Contents

Illustrations follow page 192.

To rule well a king requires two things: arms and laws, that by them both times of war and of peace may rightly be ordered. For each stands in need of the other, that the achievement of arms be conserved by the laws, [and] the laws themselves preserved by the support of arms. If arms fail against hostile and unsubdued enemies, then will the realm be without defence; if laws fail, justice will be extirpated, nor will there be any man to render just judgment.

—Henry de Bracton, *On the Laws and Customs of England,*
translated from the Latin by Samuel E. Thorne
(Harvard University Press, 1968)

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It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

—Justice Sandra Day O'Connor,
Supreme Court of the United States,
Hamdi v. Rumsfeld, 542 U.S. 507 (2004)

Cast

General Tomoyuki Yamashita, Commanding General, Fourteenth Area Army, Philippines 1944–1945
General of the Army Douglas MacArthur, Commanding General, Southwest Pacific

Members of the military commission:
Major General Russel B. Reynolds, presiding
Major General Leo Donovan
Major General James A. Lester
Brigadier General Egbert F. Bullene
Brigadier General Morris Handwerk

Members of the prosecution:
Major Robert Kerr, chief prosecutor
Captain William N. Calyer
Captain Delmas C. Hill
Captain Jack M. Pace
Captain M. D. Webster
Lieutenant George E. Mountz

Members of the defense:
Colonel Harry E. Clarke, chief defense counsel
Lieutenant Colonel James G. Feldhaus
Lieutenant Colonel Walter C. Hendrix
Major George F. Guy
Captain A. Frank Reel
Captain Milton Sandberg

Justices of the Supreme Court
Chief Justice Harlan Fiske Stone
Associate Justice William O. Douglas
Associate Justice Hugo L. Black
Associate Justice Wiley Rutledge
Associate Justice Frank Murphy
Associate Justice Stanley Reed
Associate Justice Felix Frankfurter
Associate Justice Harold Burton
Associate Justice Robert H. Jackson on leave, 1945–1946

Preface

The first war crimes trial after World War II took place in Manila. The accused man was General Tomoyuki Yamashita, commander of the Japanese army in the Philippines in the final year of the war, a year that saw horrendous atrocities committed by Japanese troops in Manila and elsewhere in the islands. Yamashita was arraigned in Manila on October 8, 1945, five weeks after Japan's surrender in Tokyo. General Douglas MacArthur accused Yamashita of the crime—if it was one—of failure to control his troops. Five American generals, none of them with any legal training, were appointed as a military commission to hear the evidence and render a verdict on 123 separate counts describing ghastly murders, tortures, rapes, arson, and other crimes. After five weeks of testimony, much of it in the anguished words of the victims themselves, the commission convicted Yamashita and ordered him executed. On February 23, 1946, on a scaffold in the predawn darkness near Manila, a hangman placed a noose around Yamashita's neck and he dropped to his death.

But Yamashita was no ordinary criminal, and this was no ordinary trial. He was Japan's most accomplished military leader, whose brilliant campaign against British and Australian troops in Malaya and Singapore in 1942 had delivered what Winston Churchill called the most devastating defeat in the history of the British Empire. No friend of the warlords in Tokyo, he had been exiled to a backwater command in Manchuria for two years, to be recalled only in 1944 and sent to the Philippines, where he fought MacArthur's vastly superior American forces to a standstill, finally surrendering in the hills of the island of Luzon only when the war was finally, irretrievably, and officially lost.

He was a dignified and thoughtful man who earned the respect and even admiration of the American military lawyers who defended him vigorously at the trial. Had Yamashita ordered these appalling crimes, his conviction and execution could not have come too soon. But he did not. He maintained stoutly and consistently from the witness chair in Manila that he had not ordered these crimes, and that he had in fact ordered his subordinate commanders to abandon

Manila as the American army approached and to retreat to the hills where he himself had already fled, hoping desperately only to hold off MacArthur's forces long enough to allow Japan to prepare its homeland defenses against inevitable invasion. The evidence fully supported his account.

After his conviction, his lawyers took the extraordinary step of asking the Supreme Court of the United States to hear his appeal, and that Court, taking an extraordinary step itself, agreed to do so. It upheld the conviction in what remains today its only decision on the responsibility of a military commander for the actions of his troops. It did so over the impassioned dissents of two of its members, who wrote eloquent opinions, invoking for the first time in that Court's history the concept of international human rights.

The precedent established in *In re Yamashita* has proven to be both troublesome and embarrassing for the United States. Had it been followed faithfully in the 1960s and 1970s, it might well have justified the trial and conviction of American generals of the Vietnam War. Were it to be followed faithfully today, it might well justify the conviction of American generals and political leaders for the tortures at Abu Ghraib prison in Iraq. Conversely, however, it would also justify a decision by the Supreme Court that the so-called unlawful enemy combatants at Guantánamo were entirely the business of the military and its commander in chief, entitled to none of the due process of law guaranteed by the Constitution of the United States. In fact, the Supreme Court has ruled that just the opposite is so.

