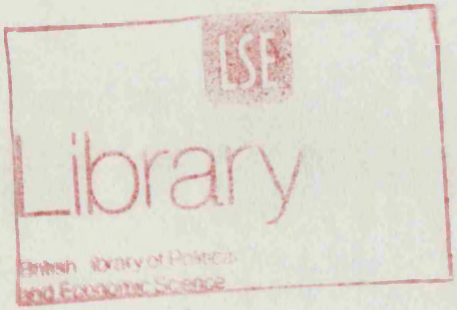

American Military Justice and the Law of War :
A Case Study of Military Law in Vietnam

by

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ABSTRACT

During the Vietnam War, in Son Thang hamlet, a five-man American patrol murdered sixteen Vietnamese noncombatant women and children. The crime was discovered and the five apprehended.

International treaties define much of the law of war. That law requires apprehension and trial of those committing "grave breaches." The manner of their prosecution is undefined. The research question, resolved through examination of the Son Thang incident and its subsequent prosecutions, is whether the United States, through its military justice system, meets its obligations under customary law of war. The study is unique in illustrating the law of war from treaty, to application, through appeal.

Also examined are jurisdictional bases, the vitality of the defense of obedience to orders, and whether a good faith effort was made to prosecute the suspects — and whether good faith translated into effective prosecutions. The case offers a unique opportunity to observe U.S. military criminal process.

A grave breach was committed at Son Thang, although the victims' status, citizens of a co-belligerent, placed even that in issue. But prosecution clearly was required. Before those prosecutions are detailed, the sources and history of law of war are noted, their translation into military law traced. Application of the law of war at Nuremberg is related, as it is in Vietnam. Employing interviews and trial records, the Son Thang events are described and juxtaposed with aspects of today's law of war and U.S. military law embodied in the Uniform Code of Military Justice. In assessing that Code's effectiveness, its procedural aspects are briefly compared with civilian models.

Appellate resolutions of the Son Thang cases are discussed, their results compared to similar prosecutions and sentences. Finally, recommendations are offered to improve prosecution of war crime cases in future wars and to enhance compliance with the laws of war.

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INTRODUCTION

On 19 February 1970, the Vietnam War was at its combat peak. On that date First Lieutenant Lewis Ambort commanded Company B of the 1st Battalion, 7th Marines, part of the American 1st Marine Division. That evening, on Hill 50 in northern Quang Nam province, Lieutenant Ambort briefed Lance Corporal Randy Herrod, who was about to lead a five-man patrol into the village of Son Thang, in enemy territory. Lieutenant Ambort told Herrod:

> I emphasized the fact to him not to take any chances, to shoot first and ask questions later....I said, "Don't let them get us any more. I want you to pay these little bastards back!"

The next morning, another Marine patrol entering Son Thang discovered what was eventually revealed as a crime of horrific proportion, committed by the previous night's patrol.

After a short-lived cover-up attempt the truth was revealed. Four months later, the first of the patrol members stood before a general court-martial, charged with sixteen counts of premeditated murder.

The examination that here follows is prompted by both the Son Thang and My Lai incidents, the cases bearing a melancholy similarity. Although Son Thang remains the most serious war crime prosecution in American Marine Corps history, it goes virtually unmentioned in legal literature. The two cases' ambivalent outcomes, in terms of trial verdicts and sentences, inevitably raise questions in the minds of laymen, lawyers, and academics. Both critics and supporters of the law may be dissatisfied with the results produced by the military justice system.

The scope of research for this case study embraces recent scholarly writing on the law of war. Interviews of surviving participants in the Son Thang trials are employed, as are transcripts of the legal proceedings, and contemporary Marine

Corps tactical records. Additional interviews of today's senior military lawyers indicate the current role of criminal law and the law of war in meeting America's responsibilities under the law of nations.

In examining the effectiveness of the U.S. court-martial system in meeting law of war obligations, the first chapter reviews the topic of international law, fixing its relationship to the law of war. The development of the law of war in large part reflects the maturation and sophistication that international law has undergone in the twentieth century, particularly since World War II. At the end of the chapter the link between international law and U.S. courts-martial is drawn and, finally, a thesis is offered. Testing of the thesis is accomplished in the classical tradition; not through empirical examination, which is in any event impossible, but by presenting various aspects of the law of war, addressing them to the Son Thang incident, and arguing their applicability and effectiveness in that case.

In the second chapter a further background is sketched for the events at Son Thang, to include the impact of the Nuremberg principles on the law of war. What part did Vietnamese municipal law play in the prosecution of war zone crimes? How did the American view of the Vietnamese people impact on U.S. combat forces' treatment of the Vietnamese? The negative results of U.S. governmental policies on its military forces are noted, as well.

The dissertation narrows its focus when the murders at Son Thang are described in chapter three. Drawing on interviews and letters from some of the officers involved, the role of the small-unit commanders is examined. The troubling criminal backgrounds of the Son Thang patrol members, revealed in Marine Corps records, demonstrates the quality of personnel the U.S. necessarily employed in the later stages of the Vietnam War.

Essentially, the law of war relies on municipal criminal law for its enforcement. The Son Thang murders raised numerous criminal law issues, some common, some unique. Chapter four examines contemporary law of war issues, as implemented in American municipal law – in this instance through the military legal process. The unsettled extent of war crimes in Vietnam is described. The age-old defense to wartime depredations, obedience to superior orders, is particularly noted in chapter four. The chapter suggests that the defense sometimes merits greater consideration than it commonly receives.

Through verbatim records of trial, the courts-martial of the Son Thang accused are examined in chapter five. Preliminarily, the place of military law in the legal system is reviewed, to include jurisdictional issues, individual rights, and the fairness of military juries. The application of basic constitutional rights to military personnel is reviewed in detail.

The troubling court-martial results, in which those apparently most blame-worthy escaped punishment and those apparently less culpable received heavy sentences, are noted as well.

Chapter six examines American military law's appellate process in general and the Son Thang appeals in particular. The significant impact of appellate review in the resolution of Vietnam war crime cases is discussed, and civilian-military sentence comparisons are offered. This comparison raises basic questions regarding the role of sentencing in achieving "justice." Additionally, an historical overview of efforts to create an international criminal tribunal discloses the difficulty in such a system being implemented. In closing, the chapter offers a resolution to the question of the adequacy of America's response to its obligation under international law to discover and try law of war violations.

A review of law of war literature is conducted in chapter seven. Besides legal sources, historical and unique military

sources are noted. As far as the general public is concerned, law of war is noted only in celebrated instances such as Nuremberg and My Lai. But in recent years there has been a continuing flow of scholarly books and articles on the subject. Excellent examples of law of war literature are noted.

Finally, chapter eight presents a summary of the preceding material, points out continuing problems in U.S. application of the law of war, and offers recommendations to improve its application on the modern battlefield.

The dissertation is a case study of the Son Thang incident. By placing the topic in a context of international law, the law of war, U.S. military law, and numerous sub-topics are also discussed, particularly America's municipal criminal law *vis-à-vis* it's law of war obligations.

It has long been asserted that applying the law of war through courts-martial comports with customary international law. By examining the historical process of the Son Thang cases the correctness of that assertion is demonstrated. In examining these issues the current vitality of the law of war in America may be revealed.

CHAPTER 1. INTRODUCTION TO EVENTS CULMINATING IN THE INCIDENT AT SON THANG

If international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law.
Lauterpacht, "*The Problem of the Revision of the Law of War*"

Sixteen Vietnamese women and children had been shot to death by American Marines. The participants in the resulting 1970 courts-martial gave little thought to international law and the law of war. The patrol members were simply charged with the premeditated murder of sixteen noncombatants — violations of Article 118 of the Uniform Code of Military Justice; premeditated murder, a simple *malum in se* violation of American military criminal law.

The rough, plywood-lined courtroom in a corrugated tin building in the U.S. Marine cantonment near Da Nang would not be mistaken for an international law forum. The Marine Corps lawyers in their camouflage field uniforms were a far cry from the usual image of international lawyers. The military-oriented procedural motions before the general court-martial did not seem the stuff of Geneva Conventions and customary international law.

But they were all that. They were the modern link in the chain that binds states recognizing the law of nations. The young judge advocates were the law of war incarnate, demonstrating through municipal criminal law both the viability and the frailty of the Geneva Conventions. The courts-martial are a window through which American resolve to abide by international law may be viewed. Though they did not often consider the law of war, those military lawyers were the test of their country's commitment to it.

The Son Thang trials were not ground breakers. Students of the law, or of war for that matter, know that the trial of war crimes is no modern innovation. The Nuremberg tribunals that followed World War II, often viewed as novel, were in

fact only refined extensions and variations on a theme hundreds of years old. But the Son Thang courts-martial present an unusually clear example of a Western nation's municipal law applied in conjunction with international law. Seldom have the legal issues in such a confluence been so well-defined, with the opportunity to so closely observe the workings of a legal system and determine its adherence to, or divergence from, international legal norms.

In this introductory chapter a broad-stroke review is presented of international law and its relation to municipal law, criminal codes, and military justice. The origins of international law are briefly noted, examining its enforceability and its application to individuals. "War" is defined and related to the rise of laws controlling its conduct. Battlefield crimes, war crimes, and grave breaches are described and differentiated. Having located law of war in its international law framework, its integration with the Geneva Conventions, the aspirations of the League of Nations, and the United Nations are summarized and applied to municipal law and military law systems.

In the chapter's closing section, a thesis is offered.

1.1. International Law and the Law of War

Acts carried out by a nation's armed forces in combat may be reviewed and dealt with in light of international as well as national concepts. A web of customary law, international conventions, declarations, and protocols bearing on the conduct of hostilities requires such an approach. Accordingly, it is necessary to review not only a particular nation's rules for the conduct of its troops in combat, but the international rules applicable to all troops in such circumstances. This, in turn, raises basic questions regarding international law, municipal law, the law of war, and their relationship to each other.

What is international law? The term does not lend itself to a universally agreed upon response. Definition of the law of war, a branch of public international law, is subject to similar disaccord. But the foundations, applications and obligations of the latter go far in revealing those of the former, and their descriptions merit consideration.

1.1.a. Defining International Law A world ruled by law is an old idea, but only in the latter portion of the nineteenth century did it come to be seen as a practical choice that governments, particularly those of Western Europe, might make in determining their conduct. By then, many statesmen anticipated a world ruled by law in the near future.

> It was part of the prevailing optimism of that time, and closely associated with the confident expectation that liberal democracy – with its great emphasis on law as the arbiter of relations among citizens with equal rights – would now become a near universal form of government.[1]

Given that emphasis and those expectations for international law, from where did it arise? Custom is the original source of law, including the law of nations. The British jurist, Lassa Oppenheim, incorporated custom when he described international law's sources as two: *express* consent, arising when states agree by treaty to certain rules for their future international conduct, and *tacit* consent; consent which is implied, or consent by conduct, given by having adopted the custom of submitting to certain rules of international conduct.[2] In deciding disputes the International Court of Justice considers the sources of international law to be:

> (a) International conventions...establishing rules expressly recognized by...contesting states;

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[1]Daniel P. Moynihan, On the Law of Nations (Mass.: Harvard University Press, 1990), 1.

[2]Lassa F.L. Oppenheim, International Law: A Treatise, vol. I, Peace, 8th ed., H. Lauterpacht, ed. (London: Longmans, Green, 1955), 25.

> (b) International custom, as evidence of a general practice accepted as law;
> (c) The general principles of law recognized by civilized nations; and
> (d) ...judicial decisions and the teachings of the most highly qualified...as subsidiary means for the determination of rules of law.[3]

The Supreme Court of the United States generally agrees with these descriptions,[4] while the United Nations War Crimes Commission, employing the Statute of the International Court of Justice,[5] adds the decisions of international and national tribunals dealing with international questions and, uniquely, diplomatic papers.[6] Most descriptions agree that custom is a primary, if not *the* primary source of international law.[7] Indeed, international law is "just a system of customary law, upon which has been erected, almost entirely within the last two generations, a superstructure of 'conventional' or treaty-made law."[8]

> State practice, in order to create a customary rule, must be accompanied by (or consist of) statements that certain conduct is permitted, required or forbidden by international law (a claim that conduct is permitted can be inferred from the mere existence of such conduct, but claims that conduct is required or forbidden need to be stated expressly)....what is necessary is that the statements are not challenged by other states.[9]

In recent years and to an ever greater extent, international agreements have assumed an important part in the formulation

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[3]Article 38.1, Statute of the International Court of Justice.

[4]*U.S. v Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820), cited in *Filartiga v Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980).

[5]Art. 38.

[6]U.N. War Crimes Commission, Law Reports of Trials of War Criminals, vol. XV (London: HMSO, 1949), 5.

[7]*e.g.*, Ian Brownlie, International Law and the Use of Force by States (Oxford: Clarendon Press, 1963), 157; Georg Schwarzenberger, International Law: As Applied by International Courts and Tribunals, vol. II, The Law of Armed Conflict (London: Stevens, 1968), 45; and Frederick Pollock, "The Sources of International Law," 2 Columbia L. Rev. 511-12 (1902).

[8]David J. Harris, Cases and Materials on International Law, 3d ed. (London: Sweet & Maxwell, 1983), 2.

[9]Michael Akehurst, "Custom as a Source of International Law," XLVII BYIL 1, 53 (1974-75).

and growth of international law. But custom remains the vital source of international jurisprudence.

International law differs from national, or municipal, legal systems in that it has no central law-making authority and no enforcement machinery. But nations adhering to international law do have such law-making and enforcement mechanisms. Those states raise custom to the level of law and make the law of nations a concrete force. "International law was the product, however imperfect, of that sense of right and wrong, of the instincts of justice and humanity which are the heritage of all civilized nations."[10]

World legal opinion recognizes that international law is true law. "[I]t would be difficult to hold otherwise since the world as a whole calls it law, regards it as law, accepts it as law, and expects it to be obeyed as law..."[11] If a definition of international law is needed, that of Professor L.C. Green is as good as any:

> That system of laws and regulations which those who operate on the international scene – be they states or international organizations...recognize as being necessary for their orderly conduct, and which they recognize as being binding upon themselves in order to achieve that orderly conduct.[12]

1.1.b. Enforcing International Law International law is not without imperfection. Based largely on evolving custom, it knows no true *stare decisis*. Cases and scholarly literature are slow to follow general trends. Institutions that exist for making and applying its law are rudimentary.

As critics repeatedly point out, international law lacks an enforcement mechanism. Some hold that "there are no international laws unless there is an international police

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[10]Lord Wright, "War Crimes Under International Law," 62 LQR 40, 1946.

[11]Morris Greenspan, The Modern Law of Land Warfare (Berkeley: University of California Press, 1959), 13.

[12]Leslie C. Green, "Is There An International Criminal Law?," 21 Alberta L. Rev., 251 (1983).

force with courts and punishments to deal with violations."[13] In accepting the Nobel Peace Prize in 1910, Theodore Roosevelt referred to the Permanent Court of International Justice and noted, "The supreme difficulty... arises from the lack of any executive power, of any police power to enforce the decrees of the court."[14]

But the same objection once could have been raised as to domestic law and the same answer given: the political system enforces it. That routinely occurs within settled polities such as the United Kingdom and United States. Though it is not routine at the international level, neither is it unattainable. Onlookers seldom note the steady observance of such treaties as that under which letters are carried over the world at fixed rates, or that in 200 years there has hardly been an instance in which an ambassador has been sued in the country of his stationing, or the hundreds of international court decisions that are routinely honored. But these, too, are international law. "The great majority of the rules of international law are generally observed by all nations without actual compulsion, for it is generally in the interest of all nations concerned to honor their obligations under international law."[15] It may reasonably be said that the law of nations is as well observed as is municipal law.[16] Moreover, a great deal of international law has been incorporated in municipal law, securing an enforcing agency through the ordinary governmental machinery of those states. "[O]n careful analysis the enforcement procedures turn out to be less defective than is normally claimed....The weight of world public opinion, the need not to wreck good relations in

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[13]Sidney Axinn, A Moral Military (Pennsylvania: Temple University Press, 1989), 166.

[14]Theodore Roosevelt, "International Peace," Address before Nobel Prize Committee, Christania, Norway, 5 May 1910, Manuscript Division, Library of Congress, Wash., D.C.

[15]Hans J. Morgenthau, Politics Among Nations, 5th ed. (NY: Alfred A. Knopf, 1972), 290.

[16]Philip C. Jessup, A Modern Law of Nations (NY: Macmillan, 1948), 6-7.

the economic, commercial, and political fields..."[17] all foster the enforcement of international norms.

1.1.c. The U.S., the U.K., and International Law It need hardly be noted that the United States recognizes and abides by international law. While aspects of its recent record are imperfect,* America was founded with a basic respect for the law of nations. During the Revolutionary War the American Congress showed "great solicitude to maintain inviolate the obligations of the law of nations, and to have infractions punished in the only way that was then lawful, by exercise of the authority of the several states."[18] The Congressional ordinance under which British Major John André was executed, following his court-martial, referred to "the law and usage of nations."[19] A 1784 Pennsylvania decision involving an assault on the consul general of France held: "The first crime in the indictment is an infraction of the law of nations. This law, in its full extent, is part of the law of this State..."[20] In 1900 the United States Supreme Court specifically held that, "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions

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[17]Antonio Cassese, International Law in A Divided World (Oxford: Clarendon Press, 1986), 408.

* Senator Daniel Moynihan points out that in the 1980s American adherence to international law faded, associated with weakness in foreign policy. "Real men did not cite Grotius." (p. 7) He notes that in 1985 the U.S., having been sued by Nicaragua in the International Court of Justice, withdrew recognition of the Court's jurisdiction just before being found, for the first time, in violation of international law in a matter involving force against another nation. On the Law of Nations , 6-8. It remains to be seen whether the resurgence of interest in international law raised by the 1991 Gulf War will last.

[18]James Kent, Kent's Commentary on International Law, ed. J. T. Abdy (Cambridge: Deighton-Bell, 1866), 427.

[19]Ordinance of Dec. 4, 1781, 7 Journals of Congress 185.

[20]*Republica v DeLongchamps*, 1 Dall. 111 (1784).

of right depending upon it are duly presented for their determination."[21]

The United Kingdom's approach to international law, set before America was a nation, is similar. It has been asserted that "there is no doubt that it was England that gave impetus to the idea of the municipal application of international law..."[22] In a 1737 opinion Lord Chancellor Talbot declared that the law of nations, to its full extent, was part of the law of England and was "to be collected" from the practice of nations and the authority of writers.[23] In a more contemporary case, Lord Denning wrote, "...the rules of international law, as existing from time to time, do form part of our English law."[24] Customary international law traditionally and automatically becomes part of English law through incorporation.[25] "There has been occasional hesitation on the part of English courts to acknowledge the full operation of the doctrine of incorporation," Lauterpacht wrote in 1947, "but there ought to be no doubt as to its validity..."[26] (The English courts, however, determine what "customary international law" is, primarily by examining prior English judgements, a technique that could be occasionally unreliable.)[27] Additionally, treaties with other

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[21]*The Paquete Habana*, 175 U.S. 677 (1900), which still controls. See *First National City Bank v Banco Para el Comercio*, 462 U.S. 614, 623 (1983).

[22]Fritz A. Mann, Further Studies in International Law (Oxford: Clarendon Press, 1990), 142.

[23]*Barbuit's Case*, cited in, Lord McNair, Selected Papers and Bibliography (Leiden: A.W. Sijthoff, 1974), 150.

[24]*Trendtex Trading Corporation v Central Bank of Nigeria*, [1977] Q.B. 529, 554. See also: *The Cristina v The King* [1938] A.C. 485.

[25]A 1939 Privy Council decision reads: "They [the courts] will treat it [international law] as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes..." *Chung Chi v The King* [1939] A.C. 160, 167. This monoist approach to the incorporation of customary international law has been inconsistent, however, *Chung Chi* having reversed *R v Ryan* [1876] 2 Ex. D 63, which in turn reversed *Triquet v Bath* (1764) 3 Burr. 1478.

[26]Hersch Lauterpacht, "The Subjects of the Law of Nations," pt. 1, 63 LQR 438, 443 (1947).

[27] McNair, Selected Papers and Bibliography, 147-57; and Michael Akehurst, A Modern Introduction to International Law , 6th ed. (London: Unwin Hyman, 1989), 43-48.

states do not automatically become part of English law – with the exception of those regulating the conduct of warfare.[28] In English practice a treaty becomes effective when ratified by the Queen, but usually has no effect in municipal law until ratified by act of Parliament, as well.[29] The 1949 Geneva Conventions, for example, have been incorporated into English domestic law through the Geneva Conventions Act of 1957.[30]

The American and English approaches are illustrative of the general practice of national courts. Where the common law prevails, courts usually apply customary international law as the law of the land. In states where the civil law or another legal system holds sway, and there is no constitutional provision directing the application of customary international law, the courts usually follow the same practice as common law courts to discover an applicable, similar rule of domestic law.[31]

International law of the past was formal in character, concerned in large part with the delimitation of jurisdiction and immunities of states and their representatives. Traditionally, the individual played an inconspicuous part. The crime of piracy was long an exception – historically an international crime for which an accused was *individually* liable to any capturing nation's courts. Through international conventions similar exceptions applied to *individuals* charged with breach of blockade, carriage of contraband, slave trade, and, oddly, injury of submarine

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[28]Lord McNair, The Law of Treaties: British Practice and Opinions, (Oxford: Clarendon Press, 1961), 89-91.

[29]*The Parlement Belge* (1879) 4 PD 129; and *R v Chief Immigration Officer ex parte Bibi* [1976] WLR 979. Treaties become part of English municipal law only when an enabling act has been passed by Parliament.

[30]5 & 6 Eliz. 2, c. 52 (1957).

[31]Austria, France, Germany, Greece, Ireland, Italy, the Philippines, and the U.S. have such constitutional provisions. Joseph M. Sweeney, Covey T. Oliver, and Noyes E. Leech, Cases and Materials on the International Legal System, 3d ed. (NY: Foundation Press, 1988), 9-18.

cables.[32] With the approach of the twentieth century the general exclusion of the individual from the processes of international law, whether or not charged with a crime, changed. The individual routinely became the subject of, and subject to, the law of nations. In 1928, the Permanent Court of International Justice specifically held that international law could apply to an individual.[33] Lauterpacht wrote in 1948:

> [T]he evolution of an international law in which the individual is the subject of duties imposed by international law is a corollary of the attribution to him of rights grounded in international law. It is difficult to urge and justify the existence of the former without admitting the operation of the latter."[34]

In America those rights and duties were underscored by the U.S. Supreme Court in the 1942 *Saboteurs' Case* when the court held, in effect, that individual offenders against the laws and customs of warfare could be punished under the law of nations without prior specific domestic legislation.[35]

By the mid-twentieth century the few remaining dissenters who had argued that international law was applicable only to sovereign states, and that it provided no sanctions for violations by individuals,[36] were won over.

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[32]Hans Kelsen, "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals," 31 California L. Rev. 530, 535 (1943); and U.N. International Law Commission, Historical Survey of the Question of International Criminal Jurisdiction (NY: U.N., 1949), 1.

[33]*Jurisdiction of the Courts of Danzig Case*, 1928, P.C.I.J., Series B, No. 15. Generally, treaties do not create direct rights and obligations in individuals but, this case held, if that was the intent of the parties, effect can be given that intent. Thus, in accordance with an agreement between Danzig and Poland regulating employment conditions in the railway service, Danzig railway officials had a right of action against the Polish railway.

[34]Hersch Lauterpacht, "The Subjects of the Law of Nations," pt. 2, 64 LQR 97, 111 (1948). For a contra view see, George Manner, "The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War," 37 AJIL 407 (1943).

[35]Ex parte *Quirin*, 317 U.S. 1 (1942).

[36]*e.g.*, Manner, "The Legal Nature and Punishment of Criminal Acts of Violence," 407-10. Some, however, continue to demur: H.W.A. Thirlway, International Customary Law and Codification (Leiden: A. W. Sijthoff, 1972), 76. "...it has always been - and probably still is - one of the most fundamental tenets...that individuals and private corporations are not subjects of International Law."

1.1.d. International Law and the Individual Individual responsibility, in many instances, extended to international *criminal* liability, as well. That is, through custom and state practice, nations gained the authority to try individual violators of international law even though, under normal rules of criminal jurisdiction, this would not have been the case. The duty of a state to punish violations of aspects of international law, such as the customary law of war, is now itself a matter of the law of nations. But whether a particular state requires specific implementation of international law into municipal law, in such instances, or opts to punish the violation directly, without domestic legislation, is a matter for each state's decision.[37] The fact that trial and punishment are left to municipal law does not deprive the crime and its sanction of its international character. The state is simply executing an aspect of international law, functioning as an organ of the international community.[38]

In the United States, the Constitution specifically grants Congress the right to define and punish "offenses against the Law of Nations."[39] This authority extends to breaches of law of war. In America in 1818, while battles with the American Indian continued, two Englishmen, Arbuthnot and Armbrister, were court-martialed and executed as "accomplices of the savages," contrary to the laws and usages of war.[40] Lest there be doubt, in 1865 the United States Attorney General wrote to the President that the laws of war "exist and are of binding force upon the departments and citizens of the Government, though not defined by any law of

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[37]Sheldon Glueck, "The Nuremberg Trial and Aggressive War," 59 Harvard L.Rev. 396, 431 (1946).

[38]Hans Kelsen, Peace Through Law (North Carolina: University of North Carolina Press, 1944), 76.

[39]Art. I, Section 8, clause 10.

[40]Francis Wharton, A Digest of the International Law of the United States , vol. III (Wash.: GPO, 1886), 326-29.

Congress."[41] Finally, "from the very beginning of its history this [United States Supreme] Court has recognized and applied the law of war...."[42] As in the application of customary international law, the English view is similar:

> The operation of rules of warfare is...a clear example of the direct effect of rules of international law upon individuals. A soldier who...is guilty of murder or plunder in occupied territory...is guilty of a war crime *jure gentium*.[43]

"The military court, by punishing the acts, executes international law," Hans Kelsen points out, "even if it applies at the same time norms of its own military law. The legal basis of the trial is international law."[44] Those inclined to grant the state a greater degree of sovereignty might disagree with Kelsen, and argue that the state actually acts to enforce its own law, or to discharge its treaty commitments, and merely looks to international law to define or take the measure of the wrong involved. The pragmatist responds that by either route the same Kelsonian destination is reached.

One realizes then, that, considered or not, those participating in the 1970 Son Thang courts-martial were following a path blazed many years before.

1.2. War, the Law of War, and War Crimes

Understanding the law of war necessitates a rudimentary understanding of war itself, the phenomenon those laws attempt to control.

1.2.a. Defining War The Peace of Westphalia, ending the Thirty Years War in 1648, gave rise to the modern state system. Under this system war has become a contest between

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[41]11 Ops. Atty. Gen. 297, 299 (1865).

[42]Ex Parte *Quirin*, 27.

[43]Lauterpacht, "The Subjects of the Law of Nations," pt. 2, 105-06.

[44]Kelsen, Peace Through Law, 77. Kelsen makes the same point in, "Collective and Individual Responsibility in International Law," 553-56.

states. The current U.S. Army manual on international law describes war as a hostile contention by means of armed forces carried on between states.[45] "Hostile contention," the atmosphere in which war is waged, is simply what Clausewitz termed "conflict."[46] "Armed forces" refer to the formal organized forces of the state, as distinguished from the civilian population. (The modern problem of differentiation between armed forces, guerrillas, and civilians, particularly in Vietnam, is addressed in Chapter 4.) "Carried on between states": since historically there was no higher organization capable of protecting the legitimate interests of each state, nations tended to look out for themselves and, since 1648, war has been an integral aspect of international politics, war most often undertaken for political ends. Accordingly, the means adopted for attainment of those ends should further, and not contradict, those ends. By implication, then, rules and laws are necessary. The U.S. Army's *Law of Land Warfare* manual states that "war may be defined as a legal condition of armed hostilities between states..."[47] Its inclusion of the term "legal" emphasizes that war is governed by specified constraints: the laws of war.

Initially, wars of limited objective were fought by small armies of professional soldiers, the civilian population of the belligerent states being little affected. With the French Revolution and the Napoleonic wars citizen armies began to supplant the small professional forces. Ideology rather than territory became a driving force. Distinctions between combatants and civilians began to blur. In the 1800s the industrial revolution helped to increase the means of

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[45]Dept. of the Army, Pamphlet 27-161-2, International Law, vol. II (Wash.: GPO, 1965), 2. Internationally inspired civil wars, particularly since World War II, have altered that aspect of the definition concerning "states," but that alteration is not pertinent here.

[46]Carl von Clausewitz, On War , ed. and trans. Michael Howard and Peter Paret (NJ: Princeton University Press, 1976), 79.

[47]Dept of the Army, Field Manual 27-10, The Law of Land Warfare (Wash.: GPO, 1956), par. 8.a.

destruction possessed by armies. The nature of the state itself began to change, becoming more closely tied to the welfare and conduct of its citizens. Limits on war faded. "Unconditional surrender" was first imposed during the American Civil War, about the same time the first Geneva Convention convened. "Total war" was ushered in with World War I.

War's progression has been uninterrupted. Its legal definition, however, has become murkier. Grotius, Vattel, or Wheaton would have had no difficulty discerning when a state of war existed as a matter of fact, if not as a matter of law. Today, however, the line dividing peace and war is often indistinct. But between the two there is nothing, legally speaking – it is either one or the other. Such is the position of English and international law.[48] The position of the United States on the war-peace dichotomy, whatever its practice, is not clearly delineated, but states do commonly disregard such objective events as organized, large-scale, armed hostilities between nations, and deny a state of war.[49] Instead they nominate the events "armed conflict," "*de jure* war," or "police action." Professor Ian Brownlie writes:

> This practice...might be considered so absurd as not to merit discussion if it were not for the circumstances that governments have frequently used the doctrine....War became such a subjective concept in state practice that to attempt a definition was to play with words.[50]

Geoffrey Best adds: "Armed conflicts – i.e., what the world used frankly to call 'wars' but now might fear to do so lest they affront U.N. proprieties – abounded."[51] Still, armed conflicts are easier to recognize than are wars, and modern major powers remain pragmatically hesitant to employ their

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[48]See *Janson v Driefontein Consolidated Mines*, (1902) AC 484, 497; and Lord McNair and A.D. Watts, The Legal Effects of War, 4th ed. (Cambridge: University Press, 1966), 45.

[49]Philip C. Jessup, "Should International Law Recognize An Intermediate Status Between Peace and War?", 48 AJIL 98 (1954), 99.

[50]Brownlie, International Law and the Use of Force, 26.

[51]Geoffrey Best, Humanity in Warfare (London: Weidenfeld and Nicolson, 1980), 317.

full arsenals if some reasonable way remains by which conflicts may be minimized.

There was no declaration of war, by any definition, in Vietnam. What happened there is usually referred to as a "conflict." Even the U.S. Court of Military Appeals, America's highest military court, which should know better, wrote in a 1970 opinion: "We conclude that the words 'in time of war' mean...a war formally declared by Congress."[52] That conclusion remains uncorrected. "But in cases turning on military discipline," another author points out, "the attitude of courts has been entirely different. Here, courts have normally construed 'war' to cover precisely what a soldier might have understood himself to be involved in...."[53] State practice commonly accepts that armed hostilities are war, a formal declaration of war's absence notwithstanding. There can be war crimes though war goes undeclared. Events in Vietnam shall herein be referred to as a war.

1.2.b. Law in War: A Paradox? During a 1981 Marine Corps field exercise, several law of war issues were injected into the tactical scenario. After the exercise the staff judge advocate reviewed the after-action reports, including critiques completed by the participants. In answer to the written question, "Of what value were the law of war problems?" one junior Marine responded: "About as valuable as a screen door on a submarine." He did not realize the extent to which he was himself protected, and obligated, by the law of war.

Can war be a rule-governed activity at all? Can *jus in bello*, the rights and duties of belligerent states in the course of war (as opposed to *jus ad bellum*, the lawfulness of resort to war) be circumscribed? Or is it rules that

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[52]*U.S. v Averette*, 41 CMR 363 (USCMA, 1970). For a lower military court's contrary view see: *U.S. v Samas*, 37 CMR 708 (ABR, 1967).

[53]Ingrid D. DeLupis, The Law of War (Cambridge: Cambridge University Press, 1987), 14.

differentiate war from riot, piracy, or generalized insurrection? The idea of war as indiscriminate violence suggests an image of violence as an end in itself — antithetical to the concept that war is a goal-related activity directed to attaining some objective. Even the view that all necessary means to achieving victory are permissible is itself implicitly restrictive in that it limits hostilities to means considered "necessary," in turn implying that violence superfluous to attaining the military objective is unnecessary and may be proscribed.[54] It is difficult to escape the conclusion that wars necessarily entail, to some degree, rules and laws.

As it pertains to individuals, the law of war, perhaps more than any other branch of law, is liable to failure. In a sense, its goal is impossible: to introduce moderation and restraint into an activity uniquely insusceptible to those qualities. At the best of times its law is "never more than imperfectly observed, and at the worst of times is very poorly observed indeed."[55]

It may seem paradoxical that war, the ultimate breakdown of law, should be fought in accordance with rules of law. Why would a state fighting for survival allow itself to be hobbled by legal restrictions? In fact, nations of the eighteenth and nineteenth centuries, when the law of war was in its formative stages, did not regard themselves as fighting for survival. Territory, not ideology, was the usual basis for wars. Defeat meant realignment of national boundaries, not subjugation or dissolution as an independent state. Rules of warfare were intended to prevent *unnecessary* suffering that brought little or no military advantage.

In modern times, despite Clausewitz' assertion that the laws of war were "almost imperceptible and hardly worth

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[54]Ian Clark, Waging War (Oxford: Clarendon Press, 1990), 24.
[55]Best, Humanity in Warfare, 11.

mentioning,"[56] they remain the best answer to the opposing tensions of the necessities of war and the requirements of civilization. "It is the function of the rules of warfare to impose some limits, however ineffective, to a complete reversion to anarchy by the establishment of minimum standards on the conduct of war."[57] The advantages of breaching the rules of war, if any, are far outweighed by the disadvantages. "Unnecessary killing and devastation should be prohibited if only on military grounds. It merely increases hostility and hampers the willingness to surrender."[58]

> Violations...can also result in a breakdown of troop discipline, command control and force security; subject troops to reciprocal violations on the battlefield or P.W. camps; and cause the defeat of an entire army in a guerrilla or other war through alignment of neutrals on the side of the enemy and hostile public opinion.[59]

"The ordinary desire of a commander to retain command of his soldiers will lead him to repress indiscipline...and to hold his soldiers to a high and consistent standard of conduct," Professor Michael Walzer points out. "[T]he best soldiers, the best fighting men, do not loot and rape...do not wantonly kill civilians."[60] Illustrating the *quid pro quo* involved, a U.S. newspaper article during the Gulf War read: "Orders have come down to treat prisoners with dignity in the hope that U.S. prisoners in Iraqi hands will receive good treatment."[61]

Strategically, violations inevitably lessen the prospect of an eventual cease-fire. Ironically then, war must be conducted in the best interests of peace.

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[56]Cited in Akehurst, A Modern Introduction to International Law, 6th ed., 270-71.

[57]Schwarzenberger, International Law, vol. II, 10.

[58]Bert V.A. Röling, "Are Grotius' Ideas Obsolete in an Expanded World?" in Hedley Bull, Benedict Kingsbury, and Adam Roberts, eds., Hugo Grotius and International Relations (Oxford: Clarendon Press, 1990), 287.

[59]Jordan J. Paust, letter, 25 Naval War College Review (Jan-Feb 1973): 105.

[60]Michael Walzer, "Two Kinds of Military Responsibility," in Lloyd J. Matthews and Dale E. Brown, eds., The Parameters of Military Ethics (Virginia: Pergamon-Brassey's, 1989), 69.

[61]Edward Cody, Washington Post, 25 January 1991, A-25.

1.2.c. Law in War: A History The chronicle of efforts to bring about a credible law of war is an ancient and absorbing story. As readers of the Old Testament, Thucydides, or Caesar knows, history relates appalling tales of rapine, pillage and massacre, often not merely permitted but admired. Still, efforts to control the baser aspects of man's wartime depredations are based in antiquity. In the fourth century B.C., Sun Tzu described the prevailing custom of sparing the wounded and the elderly. The Hindu Book of Manu, from the same period, speaks of rules for war. The Egyptians were party to treaties on the subject. The Greeks and Romans had rules on sanctuary and the treatment of wounded and prisoners, as did the Muslims. Use of the crossbow was forbidden as "deadly and odious to God" in the Catholic's Second Lateran Council of 1139. In medieval Europe the codes of chivalry restricted violence to the class of knights.

> The European law of war had its origins in a religious-based philosophy which exalted peace as the highest and most 'natural' condition of humankind and reluctantly accepted war as no more than an occasional, unwelcome and discreditable incident of mortal frailty and wickedness.[62]

One of the earliest written regulations on the conduct of hostilities was the Ordinance for the Government of the Army, published in 1386 by Richard II. On pain of death it prohibited acts of violence against women and priests, the burning of houses and the desecration of churches. "From then onwards, princes inside and outside the Holy Roman Empire vied with one another in publishing articles of war...until, by the eighteenth century, every self-respecting army in Europe had equipped itself in this fashion."[63]

Ayala, Suarez, Gentili, and the Dutch lawyer Grotius, were sixteenth and early seventeenth century scholars who set the doctrinal basis for the regulation of war by interpreting and generalizing the practices of centuries. In some cases

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[62]Best, Humanity in Warfare, 129.

[63]Schwarzenberger, International Law, vol. II, 16.

these rules became part of treaties while other rules became accepted as customary obligations. So, even if a rule was not embodied in a treaty it still could be binding upon states as customary international law.[64]

In time, the British Articles of War became the model for America's colonial Articles, which included provision for punishment of officers who failed to keep "good order" among their troops. In the last half of the nineteenth century the hitherto common practices – the customary law of war – began to form into generalized rules to an even greater degree, becoming codified and extended by treaties. Modern manuals on the subject, like the 1884 British *Manual of Military Law,* were published.

In the same era, weapons and implements of war changed in ways that called for more precise formulations in restraining and limiting warfare: metal-hulled, screw-propelled ships, the machine gun, smokeless powder, submarines, aerial bombs, and gas – all entered the armed forces' arsenal about this period.

During the American Civil War (1861-65), Francis Lieber, a German-born Columbia Law School professor who had fought in the Prussian Army against Napoleon, and who had three sons in the Civil War,[65] wrote what came to be known as the Lieber Code.[66] Promulgated in 1863 as Army General Order 100, it contained detailed discussion of the treatment of prisoners and noncombatants, as well as direction on the pursuit of warfare's objectives. Often regarded as the first general

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[64]Peter D. Trooboff, ed., Law and Responsibility in Warfare (North Carolina: University of North Carolina Press, 1975), 24.

[65]James R. Miles, "Francis Lieber and the Law of War," XXIX *Revue de Droit Militaire et de Droit de la Guerre* 253 (1990). Two sons, one of whom later became Judge Advocate General of the Army, fought for the Union; another son for the Confederacy.

[66]"Instruction for the Government of the United States in the Field by Order of the Secretary of War," approved 24 April 1863.

codification of the laws of war, the Lieber Code "served as the quarry from which all the subsequent codes were cut."[67]

The law of war is remarkably consolidated. Whether devolved from long-standing customary practice or, as a few contend, universally evident rules that are binding by common recognition,[68] the codified law of war is easily accessible. Today it consists of interlinked sets of rules pertaining to weapons, tactics, strategies, targets, and humanitarian factors. Conventions, usually declaratory of long-established custom, are the primary source of modern law of war. As earlier noted, conventions have particular significance in the United States and the United Kingdom because, as treaties they are national law, once ratified by Congress (in America) or incorporated in statutes (in the United Kingdom).[69]

The 1856 Declaration of Paris on Maritime Commercial Warfare was perhaps the first such convention. It was followed by further attempts at codification by the first Geneva Convention in 1864, pertaining to the wounded and sick. Four years later the Declaration of St. Petersburg addressed prohibited weapons, after which the Brussels Conference on the Rules of Military Warfare convened in 1874. The first Hague Conference was in 1899. Through the years similar efforts, reflecting the view of statesmen that it was finally necessary to develop machinery for the regulation of disputes, produced a growing body of written rules and laws.[70]

Throughout the law of war's evolution it has encountered a measure of political and military resistance.

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[67]Best, Humanity in Warfare, 170; and Trooboff, Law and Responsibility in Warfare, 7-10.

[68]*e.g.*, Ingrid DeLupis, The Concept of International Law (Stockholm: Norstedts Förlag, 1987), 104, 122.

[69]William V. O'Brien, "The Law of War, Command Responsibility and Vietnam," 60 Georgetown L. J. 605, 609 (1972); and A.K.R. Kiralfy, The English Legal System, 8th ed. (London: Street & Maxwell, 1990), 101.

[70]Thomas E. Holland, Studies in International Law (London: Clarendon Press, 1898), 79.

> The philosophical campaign...had to fight...on two fronts, being pressed on one side by the demands of principle and logical consistency while being harassed on the exposed flank by the requirements of operability and the need to make philosophical theory meaningful in practice.[71]

In the abstract principle and operability may not be inconsistent but in reality reconciliation came hard.

Treaties and conventions on the law of war cover a wide variety of matters pertaining to the prosecution of war, of course. Nowhere in treaty or convention, however, is the term "war crime" defined, *per se*. That is to be expected, given the wide variety of possible offenses. Instead, the Geneva Conventions define "grave breaches."[72]

1.2.d. War Crimes Are Crimes On the battlefield there are crimes, war crimes, and "grave breaches." Simple crimes, obviously, are no more than the statutory or common law acts considered public wrongs punishable by municipal criminal proceedings. One soldier assaulting a fellow soldier, the theft of personal property, *et cetera* – crimes whether committed in a combat zone or elsewhere.

War crimes, on the other hand, are acts deemed violations of the customary law of war or the law of war embodied in multinational treaties. War crimes, whether committed by individuals or national agencies, create international responsibility in the offending state.[73] Conventional individual war crimes, or what will be referred to here as "battlefield war crimes," raise individual legal responsibility, as well.

> In its restricted or conventional meaning, the term 'war crimes' denote[s] violations of the laws or customs of warfare whether committed by members of the enemy armed forces or by civilians. That is...acts committed in the conduct of a war already in being...and...acts constituting violations of a particular body of rules.[74]

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[71]Clark, Waging War, 137.

