

Selected extracts from December's issue of Forum

'Frozen in Time?'

BINA D'COSTA
"Justice must not only be done, but must be seen to be done"

THE Pakistani newspaper Dawn reported, on May 14, 2009 that the Foreign Ministry (of Pakistan) "rejected Bangladesh's demand for an apology over the alleged (emphasis added) 1971 atrocities." The official response was that Bangladesh should not be "frozen in time" but rather move ahead. Pakistan advised that Bangladesh should "let bygones be bygones" and hoped that the relations between the two countries would not become hostage to the past. Pakistani mainstream scholars in their analyses usually describe the traumatic narrative of 1971 as a "debacle" and the media as an "incident" or a "disaster." However, genocide scholars across the world widely accept that in its intent to destroy an ethnic group, in the

systematic and strategic use of rape and through the selected and targeted killings of a religious minority (Hindus) and intellectuals, the 1971 war is indeed a case of genocide.
The most recent tension arose from the Bangladesh Parliament's adoption of a resolution in early 2009 to try the war criminals under the International Crimes (Tribunals) Act 1973 (adopted on December 3). While the Office of the High Commissioner for Human Rights has not offered any formal support, the UNDP local office (United Nations Development Program) has announced that it would assist Bangladesh in designing and setting up a war crimes tribunal. Renata Lok Dessallien, the head of UNDP in Bangladesh stated, "we have suggested the names of some top international experts who have experience in how war crimes tribunals operate across the globe."
The genesis of Bangladesh as a sover-

eign entity in December 1971 is celebrated as a victory of a secular identity that went beyond any religion. In this write-up, I will focus specifically on the most recent justice-seeking movement in Bangladesh that brought the issue of redressing war crimes to the forefront of the political and security agenda.
There were 80,000 Pakistani soldiers deployed under the Eastern Command. These forces were augmented by an additional para-militia force of 25,000, a civil armed force of 25,000 and another auxiliary para-military force of ethnic Bengalis (Razakars, al-Badr and al-Shams) of 50,000. For most of the conflict, these forces fought guerrilla style warfare against the East Pakistanis whose strength is estimated to be 175,000, including a large number of personnel who deserted the East Pakistan Rifles, East Bengal Regiment and the Bengali Police force. The East Pakistani pro-liberation forces were jointly called the

Muktibahini (Freedom Force), which formed the Bangladesh Forces Command and was led by Gen. M. A. G. Osmani. This was divided into 11 sectors, and Bengali officers who had defected from the Pakistani armed force served as the commanders of each sector. Finally, in December there was an additional 250,000 Indian Allied Forces (Mitrobahini) that led the offensive against Pakistan. The Eastern Command of Pakistan under Lieutenant General A.A.K. Niazi surrendered to the India-Bangladesh joint command led by Lt. Gen. Jagjit Singh Aurora (the Commander of the Indian Allied Forces) on 16 December, 1971.
The Pakistani forces were perceived by the overwhelming majority of Bangladeshis who supported liberation as "occupation forces," and India's intervention to end the conflict was welcomed. Pakistan also attracted global condemnation because of its brutal army

