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STUDY PROJECT

GENERAL MACARTHUR AND THE YAMASHITA DECISION
SEPTEMBER 1944 - FEBRUARY 1946

SENIOR LEADERSHIP ETHICAL
CASE STUDY
FOR THE
DEPARTMENT OF COMMAND LEADERSHIP AND MANAGEMENT

BY

LIEUTENANT COLONEL PETER J. BEIN

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SECURITY CLASSIFICATION OF THIS PAGE (When Data Entered)

REPORT DOCUMENTATION PAGE		READ INSTRUCTIONS BEFORE COMPLETING FORM
1. REPORT NUMBER	2. GOVT ACCESSION NO.	RECIPIENT'S CATALOG NUMBER
4. TITLE (and Subtitle) General MacArthur and the Yamashita Decision September 1944 - February 1946		5. TYPE OF REPORT & PERIOD COVERED Individual Study
7. AUTHOR(s) LTC Peter J. Bein		8. CONTRACT OR GRANT NUMBER(s)
9. PERFORMING ORGANIZATION NAME AND ADDRESS U.S. Army War College Carlisle Barracks, PA 17013		10. PROGRAM ELEMENT, PROJECT, TASK AREA & WORK UNIT NUMBERS
11. CONTROLLING OFFICE NAME AND ADDRESS Same		12. REPORT DATE May 1989
		13. NUMBER OF PAGES 41
14. MONITORING AGENCY NAME & ADDRESS (if different from Controlling Office)		15. SECURITY CLASS. (of this report) Unc1
		15a. DECLASSIFICATION/DOWNGRADING SCHEDULE
16. DISTRIBUTION STATEMENT (of this Report) DISTRIBUTION STATEMENT A: Approved for public release; distribution is unlimited.		
17. DISTRIBUTION STATEMENT (of the abstract entered in Block 20, if different from Report)		
18. SUPPLEMENTARY NOTES		
19. KEY WORDS (Continue on reverse side if necessary and identify by block number)		
20. ABSTRACT (Continue on reverse side if necessary and identify by block number) See reverse side		

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USAWC MILITARY STUDIES PROGRAM-1989
SENIOR LEADERSHIP ETHICAL CASE STUDY
PETER J. BEIN, LT COL, USAF

ABSTRACT

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This paper presents a case study of senior military leader ethics in the decision making process. Specifically, General MacArthur's decision to try and subsequently execute General Yamashita for war crimes during WW II is documented for critical review and discussion of the importance of a professional senior military leader's responsibility to formulate decisions based on ethical and moral foundations. The case study is designed as an educational tool for use in the seminar environment.

In the study, General Yamashita's trial is presented to establish the setting and build a foundation for reader familiarization with the facts, as captured in historical documentation, of the situation in the Philippines during WW II that led to General MacArthur's decision against General Yamashita. The Supreme Court's review, the dissenting opinion of two of its justices, and General MacArthur's Staff Judge Advocate's review provide additional insight into the factors surrounding General MacArthur's decision.

General MacArthur's decision is analyzed with emphasis on possible influences of his personal convictions at the time. The impact of such factors as the consideration of the extenuating circumstances of the battle conditions in the Philippines, his legal procedures established for the trial, his personal ties to the Philippines, political influences and his ethical reasoning are reviewed so the reader can further judge General MacArthur's decision from an ethical and moral standpoint.

Finally, the study traces the legal precedent of command responsibility as established by general MacArthur's decision and captured in the laws of war then and now. It also shows the impact of senior leader decisions to future applications as pointedly significant, adding credibility to senior military leader decisions based on ethical and moral reasoning.

GENERAL MACARTHUR AND THE YAMASHITA DECISION

SEPTEMBER 1944 - FEBRUARY 1946

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CASE STUDY
FOR THE
DEPARTMENT OF COMMAND LEADERSHIP and MANAGEMENT
1988-1989

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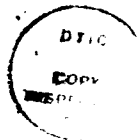
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CHAPTER I

METHODOLOGY AND OBJECTIVES

A unique aspect of the military profession, as compared with other professions, lies in our responsibility as guardians of legal violence. As such, ethical and moral considerations must center around and serve humanity. The laws of war recognize this. Crimes against humanity, in all their forms, are prohibited. Decisions at the senior leader levels of the military must not be guided by what betters the profession of arms, but must be guided by those ethical and moral standards that are for the good of humanity.

