

**WAR CRIMES IN THE AMERICAN REVOLUTION:
EXAMINING THE CONDUCT OF LT. COL. BANASTRE
TARLETON AND THE BRITISH LEGION DURING THE
SOUTHERN CAMPAIGNS OF 1780–1781**

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I have promised the young men who chose to assist me in this expedition the plunder of the leaders of the faction. If warfare allows me, I shall give these disturbers of the peace no quarter. If humanity obliges me to spare their lives, I shall convey them close prisoners to Camden. For confiscation must take place in their effects. I must discriminate with severity.¹

I. Introduction

While Lieutenant Colonel Banastre Tarleton may have enjoyed a reputation as one of Great Britain's most tactically proficient commanders during the Revolutionary War, his reputation for brutality during the Carolina Campaigns also renders him one of its most notorious. Banastre Tarleton is best known by the monikers historians have developed for him over the years such as "Bloody Ban," "Ban the Butcher," and "Bloody Tarleton" because of his practice of refusing to spare the lives of surrendering enemy rebels, which the Americans sarcastically referred to as granting "Tarleton's Quarter."² Banastre

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¹ Letter from Lt. Col. Banastre Tarleton to Lord Cornwallis (Aug. 5, 1780) (Leneu's Ferry, Cornwallis Papers, Public Record Office, Kew, 30/11/63, ff. 19–21). See also ROBERT D. BASS, THE GREEN DRAGON: THE LIVES OF BANASTRE TARLETON AND MARY ROBINSON 91 (Sandlapper Publishing Co. 1973).

² JOHN HAIRR, GUILFORD COURTHOUSE: NATHANAEL GREENE'S VICTORY IN DEFEAT, MARCH 15, 1781, at 58 (Da Capo Press 2002). The battle cry of "Tarleton's Quarter"

Tarleton's notoriety even made its way onto the big screen in Mel Gibson's movie *The Patriot* in 2000.³ In *The Patriot*, the main protagonist, a British dragoon commander named Colonel William Tavington, murders Gibson's young son, torches a plantation housing a young widow and her children, rounds up an entire town, locks them in a church, and burns the church to the ground, among other dastardly deeds. Although in real life, Banastre Tarleton never committed most of the acts depicted in the movie, his reputation for ruthlessness nevertheless lends itself to the type of creative license portrayed in movies, literature, and in history books that still shocks and angers Americans to this day.

The genesis for this article comes from a blog titled the *National American History Examiner* in which a historian recently wrote of Banastre Tarleton: "Although a skilled cavalryman, he occasionally acted in a manner unbecoming an officer. In other words, he butchered soldiers and treated civilians cruelly. In another century, Banastre Tarleton would have been a war criminal."⁴ The purpose of this article is to examine whether this supposition is true in light of the British and American Articles of War in effect at the time of the Revolutionary War and customary law that had developed prior to the late 18th Century.

The next section of the article will briefly examine Banastre Tarleton's meteoric rise to power through the ranks of the British Army as a young cavalry officer. Section III will discuss some of the more infamous incidents that contributed to his brutal reputation. Section IV will examine the law in effect at the time of the American Revolution and will conclude that under both the British and American Articles of War and under customary "Law of Nations," Banastre Tarleton personally committed war crimes and was culpable under the principle of command responsibility for some of the war crimes his dragoons committed while serving under his command.

came about as a result of the Battle of Waxhaws where Americans accused Tarleton of slaughtering surrendering rebels. See also BASS, *supra* note 1, at 81.

³ THE PATRIOT (Columbia Pictures 2000).

⁴ Don Keko, *Tarleton's Quarter*, EXAMINER.COM, September 16, 2010, <http://www.examiner.com/american-history-in-national/tarleton-s-quarter>.

II. Banastre Tarleton—A Short History

Banastre Tarleton was born in Liverpool, England, on August 21, 1754, to John and Jane Parker Tarleton and was the third of seven children. John Tarleton was a highly successful shipping merchant, owned plantations throughout the West Indies, and even became the Mayor of Liverpool in 1764. John Tarleton's wealth permitted Banastre to attend the best preparatory schools and afforded him ample time for sports and other leisure activities. He was described as uncommonly strong, a gifted athlete, and fond of speaking and acting. Banastre possessed extraordinary oratory skills, so his father encouraged him to become a lawyer.⁵ Banastre spent most of his time boxing, riding, swimming, and playing cricket and ended up dropping out of law school at the University College at Oxford after his father died in 1773. John Tarleton left Banastre a 5000 pound inheritance which he quickly exhausted, drinking and gambling the time away. With few job prospects, Banastre focused his attention on the military for employment and a chance to make a name for himself. Fortunately for him, in 1775, a young man named John Trotter purchased a commission as a Lieutenant in the British 2nd Regiment of Dragoon Guards, which caused him to sell his previous commission as a Cornet in the 1st Regiment of Dragoon Guards.⁶ Banastre purchased the commission on April 20, 1775, and thus began his career as a commissioned officer in the British Army.⁷

On December 26, 1775, Cornet Tarleton sailed to America under the command of Earl Cornwallis. Shortly after arriving in New York, Cornet Tarleton volunteered to serve with the Sixteenth Queen's Light Dragoons, one of two regular British cavalry regiments in America.⁸ Cornet Tarleton quickly gained experience in the Northeast where he participated in the New York campaigns, including the Battle of White Plains, and was present during the capture of Fort Washington and Fort Mifflin in November of 1776. One month later, Cornet Tarleton participated in another event that would solidify the reputation he already enjoyed among his superiors as an ambitious, energetic, young cavalry officer. On December 13, 1776, Tarleton's unit stumbled upon Red Bank in

⁵ BASS, *supra* note 1, at 12.

⁶ *Id.* at 14. Both Banastre Tarleton's purchase of John Trotter's commission in the 1st Dragoon Guards and John Trotter's purchase of another man's commission in the 2nd Dragoon Guards are noted in *Preferments*, 37 THE SCOTS MAGAZINE 287–88 (May 1775).

⁷ BASS, *supra* note 1, at 14.

⁸ ANTHONY J. SCOTTI, JR., BRUTAL VIRTUE: THE MYTH AND REALITY OF BANASTRE TARLETON 15 (2002).

Basking Ridge, New Jersey, the makeshift headquarters of American General Charles Lee. Once Tarleton and his men discovered that General Lee was inside the tavern, they carried out a nighttime raid up to the establishment, quickly surrounded it, and captured General Lee while receiving fire.⁹ After reflecting on the fact that he had just taken part in the capture of George Washington's most flamboyant and talented general, Tarleton wrote to his mother that "this is a most miraculous event, it appears like a dream."¹⁰ Historians mark the capture of General Lee, early in Tarleton's career, as the beginning of his remarkable rise through the ranks of the British Army.¹¹

Tarleton later saw action at Princeton and Trenton in 1777, accompanied Vice Admiral Richard Howe on his expedition to the Delaware and Chesapeake, and then participated in the battles of Brandywine, Germantown, and Monmouth Courthouse.¹² In a relatively short amount of time, Tarleton had seen significant action in battle and continued to impress his superiors. One superior in particular, Sir Henry Clinton, became a mentor of sorts and helped Tarleton secure a regular commission in the British Army and later had him conferred with the rank by which he is best known—Lieutenant Colonel of the British Legion.¹³ The British Legion was a relatively small command comprised of American Loyalist dragoons and light infantry.¹⁴ The combination of cavalry and infantry made the unit extremely mobile and versatile. During the war, the British Legion was renowned for its speed and endurance as Tarleton relentlessly drove it to pursue its Rebel enemies.¹⁵ The Legion also became infamous for killing captured American rebels and innocent civilians, and for indiscriminately destroying their property.¹⁶

The British Legion cemented its reputation for ruthlessness during the Battle of Waxhaws on May 29, 1780, when they killed nearly 200 Virginia Continentals who attempted to surrender under a white flag of

⁹ *Id.* at 16.

¹⁰ *Id.* (providing an excerpt from a letter from Banastre Tarleton to his mother written on December 18, 1776).

¹¹ *Id.*

¹² *Id.* at 16–17.

¹³ *Id.* at 19.

¹⁴ *Id.* at 33.

¹⁵ *Id.* at 35.

¹⁶ *Id.* at 31.

truce.¹⁷ The significance of this battle will be examined in detail in the next section of the article. Shortly after the Waxhaws battle, Lieutenant Colonel Tarleton and the British Legion were decisively defeated by Brigadier General Daniel Morgan at the Battle of Cowpens.¹⁸ Tarleton was later shot through the hand while fighting Major General Nathaniel Greene's forces at the Battle of Guilford Courthouse, which resulted in half of his hand being amputated.¹⁹ Wounded, defeated, and demoralized, Banastre Tarleton saw his last action at the Battle of Yorktown, where he and the rest of General Cornwallis's troops surrendered to General George Washington on October 19, 1781.²⁰

By the end of the war, Banastre Tarleton was keenly aware of how badly the Americans hated him, so immediately upon his surrender he appealed to the French for personal protection.²¹ The Comte de Rochambeau agreed to Tarleton's request but not before offering the following critique: "Colonel Tarleton has no merit as an officer—only that bravery that every Grenadier has—but is a butcher and a barbarian."²² Shortly after General Cornwallis and his principal officers were paroled, General Washington and de Rochambeau invited their British counterparts to dine with them, excepting only Tarleton. Tarleton was humiliated by the snub and asked Lieutenant Colonel John Laurens, Washington's aide-de-camp, whether there had been some sort of awkward misunderstanding.²³ Laurens curtly replied "No, Colonel Tarleton, no accident at all; intentional, I can assure you, and meant as a reproof for certain cruelties practiced by the troops under your command in the campaigns in the Carolinas."²⁴ Tarleton indignantly replied "and is it for severities inseparable from war, which you are pleased to term cruelties, that I am to be disgraced before junior officers? Is it, sir, for a faithful discharge of my duty to my king and my country, that I am thus

¹⁷ *Id.* at 137–38.