The question at the heart of the Yamashita case is as important today as it was then—perhaps even more so in a vastly more sophisticated military environment with vastly more complex command structures, where soldiers in Nevada and civilians at the CIA in Virginia can carry out lethal attacks on terrorists in Afghanistan. The question is this: can a commander be held accountable before the law for the crimes committed by his troops—crimes that inflict agonizing cruelty and death on innocent civilians, including women and children—and yet crimes that he has not ordered, not stood by to allow, and may well not even have known about or had the means to stop?

The doctrine of command responsibility—or command accountability, which I think is a more accurate term—was born in that Manila trial in 1945, but today it has been added to the Geneva Conventions, it has come to dominate several major trials in the international tribunal for the former Yugoslavia, and it has been adopted by the International Criminal Court established in 2002. It has been embroidered and restated, but it is an outgrowth of the trial that MacArthur ordered for Yamashita in 1945.

By order of five American generals, General Douglas MacArthur, and the Supreme Court of the United States, General Tomoyuki Yamashita, no depraved monster but an accomplished and professional combat commander, went to his

execution over sixty-five years ago, for what his soldiers did. But his ghost hovers over our law, and our troops, and our commanders.

This book is my telling of the case of General Yamashita, and my attempt to address this question and some others related to it. My aim in writing it is to take a new look at the trial, its consequences, and its lessons for today. I have taught the case for many years in my course on the law of war at Boston College Law School, but despite the importance of the issues it raises, little has been written about the trial, and nothing very recently. Except for the account written shortly afterward by one of Yamashita's defense counsel—an invaluable but hardly objective work—this is the first book written by a lawyer with reference to the 4,000-page transcript of the trial. The value of this work is for others to determine, but my goal in writing it has been to present the facts and the law as accurately and completely as possible and to provide as full an account of the case and its context, then and now, as I am able, so that readers may judge for themselves what happened, and why, and what lessons it holds for us today.

This case lies at the heart of the intersection of the military and the law. My military service in the 1970s as a U.S. Marine Corps lawyer was far from battle, but I believe that my experience as a Supreme Court law clerk, later an advocate in several cases before that Court, and later as the head of the Office of Special Investigations in the U.S. Department of Justice, the office charged with the investigation and prosecution of Nazi war criminals in the United States, and as a trial lawyer and teacher has given me a perspective on the issues that I hope will be useful to the reader in understanding the events and their importance. I have not been shy in setting forth my opinions and conclusions, but I have tried to do so clearly, allowing the reader to take them for what they are worth, distinct from the accurate telling of what happened.

All quotations from the trial are taken verbatim from the official transcript.* The trial was extensively covered by leading American newspapers and wire services, particularly the Associated Press, the *New York Times*, and the *Chicago Daily Tribune*, as well as by the *Manila Times*, and to a lesser extent by British and Australian newspapers, the latter made available by the National Library of Australia. My descriptions of the setting and of the appearance and conduct of the lawyers, the commissioners, and the witnesses during the trial are based on those accounts, on the films recorded by the U.S. Army, on the near-daily letters of one of the prosecutors, and on other contemporary accounts of witnesses to the event.

I could not have written this account without the assistance and support of a good many people. I am particularly grateful to Lea (Walker) Wood, formerly

* There are two surviving copies of the transcript that I know of. One is at the National Archives; the other, which I used, is at Harvard University's Yenching Library.

of the Women's Army Corps, who was a member of the defense support team at the trial, and to Colonel Harry Pratt, USMC (ret.), who was the trial's chief interpreter, for their willingness to share their accounts of the trial with me. As far as I know, they are the trial's only surviving participants. I am enormously grateful also to Angelia Herrin and George Farrell, generous hosts in allowing me the use of their home in Vermont. It was there that I first conceived the idea of this book and returned often to write a good portion of it. Richard D. Sullivan, my colleague in the Marine Corps and in the Justice Department, a former military judge, and my friend of forty years, read draft after draft, and his acute knowledge and thoughtful questions kept me focused on the story to be told. To all of them, my thanks for making this book a better one than I could have done on my own.