The following case study looks at one senior leader's decision concerning a military commander of a defeated army and one's responsibility to control subordinates who committed war crimes. It is presented to enhance the importance of a professional senior military leader's responsibility to formulate decisions based on ethical and moral foundations. The unique environment of a war often presents situations that are extremely intense for the decision making process. Combat involves managing the application of violence. A senior leader's decisions literally determine life and death and must be firmly based on sound ethical and moral values. This is the essence of decision making by the professional military leader.

The case study is designed to generate discussion concerning ethical and moral reasoning in the decision making process by officers at the senior military levels. Review the following learning objectives before reading the case study.

1. Understand the importance of a senior leader's ethical and moral standards as the underlying basis in making decisions.
2. Critically analyze the ethical and moral reasoning General MacArthur used in arriving at his decision to execute General Yamashita for violating the laws of war.
3. Understand the relationship between General MacArthur's decision and the Yamashita precedent with respect to command responsibility.
4. Understand the far reaching implications that a senior military leader's decision can have in future applications.

CHAPTER II

INTRODUCTION

General Tomoyuki Yamashita, Japanese Commander, 14th Army Group, walked out of the mountains surrounding Kaingan on the main Philippine island of Luzon on 2 September 1945 and surrendered, a defeated WW II commander. General Douglas MacArthur, Commander U.S. Far Eastern Command, ordered General Yamashita to stand trial for war crimes. On 8 October 1946, the United States charged General Yamashita with allowing his troops to commit atrocities against Americans and Filipinos. As such, he failed to control his subordinate's actions, his "command responsibility". The charges were brought to bear before an American military commission established by General MacArthur. The trial began on 29 October 1945.

The commission found General Yamashita guilty as a war criminal on 7 December 1945 (the 4th anniversary of Pearl Harbor) and sentenced him to hang. The U.S. Supreme Court reviewed his case under a Writ of Habeas Corpus and ruled against him on 4 February 1946. Required by law to review the Yamashita case, General MacArthur agreed with the commission's findings and sentence. General Tomoyuki Yamashita hung from the gallows on 23 February 1946.

General MacArthur's decision to bring General Yamashita to trial and his decision to uphold his execution established a precedent and a new crime. The definition of command responsibility took on a whole new meaning for many years. Future war crime trials would be affected by the Yamashita precedent before new law could rectify it.

Chapters III through VI will trace the facts of General Yamashita's case and the impact of General MacArthur's decision, whether morally or ethically right or wrong.

Chapter III puts the charges against General Yamashita in clear context. It sets the stage for challenging the fairness of the trial based on significant testimony as well as judicial order. It brings to light the lack of evidence that the prosecution presented and the military commission's handling of such evidence and the case overall.

Chapter IV presents the legal review of the case proceedings and commission's findings, beginning with defense counsel's submission of a recommendation for leniency to General MacArthur. The review process continues with the Supreme Court's opinion that basically upheld the military commission's legality in trying General Yamashita. Two Supreme Court justice's dissenting opinions are presented. Those opinions backed the defense counsel's charges that General Yamashita's trial was unfair.

Chapter V looks at General MacArthur's reasoning behind his decision. It questions the basis for his decision and

provides evidence to ascertain the ethical and moral considerations involved.

In chapter VI, the impact of General MacArthur's decision is traced to the current definition of command responsibility under international law. The case against General Smith, U.S. Army, at the turn of the century is briefly outlined as a measure of the significance of a commander's responsibility compared to its implications in the Yamashita case. The chapter follows the evolution of the precedent through the Nuremberg trials to Captain Medina's trial after Vietnam.

Chapter VII concludes, and offers questions for use in the seminar environment. The questions will generate discussion about ethical and moral reasoning in the decision making process by critically analyzing General MacArthur's decision to execute General Yamashita for war crimes during WW II.

CHAPTER III

THE TRIAL OF GENERAL YAMASHITA

"Tomoyuki Yamashita, General Imperial Japanese Army, between 9 October 1944 and 2 September 1945, at Manila and at other places 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 the people of the United States and of its allies and dependencies, particularly the Philippines and he, General Tomoyuki Yamashita, thereby violated the laws of war."¹

Charges against General Yamashita before
the Reynold's Commission. Manila,
Philippines, 8 October 1945

General Yamashita took command in the Philippines on 7 October 1944, nine days before the American invasion of Leyte. The Japanese War Ministry relieved the previous commander for cause and the two never got a chance to converse. Consequently, General Yamashita came to control a military force totaling 120,000 out of the 300,000 troops in the islands;² troops that were found at the time by the Japanese War Ministry as starving, not only for food, but also discipline. He gained a new staff of 15 officers, with the exception of three, all new to the command and the Philippines.³ Commanders he never knew and whose leadership abilities he had to trust served him in the field.⁴ So set the stage for General Yamashita's plight in preparing to

resist the invasion of a superior American force and in controlling a disintegrating army.