¹⁸ BASS, *supra* note 1, at 158. Interestingly enough, Colonel Buford and his men were fully aware of the British Legion's actions at the Waxhaws and the meaning of "Tarleton's quarter," yet Buford had no bloodlust after defeating Tarleton at the Cowpens and immediately offered the defeated Dragoons quarter, in keeping with the customs of war.

¹⁹ SCOTTI, *supra* note 8, at 136.

²⁰ BASS, *supra* note 1, at 4.

²¹ *Id.*

²² *Id.* at 4 (citing GEORGE WASHINGTON PARKE CUSTIS, RECOLLECTIONS AND PRIVATE MEMORIES OF WASHINGTON (1861); Sallie DuPuy Harper, *Colonial Men and Times, Containing the Journals of Colonel Daniel Trabue*, WM. & MARY C. Q. (1948)).

²³ *Id.* at 5.

²⁴ *Id.*

humiliated in the eyes of three armies?” to which Laurens retorted “There are modes, sir, of discharging a soldier’s duty, and where mercy has a share in the mode, it renders the duty more acceptable to both friends and foes.”²⁵

III. Controversial Events Surrounding the British Legion

This section of the article will examine why the Americans and French came to view Banastre Tarleton and the British Legion as butchers and barbarians. A number of inflammatory and exaggerated accounts have been given of Banastre Tarleton and his men over time. Not all these accounts are trustworthy and, to the best of the author’s ability, the exaggerated tales have been omitted from this discussion. This includes some of the post-war witness recollections and correspondence, whose inflammatory accounts are impossible to substantiate. The author has, as much as possible, relied upon Banastre Tarleton’s own recollections and admissions as he conveyed them in his account of the campaigns and through his personal correspondence, though, naturally, those accounts are likely biased in his favor. The incidents discussed in the next two sections of this article transpired while Lieutenant Colonel Banastre Tarleton was in command of the British Legion and are generally credited with contributing to his reputation for brutality.

A. The Battle of Waxhaws—May 29, 1780

News that the British had captured the city of Charleston on May 12, 1780, reached Colonel Abraham Buford and his detachment of 350 Virginia Continentals when they arrived at Lenud’s Ferry, South Carolina, on their way to relieve the city from siege. After Charleston fell, Colonel Buford and his men were ordered to retreat to North Carolina to wait for reinforcements from General Washington’s northern army, who were also headed south. General Cornwallis found out from British Loyalists that South Carolina Governor John Rutledge had escaped into North Carolina with Colonel Buford. Cornwallis quickly dispatched Lieutenant Colonel Tarleton to pursue Buford’s detachment

²⁵ *Id.*

in hopes of capturing Governor Rutledge.²⁶ Tarleton rode at the head of his cavalry and mounted infantry for nearly fifty-four hours, covered over 105 miles of unsteady terrain, and killed off a number of his horses in the pursuit.²⁷ Tarleton finally caught Buford and his detachment near a settlement on the border of North and South Carolina called the Waxhaws. Banastre Tarleton quickly sent forth a surrender demand exaggerating the strength of his own detachment in order to bluff Buford into capitulating.²⁸ Tarleton threatened Buford about failing to accept the surrender terms, warning him, “If you are rash enough to reject them, the blood be upon your head.”²⁹ Colonel Buford, not knowing the true size of Tarleton’s force and suspecting a ruse, refused Tarleton’s terms and continued on his march.³⁰ On the afternoon of May 29, Lieutenant Colonel Tarleton attacked Colonel Buford’s rear guard, where he quickly decimated it, and then proceeded to attack the main body of the Virginia Continental detachment.³¹

Lieutenant Colonel Tarleton ordered Major Cochrane to dismount and attack Buford’s flank and then ordered the 17th Dragoons and part of the Legion to attack Colonel Buford’s center. Tarleton also had a sizeable reserve comprised of mounted infantry and the remainder of his dragoons.³² For the main attack, Tarleton assembled thirty of his select horsemen and some dismounted infantry and attacked the Americans’ right flank, which enabled him to break the main American line and permitted him to observe the effects of the other attacks.³³ When the British Legion finally charged, Tarleton immediately swung around to his right and saw a young American standard bearer, a fourteen year old boy named Ensign Cruit, attempting to raise the white flag.³⁴ Lieutenant Colonel Tarleton quickly raced toward the young Ensign, cut him down with his saber and left him for dead.³⁵

²⁶ HUGH F. RANKIN, FRANCIS MARION: THE SWAMP FOX 47 (Thomas Y. Crowell Co. 1973).

²⁷ SCOTTI, *supra* note 8, at 173.

²⁸ *Id.*

²⁹ BASS, *supra* note 1, at 80 (Letter from Lt. Col. Banastre Tarleton to Col. Abraham Buford (May 29, 1780) [hereinafter Buford Letter]).

³⁰ RANKIN, *supra* note 26, at 48.

³¹ BANASTRE TARLETON, A HISTORY OF THE CAMPAIGNS OF 1780 AND 1781 IN THE SOUTHERN PROVINCES OF NORTH AMERICA 29 (London, T. Cadell 1787).

³² *Id.*

³³ *Id.* at 29–30.

³⁴ BASS, *supra* note 1, at 81.

³⁵ *Id.*

While Colonel Buford's detachment attempted to surrender, a Continental soldier fired at Banastre Tarleton, missing Tarleton but killing his horse underneath him.³⁶ Although Tarleton was trapped under his horse and uninjured, his men presumed he was dead and exacted revenge among the wounded and dying Continentals.³⁷ In a letter to General Cornwallis recounting the affair, Tarleton wrote, "[A]nd slaughter was commenced before Lieutenant-Colonel Tarleton could remount another horse, the one with which he led his dragoons being overturned by the volley."³⁸ After Banastre Tarleton's horse was shot and he was presumed dead, Tarleton's men proceeded to indiscriminately saber the unarmed and wounded Americans until they had all grounded their arms.³⁹

One historian provides the account of a Captain John Stokes, who while lying wounded on the battlefield attempted to protect his head from the saber of one dragoon only to have his right hand sliced off by another.⁴⁰ Stokes switched his sword to his left hand trying to protect himself when he was struck again, the blow this time splitting his left arm from the wrist to the shoulder. Stokes was then sabered in the head, which was split open from the length of his crown to his eyebrows. A British infantryman then mockingly asked, "Do you ask quarter?" Stokes replied "I do not; finish me as soon as possible." Twice the infantryman drove his bayonet into Stokes's body. Another British infantryman came along and asked the same question and upon receiving the same answer, he too drove his bayonet twice into the helpless American. Finally a British sergeant stepped in and protected Stokes. A British lieutenant later ordered the Legion surgeon to treat Stokes for his wounds, from which he ultimately recovered, as did the young standard bearer, Ensign Cruit.⁴¹

Banastre Tarleton attempted to explain the lopsidedness of his victory at Waxhaws in a letter to General Cornwallis, asserting that the "loss of officers and men was great on the part of the Americans, owing to the dragoons so effectually breaking the cavalry, that they had lost their commanding officer, which stimulated the soldiers to a vindictive

³⁶ *Id.*

³⁷ SCOTTI, *supra* note 8, at 176–77.

³⁸ TARLETON, *supra* note 31, at 30.

³⁹ BASS, *supra* note 1, at 81.

⁴⁰ *Id.*

⁴¹ *Id.*

asperity not easily restrained.”⁴² When the Battle of Waxhaws was over, the British had suffered eighteen casualties (five killed and thirteen wounded) compared to the Virginia Continentals, of whom Tarleton bragged, “I have cut 170 Off’rs and Men to pieces.”⁴³

B. Battle of Fishing Creek—August 17, 1780

While Banastre Tarleton suffered a disdainful reputation among the Americans after the Waxhaws massacre, his British superiors continued to view him in a favorable light, especially after the Battle of Fishing Creek where Tarleton surprised and annihilated Colonel Thomas Sumter’s rebel militia detachment.⁴⁴ Immediately after the British victory at Camden, General Cornwallis discovered the whereabouts of Colonel Thomas Sumter, the “Carolina Gamecock” as he was known, and sent Banastre Tarleton to pursue him.⁴⁵ On the morning of August 17, 1780, Tarleton began his painful pursuit.⁴⁶ After discovering Sumter’s position on the west side of the Wateree River, Tarleton paddled his cannon and infantry across the river in boats while he and his dragoons swam their horses across.⁴⁷ After fording the river, Tarleton and his men pursued Sumter over sandy terrain in the ruthless August heat.⁴⁸ By the time Tarleton finally reached Sumter, the majority of his men were so exhausted that he decided to leave them behind to rest.⁴⁹ Lieutenant Colonel Tarleton and 100 of his dragoons and 60 mounted foot soldiers took off after Sumter.⁵⁰

Tarleton pursued Sumter for about five miles when the Legion’s advance guard briefly clashed with two vedettes of Sumter’s rear guard, killing them instantly.⁵¹ Tarleton then rode up to a hill, peered over it and saw all of Sumter’s camp in disarray with their arms completely stacked.⁵² Sumter’s detachment consisted of approximately 100

⁴² TARLETON, *supra* note 31, at 30–31.

⁴³ BASS, *supra* note 1, at 81–82 (Letter from Lt. Col. Banastre Tarleton to Gen. Cornwallis (May 29, 1780)).

⁴⁴ *Id.* at 101–03.

⁴⁵ *Id.* at 101.

⁴⁶ *Id.*

⁴⁷ TARLETON, *supra* note 31, at 112.

⁴⁸ BASS, *supra* note 1, at 101.

⁴⁹ TARLETON, *supra* note 31, at 113.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² BASS, *supra* note 1, at 101.

