

# International Humanitarian Law: Challenges

edited by

John Carey  
William V. Dunlap  
R. John Pritchard



Transnational Publishers, Inc.  
Ardsley, New York

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## FOREWORD

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Of the trends I mentioned in my Foreword to Volume 1 of this inestimable series of essays, the one with the most dire implications has been the most pronounced. I refer to the campaign of the civilian leaders of the current Bush Administration to shield themselves from all accountability for war crimes and crimes against humanity. Not only has the United States crossed out the previous Clinton administration's signing of the Rome treaty establishing the International Criminal Court (ICC), but it has also been entering into bilateral treaties where the treaty partner agrees not to turn over any Americans in its jurisdiction to the new ICC. This campaign of bilateral treaties is steadily undermining the new Court even before it has had its first case. Moreover, the Bush Administration has successfully intimidated Belgium into dropping its innovative universal jurisdiction law.

What are American political leaders afraid of? Radical anti-American critics accuse them of wishing to commit war crimes with impunity. This criticism is not based on any evidence. In the American military intervention in Iraq of 2003—begun and ended within the space of the six months since Volume 1 was published—we have witnessed the most controlled military invasion in history. Emblematic of the supremacy of international humanitarian law over the conduct of hostilities was the appearance for the first time of lawyers assigned to the military platoons, regiments, and armies. These lawyers had the final word whether military units could fire at certain targets, or in a certain direction, or at certain enemy combatants (or even at enemies disguised as civilians). The lawyers made these judgments on the basis of existing international humanitarian law. This kind of on-the-spot control over military initiatives in the field is totally unprecedented. This is not to say that there were no infringements of the laws of war during the Iraqi intervention, but one would be hard put to find any deliberate violations. On the basis of these “facts on the ground,” as opposed to diplomatic initiatives emanating from Washington, D.C., one could almost credit the Bush administration with establishing a new standard for the legal conduct of military hostilities. These are not people who have a desire to violate the laws of war with impunity.

But they also have no desire to be tried for the war crimes of others. They may send soldiers into battle accompanied by lawyers, they may personally approve of all missile targets to make sure that no target violates humanitarian law, they may send their most trusted and well-informed commanders into the field to fight in accordance with the letter and spirit of the Hague and Geneva Conventions, and they may insist upon military courts martial against American soldiers who violate those conventions. Nevertheless in any war, command communications may

break down, regiments can run amok, and targets can be missed or even changed by the crew aboard an aircraft or on the deck of a vessel equipped with long-range missiles. A few inferences from recent engagements will illustrate the seriousness of the fear of war-crime prosecution on the part of American leaders. In the battle of Kosovo, where missiles were launched from aircraft at an altitude of 10,000 feet, a number of proscribed targets were hit in Kosovo and Serbia. Immediately there were calls for prosecution of the American leadership, who came within the jurisdiction of the International Criminal Tribunal for Former Yugoslavia (ICTY) because the alleged crimes were committed in Yugoslavia. What bothered the American leadership the most was that many of the alleged targeting violations came from NATO aircraft not under the immediate control of the United States. Even though the ICTY prosecutor eventually decided not to prosecute any of the American leaders for any of these alleged war crimes, the American leaders obviously resolved never again to put themselves in a position where they might be accused of responsibility for war crimes committed by commanders and officers of foreign countries. That is the main reason why the Afghanistan and Iraqi military interventions were dominated by American military forces. Even though the United States paid lip service to multilateral intervention, it is evident that the American position was "if we're going to be held to command responsibility, let's at least be sure that we are in command." (The offer by Great Britain to help in the Iraqi intervention, though earnestly solicited by the United States, was probably an embarrassment when it was actualized. The command-responsibility dilemma was neatly solved by assigning to the British troops the taking and occupation of the city of Basra, so that if any war crimes took place there, only the British could be charged.)

The political leaders of the United States are worried about command responsibility. They are not lawyers or legal scholars, and therefore the doctrine may appear far more dangerous and fuzzy to them than it really is. Even if lawyers for the Pentagon and the Department of State assure them that they bear zero risk of being convicted of war crimes under the doctrine of command responsibility, no lawyer can assure them that a foreign or international tribunal would never indict them. We can empathize with a public servant who wants to be remembered as a patriot and not as an indicted (even if never convicted) war criminal. Thus no American leader wants to take the personal risk of being charged as a war criminal; he or she would rather defeat the entire international enterprise of war crimes tribunals exemplified by the new International Criminal Court and Belgium's brief but brave attempt to open its courts to universal jurisdiction over the commission anywhere of war crimes and crimes against humanity.