The final battle for the Philippines centered around the ancient city of Manila. The Japanese occupying forces fought with vengeance and left a trail of atrocities too long to list. By the end of August, 1945, 30-40 thousand civilians (including American prisoners of war) died from starvation, massacre, torture and execution. Manila, its homes, businesses and religious buildings was in shatters.⁵ Several weeks later, American forces placed General Yamashita behind prison bars.

In a September, 1945, cable, President Truman directed General MacArthur to "...proceed, without avoidable delay, with the trial by court martial and the punishment of such Japanese war criminals as have been apprehended."⁶ This request for expedience would have a measurable influence on every aspect of General Yamashita's trial, from proceedings and rulings by the commission to his execution.

General MacArthur established a commission of five American general officers headed by Major General Reynolds. This was clearly the responsibility of the Commander, U.S. Far Eastern Forces Command as established by the War Department in Field Manual 27-5.⁷ It is significant to note that not one of the five members of the commission had any legal experience or training in legal matters, and only one had combat experience in WW II. General Reynolds was

appointed as the "law member" of the commission even though directives recommended the need for legal experience in that position.⁸

General MacArthur published the "Regulations Governing the Trial of War Criminals" that applied to the proceedings in General Yamashita's case. He found the basis for the rules in those just established by the London Charter for the trial of European war criminals before the International Military Tribunal at Nuremberg.⁹ In establishing the London Charter, the United States, Great Britain and Russia agreed to conform to the judicial approach in dealing with war criminal cases rather than with the political approach. The political approach favored execution of war criminals by association. The judicial approach favored justice by trial. President Truman publically announced the use of the judicial process "...in keeping with our tradition of fairness towards those accused of crime."¹⁰

The Reynold's Commission clearly had the basis to conduct General Yamashita's trial by the standards of judicial fairness upon which America's system was founded. The early recorded proceedings of his arraignment captured the commission's intent that General Yamashita's trial would "...be conducted in a fair and impartial manner, which is traditional American justice."¹¹

With an edict from President Truman and a commission chosen and regulated by General MacArthur, the trial of

General Yamashita began. The prosecution did not charge General Yamashita with the actual commission of war crimes. They did not accuse him of ordering such acts. They did not successfully prove that he knew of the commission of atrocities. They did not even charge General Yamashita with failure to act and prevent further occurrences or to take pecuniary action after the fact. The prosecution, by virtue of the number of crimes that took place, assumed General Yamashita "had to know" of them or, at least, "should have known" about them and therefore was accountable.¹²

The American defense counsel's job became one of proving General Yamashita's innocence. The team of U.S. Army defense lawyers brought several significant facts before the commission. Through testimony, it became evident that General Yamashita provided guidance throughout his command with respect to the proper treatment of American prisoners of war and the Filipino people. Testimony proved others were in command of the units who committed some of the atrocities. It also became known that those units under his command who committed war crimes disobeyed his orders. Finally, the defense brought out the extenuating circumstances of the battle for the Philippines as having completely disrupted his command and control of his subordinates from the outset. The discussion of each point follows.

In the days before the American invasion of Luzon, General Yamashita ordered his ground forces commander, Lieutenant General Yokoyama, to evacuate Manila. General Yamashita's plan only called for General Yokoyama's forces to protect the shipment of supplies and equipment, built up over the previous years, out of the city. In General Yamashita's eyes, Manila was undefendable because of the food required to feed the civilian population and the quantity of armed forces required. He defended against the American invasion from the mountains. He ordered General Yokoyama to transfer custody of the 1300 American prisoners of war and the 7000 interned civilians over to the American forces when they landed. In addition, testimony proved that General Yamashita ordered the Japanese forces vacating the city to treat all civilians with fairness.¹³

It's appropriate to note that General Yamashita spent several years stationed in Europe exposed to the Western view of the laws of war. In Japan's Malayan campaign against the British culminating in the capture of Singapore in 1942, Imperial Headquarters Japan admonished General Yamashita because he sought punishment for Japanese soldiers who allowed criminal activity against the British.¹⁴