Continentals, 700 militia, and two cannon.⁵³ Hoping to take advantage of his good fortune, Banastre Tarleton quickly formed his cavalry and infantry in one line and gave the command to charge.⁵⁴ The British dragoons cut the Americans off from their arms and then began swinging their sabers, causing great carnage among Sumter's detachment.⁵⁵ Tarleton later referred to the engagement as a slaughter, stating that "the numbers, and extensive encampment of the enemy, occasioned several conflicts before the action was decided."⁵⁶ Writing about himself in the third person, he added, "At length, the release of the regulars and the loyal militia, who were confined in the rear of the Americans, enabled Lieutenant Colonel Tarleton to stop the slaughter, and place guards over the prisoners."⁵⁷

Colonel Sumter was asleep when the initial charge began but was immediately awakened when the battle started.⁵⁸ The Carolina Gamecock quickly mounted a horse and rode bareback as far and as fast as he could until he reached Major William Davie's camp two days later.⁵⁹ During the Battle of Fishing Creek, Tarleton captured 300 American prisoners, freed 100 British troops the Americans had taken prisoner, and took possession of forty-four wagons of recaptured stores.⁶⁰ Elated at the outcome, General Cornwallis dashed off a letter to Lord Germaine, bragging, "This action was too brilliant to need any comment of mine, and will, I have no doubt, highly recommend Lieutenant-Colonel Tarleton to his Majesty's favour."⁶¹ Lord Germaine did in fact show King George III Cornwallis's letter and ultimately published Cornwallis's official report in the *London Gazette*.⁶²

Because of his smashing success at Fishing Creek, where he defeated a force nearly eight times the size of his own, Banastre Tarleton became a darling of his superiors and a hero to the British public.⁶³ Unfortunately, Tarleton's increasingly brutal reputation among the

⁵³ TARLETON, *supra* note 31, at 112.

⁵⁴ *Id.* at 114.

⁵⁵ BASS, *supra* note 1, at 101.

⁵⁶ TARLETON, *supra* note 31, at 114

⁵⁷ *Id.*

⁵⁸ BASS, *supra* note 1, at 101.

⁵⁹ *Id.* at 101–02.

⁶⁰ *Id.* at 102.

⁶¹ *Id.* at 103 (Letter from Gen. Cornwallis to Lord Germaine (Nov. 9, 1780)).

⁶² *Id.*

⁶³ *Id.*

Americans led them to view Fishing Creek as yet another example of his penchant for cutting down defenseless rebels.⁶⁴ Upon hearing Colonel Sumter's explanation of the events that decimated his detachment, Major Davie noted that while Tarleton may have secured a victory through good fortune and audacity, the victory at Fishing Creek was "stained by the unfeeling barbarity of the legion who continued to hack and maim the militia long after they had surrendered. . . ."⁶⁵ He further lamented that Tarleton "must have suffered severely for this boyish Temerity; the conflict was nothing, the fighting was entirely on one side, and the slaughter among the defenceless."⁶⁶

C. The Widow Richardson's Plantation—Early November, 1780

In addition to contending with the Carolina Gamecock, Banastre Tarleton fought with Colonel Francis Marion and his band of rebels, who would famously ambush the British and then quickly blend back into the swamp, earning Marion the nickname "Swamp Fox." On one occasion, Tarleton chased Colonel Marion through the swamps for over seven hours without coming close enough to even catch a glimpse of him. Frustrated by Marion's repeated escapes, Tarleton punished the local inhabitants by burning down the homes and grain of some thirty plantation owners, creating a swath of destruction from Jack's Creek to the High Hills.⁶⁷ On November 11, 1780, Tarleton issued a proclamation offering pardon to the rebel "delinquents" warning them, "It is not the Wish of Britons to be cruel or to destroy, but it is now obvious to all Carolina that Treachery Perfidy & Perjury will be punished with Instant Fire & Sword."⁶⁸ Days before issuing the proclamation, Lieutenant Colonel Tarleton had already discovered and burnt down Colonel Sumter's mills and then headed off in search of the plantation of widow Richardson, the wife of a recently deceased rebel General.⁶⁹

⁶⁴ WILLIAM R. DAVIE, *THE REVOLUTIONARY WAR SKETCHES OF WILLIAM R. DAVIE* 18 (Blackwell Robinson ed., Raleigh, N.C., Dep't of Cultural Resources, Div. of Archives and History, 1976), available at <http://www.battleofcamden.org/davie.htm> (last visited Apr. 3, 2012) (providing extracts).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ RANKIN, *supra* note 26, at 114.

⁶⁸ *Id.* at 114 (Letter from Lt. Col. Banastre Tarleton to Lt. Col. George Turnbull near Singletons (Nov. 5, 1780)).

⁶⁹ BASS, *supra* note 1, at 111.

By the time Banastre Tarleton arrived at General Richardson's plantation, he was already furious over the capture and hanging of his friend Major John André, whom the Americans had tried and executed for being a spy. Motivated out of spite for André's death, Tarleton located the grave of General Richardson and had it exhumed and ripped open so that he could "look upon the face of such a brave man," as he sarcastically noted.⁷⁰ Banastre Tarleton and his men plundered the house, forced the Richardsons' servants to feed them dinner, and then gathered and locked all the livestock in a barn.⁷¹ Tarleton then set the plantation and the barns ablaze, leaving the Richardson family destitute for the impending winter.⁷² Before he left, Tarleton allegedly flogged widow Richardson in hopes of forcing her to reveal Colonel Marion's whereabouts.⁷³ Upon hearing of Tarleton's conduct, an outraged Governor Rutledge wrote a letter on December 8, 1780, to the South Carolina delegates in the Continental Congress fuming that "Tarleton, at the house of the widow of General Richardson, exceeded his usual barbarity; for having dined in her house, he not only burned it after plundering it of everything it contained, but having driven into the barns a number of cattle, hogs, and poultry, he consumed them, together with the barn and the corn in it, in one general blaze."⁷⁴

A few days later, Francis Marion learned of the destruction of Richardson's plantation and personally bore witness to the swaths of devastation the British Legion left in its wake. Colonel Marion wrote a letter to General Horatio Gates complaining that the Legion had "burnt all of the houses and destroyed all the corn" from Camden all the way to Nelson's Ferry.⁷⁵ Of Tarleton in particular, Colonel Marion lamented, "It is distressing to see women and children sitting in the open air around a fire, without a blanket, or any clothing but what they had on, and women of family, and that had ample fortunes; for he spares neither Whig nor Tory."⁷⁶

⁷⁰ *Id.*

⁷¹ SCOTTI, *supra* note 8, at 169.

⁷² *Id.*

⁷³ RANKIN, *supra* note 26, at 115.

⁷⁴ BASS, *supra* note 1, at 111 (Letter from Gov. John Rutledge to members of the South Carolina delegates to the Continental Congress).

⁷⁵ SCOTTI, *supra* note 8, at 108 (Letter from Lt. Col. Francis Marion to Gen. Horatio Gates near Benbow's Ferry, Black River (Nov. 26, 1780)).

⁷⁶ *Id.* at 93 (Letter from Lt. Col. Francis Marion to Gen. Horatio Gates near Benbow's Ferry, Black River (Nov. 9, 1780)).

D. Killing and Raping Civilians

In addition to the burning and plundering, which Banastre Tarleton bragged about bringing by “Fire & Sword,” some of Tarleton’s dragoons also murdered innocent civilians. At the beginning of his book *Brutal Virtue: The Myth and Reality of Banastre Tarleton*, historian Anthony Scotti provides the account of Moses Hall. Hall had witnessed a group of Loyalist prisoners being hacked to death by their American captors after one of the captors exhorted the rest to “remember Buford.” The next morning, Hall and his North Carolina militia detachment made camp in an abandoned campsite used by the British Legion. Hall stumbled upon what looked to be a sixteen-year-old boy who was bleeding from a mortal wound. Still able to speak, the boy told Hall that he came out to sneak a peek at the notorious Banastre Tarleton when a few of the Legionnaires unexpectedly ran him through with a bayonet and left him to die.⁷⁷ Although disgusted by the killing of the Loyalist prisoners he had witnessed the night before, Moses Hall wrote, “The sight of this unoffending boy, butchered rather than be encumbered . . . on the march, I assume relieved me of my distressful feelings for the slaughter of the Tories, and I desired nothing so much as the opportunity of participating in their destruction.”⁷⁸

Professor Scotti relates in his book another incident involving the killing of a fourteen-year-old bugler in General Charles Lee’s Legion. On the morning of February 13, 1781, James Gilles, the boy bugler, and a few of his friends crossed paths with some Legion dragoons near the Guilford Courthouse.⁷⁹ After an exchange of words and a brief skirmish, Gilles fled on his horse to escape but was no match for Tarleton’s trained dragoons. The Legionnaires easily tracked Gilles down and sabered him to death. General Lee’s men later discovered that the dragoons who killed Gilles had been drunk at the time they killed him.⁸⁰

Tarleton recounts in his book, *A History of the Campaigns of 1780-1781 in Southern America*, an incident at Tarrant’s Tavern in North Carolina that occurred right after his defeat at the Cowpens.⁸¹ Some of the Legionnaires, after being chided by Tarleton to “Remember the

⁷⁷ *Id.* at 1.

⁷⁸ *Id.* (citing THE REVOLUTION REMEMBERED: EYEWITNESS ACCOUNTS OF THE WAR OF INDEPENDENCE 201–03 (John C. Dann ed., 1980)).

⁷⁹ *Id.* at 172–73.

⁸⁰ *Id.* at 173.

⁸¹ TARLETON, *supra* note 31, at 225–26.

Cowpens,” charged down the road toward the tavern and encountered a group of civilians and soldiers crowding the tavern and the road outside.⁸² Chaos ensued when someone yelled out “Tarleton is coming.”⁸³ The roads were clogged with wagons and there were people everywhere when Tarleton and his dragoons rode up to the tavern.⁸⁴ Tarleton admitted that “a furious onset ensued: They broke through the center with irresistible velocity, killed near fifty on the spot, wounded many in the pursuit, and dispersed above five hundred of the enemy.”⁸⁵ Professor Scotti surmised in his book that the Legionnaires undoubtedly sabered to death several innocent civilians who could not get out of the way quickly enough due to the panic and confusion.⁸⁶

In addition to killing innocent bystanders, members of the British Legion also raped them on occasion. Banastre Tarleton himself bragged of “having butchered more men and lain with more women than anybody else in the army.”⁸⁷ One of Tarleton’s preparatory school classmates exclaimed upon hearing of Tarleton’s boast “Lain with! What a weak expression! He should have said ravished. Rapes are the relaxation of murderers.”⁸⁸ Although there are no alleged instances of Banastre Tarleton having personally committed rape, there are at least two recorded instances where members of his Legion did. The first took place after a particularly grueling engagement with American rebels in April 1780, when three of Tarleton’s dragoons broke into the plantation of Sir John Colleton, a distinguished Loyalist.⁸⁹ Several women from surrounding plantations had routinely taken refuge at Colleton’s plantation when fighting broke out. On this occasion, Tarleton’s dragoons singled out three of the most attractive women from the group and raped them.⁹⁰ The women fled from the plantation after enduring the assaults and sought the protection of British officers, one of whom was Patrick Ferguson, generally thought to be one of the British Army’s most chivalrous commanders. The three rapists were quickly identified, arrested, and tried by a general court-martial panel seated in Charleston,

⁸² *Id.* at 226.