[72]Arts. 50, 51, 130, and 147 of 1949 Conventions I,II,III, and IV, respectively.

[73]Art. 3, 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.

[74]Greenspan, The Modern Law of Land Warfare, 419.

Of course, war crimes are not committed only by the enemy.

"[T]he substantial development of detailed rules in the field of individual responsibility probably came with the Nuremberg trials and the Far East trials."[75] But like all systems of law, the law defining war crimes is not static. To determine what acts constitute war crimes at any given time requires ascertainment of the actual content of the law of war at that time.

At their basic level, battlefield war crimes include illegitimate violence and the mistreatment of prisoners. The laws of war defining war crimes are a blend of permission and restriction between permissible and impermissible acts. Generally, a battlefield war crime may be described as "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."[76] The term "war crime" is somewhat misleading, for most battlefield crimes of war would be crimes in peace, as well. They remain crimes in war because they are not held to be legitimate acts of war. Thus, for a soldier in combat to assault a fellow soldier is a crime; for him to assault an enemy prisoner is a war crime. for him to kill an enemy prisoner is a grave breach.

The most serious of war crimes are described as "grave breaches" in the 1949 Geneva Conventions. The significance of this classification is that Parties to the Conventions are bound to enact criminal legislation for the punishment of persons responsible for such acts, and to bring them to trial or, presuming a *prima facie* case, hand them over to another Party for trial.[77]

Grave breaches include the "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or

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[75]DeLupis, The Law of War, 353, citations omitted.

[76]Telford Taylor, Nuremberg and Vietnam: An American Tragedy (Chicago: Quadrangle Books, 1970), 21.

[77]Schwarzenberger, International Law, vol. II, 215.

health...."[78] So grave breaches, too, often smack of criminal offenses punishable in most municipal law systems. It has been said of the 1949 Conventions that "few other treaties state with such specificity that the violation of its provisions constitutes a crime to be punished by international law or by the domestic criminal law of the signatory states."[79]

In Vietnam, another definitional aspect of the term, "war crime" arose. If a wounded and defenseless enemy soldier was captured, then shot and killed on the battlefield it was clearly a war crime and a grave breach. But what if he were killed while awaiting treatment in a U.S. hospital in Saigon? Was it a grave breach, or simply a crime, murder, triable under municipal law? If, during a U.S. assault, noncombatant North Vietnamese nurses in enemy-held territory were executed, it was a grave breach. But what if they were noncombatant South Vietnamese villagers, instead? Was it a grave breach, or simply murder? Answers were sometimes found in military courtrooms.

1.3. The Law of War: From Geneva To Vietnam

From the first Geneva Convention in 1864 through the latest protocols of 1977, Hague and Geneva Conventions have formed the backbone of modern, codified war law. They represent distinct, though not entirely separate trends: "[T]he so-called law of Geneva, more particularly concerned with the condition of war victims who have fallen into enemy hands...and the other,...the law of The Hague, relating to the conduct of war proper."[80] Geneva Conventions, it is said, protect victims of war; Hague Conventions address methods of war. By now it might be said that the *basic* rights and

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[78]Arts. 50, 51, 130, and 147, of Conventions I, II, III, and IV, respectively.

[79]M. Cherif Bassiouni, ed., International Criminal Law, vol. I, Crimes (NY: Transnational Publishers, 1986), 204.

[80]Frits Kalshoven, Constraints on the Waging of War (Dordrecht: ICRC/Martinus Nijhoff, 1987), 7.

duties contained in the Geneva and Hague Conventions have themselves been incorporated into customary international law, making them applicable even to non-signatories.[81] The modern emergence of resistance movements, guerrilla warfare, and struggles for national liberation have made Hague codifications inadequate in some respects.[82] Nevertheless, Hague and Geneva Conventions remain uniquely important to the law of war.

1.3.a. Geneva, The Hague, and Vietnam The most significant treaties regarding modern land warfare are the four 1949 Geneva Conventions which address the wounded and sick, prisoners of war, and the protection of civilians. They are "among the most universally accepted agreements in contemporary international affairs."[83] The Conventions are linked not only by certain general principles, but also by several common articles. The United States signed the four Conventions in 1949 and upon ratification they became municipal law.[84] In 1957 the Democratic Republic of Vietnam, later known as North Vietnam, also signed the Conventions*

The significant 1977 Protocols I and II to the 1949 Conventions, relating, *inter alia*, to the treatment of civilians, were made effective after the events under consideration here. Some consider the Protocols "a major achievement in bringing the laws of war into line with developments in the conduct of warfare itself."[85]

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[81]DeLupis, The Law of War, 343, 348-49; and Hilaire McCoubrey, International Humanitarian Law (Aldershot: Dartmouth, 1990), 195.

[82]Cassese, International Law in A Divided World , 262.

[83]Trooboff, Law and Responsibility in Warfare, 11.

[84]They were ratified by the U.K. in 1957 and by the U.S. in 1955, with formal reservations.

* North Vietnam later informed the ICRC that it refused to apply the POW Convention to captured U.S. pilots and would treat them as war criminals. 5 International Rev. of the Red Cross (Dordrecht, Netherlands: ICRC/Martinus Nijhoff, 1965), 527-28.

[85]Peter Rowe, Defence, The Legal Implications (London: Brassey's Defence Publishers, 1987), 150.

Nevertheless, although the U.S. has signed the 1977 Protocols, it has not ratified them and they are not U.S. law.[86]

The draftsmen of these and earlier Conventions knew that no codification could be exhaustive and they were anxious to preclude any interpretation that issues not covered were ungoverned by customary international law. To close such interstitial gaps the authors of the 1899 Hague Convention II, at the urging of Russian jurist Fedor F. Martens, included what has come to be known as the Martens Clause:

> Until a more complete code of the laws of war is issued...in cases not included in the Regulations adopted...populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations...[87]

A similar clause appeared in the Hague Convention of 1907 and analogous language is found in the four 1949 Conventions.[88] "It is important to underline the implications of the Martens clause,"[89] as it supplies norms when there are no clear rules. It is a statement of general moral principle, unique in the law of war.

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[86]Adam Roberts and Richard Guelff, eds., Documents on the Laws of War, 2d ed. (Oxford: Clarendon Press, 1989),461, 468. "The 1977 Protocols do not constitute any advance for the law of war, and in many ways constitute a significant step backwards..." W. Hays Parks, "Air War and the Law of War," 32 Air Force L. Rev., 111 (1990). In the U.S. view, significant portions of the Protocols are contrary to, or not in accord with customary international law. *e.g.*, the descriptions of proportionality, responsibility for protection of civilian populations, and cultural objects. The Protocols language is considered sometimes intentionally imprecise or again in disagreement with existing law. *e.g.*, definitions of 'attacks,' and 'civilian objects,' and who is a civilian. Protocol II's application is considered narrower than the 1949 Convention's common Art. 3 and inconsistent with the 1954 Hague Convention. For detailed discussion of U.S. objections see, Parks, 89-224; Daniel Smith, "New Protections For Victims of International Armed Conflicts," 120 Military L. Rev. 59 (1988); and Maj.Gen. George S. Prugh, "Armed Forces and Development of the Law of War," IX *Recueils de la Société de Droit Pénal Militaire* 277 (1982).

[87]Schwarzenberger, International Law, vol. II, 21-22; and Roberts and Guelff, Documents on the Laws of War, 4.

[88]Arts. 63, 62, 142, and 158 of Conventions I,II,III, and IV, respectively. The principle is reaffirmed in the 1977 Protocols, as well.

[89]DeLupis, The Law of War, 157.

In Vietnam, the usual circumstances for the application of Geneva and Hague Conventions were absent: there was no declared state of war between two or more sovereign states, each fielding an army fighting on a readily identifiable battlefront. But the Conventions impose no restrictions on their application for those circumstances, and the parties to the Vietnam war recognized and agreed to apply the Geneva Conventions.[90] The National Liberation Front, a South Vietnamese anti-government faction engaged in partisan warfare,[91] averred that it was not bound by the Conventions but would follow a humane policy towards prisoners of war.[92]

Significant segments of American and British society, including eminent jurists, contended that for various reasons the war in Vietnam was illegal. Assuming, *arguendo*, they were correct, it would make no difference to the application of the Conventions. The law of war applies even if the resort to force is unlawful.[93]

1.3.b. League of Nations/ United Nations Compared to Geneva's and The Hague's contributions, the League of Nations and the United Nations have had but tangential roles in the law of war. The ferocity of World War I and the apparent possibility of beginning a new era in international relations led to the League of Nations. There was a desire not simply to limit the horrors of war, but to attempt its abolition altogether. Drafted in February 1919, the Covenant of the League of Nations became an integral part of the Great War's peace treaties,* collectively called the Treaty of

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[90]Telford Taylor, "Remarks," in Richard A. Falk, The Vietnam War and International Law, vol. 4 (New Jersey: Princeton University Press, 1976), 365.

[91]Graham A. Cosmas and Terrence P. Murray, U.S. Marines in Vietnam, 1970-1971 (Wash.: U.S. Marine Corps, 1986), 166.

[92]DeLupis, The Law of War, 156. See also: Note, "The Geneva Convention and the Treatment of Prisoners of War in Vietnam," 80 Harvard L. Rev. 851 (1967).

[93]Brownlie, International Law and the Use of Force, 407.

* The Treaties of Versailles (June, 1919), St. Germain-en-Laye (Sept., 1919), Neuilly-sur-Seine (Nov., 1919), and Trianon (June, 1920).

Versailles. But from the outset there were problems in the wording of the Covenant, and in League membership.[94] Because of partisan domestic politics the U.S. failed to ratify the Treaty of Versailles and never became a member of the League; the U.S.S.R. was eventually expelled; three states were refused admission; three others later withdrew. Although some writers assert that the League's process for containing war was materially flawed[95] it was a commendable effort to achieve world peace. In practical terms the League was not a fruitless endeavor. Prior to its formation the waging of war was considered a right of nations. "War was in law a natural function of the State...a prerogative of its uncontrolled sovereignty," wrote Oppenheim-Lauterpacht.[96] The League of Nations altered that traditional view.

> One of the more significant changes which the Covenant effected was to make any war between states a matter of international concern. War was no longer to have the aspect of a private duel but of a breach of the peace which affected the whole community.[97]

The concept of legal and illegal wars, and the notion of economic and trade sanctions, were introduced by the Covenant, as well.[98] The League established the first world court (albeit one lacking binding jurisdiction), the Permanent Court of International Justice. Efforts to establish an international criminal court were "an abysmal failure."[99] Ultimately, the League failed to fulfill the hopes engendered by its formation and proved unable to end, or even

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[94]Manley O. Hudson, "The Members of the League of Nations," 16 BYIL 130 (1935).

[95]*e.g.*, Cassese, International Law in A Divided World, 60-62.

[96]Lassa Oppenheim, International Law, 6th ed., rev., vol. II, Disputes, War and Neutrality, Hersch Lauterpacht (London: Longmans, Green, 1944),145.

[97]Brownlie, International Law and the Use of Force, 57.

[98]Arts. 12,13, 15, and 16.

[99]Leslie C. Green, "The Law of Armed Conflict and the Enforcement of International Criminal Law," 22 Canadian Yearbook of International Law 3 (1984).

restrain aggression. It collapsed early in World War II and dissolved itself in April, 1946.[100]

As early as 1941 the Allies were calling themselves "The United Nations." In the 1943 Moscow declaration they spoke of establishing an international organization based on sovereign equality and the pursuit of peace and security. Two years later the representatives of fifty-one states signed the United Nations Charter. The Charter avoids the term "war," referring instead to "act of aggression" and "breaches' of the peace."[101]

A collective security body, the U.N. has had little to do with the law of war in any direct sense, though it has, to a limited degree, raised the cost of some illegitimate uses of Force. "[T]he United Nations long provided the same picture as that of the League of Nations period: full attention for the maintenance of peace, very little interest for the law of armed conflict..."[102] Having avoided war in its Charter, it might be considered paradoxical or pessimistic to make regulations for its control. The Charter's emphasis is on negotiated settlement of disputes rather than enforcement against violations – a "qualified, even gingerly, approach."[103] Still, through moral suasion and the potential of its international peacekeeping options, the U.N. plays a more important role than did the League. Because of its universal nature, the Charter's principles relating to limitations on the use of force may, like the Geneva Conventions, constitute general international law.[104]

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[100]Charles G. Fenwick, International Law, 4th ed. (NY: Appleton-Century-Crofts, 1965), 26-28; Manley O. Hudson, "The Twenty-fifth Year of the World Court," 41 AJIL 2 (1947).

[101]Art. 39: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken...to maintain or restore international peace and security."

[102]Kalshoven, Constraints on the Waging of War, 17.

[103]Oscar Schachter, International Law in Theory and Practice (Dordrecht: Martinus Nijhoff, 1991), 226.

[104]Brownlie, International Law and the Use of Force, 113.

Additionally, some of the principles of international law it has affirmed are relevant to defining war crimes and were pertinent to the prosecution of the Son Thang patrol members in Vietnam.

1.3.c. Applying international Law to the Individual Knowing what international law considers a war crime, what are their sanctions? The U.N. plays no role in their trial or prosecution, and only states may be parties before the International Court of Justice.[105] In the Hobbesian view, laws exist only if there is a ready mechanism to punish their violation. Such a mechanism does exist. Those who argue that effective punishments are not yet developed for law of war violations,[106] or that belligerents are only interested in denouncing war crimes committed by their opponents,[107] are countered by innumerable records of prosecutions indicating otherwise. But only recently have discrete sanctions become part of customary international law.

"In the extensive literature on the question of international crimes and international jurisdiction which has appeared since 1920 a considerable number of writers," Ian Brownlie suggests, "have envisaged criminal responsibility of states alone...." But as to individual criminal responsibility, he continues, "it is nevertheless suggested that the concept has no legal value, cannot be justified in principle, and is contradicted by the majority of developments...in international law."[108] Brownlie thus minimizes the Act of State doctrine. Briefly, that doctrine

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[105]Art. 34.1, Statute of the International Court of Justice. The I.C.J., principal judicial organ of the U.N. and a creature of its Charter, is the successor of the League of Nations' Permanent Court of International Justice and retains essentially the same statute. Shabtal Rosenne, ed., Documents on the International Court of Justice (NY: A.W. Sijthoff, 1974), ix-x, 61.

[106]Axinn, A Moral Military, 167.

[107]Yves Sandoz, "Penal Aspects of International Humanitarian Law," in Bassiouni, International Criminal Law, vol. I, 229; and Joseph W. Bishop, Justice Under Fire (NY: Charterhouse, 1974), 289.

[108]Brownlie, International Law and the Use of Force, 150-52.

holds that an individual may escape a court's jurisdiction by claiming that his otherwise improper conduct was that of a sovereign power's agent. The Act of State doctrine, long an issue in relation to an individual's war crime liability, was rejected by the time of World War II.[109] As the International Military Tribunal at Nuremberg noted in reference to war crimes: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[110] Moreover, "most of the acts constituting violations of the rules of warfare are at the same time violations of general criminal law, such as murder, pillage...rape, and the like."[111] Once again, crimes of individual criminality. International law, then, defines the limits of lawful conduct while municipal law specifically proscribes conduct and the sanctions to be imposed. Both British and American military legal codes leave no doubt that the individual is regarded directly bound by the laws of war.[112]

There are other instances of municipal courts enforcing international law; the protection of property of aliens and cases of diplomatic and sovereign immunity, for example.[113] If there is an objection to municipal courts exercising jurisdiction over international crimes it is that different national courts may tend to hand down conflicting decisions and impose varying penalties for similar offenses.[114] But that

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[109]*e.g.*, Kelsen, "Collective and Individual Responsibility in International Law," 550; and Oppenheim, International Law, 6th ed., vol. II, 451.

[110]Brownlie, International Law and the Use of Force, 154, citing Trial of German Major War Criminals (London: HMSO, 1946), 41.

[111]Kelsen, Peace Through Law, 92.

[112]HMSO, Manual of Military Law, pt III, 12th ed., 1972, The Law of War on Land (London, 1956),par. 625; Uniform Code of Military Justice, Art. 18.

[113]Harris, Cases and Materials on International Law, 10.

[114]John W. Bridge, "The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law," 13 International and Comparative L. Quarterly 1255, 1270 (1964).

risk is a negligible price to pay when weighed against the advantages of employing an established enforcing "agency."

1.3.d. International Law as Military Law The competence of national courts to try accused war criminals, including their own nationals, was confirmed in the Treaty of Versailles in 1919.[115] Although one of the first instances of such specific recognition, the competence of states to try their own nationals for war crimes "had long since developed into an accepted part of customary law..."[116] The forum for such trials might properly be an international tribunal, a civilian municipal court, or a military court.[117] But court-martial has been the forum most often turned to. To consider such prosecutions "rare"[118] is inaccurate. "Since the mid-19th century, with increasing frequency, the major powers have utilized military courts for the trial of persons accused of war crimes."[119] (In 1863 the American Lieber Code went so far as to bypass military courts and provide for summary execution of soldiers, either Union or Confederate, apprehended while committing a violent war crime.)[120] During America's war with Mexico (1846-48), the American commander created "military commissions" with jurisdiction over law of war violations committed by his men or by the enemy. An 1865 U.S. Attorney General's opinion confirmed that, "under the...laws of the United States, should a commander be guilty of...a flagrant breach of the law [of war, he] would be punished after a military trial."[121] The British take a

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[115]Treaty of Peace, Arts. 227, 228, 230. Ironically, because it still adhered to the act of state doctrine, the U.S. delegation to the Versailles Conference opposed individual responsibility for alleged war crimes.

[116]Kalshoven, Constraints on the Waging of War, 67.

[117]Ian Brownlie, Principles of Public International Law, 4th ed. (Oxford: Clarendon Press, 1990), 561.

[118]Akehurst, A Modern Introduction to International Law, 278. "It is rare to find a state trying its own nationals for war crimes..."

[119]Taylor, Nuremberg and Vietnam, 23.

[120]General Order 100 of 24 Apr 1863, Art. 44.

[121]11 Ops. Atty. Gen. 297, 303-04 (1865).

similar stand, having punished their own troops at court-martial for law of war violations as long ago as the Boer War (1899-1902).[122] The execution of Lieutenant Harry H. "Breaker" Morant, after conviction of having committed war crimes, is documented and well-known.[123]

A post-World War II Nuremberg judgement notes that "it has always been recognized that tribunals may be established and punishment imposed by the State into whose hands the perpetrators fall. Those rules of international law [have] been unquestioned."[124] As noted, that unquestioned right of enforcement applies equally to one's own soldiers.[125]

Beyond that right, the "common articles" of the 1949 Geneva Conventions charge signatory states to search for, arrest, and "bring such persons [committing grave breaches], regardless of their nationality, before its own courts."[126] Those articles comport with the practice of states that undertake the prosecution of individuals, their own nationals included, who are charged with serious war crimes. "[Q]uite a few states take the position that their existing criminal law is entirely adequate to cope with the prosecutions of grave breaches."[127] Although there is no U.S. statute, state or federal, that in precise terms makes punishable the commission of a war crime,[128] that is the position of the U.S., and of the U.K. as well - that their municipal criminal law is sufficient to the task. Both nations employ existing law to prosecute breaches by applying the criminal provisions

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[122]Howard S. Levie, "Criminality in the Law of War," in Bassiouni, International Criminal Law, vol. I, 233-34.

[123]Kit Denton, Closed File (Adelaide: Rigby Publishers, 1983). A lay account reflecting a case history far different from the 1982 film.

[124]Opinion and Judgement, Proceedings of the *Justice Case*, Trials of War Criminals Before the Nuremberg Military Tribunals, Vol. III (Wash.: GPO, 1951), 954, 970.

[125]James W. Garner, "Punishment of Offenders Against the Laws and Customs of War," 14 AJIL 70, 71 (1920).

[126]Arts. 49, 50, 129, and 146 of Conventions I, II, III, and IV, respectively.

[127]Kalshoven, Constraints on the Waging of War, 69.

[128]Sweeney, Cases and Materials on the International Legal System, 849.

of their military codes for enforcement. Moreover, when trying one's own forces at court-martial, "there is no need to charge war crimes; every army is subject to its own system of law and normally has a penal code based on its ordinary municipal law."[129]

The U.K.'s military penal law is contained in its *Manual of Military Law*; the U.S.'s in its *Manual for Courts-Martial*, implementing the Uniform Code of Military Justice. The two nations take somewhat different tacks in prosecuting offenders, though. There is no specific jurisdictional provision in the British *Manual* providing for the court-martial of British combatants charged with grave breaches. Instead, they may be tried in civilian courts under the Geneva Conventions Act, 1957.[130] The U.S. directs, in regard to U.S. combatants, that "violations of the law of war...will usually constitute violations of the Uniform Code of Military Justice and...will be prosecuted under that Code."[131] By either route, British and American combatants may be tried for grave breaches in their own nation's courts. Lord Wright has written:

> The actual law with its specified offences and penalties may not be familiar to a cheesemonger in the City of London, but must be taken to be known to all those who have to act in the matter to which it relates,...even to soldiers of lower ranks.[132]

An advantage of military courts is that "jurisdiction is, of course, easy when the accused is a member of the armed

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[129]Leslie C. Green, "Superior Orders and the Reasonable Man," 8 Canadian Yearbook of International L., 61 (1970).

[130]§ 1, Punishment of Offenders Against Conventions. However, the Army Act, 1955, Sec. 70, incorporates virtually the whole of English criminal law, making violation of almost any of that law's provisions, where ever committed, punishable at court-martial. It appears possible, then, to try a British soldier for war crimes at court-martial, basing jurisdiction on a Sec. 70 charge — with the exception that a court-martial may not be convened *in the U.K.* to try a charge of committing a grave breach of the 1949 Conventions. Sec. 70, fn. 3(b)(ii).

[131]Dept. of the Army, Law of Land Warfare, par. 507.b.; and W. Hays Parks, Chief, International Law Branch, Dept. of the Army, Washington, to author, London, 27 Mar 1990.

[132]Wright, "War Crimes Under International Law," 40 .

forces of the nation whose courts are involved. Then it is easy to try him in accordance with military law or the ordinary criminal law...."[133]

Nor is the verdict of the court-martial merely the expression of military law.

> The military court, by punishing the acts, executes international law even if it applies...its own military law. The legal basis of the trial is international law, which establishes the individual responsibility of the person committing the act of illegitimate warfare.[134]

By 1970, trial by court-martial of one's own nationals charged with war crimes was so well-established that the fact of international law's involvement was often overlooked. So it was in the Son Thang trials.

1.4. A Nexus; A Thesis

How related *are* the customary law of war and America's Uniform Code of Military Justice? If international law could be overlooked in court-martial prosecutions in Vietnam could it have played a significant role?

There is a firm nexus, although the U.S. position on the relationship of its municipal law and law of war is not found in a single statute, text, or enactment. The U.K.'s approach, on the other hand, is contained in its Geneva Conventions Act, 1957, providing that any person, of any nationality, in or outside the U.K., who commits, aids or abets any grave breach of several specified conventions may be tried and punished anywhere in the U.K. The relationship of international and municipal law is clearly and directly stated in that single source. Sweden's penal code specifies

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[133]Leslie C. Green, "Aftermath of Vietnam: War Law and the Soldier," in Falk, The Vietnam War and International Law, vol. 4, 147, 149.

[134]Kelsen, Peace Through Law, 77. For a contrary view, see, R.R. Baxter, "The Municipal and International Law Basis of Jurisdiction Over War Crimes," 28 BYIL 382 (1951).

seven offenses which are also breaches of the law of war.[135] India's municipal law specifically incorporates the law of war.[136] Canada's National Defense Act, in terms similar to the U.K.'s Geneva Conventions Act, similarly provides for the trial of war crimes.[137]

U.S. domestic law nowhere defines its interrelationship with the law of war in such succinct terms. Their close relationship and court-martial application is nevertheless apparent from legal legislative history, military and civilian appellate opinions, and U.S. legal administration throughout the Vietnam War.

The law of war/military law nexus is evident in legislative records of the UCMJ's formative stages, pre-dating the Vietnam War. Testifying before the Senate Foreign Relations Committee a representative of "the Department of Justice stated...that a review of existing legislation revealed little need for further enactments to provide effective penal sanctions for grave breaches."[138] "It was intended that the [Geneva] Conventions be self-executing through existing...legislation that punished violations of the laws and customs of war."[139] The UCMJ's legislative history goes on to note that a general court-martial, when trying war crimes, "will operate under the laws of war,"[140] and "any man in any branch of service...who violated the law of war would be triable..."[141]

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[135]Referred to in: Peter Rowe, "Murder and the Law of War," 42 Northern Ireland Legal Quarterly 216 (1991), 219, fn. 14.

[136]Geneva Conventions Act, Act No. 6 of 1960.

[137]The National Defense Act, R.S.C. 1970, c.N-4 (as amended), § 120.

[138]*Hearings on Executives D, E, F and G Before the Senate Comm. on Foreign Relations,* 84th Cong., 1st Sess 58 (1955).

[139]Comment "Punishment for War Crimes: Duty-or Discretion?", 69 Michigan L. Rev. 1312, 1320, fn. 55 (1971).

[140]Index and Legislative History: Uniform Code of Military Justice (Wash.: GPO, 1950), 958.

[141]Ibid., 961.

That intended intertwining of law of war and the UCMJ was reflected not only in the Code,* but in the first two sentences of the first *Manual for Courts-Martial* edition, in 1951: "The sources of military jurisdiction include the Constitution and international law. International law includes the law of war."[142] Elsewhere, that first *Manual* also specifies that a general court-martial is empowered to try "any crime or offense against the law of war," and "adjudge any punishment permitted by the law of war,"[143] authorizing, as does U.K. law,[144] the taking of judicial notice of "the law of nations, including the law of war..."[145]

The 1969 edition of the *Manual*, in effect during much of the Vietnam War, reproduced precisely the same language,[146] as did the post-war 1984 edition in only slightly modified terms.[147]

The considered and close relationship of court-martial practice and the law of war is also reflected in appellate opinions of the U.S. Supreme Court[148] and, more immediately for military lawyers, in military appellate opinions — even before enactment of the UCMJ.[149]

> The Court of Military Appeals has...had the opportunity to comment on many aspects of the law of armed

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* Article 18: "General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial..."

[142]Manual for Courts-Martial, United States, 1951 (Wash., GPO, 1951), 1.

[143]Ibid., 17, 18.

[144]*Re Piracy Jure Gentium* [1934] AC 586.

[145]Manual for Courts-Martial, 1951, 274.

[146]Manual for Courts-Martial, United States, 1969 (Wash., GPO, 1969), 1-1; 4-4,5; 27-48.

[147]Manual for Courts-Martial, United States, 1984 (Wash., GPO, 1984), I-1; II-7,10,13.

[148]*Coleman v Tennessee*, 97 U.S. 509 (1878); Ex parte *Richard Quirin*; *In the Matter of the Application of General Tomoyuki Yamashita*, 327 U.S. 1 (1945), leading cases bearing on the application of the law of war in U.S. civilian courts.

[149]*U.S. v Fleming*, 3 CMR 312 (ABR, 1951), a pre-UCMJ case. "GCMs have power to try any person subject to military law for any crime...punishable by the Articles of War. In addition...any other person who by the law of war is subject to trial..." To the same effect, *U.S. v Schultz*, 4 CMR 104 (USCMA, 1952), and *U.S. v Mitchell*, 45 CMR 411 (USCMA, 1972).

> conflict...[and] the 1949 Geneva Conventions were accepted as the proper source of norms for the United States armed forces in combat...[150]

In a 1955 case, the Court of Military Appeals, the highest U.S. military court, held that service custom recognized "the laws of war."[151] At the height of the Vietnam War the military high court cited the Geneva Conventions and commented on the killing of a captured Vietnamese noncombatant: "[T]o kill under the circumstances of this case is unjustifiable under the laws of this nation, the principles of international law, or the laws of land warfare."[152]

Numerous other Vietnam-era appellate opinions involving the murder of Vietnamese noncombatants repeatedly and routinely refer to U.S. responsibilities under the Geneva Conventions, the military courts' duty to enforce them, and cite the regulations implementing those law of war responsibilities in Vietnam.[153] Foremost among those opinions are the Calley holdings of the Army Court of Military Review and the Court of Military Appeals,[154] both decisions replete with references to "war crimes," "the rules of land warfare," "the laws of war," and the Geneva Conventions applicable in military legal practice. These well-publicized opinions emphasizing the military system's dedication to enforcing the law of war through courts-martial were necessarily familiar to military lawyers of all U.S. armed services, in and outside of South Vietnam. Remarked or not, the involvement

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[150]Burris M. Carnahan, "The Law of War in the United States Court of Military Appeals," 20 *Revue de Droit Pénal Militaire et de Droit de la Guerre* 331, 344-45 (1981).

[151]*U.S. v Dickensen*, 20 CMR 154 (USCMA, 1955).

[152]*U.S. v Schultz*, 39 CMR 133, 136 (USCMA, 1969), a well-known Marine Corps case. Appellate opinions were routinely provided all military legal offices in the form of slip opinions and, eventually, bound volumes.

[153]Ibid; and *U.S. v Potter*, 39 CMR 791 (USCMA, 1967); *U.S. v Keenan*, 39 CMR 108 (USCMA, 1969; *U.S. v Goldman*, 44 CMR 471, 477 (ACMR, 1970), to name but four notorious cases.

[154]46 CMR 1131 (1973) and 48 CMR 19 (1973), respectively.

of customary law of war in military trials involving grave breaches was no coincidence.

The UCMJ-law of war bridge is highlighted by the writings of publicists, some dating from many years ago:

> While the Military Law has derived from the Common Law certain of the principles and doctrines illustrated in this code, it has also a[n]...unwritten common law of its own. This unwritten law may be said to include: 1. The 'customs of the service', so called; 2. the unwritten laws and customs of war.[155]

Civilian and military law review articles, many of which are cited below, regularly emphasize the significant place of customary law of war in the military justice system. Even service newspapers occasionally highlight the relationship.[156]

In Vietnam the UCMJ-law of war nexus was particularly evident by virtue of field manual injunctions stressing its judicial enforcement through orders and directives issued by the Military Assistance Command-Vietnam (MACV), and by the on-going training mandated for all U.S. personnel – although the latter's effectiveness left much to be desired.

The Army field manual, *The Law of Land Warfare*, is held in the field library of all Army and Marine Corps battalion-sized, and larger, units. Albeit lacking the force of law,[157] the field manual enunciates official U.S. policy, providing "authoritative guidance to military personnel"[158] regarding

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[155]William Winthrop, Military Law and Precedents, 2d ed., rev. (Boston: Little Brown, 1921), 41.

[156]The Son Thang trials received detailed daily coverage in the military newspaper, *Stars & Stripes*, as well as in civilian newspapers. Similar cases continue to receive prominent treatment, e.g., that of Army Master Sergeant Roberto Bryan, charged with murdering a captured Panamanian soldier during the 1990 U.S. Panamanian incursion: "Modern military law on war crimes is based on the 1949 Geneva Conventions....The Defense Department requires all military personnel to receive training on the law of war..." J. Paul Scicchitano, "What's Special About the Bryan Case?", Army Times, 13 Aug. 1990, 12, 13.

[157]*U.S. v Blanchard*, 19 MJ 196 (USCMA, 1985); *U.S. v Brunson*, 30 MJ 766 (ACMR, 1990.

[158]Maj. Paul P. Dommer, "The Problem of Obedience to the Unlawful Order," 10 *Revue de Droit Pénal Militaire et de Droit de la Guerre* 297, 317 (1971), a particularly authoritative article written by a military lawyer in the International Affairs Division of the Office of the Judge Advocate, Headquarters, U.S. Army, Europe.

treaty and customary law of war, describing them as having "a force equal to that of laws enacted by Congress...both the letter and spirit" to be strictly observed. The manual notes that treaties governing land warfare are applicable to all U.S. forces,[159] and that grave breaches, including those committed by one's own forces, "constitute acts punishable under the UCMJ," the death penalty being imposable.[160] Notably, the manual further specifies that the fact that domestic law, such as the UCMJ, does not impose a penalty for an act constituting a crime under the law of war does not relieve the accused from legal responsibility under international law.[161]

To implement those pronouncements in Vietnam, MACV's Saigon headquarters included an International Law Division within the Staff Judge Advocate's office. That Division's responsibilities encompassed "international law for the command, including...the Geneva Conventions of 1949, and the Laws of War....investigations of alleged war crimes and atrocities committed by or against U.S. military or civilian personnel."[162]

Numerous MACV directives applicable to all U.S. forces, including Marines, concerned the law of war-military justice nexus. The first such directive dealing specifically with war crimes was issued in April 1965 and updated regularly. It made each U.S. serviceman responsible for reporting any incident which might constitute a war crime.[163] The then-MACV Staff Judge Advocate relates that:

> It was also supplemented by a number of other directives pertaining to the Geneva Conventions, war crimes, and prisoners of war. MACV Directive 27-5...listed acts

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[159]Dept. of the Army, Law of Land Warfare, pars. 7.b., 8.c.

[160]Ibid., pars. 506.b., c., and 508.

[161]Ibid., par. 511.

[162]MGen. George S. Prugh, Law at War: Vietnam 1964-1973 (Wash.: Dept. of the Army/GPO, 1975), 8, 12.

[163]Ibid., 72-73, MACV Directive 20-4.

> which constituted war crimes...punishable in accordance with...the Uniform Code of Military Justice.[164]

Another Directive[165] provided "protected status for people clearly excluded by the Geneva Conventions....[Telford] Taylor has called the instructions 'virtually impeccable'"[166] That directive and others reflected court-martial punishment for their violation.[167] Geneva Conventions Checksheets were sent to every military lawyer in Vietnam, as well.[168]

> Acts constituting war crimes were also offenses against the Uniform Code of Military Justice....[General Westmoreland] considered establishing special war crimes teams...but this was not done because the laws prohibiting war crimes and...judicial machinery...were judged adequate....The U.S. military lawyers' role in applying [humanitarian rules] brought credit to the legal profession...[169]

Early in the war "a fairly elaborate program"[170] was undertaken to inform U.S. military personnel of the more important provisions of the Geneva Conventions, and periodic refresher lectures were mandated. Some individual units distributed to their members thousands of pocket-sized pamphlets entitled, *Soldier's Handbook on the Rules of Land Warfare*, which detailed the court-martial penalties for grave breaches.[171] Pocket-sized cards summarily outlining the law of war were given every soldier entering Vietnam.* Model law of war courses with instructor outlines and guidance were made

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[164]Ibid., 73.

[165]MACV Directive 381-46, Annex A, found in: Charles I. Bevans, "Contemporary Practice of the United States Relating to International Law," 62 AJIL 754, 766 (1968).

[166]Robert G. Gard, "Remarks," in Falk, ed., The Vietnam War and International Law, vol. 4, 389.

[167]MACV Directives 190-3, Enemy Prisoners of War; 20-5, Prisoners of War - Determination of Eligibility; and 335-1, Reports of Serious Crimes.

[168]Prugh, Law at War, 73-74.

[169]Ibid., 76-78.

[170]Alfred P. Rubin, "Legal Aspects of the My Lai Incident," 49 Oregon L. Rev. 260, 265 (1970).

[171]Ted B. Borek, "Legal Services During War," 120 Military L. Rev. 19, 39 (1988).

* "Nothing short of ludicrous," wrote Lt.Gen. William K. Peers, leader of the My Lai cover-up investigation. The My Lai Inquiry (NY: Norton, 1979), 230, fn. 1.

available.[172] One U.S. writer ethnocentrically suggests that "the regulatory scheme used by the American Army in Vietnam to identify, to investigate, and to report war crimes is studied as a model in the community of nations."[173]

These directives, manuals, and classes combine to present a picture of an American army versed in the customary law of war, repeatedly advised of its Geneva Convention duties, and well aware that the price of violation was prosecution by court-martial.

U.S. military lawyers, every one a law school diplomate and graduate of a two-month course on military law, were presumably familiar with constitutional references to the law of nations, and at least some of the law review articles on the subject. They certainly were aware of the *Manual for Courts-Martial*'s repeated references to the law of war and its enforcement through the UCMJ. Military appellate opinions provided all-too-frequent reminders of such prosecutions.

The effectiveness of this education and training of soldier and judge advocate is another matter. But education and training there were, leaving little room for doubt that U.S. forces were aware of the law of war and that court-martial prosecution would follow its violation. Judge advocates similarly appreciated the central role that customary law of war played in courts-martial for offenses that constituted grave breaches.

Given that clear nexus, a thesis is offered: that America's obligation to observe the customary law of war and the Geneva Conventions calling for sanctions for their grave breach, predicted trial, conviction, and punishment for those responsible for the events at Son Thang.

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[172]Green, "Aftermath of Vietnam: War Law and the Soldier," in Falk, The Vietnam War and International Law, vol. 4, 147, 167-69.

[173]William G. Eckhardt, "Command Criminal Responsibility: A Plea For A Workable Standard," 97 Military L. Rev. 1, 7 (1982).

Further, that America's obligation to observe the law of war predicted that the Uniform Code of Military Justice, a criminal law system and the asserted vehicle for the satisfaction of law and treaty obligations, provided a legally proper and effective means of meeting the responsibilities of customary international law and the 1949 Geneva Conventions.

Demonstration of the thesis will be through a case study: examination of the series of four courts-martial conducted in the wake of murders committed in February 1970 in the village of Son Thang, South Vietnam.

CHAPTER 2. LAW OF WAR TODAY

Serious study of the law of war on its own has this therapeutic quality, that it calls attention to its own limitations, and suggests their remedy.
Geoffrey Best, *Humanity in Warfare*

By mid-twentieth century, trial by court-martial of one's own nationals charged with war crimes was established practice. Nevertheless, enforcement of the law of war did not come pre-packaged from Geneva to Vietnam and the Marine Corps lawyers prosecuting the Son Thang murders. But the evolutionary progress in the law of armed conflict had been impressively rapid in the twentieth century. Advances from the third generation Geneva Conventions of 1929 to the Vietnam War in 1965 were perhaps greater than advances in the preceding five centuries combined.

In this chapter the emergence of international humanitarian laws as a wartime consideration is briefly reviewed. The Nuremberg tribunals are examined and the question of their contemporary significance posed. The law of war is applied in the context of courts-martial and Vietnam, as well, with particular attention to the My Lai case. Finally, the circumstances of the U.S. Marine Corps in Vietnam are examined. The combat performance of the Marines was influenced not only by the enemy, but by U.S. governmental policy, as well. That policy played an indirect role in the murder of sixteen women and children at Son Thang.

2.1. Modern Change, Necessary Progress

How to account for the twentieth century's rapid and dramatic changes in the law of war? With the coming of industrialization the tools of warfare had become terrible in their effectiveness. The aeroplane and submarine became common weaponry. The machine gun became portable, then

pervasive. The deaths of an estimated ten million combatants and civilians in World War I added urgency to the work of Geneva and Hague conferees. The face of war had changed. The means of controlling it had to change as well.

Civilians, hosts to the battles fought in their streets, were the victims of World Wars I and II in greater measure than in previous wars. The law of war turned its attention to those civilians – to human rights law and international humanitarian law.* Objection is sometimes made that "human rights" are a Western concept. They are not. "[T]he justice of laws, the integrity and dignity of the individual, safeguards against arbitrary rule, freedom from oppression and persecution...are to be found in very similar form in every civilization..."[1]

2.1.a. Humanitarian Law in Modern War Humanitarian law seeks to protect individuals from man-made, and so avoidable, suffering. The first Geneva Convention of 1864 is the source of international humanitarian law applicable in armed conflicts. "Of course, rules for the protection of the victims of hostilities existed well before 1864, but either they were the result of purely moral or religious reasoning, or they stemmed from *ad hoc* undertakings."[2] On the eve of the twentieth century the Geneva Conventions had devoted themselves almost exclusively to the protection of combatants, but by the end of World War II civilians had emerged much in need of protection. What followed "at a

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*International humanitarian law and international human rights law, although closely related, are not the same. The latter, broadly speaking, applies to *all* people, the former to *states* and certain *groups* such as POWs, the wounded, and civilians in war zones. See, Theodor Meron, Human Rights in International Law (Oxford: Clarendon Press, 1984), 346; and Meron, "On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for A New Instrument," 77 AJIL 589 (1983).

[1]Paul Sieghart, The International Law of Human Rights (Oxford: Clarendon Press, 1983), 15.

[2]Sandoz, "Penal Aspects of International Humanitarian Law," in Bassiouni, International Criminal Law, vol. I, 209.

staggering pace"[3] was a growth of international humanitarian law, most prominently codified in Geneva Convention IV of 1949, protecting civilians in occupied territory in time of war. International humanitarian law is described as:

> ...that branch of the laws of armed conflict which is concerned with the protection of...those rendered *hors de combat* by injury, sickness or capture, and also civilians. It is founded upon the ideas that those ...rendered non-combatant are entitled to impartial humanitarian concern and...are not legitimate targets in hostilities.[4]

In addition to Geneva Convention IV, civilian humanitarian rights are found in the 1907 Hague Convention IV.[5] (An exception to the dictum that Hague Conventions generally address methods and not victims of war.) In both the Geneva and Hague documents the defined humanitarian rights relate to civilian enemy aliens in a belligerent state, and to civilians in occupied territories.[6]

The civilians killed at Son Thang were not aliens, but Vietnamese citizens living in their own nation while war raged around them. Nor were American combatants in South Vietnam an occupying force. The Son Thang victims were protected by the law of war nonetheless. Well before the Vietnam War the individual had acquired a status and a stature transforming him from merely an object of international compassion into a subject of international right.[7] Nor may one be totally dependent upon formalized rules, thinking that subjects and acts not "ruled upon" are therefore beyond regulation.

Acts constituting violation of international humanitarian law are not undefined. The four 1949 Geneva Conventions

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[3]Cassese, International Law in a Divided World, 289.

[4]McCoubrey, International Humanitarian Law , 1.

[5]Articles 43-53 of the Annex.

[6]Yoram Dinstein, "Human Rights in Armed Conflict: International Humanitarian Law," in Meron, Human Rights in International Law, 349.

[7]Hersch Lauterpacht, International Law and Human Rights (London: Stevens & Sons, 1950), 27-47 passim.

contain a common article three, forbidding, *inter alia*, "violence...in particular murder" of persons taking no active part in hostilities. That common article, although applicable only to armed conflict *not* of an international nature, is characteristic in describing the aspirational approach of contemporary humanitarian law in all circumstances. Similarly, article three of the Universal Declaration of Human Rights, the first catalogue of such rights enumerated by the United Nations, includes the right to life and the security of person. Similar rights are found in the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights.* No exception is made for circumstances of war in any of those prominent human rights treaties.