I am also indebted to the Harvard University Library, and particularly the librarians at Widener, Baker, and Yenching Libraries, and to the Harvard Film Archive, for leading me to the right sources and for obtaining documents from other libraries; to James Zobel at the MacArthur Memorial Library and Archives in Norfolk, Virginia; Brian Stiglmeier of the Library of the Supreme Court; Andrea Hackman of the Court's curatorial staff; Rebecca L. Collier of the National Archives; and the Robert H. Jackson Center in Jamestown, New York. The U.S. Army films of the trial at the National Archives in Suitland, Maryland, provided valuable visual information on the venue of the proceedings and the actions of the lawyers, commissioners, and witnesses as they went about the business of the trial. The UCLA Film Archive provided me a copy of the rare *Orders from Tokyo* film, and the Oregon State University archivists were diligent in searching for information about chief prosecutor Robert Kerr, whose father was president of that university. Edwin J. Peterson, former Chief Justice of the Oregon Supreme Court, generously shared insights on Kerr, his former law partner. Professor Toshiyuki Tanaka of the Hiroshima Peace Institute translated Yamashita's essay written on the day of his execution, which is quoted with the kind permission of Professor Tanaka and the *Asia-Pacific Journal: Japan Focus*. Fred Borch, John W. Dower, Eugene Fidell, Louis Fisher, Gary Solis, Ronald H. Spector, and Thomas Zeiler likewise were generous in sharing their insights and expertise, as were Robin Rowland and Brian Farrell on matters touching Singapore.

The Division of Continuing Education at Harvard made research assistants available, particularly Teresa Sullivan, who tracked down the many cases and law review articles that have cited the Yamashita decision, and Kay Makino, who translated several useful Japanese documents. Emily Kanstroom, my student at Boston College Law School, provided thoughtful research. The family of Dan Shaw generously shared their late father's recollections of his experiences in the Philippines. The valuable letters of Lieutenant George Mountz

are quoted through the courtesy of Peter Mountz and Pamela McDonald, the Allen County (Indiana) Public Library, and the Garrett (Indiana) Public Library, which have posted the letters on their website. Professor Jenny S. Martinez of Stanford Law School first used the metaphor of a ghost in describing the Yamashita case, in her thoughtful 2007 article. I am much indebted to Mike Briggs, Kelly Chrisman Jacques, Kathy Delfosse, Susan Schott, and Karl Janssen at the University Press of Kansas for bringing the book to completion.

My thanks also to Manuel Monteiro, Susan Ingram, Steve Mott, Missy Gerety, Judy Enright, Mary Jean Martindale, Peter and Janyce Kittler, Bob and Patty Bryant, Franklin Schwarzer, Elizabeth Soutter Schwarzer, Tom Eagen, Chris Griffin, Mark Brodin, and Connie Gilson for their friendship and encouragement as I plugged along. Mimi, Elisabeth, Andrew, and Erin always knew that some day, probably way in the future, I would finally be done with this book.

Above all, I cannot adequately express how much I owe to my wife, Nancy, without whose support and unfailing love, patience, and good humor I never would, or could, have written this.

Prologue

The frail priest in a white cassock gripped the arm of the metal chair and sat himself carefully to face his interrogator. A breeze billowed the thin white curtains behind him and stirred the humid air in the once-grand ballroom with its sweeping view of Manila Bay. Just to his right, five uniformed generals of the U.S. Army watched as the priest readied himself.

When he was seated, an army captain standing before him spoke.

"Will you state your name and address, please?"

"Francis Joseph Cosgrave, Redemptorist Monastery, between Dewey Boulevard and Taft Avenue extension."

"Your age, Father?"

"Forty-eight years of age."

"And you are a Catholic priest?"

"A Catholic priest," he answered. "Yes."

It was October 30, 1945, not quite two months since the Japanese army that had occupied the Philippines for three years had surrendered to the American army under the command of General of the Army Douglas MacArthur. In the ballroom of the U.S. High Commissioner's Residence in Manila, an extraordinary trial was under way. Father Cosgrave was there to describe what he had survived eight months before.

In February 1945, the Japanese occupation was coming to a brutal and violent end in Manila. The U.S. Army had landed on the island of Luzon the month before and was fighting its way into the city known before the war as the Pearl of the Orient, its stately marble buildings and broad boulevards, its walled old quarter of Intramuros, its tree-shaded universities and monasteries crumbling under fierce combat. But the Americans were still on the outskirts of the city, and the Japanese were dug in. In the boys' high school known as De La Salle College, Father Cosgrave and seventeen Christian Brothers teachers, along with fifteen Filipinos, were under siege. But the threat was not from artillery fire between the approaching Americans and the resisting Japanese.

The prosecutor asked, "Will you tell us about the Japanese who came on the 12th of February to La Salle College?"

Father Cosgrave told the story. "Well, just as we had finished lunch," he said, "this officer with, as far as I remember, about 20 men, Marines, entered, and they spoke in Nippongo. The officer spoke in Nippongo and seemed quite excited. I learned afterwards, from Brother Maximin, who was killed, that the officer asked if there were snipers or guerillas there, and he was assured that there were not, which was the truth. But he took off two of the boys, two of the servant boys. They were outside for a few minutes and we heard a shot, and a few moments later they were brought back again. I saw one of them brought back again wounded, and immediately the officer gave a command, and at once the soldiers, with their bayonets, began to attack us."