⁸³ SCOTTI, *supra* note 8, at 171.

⁸⁴ *Id.*

⁸⁵ TARLETON, *supra* note 31, at 226.

⁸⁶ SCOTTI, *supra* note 8, at 171.

⁸⁷ BASS, *supra* note 1, at 9.

⁸⁸ *Id.* at 10.

⁸⁹ *Id.* at 74–75.

⁹⁰ *Id.* at 74.

South Carolina, where they were found guilty of rape and sentenced to be flogged without mercy.⁹¹

Another reported rape occurred in the spring of 1781 a few days before Lieutenant Colonel Tarleton received an unexpected visit from his commander, General Cornwallis. After having tracked down the Legion, Cornwallis halted his column and ordered Tarleton to dismount and line up his dragoons along the side of the road. General Cornwallis, accompanied by a small group of local citizens, dismounted his horse and proceeded to inspect the assembled dragoons until he came to two in particular, one a sergeant, the other a lieutenant. The visibly nervous civilians identified the sergeant and the lieutenant as the assailants who committed a robbery and rape the night before. The two dragoons were quickly taken into custody and tried by a general court-martial in Halifax, North Carolina, where they were found guilty of robbery and rape and condemned to death.⁹²

While the events discussed so far in this section are accepted by historians as having taken place because they can be corroborated through legitimate sources,⁹³ many more allegations of brutality against Banastre Tarleton exist. Some of these are outright myths, and others are untrustworthy because witness accounts are completely contradictory, the accounts were recorded too long after the war when memories were no longer fresh, or the witnesses themselves are simply not credible. These incredible accounts, while certainly interesting, will not be discussed in this article in the interest of fairness. Instead, the remainder of the article will examine which, if any, of the incidents discussed thus far would be considered war crimes under the British and American Articles of War and the customary Law of Nations in effect during the American Revolution.

⁹¹ *Id.* at 75.

⁹² TARLETON, *supra* note 31, at 290.

⁹³ By legitimate sources, the author means accounts that are corroborated through letters and journals of actual participants in the events discussed and generally not dismissed by the historians whose works have been cited throughout this article. The author has to the extent possible relied upon Banastre Tarleton's own recollections of these events as reflected in his book and personal correspondence, though these naturally tend to be biased in his favor.

IV. War Crimes

This section will formulate a working understanding of “war crimes” and will then discuss the incidents thus far examined in the light of the following classifications: Crimes against Combatants, Crimes Against Civilians, and Crimes Against Civilian Property. This section will also briefly address command responsibility and how it applied during the American Revolution in determining whether a commander could be held culpable for war crimes committed by soldiers under his charge.

Department of the Army Field Manual (FM) 27-10, titled *The Law of Land Warfare*, succinctly articulates three fundamental purposes of the Law of War: to protect combatants and noncombatants from unnecessary suffering, to safeguard certain fundamental rights of those who fall into enemy hands, and to quickly facilitate the restoration of peace.⁹⁴ Field Manual 27-10 notes that one of the basic principles of the law of war “requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry.”⁹⁵

There are two principal sources that comprise the law of war—lawmaking treaties and customary law. Lawmaking treaties that govern the Law of War today, like the Geneva and Hague Conventions, postdate the American Revolution, so that it would not be fair to use them as a standard to judge Banastre Tarleton’s acts. Instead, this article will rely on customary international law⁹⁶ as reflected in the British Articles of War of 1765 and the American Articles of War of 1775, passed respectively by the British Parliament and the American Continental Congress prior to the outbreak of hostilities. Only then, after carefully examining the law under which Banastre Tarleton operated at the time, can we begin to objectively determine whether he was in fact a war criminal.

⁹⁴ U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (July 1956) (C1, 15 July 1976) [hereinafter FM 27-10].

⁹⁵ *Id.* at 3.

⁹⁶ Army Field Manual 27-10 loosely defines customary international law as unwritten or customary law which has not been incorporated in any treaty or convention but has been firmly established by the custom of nations and well defined by recognized authorities on international law. *Id.* at 4.

A. Crimes Against Combatants

One of the chief complaints lodged by General Washington and members of the Continental Congress during the war dealt with the British practice of refusing quarter to surrendering enemy soldiers.⁹⁷ British refusals to accept surrender are not easily understood because established international law in effect at the time required that “once an enemy had ceased to offer resistance, he could not rightfully be killed, and that quarter was to be given to those surrendering.”⁹⁸ The idea of accepting quarter and offering terms of exchange for prisoners, particularly officers, had become a commonly accepted practice both before and during the Revolutionary War.⁹⁹ In fact, throughout the war, British commanders gave explicit instructions to their troops to properly treat persons offering to surrender.¹⁰⁰

In 1620, Hugo Grotius, a prominent Dutch jurist, wrote that persons wishing to surrender, whose surrender was not accepted, could be lawfully killed, as could those who surrendered unconditionally.¹⁰¹ However, he also wrote that “moral justice” imposed a stricter duty than the Law of Nations, and required combatants to spare the lives of those who surrendered, whether they surrendered on condition that their lives be spared, or even unconditionally.¹⁰² In 1758, the Swiss jurist Emerich de Vattel, one of the founders of modern international law, wrote that enemies who submitted and laid down their arms could not be refused quarter under the Law of Nations,¹⁰³ unless the enemy had committed an

⁹⁷ EDWIN G. BURROWS, *FORGOTTEN PATRIOTS* 37, 82–83 (Basic Books 2008).

⁹⁸ Captain George L. Coil, *War Crimes of the American Revolution*, 82 MIL. L. REV. 182 (1978).

⁹⁹ Major Gary Brown, *Prisoner of War Parole: Ancient Concept, Modern Utility*, 156 MIL. L. REV. 200, 203–04 (1998).

¹⁰⁰ Coil, *supra* note 98, at 186.

¹⁰¹ HUGO GROTIUS, *THE LAW OF WAR AND PEACE* bk. 3, ch. 4, §§ XI–XII (Francis W. Kelsey trans., Carnegie Endowment ed., Clarendon Press 1925) (1625), available at <http://www.lonang.com/exlibris/grotius/>.

¹⁰² *Id.*, bk. 3, ch. 11, §§ XIV–XV.

¹⁰³ EMERICH DE VATTEL, *THE LAW OF NATIONS*, ch. 3, § 140 (Joseph Chitty, trans., 1883) (1758), available at <http://www.constitution.org/vattel/vattel.htm>. An anonymous translation of Vattel’s book was published in England in 1760, and the work was increasingly popular with American leaders through the Revolution, so that it was being used as a textbook in American universities by 1780. Albert de Lapradelle, *Introduction to 3 EMERICH DE VATTEL, LE DROIT DES GENS*, at xxix–iii (Charles G. Fenwick, trans., Carnegie Institution of Washington, 1916) (1758), available at books.google.com (search for Vattel & “droit des gens” & “volume 3”) (free e-book from Google Books). Before the Revolutionary War, American scholars were apparently unfamiliar with Vattel,

“enormous” breach of the Law of Nations, in which case surrender could be refused as punishment.¹⁰⁴

In ancient warfare, the concept of protecting or pardoning prisoners of war was highly uncommon, as defeated enemy combatants were typically enslaved or put to death.¹⁰⁵ As early as 250 B.C., however, the Carthaginians paroled prisoners in exchange for their promise to no longer take up arms against Carthage.¹⁰⁶ Throughout medieval times, the concept of ransoming captured enemy prisoners became a lucrative practice for their captors and an incentive to protect them.¹⁰⁷ The question of when and whether prisoners could be killed was not always clear, as can be shown by the controversy over Henry V’s order that his troops kill their prisoners at Agincourt in 1415.¹⁰⁸

During the 16th and 17th centuries, European armies became smaller and more professionalized and as result, European states began to place

though they studied Grotius. *Id.* at xxix. A recent writer argues that the American Founders were indeed familiar with Vattel and quoted him as an authority, but not as the sole definitive authority, on the Law of Nations, and gave great weight to Grotius as well. Brian Richardson, *The Use of Vattel in the American Law of Nations*, 106 AM. J. INT’L L. 547, 548 (2012). Nonetheless, on the point of how prisoners of war should be treated, the widespread use of parole, the trouble both sides took to keep large numbers of prisoners, and the complaints raised by Americans when American captives were mistreated suggest that Vattel properly reflected the prevailing customary norm at the time of the Revolution.

¹⁰⁴ VATTEL, *supra* note 103, at § 141. Although Vattel admitted the permissibility of refusing to accept surrender as a form of punishment, he thought such severe measures were morally wrong, and recommended “other methods of chastising the sovereign—such as depriving him of some of his rights, taking from him towns and provinces.” *Id.*

¹⁰⁵ Brown, *supra* note 99, at 201.

¹⁰⁶ *Id.* at 202.

¹⁰⁷ *Id.* at 201 & n.12.