As the Army forces moved out of Manila in Jan-Feb '45, Japanese Naval forces, under orders from Naval Headquarters in Japan, assumed the defense of Manila under Admiral Iwabuchi. When these forces came under General Yamashita's

command in early February, 1945, testimony noted that General Yokoyama relayed his orders to evacuate the city to Admiral Iwabuchi. Further evidence indicated Admiral Iwabuchi continued to follow Naval Headquarter's desires to defend Manila. The naval force in Manila exceeded 20,000 sailors and they became the real criminals in the "rape of Manila." They all perished in the battle for the city, including Admiral Iwabuchi.¹⁵

General Yokoyama suspected Admiral Iwabuchi's forces were committing atrocities in the city. The trial brought this fact out. General Yokoyama testified that he neglected to tell General Yamashita of his suspicions. In addition, the atrocities that occurred in Batangas Province under General Yokoyama by Colonel Fujishigi's forces were never reported to either General Yokoyama or General Yamashita. Colonel Fujishigi was later executed for his part, but General Yokoyama never faced charges.¹⁶

In December, 1944, the commander of Japanese Air Forces in the Philippines ordered 150 American prisoners of war executed on Palawan Island. These acts were part of the prosecution's list of particulars against General Yamashita, yet he never gained command of those Air Forces until January, 1945.¹⁷

Finally, defense put much emphasis on the extenuating circumstances brought to bear against General Yamashita's ability to communicate and control his forces. The American

land forces did their best to cut his lines of communication. The air forces controlled all air movement over Luzon. Philippine guerrillas controlled his courier system. General Yamashita moved his headquarters four times in nine months. As the Americans gained ground they isolated all his forces extensively. In their opinion, General Yamashita's attorneys thought the commission erred by not considering "...in mitigation the exceptional battle conditions [he faced]."18

On the stand, before the commission, and in response to prosecution's accusation that he had to know, General Yamashita declared lack of time to organize, preoccupation with planning against the Americans, and total loss of communications as his defense.¹⁹ He further testified:

"I did not hear at once of the events which took place, nor did I have prior knowledge that they might take place...I was under pressure night and day to plan, study and execute counter strikes against superior American forces...Nine days after my arrival in the Philippines I faced an overwhelming American tide moving on Leyte...I was forced to confront superior U.S. Forces with subordinates I did not know and with whose character and ability I was unfamiliar. As a result of the inefficiency of the Japanese Army system, I could not unify my command; my duties were extremely complicated. The troops were scattered and Japanese communications were very poor...I became gradually cut off from the situation and found myself out of touch. I believe under these conditions I did the best job I could have done...I did not order any massacres...I put forth my best efforts to control my troops."²⁰

The chief defense counselor knew the direction the commission was headed from the beginning of the trial. From the defense's opening plea:

"The accused is not charged with having done something or having failed to do something, but solely with having been something...that the accused was the commander...and by virtue of that fact alone, is guilty of every crime committed by every soldier assigned to his command. American jurisprudence recognizes no such principle so far as its own military personnel is concerned. The [U.S.] Articles of War...do not hold a commanding officer responsible for the crimes committed by his subordinates. It is the basic premise of all civilized criminal justice that it punishes not according to status but according to fault, and that one man is not held to answer for the crime of another."²¹

Historians, both legal and military, have closely scrutinized the trial of General Yamashita over the years. The thread that links each chronicle together is a lack of sufficient and convincing evidence that General Yamashita authorized or even knew such crimes were committed. Yet General MacArthur shouldered him with the responsibility of knowing what his troops were doing all the time.²²

The Reynold's Commission declared General Yamashita guilty of allowing his subordinates to commit war crimes. The final judgement linked together the commission of atrocities and his failure "...to provide effective control."²³ As the responsible commander, he was accountable based on the "must have known" or, at least, "should have known" logic.

CHAPTER IV

THE REVIEW

"In other words, read against the background of military events in the Philippines subsequent to 9 October 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 aspects 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 beselging 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 judgement are whatever we wish to make them.'"²⁴

U.S. Supreme Court Justice Murphy,
dissenting, paraphrasing the prosecution's
charges.

