law Commission*, vol. 1, 1988, UN doc. A/43/10, p. 71.

88 High Command Judgment, p. 77, see *supra* note 81.

89 ICTY, *Prosecution v. Pavle Stugar*, Appeals Judgment, 17 July 2008, IT-01-42, para. 304 (http://www.legal-tools.org/doc/981b62/).

90 Trial of Noma Kennosuke, Testimony of Col Noma Kennosuke, transcript 372, slide 389, p. 381 of document.

reference was made to the International Committee of the Red Cross Commentary to the Additional Protocols to the Geneva Conventions to the effect that "alarming information" which gives rise to constructive knowledge does not have to encompass the *mens rea* and *actus reus* of a crime as required by actual knowledge.[91] Since, as mentioned above, the prosecution would likely have found it difficult to establish actual knowledge in Noma, the court may have relied on the existence of "alarming information" to assume the existence of constructive knowledge in the accused instead.

In the heat of battle, the possibility of deteriorating discipline is an ever-present risk. This was even articulated by Noma himself when appearing as a defence witness. War tends to breed atrocities and one of the vital roles of a commander is to ensure that his subordinates do not violate international humanitarian law. In this regard, an expansive *mens rea* standard for command responsibility is desirable as it may serve as a deterrent and promote vigilance on the part of leaders in preventing violations of international humanitarian law. A standard which only imposes a duty to investigate once the commander has been put on notice of criminal conduct permits, in effect, a plea of negligence as a defence. Such a standard would contradict the underlying purpose of command responsibility by allowing commanders to assert innocence on the basis of having negligently failed to carry out their duty to create a proper reporting system. In its closing statement in the *Noma* case, the prosecution stated that "[it is important] to point out to future potential men of Noma's calibre what would happen to men who behave in the fashion he has in a similar situation and it should be a very sobering deterrent".[92] Whether or not Noma's case has served as a deterrent, it is illustrative of the evolution of a coherent theory of command responsibility that is not so far removed from the modern doctrine.

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91 "For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge". Čelebići Appeals Judgment, para. 238, see *supra* note 67.

92 Trial of Noma Kennosuke, slide 734, p. 728 of document, see *supra* note 28.

12.5. Conclusion

Command responsibility is sometimes regarded as an interloper of international criminal law because it is a form of liability that applies solely to omissions. The Trial Chamber in *Prosecutor v. Orić* noted that "the superior bears responsibility for his own omission in failing to act" and is therefore not responsible in the same manner as the subordinate who physically commits the crime.[93] Nonetheless, command responsibility is not regarded as a form of strict liability.[94] The doctrine of command responsibility is in principle distinguishable from criminal liability for "complicity" by which commanders may be held responsible for providing assistance to the principal perpetrators.

It is not clear that command responsibility was regarded exclusively as a form of dereliction of duty in *Noma*. The prosecution in its closing address explained that the charge of "concern in" war crimes meant that the accused "was so senior in rank and appointment, and yet so closely tied to the Kempeitai personnel in the chain of command, that whatever operations they undertook, his planning and guidance were present and paramount".[95] Thus, "when those operations are tinged with illegality, the Accused can be said to be 'concerned in' the misdeeds and charged on that basis".[96] The manner in which the allegation was framed, in terms of a commander's concern in the crimes of his subordinates, suggests that the theoretical foundation of command responsibility came close to complicity.

The accused's knowledge of his subordinates' crimes formed the crux of the debate in Noma's trial. The arguments of both the prosecution and defence demonstrate that in determining whether the accused was "culpably concerned" (concerned to such an extent as to render him guilty of this charge and thereby deserving punishment), the court would place weight on the same characteristics of *mens rea* that have since been deliberated in other post-Second World War developments.

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93 Orić Trial Judgment, para. 293, see *supra* note 59.

94 The International Criminal Tribunal for Rwanda ('ICTR') Trial Chamber in *Akayesu* noted that command responsibility is not a form of strict liability and that "it is certainly proper to […] at least ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent". ICTR, *Prosecutor v. Jean-Paul Akayesu,* Trial Chamber, Judgment, 2 September 1998, ICTR-96-4-T, para. 489 (http://www.legal-tools.org/doc/b8d7bd/).

95 Trial of Noma Kennosuke, slide 719, p. 713 of document, see *supra* note 28.

96 *Ibid*.

If command responsibility is international criminal law's interloper, joint culpability based on common intent at the time of the Hong Kong trials appears as its trespassing cousin. There is nothing to suggest that Regulation 8(ii) was viewed by the courts as anything other than a directive to hold joint trials in factual scenarios such as the one presented in *Kishi* and an encouragement to take a holistic approach to the available evidence while individualising guilt.[97] As the *Kishi* case demonstrates, joint responsibility for participation in the same course of conduct was not to be permitted to give rise to guilt by association.

The Hong Kong trials, as illustrated by the *Kishi* and *Noma* cases, recognised emerging forms of participation in international crimes. While *Kishi* says little in direct support of joint criminal enterprise liability, *Noma* was not an anomaly in international law and aligns with the present-day doctrine of command responsibility. It is true that in the 70 years since *Noma* command responsibility has seen much progress and become customary international law. It is also notable that the *mens rea* standard of the doctrine remains ambiguous and contentious. How this question is navigated in the coming decade will in large part be shaped by further judgments of the *ad hoc* tribunals and new judgments handed down by the International Criminal Court.

[97] Regulation 8(ii) was interpreted more creatively by the prosecution in some contemporaneous cases. See further Jørgensen, pp. 160–62, *supra* note 7.

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LIU Daqun and ZHANG Binxin (editors)

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