¹⁰⁸ Theodor Meron, *Shakespeare’s Henry the Fifth and the Law of War*, 86 AM. J. INT’L L. 1, 34–39 (1992). Meron concludes that Henry did not violate “contemporary standards” by issuing this order, because it was given during an “emergency” while the battle was still taking place, and in those circumstances was “not unprecedented” in the era of chivalry, and because it was not criticized even by French writers at the time. *Id.* at 39. Interestingly, Shakespeare’s patriotic account—which would surely have been familiar to British and American officers in the eighteenth century—justifies the order on the grounds of both emergency (Henry’s fear that the French will counterattack and the prisoners will rejoin them) and reprisal (Henry’s anger over a French attack on the “boys” attending the English luggage), *see id.* at 34–36, but subtly criticizes it by having a character ironically refer to the order as the “worthy” act of a “gallant” king, and by having another compare Henry to Alexander the Great, who killed his friend Cleitus in a drunken rage. *See* WILLIAM SHAKESPEARE, HENRY V, act 4, sc. 7.

emphasis on exercising greater restraint on the battlefield.¹⁰⁹ Starting from the beginning of the 17th century, prisoner exchange between opponents slowly became common practice, greatly increasing the chances of survival for soldiers taken captive.¹¹⁰ By the time the American Revolution was underway, there was virtually no excuse for continuing to execute surrendering enemy Soldiers as it had become common custom to either exchange them, parole them, or convince them to switch sides.¹¹¹ Indeed, during the American Revolution itself, many prisoners were exchanged and paroled by both sides.¹¹²

Grotius wrote that prisoners of war were slaves under the Law of Nations, and as such could be killed with impunity,¹¹³ but that moral justice forbade the killing of an innocent prisoner.¹¹⁴ Vattel later wrote that prisoners of war could not to be put to death under the Law of Nations, except for their own individual offenses,¹¹⁵ or in reprisal for enemy atrocities.¹¹⁶ He allowed an exception if there were too many

¹⁰⁹ Sibylle Scheipers, *Prisoners and Detainees in War*, EGO: EUROPEAN HISTORY ONLINE, Nov. 15, 2011, <http://www.ieg-ego.eu/en/threads/alliances-and-wars/war-as-agent-of-transfer/sibylle-scheipers-prisoners-and-detainees-in-war>. Scheipers describes this as only the “beginning of a development” with a “trajectory that was non-linear and characterized by numerous setbacks.”

¹¹⁰ *Id.* Scheipers notes that the fate of prisoners in this period ranged from execution and enslavement through impressment into the captor’s forces to release for ransom or exchange, but that exchange became common from the beginning of the seventeenth century. This made sense since common professional soldiers, unlike the landed knights of the previous era, had little economic value for their captors. In addition, during this period, it became common for captive officers to be paroled, allowed to return home or take residence in designated “parole towns,” provided they agreed not to take further part in the hostilities. *Id.* This practice continued through, and was common during, the American Revolution. See Coil, *supra* note 98, at 185.

¹¹¹ See Scheipers, *supra* note 109.

¹¹² Betsy Knight, *Prisoner Exchange and Parole in the American Revolution*, 48 WM. & MARY Q. 201 and *passim* (1991). The two sides in the war failed to reach a general agreement, or “cartel,” on prisoner exchange as was common in European wars, but commanders in the southern theater managed to negotiate three independent cartels and exchange many prisoners under their terms. *Id.* at 202.

¹¹³ GROTIUS, *supra* note 101, bk. 3, ch. 7, §§ I.1 to III.1.

¹¹⁴ *Id.* bk. 3, ch. 14, § III.

¹¹⁵ VATTEL, *supra* note 103, ch. 3, § 149.

¹¹⁶ VATTEL, *supra* note 103, § 142. While admitting the permissibility of reprisals, Vattel admonishes princes and generals that it is better to “check” opponents who violate the laws of war by other means than the execution of innocent prisoners. *Id.* On one occasion, General Washington threatened to hang a British officer in retaliation for the murder of an American prisoner of war by Loyalist militia, unless the murderer was delivered to him unconditionally. Coil, *supra* note 98, at 191–92. The British tried and acquitted the officer themselves, on the basis that the killing had been done on orders

prisoners to feed or keep safely, but even then only if the prisoners had not been promised their lives as a term of surrender, and the captors' safety depended on it. Even so, he reported that the European custom was to parole prisoners who could not be conveniently kept instead of executing them.¹¹⁷ An American congressional commission, chaired by the Continental Commissioner for Prisoners and assigned to investigate maltreatment of American prisoners of war, reconfirmed that it was "contrary to the usage and custom of civilized nations, thus deliberately to murder their captives in cold blood."¹¹⁸

B. Crimes Against Civilians

Closely related to the prohibition of killing surrendering enemy combatants is the well established custom which forbade the killing and raping of innocent civilians.¹¹⁹ Grotius wrote that the Law of Nations allowed combatants to injure "those who are truly subjects of the enemy," including women and children.¹²⁰ He admitted that some nations held that rape of the enemy's women was allowed, but that the "better" nations forbade the practice.¹²¹ Vattel, closer in time to the Revolutionary War, conceded that all subjects of an enemy state were "enemies" or "things belonging to the enemy" regardless of age or sex, but that there were limits to how they could be treated.¹²² In particular, he wrote that the custom had changed with respect to "the people, the peasants, the citizens," because wars were being fought by professional troops instead of levies, so that civilians in occupied territory could live safely as long as they did not take part in hostilities.¹²³ This was especially true of women and children and persons of unmilitary occupation (such as

from superior authority; but they also dissolved the militia that had carried out the execution and issued further orders to prevent repeat occurrences. *Id.* at 192.

¹¹⁷ VATTEL, *supra* note 103, § 151. Vattel excuses the execution ordered by Henry V at Agincourt, *see* note 108 *supra*, on the grounds that Henry believed the prisoners were about to join a French counterattack, so that the safety of his troops depended on it.

¹¹⁸ BURROWS, *supra* note 97, at 84–85, 177.

¹¹⁹ "Kill the [boys] and the luggage! 'tis expressly against the law of arms: 'tis as arrant a piece of knavery, mark you now, as can be offer't. . . ." WILLIAM SHAKESPEARE, HENRY V, act 4, sc. 7.

¹²⁰ GROTIUS, *supra* note 101, bk. 3, ch. 4, § IX. Foreigners who knew about the war but entered the enemy's territory anyway could likewise lawfully be injured or killed. *Id.* § VI.

¹²¹ *Id.* bk. 3, ch. 4, § XIX.1.

¹²² VATTEL, *supra* note 103, ch. 3, §§ 70, 72, 145.

¹²³ *Id.* § 147.

clergy), as long as they did not offer resistance.¹²⁴ As Vattel reported the custom, officers tried to stop their men from raping women, even if they were subjects of the enemy, and punished the offense when they could.¹²⁵

In keeping with Vattel's formulation of prevailing custom, American and British Articles of War provided some protection to civilians, especially women. The Articles of War of James II, promulgated in 1688, stated that "whoever shall force a Woman to abuse her (whether she belong to the Enemy, or not) and the fact be sufficiently proved, shall suffer Death for it."¹²⁶ The same section punished violence against civilians bringing provision to the camp, or to the hosts with whom troops were quartered.

The Articles of War of 1765, which were in effect during the American Revolution, required British commanders to appoint general courts-martial "who are to try all Persons guilty of Wilful Murder, Theft, Robbery, Rapes . . . and all other Capital Crimes, or other offenses, and punish Offenders with Death, or otherwise, as the Nature of their Crimes shall deserve."¹²⁷ In fact, murder, rape, and robbery were three of the top five major crimes prosecuted by the British at General Courts-Martial during the war.¹²⁸ The American Articles of War of 1775 required officers to redress and punish wrongs, such as "beating, or otherwise ill-treating any person, or . . . committing any kind of riot, to the disquieting of the inhabitants of this continent."¹²⁹ The Articles of War of 1776 contained the same provision and also provided that

[w]hensoever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offence against the persons or the property of the good people of any of the United American States, such

¹²⁴ *Id.* §§ 145–46.

¹²⁵ *Id.* § 145. As an example, Article 85 of Gustavus Adolphus's Articles of War of 1621 provided, "Hee that forceth any woman to abuse her, and the matter bee proved, hee shall die for it." WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 912 (2d ed. 1920), available at www.loc.gov/rr/frd/Military_Law/ML_precedents.html. Article 97 also protected churchmen, "aged people, men or women, maides or children, unless they first take arms. . . ." *Id.* at 913.

¹²⁶ WINTHROP, *supra* note 125, at 924. The Articles of War of Richard II, three hundred years earlier, likewise prescribed death for taking any woman prisoner unless she was bearing arms, or for "forcing" any woman. *Id.* at 904.

¹²⁷ *Id.* at 946.

¹²⁸ SCOTTI, *supra* note 8, at 156. Mutiny and desertion were the other two.

¹²⁹ WINTHROP, *supra* note 125, at 954.

as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required . . . to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate. . . .¹³⁰

In keeping with the custom described by Vattel, neither side allowed rape and both punished murder.

C. Crimes Against Civilian Property

Grotius and Vattel both allowed a belligerent sovereign a broad, but not unlimited, right to destroy civilian property. According to Grotius, just as enemy civilians were themselves enemies who could be slaughtered, their property could also be lawfully plundered or destroyed.¹³¹ Vattel likewise laid down the general rule that a belligerent gained rights over “things belonging to the enemy”¹³²—a category that included civilian property.¹³³ However, according to Vattel, the “voluntary law of nations” limited this right to actions which increased the strength of the belligerent party, weakened the enemy, or punished the enemy for “egregious offenses against the law of nations.”¹³⁴ Also, the right of plunder extended to the sovereign alone, and it was up to each sovereign to decide when and whether individual soldiers could take or destroy any civilian property.¹³⁵

¹³⁰ *Id.* at 964.

¹³¹ GROTIUS, *supra* note 101, bk. 3, ch. 5, § I. This extended even to “sacred” or “consecrated” property, unless it was sacred to the attackers’ own religion. *Id.* §§ II–III. However, Grotius made one clear exception: “the bodies of the dead may not be mistreated, because that is contrary to the law of burials. . . .”

¹³² VATTEL, *supra* note 103, ch. 3, § 160.

