

## United States, In re Yamashita

[Source: Supreme Court of the United States 327 US 1 (1946); footnotes partially omitted.]

**N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents.** Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[...]

**Mr. Chief Justice Stone delivered the opinion of the court. [...]**

*The charge.* Neither Congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge preferred against him is of a violation of the law of war. The charge, so far as now relevant, is that petitioner, between october 9, 1944 and september 2, 1945, in the Philippine Islands, “while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he [...] thereby violated the laws of war.”

Bills of particulars, filed by the prosecution by order of the commission, allege a series of acts, one hundred and twenty-three in number, committed by members of the forces under petitioner’s command during the period mentioned. The first item specifies the execution of “a deliberate plan and purpose to massacre and exterminate a large part of the civilian population of Batangas Province, and to devastate and destroy public, private and religious property therein, as a result of which more than 25,000 men, women and children, all unarmed noncombatant civilians, were brutally mistreated and killed, without cause or trial, and entire settlements were devastated and destroyed wantonly and without military necessity.” Other items specify acts of violence, cruelty and homicide inflicted upon the civilian population and prisoners of war, acts of wholesale pillage and the wanton destruction of religious monuments.

It is not denied that such acts directed against the civilian population of an occupied country and against prisoners of war are recognized in international law as violations of the law of war. Articles 4, 28, 46, and 47, annex to the Fourth Hague Convention, 1907 [...]. But it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. [...]

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

This is recognized by the annex to the fourth hague convention of 1907, respecting the laws and customs of war on land. Article 1 lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be "commanded by a person responsible for his subordinates." [...] And Article 26 of the Geneva Red Cross Convention of 1929 [...] for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, makes it "the duty of the commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing Articles, (of the Convention) as well as for unforeseen cases ..." and, finally, Article 43 of the Annex of the Fourth Hague Convention [...] requires that the commander of a force occupying enemy territory, as was petitioner, "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals. [...]

We do not make the laws of war but we respect them so far as they do not conflict with the commands of congress or the constitution. There is no contention that the present charge, thus read, is without the support

of evidence, or that the commission held petitioner responsible for failing to take measures which were beyond his control or inappropriate for a commanding officer to take in the circumstances.

[Footnote 4 reads: In its findings the commission took account of the difficulties “faced by the accused with respect not only to the swift and overpowering advance of american forces, but also to the errors of his predecessors, weaknesses in organization, equipment, supply ... , training, communication, discipline and morale of his troops,” and the “tactical situation, the character, training and capacity of staff officers and subordinate commanders as well as the traits of character ... of his troops.” It nonetheless found that petitioner had not taken such measures to control his troops as were “required by the circumstances.”]

We do not weigh the evidence. We merely hold that the charge sufficiently states a violation against the law of war, and that the commission, upon the facts found, could properly find petitioner guilty of such a violation. [...] It is plain that the charge on which petitioner was tried charged him with a breach of his duty to control the operations of the members of his command, by permitting them to commit the specified atrocities. This was enough to require the commission to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed on him by the law of war and to pass upon its sufficiency to establish guilt. [...]

**Mr. Justice Murphy, dissenting. [...]**

[...] I find it impossible to agree that the charge against the petitioner stated a recognized violation of the laws of war. [...]

[R]ead against the background of military events in the Philippines subsequent to october 9, 1944, these charges amount to this: “We, the victorious american forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. In those respects we have succeeded. We have defeated and crushed your forces. And now we charge and condemn you for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking your ability to maintain effective control. Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so widespread we will not bother to charge or prove that you committed, ordered or condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization which we ourselves created in large part. Our standards of judgment are whatever we wish to make them.”

Nothing in all history or in international law, at least as far as I am aware, justifies such a charge against a fallen commander of a defeated force. To use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality.

International law makes no attempt to define the duties of a commander of an army under constant and overwhelming assault; nor does it impose liability under such circumstances for failure to meet the ordinary responsibilities of command. The omission is understandable. Duties, as well as ability to control troops, vary according to the nature and intensity of the particular battle. To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations. Such calculations become highly untrustworthy when they are made by the victor in relation to the actions of a vanquished commander. [...]