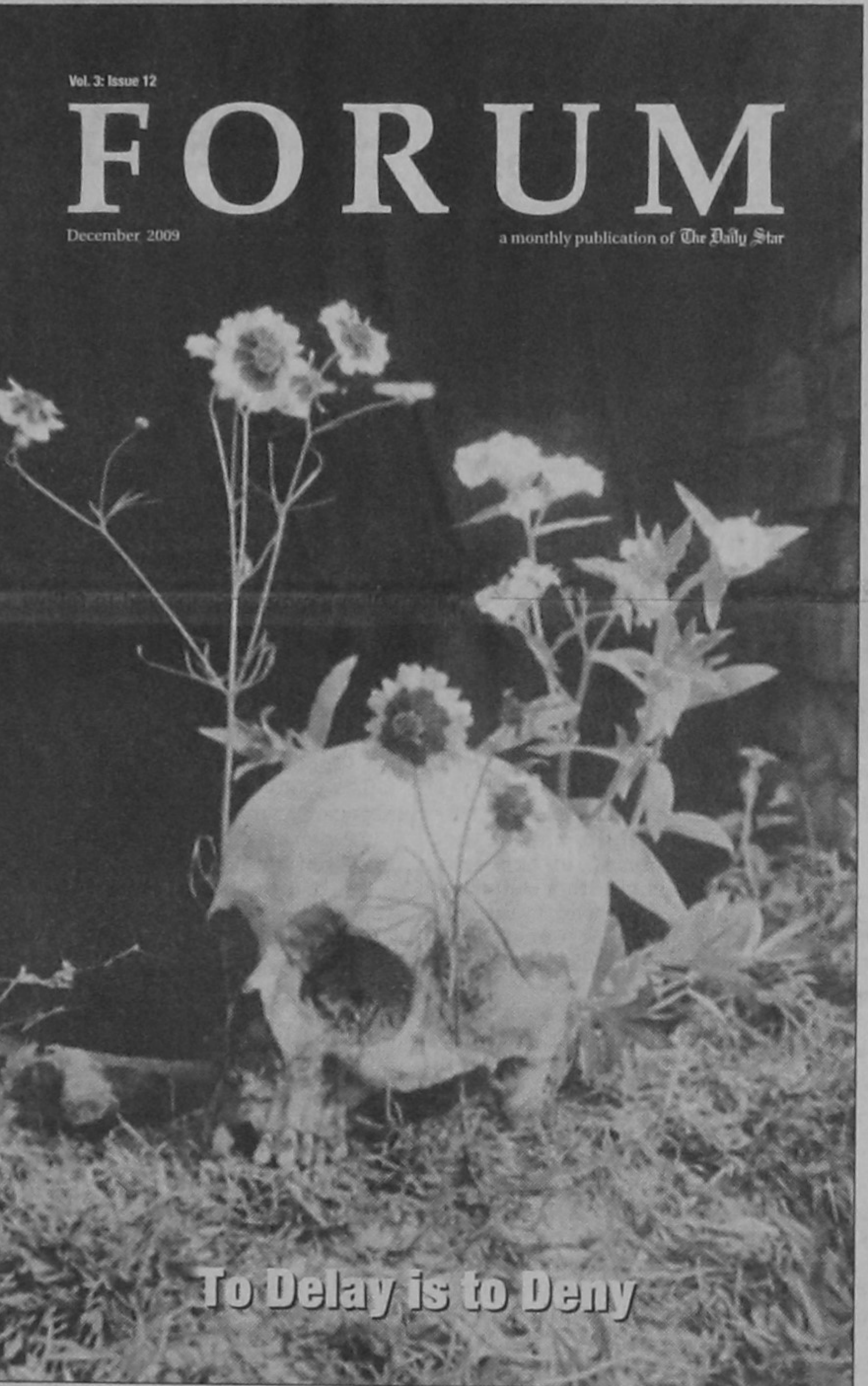
crackdown in 1971 that resulted in mass atrocities and genocide. Estimates vary but the widely accepted figure in Bangladesh is that between 1 to 3 million people perished during the nine months of conflict, and a further 8 to 10 million were forced to leave their homeland. Also, 200,000 women were reportedly victims of rape and sexual violence, with 25,000 rapes resulting in forced impregnation. A white paper issued by the Pakistani government also noted that at least 30,000 Biharis and West Pakistanis were killed as a result of the national movement and the conflict. While none of these are independent sources, the established fact is horrific violence accompanied the 1971 war.
India and Pakistan signed the Simla Pact in 1972 and India, following a series of meetings with both Pakistan and Bangladesh, agreed to return the 93,000 PoWs to Pakistan. In the aftermath of the conflict, the new state of

Bangladesh was pre-occupied in gaining both global recognition and foreign aid especially from the Middle East, US and China, which paved the way for recognition from Pakistan. In exchange for recognition from Pakistan and more importantly perhaps for return of assets Bangladesh's new leaders agreed not to prosecute the PoWs, except for 195 prisoners who were accused of war crimes, crimes against humanity and genocide.
For the full version of this article please read this month's Forum, available free with The Daily Star on December 7.
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Crime, Punishment and Historic Non-Apologies The Ticking Clock

NADEEM RAHMAN
TWO outstanding issues dominate the horizon of post-war Bangladesh: the lingering memory of morbid war crimes, and the provocative question of a convincing apology from the aggressors. On the matter of war crimes, at least those committed by errant Bangalis, it is within the jurisdiction of the laws of the country, and within the reach and scope of the Government of Bangladesh, to institute legal proceedings without any further or secondary consideration. Unlike the international war on terror, these are Bangladeshi citizens, on Bangladeshi soil, answerable to Bangladeshi law. This law, covering war crimes committed on Bangladeshi territory, during the war of liberation, was enacted by Act of Parliament, as far back as 1973. There is no question of torture or coercion, and absolutely no need for the bizarre and brazenly illegal practice of rendition.
All the excuses for procrastination are exhausted, and the only dialogue that can now ensue, should be regarding the legal framework and administrative structure of the tribunals. The infrastructure required for conducting tenable trials of alleged war criminals by a competent authority, is a vast undertaking. There is a great deal of laborious detailed leg work involved, and who should bear the responsibility for this arduous task is of the utmost importance. Witnesses need to be protected and accounts verified meticulously. For this purpose, an independent war crime commission is imperative, with assured and adequate protection from political intimidation by revisionists or antagonists alike. This will require the financial and structural assistance, and if necessary, the active participation of appropriate international bodies such as the United Nations.
On the other hand, Bangladesh may decide to deal with it as a purely domestic issue, ruling out any external influence or intervention. In any event, absolute impartiality, responsible reliability, and strict adherence to due process, are essential in establishing credibility.