In the case against General Yamashita, the legal review process started with a recommendation for clemency by defense counsel through channels to General MacArthur. Defense's approach sought to reason with the review authority on the basis of primacy. Historically, this was the first time a commander was held responsible for his subordinate's actions without, himself, having criminal intent. Since the Reynold's Commission, through its findings, created a new crime, the defense counsel logically

reasoned that the reviewing authority should reconsider the case.²⁵

Defense counsel knew in short time that General MacArthur's Staff Judge Advocate (SJA) rejected their clemency request. Consequently, they did what any conscientious attorney would do and brought the case before the U.S. Supreme Court under a Writ of Habeas Corpus; that age old guarantee of personal freedom where an individual charged and held for a crime can be brought before a court to determine case sufficiency.²⁶

General Yamashita's counsel raised a critical question before the high court. Was General Yamashita's trial fair? Defense counsel founded their arguments in the type of evidence the commission accepted throughout the trial. Defense objected to prosecution's use of affidavits, depositions, opinions, gossip and hearsay. The commission overruled each time. In the eyes of the defense, the commission failed to guarantee the accused American judicial safeguards.²⁷ They violated Congressional Articles of War. The 25th Article of War did not allow the admission of depositions (not to mention the less formal affidavit) as evidence in capital cases. Article 38 allowed the President to prescribe, among other things, rules of evidence. In absence of Presidential involvement the rules of evidence recognized in U.S. District Courts applied.²⁸

President Truman never intervened. As mentioned earlier, General MacArthur adopted rules set forth in the London Charter and conveyed them to the Reynold's Commission through his "Regulations Governing the Trial of War Criminals". This directive authorized the commission to use its own opinion and accept evidence that "...would have probable value in the mind of a reasonable man."²⁹ The London Charter applied to international war crime trials. But this was an American trial, before an American military commission on American territory under authority of a general officer of the United States Army.

In General MacArthur's opinion, the Supreme Court had no jurisdiction in this case.³⁰ But, the court accepted it for review and the War Department had to direct General MacArthur to withhold all actions against General Yamashita. Chief Justice Stone saw two critical questions reviewable under the writ. Could the U.S. detain General Yamashita for trial; and did the military commission have the authority to try and condemn him? On these two issues, Justice Stone had the support of the majority of the justices. Existing law fully supported the legality of the Reynolds Commission and the trial of General Yamashita before it. But there were other serious issues the court failed to address.

Did General Yamashita violate existing law? Was the evidence used against him in violation of established judicial procedure? Was he afforded the safeguards of the

Fifth Amendment (fair trial) of the U.S. Constitution?

Here, opinions of the Justices varied greatly.

Chief Justice Stone delicately carved the Supreme Court's opinion around these issues. The law failed specifically to define "command responsibility" that equated to General Yamashita's charges, but Justice Stone's opinion cited the generalities of a commander's responsibility outlined in the Hague Conventions of 1907 and the 1929 Geneva Convention as sufficient.

The issues of legal evidence and a fair trial were debated heatedly. Justices Murphy and Rutledge gave extensive and damaging opinions against the Supreme Court decision. But Justice Stone, in writing the Supreme Court's position, simply found these basic issues not reviewable under the Writ of Habeas Corpus. He felt it was not the court's position to review the trial for disputed facts or procedural errors. This was for the military review process to correct.³¹

Justice Murphy condemned the military commission for disregarding General Yamashita's procedural rights under the Due Process clause of the Fifth Amendment. His dissenting opinion exclaimed General Yamashita "...was rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence...there was no serious attempt to charge or to prove that he committed a recognized

violation of the laws of war...Instead, the loose charge was made that great numbers of atrocities had been committed and that the petitioner was the commanding officer; hence, he must have been guilty of disregard of duty."32

Justice Rutledge's dissenting opinion concurred that General Yamashita never received a fair trial. He agreed separately that the commission accepted illegal evidence and that defense had insufficient time to prepare its case. He specifically wrote "...the commission's actions were flagrant departures from law and...its power to proceed was lost in the course of what was done before and during the trial".33

CHAPTER V
THE DECISION

"It is not easy for me to pass penal judgement upon a defeated adversary in a major military campaign. I have reviewed the proceedings in vain search for some mitigating circumstances on his behalf. I can find none...The traditions of fighting men are long and honorable. They are based upon the noblest of human traits - sacrifice. This officer, of proven field merit, entrusted with high command involving authority adequate to responsibility, has failed this irrevocable standard; has failed his duty to his troops, to his country, to his enemy, to mankind; has failed utterly his soldier's faith...I approve the findings and the sentence..."³⁴

General Douglas MacArthur
Review Decision against General
Yamashita, February, 1946

The U.S. Supreme Court clearly laid the responsibility to review the case for disputed facts and procedural errors in General MacArthur's lap. This process took place coincidentally with the Supreme Court's review and started at Lieutenant General Styer's level at Headquarters Army Forces, Western Pacific. In essence, General Styer agreed on 12 December 1945 with his staff judge advocate's position that General Yamashita failed to keep himself informed "...of what was common knowledge throughout the command."³⁵ Yet, the prosecution, as previously noted, failed to prove the common knowledge claim, or that General Yamashita had the means to know!