"Where were you at this time?" the prosecutor asked.

"I was sitting with an old Irish brother at the entrance to the wine cellar," Father Cosgrave continued. "The Japanese soldiers were bayoneting all around us, and Brother Leo looked at me and said, 'they are going to bayonet us,' and he asked me to give him an absolution. And I raised my hand to give him an absolution and the bayonet of the Jap passed under my arm into his heart or his chest, and he immediately slumped down dead on my legs, on my knees. Before I could move I received two thrusts from the bayonet."

"What happened to you after that?"

"Immediately after that the Japanese continued bayoneting, the officer slashing with his sword. One poor woman there tried to defend her little child. Her husband was already killed, her two big boys were dead, and a boy about ten. She tried to defend the little boy. She was slashed across the shoulder, across the arm, and a big piece was taken out of her leg. She lived until the following day, as far as I remember, suffering intensely."

The priest went on.

> The Japanese then followed some of the brothers and some of the people up the staircase. Some were able to run up. Shots were fired and others were bayoneted on the staircase. Others reached the top of the stairs to the entrance to the chapel and they were bayoneted or shot there. Those of us who remained at the bottom of the staircase were told by the Japanese if we were able to do so, to lie down on the floor. Those who were not able to do so were thrown down on the floor. We were thrown onto those mattresses that were there that we had been sleeping on the night before. And there I remained on those mattresses from about, I suppose, a little after twelve until eleven o'clock that evening. There were a couple of dead men lying over my feet and a dead woman on my head. I was unable to move because of loss of blood and because of the people around me.

> As a Catholic priest I felt that I was not doing enough for the people, so I tried to make my way upstairs and to administer the last rites of religion to those who were still alive but dying. And I extricated myself and managed to administer the last sacraments to many of them, and I went upstairs, and I saw lying halfway up the stairs some dead bodies. When I reached the entrance to the chapel there were other bodies there, dead bodies, and a number of people who were wounded. And I made my way creeping into the chapel and there I saw inside the chapel some brothers lying in the passageway. I went up towards the altar and there was one brother lying before the communion rails, dead. In the corner were two other brothers with a little boy, the second youngest son of Judge Carlos, lying with them, dead. I was pretty exhausted when I reached near the altar, and I entered the sacristy there, and as far as I remember I must have collapsed, because when I awoke the sun was streaming in.

He paused to identify some photographs of the wounded and some sketches of the floor plan of the school for the five American generals.

At a table a dozen feet from Father Cosgrave, a sixth general sat. In the faded but neatly pressed uniform of the Imperial Japanese Army, Tomoyuki Yamashita, Japan's best field general and the last commander of Japanese forces in the Philippines, was on trial for his life. He listened carefully as Father Cosgrave continued.

Hiding behind the altar, the priest emerged once or twice to see if anyone was still alive and needed help, or last rites. Three days after the invasion, he heard voices. American voices.

"I managed to creep down through the church and told them what had happened and told them about my companions behind the altar and in the sacristy. They treated my wounds and gave me a shot of whiskey and put me on the ambulance, assuring me that within a few minutes they would have rescued all my companions." One teacher survived. "All the other brothers were killed," he told the generals. "Without exception."

On August 6, 1945, some three months before Father Cosgrave testified in Manila, a U.S. Army Air Force plane dropped an atomic bomb on the Japanese city of Hiroshima. Three days later, a second plane dropped another one on Nagasaki. For a military empire on the precipice of defeat, they were the final, crippling blows. On August 15, Emperor Hirohito addressed his subjects on the radio, to inform them that Japan had been defeated and had accepted the "joint declaration" of the Allies that had demanded unconditional surrender.

In the remote and beautiful green mountains of the Philippine island of Luzon, General Yamashita may well not have heard the emperor's proclamation.

Japanese communications were all but destroyed. But if he did hear it, he heard no instruction to the empire's military commanders to lay down their arms and surrender, and Yamashita, for thirty-nine years in the Imperial Japanese Army the emperor's loyal servant, did not.

American forces were all over northern Luzon and had been for months, driving the Japanese army and its commanding general from one mountain to the next in fierce combat. But they did not know where Yamashita was. For that matter, they were not entirely sure that he would surrender at all. In three years of offensive operations, from Guadalcanal in 1942 through Tarawa, New Guinea, Saipan, Iwo Jima, and Okinawa, American soldiers, sailors, and Marines had learned a hard fact about Japanese soldiers: They did not surrender. They fought until they died. And so to get the word out, to Yamashita and whatever subordinate commanders might be still up in the hills with him, American planes dropped thousands of leaflets in the days following and fitted out a small plane to fly over the mountaintops, trailing a 30-foot-long sign: "Hirohito has surrendered." But sporadic fighting continued, and Yamashita did not come out of the hills.