Those pacts make clear, as do most treaties involving international human rights, that "states have an affirmative obligation to enact laws guaranteeing this right [to life]..."[8] The 1949 Geneva Conventions, of course, oblige ratifying states to enact legislation to provide penal sanctions for grave breaches of the Conventions, which often are human rights violations, as well..

Humanitarian law does have international enforcement agencies, but they are of questionable value to the individual victim of breach. Virtually all of the major treaties establish enforcement institutions to provide recourse for violations but, except in special circumstances, rights accruing from an international wrong are vested in the victim *state* against the wrongdoing *state*,[9] the victim state in substance asserting the individual's right of redress.

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* Although voting in favor of the U.N.'s Universal Declaration of Human Rights, only in 1992 did the U.S. ratify the first of the two other conventions mentioned. "The United States has not been a pillar of human rights, only a 'flying buttress' - supporting them from the outside." Louis Henkin, "Rights: American and Human," 79 Columbia L. Rev. 405, 421 (1979).

[8]Richard B. Lillich, "Civil Rights," in Meron, Human Rights in International Law, 121.

[9]Mann, Further Studies in International Law, 139-40; and Christine Gray, Judicial Remedies in International Law (Oxford: Clarendon Press, 1990), generally.

Treaties generally do not confer enforceable individual rights upon the citizens of contracting states.[10] "Thus, there is no way for a national or a stateless person to proceed against a state."[11] Moreover, international enforcing agencies usually provide recourse for administrative delicts, rather than criminal acts, and presume a prior exhaustion of municipal remedies before international enforcement jurisdiction vests[12] and, some argue, tend toward political resolutions.[13] "Individuals may now...be called subjects of international law, but they are hardly equal members with states in international society, and they cannot hope to *enforce* their rights in that society."[14]

So, while there are means of enforcing international humanitarian law, they are ineffective on an individual level. For example, in the unlikely event of South Vietnam suing the U.S., its military ally and protector, for war claims in an international forum on behalf of South Vietnamese victims, the suit would have had little relevance to the Son Thang villagers, even though the 1907 Hague Convention III requires payment of compensation in proper cases.[15] In the first instance, "there is no assurance South Vietnam would press such a claim for its injured citizens even though there may be a valid theory of liability..."[16]

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[10]*Dreyfus v Von Finck and Merck, Finck and Co.*, 519 F.2d 1001 (1975); 81 ILR 508 (1990).

[11]Richard A. Falk, The Role of Domestic Courts in the International Legal Order (NY: Syracuse University Press, 1964), fn. 9, 24.

[12]Sweeney, The International Legal System, 580-82, 605-06, 1193-1200. *Tel-Oren v Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), cert. den. 470 U.S. 1003 (1985), in which Israeli civilian survivors of an armed attack sued Libya and the PLO for damages. The lower court's dismissal of the action was affirmed on differing bases - essentially lack of jurisdiction and nonjusticiability. *Klinghoffer v S.N.C. Achille Lauro*, 90-9060 (2d Cir.), in which the PLO is a defendant, is a similar case.

[13]John D.B. Miller, "The Third World," in John D.B. Miller and R.J. Vincent, eds., Order and Violence (Oxford: Clarendon Press, 1990), 91.

[14]R.J. Vincent, "Grotius, Human Rights, and Intervention," in Bull, ed., Hugo Grotius and International Relations, 249.

[15]Art. 3.

[16]Comment, "Punishment for War Crimes: Duty-or Discretion?" 1340, fn. 180.

Like most international law, then, international humanitarian law often looks to municipal law for meaningful enforcement.

The Nuremberg trials, however, may be seen as an instance of international enforcement of humanitarian rights.

2.1.b. Nuremberg: Tribunals, Trials and Commissions No recent event in the law of war has had such impact in the public mind as the post-World War II Nuremberg trials. Nor, perhaps, is any other chapter in the law of war so misunderstood in the public mind. Judicial prosecution of leaders responsible for war is not a new concept. Trials assessing responsibility for the Punic Wars were chronicled by Polybius in 100 B.C. After Napoleon's escape from Elba the Great Powers declared him "an Enemy and Disturber of the tranquility of the World," and upon his surrender the British banished him to St. Helena to preserve the peace. And Bismarck at one point planned an international tribunal to try Napoleon III for instigating the Franco-Prussian war (1870-71).[17]

Before Nuremberg, the most publicized attempt to fix individual criminal responsibility for the instigation of war was that following World War I. In 1919 a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties was created by the war's Peace Conference. The Treaty Of Versailles eventually contained provision for trial of former German Emperor William II, although nothing came of that provision because of Dutch refusal to surrender the former Emperor for trial.[18] While there were several convictions of lower-ranking German officers for individual *malum in se* offenses (see section 4.1.a.), no German national

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[17]Brownlie, International Law and the Use of Force, 4, 51.

[18]Green, "Is There An International Criminal Law?" 254. There is an argument that the Emperor could not have been punished under international law in any event. See, Bert V.A. Röling and C.F. Rüter, eds., The Tokyo Judgement, vol. II (Amsterdam: University Press Amsterdam, 1977), 1048-49; and James W. Garner, International Law and the World War, vol. II (London: Longmans, Green,1920), 493-94.

figure was tried for World War I crimes or for instigating the conflict.[19]

In 1943 the American Secretary of State wrote that Nazi leaders should be hanged after summary court-martial.[20] In Britain, Lord Chancellor Simon and Prime Minister Churchill similarly favored disposing of leading war criminals summarily:[21] "execution without trial is the preferable course."[22] Instead, presaged by the St. James and Moscow Conference Declarations,[23] the United Nations War Crimes Commission drafted the London Agreement of 1945. This agreement for the Prosecution and Punishment of Major War Criminals of the European Axis had as an annex the Charter of the International Military Tribunal – the IMT.

The IMT Charter defined three categories of crime for which there would be *individual* criminal responsibility: crimes against peace, crimes against humanity, and war crimes. In terms later echoed in Vietnam, the Charter decreed that having received an order to commit a charged offense would not free a defendant from responsibility for his acts.

Crimes against peace referred to the concept of the criminality in conducting aggressive war – "a crime reserved for losers," remarked one politician.[24] Crimes against humanity encompassed "murder, extermination, enslavement, deportation, and other inhumane acts committed against any

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[19]See, Claud Mullins, The Leipzig Trials (London: Witherby, 1921); and James F. Willis, Prologue to Nuremberg (Connecticut: Greenwood Press, 1982).

[20]Cordell Hull, The Memoirs of Cordell Hull, vol. II (London: Hodder & Stoughton, 1948), 1289-91.

[21]Whitney R. Harris, "Justice Jackson at Nuremberg," 20 International Lawyer 867, 868 (1986).

[22]*Aide-Mémoire* from United Kingdom, April 23, 1945, to President Roosevelt, reprinted in: Benjamin B. Ferencz, An International Criminal Court: A Step Toward World Peace, vol. I, Half A Century of Hope (London: Oceana Publications, 1980), 450.

[23]Quincy Wright, "The Law of the Nuremberg Trial," 41 AJIL 38, 39 (1947).

[24]Paul C. Warnke, "Remarks," in Trooboff, Law and Responsibility in Warfare, 187.

civil population...or persecutions on political, racial or religious grounds."[25]

> In one sense, whenever an innocent French woman was tortured by the Gestapo, there was a crime against humanity. But what is meant by the term...is conduct directed against a large section of humanity, such as the crime of racial or religious extermination....[26]

"...Crimes against humanity were to a great extent war crimes writ large," Professor Brownlie notes.[27]

In a technical sense, the offenses tried by the tribunal in regard to crimes against peace and crimes against humanity had not existed, as such, when the defendants had violated them. This led to the considerable criticism of the tribunals.

That criticism is not so easily leveled as to the charges of individual war crimes, defined as:

> Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labor...of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.[28]

"[O]ffenses over which the Tribunals were afforded jurisdiction were in fact war crimes in the traditional sense, even though some were described as crimes against humanity."[29] Other than crimes against peace, over which national criminal law would have lacked jurisdiction, virtually all of the crimes charged by the IMT could just as well have been charged as violations of the law of war or, where German nationals were victims, violations of German law. "The novelty of the Charter consisted only in constituting a competent jurisdiction for the punishment of

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[25]Article 6(c) of the IMT Charter, as modified by Four-Power Protocol of 6 Oct. 1945.
[26]Wright, "War Crimes Under International Law," 49.
[27]Brownlie, Principles of Public International Law, 562.
[28]Nuremberg Principle VI.b.
[29]Green, "Is There An International Criminal Law?" 255.

what the Law of Nations had constituted an international crime before the Tribunal was established."[30] Still, one should distinguish war crimes as defined in the IMT Charter from crimes against peace and crimes against humanity. To lump them all under the rubric of "war crimes" confuses concepts of different meaning.

In the public mind the Nuremberg trial, the Subsequent Proceedings, and the trials pursuant to Allied Control Council Law Number 10 are often thought as the single, highly-publicized tribunal involving twenty-two of the most senior Nazi defendants, including Goering, Hess, and Speer. But of course the Nuremberg trials, "a code-name so common that it seems silly not to use it,"[31] infer a number of proceedings held in numerous locations.

The first of the Nuremberg tribunals came to order in November 1945. Their companion tribunal, the IMT for the Far East, opened in Tokyo in April 1946, to initially try twenty-eight senior Japanese defendants. The Far East IMT, with its own diplomatic history, employed different, less legalistic rules and procedures.[32]

But in October 1945, before either the Far East or Nuremberg IMTs opened, General Tomoyuki Yamashita went on trial in Manila before a military commission — neither an international tribunal nor an IMT. Yamashita was charged with violating the law of war by failing to control his troops and permitting them to commit atrocities. On 7 December 1945, fourth anniversary of the Pearl Harbor attack, the five Americans who sat in judgement of Yamashita — all

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[30]Brownlie, International Law and the Use of Force, 168; To the same effect: Rowe, Defence, 152; and Lauterpacht, "The Subjects of the Law of Nations," pt. 2, 109.

[31]Best, Humanity in Warfare, 291.

[32]John A. Appleman, Military Tribunals and International Crimes (Indiana: Bobbs-Merrill, 1954), vii; and, Dept. of the Army, International Law, vol. II, 233-34.

U.S. Army generals, none trained in the law — found him guilty and sentenced him to death.[33]

Argument regarding Yamashita's culpability and the trial procedure employed in his conviction continues today.[34] He was found guilty of failure "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...and he...thereby violated the laws of war."[35] Because he was found to have either "willfully permitted...or secretly ordered"[36] the crimes charged, his conviction did *not*, as often asserted, establish a principle of a commander's unqualified criminal responsibility for the actions of subordinates.[37] This distinction was also significant in the Calley court-martial and potentially so in the Son Thang trials.

Yamashita's conviction was followed by his unsuccessful appeal to the U.S. Supreme Court.* The passionate dissenting opinions of two Justices ("Our [victor's] standards of judgement are whatever we wish to make them,"[38] one wrote with stinging sarcasm) are often quoted in defending law of war violators.

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[33]George F. Guy, "The Defense of General Yamashita," Yearbook 1981 (Wash.: Supreme Court Historical Society, 1981), 52-67.

[34]For a balanced legal assessment see, Richard L. Lael, The Yamashita Precedent (Delaware: Scholarly Resources, 1982).

[35]*In the Matter of the Application of General Tomoyuki Yamashita*, 327 U.S. 1, 13-14 (1945).

[36]From the commission's opinion, quoted in Philip R. Piccigallo, The Japanese on Trial (Texas: University of Texas Press, 1979), 54.

[37]Gard, "Remarks," in Trooboff, Law and Responsibility in Warfare, 229

* Actually a writ of habeas corpus application, the Court did not consider the guilt or innocence of Yamashita, but only reviewed the power of the military commission to try him.

[38]*In the Matter of Yamashita*, 35 (Murphy, J., dissenting).

Yamashita was hanged a mere four months after his trial began. "...Yamashita's trial did little to add to the trust of thoughtful people in military justice."[39]

In the Vietnam War, the acquittal of Captain Ernest L. Medina, Calley's immediate superior at My Lai, has been cited as evidence that the U.S. applies the Yamashita standard of near-strict liability only to its enemies.[40] Medina, like Yamashita, was charged with culpable negligence in failing to control his subordinates. Medina's acquittal, however, was grounded upon an instruction given the court-martial panel wherein it was stressed that conviction required that Medina have had *actual* knowledge of Calley's platoon's acts. "There is general agreement today that the instructions of the military judge were wrong."[41] The instruction was, however, given precisely as requested by the Army prosecutors.[42] The proper standard, contained in the U.S. law of war field manual,[43] requires only that the accused reasonably *should* have had such knowledge. The Medina case is merely evidence of a careless prosecution and little else. The Yamashita principle, that commanders may be held personally liable for the war crimes of their troops which they knew of, or which they reasonably stood have known of, remains valid and applicable.

At Nuremberg, meanwhile, nineteen of the original defendants were found guilty of one or more counts. The irony of a Soviet judge on the panel that found Germans guilty of aggressive war, when the Soviet Union had been

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[39]Arthur E. Sutherland, "The Constitution, the Civilian, and Military Justice," 35 St. John's L. Rev. 215, 220 (1961).

[40]Leonard B. Boudin, "Remarks," in Trooboff, Law and Responsibility in Warfare, 213.

[41]Lewy, America in Vietnam, 360.

[42]Eckhardt, "Command Criminal Responsibility," 18, wherein Eckhardt, Medina's prosecutor, confirms the error.

[43]Dept. of the Army, The Law of Land Warfare, par. 501.

expelled from the League of Nations only six years earlier for the same offense, did not go unnoticed.[44]

Another thirteen non-IMT tribunals were then held at Nuremberg under Control Council Law No. 10 ("Subsequent Proceedings"), employing civilian jurists and concluding in April 1949.[45] At Dachau another 489 non-IMT tribunals were held.[46] In Tokyo, the Far East IMT trials continued,* as did other non-IMT trials throughout the world. Accurate figures as to the number tried cannot be known. German postwar judges sentenced 5,288 Nazis,[47] and as late as 1961 West Germany was still averaging one war crime trial every three weeks.[48] As best as can be determined, the U.S. eventually tried 950 cases; the British, 541. France, Australia, the Netherlands, Poland, Norway, Canada, China and Greece accounted for another 625 cases, and Russia an unknown but certainly large number.[49] Other nations — Hungary, Rumania, Bulgaria — conducted war crimes trials, as well.[50]

2.1.c. After Nuremberg: New Norms? What was the significance for future conflicts of the IMTs, the Yamashita commission, and the hundreds of military commissions? Little new law was forged, although new norms were articulated and defined. Nor have the trials discouraged the internationally condemned conduct of tyrants such as Pol Pot and Saddam

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[44]For its Nov., 1939, invasion of Finland the Soviet Union became the only nation ever expelled from the League.

[45]Dept. of the Army, International Law, vol. II, 226-33.

[46]Sweeney, Cases and Materials on the International Legal System, 795.

* "Of the two tribunals the Far Eastern one never had the same standing among jurists as the European one and has carried less moral weight as well." Geoffrey Best, Nuremberg and After (Reading: University of Reading, 1984), 10.

[47]Ingo Müller, Hitler's Justice (Massachusetts: Harvard University Press, 1991), 274.

[48]Dept. of the Army, International Law, vol. II, 235.

[49]Appleman, International Tribunals and International Crimes, 267. Totals vary from source to source.

[50]U.N. War Crimes Commission, History of the United Nations War Crimes Commission (London: U.N., 1948), 515.

Hussein. But even in the cases of simple *malum in se* war crimes, the trials fulfilled a compelling purpose of the criminal law in that they replaced private, uncontrolled vengeance with the measured process of fixing guilt - this alone of significant social value.[51]

> [The tribunal] enabled a public record to be compiled and gave the defendants a chance to say what they could in their behalf, which for most of them was very little. As a result their moral guilt was established more convincingly in the eyes of the world...[52]

"The IMT also went far to re-affirm the validity of the norms of international humanitarian law..."[53] Nuremberg was a providential convergence of world opinion on a scale that made feasible the articulation of those previously inchoate norms. Beyond the trials themselves, and the reformation of international humanitarian law they encouraged, their legacy was the Nuremberg Principles.

In December 1946 the U.N. General Assembly affirmed the principles of international law contained in the IMT Charter, ratified the tribunal's judgements, and asked the U.N. International Law Commission to formulate concrete principles for U.N. consideration. (The Assembly had affirmed the principles without noting what they considered them to be.) In 1950 the Commission presented seven Nuremberg Principles to the General Assembly.[54] (Appendix B) For our purposes the relevant Principles are those four which ascribe personal responsibility for crimes against international law, exclude superior orders as an absolute defense, affirm the right to a fair trial, and specify certain crimes under international law as war crimes.

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[51]Judith N. Shklar, Legalism (Massachusetts: Harvard University Press, 1964), 158.
[52]Richard A. Posner, The Problems of Jurisprudence (Massachusetts: Harvard University Press, 1990), 229.
[53]McCoubrey, International Humanitarian Law, 217.
[54]U.N., Yearbook of the International Law Commission, 1950, vol. II (NY: U.N., 1957), 374.

But the General Assembly has never affirmed the principles,[55] in part because of the sensitivity of states about recognizing the legitimacy of disobeying superior orders.[56] "In short," Professor Schwarzenberger writes, "the matter was adjourned indefinitely."[57]

Nor have the Nuremberg Principles been explicitly incorporated in the military law of any of the four powers responsible for the IMT Charter.[58] Professor Kelsen criticized the IMTs themselves as the acts of captors who created new law, conducted the prosecution, and sat in judgement.[59] Others have been similarly critical of the IMTs. American judge Learned Hand referred to them as "a step backward in international law, and a precedent that will prove embarrassing..."[60] Supreme Court Justice William O. Douglas reportedly thought them "unprincipled."[61] Laymen, too, have sometimes been less than charitable: "It is difficult to put much faith in those who try to play Solomon when they burn down the city first and then set up court in the ruins."[62] Other writers refer to Nuremberg and its Principles as "a legal anomaly and an historical oddity,"[63] "a political football;"[64] and as merely "a noble experiment."[65]

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[55]U.N., Yearbook of the International Law Commission, 1954, vol. II (NY: U.N., 1960), 149.

[56]Adam Roberts and Benedict Kingsbury, eds., United Nations, Divided World (Oxford: Clarendon Press, 1988), 20.

[57]Schwarzenberger, International Law, vol. II, 531.

[58]Ibid., 538. "It is always easier to devise rules for others, especially one's defeated enemies, than for oneself."

[59]Hans Kelsen, "Will the Judgement of the Nuremberg Trial Against the Major War Criminals Constitute A Precedent in International Law?" I International Law Quarterly 153, 167-71 (1947).

[60]H.K. Thompson and Henry Strutz, eds., Doenitz At Nuremberg: A Reappraisal (California: Institute for Historical Review, 1983), 1.

[61]Ibid., 196.

[62]Bradley F. Smith, Reaching Judgement at Nuremberg (NY: Basic Books, 1977), 302.

[63]Robert A. Friedlander, "Problems of Enforcing International Criminal Law," in M. Cherif Bassiouni, ed., International Criminal Law, vol. III, Enforcement (NY: Transnational Publishers, 1987), 16.

[64]Best, Nuremberg and After, 5.

The Nuremberg IMT and Principles represent considerably more than those things, however. Failure to affirm the Principles notwithstanding, Nuremberg is the precedent that aggressive war is a crime susceptible of legal proof and judicial determination. It demonstrates that there is risk, however remote, of prosecution.[66] The participation of the major powers in the IMTs "constitutes very strong evidence that [they] accept as a legal norm the criminality of certain acts whenever and by whomsoever committed."[67] "Numerous states have...accepted the Nuremberg Charter as a source of general international Law."[68] The Principles are testimony to the idea that inhumane wartime excesses are of more than military concern.

> Whatever else the Nuremberg Trials did, they firmly established in the legal consciousness the proposition that there are certain crimes of international concern or crimes under international law....Treaty practice since 1945 within several international organizations has demonstrated a remarkable range of application of this principle.[69]

The Nuremberg and Far East IMTs and the uncounted national commissions have other lasting and salutary effect, as well. "Perhaps the most significant, and the most controversial achievement of Nürnberg was the application and clarification of the doctrine of individual responsibility."[70]

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[65]Warnke, "Remarks" in Trooboff, Law and Responsibility in Warfare, 190.

[66]Following the Gulf War there were numerous references to the possibility of Nuremberg-style tribunals, *e.g.*: William F. Buckley, "Nuremberg Left the Precedent," International Herald Tribune, 24 April 1991, 4; Mark Nelson, "EC Seeks Trial for Iraqi Leader on War Crimes," Wall Street Journal, 16 April 1991, 2; David Gow, "Genscher Urges an Iraqi War Trial," The Guardian, 15 April 1991, 8; Jill Smolowe, "A Case of Nuremberg II?" Time (11 March 1991), 38. Americans also fell under suspicion: Simon Tisdall, "US Navy Ignored Iraqi White Flag," The Guardian, 13 June 1991, 22; "Iraqi Soldiers 'Shot as They Surrendered'," Daily Telegraph, 13 June 1991, 9.

[67]Brownlie, International Law and the Use of Force, 175.

[68]Ibid., 191.

[69]Roger S. Clark, "The Influence of the Nuremberg Trial on the Development of International Law," in George Ginsburgs and V.N. Kudriavtsev, eds., The Nuremberg Trial and International Law (Netherlands: Martinus Nijhoff, 1990), 253.

[70]Benjamin B. Ferencz, "War Crimes Law and the Vietnam War," 17 American University L. Rev. 403, 408 (1968).

Additionally, in future trials charging *malum in se* war crimes, the IMTs confirm the responsibility of commanders, in certain circumstances, for the illegal acts of their subordinates[71] and expand the principle that individuals, senior and junior, may be held criminally liable under international law for war crimes.[72] (See section 4.3.) "Such trials...demonstrate by acts louder than words that human rights can be vindicated and inhuman offenses can be punished."[73]

Despite the continuing proliferation of armed conflicts, with Nuremberg the law of war reached a high water mark. "Victor's justice it may have been but justice for the most part it remained."[74] The nature of the crimes charged were such that both prosecution and judgement *must* have been by victor nations over vanquished foes — the worldwide scope of Axis aggression left few neutrals.

2.1.d. Applying Law of War: International or Municipal Law?

A state's armed forces, as any category of state official, are agents of that state and usual principles of legal responsibility apply. That is, the state itself may be liable for its failure to control its armed forces when, under the circumstances, it is reasonable that a duty of control be imposed.[75] But the Son Thang murders, unauthorized criminal acts, were not acts of state.[76] Accepting that the murders raised individual accountability, what law applied —

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[71]W. Hays Parks, "Command Responsibility for War Crimes," 62 Military L. Rev. 1, 77 (1973); Piccigallo, The Japanese on Trial, 55; Best, Nuremberg and After, 21.

[72]Taylor, Nuremberg and Vietnam, 82-83.

[73]Quincy Wright, "War Criminals," 39 AJIL 257, 285 (1945).

[74]Best, Nuremberg and After, 26.

[75]Ian Brownlie, System of the Law of Nations: State Responsibility, pt. I (Oxford: Clarendon Press, 1983), 140; and, N.A. Maryan Green, International Law , 3d ed. (London: Pitman, 1987), 260.

[76]For discussion of factors which might make a state responsible for its soldiers' criminal acts, an application of the act of state doctrine, see Brownlie, ibid., 159-66.

international or municipal? When, if ever, does international law become municipal law?

The relationship of international law and the individual has been described. (See section 1.3.c.) "The only effective sanction for crimes against peace is the punishment of the individual...directly responsible."[77] International law clearly applies to individuals as well as to states but it "cannot work without the constant help, co-operation, and support of national legal systems....International law cannot stand on its own feet without its 'crutches', that is municipal law."[78] That is in large part due to the absence of judicial settlement rules concerning international law and convention.[79]

> The great difference between international law and any system of national law lies in the reality and effectiveness of the sanctions attending breaches of the latter. One famous school of jurisprudence maintains that there is simply no law where there is no sovereign power to enforce it.[80]

The enforcement mechanisms in modern international law apply to states and, as noted, seldom reach individuals in any direct way.

Is municipal law in a position, then, to impose *individual* responsibility for international criminality? It is. Beyond serving national interests, international law requires municipal legal systems to provide the institutional machinery and forums for development of international legal order.[81] By serving these ends municipal law – the national or internal law of a state[82] – ensures that international law

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[77]Brownlie, International Law and the Use of Force, 154.

[78]Cassese, International Law in A Divided World, 15.

[79]DeLupis, The Law of War, 320.

[80]Best, Humanity in Warfare, 11.

[81]Falk, The Role of Domestic Courts in the International Legal Order, xi, 65.

[82]Akehurst, A Modern Introduction to International Law, 43. Another description of municipal law is that of Ian Brownlie: "Municipal law applies within a state and regulates the relations of its citizens with each other and with the executive." Principles of Public International Law, 33.

does indeed provide individual punishment for its breach. War crimes are such an instance.

The principle that law of war violators are liable to trial by municipal courts of the injured state, particularly when those violations are also offenses against general criminal law, is settled, affirmed by the Institute of International Law as long ago as 1880.[83] Following World War I the principle of first competence of municipal courts to try law of war violations was upheld by treaty.[84] That was recognition that "war crimes in the narrower sense of the term are at the same time violations of national (municipal) law in so far as they constitute crimes according to the general criminal law of the State..."[85]

With the Geneva Conventions of 1949 what had previously been a national option became a *duty* of contracting parties, where grave breaches are concerned: a duty to provide "effective penal sanctions" under the signatories' own municipal law. Contracting states agreed to search out those alleged to have committed grave breaches and to bring them before their own courts, or hand them to another contracting party making out a *prima facie* case.[86] "Thus," Professor Schwarzenberger wrote, "in these Conventions, a universal criminal jurisdiction of a mandatory character under internationally postulated municipal law has been created."[87]

Referring to the trial of enemy war criminals, the British Manual of Military Law reads:

> War crimes are crimes *ex jure gentium* and are thus triable by the courts of all states....Persons accused of war crimes are properly charged not with an offense

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[83]Garner, "Punishment of Offenders Against the Laws and Customs of War," 71.

[84]Sandoz, "Penal Aspects of International Humanitarian Law," in Bassiouni, International Criminal Law, vol. I, 214. The Treaty of Vereeniging, May, 1902, ending the Boer War, which reserved the right to try Boers before military tribunals for law of war violations, preceded the Treaty of Versailles in this regard.

[85]Kelsen, "Collective and Individual Responsibility in International Law," 531.

[86]Arts. 49, 50, 129, and 146 of Conventions I, II, III, and IV, respectively.

[87]Schwarzenberger, International Law, vol. II, 459.

> against the municipal law...but with an offense or offenses against the laws and customs of war...[88]

Few states, however, have enacted legislation specifically providing penal sanctions for breaches, choosing instead to ratify the Conventions[89] and rely on their own existing criminal law.[90]

Problems of international criminal jurisdiction remain, as well. (In fact, since the 1949 Geneva Conventions came into force, no case is known of any prosecution in any state for having committed a grave breach, as such. Instead, violators have been tried for the corresponding common crime under domestic law.)[91] Nevertheless, the 1949 provisions represent a significant advance in procedural law and a "momentous departure"[92] from customary law. Although an international consensus regarding the principal of universal jurisdiction remains elusive, the 1949 Conventions raise the principle of universal jurisdiction over war crimes in treaty form, making them triable in municipal courts.

The concept of universal jurisdiction is more complex than it initially appears. In exercising universal jurisdiction in the trial of war crimes, what law does the community of nations anticipate being applied? What courts are recognized to possess universal jurisdiction in applying that law? International law does not necessarily accept

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[88]HMSO, Manual of Military Law, pt. III, par. 637. Commencing with the 1914 edition, part III of the Manual, a separate volume, was concerned solely with law of war. Written by scholars the calibre of Oppenheim (1914 edition) and Lauterpacht (1956 edition), it provided a summary of the law, and reprinted pertinent treaties and conventions. Editions of the Manual subsequent to 1956 dispense with part III, anticipating its replacement by Joint Service Manual # 385, The Law of Armed Conflict. JSM 385, however, has met continuing delay and the long-out-of-print 1956 part III continues to be consulted.

[89]Frédéric deMulinen, "Law of War and Armed Forces, " IX *Recueils de la Société Internationale de Droit Pénal Militaire,* 35, 43 (1982).

[90]Kalshoven, Constraints on the Waging of War, 69.

[91]Gerald I.A.D. Draper, "Wars of National Liberation and War Criminality," in Michael Howard, ed., Restraints on War (Oxford: Oxford University Press, 1979), 153-54.

[92]Cassese, International Law in A Divided World, 275. Cassese argues that the very boldness of their departure renders them ineffectual in practice. "A dead letter." Vietnam-era prosecutions suggest the error of his assertion.

whatever definition of international crime a municipal law may proffer. "Rather, what is left to municipal law is the adoption of international law as the governing law of what is an international crime."[93] Municipal law does not have jurisdiction to try a municipal offense which is similar to, but not identical to, an international crime.

> If a country introduces legislation describing some offense under its own criminal law as constituting, for example, piracy, and includes within that term offences which do not strictly fall within the international law definition, then that law can only be invoked to establish jurisdiction against nationals or residents of the country in question...[94]

Only when municipal law adopts as its own the international law definition of a crime is jurisdiction applied in regard to the municipal law recognized as the exercise of universal jurisdiction under international law.[95] Then, Professor Lauterpacht notes, "rights and duties created by international law are directly applicable to individuals through the instrumentality of municipal courts..."[96]

Armed forces commonly try their own members for law of war offenses. Members charged with breach of Geneva conventions are often tried by court-martial without requiring war crime charges *per se*.[97] U.S. practice regarding the charging of breaches is three-pronged. War crimes are charged as such only if "they are committed by enemy nationals or by persons serving the interests of the enemy state."[98] Breaches by individuals subject to military law are charged according to provisions of the U.S. military criminal

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[93]*Polyukhovich v The Commonwealth*, 65 Australian L. J. 521, 540 (1991), a particularly instructive case that examines, *inter alia*, universal jurisdiction *vis-a-vis* municipal law.

[94]Leslie C. Green, "International Crimes and the Legal Process," 29 International and Comparative L. Quarterly 567, 571 (1980).

[95]*Polyukhovich v Commonwealth*, 541.

[96]Lauterpacht, "The Subjects of the Law of Nations," pt. I, 448.

[97]Green, "Superior Orders and the Reasonable Man," 61.

[98]Dept. of the Army, The Law of Land Warfare, par. 507.b.

justice system.[99] Finally, violations by nonmilitary persons usually constitute and may be charged as violations of state or federal criminal law.[100] "[Military] command, administrative, and judicial authorities are expected to apply the full body of relevant international law to a war crimes case, but the charges themselves are municipal law charges."[101] In the latter two instances, charges against civilians and one's own soldiers, the law applied is municipal law, effectively raising international legal responsibility in the trying forum.[102]

When the infrequent law of war issue *stricto sensu* appears before a municipal court, however charged, it is tried in accordance with international law, not by the municipal law of the trying nation. Occasionally the law of war may be adapted to local custom,[103] but generally its rules are of universal application, there being "a general duty to bring internal law into conformity with obligations under international law."[104]

Given the firm link between courts-martial and the international law of war, and that the U.S. tries its own soldiers for breaches, what law is applied in those courts-martial — international law or municipal? There may be departures between the two with implications for substantive law, procedure, and review.

With the exception of some special defenses (see 6.1.b.), U.S. municipal law, as enacted in the Uniform Code of Military Justice (UCMJ), is applied in trials of law of war violators. It must be recalled, however, that the law of

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[99]Municipal courts lack *in personam* jurisdiction over *enemy* persons for war crimes committed as part of belligerent operations. George A. Finch, "Jurisdiction of Local Courts to Try Enemy Persons For War Crimes," 14 AJIL 218 (1920). See, *Coleman v Tennessee,* 97 U.S. 509 (1878), to that effect.

[100]Ibid., Finch.

[101]O'Brien, "The Law of War, Command Responsibility, and Vietnam," 618.

[102]DeLupis, The Law of War, 352.

[103]*e.g.*, Majid Khadduri, War and Peace in the Law of Islam (London: Luzac, 1940).

[104]Brownlie, Principles of Public International Law, 36.

war, an aspect of international law, is inextricably interwoven into the UCMJ and its implementing *Manual for Courts-Martial*. (See section 1.4.) Therefore, it may correctly be said that national and international law are *both* applied at court-martial. But it is a national law scaffolding upon which the international law implementing mechanism is erected. The U.S. soldier-violator, then, faces charges brought under the UCMJ.

> That he is also subject to international law, in particular the laws of war, and in addition to his own military or national law, is not doubted....Since a prosecution under national law is likely to raise many fewer practical problems for both the prosecution and the defense than one under international law, the former is clearly to be preferred...[105]

And "it does not appear that the courts of the United States have been so sophisticated as to allege that they were applying international law while covertly invoking municipal law."[106]

International law is clearly a part of the law of the United States, and "where there is neither a [contrary] treaty, statute, nor controlling judicial precedent...all domestic courts must give effect to customary international law."[107] Its breaches are recognized as punishable independently of internal law.[108] Accordingly, prosecutions under the UCMJ may be grounded in international law and, in fact, that is common court-martial practice when construing status of forces agreements,[109] post-World War II peace treaty duties,[110] and other multi-national matters.[111]

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[105]Rowe, "Murder and the Law of War," 226.

[106]Baxter, "Municipal and International Law Basis of Jurisdiction Over War Crimes," 383.

[107]48 C.J.S. *International Law* §4 (NY: American Law Book Co., 1954), 8, citing *Farmer v Roundtree*, 149 F. Supp. 327 (D.C. Tenn., 11953), *cert. denied* 357 U.S. 906.

[108]*Republica v deLongchamps.*

[109]*U.S. v Sinigar*, 20 CMR 46 (USCMA, 1955);*U.S. v Cadenhead*, 34 CMR 51 (USCMA, 1963); *U.S. v Carter*, 36 CMR 433 (USCMA, 1966).

[110]*U.S. v DeLeo*, 17 CMR 148 (USCMA, 1954); *U.S. v Vierra*, 33 CMR 260 (USCMA, 1963).

So, too, is the law of war a part of U.S. law.[112] "The customary law of war will be strictly observed by U.S. Forces...and, insofar as it is not inconsistent with any treaty to which the United States is a party, is binding upon...persons serving the United States."[113]

Discussing war crime prosecutions and their relationship to international law, Major General George Prugh, former Judge Advocate General of the Army, says of the UCMJ:

> [Legal personnel] are familiar with it....If you commit a murder, for example, of a civilian which amounts to a violation of the Geneva conventions, why not charge it simply as a murder? You have the same basic elements that have to be proven.[114]

So grave breaches involving the murder of Vietnamese noncombatants were tried as common law crimes under U.S. municipal law, charged as offenses under the UCMJ regardless of the victim's nationality.[115]

> Insistence that these trials be held by the regular... military tribunals provides a certain standard of justice and procedure and insures familiarity of the court.... This minimizes the danger that the courts will deprive the accused of rights because of ignorance.[116]

An application of the customary law of war at U.S. court-martial was the trial of Captain Eugene M. Kotouc, intelligence officer of the parent command of Lieutenant Calley's unit at My Lai. Kotouc was initially accused, *inter alia*, of being a principal to murder by standing by while South Vietnamese soldiers murdered two Vietnamese civilians

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[111] *U.S. v Weiman and Czertok*, 11 CMR 216 (USCMA, 1953), jurisdiction over aliens employed by extraterritorial U.S. forces; *U.S. v Mitchell*, 45 CMR 114 (USCMA, 1972); and *U.S. v Taylor*, 45 CMR 343 (USCMA, 1972), application of a U.S. Executive Order in Japan.

[112] Dommer, "The Problem of Obedience to the Unlawful Order," 306, 315.

[113] Ibid., 318, paraphrasing Dept. of the Army, The Law of Land Warfare, par. 7.c.

[114] Scicchitano, "What's Special About the Bryan Case?" 13.

[115] Prugh, Law at War, 102.

[116] Waldemar A. Solf, "A Response to Telford Taylor's *Nuremberg and Vietnam*," 5 Akron L. Rev. 43, 65 (1972). To the same effect: Bishop, Justice Under Fire, 291.

suspected of being Viet Cong.[117] Such mute complicity is itself a war crime.[118] Though eventually tried for lesser offenses, Kotouc's acts were specifically charged as war crimes,[119] one of the few such instances in the Vietnam War.

The My Lai incident illustrates another potential application of the law of war at court-martial. Testifying in the court-martial of Calley, his company commander, Captain Medina, admitted that the day prior to assaulting My Lai he had directed Calley "to utilize prisoners to lead the elements through the mine fields."[120] Medina was not charged with that violation of Geneva Convention III[121] because occasion to carry out his direction never arose. Had it arisen, whether or not injury to prisoners actually resulted, both Medina and Calley could have been charged with law of war violations — grave breaches denominated as UCMJ infractions. Had a death resulted, Calley could have been charged with murder for carrying out the order, illegal on its face,[122] and Medina charged as a principal; Medina's participation in *all* acts constituting the crime would not have been required,[123] only his sharing of criminal intent and purpose.[124] Had Medina's order been executed and no injury to a prisoner resulted, Calley still would have been liable to

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[117]Michael Bilton and Kevin Sim, Four Hours in My Lai: A War Crime and its Aftermath (London: Viking, 1992), 148

[118]U.N. War Crimes Commission, Law Reports of Trials of War Criminals, vol. IV, *Rauer Case*, 133, 115-17.

[119]Peers, The My Lai Inquiry, 222. Another My Lai accused, 1stLt. Thomas K. Willingham, was charged with offenses specifically denominated "war crimes." In both his and Kotouc's case the specifications (charges) were otherwise worded as ordinary UCMJ offenses. Eventually, charges against Willingham were dropped and Kotouc was acquitted.

[120]*U.S. v Calley*, 46 CMR 1131, 1182.

[121]Arts. 13, 23, 52.

[122]Dommer, "The Problem of Obedience to the Unlawful Order," 308: "A subordinate who carries out the orders of a superior under circumstances evidencing a concert of purpose between the superior and subordinate and a conscious sharing of criminal intent on the part of the subordinate is considered a principal offender."

[123]*U.S. v Lyons*, 28 CMR 292 (USCMA, 1959).

[124]*U.S. v Buchanan*, 41 CMR (USCMA, 1970).

prosecution under the UCMJ for assault, and Medina for solicitation.

It must be acknowledged that law of war offenses do not always neatly correspond to UCMJ breaches. In *U.S. v Hodges* a soldier decapitated the bodies of two VC and, with others, posed for photographs with the bodies – a war crime, although not a grave breach.[125] Hodges was convicted only of an Article 134 offense, conduct to the prejudice of good order and discipline,[126] akin to conviction under section 69 of the U.K.'s Army Act, 1955. Hodges' charges and punishment are not detailed. The maximum confinement imposable upon conviction of Article 134, however, varies from one year to twenty years, depending on the specific charge, but most offenses under this "catch-all" article carry only a three or five year maximum,[127] "and circumstances might well present themselves where this sentence might not be considered to be adequate."[128] Any grave breach that comes to mind, however, suggests a corresponding specific UCMJ charge, the conviction of which allows for a substantial maximum punishment.

Nor does the admixture of international law and municipal law raise an impediment to appellate review. The UCMJ does not contain specific authorization for the Court of Military Appeals to apply international law, but neither does it specify where the Court is to find it's law.[129] As an early Court of Military Appeals judge wrote, "this Court is freer than any in the land – save again the Supreme Court – to find

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[125]Dept. of the Army, Law of Land Warfare, par. 504.c.

[126]*U.S. v Hodges*, cited in Lewy, America in Vietnam, 329. Lewy's unreviewable source was the Dept. of the Army. There is no reported appellate opinion to reveal if Hodges was acquitted of any other charge, or convicted of the sole charge alleged. An additional violation of Art. 92, failure to obey an order (a MACV Directive), with a possible further six years confinement, appears appropriate.

[127]Manual for Courts-Martial, 1969, par. 127.c, Table of Maximum Punishments.

[128]Rowe, "Murder and the Law of War," 220.

[129]Art. 67(d).

its law where it will, to seek...for *principle*..."[130] Indeed, "the whole catalog of sources of law is available to the Court of Military Appeals....[A]s a practical matter it can use any source of law that it feels suits the needs of proper interpretation."[131] "When occasion demands the Court has...felt free to draw upon the international law of armed conflict in reaching its decisions."[132] The Courts numerous decisions invoking that law, as well as the customary law of war, demonstrate the correctness of that assertion and emphasize the free application of the law of war in trials by U.S. courts-martial.

2.2. Vietnam, 1970

The history of the Vietnam War has been related often and well. Here, it is sufficient to recall that a U.S. Marine Corps brigade landed at Da Nang in March 1965, marking the beginning of the escalation of the war.[133] U.S. strength in Vietnam peaked in April 1969. By February 1970, when Randy Herrod and his patrol were charged with the murder of sixteen Vietnamese at Son Thang, troop strength had declined to about 475,000 and would continue to drop until final withdrawal of American combat units in 1973, following the Paris Peace Accords.[134] Throughout the Vietnam War the legal circumstances of the American personnel were unique.

2.2.a. American Forces, Vietnamese Law In a criminal proceeding conducted in Vietnam for the murder of Vietnamese victims, what prevented Vietnamese officials from asserting

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[130]Paul W. Brosman, "The Court: Freer Than Most," 6 Vanderbilt L. Rev. 166, 167 (1953). Italics in original.

[131]Guy A. Zoghby, "Is There A Military Common Law of Crimes?" 27 Military L. Rev. 75 (1965), 91; 107.

[132]Carnahan, "The Law of War in the United States Court of Military Appeals," 333.

[133]Jack Shulimson and Charles M. Johnson, U.S. Marines in Vietnam, 1965 (Wash.: U.S. Marine Corps, 1978), 235.

[134]U.S. Dept. of Defense, Selected Manpower Statistics (Wash.: Directorate for Information, 1983), 128.

legal authority? The Vietnamese civil police and courts continued to operate throughout the American presence.[135] Normally, territorial jurisdiction is exclusive and complete. Yet the Son Thang trials were conducted solely in American military courts.