Unlike the mock trials of America's civilian detainees by military courts in camera, every precaution should be taken to maintain transparency and the highest standards of legal procedure. Bangladesh has nothing to hide. Let this be the last chapter, a sad but just epilogue to the story of freedom, in a corner of South Asia.
The nation has waited a generation to witness the trial of the killers of the Father of the Nation. Some may protest that title, but whatever you call him, it was nevertheless a murder. Some will say, it was for the greater good, but it was still a murder. Some will contend, he brought it on himself, but it will always remain a brutal killing. The proclamation of any number of Indemnity Ordinances, citing all the laws and all the statutes trumped up by all the unconstitutional parliaments, will not wash away the blood. This capital crime, unpunished for so long, not even acknowledged as a crime for so long, was the genesis of the jealously guarded convention of guaranteed impunity. That practice persists to this day, emboldening every common criminal affiliated to political bodies with blanket protection, and elevating ordinary hoodlums to the level of gangster-laureate to the government. After this, no crime could conscientiously be punished.
The nation cannot wait another generation or two, until such time as no witnesses are left, to recount firsthand, the atrocities of '71, in order simply to muster the political will, to legally purge Bangali society of the "infidels" of Bangali nationhood. Some have long fled to foreign shores, where they have sought the protection of their host country. The repatriation of wanted criminals by third world countries like Bangladesh, are generally denied or at best frowned upon, on the grounds of lack of extradition treaties, or our alleged barbaric human rights record. But a blind eye is invariably turned to the bold abduction, and inevitable execution of fugitive Nazis, by Israel, and prosecution in Israeli courts are generally accepted as legal and justifiable, even though the state of Israel did not even



exist, at the time these crimes were committed.
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SYED ABDUS SAMAD
"Nothing is forgotten, nothing is forgiven"
THE subject is well known, extensively debated and beset with a lot of unanswered

questions and a few controversies as well. Nearly 38 years after those heinous and grisly crimes were committed, the issue has surfaced once again, largely because the party which had led the national war of liberation of Bangladesh in 1971, the Awami League and its allies, have now come to power through a massive mandate. This has raised hopes and expectations that the long aborted trials would finally be successfully concluded.
The Sector Commanders' Forum, the civil society, the Ghatak Dalal Nirmul Committee, the combined cultural ensemble, the Muktijuddho Jadughar and other pro- liberation progressive forces have all along been demanding trials for the atrocities committed by the Pakistani forces and their collaborators in the strongest possible language. The previous BNP-led 4-party alliance government (2001-2006) was quite indifferent to these demands and did not even bother to concoct reasons or arguments to evade the issue. Their reasons for ignoring the issue are not very difficult to surmise.
I have heard comments and observations that "all" past governments had failed to act to resolve this issue. This is not correct and I would like to put on record the initiatives taken by the Mujibnagar and the subsequent Awami League government (1996-2001) to put the criminals of 1971 on trial for committing war crimes like genocide, treason, waging war on Bangladesh, etc. Those were timely and effective steps but the sudden and violent changes in the political scenario in 1975 did not allow them to come to fruition. The political landscape of Bangladesh changed dramatically thereafter.
The Mujibnagar government had made a full list of all war criminals (zone- and sector wise) with records of their crimes and evidence thereof, including eyewitness accounts. A blueprint for the trials was also prepared. After liberation on December 16, the government enacted the Collaborators' Order of 1972, a special law to try those who had committed a) murder; b) rape; c) arson; and d) other cognisable offences as

defined in the Penal Code. The one offence which was not listed or defined in the Code was "collaboration with the occupation forces of Pakistan and their lackeys." This was done to keep things simple and manageable from a legal point of view.
The criteria for identifying the collaborators and the procedure for their trials were clearly outlined in the Order. This was a stringent law and there was no provision of bail for the accused. The trials were to be in civil courts and conducted by special tribunals which were also duly constituted. Hundreds of cases were filed against the collaborators and war criminals of 1971 in the 20 administrative districts of Bangladesh. I was Deputy Commissioner of Chittagong district in 1972 and, if I remember clearly, more than 100 cases were registered under the Collaborators' Order against perpetrators of war crimes in that district. These cases were duly investigated and charge sheets filed. However, while this complex and lengthy process was unfolding, the whole political scenario changed on August 15, 1975, with the staging of a military coup in which the prime minister, Bangabandhu Sheikh Mujibur Rahman, along with nearly all the members of his immediate family, were brutally assassinated. This coup d'etat and subsequent events were, in fact, largely responsible not only for the stagnation in the trials but the political rehabilitation of many of the war criminals who were, at that time, in jail awaiting trial. The Collaborators' Order was repealed, and all cases filed under its jurisdiction, dismissed. The war criminals were garlanded like heroes as they came out of the jail gates!
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Justice, the General and His Soldier