To make matters significantly worse from the perspective of American leaders, their lawyers will point out to them that it was an American precedent that initially shaped and broadened the doctrine of command responsibility: *In re Yamashita*, 327 US 1 (1946). The United States Army pressed hard for General Tomoyuki Yamashita's conviction in 1945, and the Supreme Court affirmed it.

Thus it is hard for an American leader today to disavow the *Yamashita* case. Yet, if progress is to be made in redefining the concept of command responsibility so that it applies where it reasonably should apply, we must re-imagine and reinterpret what happened in that case.

“Command responsibility” as reasonably defined should include the following five elements:

- (1) The defendant was the *de jure* commander;
- (2) The defendant was the *de facto* commander (in other words, he was not a commander in name but powerless in fact);
- (3) The defendant either knew or had reason to know of the commission by his subordinates of war crimes or crimes against humanity;
- (4) The defendant could have used the power of his office to prevent or mitigate the war crimes or crimes against humanity; and
- (5) The defendant failed to so use the power of his office.

Let us briefly consider the *Yamashita* case in light of the aforementioned elements. General Yamashita had been ordered by the Imperial Government to go to the Philippines and take charge. He arrived there on 5 October 1944, when it was in chaos. He immediately ordered Rear Admiral Sanji Iwabuchi to evacuate from Manila, a city which in Yamashita’s judgment had no military value. Instead Iwabuchi blatantly disobeyed his superior’s orders and dug in, with catastrophic consequences. Iwabuchi’s troops were cut off by Allied forces and Filipino guerrillas. His naval forces, now trapped in Manila, went into an orgy of rape, pillage, torture, and murder of the civilian population. (Military historians acknowledge that the Army and Navy of Japan constantly fought with each other during the war.)

Did Yamashita know or have reason to know about the atrocities? His U.S. Army lawyers, who worked diligently on his behalf, had to make a delicate strategic judgment. Although there was no proof that Yamashita actually knew about the war crimes, as commander-in-chief he was certainly in a position to know about them. But irrespective of the war-crimes standard of “reason to know,” due process of law requires that any person accused of a crime must be shown to have had the intent to commit it. Yamashita’s lawyers probably figured that if they denied the threshold questions of whether he knew about the crimes or had reason to know about them, the “intent” test would be pushed farther back and thus become more difficult for the prosecution to prove at trial. In other words, the “reason to know” standard in this case of first impression might be narrowed, by virtue of due process of law (a general principle of international law), so that proof of knowledge of war crimes had to be “brought home” to the defendant (by the prosecution’s evidence) and not by merely applying legal definitions to him constructively.

This defense strategy was not misplaced. Yet it was a strategic error. The atrocities committed in Manila were widespread; they were common knowledge.

It strains credulity to believe that Yamashita did not know about them. All lawyers who have argued cases in court know that making an argument that strains the judge's credulity is a strategy that often backfires. It may result only in convincing the judge that the advocate is not to be trusted on all the other arguments he is advancing.

In any event, the critical issue at trial was the question of intent. The prosecution had no evidence that Yamashita ordered or favored the commission of war crimes. But they argued that by failing to use his position of authority to prevent the war crimes, it could be deduced that he allowed them to occur. For his part, Yamashita was unable to produce any evidence that he tried to prevent the war crimes from occurring. There was no document, memorandum, order, or directive issued from Yamashita's office that even addressed the atrocities, much less one that ordered the Japanese soldiers to stop committing them. Having thus failed to rebut the presumption that by inaction he allowed the war crimes to continue, he heard the tribunal sentence him to death by hanging.

If we go back now and re-imagine the Yamashita trial, how should his defense strategy have been reconfigured? I suggest that his lawyers should have accepted, in the above table, elements (1) *de jure* commander and (3) knew or had reason to know, and denied the others. Thus, his attorneys could have argued:

As to (2) *de facto* commander: General Yamashita was the titular head of the Army and Navy in the Philippines, but the Navy's resistance to Army command was so embedded that Yamashita had virtually no *de facto* control over the Naval commander, Admiral Iwabuchi.

As to (4) and (5): General Yamashita did in fact use the full power of his office to prevent or mitigate the commission of war crimes!