Jurisdiction, the power of a particular court to hear and decide a case, is examined later (see sections 5.1.c.,d.), but before reaching the courtroom consider the U.S. serviceman's status in Vietnam – his legal standing or capacity in the eyes of the host nation. Status, a concept of diminishing importance in modern jurisprudence, was significant in determining the forum that heard the Son Thang cases.

A state generally has no duty to control the activities of *private* individuals, its nationals, beyond the bounds of state territory.[136] Control of its extra-territorial armed service personnel, agents of the state, is another matter.

> Whenever armed forces are on foreign territory in the service of their home State, they are considered exterritorial and remain, therefore, under its jurisdiction. A crime committed on foreign territory by a member of these forces cannot be punished by the local civil or military authorities, but only by the commanding officer of the forces or by other authorities of their home State. This rule, however...does not apply, if, for example, soldiers belonging to a foreign garrison of a fortress leave the *rayon* of the fortress, not on duty but for recreation and pleasure, and then and there commit a crime. The local authorities are in that case competent to punish them.[137]

The rule described by Professor Oppenheim, whereby a host state surrenders jurisdiction over visiting forces in certain

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[135]Charles A. Joiner, Public Administration in the Saigon Metropolitan Area (Michigan: Agency for International Development, n.d.), 41, 73; and Prugh, Law at War, 27-29.

[136]Brownlie, System of the Law of Nations: State Responsibility, pt. I, 165. A state may incur international responsibility, however, should it fail to exercise due diligence in preventing harm to another state - storming of an embassy, for example.

[137]Oppenheim, International Law, vol. I, Peace, 4th ed., ed. McNair, 670.

circumstances[138] has a long history in the U.S.,[139] Great Britain,[140] and other Western nations.[141]

During World War I, however, the millions of troops on foreign soil raised a need for specific articulation of the jurisdictional status of visiting troops, rather than dependence upon a general rule. The British Empire and France entered such an agreement in 1915, followed by similar conventions involving other ally nations.[142]

In American and British practice since World War II, the legal standing of visiting forces has been a matter of negotiation between the host state and the U.S. or U.K., usually commemorated in a status of forces agreement, or SOFA. "[W]here a crisis situation does not prevail in the host state, various delicate factors will have to be weighed" in determining the question of status and, ultimately, criminal jurisdiction over visiting troops.[143] Whether or not one considers "a crisis situation" to have prevailed in Vietnam when escalation of the war began (there had been an armed American presence in the country since 1954) there existed no Vietnamese-American SOFA.

Instead, the parties looked to informal practice and the Agreement for Mutual Defense Assistance in Indochina,[144] commonly referred to as the Pentalateral Agreement, to define jurisdictional issues. The Pentalateral Agreement was concluded between Vietnam, France, Cambodia, Laos, and the

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[138]The varying situations where, absent other agreement, jurisdictional "waiver" does or does not apply are exhaustively explored in three articles by G.P. Barton, "Foreign Armed Forces," 26 BYIL 380 (1949), 27 BYIL 186 (1950), and 31 BYIL 341 (1954).

[139]*The Schooner Exchange v McFaddon & Others*, 11 U.S. 116 (1812).

[140]*Chung Chi v The King.*

[141]*The Casablanca case* (1909), Hague Court Reports, i.110.

[142]Archibald King, "Jurisdiction Over Friendly Foreign Armed Forces," 36 AJIL 539 (1942).

[143]D.S. Wijewardane, "Criminal Jurisdiction Over Visiting Forces With Special Reference to International Forces," 41 BYIL 122, 196 (1965-66), the most authoritative article on the subject.

[144]2 U.S.T. 2757, T.I.A.S. No. 2447.

U.S. in 1950, long before the 1965 landings. Less than six pages long, including annexes, the Agreement's terms were broad and general. Like similar pacts with other nations, the Pentalateral Agreement provided that American forces entering Vietnam would be considered members of the U.S. diplomatic mission with the same legal status as actual members of the mission of corresponding grade. Military personnel were divided into three categories: senior military members of the mission with full diplomatic status and full immunity; a lesser undefined category which also would enjoy exclusion from Vietnamese civil and criminal jurisdiction; and the third category, whose membership was again undefined, with the similarly undefined legal status of clerical personnel of the diplomatic mission. In 1958, the U.S. advised the Vietnamese government that it would consider top U.S. commanders to be in the first category, all other officers to be in the second category, and enlisted men to be in the third category. In terms of legal status then, these "extremely liberal treaty provisions"[145] viewed U.S. infantrymen as diplomatic mission clerks.

In normal diplomatic practice involving similar agreements with other states – Belgium, Nationalist China, and Norway, for example – personnel of the third category enjoy no immunity whatsoever and are subject to the full jurisdiction of the receiving [host] state."[146] Not so, where the Pentalateral Agreement was concerned. "[T]he general issue...was a matter of interest and discussion in early 1965 in Saigon," recalls the Army's then-senior lawyer in Vietnam. "There was no interest on either the US or the RVN side to change the *modus vivendi* that existed via the Pentalateral Agreement."[147]

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[145]Wade S. Hooker, Jr., and David H. Savasten, "The Geneva Convention of 1949: Application in the Vietnamese Conflict," 5 Virginia J. of International L. 243, 244.

[146]Serge Lazareff, Status of Military Forces Under Current International Law (Netherlands: A.W. Sijthoff, 1971), 51.

[147]MGen. George S. Prugh, California, to author, London, 29 Nov. 1991.

The Pentalateral Agreement and 1958 advisory (addendum) specifying the U.S. military's status under it, are the accords referred to by General William Westmoreland when he writes that "under agreements preceding American commitment ...discipline of American troops was to be an American responsibility."[148] Although apparently unaware of America's international practice to the contrary as to enlisted personnel, Westmoreland's statement was accurate, for the usual international practice was not applied in South Vietnam.

> When the Pentalateral Agreement was signed in 1950, the signatory parties obviously meant the agreement to apply to the activities of the small U.S. Military Advisory Assistance Group...There were 200 to 300 of these...It is unlikely that the diplomats ever imagined that its simple provisions would govern the legal status and activities of almost 600,000 Americans in Vietnam.[149]

The vague Pentalateral Agreement remained in force, seeming to grant enlisted personnel an undefined, semi-diplomatic immunity. A clearer or more detailed agreement was never negotiated and jurisdiction over low-ranking U.S. troops charged with murdering Vietnamese could not be predicted with assurance. That was because although the *practice* was for the U.S. military to discipline its own, the Agreement neither required that approach, nor specified immunity from host nation laws for third category U.S. forces — the low-ranking combat troops who were most likely to fall afoul of the criminal law.

2.2.b. The "Mere Gook Rule" South Vietnam is a nation divided into provinces, each province subdivided into districts. Districts have many villages, most made up of several hamlets. The Vietnamese are an agrarian society

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[148]Gen. William C. Westmoreland, A Soldier Reports (NY: Doubleday, 1976), 247. There was another agreement as to civilian personnel (MACV Directive 190-1 of 23 June 1967) but not as to service personnel. MACV Directive 27-1 of 16 April 1965, par. 10, did explicate U.S. military jurisdictional status in much the same terms as the Agreement and its advisory.

[149]Prugh, Law at War, 118.

whose loyalties have always been decidedly local. For those not uprooted by the war, life centered around family and hamlet.[150]

The South Vietnamese encountered in the combat zone were, by Western standards, unsophisticated and unschooled. It was impossible to differentiate the peasant farmer from the enemy. Roughly speaking, the Vietnamese enemy fell into three categories: local militia, or Viet Cong (VC), who often were also local farmers; and main force regulars.[151] The uniform of the VC was the dress of the peasant population: the thin, black *ao abab*, a pajama-like tunic and trousers worn by both males and females.

> [T]he population did not try to sit out the war...The people were the enemy. It was a brutal war of snipers, ambushes, and old women who planted booby traps — and where the Search & Destroy doctrine was most cruelly interpreted by frustrated and inexperienced U.S. forces.[152]

While this pessimistic view did not reflect the attitude of all Americans toward the South Vietnamese it was that of a substantial portion and gained ascendancy as the conflict wore on. Early in the war, U.S. troops were better trained and disciplined, with fewer Reservists involved in the fighting. Over time, increased manpower needs, lowered recruiting standards, and the war's political unpopularity were reflected in the soldiers' attitudes toward the Vietnamese. After repeated instances of children killing U.S. soldiers from ambush and women victimizing soldiers through booby traps and deadly ruses, servicemen grew wary and suspicious of all Vietnamese, regardless of sex or age.[153]

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[150]Ibid., 17.

[151]Bernard B. Fall, Street Without Joy (NY: Pantheon Books, 1961; NY: Schocken Books, 1972), 350. This is a simplified description of the enemy force. A detailed, authoritative breakdown is in: Douglas Pike, PAVN: The People's Army of Vietnam (NY: Presidio Press, 1986), 89-91, 247-51.

[152]Keith W. Nolan, Death Valley (California: Presidio Press, 1987), 22.

[153]Dept. of the Army, Review of the Preliminary Investigation into the My Lai Incident, hereafter: Peers Inquiry (Wash.: Dept. of the Army, 1970), ch. 8.I., reprinted in

"So you begin to think they're all your enemies. And that all of them are something not quite human...You give them names to depersonalize them, to categorize them...They become dinks and slopes and slants and gooks..."[154] "The rule in Viet-Nam was the M.G.R. — the 'mere gook rule': that it was no crime to kill or torture or rob or maim a Vietnamese because he was a mere gook."[155] "The trouble is no one sees the Vietnamese as people. They're not people. Therefore it doesn't matter what you do to them."[156]

Colonel David J. Cassady was a judge advocate in Vietnam. He recalls prosecuting a Marine charged with rape. The accused, against whom the evidence was clear, raised consent as a defense. The officer-jurors found the accused not guilty. Colonel Cassady later spoke to the officer who had been the senior juror and recalls him saying: "There's not much doubt what happened there, but we're not going to ruin the lives of these young Marines for some Vietnamese. 'Vietnamese' wasn't the word he used," Colonel Cassady added. "This became referred to — and there were other cases similar to that one...the mere gook theory."[157]

The word "gook" originally referred not to Vietnamese, but to Nicaraguans, its first use noted during the U.S. intervention in Nicaragua in 1912.[158] The term was common in Vietnam.

> Callousness toward the Vietnamese was also caused by the writings and pronouncements of many American journalists and politicians who...for years exaggerated the faults of the South Vietnamese...and gradually created an image of

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Joseph Goldstein, Burke Marshall, and Jack Schwartz, The My Lai Massacre and Its Cover-up (NY: Free Press, 1970), 199.

[154]Richard Hammer, One Morning in the War (NY: Coward-McCann, 1970), 71.

[155]Richard Hammer, The Court-Martial of Lt. Calley (NY: Coward-McCann & Geoghegan, 1971), 392.

[156]Taylor, Nuremberg and Vietnam, 171.

[157]Col. David J. Cassady, interview by author, 4 Nov. 1986, Wash., tape recording 6493, Oral History Collection, Marine Corps Historical Center, Wash.

[158]John R. Elting, Dan Craig and Ernest Deal, A Dictionary of Soldier Talk (NY: Scribner's, 1985), 135.

> people not worth defending, if not altogether worthless.[159]

"[O]rdinary soldiers under the strains and stresses of modern warfare can hardly be expected to bear [law of war] injunctions in mind," writes Professor L.C. Green, "when the enemy...has been denigrated by their high command, their political leaders and the media to the level of uncivilized sub-humans."[160]

But passing the buck of societal prejudice to the media and senior commanders is too easy, too facile. Few wars have had so little propaganda raised against the enemy by national or military leadership. Significant segments of the U.S. and British populations even viewed the Viet Cong with respect and admiration. The mind-set illustrated by the "mere gook rule," ubiquitous in conversation among U.S. forces of all ranks in Vietnam, reflected casual, unthinking racism and cultural arrogance. True, combatants have always used appellations of varying crudeness to describe their enemies; redcoats, rebs, and krauts, for example. Nor does the military hold a copyright on the use of such terms. But "wherever such antipathies exist, the prospects for limitation, restraint, and humanity in warfare have always been...poor indeed."[161]

Lieutenant General William Peers, senior member of the panel that investigated the My Lai incident and its cover-up, reported:

> The most disturbing factor we encountered was the low regard in which some of the men held the Vietnamese...considering them subhuman, on the level of dogs....Some of the men never referred to Vietnamese as anything but "gooks"....We thought that perhaps the units had included an unusual number of men of inferior quality....The result [of a personnel analysis] concluded

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[159]Lewy, America in Vietnam , 310.

[160]Green, "Aftermath of Vietnam," in Falk, The Vietnam War and International Law, vol. IV, 147, 172.

[161]Best, Humanity in Warfare, 220.

> that the men...were about average as compared with other units in the Army."[162]

Sociologists are familiar with the result of such dehumanization.

> When victims are dehumanized...the moral restraints against killing or harming them become less effective. Groups of people who are systematically demonized, assigned to inferior or dangerous categories, and identified by derogatory labels are readily excluded from the bonds of human empathy and the protection of moral and legal precepts.[163]

The part played by the "mere gook rule" in the Son Thang murders cannot be documented but was surely significant.

2.2.c. Free Fire Zones: Fire at Will A significant nonlegal factor in the Son Thang courts-martial was the free fire zone. Throughout the Vietnam War, unless actually being fired upon, it was necessary for U.S. combat forces to obtain explicit permission to employ their weapons against the enemy – and this constraint was generally enforced, often to the puzzlement and anger of U.S. personnel endangered by it. Enforced, that is, unless the unit was operating in a free fire zone.*

In 1966, certain areas in South Vietnam were designated by the Vietnamese government as being uninhabited and declared cleared areas, known as "free fire zones." A free fire zone was ostensibly free of Vietnamese populace and approved for employment of military fire and maneuver.[164] Often the populace had been forcibly removed to refugee camps in order to clear the area. In a resulting free fire zone the enemy could be taken under fire as soon as detected.

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[162]Peers, The My Lai Inquiry, 230-31; to the same effect: Peter Karsten, Law, Soldiers, and Combat (Connecticut: Greenwood Press, 1978), 35.

[163]Herbert C. Kelman and V. Lee Hamilton, Crimes of Obedience (Connecticut: Yale University Press, 1989), 163.

* Officially, the term "free fire zone" was replaced in 1967 by "specified strike zone." No one outside General Westmoreland's headquarters paid attention to the semantic change.

[164]Dept. of the Army, Peers Inquiry, ch. 9.B.1.c, in Goldstein, The My Lai Massacre, 212.

Otherwise, permission to fire was first required from a military coordinator and the Vietnamese province chief via time-consuming radio relays. The theory was that the VC lived among the rural civilian population. If, as postulated in free fire zones, the population were removed, whoever remained must be the enemy.

But villagers were often unhappy with life in the refugee camps to which they were moved. "People did not return at the end of the work day and others crept off to return to old homes, more concerned with what the VC could do to them [in the refugee camps] than what the Americans could do for them."[165] Or out of sympathy for the VC they drifted back into cleared areas or managed to evade resettlement in the first instance. Hence, they were in harm's way during any local combat operation. While "it is not likely that these civilian casualties raise an issue of criminal liability as long as adequate notice of the designation of an area as [a free fire zone] was given,"[166] they remained potential victims of war. The only way to establish control over some VC-dominated parts of the country, General Westmoreland wrote, "was to remove the people and destroy the village. That done, operations could be conducted without fear of civilian casualties."[167] Unfortunately, that assumption often did not correspond to reality.

The village of Son Thang was on the edge of a free fire zone where prior permission to fire was not required.[168] Later trial testimony indicated that the South Vietnamese government had urged its residents to move to secure areas, warning them that their huts bordered a free fire zone. Villagers who remained were considered, with some basis, to

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[165]Nolan, Death Valley, 43.

[166]Lewy, America in Vietnam, 229.

[167]Westmoreland, A Soldier Reports, 152.

[168]Lt.Gen. Charles G. Cooper, Interview by Benis Frank, session 10, 14 Aug. 1986, transcript, Oral History Collection, Marine Corps Historical Center, Wash., n.p.; and, Lt.Col. Richard E. Theer, California, to author, Wash., 24 Feb. 1989.

be, at the least, VC sympathizers. Enemy sympathizers, "mere gooks," on a free fire zone border: elements that set the stage for what was to come.

2.2.d. Impact of the Calley Case In November 1969, three months before the Herrod patrol was alleged to have murdered noncombatants at Son Thang, Army First Lieutenant William L. Calley, Jr., was charged with the premeditated murder of "not less than" 109 Vietnamese at My Lai.[169] Even before the official charges were served, world-wide publicity made Calley and My Lai infamous.

In 1975, the U.S. Army's Judge Advocate General took a conservative, but seemingly correct, legal view of the crimes committed at My Lai in 1968:

> Technically, of course, the killing of those South Vietnamese people was not a war crime. The victims were citizens of an allied nation, not enemies protected under the Geneva Conventions, but citizens protected by the law of Vietnam...Within the scope of the Uniform Code of Military Justice, the My Lai murders were not legally distinguishable from other homicides...[170]

Telford Taylor, former chief prosecutor for the subsequent Nuremberg proceedings, disagreed, pointing out that My Lai was regarded as VC-controlled and armed and enemy resistance was expected. "It would be highly artificial," Taylor wrote, "to say that this was not 'hostile' territory within the meaning of the Hague Convention, or to question the applicability of the laws of war..."[171]

Neither Taylor nor the Judge Advocate General are entirely correct in assessing the law. Article 4 of the 1949 Geneva Convention IV, specifying those protected by the Convention, reads: "[N]ationals of a co-belligerent State," as South Vietnam was, *vis-a-vis* the U.S., "shall not be regarded as protected persons..." Nor does protected status

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[169]Hammer, The Court-Martial of Lt. Calley, 46-47.

[170]Prugh, Law at War, 102.

[171]Taylor, Nuremberg and Vietnam, 134.

turn on the hostile character of the territory, as Taylor suggests, even under the Hague Conventions he apparently refers to.[172] The particular *law* of war Taylor invokes was not applicable. But the Judge Advocate General's assertion that the killings were not war crimes, as that term is commonly defined, is too narrow and similarly incorrect. Under customary law of war, the Nuremberg Principles,[173] or the U.S. Army's own tautological definition,[174] My Lai was a war crime. In its appellate opinion reviewing the Calley case, the Army Court of Military Review noted without elaboration, "Although all charges could have been laid as war crimes, they were prosecuted under the Uniform Code of Military Justice."[175]

Even under the 1949 Conventions cited by the Judge Advocate General, the prisoner of war Convention was arguably breached at My Lai. The My Lai civilians had not taken up arms to resist Calley and his platoon, but uncertainty as to that fact raised the question in the minds of Calley's men as to the civilians' status as combatants. The Vietnamese were believed to be VC supporters, if not actual VC cadre. But were they? "Should any doubt arise as to whether persons ...belong to any of the [POW] categories enumerated," Convention III reads, "...such persons shall enjoy the protection of the present Convention..."[176] Ambiguities in the Conventions should be resolved in favor of their widest possible coverage consistent with their humanitarian purposes.[177] While there may be room for argument, the status of the My Lai victims, combatants or civilians, should

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[172]The Hague Conventions respecting the Law and Customs of War on Land of July 29, 1899 and Oct. 18, 1907, which 1949 Geneva Convention IV supplements (Art. 154).

[173]Principle VI.b. (See Appendix B.)

[174]The Army's definition: "The term 'war crime' is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime." U.S. Dept. of the Army, The Law of Land Warfare, par. 499.

[175]*U.S. v Calley*, 46 CMR 1131, 1138 (ACMR, 1973).

[176]Art. 5.

[177]Note, "The Geneva Convention and the Treatment of Prisoners of War in Vietnam," 854-55.

reasonably have been in doubt and POW status accorded them until that doubt was resolved.

Calley was convicted by court-martial of the premeditated murder of twenty-two Vietnamese and one assault with intent to commit murder. He was sentenced to loss of all pay, dismissal from the Army, and confinement at hard labor for life. Fourteen soldiers had been charged, four tried, but only Calley was convicted of criminal acts involving the My Lai killings and their subsequent cover-up.

Upon initial review, Calley's confinement was reduced to twenty years. Final military review left the reduced sentence undisturbed.[178] President Richard Nixon, in an apparently political response to public dissatisfaction with the court-martial verdict,[179] released Calley from confinement pending appellate review of his case, ordering him into guarded officer's quarters to await further consideration of his case. The Secretary of the Army then reduced Calley's confinement to ten years and he was released in November 1974, pending further appeal. After the U.S. Supreme Court denied *certiorari* the Army transferred Calley to a brig until, within four months and three weeks, he was eligible for release by reason of having served one-third of his sentence, with credit for pretrial confinement.[180]

To the dismay of many who served in Vietnam, Calley was lionized by large segments of the public, unfamiliar with the law of war and largely ignorant of the circumstances of My Lai. A judge advocate wrote of the Calley case:

> [S]ome who seemingly bathe in unawareness have even suggested that to prosecute a person who violates the law of war is to make the accused a scapegoat. Certainly this is a confusion of terms in that 'scapegoat' implies a sacrifice of an innocent thing.[181]

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[178]*U.S. v Calley*, 48 CMR 19 (USCMA, 1973).

[179]Comment, "Punishment for War Crimes: Duty - or Discretion?" 1346, fn. 203.

[180]Prugh, to author, 29 Nov. 1991.

[181]Jordan J. Paust, "My Lai and Vietnam: Norms, Myths and Leader Responsibility," 57 Military L. Rev. 99,108 (1972).

Still, seventy-nine percent of the respondents in a Gallup poll disapproved of Calley!s having been tried. Only nine percent approved.[182] Entire draft boards resigned in protest over his trial. Patriotic organizations raised legal fees for him. State capitols flew flags at half mast.

More importantly, My Lai immediately changed the way America's armed forces were trained.

> The operations in...Vietnam and the United States courts martial arising therefrom demonstrate that there was something gravely lacking in the education being given to United States armed forces.[183]

Regulations had long required minimal training and periodic updating of instruction in the law of war during initial indoctrination of enlisted personnel. Refresher training had been required for troops in Vietnam, as well.[184] But that training, if given at all, was perfunctory.[185] Newly commissioned Marine Corps officers received no training, perfunctory or otherwise, during their schooling.[186] During thirteen months spent in Vietnam in 1966-67, Brigadier General Michael E. Rich, Director of Marine Corps Judge Advocates, but then an infantry captain, received none of the required law of war training, ("Zero," as he put it), nor did the men in his charge. ("Zero," he repeated.)[187] Former Commandant of the Marine Corps, General P.X. Kelley, who spent two years in Vietnam combat, says neither he or his men received the training. ("None.")[188] But another Marine officer, a brigadier general while in Vietnam, recalls that

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[182]Kelman and Hamilton, Crimes of Obedience, 169.

[183]Leslie C. Green, "The Man in the Field and the Maxim *Ignorantia Juris non Excusat*," 19 *Archiv des Volkerrechts* 169, 181 (1980/1981).

[184]Prugh, Law at War, 74-75.

[185]Lewy, America in Vietnam, 366.

[186]Maj. Herbert D. Williams, "The Army Lawyer as an International Law Instructor" (Thesis, U.S. Army School of the Judge Advocate General: Virginia, 1976), 8.

[187]BGen. Michael E. Rich, interview by author, 26 Aug. 1990, London, tape recording, author's collection.

[188]Gen. Paul X. Kelley, Interview by author, 12 Dec. 1990, Wash., tape recording, author's collection.

"there was a presumption that all officers were schooled in these matters as part of their regular military education....This would probably apply to noncommissioned officers, too."[189] That presumption was not correct. "The law of war," wrote a Marine Corps lawyer, "is often viewed as...an unnecessary, unrealistic restraining device inhibiting the combat commander..."[190]

After My Lai, expanded training courses were initiated for all U.S. armed forces. The Army's Judge Advocate General admits:

> It's no secret that we had gotten lax in the military about teaching...the Hague and Geneva conventions — the law of war....After the Peers commission...all hell broke loose and we started teaching law of war day and night.[191]

New directives were issued containing combat-related examples applying law of war, and providing instruction for officers and noncommissioned officers regarding their duty to report its violation. "Since murder is so obviously a major crime," General Westmoreland wrote, "surely it was unnecessary to put out a specific order...not to murder unarmed civilians."[192] Training films were produced.[193] Compliance with the newly mandated training was closely monitored.

Still, the Army's post-My Lai Judge Advocate General argues that it is incorrect that "there was little attention paid to Law of War matters until after My Lai, [or that] then there was a panic reaction."[194] He points out that:

> Much law of war material...does sprout from basic morality and common sense. It is very late to try to teach an eighteen- or nineteen-year old rifleman, as he

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[189]BGen. Edwin H. Simmons, interview by author, 17 Dec. 1990, Wash., tape recording, author's collection.

[190]W. Hays Parks, "Crimes in Hostilities," pt. I, Marine Corps Gazette, Aug. 1976, 21.

[191]MGen. William K. Suter, interview by author, 11 December 1990, Virginia, tape recording, author's collection.

[192]Westmoreland, A Soldier Reports, 288.

[193]"What the Army is Doing to Prevent Another My Lai," U.S. News & World Report, 12 April 1971, 24-25.

[194]Prugh to author, 29 Nov. 1991.

> is about to enter combat, that he should carefully distinguish combatants from noncombatants and that he should not kill helpless people.[195]

Perhaps the most significant outcome of My Lai was that the law of war became a constant consideration in the minds of commanders. The result of allowing or disregarding breaches had been dramatically highlighted and few officers were likely to ignore the moral and legal responsibilities they now understood themselves to carry. Military cynics might have added that neither would they overlook the career-ending damage a cover-up would wreak, once discovered.

That awareness and sense of responsibility did not reach as far as the Son Thang patrol members, though it did reach far enough to ensure their courts-martial.

2.3. U.S. Marines in Vietnam

South Vietnam was a nation of sixteen million people. Forty percent of the country is uninhabited, covered by jungle, scrub brush, elephant grass, and swamp. A thin strip of arable land extends along the coast, where the bulk of the populace lives. Throughout the war South Vietnam, partitioned from North Vietnam at the 17th parallel, was divided into four military and governmental regions: Corps Tactical Zones I, II, III, and IV. A demilitarized zone extended five kilometers on each side of the 17th parallel. The I Corps Tactical Zone, referred to simply as I ("Eye") Corps, was just inside South Vietnam's border, immediately south of the demilitarized zone. The U.S. Marine Corps had responsibility for American combat operations in I Corps. The U.S. Army was responsible for the three more southerly zones.

2.3.a. I Corps Marines Some of the war's heaviest fighting occurred in I Corps.

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[195]Ibid.

> The Demilitarized Zone and northern I Corps were an ideal battleground for the Vietnamese....Their lines of supply and reinforcement were obviously shortest along the Demilitarized Zone, and whenever a Vietnamese unit needed to break off a fight it could easily gain sanctuary across the DMZ....The land...is broken even along the coast, with hills, stretches of sand dunes, and swamps interspersed among the rice fields. The...mountains beyond are among the wildest on earth...[196]

In mid-1969 U.S. withdrawal from Vietnam began in incremental stages. By February 1970, the time of Herrod's Son Thang patrol, 55,000 Marines remained in I Corps.

The senior Marine unit in I Corps, and Vietnam, was the 3d Marine Amphibious Force (III MAF), with headquarters at Da Nang. Two infantry divisions were III MAF's operating units. A Marine Corps infantry division was comprised of about 28,000 men.

Of the two divisions, the 3d Marine Division operated in the far north of I Corps, where contact with uniformed, main-force enemy units was the norm. Combat engagements were often sustained and fierce. The 1st Marine Division, on the other hand, operated in central and southern I Corps, where the enemy was often the elusive VC irregular. Combat for the 1st Division was more often brief; a land mine, or momentary firefight with only a fleeting view of the enemy — if that. "Both approaches were equally lethal, but the frustration in the [southern] DaNang area would be the greater because of the near impossibility of retaliating."[197] The differing types of combat encountered by the 3d and 1st Marine Divisions was marked and significant. Herrod's Son Thang patrol came from the 1st Marine Division, in central I Corps.

The Duke of Wellington reputedly said there are no bad troops; there are only bad captains. Wellington was never in Vietnam. In 1970 the Marines had problems besides those raised by the VC. During that period there was an alarming general breakdown of discipline, not only in I Corps Marines,

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[196]Neil Sheehan, A Bright Shining Lie (London: Jonathon Cape, 1989; Picador, 1990), 638-39.

[197]Lewis B. Puller, Fortunate Son (NY: Grove Weidenfeld, 1991), 98.

but among all U.S. forces in Vietnam. "The morale, discipline and battleworthiness of the U.S. Armed Forces are, with a few salient exceptions, lower and worse than at any time in this century and possibly in the history of the United States," wrote a respected commentator.[198] Another writer noted: "Standards had collapsed; morale was a farce; and discipline in many units resembled something very close to anarchy."[199] The unrest in the military reflected divisions wracking American society as a whole, including the war's ever-growing unpopularity. Court-martial rates were higher than ever before. Marijuana sale and use was so prevalent that they overloaded the military justice system and, when discovered, often did not even result in trial. Murder and aggravated assault, of Marines by Marines, were no longer unusual. The Da Nang brig was filled with men so hardened that first-time offenders were seldom allowed to be confined there. Racial incidents, long a serious problem in Vietnam, had become frequent and alarmingly violent. Marine Corps' accounts reflect that 1969 and 1970 were the Corps' "disciplinary nadir."[200] To be sure, most Marines carried out their duties reliably and without incident, but the pervasive breakdown of discipline was felt in every combat unit. The problem was based, in significant part, on the quality of individual the armed services were accepting during those turbulent years.

2.3.b. The Impact of Project 100,000 Few outside the ranks of Vietnam-era military officers realize the harm done the armed services, and the conduct of the war in Vietnam, by Project 100,000. Few Americans would even recognize the

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[198]Col. Robert D. Heinl, "The Collapse of the Armed Forces," Armed Forces Journal, 7 June 1971, 30.

[199]Rick Atkinson, The Long Grey Line (Boston: Houghton Mifflin, 1989), 366.

[200]Lt.Col. Gary D. Solis, Marines and Military Law in Vietnam (Wash.: U.S. Marine Corps, 1989), 140-41; to the same effect, Cosmas, U.S. Marines in Vietnam, 1970-1971, 369.

term. Having dealt with the criminality that Project 100,000 engendered, military lawyers were particularly aware of its disservice.

In 1964 a U.S. Federal task force found that the military services rejected about 600,000 men each year who failed to meet intelligence standards. The task force suggested that some of these men were suitable for military duty. With the war's increased manpower needs in mind, Project 100,000, "an ill-conceived program,"[201] was implemented, requiring the military to accept some of those previously rejected.

Armed forces entrance examinations, standard for all services, classify prospective entrants into five intelligence categories. Those scoring in categories I, II, and III are automatically acceptable for service; those in category V are automatically rejected. A small number of category IVs had always been accepted, but now all services were required to accept many more. In October 1966, 40,000 category IVs, "cat-fours," were ordered accepted for service the following year and 100,000 more each year thereafter. It became necessary to turn away better qualified volunteers to meet the mandatory "cat-four" quota. "Through 'Project 100,000' they had to accept men of lower intelligence ratings who were ill-suited for the exacting demands of a counterinsurgency war like Vietnam. The results could have been expected."[202]

The influx of "cat-fours" had an immediate negative effect on discipline. General Westmoreland bluntly said: "Category IV is a dummy...That [program] introduced a weak-minded, criminal, untrained element....When those people came to Vietnam...that's when disciplinary problems began on the battlefield."[203] "Cat-fours" had both desertions and court-

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[201]Puller, Fortunate Son, 77.

[202]Lewy, America in Vietnam, 331.

[203]Laura Palmer, "The General, At Ease: An Interview With Westmoreland," MHQ, The Quarterly Journal of Military History, Autumn 1988, 34.

martial convictions at about double the rate of other servicemen. General Robert E. Cushman, commander of Marine forces in Vietnam from mid-1967 to mid-1969, said: "We just had a hell of a time with quality....I was always massaging the numbers and trying to get the mental Group IVs down to the lowest possible level."[204] General Leonard F. Chapman, Commandant of the Marine Corps at the height of the war, vowed: "We're going to fight to the highest levels of government projects like Project 100,000....We're going to do everything possible to get rid of them."[205] But the requirement continued until June, 1971,[206] their two-year enlistments extending until after the war's end.

By 1970, seven percent of Marine Corps enlisted strength was "cat-four,"[207] their relatively small numbers illustrating the military adage that commanders spend ninety percent of their time dealing with ten percent of their men. Many "cat-fours" were virtually untrainable, requiring constant close supervision. Leadership standards, as well, tended to fall as the war progressed and the necessary supervision was often lacking. Many "cat-fours" became disciplinary problems, requiring the attention not only of commanders but military police, investigators, judge advocates, and warders. Ultimately, the manpower dividend of Project 100,000 resulted in a manpower deficit.

Of the five Son Thang patrol members, three appear to have been "cat-fours."

2.3.c. Personnel Turbulence An advantage of the British regimental system is the strong unit identification engendered in each regimental member. Many British soldiers

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[204]Gen. Charles E. Cushman, Jr., Interview by Benis Frank, n.d. 1984, transcript, Oral History Collection, Marine Corps Historical Center, Wash., 344, 361.

[205]Gen. Leonard F. Chapman, Jr., remarks before General Officer's Symposium, Wash., 1970, Marine Corps Historical Center, Wash.

[206]Capt. David A. Dawson, Marine Corps Historical Center, Wash., to author, London, 6 March 1992.

[207]Solis, Marines and Military Law in Vietnam, 74, 203.

pass their entire military careers in the same regiment. Robert Graves wrote of his World War I service in the Royal Welch Fusiliers: "[W]e all agreed that regimental pride remained the strongest moral force that kept a battalion going as an effective fighting unit; contrasting it particularly with patriotism and religion."[208] No less was true a half-century later in Vietnam, but the unifying element of unit integrity was not employed there.

U.S. troops served for one year in Vietnam then left for assignment elsewhere. The known length of tour was considered beneficial to morale. "A limited tour is particularly desirable in Vietnam," wrote General Westmoreland, "because of the intensity of combat and the debilitating climate and environment of Southeast Asia."[209] But another view was expressed by Colonel Bui Tin of the enemy North Vietnamese army:

> Only one year! He spends six months learning; for three months he is a good fighter, but for the last three months he is trying to...make sure he stays alive. About the time he is ready to fight, he was ready to leave! I do not understand such a policy.[210]

Eventually, even General Westmoreland agreed with Colonel Tin: "It may be that I erred..."[211]

But that was not his stance while the conflict was in progress. At the war's outset, whole units came to and departed Vietnam as cohesive entities. By 1970 combat deaths, woundings, sickness, and various other factors led to personnel, both officer and enlisted, joining and leaving units individually. "The problem was to maintain unit efficiency and cohesion, and develop teamwork in the face of

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[208]Robert Graves, Goodbye To All That (London: Jonathon Cape, 1929; Penguin Classics, 1960), 157.

[209]Gen. William C. Westmoreland, "The State of the Command," in Report on the War in Vietnam, sec. II (Wash.: U.S. GPO, 1969), 242; and, Anthony Kellett, "The Soldier in Battle: Motivational and Behavioral Aspects of the Combat Experience," in Betty Glad, ed., Psychological Dimensions of War (California: Sage Publications, 1990), 222.

[210]Morley Safer, Flashbacks (NY: Random House, 1990), 23.

[211]Westmoreland, A Soldier Reports, 417.

a high personnel turnover rate....The one-year tour... stretched the experienced leadership available from career personnel very thin..."[212] The staged withdrawal of U.S. forces exacerbated this "personnel turbulence," as military manpower chiefs termed it: whole units were to be withdrawn from Vietnam though many in the withdrawing unit had not completed their year-long tour of duty. The Marine Corps' solution was Operation Mixmaster, which sent those with time remaining to other units and replaced them with men from still other units whose year was nearly completed.[213]

> Marine commanders almost universally deplored the impact of the "mixmaster" on unit effectiveness and on the well-being of the individual Marine....Mass personnel transfers resulted in the loss of key Marines and undermined morale and efficiency.[214]

In a sociological sense "the policy was ineffective and disruptive,"[215] minimizing the importance of personal attachments.

Of the five Son Thang patrol members, Herrod, the patrol leader, had joined the company little more than two months previously; another patrol member had been transferred to the unit a week before the patrol; a third, only five days previously.

2.3.d. 1st Battalion, 7th Marines In the American Marine Corps, infantry units, in descending order of size, are: division, regiment, battalion, company, and platoon. The Son

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[212]Gen. Bruce Palmer, The Twenty-Five-Year War (Kentucky: University Press of Kentucky, 1984), 170.

[213]Keith Fleming, The U.S. Marine Corps in Crisis (SC: University of South Carolina Press, 1990), 7.

[214]Cosmas, U.S. Marines in Vietnam, 1970-1971, 333. In the 1980s, unit transfer, rather than individual transfer, became Marine policy. "Nothing will be more important in the manpower business," wrote the commander of Marine forces in the Gulf War,"than putting Marines in units and letting them stay there." MGen. Walter E. Boomer, "Smaller and Better in the 1990s," U.S. Naval Institute Proceedings , May 1990, 106.

[215]Roger W. Little, "Buddy Relations and Combat Performance," in Morris Janowitz, ed., The New Military (NY: Russell Sage Foundation, 1964), 221. The writer's subject is the Korean War but the thought is considered applicable to Vietnam.

Thang patrol came from the 1st Battalion of the 7th Marines. (In Marine Corps usage, the defining term, "regiment" is omitted, it being understood — by Marines, if few others — that an ordinal number followed by the word "Marines" in fact refers to a regiment.) Battalion and regimental designations, when written, are denoted in the form of a fraction. Thus, the 1st Battalion, 7th Marines, is written "1/7" and pronounced "one-seven."

The 1st Marine Division was headquartered at Da Nang. The Seventh Marines, 3,951 strong, was one of three infantry regiments that made up the 1st Marine Division. The first battalion of the Seventh Marines, 1/7, numbered 1,225 men, and was one of three infantry battalions that comprised the 7th Marines.

The regiment, along with other units, was responsible for protecting Da Nang and its heavily populated suburbs from the enemy. Its responsibility was to patrol the mountainous jungle to the west of Da Nang, the Que Son Valley, and a portion of the coastal plain. Although removed from the Demilitarized Zone where fighting was frequently fierce, 1/7 and other 1st Division units were not in any rest area. In the last half of 1969 the Division had suffered 419 killed.

Clearly, 1/7 was a combat-experienced battalion. In heavy fighting during late 1969, its commander had been killed in action. In the ninety days prior to the Son Thang patrol, 1/7 was engaged in combat every day. In the week before the Son Thang patrol the battalion suffered thirteen killed and thirteen wounded; the month before that another thirteen had been killed and forty wounded.[216] And 1/7 gave as good as it got. An officer who was in the battalion

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[216] 1/7 Command Chronology, Jan. and Feb. 1970. Combat Records Section, Marine Corps Historical Center, Wash. All battalion- and larger-size units were required to maintain a monthly command chronology detailing combat and garrison activities - an invaluable historical source.

throughout that period recalled that 1/7 was "operationally keen and efficient...a well-oiled war machine."[217]

The battalion's chronology (war diary) for the month of January 1970 includes the notation that it "operated within assigned areas of operations, concentrating on platoon, squad and Killer Team patrols."[218] It was one of those killer teams that was sent into Son Thang on 19 February 1970.

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[217]Col. Raymond A. Hord, interview by author, 8 May 1990, Virginia, tape recording, author's collection.

[218]1/7 Command Chronology, Jan. 1970, 6.

CHAPTER 3. THE SON THANG INCIDENT

The strong do what they can and the weak suffer what they must.
Thucydides

How many combat patrols were undertaken by U.S. forces in the course of the Vietnam War? Half-a-million? A million? How many of that number led to criminal misconduct? Among the infinitesimally small percentage of combat actions that involved grave breach of the law of war the Song Thang incident remains among the most stark examples of wartime excess.

Besides those directly involved in the case, there were commanders, lawyers and supporting personnel, all leaving their mark on the resulting criminal trials.

In this chapter those with a direct impact on the case are introduced and the Son Thang incident itself is depicted. There were more heinous war crimes committed in Vietnam, by Korean, VC, and North Vietnamese forces, as well. But few are as well-documented; few so starkly illustrate law of war issues played out in a domestic court setting.

3.1. LEADERS AND LAWYERS

During the six months preceding the Son Thang patrol, all three battalions of the 7th Marines were in constant contact with the enemy. Five men of the regiment were awarded the Medal of Honor during that period, all posthumously. Can one be swayed to criminal action by overly-aggressive leadership? Such questions are largely bypassed by the criminal law, more interested in concepts like knowledge, intent, and reasonableness. But the leadership of the Son Thang patrol was a volatile mixture of aggressiveness and inexperience.

3.1.a. The Battalion The commander of 1/7 was Lieutenant Colonel Charles G. Cooper, a veteran of Korea. Before

assuming command of 1/7 he was a 1st Marine Division headquarters staff officer, a billet in which he reportedly was not happy. "Charley was very frustrated...He was coming up for general [and] even though he was a lieutenant colonel his time to shine was probably going by the wayside unless he got a battalion..."[1] He got his battalion, his first combat command in twenty years, only to deal with the Son Thang incident a month later. The 1st Marine Division's assistant commander said of Cooper: "He had a wonderful reputation and career pattern. He had had all the right jobs and was obviously destined to a splendid career...He was regarded as a very good battalion commander."[2] Fifteen years later Cooper would retire as a lieutenant general. But in February 1970 he was new to his job and had not yet had time to shape the battalion to his standards.

Cooper recalled that when he took command, the battalion was beset by disciplinary, racial, and morale problems. With no noticeable lack of modesty, however, he believed he was just the man to remedy 1/7's problems: "I kind of feel like the good Lord put me on the face of the earth to take over an outfit that was down, that was disillusioned and discouraged, and to bring them back to life."[3] Cooper's negative view of the battalion was not unanimous,[4] but by 1970 the Marines of 1/7 were not the stuff of recruiting posters. A company commander complained that:

> his company was a body of teenagers The grunts were mostly new graduates or dropouts from high school, and most of his noncommissioned officers had been promoted early due to the manpower drain of Vietnam. He had sergeants who weren't old enough to drink beer

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[1]Kelley Interview, 12 Dec. 1990.