One American knew where Yamashita was. He was Captain Dan Shaw of Poteau, Oklahoma, a twenty-six-year-old pilot who had been shot down behind Japanese lines in Luzon just hours after the announcement from Tokyo. He was taken to Yamashita's headquarters near the village of Kiangan in the mountainous Cordillera in north Luzon. Eleven days later he was released, unharmed, the first step in a courtly exchange that led to surrender.

Yamashita gave Shaw a letter, praising him for not disclosing any information during questioning in captivity. Shaw brought the letter to Major General William Gill, commander of the Thirty-Second Division, which had been chasing and battling Yamashita's forces for months. Gill replied in kind, writing a letter to Yamashita expressing appreciation for his humane treatment and release of the pilot. He gave the letter to Shaw, who took off the next day and flew over the village where he had been held, dropping the letter and instructions on how to surrender. Soon afterward a Japanese detail made its way to an American outpost with a letter to Gill, written in English and signed by Yamashita.

"I am taking this opportunity," the letter read, "to convey to you that orders from Imperial headquarters pertaining to cessation of hostilities have been duly received by me Aug. 20 and I immediately issued orders to cease hostilities to all units under my command insofar as communications were possible. I also wish to add at this point my heartfelt gratitude to you, fully cognizant of the sincere efforts and deep concern you continuously show with reference to the cessation of hostilities. I failed to receive orders from Imperial headquarters authorizing me to enter into direct negotiations here in the Philippines with

the United States army concerning carrying out the order on cessation of hostilities but I am of the fond belief that upon receipt of this order negotiations can immediately be entered."

The commander of all Japanese soldiers in the Philippines may have been of the fond belief that negotiations could immediately be entered, but Major General Robert S. Beightler was not interested in that. As commander of the Thirty-Seventh Infantry Division of the U.S. Army, Beightler's job was to take custody of all the Japanese soldiers on Luzon, and that meant Yamashita above all.

At nine o'clock on the morning of September 2, Yamashita and twenty-one Japanese officers and enlisted men walked slowly down the steep path of the mountains and were met by an advance party of American officers. The Japanese had divided themselves into two groups—the Imperial Japanese Army and the Imperial Japanese Navy. A U.S. Army reporter noted, "The Army and Navy groups were made necessary because of disunity between the commands, each service jealously guarding its own rights and not recognizing authority of the other to surrender the combined forces."

"As he walked toward me," Beightler wrote of Yamashita a few months later, "he proffered his hand. I refused to shake hands; he then stepped back, saluted and bowed. I could not help but feel a sense of satisfaction that standing before me, beaten and submissive, was the man who had wrought havoc, destruction and bloodshed throughout the Philippines with a vile and cruel hand, now compelled to surrender all the fanatical Japanese forces who had carried out his diabolical plans."

Beightler loaded Yamashita and the others onto a pair of C-47 transports and flew to the west coast of Luzon, where they began a rugged three-hour journey by car, jeep, and truck to Baguio, to the elegant mansion that had been the summer retreat of the American High Commissioner.

Baguio, 130 miles from Manila by air but longer by tortuous mountain roads, was a place Yamashita knew well, for it had been his headquarters just a few months earlier. In January 1945, when MacArthur's imminent landing on Luzon had led Yamashita to abandon Manila and head for the hills, Baguio was the natural retreat: elevated, protected by the mountains, adjacent to the enemy's avenues of approach.

At five o'clock in the evening of the day he walked out of the jungle, Yamashita and the Japanese party arrived at Baguio. He surrendered his sword and asked one question: When will we be executed?

He was told that there would be no execution there.

The next morning, just before noon, Yamashita was led to the dining room, filled with army technicians setting up radio, teletype, and telephone connections to broadcast the ceremony to the world. Lieutenant General

Jonathan Wainwright, who had surrendered American forces at Bataan in the spring of 1942, ending the American defense of the Philippines, and Lieutenant General Arthur E. Percival, who had surrendered British forces to Yamashita at Singapore in February of 1942, entered the room, surrounded by dozens of American and British officers. "Yamashita's face twitched and he noticeably gulped," Beightler recalled, when he saw Percival, whom he had last seen across a similar table in Singapore when Percival had been the vanquished one.

Yamashita was shown the instrument of surrender. Perhaps thinking that this was the time for negotiation, he began to seek changes in the language, but an American lieutenant interrupted, speaking firmly in Japanese. "General," he said curtly, "we are not asking you to sign this surrender. We are telling you that you will sign."