To win on these contentions, the defense attorneys would have to conduct what amounts to an affirmative defense. That is, they would have to present evidence to the tribunal to support the contentions. They could not simply sit back and say that the prosecutor must disprove the contentions.

As I imagine it, the defense would begin with an observation that all the judges on the tribunal would appreciate: that the atavistic, bestial propensity of unrestrained soldiers to torture, rape, and kill defenseless civilians has unfortunately been true of all soldiers in all wars throughout all of history. By far the most important thing that the military commander must do in such a situation is to impose strict military discipline. That is the only thing that prevents soldiers from running amok. In Manila in 1944, the commander—whether it was Yamashita or Iwabuchi—would have been wasting his time if he had threatened the rioting soldiers with arrest. Such a threat would not have been credible (who would guard the prisoners?) Thus, the defense could have maintained, any "paper orders" from Yamashita's headquarters would have been useless in Manila in 1944.

To prevent the large-scale commission of war crimes would therefore require the imposition of military discipline. The main task of the defense attorneys would then be to prove that Yamashita spent 100% of his working day in bringing military discipline to the Philippines. He did this in three ways: by setting an example (by all reports there was strict military discipline at his headquarters and in its vicinity), by moving his disciplined troops steadily into Manila so as to "spread" the orderliness to the naval forces, and to take over control of the naval chain of command. The latter was his most difficult task. For although he had been named the supreme commander of the Japanese military forces in the Philippines, the government that nominated him in Tokyo had little real authority over the Army or the Navy. It could order Rear Admiral Iwabuchi to subordinate his command to that of General Yamashita, but the order would fall upon unhearing ears. It is very likely that Yamashita could have produced evidence of his attempts to get the Emperor to order Admiral Iwabuchi to subordinate himself to the Army command. Yet even if he had tried to approach the Emperor (through the Lord Privy Seal and others who were close to the Emperor personally), he probably would not have succeeded; the Emperor had long made known his extreme reluctance to intervene in jurisdictional disputes between the Army and the Navy. Yet it was not necessary that Yamashita had to succeed in stopping the war crimes. It was only necessary for his defense to show that he had used his best efforts to do the things that were objectively necessary to prevent the war crimes from continuing. Such a showing would be a complete legal defense to the charge of command responsibility.

Whether the defense I have just sketched would actually have worked at the Yamashita trial, had his lawyers thought of it, is anybody's guess. It is unfortunately clear that the current American leaders in the Bush Administration would probably not have been sympathetic to such a defense if they had been in office in 1945; their unwillingness at the present time to accord alleged Taliban terrorists, captured by American troops, a full and fair trial is today's mirror of the lack of consideration the Army in 1945 gave to the American officers assigned to Yamashita's defense team.

But the important point is not what could have or should have happened to Yamashita. Instead, we should reread the *Yamashita* case in light of the factual defense that could have been made. Such a rereading casts grave doubt upon the case's outcome and, more important, its precedent value. If in the future the Supreme Court gets the opportunity to review a case of command responsibility, it would be doing a great service to the cause of international accountability for war crimes and crimes against humanity if it were to formally overrule the *Yamashita* case.

The other hope for clarification of the doctrine of command responsibility lies in the hands of the International Criminal Tribunal for Former Yugoslavia, now well into its second year of the trial of Slobodan Milosevic. As I write these words, the prosecution still has not completed its side of the case. But that very

fact says a great deal. If the prosecution had based its theory on the *Yamashita* precedent, it could have finished its side of the case in less than a month. There is cause for mild optimism just in the fact of the amount of testimony being recorded at The Hague—testimony not just about the fact that atrocities occurred, and not just about the fact that Milosevic was the *de jure* commander of the Serbian Army, but testimony attempting to link him to a failure to use his authority to reduce or eliminate the war crimes and depredations. Milosevic has not yet had his chance to present exculpatory evidence in his own behalf. The world is watching (unlike the *Yamashita* trial, which went virtually unnoticed). The public, I am quite confident, will not accept a verdict that finds Milosevic guilty for the war crimes of others simply because he was in charge. If he is found guilty, it will have to be on the basis of evidence that he decided not to use his effective authority to reduce or eliminate those crimes. Such a standard, in my view, would serve all civil and military leaders well.

Anthony A. D'Amato  
Leighton Professor of Law  
Northwestern University  
Chicago, August 2003