[2]BGen. Edwin H. Simmons, Interview by author, 10 May 1990, Wash., tape recording, author's collection.

[3]Cooper interview.

[4]Theer, to author, 24 Feb. 1989. "Cooper's remarks...simply reflect his lack of understanding of what the war at the company level was really like."

> legally. His platoon leaders were all rushed through a shortened version of Basic School for one use only.[5]

Still, 1/7 was a rough, aggressive unit, beset by occasional allegations of mistreatment of prisoners[6] that would later be confirmed in courtroom testimony unrelated to Son Thang. A 1/7 noncommissioned officer said of that period:

> We definitely did not go over and just blow civilians away for no reason at all....We did kill every duck, chicken, and water buffalo that we came across....These people were all supporters of the NVA [North Vietnamese Army] and VC, and they deserved whatever happened to them. But unless a gook had a weapon we didn't kill him.[7]

The battalion's command chronology for February records that 1/7 "deployed rifle companies in areas of operation with the mission of conducting rice denial/search and clear operations...extensive small unit patrols and ambushes to interdict enemy movement."[8] Unmentioned in the chronology is that one of those patrols resulted in sixteen murders.

3.1.b. The Company and Platoon Lewis R. "Ron" Ambort assumed command of Company B, 1/7, in October 1969, shortly after his promotion to first lieutenant. He had just turned 23-years of age and had been a Marine for only sixteen months.[9] Lieutenant Colonel Cooper recalled Company B and its commander as "certainly the brightest and most aggressive company in 1/7...[Ambort] had by far the preponderance of successes and kills...."[10] But Cooper later added an inconsistent qualifying note: "I was very concerned about the morale and operational effectiveness of Company B."[11]

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[5]Nolan, Death Valley, 80.
[6]Ibid., 60.
[7]Ibid., 29-30.
[8]1/7 Command Chronology, Feb. 1970.
[9]1/7 Command Chronology, Sept.-Oct. 1969; and USMC, Combined Lineal List (USMC: Wash., 1971), 161.
[10]Cooper interview.
[11]Lt.Gen. Charles G. Cooper, Virginia, to author, Wash., 12 Sept. 1988.

Major Richard E. Theer, the battalion's operations officer, thought Cooper over-estimated Company B's combat prowess:

> If one believed all the reports of contacts and confirmed kills submitted by B Company, then perhaps one's opinion could have been swayed. I am sure...Cooper's opinion was based on "false" reports submitted by Lieutenant Ambort on several occasions....Ambort was aggressive, cocky and extremely eager to impress...[12]

Like the allegations of prisoner mistreatment, Ambort's false combat reports would soon be a matter of legal record. A review of 1/7 command chronologies indicates that Company B was no more effective than other companies in the battalion. More aggressive, perhaps, but no more effective.

The Son Thang patrol came from the second platoon of Company B. The platoon commander was twenty-two-year old Second Lieutenant Robert B. Carney. A Marine officer for eight months, six of which had been spent at officer's school, Carney was an inept novice leader. At the time of the Son Thang patrol he had been in the company for only twelve days and had not received instruction on rules of engagement.[13] Even at that early juncture the battalion operations officer thought him "a non-entity as an officer. Most everyone knew the platoon was really led by his platoon sergeant."[14]

3.1.c. <u>The Quality of Leadership</u> American Professor Guenter Lewy, writing about incidents like My Lai and Son Thang, notes:

> Probably the most important single element, present in almost all incidents, was weak leadership. Strong and effective commanders managed to keep their subordinates under control even in situations of great stress; but such leaders were often in short supply, especially at the platoon and company level.[15]

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[12]Theer, to author, 24 Feb. 1989.
[13]Record of trial, *U.S. v Pvt. Michael A. Schwarz,* 45 CMR 852 (NCMR, 1971), 396.
[14]Theer, to author, 24 Feb. 1989.
[15]Lewy, <u>America in Vietnam</u>, 330.

"None of these factors justify the atrocities," Lewy wrote, "but they help provide explanations for them,"[16] A senior officer on General Westmoreland's Saigon staff agreed:

> Underlying and aggravating all the other factors...was inadequate leadership where it was most important, at the noncommissioned officer and junior officer level....In the rapidly expanded Army and Marine Corps, men became sergeants and lieutenants who were inadequate in character, intelligence, experience, and motivation....The failure of leadership at the small-unit level was particularly devastating.[17]

Another Army general said: "It is easy to blame the quality of the enlisted men or the lack of support on the home front for all this. But let's state it straight — the problem... was one of ineffective leadership..."[18]

Company B and its second platoon were not well led. But neither was their leadership notably worse than that of many infantry units at that stage of the war.

3.1.d. Marine Corps Judge Advocates There were twenty-six Marine lawyers — judge advocates — assigned to the 1st Marine Division in 1970. That number rose and fell through the year as judge advocates ended their tours of duty in Vietnam and were replaced by others. Roughly forty lawyers filled the twenty-six billets in the course of the year.

The four or five senior lawyers were career Marines who had served in a variety of legal billets. They possessed broad experience in military criminal law. As in the British Army before 1948,[19] the Marine Corps had (and still has) no separate legal corps, or judge advocate corps, despite the career lawyers in its ranks.

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[16]Ibid.

[17]Lt.Gen. Phillip B. Davidson, Vietnam at War (London: Sidgwick & Jackson, 1988, 618.

[18]Gen. Douglas Kinnard, The War Managers (New Hampshire: University Press of New England, 1977), 112.

[19]Michael Barthorp, The Armies of Britain, 1485-1980 (London: National Army Museum, n.d.), 288.

The twenty-or-so junior judge advocates were, to a man, reservists; volunteer officers serving their first and, in all but two cases, last tour of uniformed service. Upon arrival at Da Nang they were assigned to defend or prosecute, according to legal office vacancies. After serving their tour in Vietnam they would return to the U.S. for another year's assignment to complete their three years of contractual military duty, then return to civilian life.

They were the lawyers who tried whatever cases went to trial. They were possessed of the enthusiasm and willingness so admirable in new lawyers. When assigned major cases involving complex litigation or novel issues, however, inexperience could betray dedication. Particularly when a seasoned civilian defense lawyer was retained and brought to Vietnam by a military accused. That is permissible under U.S. military law[20] and was surprisingly common throughout the war. At such trials the visiting civilian defense counsel often made short work of the opposing military judge advocate. However, there was little choice but to assign tyro lawyers to major cases. There was no one else to try them and caseloads were at record levels. Throughout 1970 it was not unusual for 1st Division judge advocates to try several murder cases in a single month.[21] For the military lawyer a year or two out of law school it was trial by fire.

In the Son Thang courts-martial the inexperience of military prosecutors and the expertise of civilian defense counsels had its effect in each case.

3.2. SON THANG KILLER TEAM

In one Son Thang court-martial the prosecuting judge advocate – the trial counsel, in military parlance – asked his witness

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[20]UCMJ, Art. 38.(b). Civilian counsel is permitted under British military law, as well. HMSO, Manual of Military Law, pt. I, ch. III, par. 26; Rule of Procedure (Army), 79(1).

[21]1st Marine Division Command Chronology, Jan.-Dec. 1969.

to describe the mission of a killer team. The corporal, who had been on several such teams, testified:

A: "A killer team is to go out and rove around and try to catch the enemy off guard, trying to hit as quick and fast and try to get out of the area as quickly as possible without getting any casualties."
Q: "Basically, what rules of engagement do you abide by?"
A: "At that time, anything out after about eight o'clock was considered the enemy if it was moving at all outside the ville,* inside and around."[22]

To the same question another witness, an experienced platoon sergeant, replied: "They go out in small teams of four to five men and search out hamlets for weapons, rice, different types of caches and to make contact with the enemy and kill as many as possible."[23] The company commander, Lieutenant Ambort, described a killer team's mission as being:

> ...to search out, locate, and destroy the enemy. Its purpose is to provide an effective reconnaissance type force....An ambush only covers one point and your chances of catching the gooks moving in that one point are a lot slimmer than they are if you've got the people roaming around.[24]

The battalion commander, Lieutenant Colonel Cooper, in his trial testimony, added yet another shade of meaning to the killer team's mission:

> So, the expression troops use, and quite accurately is,'Anything that moves at night is fair game.' Now, this doesn't mean in the villes. My troops had

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* Any Vietnamese inhabited area, large or small, was referred to as a "ville."

[22]Record of trial, *U.S. v Schwarz*, 370. The same corporal was asked to describe a killer team he had led: "Yes, sir. Like, let's see....There was five of us and we went into a ville area. There was movement and talking in this one hooch....This man from another bunker starts hollering....He's got a rifle, or something. So I went over and fragged him. [Threw a fragmentation hand grenade.] Then, when I did that, all of the women started to run for the hooch — went around back. So my men opened up on the three mamasans. And, the next morning we came back, we found one man and one mamasan dead."

Judge advocate to judge: "Colonel, the government requests that this witness be warned of his rights [against self-incrimination]."

Judge to Judge Advocate: "It's a bit late in the day, isn't it, Captain?"

[23]Ibid., 188.

[24]Ibid., 346

> authority...to search villes at night just because we knew there were numerous [VC] meetings at night...[25]

Was the killer team mission one of "hit and run," reconnaissance, search, or just kill whatever is encountered? The understanding of the mission obviously was unclear to those who undertook it, but all agreed that any Vietnamese, including civilians, outside a ville after dark were subject to being shot on sight, no questions asked. No one, including the lawyers, evidenced awareness of that policy's questionable legality under international law,[26] or questioned the knowledge of the South Vietnamese populace of the shoot-to-kill policy. Although the Marines recited varying degrees of indoctrination regarding rules of engagement, from private to colonel there apparently was no awareness of the 1949 Geneva Conventions or the general law of war.

"Killer teams" do not appear in the training syllabi of any Marine Corps instructional program or school. They are unmentioned in any official account of the Vietnam War except in relation to the Son Thang incident and are rarely encountered in any appellate record or account of the war.* Unrecorded even in the parent 7th Marine's command chronology, killer teams appear to have been largely unique to 1/7. Their genesis is unknown. Lieutenant Colonel Cooper erroneously ascribes their development to Lieutenant Ambort.[27] The battalion operations officer writes that he learned of them only after Son Thang,[28] overlooking their prior mention in the command chronologies he was involved in preparing.

Whatever their etymology, they were common practice in 1/7. Neither listening post nor observation post, neither an

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[25]Ibid., 290.

[26]*In re Lippert* (Holland, D.Ct. of Arnhem, May, 1950), 17 ILR 432 (1950), which holds such a policy violative of the law of war.

* There is reference to "hunter-killer teams" in *U.S. v Schultz*, 39 CMR 133 (USCMA, 1969), and to "killer teams" in a professional journal article: Col. Michael D. Wily,"Light Infantry and Vietnam," Marine Corps Gazette, June 1990, 58.

[27]Cooper interview. Killer teams figure in battalion chronologies before Ambort assumed command of Company B.

[28]Theer, to author, 24 Feb. 1989.

ambush nor intelligence related, killer teams were nighttime roving bands with a vague and elastic mission interpreted differently by different Marines. After Son Thang the term, if not the practice, was discontinued.

3.2.a. LCpl. Randell D. Herrod Herrod was the leader of the Son Thang patrol. In February 1970, he was a twenty-year old lance corporal, sixteen months a Marine.[29] When he first arrived in Vietnam he had been assigned to the 3d Marine Division, near the demilitarized zone. His platoon commander then was First Lieutenant Oliver L. "Ollie" North. Herrod was seriously wounded in July 1969 in an action in which he retrieved a wounded and unconscious Lieutenant North and shielded him from enemy fire with his own body.[30] For this action, Herrod was recommended for the Silver Star Medal, a prestigious award for valor seldom given enlisted men.

When the U.S. began withdrawing from Vietnam, Herrod's original unit was one of the first designated to leave. Since his one-year tour was incomplete, Herrod was transferred south to the 1st Marine Division, assigned to 1/7 in compliance with Operation Mixmaster directives. Before reporting to his new unit Herrod took unauthorized absence in Da Nang for two months, finally surrendering to Marine authorities. He was tried by special court-martial for that offense, considered relatively minor at that point in the war, given the many more serious cases being dealt with. As punishment, Herrod was to be reduced to the rank of private and spend three months in confinement. As a matter of clemency, however, the confinement portion of the sentence was suspended and Herrod went directly to 1/7.[31] While Herrod's court-martial was being reviewed, he remained a

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[29]Record of trial, *U.S. v Pvt. Randell D. Herrod,* (summarized) NCM 70 2970.

[30]PFC Randell D. Herrod, Silver Star Medal citation, n.d., USMC Medals and Decorations Branch, Wash., and author's collection.

[31]Randy Herrod, Blue's Bastards (Wash.: Regnery Gateway, 1989), 94-97.

lance corporal. Upon approval of the proceedings his reduction to private would become effective.

He had been in the second platoon of Company B for two months when selected to lead the killer team into Son Thang. At the time, Herrod was a machine-gunner, thought well of and respected for his combat experience, as well as for his recommended but not yet awarded Silver Star. His platoon sergeant described Herrod as, "very aggressive and...a good leader."[32]

3.2.b. Pvt. Michael A. Schwarz Like Herrod, Schwarz had been transferred to 1/7 from the 3d Marine Division. He had been in Vietnam for four months. His background was checkered.

Dropping out of school at the age of sixteen, he had enlisted in the Marine Corps[33] either by forging his parents' written consent or with their fraudulent written statement that he was seventeen, the minimum legal age of enlistment. His remarkably low intelligence score indicates that Schwarz was an intelligence category IV enlistee – a "cat four."*

Schwarz' disciplinary record, even for those troubled times, was extremely poor. In three-and-a-half years he had been the subject of two special courts-martial, a lesser summary court-martial, and five nonjudicial punishments – commander's minor disciplinary hearings.** In any other period Schwarz would not have been accepted for enlistment and, if accepted, soon would have been administratively discharged for his repeated misconduct. Though his offenses were all minor absences and drunkenness, their metronomic

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[32]Record of trial, *U.S. v Schwarz*, 188.

[33]Brief for Appellant at 9, *U.S. v Schwarz*. In the U.K. one may enlist as a "Junior Leader" at 15 years, 11 months, with parental consent. (Army Youth Training Scheme, regulation 4).

* His General Classification Test (GCT) score, closely akin to an IQ score, was 74. One hundred is considered average, 74 exceptionally low.

** Similar, in British military law, to action under §76, Army Act (1955); Rule of Procedure (Army) 7-10.

regularity indicated his basic unsuitability for military service.

On 19 February, having joined Company B only five days previously,[34] Schwarz volunteered to join the Son Thang killer team.

3.2.c. P.F.C. Samuel G. Green, Jr. Green was eighteen years old when he volunteered to accompany Herrod and Schwarz, and his enlistment was also suspect. During the Vietnam War it was not uncommon for U.S. civilian courts to give young accuseds a choice between jail or military enlistment.[35] Similarly, confinement was sometimes shortened if military enlistment immediately followed a prisoner's release. Though such enlistments were prohibited by military regulations, military recruiters often were parties to such arrangements.[36]

Following charges of truancy, runaway, drug abuse, and incorrigibility, which resulted in four separate juvenile proceedings,[37] Green had served twenty-three months confinement in a juvenile facility prior to joining the Marine Corps.[38] If that confinement were known to his recruiter his enlistment was contrary to service regulations. If the confinement was not known to the recruiter, Green materially misrepresented his background upon enlisting. In either case, his enlistment was voidable.

But Green's brief military service was until then unblemished. He had been in the Marine Corps for less than

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[34]Record of trial, *U.S. v Schwarz,* 109.

[35]Francis A. Gilligan and Fredric I. Lederer, Court-Martial Procedure (Virginia: Michie, 1991), vol. 1, 23, fn.105.

[36]*U.S. v Catlow,* 48 CMR 758 (USCMA 1974); *U.S. v Russo* 1 MJ 134 (USCMA, 1975), companion post-Vietnam cases which made such enlistments, when discovered, voidable. "Constructive enlistments" often resulted, however.

[37]*Green v Wylie, Commandant, Disciplinary Command,* 43 CMR 231 (USCMA, 1971).

[38]Record of Article 32 pretrial investigation, *U.S. v Herrod, Schwarz, Green, Boyd & Krichten,* 232. Hereafter: Pretrial investigation. Such confinement would not have been documented in his service record or he would not have been acceptable for enlistment.

six months, in Vietnam for ten days,[39] and Company B for a week.[40] His platoon sergeant later testified, "He was a good man. He followed orders."[41] He did indeed.

3.2.d. P.F.C. Thomas R. Boyd; LCpl. Michael S. Krichten

Little is known about Private First Class Boyd and Lance Corporal Krichten. There are no surviving court-martial records directly involving them, and the civilian custodians of their service records, stored in federal repositories, fail to make them available upon official military request. Trial records of the Son Thang proceedings involving others mention Boyd and Krichten only infrequently.

It is known that both had been in the Marine Corps for slightly more than one year, both were nineteen years old and, significantly, they had been together in the same squad for seven months.[42] Both reportedly had been wounded.[43] Of the five Son Thang patrol members, Boyd and Krichten were the only two who knew each other before the day of the patrol.

3.3. THE SON THANG PATROL, 19 FEBRUARY 1970

Company B, patrolling in the Que Son Valley west of Da Nang, had recently been in daily contact with the enemy. Since November the company had suffered fourteen killed and eighty-five wounded. Nine of the fourteen dead were killed in the week preceding the Son Thang patrol. Women and children had been involved in several of the incidents that resulted in casualties, usually as lures or diversions, sometimes as actual combatants.[44]

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[39]*U.S. v PFC Samuel G. Green, Jr.*, NCM 70 3811 (unpublished NCMR appellate opinion, 19 May 1971), 6.

[40]Record of trial, *U.S. v Schwarz*, 566.

[41]Ibid., 566.

[42]Record of pretrial investigation, charge sheets.

[43]Stars and Stripes, 2 March 1970; 25 June 1970.

[44]1/7 Command Chronologies, November 1969-February 1970.

On the afternoon of 19 February, the men of Company B approached Hill 50, where they would spend the night. While establishing their defensive perimeter Private First Class Richard Whitmore was killed by a VC boobytrap.[45] As dusk fell, the company commander, Lieutenant Ambort, directed Lieutenant Carney, leader of the second platoon, to form a killer team, the only patrol to be employed that night. Herrod, Schwarz, Green, Boyd, and Krichten volunteered.[46] Upon volunteering, Herrod was appointed team leader despite his being a junior lance corporal.* Normally noncommissioned officers — corporals or sergeants — led such patrols.

Asked why he appointed Herrod the patrol leader despite knowing him to be junior, Lieutenant Carney testified that Herrod was good at map reading, essential if fire support had to be called for, and "he was cool under fire. He was aggressive....He seemed like a natural leader with the men."[47] Indeed, many in Company B were junior, from the company commander on down. Lieutenant Colonel Cooper later added, "Usually such teams were led by noncommissioned officers, but...[Herrod] was considered bush-wise and more mature than most of his comrades....At this date and time in Vietnam, this type of jury-rigging was unfortunately not unusual..."[48]

Cooper's assertion notwithstanding, assignment of a junior Marine to lead a combat patrol was, at the least, odd. But authority is sometimes derived from the position occupied, without the supporting military rank.[49] Particularly when, like Herrod, the authority-holder was recommended to

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[45]Report of Casualty #250-70, 24 February 1970, Marine Corps Historical Center, Wash.

[46]Record of trial, *U.S. v Schwarz*, 281, 343-344, 347.

* Trial testimony conflicts as to Herrod's rank on the date of the patrol, lance corporal or private. Although rank insignia often were not worn in combat, the confusion related to the date the reduction from Herrod's prior court-martial was effective.

[47]Record of pretrial investigation, 506.

[48]Cooper, to author, 12 Sept. 1988.

[49]Little, "Buddy Relations and Combat Performance," in Janowitz, ed., The New Military, 213. To the same effect: Nico Keijzer, Military Obedience (The Netherlands: Sijthoff & Noordhoff, 1978), 43, 111.

receive a prestigious combat award, "...a person whose action had been officially recognized as making an exceptional contribution to the mission of the organization....perceived by the recipient's peers as...an inspirational symbol..."[50]

A squad leader in Herrod's platoon later testified at the Son Thang pretrial investigation that he and the five patrol members discussed the upcoming mission, prior to the killer team departing:

Q. "Do you recall...a conversation you had with these individuals in which they said they were going to go out and kill more than you got on your killer team?"
A. "We were just joking around, and I had gotten four, one night before that – we were all kidding around....and they said, maybe we can get more than you got...."
Q. "Do you remember who said that?"
A. "Herrod I think said it....He said, 'I'd like to get more than you got, maybe I'll beat your record,' or something. He was just joking around."[51]

3.3.a. <u>The Briefing</u> Just before leaving the company's position on Hill 50 the patrol was briefed by the company commander. After going over the team's route Ambort, according to his own remarkably candid trial testimony, addressed the five:

> I gave them a pep talk...I didn't want any casualties....since they were out there alone there wouldn't be much I could do. And I emphasized the fact to not to take any chances; to shoot first and ask questions later. I reminded him of the nine people [Marines] that we had killed on the twelfth of February, and I reminded him of Whitmore, who had died that day. I said, "Don't let them get us any more. I want you to pay these little bastards back!"[52]

Before the team moved out the platoon sergeant, Sergeant Harvey Meyers, took Herrod aside. Meyers later testified:

> I heard this rumor that the killer team was supposed to kill anything that moved, so I asked Private Herrod about it – exactly what he was told to do. And he said that the skipper [the company commander, Ambort] told him to kill anything that moves. And I told him not to do it. I

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[50]Ibid., Little, 203.
[51]Record of pretrial investigation, 585-86.
[52]Record of trial, *U.S. v Schwarz*, 348.

> said, "Don't do anything stupid. Just go out and get some.[53]

Asked what the term "get some" meant, Sergeant Meyers replied, "It means going and getting as many kills as possible; make contact with the VC or NVA; kill as many as possible."[54]

As darkness fell the team moved out. There was a bright moon as they approached the hamlet of Son Thang,* a meager collection of five or six thatched-roof, bamboo-framed huts. The hamlet lay only 500 meters from Hill 50.

3.3.b. "Kill Them All" Court-martial records reveal what happened when the killer team reached Son Thang. Approaching a hut, Herrod directed Schwarz to order its occupants out, which Schwarz did in pidgin Vietnamese. Four individuals gathered in front of the hut on what was subsequently referred to as the "patio." One of the Vietnamese, a woman, suddenly broke and ran toward a nearby tree line. Herrod shot her. The woman fell to the ground, screaming.

Testifying under a grant of immunity, Krichten related what next transpired:

> Then he [Herrod] told Private Schwarz to go over and finish her off....All I heard was the .45 [caliber pistol] go off....Herrod gave the order to kill the rest of the people, and I told him not to do it....Then he says, "Well, I have orders to do this by the company commander, and I want it done," and he said it again, "I want these people killed." And I turned to PFC Boyd, and I said to PFC Boyd, "Is he crazy, or what?" And Boyd said, "I don't know, he must be." ...And then everybody started opening up on the people....[55]

The range was estimated to be ten to fifteen feet. Schwarz, testifying in his own court-martial, said:

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[53]Record of pretrial investigation, 549.

[54]Ibid., 550.

* Like most hamlets, Son Thang was known by one name to Americans and by another to Vietnamese. My Lai was initially known to U.S. soldiers as "Pinkville," and to the Vietnamese as "Xom Lang." Son Thang was designated "Son Tra (4)" on U.S. military maps, and known to its inhabitants as "Son 4, Thang Tra Hamlet."

[55]Record of trial, *U.S. v Schwarz*, 286-87.

A. "...All of a sudden Herrod started yelling, 'Shoot them, shoot them all, kill them.'"
Q. "What was in your mind at that time?"
A. "To get some....I grabbed my rifle, started firing, got with them in the direction they were firing and fired the same way...."
Q. "And, what was in your mind at this minute?"
A. "That we had some 'gooks' in the bushes firing at us."
Q. "What about the people [on the patio]?"
A. "I didn't even see the people. I didn't even remember. I had forgotten completely about the people. I didn't know where they were at."
Q. "And, how did the firing stop?"
A. "Someone yelled, 'Cease fire,' ....Then it dawned on me that these people – a bunch of people were lying there in front of me...."[56]

According to trial records, the patrol then formed in a column and, without discussion, walked towards another hut. They left behind two women, one of them blind, and two girls, aged eight and six. All four were dead.

At a second hut much the same events occurred. Schwarz entered, this time, and marched out six occupants. According to Krichten, as the Vietnamese stood on the patio Green shouted that one of the women was reaching into her trousers for something. It was Herrod, Krichten believed, that shot the woman. Then, Krichten testified:

> Schwarz was just coming out of the hooch, and Boyd and myself were just coming up on line, when Private Herrod gave the order to kill them all; and everybody hesitated. Then again he hollered at us, and said, "I want these people killed immediately." And then everybody started firing.[57]

Schwarz testified concerning the same event:

A. "...all of a sudden Herrod yelled, 'Open up, shoot them, kill them all.'"
Q. "What was in your mind at that time?"
A. "The 'gooks' had come back. We had more 'gooks.'...Then I was firing and it dawned on me the women and people were right there in front of me...."[58]

The firing stopped. Again without discussion, the team turned and moved on to a nearby tree line. This time they

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[56]Ibid., 406-07.
[57]Ibid., 289-90.
[58]Ibid., 408-09.

left behind a Vietnamese woman of twenty, three boys aged thirteen, eight, and six, and two thirteen-year-old girls, dead in front of the hut.

At a third hut the scene was repeated yet again. Schwarz called out its six occupants and Herrod told the patrol members to form a line facing the Vietnamese. Krichten:

> I don't know who shot first, but I think it was a '79* that went off first, and then Herrod said to kill them all, and everybody hesitated again, and he hollered at us again, "I told you that I want these people killed, and I mean it." By that time everybody started opening up on the people.[59]

Schwarz testified:

A. "...Herrod said, 'Open up, kill them all, kill all of them.'...He fired his '79, then he reloaded. And, all this time he was reloading, he was yelling, 'Shoot them, kill them all, kill all of them bitches.'..."
Q. "Did you ever fire your .45 [pistol]?"
A. "Yes, sir, I did....All of a sudden I started catching these flashes...so I started firing through there....I thought they were muzzle flashes...."
Q. "What about the people [on the patio]? Did you shoot at these people?"
A. "I shot towards the people, but I didn't shoot at the people.
Q. "You shot between them?"
A. "Yes, sir. I was trying to put my rounds between them...Then someone yelled, 'Cease fire,' sir."
Q. "What happened after that?"
A. "...I heard a baby cry and Herrod said, 'go shoot the baby and shut it up....' When I found the one that was crying...I put my .45 down and fired two rounds over the right shoulder."
Q. "You didn't hit anybody?"
A. "No, sir. I know definitely I didn't hit anyone."[60]

Krichten testified: "I heard Private Herrod tell Private Schwarz to go shoot the baby that was crying, but I don't know if he did. I don't know if he did. All I heard was a .45 go off."[61] (The officer who first viewed the bodies the next day testified that a dead woman at the third hut was clutching a dead child, "about five or six years old, at the

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*M-79 grenade launcher, a 40mm, smooth bore, single shot, shoulder weapon filling the gap between a shotgun and a mortar. Herrod carried the only M-79 in the patrol. He employed buckshot rounds.

[59]Record of trial, *U.S. v Schwarz*, 294.

[60]Ibid., 411-12.

[61]Ibid., 295.

most....[I]t's head had just been blown apart, and its grey matter was laying on the ground.")[62] At the third hut the killer team left four females, aged forty, thirty-five, thirteen, and eight, and two boys, ten and six, all dead.

Nowhere in the numerous written statements, in the pretrial investigation, nor in the surviving records of trial, is a motive alluded to, or attributed to the patrol members. Another squad leader's testimony, very reluctantly given at the pretrial investigation, described Herrod later telling him that the team had agreed to simultaneously fire on their victims on a count of three.[63] That testimony was not repeated at trial.

3.3.c. Cover-up and Investigation The firing in Son Thang was heard on Hill 50, raising concern for the patrol. Herrod was instructed by radio to return to Company B's position. Upon arriving he reported that the team had met an enemy patrol and killed six VC. Herrod and Ambort conferred to formulate the required contact report. Herrod told the company commander that there could have been as many as twelve to sixteen enemy killed. Indicating his immediate suspicion, or awareness, of the report's falsity, Ambort called for an enemy rifle that had been captured several days before and sent it to battalion headquarters with the contact report to add veracity to the claim of six enemy killed.

The false report, now embroidered with detail, was entered in the battalion operations journal at 8:30 that night: "Spotted 15-20 VC, some carrying arms, with no packs, moving southwest along trail. Set up hasty ambush, killed 6 NVA and 1 female. Patrol withdrew...."[64]

The next morning another 1/7 patrol in the vicinity of Son Thang was approached by a Vietnamese woman complaining

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[62]Record of pretrial investigation, 61.
[63]Ibid., 596-98.
[64]1/7 Command Chronology, Feb. 1970, Operations Journal entry 192030H.

that Marines had killed people in her hamlet the night before. The information was radioed to the 1/7 command post at FSB Ross, where it was received by the battalion operations officer, Major Theer. On his third tour of duty in Vietnam, Theer was the most combat-experienced Marine in the battalion, and a mainstay. Directed by Theer, the patrol detoured to investigate the woman's report and discovered the bodies of sixteen women and children laying before three huts, along with a large number of spent U.S. cartridge casings. After reporting its findings, the patrol assisted the villagers in burying the dead.

Theer knew there had been enemy contact reported in that location the night before and wondered if there was a connection. After approval by the battalion commander, Theer cut short Company B's operation and recalled it to the battalion headquarters at FSB Ross. Later, in court, Major Theer was asked:

Q. "When he mentioned that sixteen women and children [were dead], this raised no suspicion in your mind?"
A. "No, because it was in the hamlet where they had a contact on the nineteenth, and I had no reason to doubt that those people might have died as a result of fire between the Marines and the enemy, in that contact. That happens, you know, in war."
Q. "....Did you find it unusual that there were no men mentioned?"
A. "Not at all...The men that you see out there are usually past the age of seventy or below the age of ten."[65]

Nevertheless, to ensure that there had been no Marine involvement in the deaths, Lieutenant Colonel Cooper, the battalion commander, ordered Theer to investigate. Upon questioning, Lieutenant Ambort quickly admitted to Theer that his contact report of the previous night was false in that the enemy rifle had not been recovered by the killer team. Theer next separately interviewed each member of the patrol, after warning them, in writing, of their rights against self-incrimination and to have judge advocate counsel representation, including the lawyer's presence at any

[65]Record of pretrial investigation, 309.

questioning.* Each of the five read the rights advisement and initialled each individual right, indicating his understanding, and then signed the form. Each readily agreed to an interview by Theer and each declined legal counsel.

All five gave written, sworn statements similar to the oral reports they had allegedly given Lieutenant Ambort upon their return from Son Thang the night before: As they approached the hamlet, their statements read, they heard men's voices from a large group gathered on a patio. Thinking they had stumbled onto a meeting of VC, they approached the hut, only to find the males gone. As they detained the remaining women and children they were taken under fire. They returned the fire. Then, hearing noises in another hut, they forced its occupants outside, whereupon the patrol again came under fire. And again, they returned the fire. Implicit in their recitations describing the two encounters – the third incident was unmentioned – was that the women and children had been caught in the crossfire. Major Theer later testified that "in each case their statements were almost identical, with a few discrepancies. And...I know that no five people could see the same thing."[66]

The next day, accompanied by another patrol, an interpreter, and a scout dog, Theer made his own examination of Son Thang.

> ...I had searched the area quite carefully. I could find no evidence that an enemy sniper had been in the area. I had searched each tree, each of the individual houses, looking for...bullet impact marks. I had searched all of the tree lines and hedge rows in the immediate vicinity and found no traces of footprints, enemy empty cartridges or bent back brush...that would indicate that a sniper or enemy soldier had been lurking there....trying to get an idea for myself where a sniper might locate himself based on what the men had told me....And I found nothing.[67]

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* Similar to, but broader than, warnings required by the British Manual of Military Law, part I, ch. V, par. 2.3.

[66]Record of pretrial investigation, 216.

[67]Ibid., 210, 257, 355.

Theer also determined that there were no places of hiding from which the patios of the victims' huts could be fired upon, or even seen. Theer later added:

> There were numerous freshly expended [American] M-79, M-16, and .45 caliber casings lying on the patio. There were also considerable blood stains and gore....[My] patrol probed the entire scene in a 180 degree fan... without finding any expended enemy brass...or any sign of blood, drag marks, footprints or broken vegetation....At that point I seriously began to doubt the statements the patrol had given to me.[68]

Upon returning to FSB Ross, Theer learned that after Company B had been called back to the FSB, but before he had conducted his interviews of the patrol, Lieutenant Ambort apparently had second thoughts about the team's report to him. Ambort had gathered the patrol members and told them that events were taking a very serious turn; that it would be best to simply tell the truth, and that he intended to do so himself, starting by revealing his own false contact report.

Theer was concerned that the statements he had subsequently taken might have been subtly coerced, without his having known, by Ambort's comments to the patrol. Theer testified:

> I felt that perhaps each of these men might have been under some duress, and I could recall the colonel [Cooper] had told me that we must ensure that each man's rights were preserved....Having been a company commander myself once before, you have a family relationship ....There are very tight bonds. If the commanding officer said something, I'm sure that the men would feel like that might be what — they would take it as authoritative. Like your father speaking to you.[69]

"...It is in the nature of military organizations to recapitulate the psychodynamics of an authoritarian family group, one in which the paterfamilias can do no wrong."[70] Theer decided to re-interview the patrol members.

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[68]Theer, to author, 24 Feb. 1989.

[69]Record of pretrial investigation, 190.

[70]Norman Dixon, On the Psychology of Military Incompetence (London: Jonathan Cape, 1976), 218.

At the same time he sent word up the chain of command of what appeared to be unfolding. In consequence of Theer's report the commanding general of the 1st Marine Division sent an "eyes only" message to his senior, the commander of III MAF: "This is an initial report of possible serious incident involving elements of B-1/7 and Vietnamese civilians....Full scale inquiry commencing immediately."[71]

3.3.d. Discovered At the second interviews Theer again advised each of the men, in writing, of their rights to counsel and against self-incrimination, and added a further typewritten admonition: "I should not be influenced into making a statement merely because my commanding officer, First Lieutenant Ambort, told me to tell the truth and tell the whole story." Additionally, following the recitation of rights, the form read: "I do desire/do not desire to withdraw my [initial] statement which was made on 21 February."[72] The men acknowledged this preliminary advice by again initialling each paragraph of the typed form and by lining out the appropriate clause at the bottom.

One by one, Theer called the patrol members to his quarters for second interviews. Herrod said he would stand by the statement he had already given. Green opted to let stand his initial statement, but offered to orally respond to new questions. Major Theer testified:

> I asked Green to go over the circumstances again...and he began to tell me this in his narrative, and then he mentioned sniper fire. When he said that, I said, "Now wait a minute, Sam. You know and I know that there wasn't any sniper fire." And he became very hostile at that point and turned towards me with fire in his eyes and said, "What do I care about a gook woman or child? It's them or me. If they get in my way, that's too bad." And then I asked him to go on, and mentioned, he mentioned the next house and also taking sniper fire from it and I told him, I said, "I've been out there. The area that you are describing was impossible for anyone to

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[71]USMC, CG First MarDiv msg 202322Z Feb 70, Marine Corps Historical Center, Wash., and author's collection.

[72]Record of pretrial investigation, exhibits 35, 37, 40, 42, 46.

> see where you were, if you were standing on the patio." And with that he turned around and said that he wasn't going to answer any more questions....that he had been in jail for some 23 months prior to coming in the Marine Corps, and that he wasn't going back. And I said, "Okay, Sam. The interview is terminated. You may return to your post.[73]

Then Schwarz entered and, like the others, was again advised of his right against self-incrimination, to have legal counsel present, to decline further interview, and to retract his statement of the day before. The additional, tailored advice was also given him. Theer testified:

> When Schwarz came into my quarters that night he had a very bold approach. Very confident air about him....While we were going over this narrative...he became nervous and continued to smoke cigarettes one after another, and I, I felt that he was under some pressure. And I asked him...if what he had been telling me was the truth and he indicated that it had not been the truth....I asked if he was willing to make another written statement or modify the one that he had already presented me. He said that he would....I gave him a pad and a pen. He went in to the desk [in another room] and commenced writing another statement. And it took him a long time to write this statement. During the course of the time he was writing this statement I could hear him sobbing in there, crying in the office...[74]

In his seven-page, handwritten statement Schwarz, twenty-one years-old, the married father of a three-year old son, wrote:

> ...The team leader said we had the go ahead to kill anything on our rought and I could walk point....[At the first hut] the team was orderd to kill them and when they opened fire I joind in. When the fireing quieted all the people were dead....[At the second hut] the team leader orderd to kill them all. I started to fire along with everyone else as order. Again all the women and childeren were killed....[At the third hut] the team was agaid orderd to shot every one. The team hesetated and were again orderd to fire, so we did. We them were called back to the poss [position on Hill 50] and debreived. The C.O. ask what realy happen and was told. .He said that as soon as he heard the shooting he knew Harred had gone to wipe out a ville and that was a thing he didn't want. He also said "I know you men are killers so am I, but you just can't go in to a vill and start killing people"....The team leader told we had recieved sniper fire of witch we all when along with for fire of

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[73]Ibid., 232.
[74]Ibid., 327-28.

> what would had if it was descuverd what had really happen....When I relised what was happening I got scard and sick but was orderd to shot the people and knew if I did not obay the order I could get court mariald. From the time we started shotting I regetted ever going with this team....The patol resicved no sniper fire....I saw no one that I consiter enemy during the whole patrol not even a bobby trap.(sic)[75]

Schwarz swore to the truth of his statement and signed it. Boyd and Krichten subsequently submitted new statements admitting all, focusing blame on Herrod.[76] On 23 February 1970, all five were placed in pretrial confinement.

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[75]Ibid., exhibit 47.
[76]Ibid., exhibits 38, 43.

CHAPTER 4. WAR CRIMES AND WAR CRIMES ISSUES IN VIETNAM

A tight rein on aggression is mandatory in a profession whose stock in trade and solution to most problems is physical violence.
Norman F. Dixon, *On the Psychology of Military Incompetence*

It may be argued that the Son Thang murders were a violation of the customary law of war, breaching the Nuremberg Principles,[1] 1949 Geneva Convention III,[2] and international human rights agreements.[3] That the victims were unarmed women and children lent the crime no greater or lesser legal effect, but made the human misfortune all the more poignant.

International, municipal, and military law notwithstanding, war crimes have occurred throughout the history of war, the same offenses repeated with saddening regularity. In this chapter war crimes trials through history are briefly reviewed, noting their forums and results. The modern battlefield conundrum, distinguishing combatants from noncombatants — a particularly difficult problem in Vietnam — is examined. The extent of the Vietnam War's reported battlefield war crimes is noted, preparatory to discussing the criminal law issues raised, and not raised, by the Son Thang incident. The chapter's final section examines obedience to superior orders, the defense most frequently interposed in battlefield war crime prosecutions, and just as often rejected. The justice of its out-of-hand rejection is obliquely raised, as well.

As wartime crime goes, the Son Thang incident was pedestrian. Its uniqueness lies in the clarity of its law of war/criminal law issues, the availability of the record of

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[1]Principle VI. b.
[2]Art. 5, par. 2.
[3]IMT Charter, section II (b); Universal Declaration of Human Rights, ¶3; International Covenant on Civil and Political Rights, ¶6(1).

the cases' dispositions, and the outcomes of its trials. But the issues raised at Son Thang were not novel. They were common battlefield war crime tragedies.

4.1. War Crimes

In 1415, near the village of Agincourt, Henry V faced the French army. As the battle neared conclusion, Henry feared his prisoners would overpower their guards and join an eminent French attack. He ordered the several hundred prisoners killed.

> Comprehensible in harsh tactical logic; in ethical, human and practical terms much more difficult to understand. Henry [was] versed in the elaborate code of international law governing relations between a prisoner and his captor....Its most important provision was that which guaranteed the prisoner his life...[4]

As at Son Thang, Henry's subordinates at first refused to obey. A detail of archers finally carried out the King's order.[5] Perhaps not the first war crime, to apply a modern term to the medieval age, but a notable one. No trial followed. Lesser soldiers have been less fortunate.

4.1.a. War Crimes Through History A forerunner of contemporary international war crimes trials was that of Peter von Hagenbach, governor of Breisach, Germany, under Charles of Burgundy. After several years of rule — during time of military occupation, not war — Hagenbach was tried by a tribunal of twenty-eight judges from the allied states of the Holy Roman Empire, charged with murder, rape, and arson. Stripped of his knighthood, he was executed in 1474.[6]

In medieval times heraldic courts tried mercenaries, usually for engaging in military acts without war having been declared. "The rights under the 'law of arms'...were minutely

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[4]John Keegan, The Face of Battle (London: Jonathon Cape, 1976; Penguin, 1978), 109.
[5]M.H. Keen, The Laws of War in the Late Middle Ages (London: Routledge & Kegan Paul, 1965), 158, 179.
[6]Schwarzenberger, International Law, vol. II, 462.

governed, and argued with considerable subtlety by civilians and canon lawyers before military tribunals in which experienced knights and heralds often acted as judges..."[7] In 1689, James II relieved Count Rossen of his military duties for murdering civilians in the siege of Londonderry.

Following the U.S. war with Mexico (1846-48) an American colonel responsible for illegal acts during the campaign in Mexico was tried by a municipal court and received a personal $95,855.38 civil judgement, later upheld by the Supreme Court.[8]

After America's Civil War (1861-65), Major Henry Wirz, Swiss doctor and commandant of the Andersonville prisoner of war camp where 12,000 Union soldiers died, was tried by a military commission. Like von Hagenbach 300 years before, Wirz pleaded that he was obeying superior orders. Like von Hagenbach, Wirz was executed.