"Clearly and emphatically," the official army reporter wrote, the terms of the document were read "while the Japanese representatives listened impassively." The terms were blunt. "We hereby surrender unconditionally to the Commanding General, United States Army Forces, Western Pacific, all Japanese and Japanese-controlled armed forces, air, sea, ground and auxiliary, in the Philippine Islands," the instrument stated. "We hereby command all Japanese forces wherever situated in the Philippine Islands to cease hostilities forthwith. . . . We hereby direct the commanders of all Japanese forces in the Philippine Islands to surrender. . . . We hereby undertake faithfully to obey all further proclamations, orders and directives deemed by the Commanding General, United States Army Forces, Western Pacific, to be proper to effectuate this surrender."

Four parchment copies of the instrument were placed before Yamashita. He signed, and the ceremony was concluded. It had taken barely fifteen minutes.

Yamashita was escorted from the room under armed guard, a prisoner of war now. He was flown that afternoon to Manila, where he would be taken to New Bilibid Prison. As the plane began its approach over Manila Bay, Yamashita gazed out the window at the armada of ships that had been assembled for an invasion of Japan and at the docks piled high with weapons, munitions, vehicles, and supplies. He turned to a military policeman escorting him. "How could we win," he said through a translator, "when you had all that?"

Yamashita's Ghost

1

Law and War

The marriage of war and law has always been uneasy. The essence of war, after all, is killing people. War is everywhere accompanied by violence, some necessary to the accomplishment of the objective, some not. Yet war is not supposed to be mere gratuitous violence; it has always been an act of state, a decision made and implemented by political authority to accomplish a public purpose. Sometimes that decision seeks to aggressively control weaker adversaries; sometimes it seeks to defend against such imposition. But whether the decision is wise or unwise, whether we deem the war just or unjust, the distinction between war and violent outlawry lies in the political nature of the decision, the undertaking by the state to wage war using its citizens and public funds. The tension between war and the law arises from what many see as the unnatural union of lethal violence and legal restraint. A "law of war" seems an oxymoron, an ill-suited and perhaps even hypocritical attempt to distinguish among murderous acts.

Telford Taylor, the American deputy prosecutor at the International Military Tribunal at Nuremberg, explained the distinction:

> War consists largely of acts that would be criminal if performed in time of peace—killing, wounding, kidnapping, destroying or carrying off other peoples' property. Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over the warriors.
>
> But the area of immunity is not unlimited, and its boundaries are marked by the laws of war. Unless the conduct in question falls within those boundaries, it does not lose the criminal character it would have should it occur in peaceful circumstances. In a literal sense, therefore, the expression "war crime" is a misnomer, for it means an act that remains criminal even though committed in the course of war, because it lies outside the area of immunity prescribed by the laws of war.

But this concept—this rationalization, perhaps—is of relatively recent origin. The Roman Empire and the city-states of ancient Greece, both deeply acquainted with military conquest, gave little thought to war as a subject of secular law. Greece had certain military customs—respecting the sanctity of temples, halting combat during the (Olympic) games, allowing the vanquished to claim their dead from the battleground—and Rome had certain expectations for the conduct of professional soldiers and their generals, but the source of these customs and expectations was tradition, honor, religion, or the expectation of reciprocity, not law as given by secular or political authority. "Inter arma enim silent leges," wrote Cicero: "In times of war, the law falls silent."

The idea that war should be subject to law did not emerge in the Western tradition until the late Middle Ages in Europe, and its roots were in both the church and the crown. Here a distinction must be made between two concepts that are often commingled. One is whether a war is indeed "just"—that is, undertaken for a righteous purpose, and only when other means of diplomacy or persuasion have failed. The other is the lawfulness of the combat itself—that is, whether the war is carried out according to accepted standards of behavior, limiting as much as possible the collateral damage to noncombatants: civilians, the wounded, and the soldiers who surrender.

The two are conceptually distinct, even distant. The question of the just war occupied Cicero and other ancients, but in the Middle Ages it became firmly a theological doctrine—what medieval scholars called "*jus ad bellum*." God favored only the righteous warriors, and for God to be on one's side, the war had to be lawfully declared, carried on by the lawful authority of a sovereign prince or king, and, most importantly, dedicated to a rightful purpose—the defense of one's own lands or the reclamation of lands or a crown wrongfully held by the adversary. Given the confluence of secular and religious authority wielded by sovereigns, it was easy—indeed, inevitable—to cast the justness of going to war as a legal issue.

Nowhere is this more dramatically illustrated than in Shakespeare's *Henry the Fifth*, a remarkably accurate portrayal of the tension between law and war in the fifteenth century. The young and restive English king, coveting France, fixates on the denial of the crown to his great-grandmother, a French princess. But he fears that the law in France denies any right of succession through the line of the female, which if true would preclude his claim to recover the crown and strip his ambition of its righteousness. He summons the Archbishop of Canterbury, who, in an elaborate and masterful display of legal analysis, proclaims that the law is invalid—indeed, it has been disregarded repeatedly by French kings, who themselves have inherited the crown from female ancestors.