¹³³ *Id.* § 73. This included property belonging “to the state, to the sovereign, to the subjects, of whatever age or sex.” *Id.*

¹³⁴ *Id.* § 173. Vattel approvingly cited the then-recent custom of “contributions,” by which a civilian population could be forced to support an invading army, but the supplies required were “proportion[ed] . . . to the abilities of those on whom they [were] imposed.” He cited the wars of Louis XIV, who at the commencement of hostilities regularly made agreements with his enemies to regulate the amounts that each belligerent might take from the other’s civilian populations.

¹³⁵ *Id.* § 164. “[The sovereign’s] soldiers, and even his auxiliaries, are only instruments which he employs in asserting his right. He maintains and pays them. Whatever they do is in his name, and for him . . . But the sovereign may grant the troops what share of the booty he pleases. . . .”

The British and American Articles of War exercised that authority by forbidding soldiers to do any such thing, in virtually identical language:

All Officers and Soldiers are to behave themselves orderly in Quarters, and on their March; and whosoever shall commit any Waste or Spoil, either in Walks of Trees, Parks, Warrens, Fish-ponds, Houses, or Gardens, Cornfields, Enclosures, or Meadows, or shall maliciously destroy any Property whatsoever belonging to any of our subjects, unless by Order of the then Commander in Chief of Our Forces to annoy Rebels, or other Enemies in Arms against Us, he or they that shall be found guilty of offending herein, shall (besides such Penalties as they are liable to by Law) be punished according to the Nature and Degree of the Offence, by the Judgment of a Regimental or General Court-martial.¹³⁶

This was in keeping with a longstanding English tradition of forbidding soldiers to despoil the civilian population.¹³⁷

D. Command Responsibility

An early notion of command responsibility present in both the British and American Articles of War contemplated holding commanders individually liable for bad acts committed by their subordinates.

¹³⁶ *Id.* at 940 (Article XVI, Section XIV, of the British Articles of War of 1865); *see also id.* at 967 (Article 16, Section XIII, of the American Articles of War of 1776) (the American version refers to “the good people of the United States” instead of “our subjects” and “against said states” instead of “against us”).

¹³⁷ Thus, Richard II in his 1385 Articles of War required “that no one be so hardy as to rob or pillage another of money, victuals, provisions, forage, or any other thing, on pain of losing his head. . . .” WINTHROP, *supra* note 125, at 904. The penalty extended to soldiers taking provisions “brought for the refreshment of the army” for their own use. Henry V, during the Agincourt campaign in France, famously forbade looting the inhabitants and had a soldier hanged for stealing from a church. Meron, *supra* note 108, at 31-33. James II likewise forbade soldiers to commit “Waste, or spoil . . . without Leave from their Superior Officer,” and also from burning “any House, Barn, Stack of Corn . . . Ship . . . or carriage, or anything which may serve for the Provision of the Army, without Order from the Commander in Chief. . . .” WINTHROP, *supra* note 125, at 922-23.

Grotius held that a sovereign could be held responsible for the acts of his subordinates, under the principle that “those who order a wicked act, or who grant it the necessary consent . . . [or] do not forbid such an act although bound by law properly so called to forbid it...[or] do not dissuade when they ought to dissuade . . . deserve punishment.”¹³⁸ He wrote further that, in an unjust war, not only the sovereign, but soldiers and generals were individually responsible for the harm they had done and required to make restitution.¹³⁹ Vattel admitted that the sovereign could be held personally responsible for unjust war, but denied Grotius’s contention that soldiers or generals could be required to make restitution for “the injuries which they have done, not of their own will, but as instruments in the hands of the sovereign.”¹⁴⁰

For centuries before the Revolutionary War, sovereigns had been holding their subordinates responsible for war crimes. Thus, in 1439, Charles VII of France ordered “that each Captain or lieutenant be held responsible for the abuses, ills, and offenses committed by members of his company, and that “[i]f he fails to do so or covers up the misdeed or delays taking action . . . the Captain shall be deemed responsible for the offence as if he had committed it himself and shall be punished. . . .”¹⁴¹ A tribunal of the Holy Roman Empire made use of the concept in 1474 when it tried and convicted Peter von Hagenbach of murders and rapes committed by his men, because as a knight he was held to have a duty to prevent such crimes by his subordinates.¹⁴² Gustavus Adolphus of Sweden incorporated the same idea in his Articles of War in 1621, proclaiming that “[n]o Colonell or Captaine shall command his souldiers to doe any unlawful thing; which who so does, shall be punished according to the discretion of the Judges.”¹⁴³ This included officers whose men burned down towns or villages without proper authority, especially if the act proved prejudicial to the king and advantageous to the enemy.¹⁴⁴

¹³⁸ GROTIUS, *supra* note 101, bk. 2, ch. 21, §§ I.2 and II.

¹³⁹ *Id.* bk. 3, ch. 10, § IV.

¹⁴⁰ VATTEL, *supra* note 103, ch. 3, §§ 185, 187.

¹⁴¹ Victor Hansen, *What’s Good for the Goose is Good for the Gander: Lessons from Abu Ghraib*, 42 GONZAGA L. REV. 335, 349–50 (2007) (citing THEODORE MERON, HENRY’S WARS AND SHAKESPEARE’S LAWS 149 n.40 (1993)).

¹⁴² Major William S. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 4–5 (1973).

¹⁴³ WINTHROP, *supra* note 125, at 910.

¹⁴⁴ *Id.* at 912.

The 1765 British Articles of War included the same concept:

Every officer commanding in Quarters, Garrisons, or on a March, shall keep good order, and to the utmost of his Power, redress such abuses or disorders which may be committed by any Officer or Soldier under his command; if, upon Complaint made to him of Officers or Soldiers beating or otherwise ill-treating of their Landlords, or of extorting more from them than they are obliged to furnish by Law; of disturbing Fairs or Markets, or of committing any Kind of Riots, to the disquieting of Our People; he the said Commander who shall refuse or omit to see Justice done, and Reparation made to the Party or Parties injured, as far as Part of the Offender's Pay shall enable him or them, shall, upon Proof thereof, be punished by a General Court-Martial, as if he himself had committed the Crimes or Disorders complained of.¹⁴⁵

American authorities enacted the same principle in virtually identical language, in the 1775 Massachusetts Articles of War, the 1775 American Articles of War, and the 1776 American Articles of War.¹⁴⁶ Also, during the Carolina campaigns, British General Alexander Leslie was concerned with some of the “excesses” British troops had been committing against the Americans. In order to reinforce discipline within his ranks, General Leslie issued an order on February 6, 1781, declaring that “Any officer who looks on with Indifference & does not do his Utmost to prevent the Shameful Marauding Which has of late prevailed in the Army Will be Considered in a more Criminal light than the persons who Commit those Scandalous Crimes, which must bring disgrace & Ruin on his Majesty's Arms.”¹⁴⁷

¹⁴⁵ *Id.* at 937.

¹⁴⁶ *Id.* at 948–49, 953, 964. In 1779, the Americans captured British Lieutenant Governor Henry Hamilton, and he was indicted under Virginia law for atrocities committed by his Indian allies, though these were contrary to his explicit orders. Hamilton was ultimately paroled and exchanged without being tried, in part because General Washington doubted the propriety of treating him as a criminal after his surrender. Coil, *supra* note 98, at 193–97.

¹⁴⁷ SCOTTI, *supra* note 8, at 163. See also A.R. Newsome, *A British Orderly Book, 1780–1781*, 9 N.C. HIST. REV. 165, 289–90, 296–97 (1932).

V. Legal Application

A. Battle of Waxhaws

Under British, American, and customary law in effect at the time of the American Revolution, it is clear that Banastre Tarleton and the British Legion committed war crimes. The most infamous of these occurred at the Battle of Waxhaws, discussed in Part III.A. above, where Tarleton himself attacked an ensign attempting to raise a white flag, and after believing Tarleton to be dead, his men continued to kill Americans who had laid down their arms until all had surrendered. As discussed in Part IV.A., by the time of the American Revolution, it had become established custom to give quarter to surrendering enemy combatants.

Tarleton and his men had no excuse for executing surrendering American soldiers. The British had already established an elaborate system for housing American prisoners of war, and Tarleton could have sent prisoners to Charleston for internment. Even were it not so, the prevailing custom would have been to parole prisoners rather than execute them. Per the rule laid down by Vattel, executing prisoners who could not be kept was only permissible if sparing their lives would endanger the captors.

Historian Anthony Scotti suggests that since Colonel Buford rejected Tarleton's original terms of surrender before attacking him, Tarleton was technically absolved from any obligation to offer Buford's men quarter.¹⁴⁸ However, between Grotius's treatise in 1620 and Vattel's in 1748, the requirement to give quarter to surrendering troops had grown from a requirement of "moral justice" to an established custom of international law. Even though Buford had refused Tarleton's terms to surrender his whole detachment, individuals who surrendered during the fight were surrendering unconditionally, and as such were entitled to quarter. Technically, the white flag being raised by Ensign Cruit was a request to parley, which Tarleton could have refused,¹⁴⁹ but under the circumstances it was an obvious effort to surrender by someone who was no longer taking part in the fight. At the very least, Tarleton should have

¹⁴⁸ SCOTTI, *supra* note 8, at 178.

¹⁴⁹ GROTIUS, *supra* note 101, bk. 3, ch. 24, § V ("At the present time white flags are the implied sign of request for a parley."). The obligation not to hurt the other party extended only to those who requested and those who were granted parleys. *Id.* § III.

offered quarter to Ensign Cruik himself, if not the entire detachment, at that point.