An unusual Civil War case involving a soldier's burning of a Kentucky courthouse resulted in a municipal civil trial and imposition of damages upon the soldier.[9] Some 2,000 cases were tried by military commission during the Civil War and the subsequent Reconstruction, several for war crimes. Dr. Samuel Mudd and seven other civilians were tried by such a commission, charged with violating the law of war for their complicity in assassinating President Lincoln, a quite unusual instance of a U.S. citizen and civilian, charged with a war crime allegedly committed within the U.S.[10]

Following the Spanish-American War (1898), a number of American soldiers and Marines were tried by U.S. courts-martial. "[T]heir trials would have been denominated 'war

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[7]Gerald I.A.D. Draper, "Grotius Place in the Development of Legal Ideas about War," in Bull, Hugo Grotius and International Relations, 185.

[8]*Mitchell v Harmony*, 54 U.S. (13 How.) 115 (1851).

[9]*Christian County Court v Rankin & Tharp*, 63 Ky. 502 (1866).

[10]*Ex parte Mudd*, 17 F. Cas. 954 (No. 9899) (S.D. Fla. 1868), cited in Jordan J. Paust, "After My Lai: The Case for War Crimes Jurisdiction Over Civilians in Federal District Courts," 50 Texas L. Rev., 6 (1971).

crimes trials' if they had been tried by an enemy or an international court."[11] Among those tried was an Army Brigadier General convicted of inciting, ordering and permitting subordinates to commit atrocities. In approving the general's conviction, President Theodore Roosevelt could have been writing about Vietnam:

> That warfare is of such character as to afford infinite provocation for the commission of acts of cruelty by junior officers and the enlisted men, must make the officers in high and responsible position peculiarly careful...to keep a moral check over any acts of an improper character by their subordinates.[12]

During the Boer War (1899-1902), the British court-martialed both Boers and her own soldiers for war crimes.[13] By the time of the first World War the U.K.'s *Manual of Military Law* had been in effect for thirty years. Flogging was abolished in 1881 but capital punishment remained common upon conviction by field general court-martial. But the 346 traceable British Expeditionary Force executions were all for military offenses; none the result of war crimes.[14] Similarly, none of the ten U.S. wartime executions were for law of war

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[11]Levie, "Criminality in the Law of War," in Bassiouni, International Criminal Law, vol. I, 233.

[12]*U.S. v BGen. Jacob H. Smith*, an unreported case described at: S. Doc. 213, 57th Cong., 2nd Sess., 5-17. Smith's written order to a patrol leader reads: "I want no prisoners. I wish you to burn and kill; the more you burn and kill, the better it will please me." Smith instructed that anyone capable of bearing arms, down to ten years of age, should be killed.

[13]Thomas Pakenham, The Boer War (London: Weidenfeld and Nicolson, 1979; Futura, 1988), 449, 538-39, 561. This exceptionally brutal war first saw concentration camps, organized guerrilla forces (guerrillas first having appeared in the Franco-Spanish Peninsular campaign of 1808-09), and standard issue dum-dum bullets.

[14]Anthony Babington, For the Sake of Example (London: Leo Cooper, 1983), 189. Another source puts the number at 350: Julian Putkowski and Julian Sykes, Shot at Dawn (London: Leo Cooper, 1989). Yet another text asserts that "in nearly every instance, the [British] Army's court martial procedures seem to have hampered a fair trial." Brian Bond, ed., The First World War and British Military History Oxford: Clarendon Press, 1991), 300.

offenses.[15] There were numerous courts-martial of German troops by German authorities, as well.[16]

Following World War I, pursuant to the Treaty of Versailles, 896 alleged German war criminals were identified by a commission formed for that purpose. For political reasons the list eventually shrank to forty-five. The commission recommended that a "High Tribunal" undertake their trial while the Treaty spoke of "military tribunals." Germany protested trial of its nationals by a foreign court and was finally allowed to try its own citizens for the alleged war crimes. Twelve of the forty-five were tried before the Supreme Court of the *Reich* sitting in Leipzig. "The doctrine of superior orders and the plea of military necessity were elevated to paramount legal principles..."[17] Six of the twelve were acquitted and three received sentences to confinement of less than a year. A major, convicted of shooting wounded prisoners, was sentenced to a mere two years imprisonment. Two submarine officers, claiming they had been ordered to fire on life boats of the ship they had sunk, the *Llandovery Castle*, were sentenced to four years confinement but soon escaped, apparently with official connivance.[18] Allied outrage at the leniency of the trials ("The Leipzig trials, as a whole, were...a farce.")[19] was not forgotten when the Nuremberg Tribunals were initiated.

Throughout the Second World War the *Wehrmacht-Untersuchungsstelle für Verletzungen des Völkerrechts* (Bureau for the Investigation of War Crimes) was an active unit of the German army. It regularly gathered evidence for the

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[15]Ibid., Babington, 190.

[16]Elbridge Colby, "War Crimes," 23 Michigan L. Rev. 482, 504 (1924-25).

[17]Hersch Lauterpacht, "The Law of Nations and the Punishment of War Crimes," 21 BYIL 58, 84 (1944).

[18]Sheldon Glueck, "By What Tribunal Shall War Offenders be Tried?" 56 Harvard L. Rev. 1059 (1942-43); and, Leon Friedman, ed., The Law of War: A Documentary History, vol. I (NY: Random House, 1972), 777.

[19]Alan M. Wilner, "Superior Orders As A Defense to Violations of International Criminal Law," 26 Maryland L. Rev. 127, 134 (1966).

court-martial of German soldiers charged with war crimes and death sentences often resulted.[20] The post-World War II Nuremberg and Tokyo IMTs are reviewed elsewhere. (See section 2.1.b) Also during the post-war period, Axis civilian nationals were prosecuted for war crimes by municipal courts and military tribunals.[21]

War crimes cases in recent years include those of Adolph Eichmann[22] and John Demjanjuk[23] in Israel, and Klaus Barbie in France,[24] each in municipal forums. Andrija Artukovic, deported to Yugoslavia, awaits trial.[25]

Heraldic courts, commissions, boards of officers, courts-martial, municipal courts, tribunals, and international military tribunals have tried war crimes cases. Both military and civilian courts act as agents of international order, as well as constituent institutions of the national order. In Vietnam issues arose that, if not new, were of greater relevance and difficulty than ever before.

4.1.b. Who is the Enemy, Who is A Civilian? Asked his understanding of the difference between a combatant and a noncombatant, Lieutenant Ron Ambort testified with unknowing sophistication: "A noncombatant is a momentary thing. It's somebody who's sitting there right now, not doing anything."[26]

The need to and reasons for distinguishing between civilians and combatants in warfare hardly require discussion. The 1949 Geneva Conventions set the criteria for

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[20]Alfred M. deZayas, The *Wehrmacht* War Crimes Bureau, 1939-1945 (Nebraska: University of Nebraska Press, 1989), 10, 18, 20-21, 86.

[21]Willard B. Cowles, "Trial of War Criminals (Non-Nuremberg)," 42 AJIL 299 (1948).

[22]*Attorney-General of Israel v Eichmann* (Israel, D. Ct. of Jerusalem, Dec. 12, 1961), 36 ILR 18, 277(1962).

[23]*Matter of Demjanjuk*, 603 F.Supp. 1463 (1984) and *Demjanjuk v Petrovsky*, 776 F.2d 571 (1985), U.S. cases relating to Demjanjuk's deportation to Israel for trial.

[24]*Court of Cassation (Criminal Chamber)*, 6 Oct. 1983; 78 ILR 132 (1983-84).

[25]79 ILR 386.

[26]Record of trial, *U.S. v Schwarz*, 351.

protected combatant status as a force commanded by a person responsible for his subordinates, having a distinctive sign recognizable at a distance, openly carrying arms, and conducting operations in accordance with the laws of war.[27] If those criteria are not met the combatant is unprotected by the Conventions.

The term "civilian" is rarely found in Geneva Convention IV. Rather, it addresses "protected persons," characterizing them as individuals who "in any manner whatsoever, find themselves...in the hands of a Party to the conflict.[28] But co-belligerents, the Convention specifies, are excluded from protected status.[29] The South Vietnamese civilians of Son Thang were certainly in the hands of a Party at the time of their deaths. But as nationals of a U.S. co-belligerent, they apparently were excluded from the Conventions' protection. (But see section 4.2.a.) The theory behind such exclusion is that regular diplomatic protections available to co-belligerents make the added protection of Convention IV superfluous.[30] The 1977 Protocols I and II, which supplement Convention IV's identification of civilians, have been ratified by neither the U.K. nor the U.S.

Restrictions on attacks upon civilian populations date back at least to the turn of the century and the Regulations upon Land Warfare annexed to the 1899 and 1907 Hague Conventions. "But history shows that civilians, in spite of this protective regime [against attack], are increasingly at risk in war."[31]

> The mobilization of an entire population behind the war effort, and the imagery of the "home front," makes the traditional conception seem superficial...For example, was a cypher clerk working at Bletchley, engaged in cracking enemy codes, to be classed as a combatant or

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[27]Arts. 13, 13, and 2 of Conventions I, II, and III, respectively.
[28]Art. 4.
[29]Ibid..
[30]Dept. of the Army, International Law, vol. II, 132-33.
[31]DeLupis, The Law of War, 241.

> not? [He] was probably more dangerous to the enemy than any front-line soldier.[32]

Today the distinction between combatant and noncombatant is "largely illusory, now that the whole of a country's economy is geared to the war effort."[33] The killing of civilian factory workers may produce military advantage un-imagined a century ago. Civilians like Britain's Observer Corps were critical to the World War II combat effort. There have always been exceptions to the combatant-noncombatant distinction* but today "the distinction has been so whittled down...that it has become more apparent than real... [Belligerents] have extended the definition of combatant to include almost all important elements of the enemy's civilian population."[34] The British view of civilians *vis-a-vis* the enemy, for example, is expansive:

> One of the consequences [of war] is that every subject of the one State becomes an enemy to every subject of the other. It is impossible to sever the subjects from their State...[although] civilians must not be made the object of attack directed exclusively against them.[35]

Sir Arthur "Bomber" Harris, Marshall of the R.A.F. who directed the World War II bombing of Hamburg, Dresden, and other German cities, wrote:

> But the point is often made that bombing is specially wicked because it causes casualties among civilians ....International law can always be argued pro and con, but in this matter of the use of aircraft in war there is, it so happens, no international law at all.[36]

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[32]Clark, Waging War, 92.

[33]Akehurst, A Modern Introduction to International Law, 272-73.

* *e.g.*, civilian workers in a legitimate target, collateral (indirect and unintentional) injury, siege/blockade victims, and reprisals. World War II's bombing of dams, atomic bombing, fire bombings, and targeting of population centers are now sometimes regarded by military planners as within the bounds of the law of war.

[34]Lester Nurick, "The Distinction Between Combatant and Noncombatant in the Law of War," 39 AJIL 680 (1945). To the same effect, Clyde Eagleton, "Of the Illusion That War Does Not Change," 35 AJIL 659, 660 (1941).

[35]HMSO, Manual of Military Law, pt. III, par. 13.

[36]Sir Arthur Harris, Bomber Offensive (London: Greenhill Books, 1990), 176-77.

That assertion, questionable before World War II, in light of the 1923 Hague Commission of Jurists, was certainly incorrect after the Nuremberg principles were accepted (but not adopted) by the U.N.[37]

The U.S. position is similar to Britain's: Civilians of an opposing state are "enemies" who offer no resistance and who may not lawfully be the direct subjects of violence.[38]

Should a civilian deliberately and directly harm his enemy his protection under international law, such as it is, is withdrawn.[39] As Geoffrey Best notes:

> The moment they did offer resistance or become in any other way involved in the war apparatus...their title to indulgence disappeared...even where it was 'not their fault' but simply by accident of war...for example...in the cross-fire between armies.[40]

Area bombing and atomic bombing of civilian targets during World War II confirmed that even that distinction is largely honored in the breach. Unlawful combatants — mercenaries and terrorists — enjoy no protection under the law of war and are always legitimate targets for belligerent action.

Where did that leave the South Vietnamese civilian, a co-belligerent and ostensible U.S. ally who, despite the advice of his own government, often opted to remain in his native hamlet? He was not a munitions worker, defense employee, or factory hand, but a simple subsistence farmer. If the civilian-combatant distinction has been rendered illusory, was the indigenous Vietnamese "fair game"? Of course not. While the distinction has faded in a strategic sense, that does not give soldiers on the battlefield license to assault or kill civilians. The difference is that of the pilot who bombs an arms factory, resulting in a civilian's

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[37]The Commission's Air Rules were not adopted, but were persuasive. For other conventions regulating air warfare, see Rowe, Defence, 123-24.

[38]Dept. of the Army, The Law of Land Warfare, par. 25.

[39]Robert W. Gehring, "Loss of Civilian Protections Under the Fourth Geneva Convention," XIX *Revue de Droit Penal Militaire* 15, 18 (1980).

[40]Best, Humanity in Warfare, 55.

death, and an infantryman who points his pistol at an unarmed civilian and kills him: moral choice and criminal intent. A more difficult question is when such a killing is a war crime.

Throughout the Vietnam War the civilians' status was clouded by insurgents who indistinguishably intermingled their soldiers with the general population, eluding discrimination while depending on the U.S. attempt to discriminate, "relying upon the principle of noncombatant immunity while acting in such a way as to undermine it."[41] True, the farmer often *was* part of the insurgency, and even if he wasn't a part-time guerrilla he was suspected of it by U.S. troops.

> In essence...[to U.S. forces] the entire civilian population became the military enemy because of their sympathies or activities, because of their status as potential recruits, or even because they were visually indistinguishable from insurgent soldiers.[42]

"Here we come to the heart of the contemporary problem in respect of the law of land war. The accommodation of guerrilla warfare within the law of war..."[43] Lieutenant Calley expressed widespread military opinion in Vietnam when he railed:

> *These people, they're all the VC*....if those people weren't all VC then prove it to me. Show me that someone was for the American forces there. Show me that someone helped us and fought the VC. Show me that someone wanted us: One example only![44]

Perhaps Calley recognized a response to his plea when the military judge in his court-martial instructed the jurors:

> Noncombatants detained by the opposing force, regardless of their loyalties, political views, or prior acts, have the right to be treated as prisoners until released,

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[41]R.L. Phillips, War and Justice (Oklahoma: University of Oklahoma Press, 1984), 98.
[42]Richard A. Falk, "Remarks," in Trooboff, Law and Responsibility in Warfare, 38.
[43]Geoffrey Best, "Restraints on War by Land Before 1945," in Howard, Restraints on War, 31.
[44]John Sack, Lieutenant Calley: His Own Story (NY: Viking Press, 1970), 79. Italics in original.

[Solis, 1992,

> confined, or executed in accordance with law....Summary execution of detainees or prisoners is forbidden by law.[45]

Confusingly, though, the terms "prisoner," "detainee," "guerrilla," "VC suspect," or "refugee" could all describe the same Vietnamese captive, depending on how the U.S. military commander chose to see him in reports to higher headquarters.[46]

Lieutenant General Charles G. Cooper, who commanded 1/7 as a lieutenant colonel, recently wrote:

> It concerned me no end that the mystery of identifying who the enemy was never was resolved, nor could it have been. Basically you responded to fire, and often that was too late...The trooper rightly never understood why we could order an air strike on a village that was the source of fire, but a more definitive rule of conduct applied to the man with the rifle. There is a difference, a big difference, but can you explain that satisfactorily to a man who saw his best friend just killed in an ambush triggered by a 10-year old with an AK-47?[47]

Despite experience, one still hopes the answer is yes.

4.1.c. Military Necessity and Reprisals In defense of the Son Thang incident could the killer team's acts be considered a reprisal, or military necessity? These issues, though apparently inapplicable to the facts of the case, merit brief attention.

Today, because it is so infrequently invoked, "military necessity" is a term more familiar to civilian jurists than to judge advocates. First encountered around 1900 in Germany's *Kriegsraison* theory, military necessity essentially holds that the method is permitted if it is necessary for success, laws to the contrary notwithstanding. Besides its application on the battlefield, the concept is linked to the

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[45]Jury instructions, *U.S. v Calley*, quoted in Friedman, The Law of War, vol. II, 1703, 1721.

[46]Jonathan Schell, The Real War (London: Corgi Books, 1989), 177.

[47]Cooper to author, 12 Sept. 1988.

continued existence of the state.[48] Our concern is limited to the former usage, tactical military necessity.

It has been argued that in time of unique tactical need or danger military necessity suspends the criminal character of certain war crimes and converts them into legitimate acts.[49] Thus, survivors of submarine torpedoing have been machine gunned to hide the submarine's presence[50] and prisoners executed to free an endangered unit of their burden.[51] But, as the Tribunal in the *Krupp* case said:

> [The] rules and customs of warfare are designed specifically for all phases of war....To claim that they can be wantonly – and at the sole discretion of any one belligerent – disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.[52]

"This view of the elasticity of the laws of war must be absolutely rejected....It would enable combatants to justify any deviation from the laws of war on the real or supposed ground of military necessity."[53]

U.K. and U.S. views are in accord in rejecting the concept.[54] Conventional and customary rules of warfare are always binding and cannot be disregarded even in cases of purported military necessity.[55]

> Neither international law nor even the domestic laws of civilized communities recognize a claim that an

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[48]Dept. of the Army, International Law, vol. II, 9-10.

[49]DeLupis, The Law of War, 333. (DeLupis notes and rejects that argument.)

[50]U.N. War Crimes Commission, Law Reports of Trials of War Criminals , vol. I, *The Peleus Trial*, 1.

[51]Ibid., vol III (1948), *Trial of Gunther Thiele and Georg Steinert*, 56.

[52]Judgement, Trials of War Criminals Before the Nuremberg Military Tribunals, vol. IX (Wash.: GPO, 1950), 1347.

[53]Erik Castrén, The Present Law of War and Neutrality (Helsinki: Suomalaisen Kirjallisuuden, 1954), 66.

[54]Dept. of the Army , The Law of Land Warfare, par. 3.a.; HMSO, Manual of Military Law, pt. III, par. 633. Until after World War I, however, the U.S. position was that of *Kriegsraison*. U.S. War Dept., Rules of Land Warfare, 1914 (Wash.: War Dept., 1914), par. 11.

[55]N.C.H. Dunbar, "Military Necessity in War Crimes Trials," 29 BYIL 442, 444 (1952).

> individual is entitled to sacrifice others to ensure his own survival. Domestic legal systems universally condemn such a sacrifice as a crime.[56]

In any event there was no suggestion that the Son Thang patrol considered the killing of its victims necessary for completion of the mission or to preserve its own safety.

In customary international law, reprisals and collective punishment of civilians offering resistance in occupied areas have been considered permissible and "a legitimate means of ensuring compliance with the law of war by the enemy."[57] Reprisals usually refer to the actions of states, with which we are not here concerned. But there are also what may be referred to as battlefield reprisals. Professor Ingrid DeLupis defines that type of reprisal as:

> Acts...by a belligerent directed against groups of civilians, prisoners-of-war or other persons *hors de combat*, in response to an attack by persons of unprivileged status or by persons not immediately connected with the regular forces of the enemy.[58]

"Reprisals by definition are unlawful acts deliberately done to punish and deter an unlawfully behaving enemy."[59] Could the actions of the Herrod patrol, having witnessed the death of a fellow-Marine just hours before, be considered a reprisal? Or simply retaliation and revenge? Since reprisal presumes a prior illegal act by the enemy, characterizing the Son Thang killings as a reprisal seems bootless.

In very limited circumstances, U.S. law allows reprisals, but only after an implementation process that transpires at a far-higher than tactical level.[60] British law, while not as confining, similarly takes reprisals from the hands of the individual soldier.[61] The 1949 Geneva Conventions

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[56]Louis F.E. Goldie, "Remarks," in Trooboff, Law and Responsibility, 85.

[57]Anthony V.P. Rogers, "Armed Forces and the Development of the Law of War," IX *Recueils de la Société Internationale de Droit Pénal Militaire* 201, 205 (1982).

[58]DeLupis, The Law of War, 255.

[59]Best, Humanity in Warfare, 267-68.

[60]Dept. of the Army, The Law of Land Warfare, par. 495-497.

[61]HMSO, Manual of Military Law, pt. III, par. 642-649.

prohibit collective punishments and reprisals against protected civilians[62] – a notable change since, despite its Charter specifying the killing of hostages a war crime, not even the Nuremberg tribunals declared reprisals against civilians always illegal.[63] Some argue that all reprisals have been rendered contrary to international law by the U.N. Charter,[64] though such arguments strike others as unconvincing.

In circumstances similar to the Son Thang patrol's, Lieutenant Calley urged his court-martial to view his actions as a reprisal. The military appellate opinion, released after the Son Thang trials, addressed Calley's assertion, leaving little doubt as to the U.S. military's legal view:

> In an argument of extraordinary scope, appellant asks us to hold that the deaths of the My Lai villagers were not legally requitable....The premises for this view are first, that the history of operations around Pinkville discloses villager sympathy and support for the Viet Cong, so extensive and enduring as to constitute all the villagers as belligerents...not entitled to the protections of peaceful civilian status....Participation in irregular warfare is done by individuals, although they may organize themselves for the purpose. Slaughtering many for the presumed delicts of a few is not a lawful response....Villagers [of toddler age] were indiscriminately included in the general carnage....The argument is in essence a plea to permit summary execution as a reprisal for irregular villager action favoring the Viet Cong. Reprisal by summary execution of the helpless is forbidden in the laws of land warfare.[65]

Despite Lieutenant Ambort's direction to Herrod to "pay these little bastards back," the Son Thang incident was not a battlefield reprisal. The patrol lacked an intent to execute

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[62]Convention IV, Art. 33.

[63]Frits Kalshoven, Belligerent Reprisals (The Netherlands: A.W. Sijthoff, 1971), 334; and U.N. War Crimes Commission, Law Reports of Trials of War Criminals, vol. VIII, 76-88.

[64]Brownlie, International Law and the Use as Force, 223, referring to Art. 2: "All members shall refrain...from the threat or use of force...."; also see: Quincy Wright, "Legal Aspects of the Vietnam Situation," in Richard A. Falk, Gabriel Kolko, and Robert J. Lifton, eds., Crimes of War (NY: Random House, 1971), 187.

[65]*U.S. v Calley*, 46 CMR 1131, 1174 (1973).

a lawful act of reprisal which was, in any event, beyond its authority to conduct. The killings were simply war crimes.

4.1.d. The Extent of U.S. War Crimes in Vietnam There were directives applicable to all troops in Vietnam on the subject of war crimes, first issued in 1965 and updated regularly. They directed that all personnel were responsible for reporting suspected war crimes.[66] Many in fact were reported and the U.S. did try by court-martial a significant number of its nationals.

Assessing the true extent of battlefield war crime in any conflict is impossible since significant offenses go unreported and undiscovered. Assessing the number of Vietnam convictions for breach of the law of war is similarly problematic. Only the U.S. Army kept count of its war crimes cases; no other armed service did so.[67] There was no central, all-service reporting authority.

> [General Westmoreland's headquarters] had considered establishing special war crimes teams and having the Army maintain centralized files...for all services, but this was not done because the laws prohibiting war crimes and the...machinery for investigating and punishing such offenses were judged adequate.[68]

Nor can one make a determination by reviewing appellate records since not all cases are appealed, not all appellate opinions are published, and those published seldom refer to the offenses as war crimes, describing them instead as murder, assault, rape, *et cetera*. A few war crimes, as in one instance involving dismissal of charges ostensibly for reasons of national security, were not even prosecuted.[69]

There does exist an all-service record of convictions for serious offenses involving Vietnamese victims — but not

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[66]Prugh, Law at War, 72-74.

[67]Lewy, America in Vietnam, 350.

[68]Prugh, Law at War, 77.

[69]Westmoreland, A Soldier Reports, 367-68, describes dismissal of charges against seven Green Beret officers involved in the murder of a South Vietnamese intelligence agent.

all such offenses are necessarily war crimes. One U.S. soldier whose case figures in the totals, for example, was convicted of murdering a Vietnamese drug dealer.[70] Still, the number of South Vietnamese serious crime victims is revealing. The following two tables are based on Department of Defense and Department of the Army figures.

Court-Martial Convictions Involving Vietnamese Victims, 1965-1973[71]

Offense	Army	Navy	Marine	Air Force
Murder	41	3	27	0
Rape	25	1	16	0
Mutilation of Corpse	2	0	1	0
Manslaughter	26	2	15	1

The second table accurately indicates war crime trials, but only reflects offenses alleged against U.S. Army personnel:

Allegations Against Army Personnel, Other Than My Lai, 1965-1975[72]

	Pre-My Lai	Post-My Lai	Total
Allegations made:			
Unsubstantiated/unfounded	19	144	163
Substantiated	31	47	78
Total	50	191	241
Cases referred to court-martial:			
Convicted	22	14	36
Acquitted/dismissed	15	5	20
Offenses of which convicted:			
Murder/manslaughter	6	3	9
Rape	3	0	3
Mutilation	3	2	5

Other war crime tabulations said to be from official sources vary in minor ways, there being no way to determine which figures are accurate.[73] Still other tabulations cover

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[70]*U.S. v Stamats*, 45 CMR 765 (ACMR, 1971).

[71]Parks, "Crimes in Hostilities," pt. I, 18.

[72]Lewy, America in Vietnam, 348.

[73]Aubrey M. Daniel, "The Defense of Superior Orders," 7 U. of Richmond L. Rev. #3, 477, 495 (1973).

only a portion of the war,[74] or fail to reflect a reliable source.[75] How a war-crime/non-war-crime distinction was made by military officials is unspecified, although directives in effect throughout the conflict describe war crimes in terms of Geneva Convention grave breaches.[76] Telford Taylor would differentiate on the basis of where the crime occurs, friendly territory, or enemy territory.[77] Major General Prugh, Judge Advocate General from 1971 to 1975, suggests an operational/ non-operational dichotomy:

> Serious incidents involving assault, rape, and murder that were not directly connected with military operations in the field were not characterized as war crimes but were reported through military police channels as violations of the Uniform Code of Military Justice.[78]

In any event, the number of war crimes indicated in the foregoing tables, the best official estimates available, is so low as to clearly suggest their unreliability as an indicator of actual offenses. The number of Army war crime trials may be known but ultimately the number of Vietnam war crimes cannot even be accurately estimated.

4.2. Preliminary Son Thang Trial Issues

By discovering and promptly initiating legal proceedings against the Son Thang patrol members the Marine Corps was spared many of the problems encountered by the Army's My Lai prosecutors. Within ninety-six hours of the charged acts, the Herrod patrol was jailed, awaiting a preliminary judicial inquiry. In contrast, it was over a year before the My Lai allegations were first aired, another five months before

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[74]Solf, "A Response to Telford Taylor's 'Nuremberg and Vietnam'," 67; Goldstein, The My Lai Massacre and its Cover-up, 15, n.7.

[75]U.S. News & World Report, 19 April, 1971, 20; Bishop, Justice Under Fire, 291.

[76]*e.g.*, MACV Directive 20-4, dated 10 July 1970, Annex D, Inspections and Investigations: War Crimes.

[77]Taylor, Nuremberg and Vietnam, 134.

[78]Prugh, Law at War, 76.

charges were brought against Lieutenant Calley, and yet another fourteen months before his trial began, half a world away from the crime scene. Though much of the delay was no fault of the Army's, throughout the nineteen months between revelation and trial world-wide publicity made My Lai infamous and provided fertile ground for defense issues.

The Son Thang trials, because of their prompt disposition near the crimes' occurrence, were to be uncommonly "clean" cases, free of allegations of command influence, prejudicial publicity, or political interference. While there were numerous preliminary issues, they tended to be straightforward and subject to courtroom resolution.

4.2.a. Civilians as Protected Persons Upon first impression the Son Thang victims, nationals of a co-belligerent state, appear excluded from the protection of the 1949 Geneva Conventions, though U.S. military courts had previously disregarded the seeming exclusion.[79] America's 1863 Lieber Code made clear that "the unarmed citizen is to be spared...as much as the exigencies of war will admit," and "wanton violence" against such persons, whether ally or enemy, shall be punished.[80] No distinction is made between co-belligerent and other civilians. The 1907 Hague Convention IV is to the same effect.[81] The U.N.'s War Crimes Commission notes treaty and case law on point, as well:

> On a narrow interpretation, the Hague Convention [1907 Hague Convention IV Respecting the Law and Customs of War on Land] does not protect civilians outside of occupied territory...but this has not in fact prevented courts from extending the protection of the laws and usages of war....In the *Hadamar Trial*...various accused were found guilty of taking part in the deliberate killing of...civilians...[That they were] not in

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[79] *U.S. v Schultz*, a noncombatant murder case wherein Convention IV is prominently relied upon as authority.

[80] Arts. 22 and 44, respectively.

[81] Art. 46.

> occupied territory, was treated as irrelevant. Another example among the many, is the *Belsen Trial*.[82]

But legal and philosophical distinctions based upon notions of humanity may be forgotten as one gets closer to the sound of guns.

If the Son Thang victims were protected noncombatants, "such killings would be classical examples of 'war crimes'."[83] The most calloused infantryman would recognize a young blind girl as a noncombatant; six of the dead were six- and eight-year old children, obviously not combatants. But were they protected persons? Were they VC and unlawful combatants?

> He who engages in combat by night, while purporting to be a quiet civilian by day, is neither a civilian nor a combatant. He is an unlawful combatant, who is deprived of the protection of international law (in the form of entitlement to the status of a prisoner of war)...[84]

Noncombatants, as well as unlawful combatants, normally cannot claim prisoner of war (POW) status,[85] but compelling facts indicate that the Son Thang victims were entitled to such standing.[86] Hague Convention IV of 1907 notes that belligerent armed forces may consist of combatants and noncombatants and both, if captured, "have a right to be treated as prisoners of war."[87] Article 5 of the 1949 POW

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[82]U.N. War Crimes Commission, Law Reports of Trials of War Criminals, vol. XV, 85-86, citations omitted.

[83]Nigel S. Rodley, The Treatment of Prisoners Under International Law (Oxford: Clarendon Press, 1987), 154.

[84]Yoram Dinstein, "The Distinction Between Unlawful Combatants and War Criminals," in Dinstein, ed., International Law at a Time of Perplexity (Dordrecht: Martinus Nijhoff, 1989), 105.

[85]1949 Convention III, Art. 4.

[86]In support of such a determination, see: Stanley L. Paulson and John S. Banta, "The Killings at My Lai: 'Grave Breaches' Under the Geneva Conventions and the Question of Military Jurisdiction," 12 Harvard L. Rev. (!971), which makes the argument that the similarly situated My Lai victims should have been considered POWs. The same argument is persuasively made in: Note, "The Geneva Convention and the Treatment of Prisoners of War in Vietnam," 854-55; and in Carnahan, "The Law of War in the United States Court of Military Appeals," 340, 344-45. Not all writers agree, however: Donald L. Shaneyfelt, "War Crimes and the Jurisdiction Maze," 4 International Lawyer 924 (1969-70); and Dinstein, "The Distinction Between Unlawful Combatants and War Criminals."

[87]Art. 3.

Convention addresses persons whose eligibility for POW status is uncertain: "Should any doubt arise as to whether persons...belong to any of the categories enumerated [for POW status] such persons shall enjoy the protection of the present Convention until such time as their status has been determined..." Having forced their captives from their huts, the killer team reasonably should have harbored doubt concerning their status; doubt sufficient to have rendered them protected persons until their actual status could be determined. Son Thang bordered a free fire zone; the VC, including women and children, were well-known to be operating in the area – the battalion operations journal reflects that two days before the Son Thang patrol "a child"[88] lured a squad of Marines into an ambush that resulted in two dead and three wounded; two days before that an enemy female soldier had been killed;[89] the day before that a VC estimated to have been eleven years old was taken under fire, captured, and detained;[90] Herrod and his patrol purported to have seized their victims on the basis of suspected VC presence in Son Thang; and most importantly, a MACV directive ordered that Geneva Convention POW protections should extend to "[p]ersons who when detained were not openly engaged in combat and whose status may be: innocent civilian, returnee, prisoner of war, or civil defendant."[91]

Nor did the captives' lack of uniform or fixed distinguishing sign, called for by Convention III,[92] rule out POW status. The Court of Military Appeals noted in a 1969 opinion involving a single Vietnamese civilian held, then killed by a patrol in virtually identical circumstances:

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[88]1/7 Command Chronology, Feb. 1970, 20, entry 171315H.
[89]Ibid., 19, entry 151115H.
[90]Ibid., 18, entry 141620H.
[91]MACV Directive 20-5 of 15 March 1966, par. 19, quoted in Paulson and Banta, "The Killings at My Lai," 348, fn. 18.
[92]Art. 4 A.(2)(b).

> There is not an iota of evidentiary support that the victim was a Viet Cong or its sympathizer....But, even if we were to assume the contrary, accused had taken his victim prisoner. The conduct of the accused...had to be governed by...Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War...[93]

The military Court clearly regards the Conventions as policy norms to be applied in light of their humanitarian purposes, rather than technical entitlements created solely by the Conventions themselves.[94] Whether unprotected civilians, POWs, or combatants, "humane treatment is still the general principle."[95] The 1907 Hague Convention's Martens clause long ago laid to rest the misconception that what is not expressly prohibited in warfare is permitted.[96]

Before taking action against their captives Herrod and his patrol had a duty to await a determination by responsible authority of their status – a determination not for them to make. The ICRC notes in that regard, "decisions which might have the gravest consequences should not be left to a single person, who might often be of subordinate rank."[97] Once seized, the sixteen Vietnamese should have been considered POWs, protected by 1949 Geneva Convention III, and their killing was a grave breach of the law of war.

4.2.b. Insanity Turning from the victims to the accused, other pretrial issues arise. Having been ordered by Herrod, their patrol leader, to kill four unarmed female civilians,

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[93]*U.S. v Schultz*, 136, citations omitted. Though uncommon in post-World War II trials, a similar result did sometimes obtain where lack of uniform or distinctive sign was in issue: U.N. War Crimes Commission, Law Reports of Trials of War Criminals, vol. IX, *Trial of Skorzeny, et al.*, 90, which involved use of the enemy's uniform. The issue is largely mooted by Protocol I, Sec. II, Arts. 44-45, which grants civilian-combatants such as the VC POW status in Son Thang-like situations.

[94]Carnahan, "The Law of War in the United States Court of Military Appeals," 340.

[95]Percy E. Corbett, "The Vietnam Struggle and International Law," 348, 375, in Richard A Falk, ed., The International Law of Civil War (Maryland: Johns Hopkins Press, 1971).

[96]Rowe, Defence, 145.

[97]Jean S. Pictet, ed., Commentary, III Geneva Convention; Relative to the Treatment of Prisoners of War (Geneva: ICRC, 1960),77.

one of whom was obviously blind, Krichten asked Boyd, "Is he crazy, or what?" "He must be," replied Boyd. Given the nature of the charged offenses, the issue of mental responsibility immediately comes to mind.

Under U.S. military law applicable during the Son Thang trials, if reasonable doubt existed as to the mental responsibility of the accused he could not be convicted of any offense. The test of mental capacity was a modified version of the England's *M'Naghten*[98] standard: "A person is not mentally responsible...unless he was, at the time, so far free from mental defect, disease, or derangement as to be able...both to distinguish right from wrong and to adhere to the right."[99]

But insanity was not raised as a defense in any Son Thang trial. In Herrod's court-martial the civilian defense team did call as a witness in its case-in-chief a civilian psychiatrist who testified without having examined the accused. "The psychiatric evidence we presented," wrote Herrod's counsel, "...was very persuasive, I think."[100] Persuasive of what, one wonders? Subsequently the defense made a motion to dismiss all charges against Herrod "due to a lack of mental responsibility on the part of the defendant,"[101] a motion perhaps based upon the civilian practice with which Herrod's civilian defense counsel was familiar. There is no such ground for dismissal of charges in military practice and the motion was withdrawn immediately upon being made.

4.2.c. Partial Responsibility The Son Thang accuseds may have lacked a legitimate insanity defense, but if they

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[98]*M'Naghten's Case,* 8 Eng. Rep. 718 (1843).

[99]Manual for Courts-Martial, 1969 (Wash.: GPO, 1969), par. 120.b. See *U.S. v Frederick,* 3 MJ 230 (USCMA, 1977) for comprehensive description of the insanity defense in military law to that date.

[100]Denzil D. Garrison, Oklahoma, to author, Wash., 22 August 1988.

[101]Record of trial, *U.S. v Herrod,* 991. (The summarized record is oddly numbered.)

suffered from a lesser abnormal mental condition it would have been a relevant consideration in determining guilt or innocence. In U.S. military law, partial mental responsibility does not amount to a general lack of mental responsibility which would excuse criminality. It does, however, result in an inability to form specific intent or a premeditated design to kill,[102] and would have been a partial defense. Since specific intent and premeditation are not required for a finding of guilt of *un*premeditated murder, guilt of that offense would not have been precluded.[103] An appropriate showing of partial mental responsibility does not, however, result in commitment, as does a successful insanity defense.[104]

But neither was partial mental responsibility raised as a defense, although in two cases the eventual outcomes were the same as if it had been: findings of guilt to the lesser charge of unpremeditated murder. Still, experienced defense counsel might reasonably have been expected to raise the issue of partial mental responsibility, pleading, for example, provocation related to recent combat stress adequate to cause a loss of normal self control.[105] All of the accuseds except Green had been engaged in combat for a considerable period; a company member had been killed in their presence only hours before the charged crimes; civilians in the vicinity of Son Thang, including women and children, had frequently engaged them in combat; other friends had recently been killed or wounded. But the issue was not raised.

4.2.d. Principals, Aiders and Abettors There was later argument as to who among the five patrol members fired *at* the

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[102]*U.S. v Kunak,* 17 CMR 346 (USCMA, 1954).

[103]Manual for Courts-Martial, 1969, par. 120.c.; *U.S. v Chappell,* 41 CMR 236 (USCMA, 1970).

[104]Wayne R. LaFave and Austin W. Scott, Jr., Criminal Law, 2d ed. (Minnesota: West Publishing, 1986), 369.

[105]Edwin R. Keedy, "A Problem of First Degree Murder: Fisher v. United States," 99 U. Pennsylvania L. Rev. 267, 277-90 (1950), describes such a circumstance.

Vietnamese at Son Thang and who merely *fired.* All five were charged with having actually fired at the women and children. But what if the prosecution lacked *proof* that each of the accused in fact shot *at* the victims?

The concept of aiders and abettors applies in the law of war as in general criminal law. British practice is to charge an accused with being "concerned in" committing a specific war crime; the English civilian law of principals and accessories is analogous.[106] "The possible range of persons who may be held guilty of war crimes...is not limited to those who physically performed the illegal deed. Many others have been held to be sufficiently connected with an offence to be held criminally liable..."[107] Following World War II, not surprisingly, there were numerous war crime convictions grounded on the principle of complicity, the parallel of aiding and abetting.[108] "It is a universally recognized principle of modern penal law," said a World War II tribunal, "that accomplices during or after the fact are responsible in the same manner as actual perpetrators....That is a principle recognized equally in the field of war crimes."[109]

The U.S. code of military law, the Uniform Code of Military Justice, reads:

> ...[M]ere presence at the scene is not enough nor is mere failure to prevent the commission of an offense; there must be an intent to aid or encourage the persons who commit the crime. The aider and abettor must share the criminal intent....An accused, without intent to kill and without active participation in a homicide, is a principal guilty of murder committed by those with whom he voluntarily associated himself in the execution of an unlawful design [that] involves a hazard to life.[110]

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[106]U.N. War Crimes Commission, Law Reports of Trials of War Criminals, vol. XV, 79.
[107]Ibid.
[108]See citations in: Paust, "My Lai and Vietnam: Norms, Myths and Leader Responsibility,"167-69.
[109]U.N., Law Reports of Trials of War Criminals, vol. VIII, *Trial of Franz Holstein*, 32.
[110]Manual for Courts-Martial, 1969, par. 156: UCMJ, Art. 77

At trial here was no evidence that Green had shot *at* any of the victims; he was prosecuted "as a principal to murder by virtue of his having aided and abetted those actually shooting the victims..."[111]

4.3. Issues in The Defense of Superior Orders

The defense of obedience of superior orders clearly would be central in the Son Thang trials. Of that issue Professor Lauterpacht wrote: "The problem raised by the plea of superior orders is, by general admission, one of great complexity both in international and in municipal law....The law oscillates..."[112] In drafting the Protocols to the 1949 Geneva Conventions the issue of superior orders was so contentious that the Conference could not adopt an acceptable proposal concerning the subject. Each state is left to apply its own understanding of the law of superior orders.[113]

Superior orders is raised as a defense in war crime trials more frequently than any other.[114] Peter Hagenbach unsuccessfully raised the plea in 1474, as did the guard commander at the execution of Charles I, where the court held:

> [The colonel] justified that all he did was as a soldier, by the command of his superior officer, whom he must obey or die. It was...no excuse, for his superior was a traitor...and where the command is traitorous, there the obedience to that command is also traitorous.[115]

In the 17th century Grotius wrote, "If the authorities issue any order that is contrary to the law of nature or to the commandments of God, the order should not be carried out."[116] Yet the British Military Code of 1715 provided that refusal

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[111] *U.S. v Green*, 5.

[112] Lauterpacht, "The Law of Nations and the Punishment of War Crimes," pt. I, 70-71.

[113] Howard, Restraints on War, 156.

[114] U.N. War Crimes Commission, Law Reports of Trials of War Criminals, vol. XV, 157.

[115] *Axtell's Case* (1661), Kelyng 13; 84 E.R. 1060.

[116] Hugo Grotius, *De Jure Belli ac Paris Libri Tres* (Paris: Buon, 1625), book I, chap. 4, § I; cited in Bull, Hugo Grotius and International Relations, 24.

to obey a military order was a capital offense, no qualification being made as to the lawfulness of the command.[117] Still, in 1784 Horatio Nelson breached international law and successfully pleaded superior orders.[118] The shooting of disobedient prisoners was accepted under certain circumstances during the Boer War.[119] Nazis, of course, raised the defense after World War II, as did Lieutenant Calley and others in Vietnam. Civilians have pleaded superior orders.[120] After Nuremberg one might have thought the defense of superior orders had been scrapped. Such is not the case.

4.3.a. The Defense of Superior Orders The American Marine Corps considers itself an elite unit and is zealous in maintaining its reputation for soldierly bearing and military discipline. "[T]he U.S. Marine Corps is more than a crack military machine. It is a fraternity bonded in blood."[121] While some psychologists maintain that such a self-image produces "criminogenic factors,"[122] there is a "long-standing Marine assumption that discipline, as exemplified by immediate obedience to orders, is the overriding factor in combat success."[123] Brigadier General Edwin H. Simmons, assistant commander of the Son Thang patrol's parent division, notes that "there is a predisposition...stronger in the Marine Corps than it might be in other services, to accept orders without question....In many cases, the better

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[117]Lauterpacht, "The Law of Nations and the Punishment of War Crimes," 73.