TAZREENA SAJJAD
IN January 1988, Col. Yehuda Meir ordered his troops to round up twenty Palestinian men from Hawara and Beita in the West Bank, bind them in handcuffs and blindfolds, and break their bones. The unit commander reporting to Meir passed on the order to his troops, but also told them he did not require them to comply. Some soldiers refrained from doing so, but others carried out the order with such zeal that they broke their truncheons.
The impending possibility of a war crimes trial in Bangladesh to try the alleged perpetrators of the 1971 genocide raises a plethora of pressing questions: Who should be prosecuted? How? Can and should the trial prosecute all those responsible for the genocide and crimes against humanity? How far up the command chain is it possible to go? Would the trial include the prosecution of the Pakistani generals? Is it too late to

prosecute? What should the punishment be for war crimes atrocities?
While this is by no means an exhaustive list, the central issue surrounding many of these questions which requires greater clarity is that of command responsibility. The 1973 War Crimes Act of Bangladesh (Articles IV and V) recognises the importance of identifying command responsibility. But what does it actually mean? As Meir's case above raises, and what the trials in Bangladesh would also reflect, is that command responsibility involves two fundamental thorny and complex questions. First, can obedience to superior orders be a defence against allegations of war crimes? Second, how far up the chain of command does "command responsibility" reach?
And while these questions may be the subject of intense legal debate and scrutiny, in the context of Bangladesh where crimes were ordered and committed by Pakistani officers, collaborators and Bengali auxiliary forces (Al

Badr, Al Shams), the answers have overwhelming significance.
The doctrine of command responsibility is simple: in the armed forces, military commanders are responsible for the acts of their subordinates. If they fail to prevent or punish war crimes committed by their troops, they can be held responsible for violations of the laws of war. Contrary to a common perception, command responsibility is not a new development in international humanitarian law, national law or military codes. Its existence may be traced back in history to around 500 B.C. to Sun Tzu's "the Art of War" outlining the duty of commanders to ensure that subordinates conduct themselves with a certain level of civility in armed conflict. In contemporary history, the principle of command responsibility can be traced to the US Civil War where Article 71 of General Orders No. 100 imposed criminal responsibility on commanders for ordering or encouraging soldiers to wound or kill already

disabled enemies.
The first attempt at codifying the principle of command responsibility on a multinational level was The Hague Convention (IV) of 1907, Respecting the Laws and Customs of War on Land. Legal precedence for command responsibility was further consolidated in what are known as the Yamashita standard and the Medina standard, both of which inform the doctrine of hierarchical accountability for war crimes. The "Yamashita standard" is based upon the precedent set by the United States Supreme Court where Yamashita was charged with "unlawfully disregarding and failing to discharge his duty as a commander to control the acts of members of his command by permitting them to commit war crimes" in the Philippines and duly prosecuted. The "Medina standard" is based upon the prosecution of US Army Captain Ernest Medina in connection with the My Lai Massacre during the Vietnam War.
In the realm of international law, the

Geneva Conventions of 1949 and their Additional Protocols provide for criminal liability based on the accused's position as a commander. On the international level, the doctrine of command responsibility clearly has been extended to civilian authorities exercising control over military forces. In the post-World War II prosecutions in Nuremberg and Tokyo, a number of civilian authorities were convicted of war crimes. More recently, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") have held civilians criminally liable for the actions of militarised forces under their control. In February 2001, the ICTY found Dario Kordic, a Bosnian Croat political leader, guilty under a theory of command responsibility for grave breaches of the Geneva Conventions, crimes against humanity, and violations of the laws and customs of war for the actions of Bosnian Croat militia forces operating

in central Bosnia. In 1998, at the ICTR, the former Prime Minister of Rwanda, Jean Kambanda, pled guilty to six criminal counts, including genocide and crimes against humanity. He is currently serving a life sentence.
The doctrine of command responsibility has recently been codified in Article 28 of the Rome Statute of the ICC. Article 28(a) imposes individual responsibility on military commanders for crimes committed by forces under their effective command and control, if they either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.
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