The court's reliance upon vague and indefinite references in certain of the Hague Conventions and the Geneva Red Cross Convention is misplaced. Thus the statement in Article 1 of the Annex to Hague Convention No. IV of October 18, 1907 [...] to the effect that the laws, rights and duties of war apply to military and volunteer corps only if they are "commanded by a person responsible for his subordinates," has no bearing upon the problem in this case. Even if it has, the clause "responsible for his subordinates" fails to state to whom the responsibility is owed or to indicate the type of responsibility contemplated. The phrase has received differing interpretations by authorities on international law. In Oppenheim, *International Law* (6<sup>th</sup> ed., rev. by Lauterpacht, 1940, vol. 2, p. 204, fn. 3) it is stated that "the meaning of the word 'responsible'... is not clear. It probably means 'responsible to some higher authority,' whether the person is appointed from above or elected from below; ..." Another authority has stated that the word "responsible" in this particular context means "presumably to a higher authority," or "possibly it merely means one who controls his subordinates and who therefore can be called to account for their acts." Wheaton, *International Law* (7<sup>th</sup> ed., by Keith, London, 1944, p. 172, fn. 30). Still another authority, Westlake, *International Law* (1907, part II, p. 61), states that "probably the responsibility intended is nothing more than a capacity of exercising effective control." Finally, Edmonds and Oppenheim, *Land Warfare* (1912, p. 19, par. 22) state that it is enough "if the commander of the corps is regularly or temporarily commissioned as an officer or is a person of position and authority ..." It seems apparent beyond dispute that the word "responsible" was not used in this particular Hague Convention to hold the commander of a defeated army to any high standard of efficiency when he is under destructive attack; nor was it used to impute to him any criminal responsibility for war crimes committed by troops under his command under such circumstances. The provisions of the other conventions referred to by the court are on their face equally devoid of relevance or significance to the situation here in issue. Neither Article 19 of Hague Convention No. X [...] nor Article 26 of the Geneva Red Cross Convention of 1929 [...] refers to circumstances where the troops of a commander commit atrocities while under heavily adverse battle conditions. Reference is also made to the requirement of Article 43 of the Annex to Hague Convention No. IV [...] that the commander of a force occupying enemy territory "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." But the petitioner was more than a commander of a force occupying enemy territory. He was the leader of an army under constant and devastating attacks by a superior re-invading force. This provision is silent as to the responsibilities of a commander under such conditions as that. [...]

The only conclusion I can draw is that the charge made against the petitioner is clearly without precedent in

international law or in the annals of recorded military history. This is not to say that enemy commanders may escape punishment for clear and unlawful failures to prevent atrocities. But that punishment should be based upon charges fairly drawn in light of established rules of international law and recognized concepts of justice. [...]

## Discussion

1. a. At that time, was the charge against the petitioner a recognized violation of the laws of war? Or was it merely the administration of victor's justice?  
b. Is such a charge a recognized violation of IHL today? (P I, Arts 86 and 87; CIHL, Rule 153)
2. a. If a military commander is personally responsible for criminal misconduct by members of his command vis-à-vis protected persons, and if he fails to take the necessary steps to prevent such misconduct before it occurs (and to end it and punish offenders if it does occur), which necessary steps suffice to avoid personal responsibility? How is this to be assessed? Will the minimum necessary steps vary with the circumstances?  
b. For a finding of culpability, is a subjective or an objective standard applied, i.e., must the commander know that his subordinates are going to commit a breach of IHL or have information which should have enabled him to so conclude? Which is the higher standard of mens rea?
3. a. Is Justice Murphy correct in his dissent that a commander should not be held responsible for the actions of his troops when "under constant and overwhelming assault"? Is such a requirement militarily unrealistic? Does that matter? Should it matter?  
b. Can an intense combat situation really be fairly assessed in retrospect? Particularly by the victors of a conflict? If not, can soldiers thus never be fairly prosecuted and punished? [See also United States, United States v. William L. Calley, Jr.]