Shakespeare's Henry is steely-eyed. "May I with right and conscience make this claim?"

The archbishop, himself covetous of extending his churchly realm, assures Henry that he can, thus giving him a divine cover for his ambitions. "Now are we well resolv'd, and by God's help / . . . France being ours, we'll bend it to our awe or break it all to pieces." Victory, he is sure, "lies all within the will of God, to whom I do appeal and in whose name . . . I am coming on, / To venge me as I may and to put forth / My rightful hand in a well-hallow'd cause."

This doctrine of the just war is distinct from what became known as *jus in bello*—the idea that law should restrain the actions of soldiers on the battlefield, restricting their killing to enemy soldiers, leaving the populace undisturbed. That has always been a political doctrine, not an especially theological one. Although it is evident as early as the eleventh century, in a decree that the clergy should be spared the vicissitudes of war, it was not yet fully developed even up to the late Middle Ages. Knights made much of the concept of chivalry, including fair combat when they fought each other for their respective princes in England or France or Germany, but no chivalrous concepts restrained their conduct when they beheaded infidels in the Crusades or pillaged their own countrysides, hiring themselves out to warlords and oligarchs when no prince had need of their services.

As Henry's army marched through France toward the climactic battle at Agincourt, in Shakespeare's telling, Henry presides over the hanging of a soldier who stole a chalice from a church, then tells his assembled army, "We would have all such offenders so cut off. And we give express charge that in our marches through the country there be nothing compell'd from the villages, nothing taken but paid for, none of the French upbraided or abused in disdainful language." Henry's motivation is not spiritual, but secular, even tactical: "For when lenity and cruelty play for a kingdom," he advises his troops, "the gentler gamester is the soonest winner."

And when, in the battle, French soldiers slip behind the English lines and kill the boys who are guarding the army's supplies, Henry's lieutenant is outraged: "'Tis expressly against the law of arms," he cries. Henry too: "I was not angry since I came to France / Until this instant." Yet this gentle gamester could, and in fact did at Agincourt, order that French prisoners be slain in cold blood, and he sends a warning to the French that if they continue the battle, he will take more prisoners, warning, "We'll cut the throats of those we have, / And not a man of them that we shall take / Shall taste our mercy." The slaughter of noncombatants, it seems, was wrong when the other side did it.

In 1648, the Treaties of Westphalia ordained a Europe of nations that gradually displaced a plethora of duchies and kingdoms, and this fostered the growth of the "law of nations," which we now call international law. By that was meant not a regime of law that transcended national boundaries—that idea of transnational law was still struggling for acceptance in the twentieth century—but

rather the law *of* nations, the law *among* nations, a means by which nations could deal profitably with each other as equals, adopting common expectations and customs and rules to advance each nation's parochial and often competitive interests. By agreeing on the sovereignty of the high seas, the safety of neutral nations' vessels during war, the exchange of ambassadors, and the benefits of trade and commerce among nations, "customary international law"—the unwritten but important practices and expectations that nations voluntarily follow in their dealings with each other—became a way of advancing national interests.

International law never held war to be illegal. It hardly could, given war's prevalence. It accepted war as a legitimate if sometimes regrettable form of intercourse among nations. In the famous words of Carl von Clausewitz, war is diplomacy—or politics, or policy—carried on through other means.

In this context, the medieval *jus in bello*—the behavior expected of soldiers in combat—became an important part of customary international law. Two guiding principles emerged. The rule known as distinction reflected a belief that wars should be fought between armies, not between peoples, and required that soldiers distinguish between military objectives and civilian lives and property and confine their arms to the former to the extent possible. But recognizing that war inevitably causes disruption, harm, and death to civilians too, the rule of proportionality required that such collateral damage not exceed the value of the military objective: no widespread destruction in pursuit of a military objective of little value.

In practice these rules were quite elastic, leaving much to the discretion of military commanders. Because they arose from behavior and expectations rather than from positive law, they came to be known as the "customs of war." They developed gradually and on the battlefield were often ignored. Not until the middle of the nineteenth century did treaties—formal and binding agreements among states—emerge as explicit rules of humanitarian constraints in warfare and take their place with the customs of war to form the international law of war.

The original Geneva Convention in 1864 laid down rules more specific than anything seen so far: In war on land, those who were wounded in action and those taken prisoner were to be treated humanely; and those on the battlefield tending to the wounded were to be immune from hostile action. To signify their protected status, medical attendants were to wear the emblem of a red cross on a white field. The body created to oversee compliance was called the International Committee of the Red Cross. A second Geneva Convention later extended the same principles to warfare at sea.

These Geneva Conventions were among the first multilateral international treaties, and each nation, by ratifying the treaties, took upon itself the obligation to enforce their terms. But there was no semblance of any international means

for doing so. Each nation was sovereign; as in all international matters, other nations could ask or plead or bargain or pressure or threaten or even go to war, but no nation could bring another's soldiers, much less its king, into its courts to answer for violations of the treaties. Instead, each nation pledged in the conventions to make violations crimes under its own laws and to hold accountable, in its own courts, any of its citizens who violated them.