When the case came before General MacArthur's SJA in January, 1946, his recommendation to General MacArthur cited case testimony. "Since the duty rests on a commander to protect ...civilian population and [prisoners of war] from wrongful acts...and since the failure to discharge that duty is a violation of the laws of war, there is no reason...he should not be criminally responsible."³⁶

General MacArthur reviewed the case in February, 1946. He knew on 4 February that the Supreme Court would not uphold the writ. This came via message. The written opinion, including dissenting opinions, soon followed by mail. General MacArthur did not wait. In his decision, he stated: "The proceedings were guided by that primary rational of all judicial purpose - to ascertain the full truth, unshackled by any artificialities of narrow method or technical arbitrariness. The results are beyond challenge."³⁷

The international news media covered the hearings before the Reynold's Commission extensively. A London Daily Express correspondent summed it up in his report: "The military commission sitting in judgement continued to act as if it wasn't bound by any law or rules of evidence."³⁸ General Yokoyama, General Kuroda (General Yamashita's predecessor) and Field Marshall Terauchi (General Yamashita's superior) never came to trial before General MacArthur's International Military Tribunal for the Far East

(Tokyo Trials).³⁹ Why? Was General MacArthur really seeking justice? Emperor Hirohito was Japan's military commander in chief, yet General MacArthur felt "...the principle of holding criminally responsible the political leaders...is repugnant to me...I felt to do so was to violate the most fundamental rules of criminal justice."⁴⁰

In the review process, did General MacArthur weigh the extenuating circumstances of battle; the stress and exhaustion of battle on General Yamashita's subordinate's ability to make logical decisions and the disruption to his command and control? Did he weigh the course of legal proceedings he established when, as a matter of record, the Reynold's Commission stopped allowing cross examination and repetitive questioning by defense in the interest of saving time?⁴¹ In the history of Anglo-Saxon judicial proceedings, there exists evidence that lighter sentences are dealt where new law is established. Did General Yamashita deserve the death sentence?

Did General MacArthur's ties to the Philippines weigh on his judgement? His father had fought for the freedom of Manila in the late 19th century and served as Philippine Military Governor in the 1920s. General MacArthur, himself, served in the islands many times; three tours before becoming the U.S. Military Advisor to President Quezon in 1935 and the Supreme Commander Southwest Pacific Area

(headquartered in Manila) until 1942 when his "beloved Philippines" fell to Japan under General Homma.⁴²

Was there a political connection behind General MacArthur's decision? He persuaded the Joint Chiefs of Staff and President Truman that the route to the defeat of Japan and the end to the Pacific war lie through the Philippines and not Formosa.⁴³ General MacArthur felt the Filipinos suffered greatly at the hands of the Japanese. Historians note General Yamashita's trial (as well as others) quelled the Filipino's thirst for retaliation and smoothed the United State's post-war reconstruction of Japan.⁴⁴

Was there a personal vengeance in General MacArthur's decision? He repeated history and his father's footsteps in freeing the city of Manila. "For me it was a soul wrenching moment...the ghosts of the past - my father, Quezon, Taft, Wood, Stimson, Davis, Roosevelt, Murphy...In this city, my mother had died, my wife had been courted, my son had been born..."⁴⁵

If there existed insufficient legal proof to execute General Yamashita, did General MacArthur have a higher ethical reason? In his decision against General Yamashita (quoted at the beginning of this chapter), General MacArthur's tone captures the chivalry of the long established military profession, "...has failed utterly his soldier's faith." Clearly there was insufficient evidence

proving General Yamashita's culpability to commit war crimes as compared to the evidence presented against General Homma (Bataan death march); yet they suffered the same fate. In review of Homma's case, General MacArthur stated: "Soldiers of an army invariably reflect the attitude of their general. The leader is the essence. Isolated cases of rapine may well be exceptional, but widespread and continuing abuse can only be a fixed responsibility of highest field authority."⁴⁶

Was General Yamashita's fate sealed by General MacArthur before he came to trial? Many historians have published reviews of this landmark case. Was justice satisfied or was General Yamashita a scapegoat of war; the rightful end for so many deaths; the sacrifice for being the defeated adversary? There was more compelling evidence against some U.S. commanders for their actions during the war. For example in the same battle for Manila, General Brightner (37th Infantry Division) issued orders to take no more Japanese prisoners after discovering the many atrocities and the Japanese' continued refusal to surrender upon demand.⁴⁷ General MacArthur's decision in the case against General Yamashita stands today for all to review in the context of professional ethics and morality.