[118]Alfred T. Mahan, The Life of Nelson, vol. I (Boston: Little Brown, 1923), 54.

[119]H.L. Stephen, "Superior Orders As Excuse For Homicide," 65 L. Quarterly Rev. 87 (1901).

[120]Wilner, "Superior Orders As A Defense to Violations of International Criminal Law," 127.

[121]Clare Booth Luce, forward to First To Fight, Victor H. Krulak (Maryland: Naval Institute Press, 1984), xii.

[122]Dr. Erwin Beckert, "Influence of the Armed Forces Upon the Aggressiveness of Military Men," XXIII *Revue de Droit Pénal Militaire et de Droit de la Guerre* 41, 46 (1984).

[123]Fleming, The U.S. Marine Corps in Crisis, 4.

the Marine, the less apt he would be to challenge an illegal order."[124] Before Son Thang the Marine Corps' near-automatic obedience to orders had been pleaded in defense of murdering Vietnamese civilians. In rejecting that Marine ethos, a military appellate court wrote: "A Marine is a reasoning agent, who is under a duty to exercise judgement in obeying orders..."[125]

The "reasoning agent" standard was not always the measure of a soldier's judgement. In America the defense of superior orders was defined first in non-military civil and criminal cases which rejected the defense if the order on which the subordinate relied was illegal in the abstract, without regard to the order's appearance of legality to the subordinate.[126]

In an 1813 civil case involving a police officer, *U.S. v Jones,*[127] the court enunciated today's U.S. standard: obedience to a superior order is not a defense if the subordinate knows or ought to know the order is illegal. An analogous English military case, *Regina v Smith,* reached the same formulation.[128] "By focusing...on the state of mind of the actor and the surrounding circumstances, a reasonable belief in the legality of the orders would exculpate the defendant by negating the requisite *mens rea.*"[129]

But the military standard of that period was far different: "Individuals of the Armed Forces will not be punished for these offenses in case they are committed under orders or sanction of their government or commanders. The commanders ordering the commission of such acts...may be punished...."[130] Contrary U.S. civilian case law

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[124]Simmons interview, 17 Dec. 1990.
[125]*U.S. v Keenan,* 39 CMR 108 (USCMA, 1969).
[126]*Little v Barreme,* 1 U.S. (2 Cranch) 465 (1804); *U.S. v Bright,* 24 F. Cas. 1232 (C.C.D. Pa., 1809).
[127]26 F. Cas. 653 (C.C.D. Pa.).
[128](1900), 17 Special Court Reports of Cape of Good Hope, 561.
[129]Daniel, "The Defense of Superior Orders," 483.
[130]War Dept., Rules of Land Warfare, 1914, par. 366.

notwithstanding, obedience to orders was an absolute defense, according to both the U.S. and British law of war manuals.[131] This divergence continued through the First World War, accounting for the lack of allied war crimes courts-martial, and continued into World War II. Interestingly, German military law consistently applied the more harsh civil standard of *U.S. v Jones*, as evidenced in the post-World War I *Llandovery Castle* and *Dover Castle* convictions.[132]

"During the Second World War, bearing in mind possible future trials of German atrocities, [allied] opinion changed..."[133] Ironically, in 1944 Britain adopted the German approach, amending her law of war manual to allow compliance with orders, with lack of knowledge of their illegality to be considered in determining individual responsibility.[134] Seven months later the U.S. amended its manual, as well: "...The fact that the [law of war violations] complained of were done pursuant to the order of a superior...may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment."[135]

These changes to a more stringent standard of course represented a significant *volte-face*. The difference between the two nations' provisions was that the British allowed the prosecution of one who obeyed orders that he *knew* were unlawful; the accused's mistake of law, however, remained a defense. The U.S., on the other hand, provided no guidance, leaving unstated when obedience to orders should be a matter in defense and when a matter in mitigation. "It was a most

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[131]James E. Edmonds and Lassa Oppenheim, Land Warfare. An Exposition of the Laws and Usages of War on Land (London: HMSO, 1929), par. 443.

[132]*The Dover Castle (Case of Karl Neumann)*, and *The Llandovery Castle (Case of Dithmar and Boldt)*, both: German Supreme Court, German War Trials, Cmd 1450 (1921). See also, "Judgement in Case of Lieutenants Dithmar and Boldt Hospital Ship 'Llandovery Castle'," 16 AJIL 708 (1922).

[133]Keijzer, Military Obedience, 168.

[134]U.N. War Crimes Commission, Law Reports of Trials of War Criminals, vol. I, 18.

[135]Dept. of War, Rules of Land Warfare, 1914, change 1, 15 November 1944, par. 345.1.

unsatisfactory formulation."[136] Still in conflict with both U.S. and U.K. municipal law, the force of these changed military administrative regulations was uncertain. Lauterpacht noted that the British amendment "is not believed to represent a sound principle of the law of war, and is in no sense binding upon Great Britain in the international sphere."[137] No American expert was so frank.

Article eight of the Nuremberg IMT Charter differed significantly from both the old *and* the amended U.S.- U.K. regulations: "The fact that the Defendant acted pursuant to order...of a superior shall not free him from responsibility, but may be considered in mitigation of punishment...." Nuremberg's rule was one of absolute liability.

> Clearly, the Nuremberg standard of obedience to superior orders is a much stricter standard than any applied by American courts since *United States v. Jones* allowed an apparently legal, though actually illegal, order to be a defense....The international law rule, as expressed by the Nuremberg standard, was quite different from and much stricter than the existing American rule.[138]

In practice, however, Nuremberg saw a new, ameliorating factor injected: "The true test," noted a Nuremberg military tribunal, "which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."[139] This "moral choice" test, which effectively and unofficially modified the IMT Charter by only half accepting its rejection of the plea of superior orders, led to the requirement of duress as a necessary part of a successful defense of superior orders at Nuremberg.[140] Application of the "moral choice" test is apparent in several trials, for example, the *Flick, Farben,*

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[136]Taylor, Nuremberg and Vietnam, 49.

[137]Lauterpacht, "The Law of Nations and the Punishment of War Crimes," 69, fn. 2.

[138]Daniel, "The Defense of Superior Orders," 491-92.

[139]U.N. War Crimes Commission, Law Reports of Trials of War Criminals, vol. IV, *U.S. v Ohlendorf,* the *Eisensatzgrupen* Case, Opinion and Judgement, 411, 471.

[140]The imprecision of the moral choice test test is discussed in Greenspan, Modern Law of Land Warfare, 493-95.

and Krupp judgements.[141] So, despite Article eight of the Charter, many defendants did raise the defense of superior orders, pleading lack of moral choice, and a few were acquitted on the basis of the plea when the "moral choice" issue was also considered. "In general, however, the [harsher] rule adopted at Nuremberg applied, and this defense was considered only in mitigation and not in exoneration of guilt."[142] "In fact, the [Nuremberg] tribunal did not accept the plea of superior orders in regard to any of the accused...and the plea was specifically rejected in the judgements on the two military leaders, Keitel and Jodl."[143]

Since World War II the defense of obedience to superior orders has remained unchanged in British military law.[144] Several British soldiers have been prosecuted in civilian courts for killing suspected terrorists in Northern Ireland, the only conviction tangentially involving superior orders.[145] The defense remained constant in U.S. application until 1956, when *The Law of Land Warfare* field manual was re-published. Once again, the U.S. softened its position.

The defense, reads the current manual, is not available unless the accused "did not know and could not reasonably have been expected to know that the act ordered was unlawful."[146] This formulation, an affirmative defense involving *mens rea*, was echoed in the revised *Manual for Courts-Martial* that became effective in 1969: "An act performed manifestly beyond the scope of authority, or pursuant to an order that a man of ordinary sense and

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[141]U.N. War Crimes Commission, Law Reports of Trials of War Criminals, vol. XV, 156.

[142]Appleman, Military Tribunals and International Crimes, 312.

[143]Greenspan, Modern Law of Land Warfare, 495.

[144]HMSO, Manual of Military Law, pt. III, par. 627: "Obedience to the order of a...superior...affords no defense to a charge of committing a war crime but may be considered in mitigation of punishment."

[145]*R. v Thain* (24 Oct. 1985), discussed at, HMSO, Manual of Military Law, pt. II, 10th ed., 5-10.

[146]Dept. of the Army, The Law of Land Warfare, par. 509.a.

understanding would know to be illegal...is not excusable."[147] That the individual was acting pursuant to orders "may be considered in mitigation of punishment,"[148] however. That remains the state of the law. Those who would raise the defense still face significant problems: was there an actual "order" given? Was it unlawful as a matter of law? Did the accused have actual knowledge of its illegality? Can a lack of intelligence rise to a defense?[149]

The U.S. defense of obedience to orders, then, has both subjective ("did not know"/"would know") and objective ("manifestly") elements, the latter having been added by the 1969 *Manual for Court-Martial*. Although neither element is simple in application, there are cases interpreting both. Most of those cases arose in Vietnam, which saw more prosecutions of Americans for killing noncombatants than any previous war.

4.3.b. Illegal Orders and *Malum in Se* Crimes The subjective element of the defense of superior orders was central to most Vietnam cases, a few of which resulted in acquittal,[150] although most, like Calley's, ended in conviction.

The soldier's conflicting obligations are often cited, usually in garish terms: "The position of a soldier is in theory and may be in practice a difficult one. He may...be liable to be shot by a court-martial if he disobeys an order, and be hanged by a judge and jury if he obeys it."[151] In fact, no American or British soldier will be either shot or hanged

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[147]Par. 216.d.

[148]Dept. of the Army, The Law of Land Warfare, par. 509.a.

[149]At least one post-World War II war crime case, *In the Trial of Gerbsch* (1948), recognized as a mitigating circumstance that the accused's "mental faculties were defective and undeveloped" at the time of his crimes, as well as at trial. U.N., Law Reports of Trials of War Criminals, vol. XIII, 132, 137.

[150]*U.S. v Hutto, e.g.*, a My Lai case which, because an acquittal, has no appellate citation.

[151]Albert V. Dicey, Introduction to the Study of the Law of the Constitution, 10th ed. (London: Macmillan and Co., 1959), 303.

for simple disobedience of a lawful order, but the conflict is nevertheless apparent.*

> The major problem...is, first, that more often than not the soldier will be quite ignorant as to whether or not the order is legal; second, that the jurists and legislators of different nations often disagree quite vehemently on the finer points of international law.[152]

Scholars often make much of the problem of subjectively determining the legality of orders, as well:

> How, indeed, is the soldier to make a determination on the legality of the order...having but a partial view of the field of battle and being incapable of judging whether a particular operation is strictly militarily necessary or not?....[H]ow can the individual soldier reach a reasoned judgement? Even if he could, is he a free agent?....[H]ow far is the soldier required to go in incurring personal penalties...in resistance to orders known to be in contravention of the laws of war?[153]

Another professor writes: "It is easy to instruct men....But there is no attempt to tell the soldier how he is to distinguish the non-combatant child from a boy soldier...the ordinary village population from guerilla units..."[154]

But this makes too much of battlefield war crimes, which are usually simple *malum in se* offenses. There are no Vietnam-era murder prosecutions for having mistaken, in good faith, a civilian for a combatant. Herrod ordered, "Kill them all!" Calley demanded, "Why haven't you wasted them yet?" In a case not detailed here, a Captain Ogg commanded, "Take [the prisoner] down the hill and shoot him."[155] Given

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*Disobedience of a lawful order, even in wartime, is not and was not a capital offense under the UCMJ. Britain's *Army Act, 1955,* similarly specifies imprisonment as punishment for such a violation. (Pt. II, §34. Disobedience of an order in the presence of, and with intent to assist the enemy, however, does render one subject to the death penalty. Pt. II, §24.) In the Second World War, German soldiers were on occasion summarily shot for disobeying orders. See: Keijzer, Military Obedience, 149, fn. 41.

[152]Julius Stone and Robert K. Woetzel, eds., Toward A Feasible International Criminal Court (Geneva: World Peace Through Law Center, 1970), 261.

[153]Clark, Waging War, 81.

[154]Green, "Aftermath of Vietnam," in Falk, ed., The Vietnam War and International Law, vol. 4, 172.

[155]*U.S. v Griffen*, 39 CMR 586, 588 (ACMR, 1968).

such circumstances, does a soldier require a class on the Geneva Conventions to recognize the manifest illegality of such orders? Will any nation's jurists consider those to be legitimate orders? Might any soldier believe such orders to be in execution of a lawful reprisal – a mistake of fact?[156] Can possible disciplinary action for not obeying such an order excuse the obeying of it? Or will one say, with the prosecutor in *The Peleus Trial*, "it must have been obvious to the most rudimentary intelligence that it was not a lawful command, and that those who did the shooting are not to be excused for doing it upon the ground of superior orders?"[157] Recognizing the clear illegality of such orders requires neither superior intelligence nor academic accomplishment. There are improper orders of less clear illegality, no doubt, subtle in their wrongfulness, requiring a fine moral discernment in their execution to avoid criminality. But such orders are rare on the battlefield. Too few commentators distinguish between combat zone illegal orders and illegal orders more appropriately constituting crimes against peace.

Mistake of fact and mistake of law, of course, would excuse an accused. "If the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent...exists."[158] But such innocent, subjective states of mind are unusual in battlefield violations of the law of war.

Recognizing the objective element of the defense of superior orders, at least two court-martial judges in Vietnam refused to instruct the members (jurors) on the superior

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[156]See, *e.g.*, Joseph B. Keenan and Brendan F. Brown, Crimes Against International Law (Wash., Public Affairs Press, 1950), 136-37, where the authors apply the mistake of fact defense to individual soldiers who, the authors aver, grandly conceive of war in just-unjust terms.

[157]*The Peleus Trial*, U.N. War Crimes Commission, Law Reports of Trials of War Criminals, vol. I, 12.

[158]Capt. Luther N. Norene, "Obedience to Orders As A Defense to A Criminal Act" (Thesis, U.S. Army School of the Judge Advocate General: Virginia, 1971), 48-49.

orders defense.[159] In both cases the charges involved shooting to death detained Vietnamese upon the order of a superior. Appellate courts upheld the refusal to instruct in both instances, noting that "the killing of a docile prisoner taken during military operations is not justifiable homicide."[160] The orders were held to be manifestly illegal as a matter of law. In a 1958 opinion an Israeli court wrote:

> [T]he distinguishing mark of a "manifestly unlawful order" should fly like a black flag....Not formal unlawfulness, hidden or half-hidden, nor unlawfulness discernible only to the eyes of legal experts...but a flagrant and manifest breach of the law...on the face of the order itself, the clearly criminal character of the acts ordered to be done, unlawfulness piercing the eye and revolting the heart, be the eye not blind nor the heart stony and corrupt – that is the measure of "manifest unlawfulness" required to release a soldier from the duty of obedience....[161]

In a Vietnam court-martial involving a patrol's killing of noncombatants, prior to the Son Thang cases, the military judge instructed the members:

> ...The acts of a Marine done in good faith and without malice, in the compliance with the orders of a superior are justifiable, unless such acts are manifestly beyond the scope of his authority and such that a man of ordinary sense and understanding would know them to be illegal. Therefore, if you find beyond a reasonable doubt that the accused under the circumstances of his age and military experience could not have honestly believed the order issued by his squad leader to be legal under the laws and usages of war, then the killing of the alleged victim was without justification.[162]

That instruction is contained in every military judge's bench manual, to be tailored to incorporate the facts of each case to which it is applicable.

Brigadier General Simmons relates an anecdote that says much about the Vietnam-era Marine's lack of understanding of lawful orders. General Simmons explains that units in

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[159]*U.S. v Schultz*; and *U.S. v Griffen.*

[160]Ibid., *U.S. v Griffen*, 588.

[161]*Chief Military Prosecutor v Melinki and Others,* 44 Pesakim Elyonim 362 (1958), cited in *A.G., Israel v Eichmann.*

[162]*U.S. v Keenan.*

Herrod's parent division, of which Simmons was then assistant commander, were routinely rotated to the relative security of division headquarters for several day's rest, re-fit, and training. The general himself regularly conducted a class on proper conduct in combat:

> I was talking to thirty or forty corporals and sergeants, stressing the matter of legal and illegal orders. I was using the My Lai incident as a case in point. As a dramatic device, while I was discussing it, I looked around and there was an army sergeant, a Green Beret, standing outside the pavilion, listening with a great deal of interest....I thought I would use him as an example of the most outrageous and absurd, illegal order I could think of....I said, "What's that S.O.B. doing eavesdropping on us?" I pointed to a sergeant in the front row and said, "Take your .45 and go shoot that son-of-a-bitch!" And he got up out of his seat and started toward the Green Beret. I said, "Wait! Wait! Don't you realize that I was giving you an illegal order — a completely ludicrous order?" He said, "I thought the general knew something I didn't know." And I think there's a lot to that.[163]

The defense of superior orders, although central in only one defense, was raised in all of the Son Thang trials except that of Boyd.

4.3.c. *Respondeat Superior* and Duress To accept the defense of superior orders does not eliminate criminal responsibility for a law of war breach, it simply shifts its locus upwards. The converse of the defense of superior orders is *respondeat superior*, let the superior answer; the doctrine that a subordinate is not responsible for actions taken pursuant to orders, resting on the assumption that the superior is.

> The superior's responsibility, moreover, is not limited to the situation where he has given affirmative orders. A commander is responsible for the conduct of his troops, and is expected to take all necessary action to see that they do not, on their own initiative, commit war crimes.[164]

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[163]Simmons interview, 17 December 1990.

[164]Taylor, Nuremberg and Vietnam, 52-53.

The principle that a commander may be responsible for the acts of his subordinates is long-standing. During America's Black Hawk War (1832) Abraham Lincoln, then a militia captain, was convicted by court-martial of failing to control his men, who had broken into liquor rations. Lincoln was sentenced to carry a wooden sword for two days.[165] The U.S. Civil War's Lieber Code recognized *respondeat superior*, as did the 1914 *Rules of Land Warfare*.[166] Before World War II, U.S. manuals, reflecting the then-current interpretation of the superior orders defense, placed responsibility for troops' depredations fully upon their commanders:[167] "Obedience to orders is the first duty of a soldier.... justice requires the punishment of the officer who is responsible for the order rather than the simple soldier...who has no power of judgement or discretion."[168]

Like much of the current law of war, *respondeat superior* reached the apex of its modern interpretation in the Nuremberg and Far East tribunals, which examined the responsibility not only of the immediate battlefield commander, but of more senior officers, as well. *Yamashita* addressed the responsibility of the commander with a broad brush, establishing a strict "constructive knowledge" standard; the *High Command* and *Hostage* cases (opinions rendered by judges, rather than laymen, as in *Yamashita*) provided greater detail. "The commanding general..." the tribunal said in the trial of Field-Marshal Wilhelm List, "will not be heard to say that a unit taking unlawful orders from someone other than himself was responsible for the crime and that he is thereby absolved from responsibility."[169]

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[165]Solf, "A Response to Telford Taylor's 'Nuremberg and Vietnam,'" 67.

[166]Art. 71 and par. 366, respectively.

[167]War Dept., Rules of Land Warfare, 1914, par. 366; and, Dept. of the Army, The Law of Land Warfare, par. 347.

[168]Garner, "Punishment of Offenders Against the Laws and Customs of War," 84.

[169]U.N. War Crimes Commission, Law Reports of Trials of War Criminals, vol. VIII, *The Hostages Trial; Trial of Wilhelm List and Others*, 69.

Still, the IMT resulted in a more lenient "actual knowledge" standard, not entirely in accord with *Yamashita*.

Under today's U.K. and U.S. military law,[170] the commander who knows that his troops are committing war crimes pursuant to orders from *his* superiors, passed down independently of him, must act to stop the offenses. But in no instance is any soldier, commander or private, held responsible for the acts of another, absent the establishment of some sharing of *mens rea*.[171]

In Vietnam, what was the commander's responsibility for crimes such as those committed at Son Thang? Neither *Yamashita*, nor the *High Command* or *Hostage* cases impose a standard of absolute liability upon commanders, although *Yamashita* came close to doing so with its strict constructive knowledge standard. A commander is responsible for the war crimes of subordinates if he orders the offenses, or has actual knowledge of them, *or should have knowledge*, through reports or other means, of the crimes being committed by his troops – a "reasonableness" test rather than one of strict liability. Those who assert that a commander may be convicted for a subordinate's war crimes on the basis of *respondeat superior*, without a showing of knowledge,[172] misinterpret the holding of *Yamashita*. Those who assert that the acquittal of Calley's commander at My Lai, Captain Medina, demonstrates U.S. unwillingness to apply the *Yamashita* criterion to its

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[170]HMSO, Manual of Military Law, pt. III, par. 631; Dept. of the Army, Law of Land Warfare, par. 501.

[171]Parks, "Command Responsibility," 103.

[172]*e.g.*, Taylor, Nuremberg and Vietnam, 180-81, whose argument is repeated in *U.S. v Calley*, 382 F. Supp. 650, 696 (1974).

own commanders,[173] are unaware of the erroneous legal standard concededly applied in *Medina*.* (See section 2.1.b.)

Under the doctrine of *respondeat superior*, should Lieutenant Colonel Cooper, commander of the Son Thang patrol's parent battalion, have shared in the patrol's culpability? No. He gave no improper orders. He neither knew, nor is there any indication that he should have known, of the murders as they were happening. Nor was he aware of any pattern of past murders.

May Cooper's subsequent performance be questioned? "The actions of the commander...at the time of the discovery of the offense will determine whether he is deemed to have acquiesced in the offense."[174] Immediately after hearing the first unconfirmed report of the patrol's illegal acts, Colonel Cooper took steps to investigate the allegations. Upon gaining actual knowledge of the crimes he took prompt, decisive action to initiate a formal investigation and charge the suspects. The law of war can ask no more.

Was the record of U.S. war crimes in Vietnam such that commanders senior to Cooper — the division commander or higher — should have been charged? Although General Westmoreland's possible awareness of battlefield war crime was later investigated,[175] the answer is again, no.

> First, despite facile accusations, it is really not established that the record of torturing, mistreatment, and killing of civilians in Vietnam is so widespread and clear that the facts speak for themselves, thus imposing an indirect liability [on] commanders. Second, the record of command efforts to prevent, repress, and punish is sufficiently strong so that it cannot be

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[173]*e.g.*, Best, Nuremberg and After, 21; Richard B. Lillich and John N. Moore, Readings in International Law From the Naval War College Review, vol. 2 (Rhode Island: Naval War College, 1980), xx.

*The same erroneous standard, initially applied in a similar pre-Medina case, *U.S. v Goldman*, 44 CMR 471 (ACMR, 1970) was quickly realized and reversed in a subsequent, and no doubt embarrassed, reconsideration. 44 CMR 711.

[174]Parks, "Command Responsibility for War Crimes," 82.

[175]Lewy, America in Vietnam, 239. Such an investigation goes unmentioned in Westmoreland's autobiography, A Soldier Reports.

> brushed aside on the ground that the record of violations proves these efforts to have been so ineffectual as to constitute negligent failure.[176]

The Son Thang patrol acted on the orders of Lance Corporal Herrod. No higher-ranking authority was involved and no allegation of more senior involvement was made in the subsequent courts-martial.

Between the extremes of *respondeat superior*, under which the knowing commander is always responsible for illegal orders, and full subordinate responsibility, under which the trooper would be required to investigate the legality of every order before its execution, the law of war attempts to find an equitable doctrine of limited responsibility. The fulcrums upon which that limited responsibility balance are the soldier's knowledge of wrongfulness and, less frequently, duress.

If a soldier is aware that the order given is beyond the pale, but the commander facing him holds a weapon, the issue of duress may be raised. Indeed, that is often the case when illegal orders are given in combat. Herrod had a .45 caliber pistol on his hip and held a loaded grenade launcher while issuing his orders in Son Thang. To plead superior orders one must show an excusable ignorance of their illegality; to plead duress one recognizes the illegality but risks immediate personal harm if he disobeys. A possible court-martial for failure to obey an order is one thing;* the risk of being killed by your own commander is another. Again, the Nuremberg trials provide a guideline:

> Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime

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[176]O'Brien, "The Law of War, Command Responsibility and Vietnam," 655.

*Under the UCMJ, five years confinement, loss of rank and pay, and a dishonorable discharge is the maximum permissible punishment for disobeying an officer; a less onerous bad conduct discharge and six months confinement for disobeying a noncommissioned officer. In practice the punishments imposed, even in a combat zone, are far lighter than the maximums permitted. Herrod, it will be recalled, wasn't even an NCO.

> which he condemns. The threat, however, must be imminent, real and inevitable.[177]

In municipal law this is the defense of necessity. At Nuremberg various tests for necessity/duress were applied: not a mere presence of danger to the one raising the defense, but a subjective, "actual *bona fide* belief in danger..."[178] The act done must "avoid an evil severe and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportional to the evil;"[179] "A clear and present danger" at the time of the offense;[180] "Circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong."[181] The term "no moral choice" was frequently heard. But the duress defense was generally rejected at Nuremberg because the threats invoked were not considered direct enough.[182]

In American military practice duress has seldom been raised in superior order cases.[183] Although there is a degree of coercion inherent in the mere giving of an order by a superior to a subordinate that is obviously insufficient to put the subordinate in reasonable apprehension of immediate death or serious bodily harm and so does not rise to duress. Moreover, there sometimes is a certain elasticity in compliance with orders in the combat zone. After My Lai, those soldiers who refused Calley's orders to fire on civilians did not suffer for their refusal and apparently did not expect to — suggesting all the more the blameworthiness of those who did obey.

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[177]U.N. War Crimes Commission, Law Reports of Trials of War Criminals, vol. VIII, *The Einsatzgruppen Trial*, 91.

[178]Ibid., vol. X, *The Krupp Trial*, 148.

[179]Ibid., 149.

[180]Ibid., vol. IX, *The Flick Trial*, 20.

[181]Ibid., vol. XII, *The High Command Trial*, 72.

[182]Keijzer, Military Obedience, 149.

[183]*U.S. v Fleming*, 23 CMR 7 (USCMA, 1957), and *U.S. v Olson*, 22 CMR 250 (USCMA, 1957), post-Korean War cases in which duress was unsuccessfully raised by two former American POWs as a defense to collaboration charges.

In any event, duress is not a defense to murder in either U.S. or U.K. criminal law.[184] The defense is not specifically recognized in U.S. military law in regard to *any* offense. The Army's international law manual takes note of it, saying it requires an "honest belief" that the actor will be subjected to "serious wrong" outweighing the consequent harm to others if he fails to obey the illegal order.[185] This applies whether it is friendly or enemy personnel who are being tried. The defense, then, may be raised in courts-martial as a substantive defense to crimes other than murder, and in sentence mitigation, even in murder cases.

> It would appear to be equitable that the same standards should apply to the defense of necessity as are applied to the plea of superior orders....As in the case of superior orders, the fact that a person offended out of necessity should certainly be taken into consideration in assessing sentence, in mitigation of punishment.[186]

Under U.K. military law, too, duress is a specific defense to war crimes except those involved in "the taking of innocent life"[187] and may be considered in mitigation of sentence.

Though a colorable defense of duress was available to the Son Thang patrol subordinates,* the issue went unmentioned.

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[184]John Beaumont, "Duress As A Defence to Murder," 3 Dalhousie L.J. 580 (Oct. 1976). English courts once allowed the defense in murder trials where the accused was not a principal (DPP v Lynch [1977] AC 653), but have since abolished the principal/accomplice distinction (DPP v Howe [1987] AC 417); see also, Leslie C. Green, Superior Orders in National Law and International Law (The Netherlands: A.W. Sijthoff, 1976), 17-34.

[185]Dept. of the Army, International Law, vol. II, 248.

[186]Greenspan, The Modern Law of Land Warfare, 501-502.

[187]HMSO, Manual of Military Law, pt. III, par. 629.

* Though only if the accused argued that he fired only in the victims' direction but not at them. As duress is not a defense to murder, the accused would have had to argue he did not in fact murder the victims. So, while never mentioning duress, Schwarz testified he fired *near* the victims; Krichten testified that Boyd fired *over* the victims; and Green argued there was no evidence he actually *hit* any victim.

4.3.d. Illegal Orders in A Combat Environment Cicero's assertion that in time of war the laws are silent, is clearly incorrect. But is modern combat subject to unique norms that render the Geneva Conventions, training, and manuals, of questionable meaning?

> What soldiers actually think about conduct in war, and how their thoughts affect their conduct, is an area...very little explored. The legal literature, understandably enough, takes no notice of the possibility that within armed forces a kind of sub-culture or 'private' culture may exist, the norms and tendencies of which may conflict with those prescribed in the manuals of military conduct, etc.[188]

"'Battle', for the ordinary soldier," we are told, "is a very small-scale situation which will throw up its own leaders and will be fought by its own rules – alas, often by its own ethics."[189] In combat a group dynamic tends to overtake individual judgement, one's normal behavior submerged in the behavioral commonality of the unit; sometimes the lowest common behavioral denominator. "The military group provides powerful incentives for releasing forbidden impulses, inducing the soldier to try out formerly inhibited acts which he originally regarded as morally repugnant."[190]

> The combat situation was one of mutual dependence. A man's life depended literally and immediately upon the actions of others; he in turn was responsible in his own actions for the safety of others. This vital interdependence was closer and more crucial in combat than in the average run of human affairs....The group was thus in a favored position to enforce its standards on the individual.[191]

That men fight for their comrades, rather than abstractions like democracy and country, is a truism. And past wars have demonstrated that combat-fostered intimacy "extended little

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[188]Howard, Restraints on War, 24.

[189]Keegan, The Face of Battle, 47.

[190]I.L. Janis, "Group Identification Under Conditions of External Danger," 36 British J. of Medical Psychology 227 (1963).

[191]Stouffer and others, The American Soldier: Combat and its Aftermath, vol. II (New Jersey: Princeton University Press, 1949), 98-99.

farther than the platoon and company..."[192] "[I]n a crisis and if forced to make a choice, a man would think first of his loyalty to a buddy..."[193] Perhaps that loyalty is even greater in organizations like the Marines, who see themselves as an exclusive fraternity. "Among Marines there is a fierce loyalty....Woven through that sense of belonging, like a steel thread, is an elitist spirit. Marines are convinced that, being few in number, they are selective, better, and, above all, different."[194] "The bond, the loyalty to the Corps is almost mystical in its power."[195]

> ...Marines went into harm's way because they knew that the rest of their squad, or platoon, or company counted on them to go....their buddies had faced similar risks, and now it was their turn. They knew that they had to do their share for the unit to survive....bonds are formed and mutual dependence emerges, often by sharing hardship and even tragedy.[196]

It will be remembered that, except for two, the Marines on the Son Thang patrol had met only that afternoon. Three of the five had been in the Marine Corps for little more than a year, one for only six months. But they were Marines and presumably felt the bond that the title "Marine" traditionally imparts.

Of the five patrol members, the oldest was twenty-one. Three were teen-agers. The most senior in rank among them was a lance corporal awaiting reduction to private as a result of recent court-martial. Except for their leader, Herrod, their written statements reveal a marked lack of education and intellect. During the patrol they were on their own, at night, beyond friendly lines. A member of their company had been killed only hours before. What, then,

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[192]Little, "Buddy Relations and Combat Performance," in Janowitz, ed., The New Military, 204.

[193]Ibid., 201.

[194]Krulak, First To Fight , 175.

[195]Safer, Flashbacks, 105.

[196]Col. Fred T. Fagen, "Time For A One-Eighty," U.S. Naval Institute Proceedings, February, 1991, 48.

passed through their minds when ordered to fire on unarmed women and children? Who among the four subordinates might have considered the legality of their instruction or refused the order?

In battle "the relatively abstract commands of the Conventions are not likely to bear much relation to reality in the mind of a serviceman who is not...attuned to the niceties of the law,"[197] and the group's standards become those of the individual.

> Not only do normal moral principles become inoperative, but – particularly when the actions are explicitly ordered – a different kind of morality, linked to the duty to obey superior orders, tends to take over.[198]

To the extent that others obey, the definition of the situation as requiring obedience is strengthened. "The man who refuses to obey an order which his friends are carrying out finds himself in an intolerable position in a combat situation..."[199] Superior orders can override an individual's own sense of morality.[200] "Even when the facts of a situation are clear, moral choice may demand more moral courage than even a competent professional can muster..."[201] It can be done, to be sure. A private first class and a specialist fourth class refused Calley's orders to fire on civilians at My Lai. But who among the benighted Son Thang accused was a candidate to speak out and refuse Herrod's orders?

A judge on the Court of Military Appeals, the highest American military court, said of one Son Thang accused:

> What alternative does Sam Green have if he's ordered to kill those people? If he disobeys the order and the order was valid, he goes to prison. If he obeys the order and the order is not valid, he goes to prison.

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[197]Rubin, "Legal Aspects of the My Lai Incident," 265.

[198]Kelman and Hamilton, Crimes of Obedience, 16.

[199]Rubin, "Legal Aspects of the My Lai Incident,"268.

[200]Dr. Stanley Milgram, "Behavioral Study of Obedience," 67 J. of Abnormal and Social Psychology 371 (1963).

[201]Anthony E. Hartle, Moral Issues in Military Decision Making (Kansas: University Press of Kansas, 1989), 123.

> What does sad Sam Green, with an IQ of 78, do in that moral dilemma?....The people in Brussels and the Hague would have difficulty putting themselves in that position....It's a burden that soldiers carry, and maybe the court-martial understands the burden.[202]

Sociologists confirm that "the risk of punishment discourages him from challenging the legitimacy of the order and makes him more likely to obey....[I]t reinforces the already strong push toward obedience built into the structure of the authority situation."[203]

Yet, could any Son Thang accused, however dull, however obedient, actually fail to appreciate the magnitude of wrong they were ordered to carry out, not once, but three times?

> The trigger is always part of the gun, not part of the man. If they are not machines that can just be turned off, they are also not machines that can just be turned on. Trained to obey "without hesitation," they remain nevertheless capable of hesitating.[204]

How were guilt, innocence, and justice to be apportioned?

In the summer of 1970, four courts-martial reached diametrically opposed answers to that question.

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[202]Judge Walter T. Cox, interview by author, 7 December 1990, Wash., tape recording, author's collection.

[203]Kelman and Hamilton, Crimes of Obedience, 94.

[204]Michael Walzer, Just and Unjust Wars (London: Allen Lane, 1978), 311.

CHAPTER 5. THE SON THANG COURTS-MARTIAL

"In the Armed Forces, as everywhere else, there are good men and rascals, courageous men and cowards, honest men and cheats."

Ball et al. v United States
366 U.S. 393 (1961)

Four days after the alleged murders, on 23 February 1970, the five Son Thang killer team members were placed in pretrial confinement in the Third Marine Amphibious Force brig, south of DaNang. The Staff Judge Advocate of the 1st Marine Division directed that a preliminary hearing be convened.

The My Lai incident, revealed eleven months before, had only come to public attention ninety days prior to the Son Thang murders. By acting quickly the Marine Corps hoped to avoid the already apparent problems of the Army's My Lai prosecution. International law and the law of war would soon be applied in Vietnam, the vehicle of its application the Uniform Code of Military Justice (UCMJ).

This chapter examines how America implements law of war sanctions. Several jurisdictional issues were raised by U.S. courts-martial in Vietnam. Those issues are noted and their resolution seen in trial. American military criminal law is codified in the UCMJ. The evolution of the Code is briefly summarized, then seen in application in the courts-martial of the Son Thang accuseds, with particular attention to the difficulties of practicing military law in Vietnam. Also considered are the basic rights applicable to Americans in uniform, and the lack of a stated theoretical framework for military law. The trials themselves are reviewed, as well. As so often in criminal practice, the results were unexpected. Anticipated or not, the trials demonstrate that the U.S. system for trying law of war violations and grave breaches is workable, even in a combat zone.

5.1. Law of War Applied: Vietnam

"Execution of an international convention implies the implementation of its provisions in practice," Professor Ingrid DeLupis writes. "Without such execution the document's value in practical terms will be much reduced..."[1]

In Vietnam, implementation of Geneva and Hague conventions by the U.S. was achieved through instructions promulgated, at the highest level, by Department of Defense directives initiated by the nation's political agencies. Those Department of Defense directives were in turn implemented by the individual armed services through Army, Navy, Marine Corps, and Air Force orders. The service-wide orders, in the Marine Corps' case, were passed to the troops by various division, base, and fleet orders. Individual unit training schedules in compliance with, for example, a division order, directed specific officers or noncommissioned officers to carry out the orders by instructing the individual Marines of their units. "Lesson plans" for the instruction were appended to the orders. Lesson plans — outlines containing main points to be covered — usually listed additional informational sources, although those sources were rarely available at the implementing level. The Geneva/Hague Convention instruction was sometimes grudgingly or ineptly given, but the operative fact was that it was ordered, and having been ordered it was done.

Three-inch by five-inch cards entitled, "The Enemy in Your Hands," were distributed to all Army personnel entering Vietnam and, later in the war, to all entering Marines. The cards contained on one side, basic Vietnamese language phrases ("put up your hands," "lay down your gun"); on the reverse side, five admonitions for the proper treatment of prisoners. No assurance of the cards' continued possession or eventual use was possible.

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[1]DeLupis, The Law of War, 320.

By such means was a continuing awareness of international law and the Conventions, first raised in basic training classes, imparted to the lowest-ranking combatant. The sometimes sketchy compliance with orders to disseminate the Conventions received much closer attention after My Lai.

5.1.a. Enforcing Law of War Speaking of modern states generally, one writer notes that "on careful analysis the enforcement procedures turn out to be less defective than is normally claimed..."[2] Signatories of the 1949 Geneva Conventions are bound to search for those who commit grave breaches and "bring such persons, regardless of their nationality, before its own courts."[3] Accordingly, in Vietnam "a war crime is the business of the United States, regardless of the nationality...of the victim."[4] As decided at Nuremberg, "crimes against international law are committed by men...and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[5]

The killing of civilians under the circumstances of Son Thang was at the same time a war crime, a grave breach, and a criminal offense. Although court-martial was the forum to be employed in such instances, other forums were, and are, possible.

5.1.b. War Crime Commissions, Tribunals, and Other Venues The *U.S. Manual for Courts-Martial* in effect in 1970 reads, in pertinent part:

> The agencies through which military jurisdiction is exercised include: Military Commissions and Provost Courts....Subject to the applicable rule of international law...these tribunals will be guided by...principles of law and rules of procedure and evidence prescribed for courts-martial.[6]

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[2]Cassese, International Law in A Divided World, 408.

[3]Arts. 49, 50, 129, and 146 of Conventions I, II, III, and IV, respectively.

[4]Axinn, A Moral Military, 126.

[5]U.N., The Charter and Judgement of the Nürnberg Tribunal (NY: U.N., 1949), 41

[6]Par. 2, Military Jurisdiction.

A provost court is a variety of military tribunal usually employed in occupied territory to try civilians. They operate "with whatever rules are prescribed for them,"[7] often applying court-martial procedures, and sometimes local law.

Commissions, a variety of military tribunal distinct from courts-martial, are wartime courts with jurisdiction over *enemy* law of war violators.[8] War crimes of a nation's own nationals *may* be tried by a commission, but in practice are dealt with by courts-martial administering national military law.[9] Commissions were first employed in the U.S.-Mexican War (1846-48) to try soldiers of the Mexican army for common crimes as well as violations of the law of war. Commissions have been employed by the U.S. in all its subsequent wars except Vietnam,[10] their jurisdiction having been upheld by the U.S. Supreme Court half a century ago.[11]

Commissions and tribunals are authorized by military law to try war crime cases, as are courts-martial.[12] Strictly speaking, tribunals apply municipal rather than international law. But "the military court, by punishing the acts, executes international law even if it applies at the same time norms of its own military law."[13]

Tribunals such as the Nuremberg IMT and the "high tribunal" envisioned by the Treaty of Versailles, are *sui generis*, international in nature, with jurisdictional bases and trial procedures independent of any single nation's legal code.

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[7]Index and Legislative History: Uniform Code of Military Justice, 1061.

[8]10 U.S. Code 821 (1956). See, Glueck, "By What Tribunal Shall War Offenders Be Tried?", 1063.

[9]Wright, "War Criminals," 275, 277.

[10]For histories of the employment of commissions see, Colby, "War Crimes," 485-87; Shaneyfelt, "War Crimes and the Jurisdiction Maze," 929-31; and, Elbridge Colby, "Courts-Martial and the Laws of War," 17 AJIL 109 (1923).

[11]*Ex Parte Quirin*; *Matter of Yamashita*; *Madsen v Kinsella*, 343 U.S. 341 (1952).

[12]Dept. of the Army, Law of Land Warfare, par. 13.

[13]Kelsen, "Collective and Individual Responsibility in International Law," 536.

Neither the U.S. Constitution nor legislation mandate that law of war violations *must* be tried before military tribunals. Although that power is "well established"[14] in the military, no legislation grants the military exclusive jurisdiction over war crimes. Nor has any U.S. case been found specifically addressing civilian court jurisdiction over war crimes, although during the Civil War and both World Wars civil courts sometimes found jurisdiction concurrent with military tribunals.[15]

5.1.c. Jurisdiction and the Law of War In international law, the jurisdiction of a state refers to the state's entitlement to subject certain categories of persons or events to its rules of law. It is not necessarily correct that the same rules apply in a municipal legal system. In the international system jurisdiction refers to a state's jurisdiction as a whole, not to that of its constituent units or political divisions. The jurisdictional question in international law is whether the U.S., for example, is entitled to try an individual; not where or by what court in the U.S. the individual might be tried.[16] In exercising jurisdiction a state claiming competence to act has broad discretion. "All that can be required of a state is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."[17] A state may make any jurisdictional claim not explicitly prohibited by international law.[18]

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[14]*Johnson v Eisentrager,* 339 U.S. 763, 786 (1950).

[15]Sweeney, The International Legal System, 779, citing *U.S. v Canella,* 63 F. Supp. 377 (S.D. Cal 1945), and *Kennedy v Sanford,* 166 F.2d 568 (5th Cir. 1948), cert. denied, 333 U.S. 864 (1948).