That did not work out very well. Once in a while a government might put its own soldiers on trial for mistreatment of prisoners, for depredations against civilians, or for other crimes in war, but such cases were rare. In 1863, President Abraham Lincoln issued "Instructions for the Government of Armies of the United States in the Field," known as the Lieber Code after its author Franz Lieber, a German-born professor of law at Columbia University. It was the first actual code of the laws of war meant to govern an army, and it was influential in shaping thought on the subject for decades afterward, but no one was ever actually tried for violating it.

Very occasionally, nations victorious in war, including the United States, haled before its courts the defeated enemy and put *them* on trial for violations of the law of war. The law that was invoked was not the formal language of the treaties but the customary law of war, those precepts of humane treatment but uncertain boundaries. In 1865, for example, Henry Wirz, the commandant of the Confederacy's prisoner-of-war camp at Andersonville, Georgia, was tried by the United States for gross mistreatment of U.S. soldiers captured and held there. He was convicted and hanged. But those cases were exceptional (and anyway, the United States considered the Confederacy a rebellion, not a nation). The law of war, though well understood in principle by scholars and sovereigns, rarely found its way into court.

While the Geneva Conventions addressed the treatment of noncombatants, in the latter part of the nineteenth century, there were any number of international conferences designed to go one step further: to regulate the tactics and weapons by which warfare itself could be waged. Several treaties emerged, culminating in the Fourth Hague Convention of 1907, which proclaimed that "the right of belligerents to adopt means of injuring the enemy is not unlimited" and outlawed tactics intended to "kill or wound treacherously," such as poisoned weapons and "arms, projectiles or material calculated to cause unnecessary suffering." The Fourth Hague Convention also prohibited the pillaging or other destruction of property not "imperatively demanded by the necessities of war" and the targeting of historical, cultural, or educational sites.

Other treaties followed, on all manner of wartime subjects—treaties banning the dropping of weapons from balloons; treaties requiring that submarines give fair warning to their targets before letting loose the torpedoes. Many of them were ineffectual; others did not survive World War I. But it was only after that

Great War, in the proceedings at Paris leading to the Treaty of Versailles, that the international community—the "civilized world" or "league of nations," as it called itself—seriously discussed what would have been a significant advance: a means by which those who had violated the treaties or the customary laws of war could be called to account in a court of law.

In June 1918, a German submarine had torpedoed the *Llandovery Castle*, a British hospital ship, off the Irish coast, killing 234 people. The vessel bore a prominent red cross, and there is little doubt that the attack was deliberate. There was common understanding among the victors' delegates in Paris that such a crime should be punished and that the submarine's captain should be held accountable. Many also urged that responsibility for these and other wartime misdeeds be carried up the chain of command, even to Kaiser Wilhelm, and that the case go to court.

But just *what* court was a problem. Proposals for a permanent international court were successfully opposed by the United States, whose embrace of the sovereignty of nations was far too strong to countenance a true international court. Nor would the United States delegation endorse the idea that a victorious nation could bring before its courts the military or political leaders, much less the heads of state, of the vanquished ones.

The conclusion in Paris, therefore, was that the Germans themselves must put on trial those responsible for the sinking of the *Llandovery Castle*. The resulting proceedings in German courts were, to put it gently, ineffective. The captain of the submarine escaped before trial, and two of his lieutenants, convicted and sentenced to four years' imprisonment, escaped soon afterward.

The failure of international law at this important juncture was surely due in part to the aversion of German judges to punishing German military officers for acts carried out in a war against Germany's enemies. But in part it was due to a fundamental difficulty. From the time of its inception in the seventeenth century, international law had been a regime to regulate the conduct of nations, not of men.

The laws that governed war, to the extent they did so at all, were like the laws that governed trade or diplomacy or the high seas: understandings among nations as to how they would conduct their affairs with each other. Even when these understandings were codified and formalized in treaties, as they were at Geneva and The Hague, no one seriously suggested that the treaties were an international criminal code. The idea first broached in Paris—that individuals should be tried and punished in a criminal trial—was a failure, as the *Llandovery Castle* case showed. Soldiers were accountable only to their own governments, if indeed they were accountable at all.

There was thus a considerable abyss between the international regime of law

that had emerged over hundreds of years, the result sometimes of custom and sometimes of treaties, and any actual enforcement of that law. There matters stood when World War II began in 1939, with Germany's invasion of Poland and its blitzkrieg through Europe, and Japan's simultaneous attacks two years later on the United States at Pearl Harbor, on Great Britain in Malaya, and on the American commonwealth of the Philippine Islands.