CHAPTER VI

THE PRECEDENT

"He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control operations of the members of his command...The recorded annals of warfare and the established principals of international law afford not the slightest precedent for such a charge. The high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the realization of the boundless and dangerous implications of the procedure sanctioned today."⁴⁸

U.S. Supreme Court Justice Murphy, Dissenting Opinion.

"No new or retroactive principles of law, either national or international, are involved. The case is founded upon basic fundamentals and practices as immutable and as standardized as the most natural and irrefragable of social codes. The proceedings were guided by that primary rationale of all judicial purposes - to ascertain the full truth unshackled by any artificialities of narrow method or technical arbitrariness. The results are beyond challenge".⁴⁹

General Douglas MacArthur, Review Decision against General Yamashita - February, 1946

General Jacob Smith, U.S. Army, commanded U.S. forces against the Philippine guerilla insurrection on the island of Samar, Philippines, in 1901. During the insurrection, General Smith's troops killed a good many non-combatant Filipinos. The War Department court-martialed General Smith for conduct to the prejudice of good order and military discipline.

General Smith issued an order to his subordinate commander on Samar not to take prisoners. "I wish you to kill and burn. The more you kill and burn, the better you will please me... The interior of Samar must be made a howling wilderness." The commander asked General Smith for clarification as to what age applied when killing those capable of bearing arms. General Smith set the age at ten years. The court-martial found that his order was unnecessary to regulate the conduct of his subordinate's operations and that he incited revengeful feelings which caused his troops to commit the killings.

In General Smith's case, command responsibility was clearly established. His order established culpability. General Smith went a step beyond that for which General Yamashita was executed. Yet President Roosevelt only admonished General Smith and retired him from the service.⁵⁰

General MacArthur's decision to uphold the Reynolds Commission's findings and sentence did indeed set a precedent--a new definition of command responsibility. General Yamashita not only "should have known" atrocities occurred and the law of war violated, but he also "must have known" because of the very nature of the commander/subordinate relationship. And while the Supreme Court's ruling failed to approve or disapprove the procedural fairness of the trial, its rendered opinion on the case added weight and drove many to conclude that it backed the

commission's verdict and therefore its reasoning.⁵¹ This case established a legal precedent that found its way into the Nuremberg trials and survived to be a legal consideration in the era of the Vietnam War.

In the Nuremberg trials following WW II, there were two cases where the Yamashita precedent played its role in jurisprudence. In the Hostage Case (February, 1948) the international tribunal charged German officers with war crimes and crimes against humanity, specifically, killing of hostages (civilians taken into custody for the purpose of guaranteeing, with their lives, the future good conduct of inhabitants of their community).⁵² The prosecution used the Yamashita precedent as a basis for charges against the German officers. As charged, they failed under the new definition of command responsibility.

Three American judges found some of the accused not guilty. They ruled that if a commander, faced with exceptional circumstances, had legitimate reasons for not knowing about the actions of his subordinates, then he should not be held responsible for those actions. The "must have known" logic made precedent in General Yamashita's case failed to stand up to judicial scrutiny here.⁵³

In the High Command Case (October, 1948), the U.S. Military Tribunal abolished the "must have known" logic and put the "should have known" logic in serious legal doubt. In their opinion of the case against the officers of the

German high command charged with crimes against the peace, war crimes and crimes against humanity, the judges found that a commander must exhibit a personal dereliction or personal neglect amounting to a wanton, immoral disregard of his subordinate's actions. "We are of the opinion...that the occupying commander must have knowledge of these offenses and acquiescence, or participate, or criminally neglect to interfere..." as the only basis to hold him responsible. The tribunal overruled General MacArthur's premise that military subordination is a condemning link to criminal responsibility.⁵⁴

From an international law perspective, the 4th and 10th Hague Protocol of 1907 and the Geneva Protocol of 1929 covered the period of WW II. These protocols defined command responsibility in such general terms as to be of no use in General Yamashita's defense. Yet the laws of war as outlined in the Geneva Protocol of 1949 failed to capture any definition better than that preceded by the Yamashita case and further clarified by the Nuremberg trials. The legal interpretation of command responsibility rested on the Yamashita case until the U.S. Army's Field Manual 27-10 was published in 1956. FM 27-10, Paragraph 501, defined command responsibility in this manner:

"Such a responsibility [for acts of subordinates] arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge

through reports received by him through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law or to punish violators there of."⁵⁵

The precedent established by General MacArthur's decision against General Yamashita and modified at Nuremberg survived some 20 years when Captain Medina faced court martial charges for the My Lai massacre during the Vietnam War. Colonel Howard, the military judge in the case, put to rest the "should have known" logic in his instructions to court members.