Professor Scotti also attempts to excuse Tarleton's conduct at the Waxhaws in his book on the grounds that the Americans had committed similar atrocities.¹⁵⁰ Reprisals were permissible under the Law of Nations at that time,¹⁵¹ though killing prisoners in reprisal was disfavored by the major authorities in international law on moral grounds.¹⁵² In some instances, General Washington or his British counterparts threatened (but did not carry out) reprisals to stop ungentlemanly and unlawful acts committed by the other side, but the British have never claimed the Battle of Waxhaws as a reprisal for some alleged atrocity committed by the Americans. Even if it had been, Tarleton would not have been able to take matters into his own hands, as typically reprisals were handled between the highest levels of command in the British and American Armies, as when the Continental Congress threatened retaliation against the British for mistreatment of American prisoners.¹⁵³

Professor Scotti also suggests that Banastre Tarleton was not responsible for war crimes at the Battle of Waxhaws because he was not aware of what was going around him. However, this suggestion is flawed. As discussed in Part III.A., Banastre Tarleton wrote to Lord Cornwallis in full awareness of what had happened when Colonel Buford's detachment attempted to surrender. Lieutenant Colonel Tarleton, as the Legion's commander, would have naturally positioned himself somewhere near the center of the battlefield in order to command a better view of the action. Long after the war was over, Tarleton claimed in his book for the first time that his horse had been shot from underneath him as Colonel Buford's men were attempting to surrender.¹⁵⁴ Tarleton claims that he was trapped under his horse while his dragoons hacked Buford's men to pieces as they unsuccessfully

¹⁵⁰ SCOTTI, *supra* note 8, at 137–38.

¹⁵¹ Reprisals are acts of retaliation to specific customs of war or law of war violations committed by an adversary which are intended to induce future compliance. Reprisals are intended for use only after other less extreme measures have been exhausted and only as an unavoidable act of last resort. See FM 27-10, *supra* note 94, ch. 8, para. 497a–d. Modern law prohibits reprisals against prisoners of war. *Id.* para. 497c.

¹⁵² GROTIUS, *supra* note 101, bk. 3, ch. 11, §§ XIV–XV; Vattel, *supra* note 103, § 141.

¹⁵³ BURROWS, *supra* note 97, at 78, 191–93. Traditionally reprisals can only be ordered by the highest-ranking military authority available. See FM 27-10, *supra* note 128, ch. 8, para. 497d. In Tarleton's case, that would have been General Cornwallis, commander of the British Army in the South.

¹⁵⁴ TARLETON, *supra* note 31, at 30.

begged Tarleton for quarter.¹⁵⁵ Professor Scotti concedes in his book that even though Tarleton may have been dazed by the fall after his horse was shot, that in itself fails to excuse the fact that “he could have tried to take charge before the situation devolved into complete mayhem.”¹⁵⁶

According to Tarleton, it was only after much exertion on his own behalf that he was able to stop his dragoons from cutting down what was left of the Virginia Continental detachment.¹⁵⁷ But if such was the case, why did he not mention it in his letter to Cornwallis, instead of waiting years to mention it in his own book? Furthermore, his own actions in attacking Ensign Cruikshank as he attempted to raise a flag of truce, after having warned the Continentals that “the blood would be on their heads” if they did not surrender without a fight, too clearly showed his men what he wanted them to do. Thus, even if Tarleton’s self-serving story was true, he would have been responsible as commander under the British Articles of War. Killing surrendering troops was the opposite of the “good order” each commander was charged to keep, and an “abuse or disorder” of the kind he was required to redress.

As commander of the British Legion, Tarleton was responsible for his unit’s utter lack of self-discipline in murdering Buford’s troops as they attempted to lay down their arms and surrender. By all accounts, Banastre Tarleton was considered a perfectionist when it came to drilling his dragoons.¹⁵⁸ Regardless of where he was physically located on the battlefield, his dragoons should have been disciplined enough to abide by the customs of war regardless of the circumstances in which they found themselves. Although Lieutenant Colonel Tarleton instilled tactics and discipline into his dragoons, he was also unfortunately indifferent toward and even outright encouraged their “excesses” at times.¹⁵⁹ Tarleton admits in his book, *A History of the Campaigns of 1780–1781 in Southern America*, that General Cornwallis had to warn him about tempering his conduct, admonishing Tarleton that “I must recommend it to you in the strongest manner to use your utmost endeavours to prevent the troops under your command from committing irregularities.”¹⁶⁰ General Cornwallis noticed early on in the Southern campaigns, as the Americans did, that Banastre Tarleton’s prisoners of war “by all accounts

¹⁵⁵ *Id.*

¹⁵⁶ SCOTTI, *supra* note 8, at 177–78.

¹⁵⁷ *Id.* at 30–31.

¹⁵⁸ *Id.* at 46–47.

¹⁵⁹ *Id.* at 167.

¹⁶⁰ TARLETON, *supra* note 31, at 38.

have been most cruelly treated.”¹⁶¹ His reputed indifference to the well-being of prisoners after they were captured is in keeping with his apparent indifference to letting them surrender in the first place.

B. Battle of Fishing Creek

While the Battle of Waxhaws was a slaughter among the defenseless, the Battle of Fishing Creek was another matter altogether. As previously discussed in Part III.B., Banastre Tarleton caught Colonel Sumter’s camp completely unaware and in a state of disarray while they camped alongside Fishing Creek. Sumter’s men had stacked all of their arms together while they cooked, slept, and generally passed the time away.¹⁶² Lieutenant Colonel Tarleton rightly seized the initiative and attacked Sumter’s detachment despite the fact that it was nearly eight times the size of his own.¹⁶³ Tarleton completely surprised Sumter’s troops and quickly cut them off from their arms and from one another and methodically cut them down until the remaining 300 or so survivors were taken prisoner.¹⁶⁴ Colonel Sumter was asleep when the attack began. When he awoke, he frantically mounted his horse bareback and fled to Major Davie’s camp.¹⁶⁵

Though Major Davie considered the Battle of Fishing Creek a “slaughter among the defenseless” after hearing Sumter’s account, Tarleton had simply used the element of surprise to rout an unsuspecting enemy. Then and now, this was both allowable and desirable.¹⁶⁶ Davie asserted that the Legion “continued to hack and maim the militia long after they had surrendered,” but there is no evidence that this was so. Tarleton therefore, cannot be held guilty of a war crime for his actions at the Battle of Fishing Creek.

¹⁶¹ SCOTTI, *supra* note 8, at 93.

¹⁶² *See supra* text accompanying note 73.

¹⁶³ TARLETON, *supra* note 31, at 112–13.

¹⁶⁴ *Id.* at 115.

¹⁶⁵ *See supra* text accompanying notes 78–79.

¹⁶⁶ U.S. DEP’T OF ARMY, FIELD MANUAL 3.0, OPERATIONS para. 4-47 (14 June 2001) (classifying surprise as one of the nine principles of war (objective, offensive, mass, economy of force, maneuver, unity of command, security, and simplicity being the others). Surprise results from taking actions which the enemy is unprepared to respond to. Factors contributing to surprise include speed, information superiority, and asymmetry.

C. The Widow Richardson's Plantation

On top of the war crimes the British Legion committed at the Battle of Waxhaws, Tarleton and his dragoons committed more war crimes when they plundered and burned the Widow Richardson's plantation and other civilian property. As discussed in Part III.C., Tarleton admitted to having destroyed "by Fire & Sword" great swaths of property in the Carolinas. Francis Marion noted that Tarleton burned down plantations, homes, and other property all the way from Jacks Creek to the High Hills.¹⁶⁷ Marion was deeply distressed to see women and children left homeless and without food or clothing, huddled around makeshift fires in midwinter.¹⁶⁸ Tarleton's actions at the Richardson plantation were in keeping with his actions throughout the South. He not only desecrated the grave of Mrs. Richardson's husband and burned down her home, but locked all the family livestock in a barn and burned that to the ground too.¹⁶⁹

Under the "voluntary law of nations" as described by Vattel, hostile sovereigns could only destroy civilian property if doing so gained some military advantage, by strengthening the hostile power, weakening the enemy, or punishing the enemy for an egregious violation of the Law of Nations. None of these applied to Tarleton's destruction of the Widow Richardson's plantation or the exhuming of her husband's body. Furthermore, the British Articles of War of 1765 forbade officers and enlisted men to "commit any Waste or Spoil" or to "maliciously destroy any property" of their own accord. Only the commander in chief could authorize such acts and only when it worked to the king's benefit.

There is no evidence that Lord Cornwallis authorized Tarleton's actions at the plantation or that these actions were an effort to secure some advantage to the Crown. Mrs. Richardson was a widow living at home with her children minding her own business when Tarleton dug up her husband's grave and destroyed everything she and her children owned. Tarleton's apparent motive was revenge for the hanging of his friend, alleged spy Major John André. And his decision to desecrate the grave of General Richardson violated even the earlier, more permissive Law of Nations recognized by Grotius. Tarleton's actions at the plantation were war crimes.

¹⁶⁷ See *supra* text accompanying notes 67–68.

¹⁶⁸ See *supra* text accompanying note 76.

¹⁶⁹ See *supra* text accompanying note 74–75.

D. Rape and Killing of Civilians

Rape and murder also violated the law of war during the American Revolution. Customary international law, as set forth by Vattel, forbade soldiers to harm “the people, the peasants, the citizens,” and especially women and children who did not take up arms or offer resistance. The British Articles of War required commanders to appoint courts-martial “to try all Persons guilty of Wilful Murder . . . Rapes . . . and all other Capital Crimes,” and to “redress such abuses or disorders which may be committed by any Officer or Soldier under [their] command.” Some of Banastre Tarleton’s defenders argue that murders and rapes like the ones described in Part III.D. were isolated events and that it was impossible for Tarleton to know about and prevent them all.¹⁷⁰

With respect to the killings described in Part III.D., Lee’s bugler, despite his youth, was a soldier fleeing the legion after a skirmish. As such he was not an “innocent” civilian, and could lawfully be killed under the Law of Nations as articulated by Grotius and Vattel. Grotius, as noted above, held that all children belonging to the enemy could be killed or enslaved under the Law of Nations; Vattel held that women and children were in general protected because they could not bear arms, but a bugler who participated in the war effort was not “innocent” in the way Vattel used that term and could lawfully be killed. The dying boy met by Moses Hall may have been mistaken for an American scout or spy. His ill-considered mission to sneak a peek at the notorious Banastre Tarleton would have rendered him indistinguishable from such a combatant, and so may have made him a lawful target.¹⁷¹ Even the killing of innocent civilians at Tarrant’s tavern may not show a war crime by Tarleton. The civilians were mixed in with a crowd of American soldiers, and on the information available it is not possible to say whether they resisted the Legion themselves (as would make them likely targets under Vattel’s formulation) or whether it was reasonably possible for Tarleton’s dragoons to attack the American soldiers without striking these civilians, let alone whether Tarleton himself knew or condoned an unlawful civilian killing on this occasion. Neither then nor now could soldiers

¹⁷⁰ SCOTTI, *supra* note 8, at 165.