Citing FM 27-10, Colonel Howard advised that a commander must remain vigilant of how his orders are carried out; he must act if he knows war crimes are about to occur or have occurred; his mere presence at the scene without knowledge does not constitute responsibility; and, knowledge is not established through the basic nature of the commander/ subordinate relationship.⁵⁶ In essence, Col Howard established that in order to be held responsible, a commander had to fail to intervene after having gained knowledge.⁵⁷ This is significant because if the Yamashita precedent carried its original weight and judicial significance, General Westmoreland could have been prosecuted for the My Lai massacre.

International law finally clarified command responsibility with the additional protocols to the 1949 Geneva convention articulated in 1977.

Article 86 - FAILURE TO ACT

[2] "The 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 responsibility as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, 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."⁵⁸

Article 87 (Duty of Commanders) specifically outlines a commander's duty to prevent and suppress breaches of this protocol; to ensure his subordinates are aware of their obligations under this protocol; and, that once he knows that subordinates are going to commit or have committed a breach to the protocol, that he act to prevent or initiate disciplinary action.⁵⁹

It took some thirty years to unravel a legal precedent established by General MacArthur's decision against General Yamashita. The precedent that once took the commander/subordinate relationship in its simplicity and tied to the commander total responsibility for his subordinate's actions without culpability is gone.

CHAPTER VII

CONCLUSION AND POINTS TO CONSIDER

General MacArthur's decision, in his capacity as the senior U.S. military officer in the Far East, to try, and execute General Yamashita was difficult. Most will never be in a position where the impact of one's decision has such tremendous consequences for the future. Many considerations had bearing and relevancy on that decision. If General MacArthur reasoned and judged based on ethical and moral standards, then his decision was right and the precedent was just. If political, selfish, or other reasons flawed his judgement then the precedent did a great disservice to mankind. One must ask oneself whether or not the outcome of the case against General Yamashita served humanity.

General MacArthur had the vested authority to try and sentence a fallen commander. The case study brought out that the accused stood charged with a crime never before presented in legal history. The commission consisted of judges not totally familiar with judicial processes, and more significantly, unaware of the complications a precedent setting case entails. As such, the commission's proceedings as to evidence accepted, the prosecution's lack of proof and the defense's muzzled presentation bore heavily against the fairness of the trial under Anglo-Saxon Justice.

General MacArthur had the responsibility by law to review the case and pass judgement. An enraged defense counsel sought the review of the highest court because they believed the trial to be a mockery of a proven legal system. The Supreme Court's decision to leave the judgement of disputed facts and procedural errors in the hands of the military review authority perhaps highlighted the flaws still evident in that legal system. Yet two Supreme Court Justices refused to sit by and watch the accused be denied his rights under the Constitution. Their dissenting opinions added tremendous weight against General MacArthur's decision.

It is questionable whether General MacArthur's subordinate staff judge advocates were watching the law or fulfilling General MacArthur's desires in their recommendations to uphold the commission's sentence. General MacArthur failed to enlighten himself of the Supreme Court justice's dissenting opinions. When they dissented again in the case of General Homma, he established an international tribunal (Tokyo Trials) beyond the U.S. Supreme Court's jurisdiction. His reasoning to uphold the execution could have selfish tones, political implications, or even some high ethical plane as its foundations. This will be critically analyzed for a long time to come.

Nevertheless, General MacArthur set a precedent establishing the essence of command responsibility that took

years to refute. Command responsibility and one's culpability in war crimes have now been solidified in law. In the study of ethics in the senior leader decision making process, it is up to the student to glean from the past and put to good use those lessons learned. The following questions are offered as points to consider in discussing the ethical and moral considerations in the decision making process.

1. Was General MacArthur's decision based on ethical and moral standards or was his reasoning flawed?

2. How much of General MacArthur's thinking and ultimate decision in the Yamashita case was politically motivated, ethically motivated or personally motivated?

3. Is the current, legal definition of command responsibility an improvement over General MacArthur's, or does it totally remove the responsibility for ethical and moral behavior from the commander? What safeguards are there to prevent an (unethical) commander from ignoring the possibilities of atrocities? And what negative effect could this have in future confrontations?

4. Does the higher plane of ethics demand a commander take the full responsibility for his subordinates actions regardless of culpability?

5. Where do the laws of society and ethics meet on common ground? Are there unethical laws? Are ethics ever absolute?

FOOTNOTES

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