¹⁷¹ The Law of Nations as formulated by Vattel focused on the concept of “innocence,” and protected such persons as were too young, too old, too female, or otherwise too far removed from the war effort to constitute credible threats; only later was the concept of “innocent” changed for the broader, modern concept of “civilian.” See Meron, *supra* note 108, at 25. This individual, as a sixteen-year-old male, was able to handle weapons and serve in either side’s armed forces.

render themselves immune from attack simply by crowding together with civilians.

However, with regard to the rapes at Sir John Colleton's plantation, Tarleton's dragoons carried out those heinous acts in the open after rounding up all of the women and singling out the three most attractive to debase, without even a hint of trying to disguise their evil intentions from the witnesses present. This suggests that they knew such acts were tolerated in their command. The fact that General Cornwallis had to personally intervene in an unrelated second rape incident suggests something about the command environment Banastre Tarleton fostered in the British Legion. Either Tarleton had no idea that the rapes had taken place or he did know about them and chose to look the other way. Neither possibility speaks well of Lieutenant Colonel Tarleton as a commander. As noted above, the concept of command responsibility had been recognized in Europe for several centuries before the Revolutionary War. The British and American Articles of War required officers to "keep good order" and redress "abuses and disorders" by their troops, and if they failed to do so they could be punished as though they had committed those same acts themselves.¹⁷² The evidence does not conclusively prove that Tarleton violated these standards, and so committed war crimes, but it does suggest it.

VI. Modern Legal Application

Under established customary international law today, Lieutenant Colonel Banastre Tarleton would without doubt be considered a war criminal.

The Waxhaws massacre would certainly qualify as a war crime today. The Hague Convention of 1907 [hereinafter Hague IV] expressly forbids killing or wounding "an enemy who, having laid down his arms . . . has surrendered at discretion" (i.e., unconditionally).¹⁷³ Assuming the war was treated as "not of an international character"—i.e., that the American rebels were considered as British subjects—Common Article 3 to the Four Geneva Conventions of 1949 would explicitly protect "[p]ersons taking no active part in the hostilities, including members of

¹⁷² See *supra* text accompanying note 218.

¹⁷³ Convention (IV) Respecting the Laws and Customs of War on Land, Annex (Regs.), art. 23, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague IV].

armed forces who have laid down their arms.” It provides that such persons must “in all circumstances be treated humanely,” with a specific prohibition on “violence to life and person.” This is reaffirmed in Article 4 of Additional Protocol II to the Conventions, which explicitly forbids violence against all persons “who have ceased to take part in hostilities.” If the conflict was international, then it would be governed by Article 41 of Additional Protocol I (AP I) to the Conventions, which requires that any person who is *hors de combat* by reason of expressing an intention to surrender shall be spared from further attack.¹⁷⁴

Article 23 of Hague IV and Article 40 of AP I make it a crime to refuse to offer quarter to such soldiers or even to *threaten* to refuse quarter to a defeated adversary. Tarleton’s threat to Buford after proposing surrender terms—“if you are rash enough to reject them, the blood be upon your head”—was ambiguous in this regard; but his actions and his troops’ in the battle suggest that he intended, and they understood, that he meant for them to refuse quarter and kill surrendering Americans in reprisal if they failed to surrender at once. If that was the case then under modern standards he was guilty of a war crime before the battle even began. As noted above, eighteenth-century international law permitted a side to execute prisoners or refuse quarter in reprisal for enemy violations of the law of war (though there is no evidence that Tarleton intended this at Waxhaws). Modern international law does not permit even this—Common Article 3, AP I, and AP II admit of no such exceptions.

The principle of command responsibility, which had already received some recognition in the writings of Grotius and Vattel and in both sides’ Articles of War in the Revolutionary War, is now an explicit and robust part of customary international law. Article 86 of AP I provides that

[t]he fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary

¹⁷⁴ Additional Protocol to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), arts. 40–41, Dec. 12, 1977, 16 I.L.M. 1391 [hereinafter AP I] (providing that “[i]t is prohibited to order that there shall be no survivors, [or] to threaten an adversary therewith,” that “[a] person is who is recognized or who, in the circumstances, should be recognized to be hors de combat shall not be made the object of attack,” and that a person is hors de combat if “he clearly expresses an intention to surrender . . . provided that . . . he abstains from any hostile act and does not attempt to escape”).

responsibility . . . if they knew, or had information which should have enabled them to conclude . . . that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach. . . .

Article 87 goes further, and imposes on commanders a duty to prevent, suppress, and report breaches to their superiors, and to “ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.” The United States Supreme Court recognized, in *Yamashita v. Styer*, that under international law a commander has “an affirmative duty to take such measures as [are] within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.”¹⁷⁵ And the International Criminal Tribunal for the Former Yugoslavia reaffirmed this principle in *Prosecutor v. Delalic*, stating that “[a] person in a position of superior authority should . . . be held individually responsible for giving the unlawful order to commit a crime. . . . But he should also be held responsible for failure to prevent a crime or to deter the unlawful behavior of his subordinates.”¹⁷⁶ Thus, Tarleton’s failure to *prevent*, as much as his failure to stop, the killing of surrendering Continentals would render him liable under the modern law of war. Even by failing to train his dragoons on the importance of accepting an enemy’s surrender, Tarleton would be guilty of a war crime under this standard.

Part III.D. discussed two incidents where Tarleton’s dragoons raped local civilian women. The first took place at Sir John Colleton’s plantation where a group of local women had gathered to take refuge from the war, and the second took place in the Spring of 1781, when General Cornwallis made an unannounced visit to the British Legion. Cornwallis was summoned by a group of local townsfolk who informed him of the rapes and later identified the two offenders who were under Tarleton’s command. As noted above, the offenders were ultimately court-martialed and punished.¹⁷⁷ Under the Geneva Convention, and in

¹⁷⁵ *Yamashita v. Styer*, 321 U.S. 1, 16 (1946). See also COURTNEY WHITNEY, *YAMASHITA V. STYER: A MEMORANDUM* 46–58 (1949), available at http://www.loc.gov/rr/frd/Military_Law/Yamashita_case.html (discussing the international law of command responsibility as it stood in 1946, including examples of commanders being held responsible for failing to act to prevent serious law of war violations).

¹⁷⁶ *Prosecutor v. Zejnir Delalic*, Case No. IT-96-21-T, Judgment ¶¶ 333–34 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (citing AP I, *supra* note 174, art. 87).

¹⁷⁷ See *supra* text accompanying notes 122, 126.

particular Article 76 of AP I, women are to be treated as objects of “special respect” and are to be protected from indecent assault, forced prostitution, and rape.¹⁷⁸ Though Banastre Tarleton did not personally commit the rapes discussed in the article, under Article 87 he might still be held responsible under the doctrine of command responsibility for failing in his obligation as a commander to prevent the rapes from happening and for failing to immediately report them to his superiors once they did, if he knew or should have known they were likely to occur.¹⁷⁹

Lastly, modern international law would surely condemn the wanton destruction of property which Banastre Tarleton threatened to bring about “with Instant Fire & Sword,”¹⁸⁰ including his destruction of the Widow Richardson’s barn and livestock. In the eighteenth century, such destruction was allowable if it met the test of military necessity—that is, if it strengthened the attacking force or weakened or punished the enemy—and, in the case of plunder, if the sovereign allowed it. British and American articles of war allowed plunder and destruction only with permission from the respective commanders-in-chief. But the modern law of war forbids outright the deliberate (as opposed to the incidental) destruction of civilian property.¹⁸¹ Article 52 of AP I states that civilian objects are protected against attack unless they forfeit their protected status and become valid military objectives.¹⁸² Thus, Tarleton’s “Fire & Sword” policy, his destruction of civilian plantations, would be unlawful in our own day even if his commander-in-chief had expressly ordered it. His desecration of General Richardson’s grave would be quite as unlawful in our day as it was in his own.¹⁸³

¹⁷⁸ See *supra* note 277.

¹⁷⁹ AP I, *supra* note 174, arts. 86–87; see also Prosecutor v. Slobodan Milosevic, Case No. IT-02-54-T, Decision on Prosecution Motion for the Admission of Transcripts, ¶ 33 (Int’l Crim. Trib. for the Former Yugoslavia Jun. 30, 2003) (noting that Milosevic, while not charged with committing rape himself, would be defending charges that he failed to take the necessary measures to prevent or punish rape).

¹⁸⁰ See *supra* text accompanying notes 90–91.

¹⁸¹ FM 27-10, *supra* note 94, para. 40c (“Pursuant to the provisions of Article 25 [of Hague IV] . . . cities, towns, villages, dwellings which may be classified as military objectives, but which are undefended . . . are not permissible objects of attack.”).

¹⁸² AP I, *supra* note 174, arts. 51–52.

¹⁸³ FM 27-10, *supra* note 94, paras. 218 (“Parties to the conflict . . . shall further ensure that the dead are honorably interred . . . [and] that their graves are respected. . . .”), 504c. (listing “maltreatment of dead bodies” as a war crime).

VII. Conclusion

In conclusion, the notion that Banastre Tarleton was not a war criminal despite the fact that he “butchered surrendering soldiers and treated civilians cruelly” is patently false. Lieutenant Colonel Tarleton and his dragoons violated established customary law and very explicit provisions of the British Articles of War prohibiting murder, rape, destruction of civilian property, and the killing of enemy prisoners. Had General Washington decided to court-martial Banastre Tarleton for war crimes after his surrender at Yorktown, the law would have supported his conviction. Had General Cornwallis decided to court-martial Banastre Tarleton for war crimes after repeatedly warning him about committing “irregularities” and “cruelly treating” the Americans, the law would have supported his conviction. The fact that neither side did so does not detract from the fact that Banastre Tarleton was a war criminal—certainly by today’s standards and even in his own day.