[16]From the standpoint of international law, and the court which serves as its organ, municipal laws are merely facts. *German Interests in Polish Upper Silesia* (Merits) (1926), PCIJ, Ser. A, no. 7, 19.

[17]*The Lotus,* P.C.I.J. Reports, Ser. A, No. 10, 19 (1927).

[18]Falk, The Role of Domestic Courts in the International Legal Order, 25.

Universal jurisdiction over accused war criminals, a concept first raised in the 1922 Treaty of Washington[19] (and some suggest before that)[20] is ubiquitously noted in modern law of war writings.* "War crimes and genocide are now widely accepted as being susceptible to universal jurisdiction,"[21] although this jurisdictional basis has never been utilized except, arguably, in the Eichmann case.[22] (Invocation of universal jurisdiction was a necessity because it was the sole source of Israeli jurisdiction, since the crimes alleged took place before formation of the nation of Israel.) Thus, under the banner of universal jurisdiction, "even in the absence of any domestic enactment, states may properly punish offenders against the laws and customs of war..."[23] The requirements of the 1949 Conventions, for trial and punishment of those convicted of grave breaches, reflects acceptance of universal jurisdiction.

5.1.d. Jurisdiction and the Vietnam War By what domestic authority did the U.S. exercise jurisdiction over her soldiers? The American constitution gives Congress the right to punish "offenses against the law of nations."[24] Courts-martial, while having no specific jurisdiction set apart under the constitution, do have a constitutional source, being established under the Congress's power to make rules for the government and regulation of the armed forces.[25] Military personnel are subject to the U.S. military justice

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[19]Sandoz, "Penal Aspects of International Humanitarian Law," in Bassiouni, International Criminal Law, vol. I, 215.

[20]Brownlie, Principles of Public International Law, 561, urges "the latter half of the nineteenth century..."

* The conceptual scope of war crimes and of grave breach are not identical. (See 1.2.d.)

[21]Rebecca M.M. Wallace, International Law: A Student Introduction (London: Sweet & Maxwell, 1986), 104.

[22]Sandoz, "Penal Aspects of International Humanitarian Law," in Bassiouni, International Criminal Law, vol. I, 230.

[23]Glueck, "By What Tribunal Shall War Offenders Be Tried?", 1081.

[24]U.S. Constitution, Art. 1, § 8, clause 10.

[25]Ibid., clause 14.

system by virtue of Article 2 of the UCMJ, itself federal law.[26] A nation's jurisdiction over its own forces, being *in personam* rather than territorial, continues when those forces are dispatched to foreign locations.

Accepting the not surprising proposition that the U.S. had jurisdiction over its own troops in Vietnam, how was that jurisdiction implemented, in light of South Vietnam's competing jurisdictional claim based upon territoriality? The answer, through concurrent jurisdiction, is well-settled law.

When one nation's armed forces are granted permission to enter another nation's borders, the host nation's "generally recognized"[27] jurisdiction based upon territoriality also applies to the guest force, *unless* waived or ceded. In 1812 the U.S. Supreme Court addressed this issue:

> A...case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions....The grant of free passage...implies a waiver of all jurisdiction over the troops...and permits the foreign general to use that discipline...which the government of his army may require.[28]

That opinion, *The Schooner Exchange*, is "the most commonly quoted statement of the principle" of jurisdictional waiver,[29] or immunity. The opinion is referred to by Lord Atkin as "a judgement which has illuminated the jurisprudence of the world."[30] In recent times the practice of basing troops on foreign soil has been controlled by host nation-guest nation compacts.[31] Such compacts, status of forces agreements,

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[26]Title 10, §§ 1-835, United States Code.

[27]Brownlie, Public International Law, 4th ed., 310.

[28]*The Schooner Exchange*, 139. To the same effect: Oppenheim, International Law, 4th ed., vol. I, sec. 445.

[29]Brownlie, Public International Law, 4th ed., 325.

[30]*Chung Chi v The King*, 168.

[31]King, "Jurisdiction Over Friendly Foreign Armed Forces," 550-53.

commonly provide for some degree of concurrent host-guest criminal jurisdiction over visiting forces.[32]

The lack of a U.S.-South Vietnamese status of forces agreement clearly delineating criminal jurisdiction has been noted. (See section 2.2.a.) Instead, both countries looked to the brief and loosely worded Pentalateral Agreement which spoke of diplomatic rights, duties, and privileges. The U.S. maintained exclusive jurisdiction over its troops in South Vietnam through an amendment, "Change 1," to the Pentalateral Agreement. The pertinent section of that change reads, in full: "Under Article 4 and Annex B of the Agreement, immunity from criminal and civil jurisdiction is granted to US military personnel in Vietnam along with certain categories of civilians."[33] Major General Prugh, the Army's Judge Advocate General in the War's latter stages, points out:

> The United States has never relinquished jurisdiction over its armed forces during combat; to do so in Vietnam would have been as unprecedented as it would have been impractical. During World War II, for example, the United States kept jurisdiction over U.S. troops in the United Kingdom.[34]

"Providing the visiting forces have an efficient court-martial system," writes another author, "there is no practical reason why a host country should insist on trying visiting soldiers in its own courts."[35]

In punishing war crimes committed by "all persons, including members of a belligerent's own armed forces,"[36] the UCMJ is the U.S. military criminal law charter. Under Article 18 of that Code, war crimes are incorporated into military law, within the jurisdiction of general courts-

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[32]Gilligan and Lederer, Court-Martial Procedure, 83.

[33]Par. 1.B., Ch. 1, Directive Number 27-1, HQ MACV, 30 September 1965, "SOP for Litigation Actions Under the Pentalateral Agreement."

[34]Prugh, Law At War, 89.

[35]Archibald Cox, "Further Developments Concerning Jurisdiction Over Friendly Foreign Armed Forces," 40 AJIL 257, 278 (1946).

[36]Dept. of the Army, The Law of Land Warfare, par. 506.b.

martial.[37] UCMJ Article 21 grants war crimes jurisdiction to "military commissions, provost courts, or other military tribunals," as well. Again, that jurisdiction is personal, not territorial[38] – military courts have jurisdiction of military personnel regardless of the army's location.

The U.S. usually punishes war crimes, denominated as war crimes *per se*, only if committed by enemy nationals.[39] The U.S. law of war manual further limits the scope of jurisdictional application, saying:"...[M]ilitary commissions and similar tribunals have no jurisdiction of such purely military offenses specified in the UCMJ as are expressly made punishable by sentence of court-martial..."[40] In other words, when a U.S. serviceman or woman commits a war crime, which war crime is also an offense under the UCMJ, he or she will be tried, not by commission or provost court, but under the Code for the criminal law offense. No reference to war crimes is necessary.

5.2. U.S. Military Law, 1970

A former U.S. ambassador to the United Nations recently wrote: "The military have a Uniform Code of Military Justice and a manual for courts-martial. This law extends very much to the rules of cross-national conduct as codified and agreed to in treaties."[41] That Manual and the UCMJ were a long time in gestation.

5.2.a. The UCMJ and Courts-Martial, 1970 In 1775 the Continental Congress adopted the first American code

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[37]Art. 18, Jurisdiction of General Courts-Martial, reads, in pertinent part: "General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."

[38]*Coleman v Tennessee*; See also, Willard B. Cowles, "Universality of Jurisdiction Over War Crimes," 33 California L. Rev. 177, 204 (1945).

[39]Sweeney, The International Legal System, 773.

[40]Dept. of the Army, The Law of Land Warfare, par. 13.

[41]Moynihan, On the Law of Nations, 135.

governing land armies, based on the British Articles of War. The Rules for the Regulation of the Navy, adopted the following year, also followed the British model. Britain's military law for land armies had evolved from that of Gustavus Adolphus, rather than from the English common law, and her navy's code was distant relative to that of the Phoenicians.

Over the next 175 years American military law, of both land armies and the sea, underwent evolutionary change, but "despite subsequent alterations by Congress, the American military justice code still retains certain substantive and procedural aspects of the 18th century British code."[42]

Until 1950 the U.S. Army and Air Force were governed by the Articles of War, the Navy and Marine Corps by the Articles for the Government of the Navy. Both codes had fallen into public and political disfavor. World War II, with its millions of citizen soldiers, focused attention on the shortcomings of military justice and in 1948 a primarily civilian committee, assembled by presidential order and chaired by a Harvard law professor, began writing a new military criminal code. In 1950 this major reform and consolidation, the UCMJ, became law. The UCMJ and a new *Manual for Courts-Martial*, an Executive Order "loosely described as the 'Bible' for military practice,"[43] to implement the Code, were applicable to all U.S. armed forces. One familiar with the British *Manual of Military Law* will find America's *Manual for Courts-Martial* quite similar. Trial administration and procedure are much alike, as are the offenses.

The 1950 Code was a landmark improvement, but over the years flaws and gaps inevitably surfaced. In 1969 the preceding year's Military Justice Act took effect. It

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[42]Edward F. Sherman, "The Civilianization of Military Law," 22 Maine L. Rev. 3 (1970).

[43]Benjamin Feld, "Courts-Martial Practice: Some Phases of Pretrial Procedure," 23 Brooklyn L. Rev. 25, 26 (1956).

significantly revised the 1950 UCMJ and implemented an entirely new *Manual for Courts-Martial*. They were the military criminal law in effect during the Son Thang trials.

The revised 1969 UCMJ brought military trial procedure into line with civilian federal court practice. For the first time, military judges – senior military lawyers with lengthy trial experience – were mandated in virtually all courts-martial, with powers roughly equivalent to those of civilian federal judges. Another significant change required that, except in rare circumstance, a judge advocate represent every military accused, free of charge, from confinement or charging, through appeal. Of the many revisions those two alone dramatically altered military law practice. A critic, upon reviewing the new procedures, conceded that the revisions:

> ...extended substantially new due process rights to servicemen, some of them more favorable than were then provided in civilian courts, and its changes in court-martial procedures, especially the general court-martial, considerably replaced the old disciplinary flavor with a judicial one.[44]

From 1969 onward, there were "relatively few important procedural differences between civilian and military trials, and some of the obvious ones are indicative of form rather than substance."[45]

The UCMJ provides for three types of court-martial. The summary court is a brief, one-officer hearing designed, as the name implies, to summarily dispose of minor disciplinary infractions. Lawyers are not involved; the accused has no legal representation. The hearing officer, usually from the accused's battalion, hears the evidence, protects the accused's rights, decides the issues and, upon a guilty

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[44]B. Wasserstein and M.J. Green, eds., With Justice For Some (Boston: Beacon Press, 1970), 77.

[45]Charles A. Shanor and Timothy P. Terrell, Military Law in A Nutshell (Minnesota, West Publishing, 1980), 114. (This book applies only to the Manual for Courts-Martial, 1969.)

finding, imposes punishment. Acquittal is unusual, but the maximum punishment is light — confinement in excess of one month is precluded — and a finding of guilt is considered an administrative matter, not a federal conviction.[46] Significantly, an accused may refuse a summary court-martial. In such instances the commander initiating the summary court may either take the charges to a non-judicial administrative forum, or up-grade the case to a special court-martial. Most offenders accept trial by summary court-martial knowing that if their rights are not as rigorously observed, neither are the potential consequences as Draconian as in other forums — much as an Englishman might opt for trial at magistrate's court rather than in a Crown Court. Typical summary court-martial offenses include brief unauthorized absences, minor fights, disrespect to junior noncommissioned officers, and the like.

A special court-martial, the second type, requires a *verbatim* record, lawyer representation of the accused, and a certified military judge. At the option of the accused, trial may be before the military judge alone, or before a panel known as "members" in military practice — essentially jurors in uniform. Conviction by a special court is a federal conviction, with the attendant disabilities and stigma. Most military trials are special courts-martial. The maximum possible punishment includes a bad-conduct discharge from the service, reduction in grade to private, loss of all pay for six months, and six months confinement at hard labor — "six, six, and a kick." Roadside trash pick-up is considered "hard labor."

The final type proceeding, the general courts-martial (GCM), is reserved for serious criminality such as rape, murder, desertion, and war crimes. All the procedural aspects of a special court are present at a GCM, where the maximum punishment, if authorized for the charged offense, is

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[46]*Middendorf v Henry*, 425 U.S. 25 (1976).

death.* Only experienced special court-martial judges are selected for assignment as GCM judges.

In considering the trial of war crimes, the authors of the *Manual for Courts-Martial* originally viewed the GCM, acting as a tribunal rather than a court-martial, as a trial forum for enemy spies and saboteurs — but not for the trial of U.S. military personnel charged with war crimes.[47] The subsequently issued *Manual*, which fixes military rules of practice,[48] negated that intent and prescribed the GCM as the forum for war crime trials of U.S. service personnel.

All GCMs must be preceded by a formal pretrial hearing to establish probable cause, called an "Article 32" for its placement within the UCMJ's 140 articles. The Article 32 investigation is the military analogue to the civilian grand jury proceeding. (See section 5.3.) The pretrial hearing officer is a usually a judge advocate, although that is not a Code requirement, and the accused is represented by lawyer counsel. The rules of evidence are relaxed and defense discovery is extremely liberal at such hearings. The defense need present no evidence whatever at an Article 32.

The 1969 revisions, for the first time, provided for either members (jury) or bench trial, at the option of the accused. Prior to 1969 all courts-martial had been decided by members. Military rules of evidence, closely akin to federal rules of evidence, are applicable throughout trial. All rulings and opinions of the U.S. Supreme Court are binding on military courts.[49] As in civilian jurisdictions, a body of military case law, regularly reported in bound volumes, applies to military trials.

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*No Marine has been executed pursuant to sentence of court-martial since 1817. No U.S. serviceman, of any service, has been executed since 1961. James E. Valle, Rocks and Shoals (Maryland: Naval Institute Press, 1980), 8-9, 103-110.

[47]Index and Legislative History: Uniform Code of Military Justice, 958-61.

[48]*U.S. v Villasenor*, 19 CMR 129 (USCMA, 1955).

[49]Stephen A. Saltzburg, Lee D. Schinasi, and David A. Schlueter, Military Rules of Evidence Manual, 3d ed. (Virginia: Michie Company, 1991), x; 6.

Staff Judge Advocate (SJA) offices are part of every division or equivalent-size headquarters. The court-martial convening authority, with the advice of the SJA's office, decides whether to proceed with a special or general court, although serious charges usually make the choice self-evident. For both special and general courts, the SJA assigns lawyer counsel for both the accused and the government, requests a military judge, and assigns a tentative trial date. The military judge, once assigned to a case by his judicial superiors, has final authority over case progress, including continuances, witness requests, and other pretrial matters. During trial the military judge is the sole arbiter and authority. The 1969 amendments removed judges from local command authority for any purpose (watch and duty rosters and performance ratings, for example) and made them answerable only to their senior military judge.

The original 1950 UCMJ brought military justice toward the mainstream of civilian criminal practice. The 1969 revisions continued that "civilianizing" trend, making courts-martial much like civilian municipal criminal court systems. Indeed, civilian defense lawyers make frequent appearances in military trials without need of special briefing or familiarization.

But trying cases in a tin-roofed hut in Vietnam was not the same as trying cases in any municipal system, no matter how improved the military system. Harvard University's Professor Arthur Sutherland points out, in regard to the application of military law:

> There is a difference between "forces in the field" and forces in garrison....There is a difference between matters overseas and matters at home; our airman at a base in the peaceful English countryside are scarcely "in the field" in any conventional sense...[50]

The UCMJ makes no allowance for its application in combat or field circumstances. All peacetime procedure and precedent

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[50]Sutherland, "The Constitution, the Civilian, and Military Justice," 217-18.

remain fully effective, peacetime standards of military justice equally applicable in time of war.[51] A review of the UCMJ's legislative history reveals no consideration of the possibility that courts-martial might be conducted anywhere other than in the controlled environment of peacetime courtrooms.

British military law, on the other hand, provides for Field General Courts-Martial when forces are "on active service,"[52] that term defined as being engaged in operations against the enemy, or engaged elsewhere than in the United Kingdom in operations for the protection of life or property, or, finally, in military occupation of a foreign country.[53] Regulations for Field GCMs provide for a diminished number of members, lowered grades (ranks) of participants, and even the possibility of omission of judge advocate participation. There is no U.S. analogue to the Field GCM.

British military law allows latitude in the application of the evidentiary Rules of Procedure when "the exigencies of the service render compliance with all or any of the provisions of the Rules...impracticable"[54] The latitude granted extends only to the production of witnesses for cross-examination and minor documentary matters, but that could be significant in combat zone trials. Again, there is no analogous provision in American military law.

Before the Vietnam War U.S. courts-martial had been conducted under field conditions, but never on a sustained basis involving every case referred to trial, as in Vietnam. Upon reviewing its legislative history, one might reasonably conclude that the Code's framers did not consider the eventuality that occurred in Vietnam: the court-martial process transpiring from charging to initial review, over a

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[51]*Curry v Secretary of the Army*, 595 F.2d 873, 194 (U.S. App. D.C., 1979).
[52]HMSO, Manual of Military Law, pt. I, ch. III, par. 5.
[53]Army Act of 1955, sec. 224.(1).
[54]HMSO, Manual of Military Law, pt. I, Rules of Procedure (Army), 1972, rule 103.-(1).

period of years, in the field. During the Korean War, when the UCMJ was initially implemented, combat zone-based crimes, few as they were, were often tried in Japan and the potential difficulties never surfaced.

The Vietnam War was the first real application and test of the Code's reformed procedures under combat conditions. On a practical level, combat conditions imposed formidable limitations, raising evidentiary, procedural, and technical difficulties. Often it was not possible to examine a crime scene, or go to a village in search of witnesses because the place in question was an unsecured area. Court recording equipment, dependent upon electrical power, often failed due to gasoline-powered generator problems, leading to loss of the mandatory verbatim record of trial. Despite efforts to "reconstruct" such truncated records, subsequent reversal of convictions for want of the required verbatim record often resulted.[55] Incoming enemy fire was treated as an unscheduled recess. A judge advocate wrote, "I recall one trial interrupted by sniper fire and two interrupted by fire missions which required members of the court, witnesses, and the accused, to man their posts. It was interesting..."[56]

Securing the presence of witnesses for combat zone trials was a constant problem, the *bête noire* of prosecutors who, under U.S. military law, are required to produce both government *and* defense witnesses. Pre-war case law raised a low threshold for establishing witness materiality at trial and Vietnam defense counsel frequently discovered a pressing need for testimony from witnesses located half-a-world away. Depositions are provided for in the UCMJ,[57] permitted, in fact, in a broader range of circumstances than in the

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[55]BGen. John R. DeBarr, interview by author, 2 Oct. 1986, Wash., tape recording 6491, Oral History Collection, Marine Corps Historical Center, Wash.

[56]Col. John T. Fischbach, Kentucky, to author, Washington, n.d., Marines and Military Law in Vietnam collection, Marine Corps Historical Center, Washington.

[57]Art. 49.(a).

civilian Federal Rules of Criminal Procedure.[58] But depositions would not do, the defense counsel would aver and trial judges, bound by case law, often granted the witness requests. The mechanics of flying a witness – perhaps a mother, or a discharged former squad-mate – to Vietnam, securing their billeting and transportation to and from the rudimentary courtroom each day, were daunting...and at government expense.*

Even the production of Marine witnesses from within Vietnam presented problems. A Marine judge advocate recalled:

> On one occasion...before the matter [a rape charge] could go to trial, one of the defendants was killed in combat and the other was medically evacuated from RVN with a broken leg....On still another occasion...I discovered, just as I was about to conclude my opening argument, that my witness had been sent home two days prior to trial, forcing me to grudgingly join with the defense in a motion to dismiss the charges.[59]

There was not then, and there is not now, provision in the UCMJ for such occurrences. Wounded or killed witnesses, military or Vietnamese, are unavailable witnesses. The recorded testimony from a preliminary hearing (Article 32 investigation), however, is admissible in subsequent proceedings and testimony was sometimes preserved by that means. If affidavits were fortuitously recorded before wounding or death – so rare as to be unheard of in Vietnam – or if prior testimony in another judicial proceeding had been transcribed, it could be used.[60] But seldom was that the case. If unavailable testimony was crucial to proving the government's case, or to corroboration or establishment of a

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[58]American Bar Association, Comparative Analysis: Federal Rules of Criminal Procedure and Military Practice and Procedure (Washington: ABA, 1982), 39.

* Civilians could not be forced to attend trials in Vietnam. In *dicta*, the combat zone was held to present "such a grave danger to a civilian witness" that a deposition would suffice. *U.S. v Hodge*, 43 CMR 252 (USCMA, 1971).

[59]Maj. Donald Higginbotham, Texas, to W. Hays Parks, Wash., 15 Jan. 1977, Marines and Military Law in Vietnam collection, Marine Corps Historical Center, Wash.

[60]*U.S. v Wheeler*, 45 CMR 242 (USCMA, 1972).

defense, the prosecution or the defense simply failed. Harsh as that may be, discussion of Vietnam trials with numerous Vietnam-era judge advocates reveals only a few prosecution cases lost because of that fact, and no defense cases.

In the same vein, documents lost to combat action were considered just that: lost. The best evidence rule[61] allowed the substitution of copies, if available in that time before Xerox machines, but a document's loss due to combat action was not, and is not today, specified as a situation allowing substitution of copies. The matter is for the military judge's discretion. In sum, the rules of evidence were, and are, neither set aside nor relaxed for reason of combat.

Brigadier General Simmons, assistant division commander of the 1st Marine Division when the Son Thang cases were tried, wrote:

> [S]enior officers say that our experience in Vietnam "proves" that...the present cumbersome system of military justice will "work" in a combat environment....[But] we must find ways of keeping the extraneous administrative functions in the rear, out of the objective area.[62]

Some judge advocates thought that, in light of the thousands of Vietnam courts-martial that were tried, the UCMJ worked well in the combat zone.[63] Others, like General Simmons, disagreed. Brigadier General Duane L. Faw, the Vietnam-era Director of the Judge Advocate Division — the Marine Corps' senior lawyer — bluntly says:

> I'm one of the people that thinks that the Uniform Code of Military Justice failed in Vietnam....There were too many people who were guilty of very, very serious crimes who were never brought to trial because of the difficulties of getting witnesses, keeping witnesses [in country], and so forth...[64]

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[61]Manual for Courts-Martial, 1969, par. 143.a.(1).

[62]BGen. Edwin H. Simmons Vietnam service debriefing to Commanding General, Fleet Marine Force, Pacific, 24 May 1971, Marine Corps Historical Center, Wash.

[63]*e.g.*, BGen. James P. King, interview by author, 5 Nov. 1986, Wash., tape recording 6478, Oral History Collection, Marine Corps Historical Center, Wash.

[64]BGen. Duane L. Faw, interview by author, 8 October 1986, California, tape recording 6470, Oral History Collection, Marine Corps Historical Center, Wash.

Another Marine lawyer, a veteran of two Vietnam tours, concurs, pointing out other difficulties raised by the UCMJ's failure to consider the impracticality of its implementation in combat:

> Defense requests for numerous character witnesses from the U.S.; requests for psychiatric examinations in the U.S.; requests for expert witnesses from the U.S.; requests for delay while the accused attempted to obtain civilian counsel in the U.S....All of these, combined with the witness problems...made the trial of a serious or complex case very difficult to get off the ground...[65]

What solution presents itself? Many senior lawyers with Vietnam experience recommend major change in the UCMJ to, in effect, bring it into line with British field practice. (See section 8.3.c.) Major General Prugh, former Judge Advocate General of the Army, in conjunction with General William Westmoreland, proposed draft wartime modifications to the UCMJ,[66] but they received scant attention.* Changes to accommodate field conditions are not anticipated.

5.2.b. Members — the Military Jury Members trials were anticipated for the Son Thang accused. Since their introduction in the 1950 UCMJ, members, and their selection, have been the frequent target of critics.

The UCMJ requires selection of members "best qualified ...by reason of age, education, training, experience, length of service, and judicial temperament."[67] At the division level, where GCMs are convened, members are selected from a roster of division officers, usually. The actual selection is made by an administrative officer, often the adjutant, or

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[65]Col. Curtis W. Olson, California, to author, Wash., 27 October 1986, Marines and Military Law in Vietnam collection, Marine Corps Historical Center, Wash.

[66]Gen. William C. Westmoreland and MGen. George S. Prugh, "Judges in Command: the Judicialized Uniform Code of Military Justice," 4 Harvard J. of L. and Public Policy 199 (1974).

* Significant changes recommended by Prugh and Westmoreland that *have* been adopted include videotaping of depositions and testimony, and limiting the accused to one military counsel. Many significant modifications they suggested remain unadopted, however.

[67]Art. 25.

his/her assistant. Member selection is random, guided by availability and common sense: operations officers are seldom selected because they must be constantly available to carry out their critical duties; military police officers and provost marshalls go unpicked for the possibility of their disqualifying familiarity with pending cases. Occasionally, selection is by service number - captains or colonels whose service numbers end in the digit six, for example. There is no standard maximum number of jurors. The minimum number for GCM is five. The officers selected are assigned to a panel, sometimes for a single case, more often for a series of unrelated cases. The order appointing them members is signed by the only officer with authority to convene GCMs, the commanding general. In a sense, then, military jurors are "selected" by commanders. In fact, selection is an administrative matter accomplished by a mid-level officer on the commander's staff who has no idea what cases may come before that panel. Instances of commanders deleting or adding officers to a members list in order to bias the panel are rare,[68] and the mere "appearance of impurity"[69] is sufficient to overturn a conviction rendered by a panel discovered to be so tainted.

At the special court-martial level, usually a battalion, the same members selection process applies. For special courts the minimum number of members is three.

Critics argue that commanders need not make changes to panel assignments; the mere fact that jurors come from the officer ranks is sufficient bias in and of itself to ensure conviction.

> Because of the systematic exclusion of the young, the inexperienced, and those with a minimal amount of service background....the convening authority has the ability to

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[68]*U.S. v Hedges,* 29 CMR 458 (USCMA, 1960), is one.
[69]Ibid.

> turn the court into a well-controlled panel of disciples.[70]

Ignoring what such a broad charge implies about officer integrity and intelligence, true random member selection involving all ranks is in fact possible and is sometimes practiced. Only rarely, however. Its non-use is justified on the ground that junior enlisted jurors, privates and lance corporals, eighteen- and nineteen-year olds, are not those "best qualified," as called for by the UCMJ.

An accused may request that enlisted personnel be included on his panel, in which case at least one-third of the jurors must be enlisted.[71] Seldom, however, are any but senior enlisted personnel assigned — unlike British court-martial practice, which allows only officers to serve as members. In U.S. courts-martial most accused prefer to take their chances with an officer panel, rather than risk an unknown sergeant major's judgement. The common belief, unsupported by experience, is that enlisted jurors always vote for conviction.

Critics further charge that members, predominantly college-trained officers accustomed to following instructions, are not peers of a military accused.[72] But trial lawyers recognize that "peers" are rare in any jurisdiction, including civilian:

> In courtrooms across the country, juries with tenth-grade educations are responsible for deciding complicated ...cases, not because they are...fair, but because they are the only ones available....Experienced litigators know no one is ever unbiased. What they are looking for

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[70]G. Edward Rudloff, "Stacked Juries: A Problem of Military Injustice," 11 Santa Clara Lawyer 362, 372 (1970-71). Also see, Luther C. West, "A History of Command Influence on the Military Judicial System," 18 U.C.L.A. L. Rev. 1 (1970), the leading article on the subject, although pre-dating the 1969 Manual for Courts-Martial.

[71]Manual for Courts-Martial, 1969, par. 41.d(2).

[72]William L. Standard, Aggression: Our Asian Disaster (NY: Random House, 1971), 108; Rudloff, "Stacked Juries," 372.

> are jurors who will be *partial* to their client's case and prejudiced against their opponents.[73]

F. Lee Bailey, a prominent American lawyer, writes: "In my opinion, despite all the criticism leveled at the military, the odds are that a military court will produce a more accurate verdict in a disputed issue of fact than a civilian jury."[74]

Courts-martial have an undeniably high conviction rate. In 1970, the year of the Son Thang trials, 94.6 percent of the Army's 2,647 GCMs resulted in conviction.[75] Marine Corps figures are unavailable but no doubt comparable.[76] In 49.8 percent of the Army GCMs 'not guilty' pleas were entered. The conviction rate in those cases was a lower 89 percent. 'Not guilty' pleas heard by a military judge sitting without members resulted in a conviction percentage of 92; those decided by members, 83 percent.[77] The following year the members/judge alone difference was more pronounced: 90 percent convictions by judge alone, 65 percent convictions by members,[78] demonstrating that military juries have significantly lower conviction rates than do judge-decided cases. Such figures rebut assertions of military jury bias.

A significant factor elevating the military's overall conviction rate is the military's unique offenses – unauthorized absence, culpable loss of government property, breaking restriction – common charges, the courtroom proof of which is administrative simplicity. Another factor is the

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[73]Roy Grutman and Bill Thomas, Lawyers and Thieves (NY: Simon & Schuster, 1990), 119, 122.

[74]F. Lee Bailey, The Defense Never Rests (NY: Stein & Day, 1971), 259.

[75]R. Rex Brookshire, "Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction," 58 Military L. Rev. 71, 86 (1972).

[76]Report of the Judge Advocate General of the Navy, Annual Report of the U.S. Court of Military Appeals, 1970 (Wash.: GPO, 1971), 26-30, lumps Navy and Marine Corps convictions together.

[77]Brookshire, "Juror Selection Under the Uniform Code of Military Justice," 86.

[78]Colonel Wayne E. Alley, "Determinants of Military Judicial Decisions," 65 Military L. Rev. 85, 102-103 (1974).

common military practice of administratively disposing of cases that lack reasonably strong proof.*

Countless books and scholarly articles both extoll and excoriate military justice in detail. In the end, the system is much better than its critics would believe, and more imperfect than its proponents would admit.

5.2.c. Military Law and Individual Rights Military justice has never lacked for critics. The late Supreme Court Justice William O. Douglas, in an oft-repeated opinion, referred to military justice as: "a system of specialized military courts, proceeding by practices different from those obtaining in the regular courts and in general less favorable to defendants." He added that, "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."[79] While that statement, agreed with or not, pre-dated the major 1969 amendments, the opinion in some lay and civilian legal circles remains that military courts are inherently unfair, oriented solely toward the maintenance of discipline at the expense of justice. Most jurists and legal scholars, however, have a greater confidence in contemporary military justice, realizing its commitment to the basic rights enjoyed by all U.S. citizens.

At its initial session in 1789, the first American Congress submitted twelve Constitutional amendments for the consideration of the state delegates. The amendments were intended to clarify certain individual and state rights not enumerated in the Constitution and to guarantee the preeminence of civil over military power.[80] Ten of the twelve proffered amendments, the Bill of Rights, were eventually ratified.

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* A practice criticized in: Glanville Williams, "Letting Off the Guilty and Prosecuting the Innocent," 1985 Criminal L. Rev. 115.

[79] *O'Callahan v Parker,* 395 U.S. 258 (1969).

[80] Chief Justice Earl Warren, "The Bill of Rights and the Military," 37 New York University L. Rev. 181, 185 (1962).

When the Bill of Rights was written it was already long-standing practice in British courts-martial that the ordinary criminal procedure of civilian courts be followed, except as otherwise provided in the articles of war.[81] Eventually, U.S. courts-martial would follow suit, but not for many years. American civilian courts at first made clear the fact of their authority over military courts, as well as the weak role of the Bill of Rights in limiting that dominance: "[T]he power of the Congress in the government of the land and naval forces and of the militia," the U.S. Supreme Court flatly said in 1866, "is not at all effected by the fifth or any other amendment."[82]

Nor was the Bill of Rights initially considered to apply to those in uniform.[83] "[T]he Founders...never thought of extending to soldiers the guarantees of common-law criminal procedure that they wrote into the Bill of Rights for the protection of civilians."[84] The founders' original intent, however, has by now been rendered academic.

> Congress has gradually extended the serviceman's protection by statute, and today the Court of Military Appeals is giving to the statutory provisions a content which, in most instances, is indistinguishable from that of the constitutional norms regularly formulated and applied in the federal courts.[85]

The civilian court's view of its relationship to the enforcement of rights within the military has changed, as well. Thirty years ago the Chief Justice of the Supreme Court evidenced that transition in saying:

> So far as the relationship of the military to its own personnel is concerned, the basic attitude of the Court has been that the latter's jurisdiction is most limited....The most obvious reason is that [civilian]

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[81]Gordon D. Henderson, "Courts-Martial and the Constitution," 71 Harvard L. Rev. 293, 317 (1957).

[82]*Ex Parte Lambdin P. Milligan*, 71 U.S. 281, 301, 4 Wall. 2 (1866).

[83]Frederick B. Wiener, "Courts-Martial and the Bill of Rights: The Original Practice," pt. I, 72 Harvard L. Rev. 1, 44 (1958).

[84]Ibid., pt. II, 72 Harvard L. Rev. 266, 293 (1958).

[85]Ibid., 294.

> courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are...alien to the problems with which the judiciary is trained to deal.[86]

At the same time the Chief Justice warned, "citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes,"[87] an admonition also contained in several recent Supreme Court opinions.[88] The military's high court, the Court of Military Appeals, reinforces that view, noting that "the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."[89]

Some basic rights are even more expansive in military proceedings than in civilian courts: warnings against self-incrimination; the accused's right to the substance of the expected testimony of prospective witnesses against him; and information as to all evidentiary matter in prosecution hands, for example. Military trial procedure may be considered superior in some respects, as well.

> In the armed forces, there are no reports of corrupt military judges; no defendants waiting months or years until trial; no defendants told by the judge to plead guilty or suffer the consequences; no defendants impoverished by the need to retain counsel or forced to be represented by incompetents.[90]

Still, there is no question that "service in the armed forces, in both war and peace, entails substantial restriction on fundamental rights."[91]

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[86]Warren, "The Bill of Rights and the Military," 186-87.

[87]Ibid., 188.

[88]*e.g.*, *Burns v Wilson*, 346 U.S. 137, 142 (1953); *Brown v Glines*, 444 U.S. 348 (1980).

[89]*U.S. v Jacoby*, 29 CMR 244 (USCMA, 1960). Although the U.S. Supreme Court now assumes the Bill of Rights to apply to the military, it has yet to squarely hold them applicable.

[90]Gilligan and Lederer, Court-Martial Procedure, vol. I, 36.

[91]Robert E. Quinn, "The United States Court of Military Appeals and Individual Rights in the Military Service," 35 Notre Dame Lawyer 491, 493 (1960).

What, then, are the rights contained in the Bill of Rights and which of them are, for the military, restricted? Of the ten specified rights, five are clearly inapplicable to the uniformed individual: the right to keep and bear arms, the prohibition against quartering soldiers in one's home without consent, the right to trial by jury in suits exceeding twenty dollars value in controversy, the reservation to the states of those powers not delegated to the federal government, and the enumeration of constitutional rights as not being a denial of other, retained rights — the second, third, seventh, ninth, and tenth amendments.

The sections of the Bill of Rights not relating to limitations on federal powers have been applied to the separate states by incorporation, employing the Due Process clause of a later Constitutional amendment, the fourteenth.[92] Similarly, those sections of the Bill of Rights have, with some limitations, been integrated into the UCMJ, but by case law and statute, rather than by incorporation.

The five amendments enumerating personal liberties in the Bill of Rights — the ones of possible application to service personnel — are the first, fourth, fifth, sixth, and eighth. The first amendment centers on free speech.

Freedom of speech has never been absolute, of course. The guarantee does not protect "the profane, the libelous, and the insulting or 'fighting' words..."[93] As to those in uniform, the current Chief Justice of the Supreme Court has written, "The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment..."[94] In another opinion he expounds:

> While members of the military are not excluded from the protection granted by the First Amendment, the different

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[92]See, Abraham S. Goldstein and Leonard Orland, Criminal Procedure: Cases and Materials (Boston: Little, Brown, 1974), 26; 594.

[93]*Chaplinsky v New Hampshire*, 315 U.S. 568, 572 (1942).

[94]*Goldman v Weinberger*, 475 U.S. 503, 508 (1986).

> character of the military community and of the military mission require a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[95]

Thus, in modern U.S. (and British) military law, limitations are placed upon a service person's speech that, for instance, counsels desertion, interferes with accomplishment of the military mission, or military morale and discipline.[96] Additionally, there are speech-related offenses unique to the military: disrespectful or insubordinate language to those superior in rank,[97] and offenses against order and discipline. But the Department of Defense[98] and the Court of Military Appeals have continuously made clear that they will allow only those limitations on the right to speak that are essential to military discipline and order.[99]

The fourth amendment's prohibition against unreasonable searches and seizures of one's person, house, papers, and effects, is embodied in numerous military appellate decisions which closely follow civilian rules.[100] It is generally true that decisions in the Federal system interpreting the fourth amendment serve as precedent in determining military search and seizure issues.[101]

> The principal difference between the military and civilian procedure relates to issuance of a warrant... The military practice does not provide for a warrant. In its place, however, is the requirement that the search be authorized by the commanding officer... The exercise of

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[95]*Parker v Levy*, 417 U.S. 733, 758 (1974).

[96]Walter T. Cox, "The Army, the Courts, and the Constitution: The Evolution of Military Justice," 118 Military L. Rev. 1,23 (1987); Army Act 1955, secs. 60, 63A.

[97]UCMJ, Arts. 89, 91; Army Act 1955, sec. 33.

[98]DoD Directive 1325.6 (1969), directs commanders to preserve service persons' "right of expression...to the maximum extent possible, consistent with good order and discipline and the national security."

[99]Quinn, "The United States Court of Military Appeals and Individual Rights," 497.

[100]*e.g., U.S. v Ezell*, 6 MJ 307 (USCMA, 1979).

[101]American Bar Association, Comparative Analysis, 86.

> authority to search must be predicated upon probable cause.[102]

The "shakedown" search of days past — search of entire living areas such as barracks, with probable cause, if any, only relating to the entire undifferentiated area — has been so radically narrowed by case law as to be a thing of the past.[103]

In recent years, random, involuntary urinalysis has been the continuing subject of concerted attack by the military defense bar and civil libertarians on fourth amendment grounds. Generally, however, appellate courts have supported the practice, when carried out in accordance with Department of Defense and service directives, and the voluminous military case law on the subject.[104] Indeed, civilian jurisdictions have followed the military's lead in crafting legislation and court decisions that affirm the state's right to lawfully seize bodily fluids in protection of the public welfare.

Even in such modern application of the fourth amendment its provisions have full effect in the armed forces. The Court of Military Appeals has written:

> While certain [Bill of Rights] protections have been deemed inapplicable, neither this Court nor the Supreme Court has ever held that the Fourth Amendment does not shield the American service person. "Indeed, the opposite is true."[105]

The military is specifically excluded from the fifth amendment's right to a grand jury indictment, the only time the armed forces are mentioned in the Bill of Rights. The other rights enumerated in that amendment, those against self-incrimination, double jeopardy, and the right to due process of law, are all applicable to the service person. The most significant of those in terms of war crimes

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[102]Ibid. See also, *U.S. v Drew*, 15 USCMA 449 (1965).
[103]*U.S. v Middleton*, 10 M.J. 123 (USCMA, 1981).
[104]*U.S. v Harris*, 5 M.J. 44 (USCMA, 1978), and its progeny.
[105]*U.S. v Middleton*,126-27, citations omitted.

adjudication is the right against self-incrimination, first recognized in courts-martial in 1795.[106]

UCMJ Article 31, the military version of the familiar warnings against self-incrimination, is broader than the fifth amendment's requirements in that Article 31 applies to non-custodial, as well as custodial, situations.[107] Also broader than some civilian jurisdictions' requirements, military case law requires that evidence extraneous to a suspect's confession "establish the probable existence of each element of the offense charged;"[108] The uncorroborated confession which bedevils British courts is inadmissible in courts-martial.

Protection against double jeopardy is contained in Article 44(a) of the UCMJ, which corrected an inequity endured under the UCMJ's predecessor, the Articles of War and the Articles for the Government of the Navy. Until prohibited by regulation, the Articles allowed "reconsideration": technically, there was no court-martial judgement until the reviewing authority acted and that authority could return the record to the trial court for reconsideration and "revision" which baldly directed imposition of a more severe sentence, that procedure now recognized as a fifth amendment violation.[109] During World War I, fully one-third of all Army court-martial acquittals were reportedly "revised" to findings of guilty.[110]

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[106]Wiener, "Courts-Martial and the Bill of Rights," pt. II, 277.

[107]*U.S. v Wilson*, 2 USCMA 248 (1953).

[108]*U.S. v Snearley*, 15 USCMA 462, 463 (1965); *U.S. v Gaines*, 44 CMR 375 (ACMR, 1971).

[109]Wiener, "Courts-Martial and the Bill of Rights," pt. II, 272-77.

[110]William T. Generous, Jr., Swords and Scales (NY: Kennikat Press, 1973), 8. This assertion is disputed by MGen. Prugh, who objects that Professor Morgan, a principle author of the UCMJ who originally made the claim, was unsupported by facts. Wiener, "Courts-Martial and the Bill of Rights," pt. II, 273, however, agrees with Generous.

The revision procedure that continues in today's British military law allows only for sentence suspension or remission.[111]

Although the term "due process" defies easy definition, that fifth amendment concept is fundamental to modern common law. It, too, is fully applicable to the military individual.

> [M]ilitary due process begins with the basic rights and privileges defined in the federal constitution....The letter and the background of the Uniform Code add their weighty demands to the requirements of a fair trial. Military due process is...not synonymous with federal civilian due process. It is basically that, but something more, and something different. How much more and how much different is indefinable in general terms...[112]

From its earliest decisions, defined or not, the Court of Military Appeals has recognized and applied the concept to the armed forces.[113]

Speedy trial, an impartial jury, and the assistance of counsel are rights embodied in the sixth amendment. Technically, the military does not have the right to trial by jury.[114] Some contend that the authors of the Bill of Rights never intended that service people be given that right.[115] Service personnel instead have the right to be tried by a panel of officers — members — with provision for enlisted members;[116] a semantic distinction without a difference, perhaps, but a distinction that differentiates military from civilian practice.[117]

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[111]HMSO, Manual of Military Law, pt. I, app. III, par. 9-27.

[112]Robert E. Quinn, "The United States Court of Military Appeals and Military Due Process," 35 St. John's L. Rev. 225, 232 (1961).

[113]*e.g., U.S. v Clay*, 1 CMR 74 (USCMA, 1951); *U.S. v Lee*, 1 CMR 212 (USCMA, 1952).

[114]*O'Callahan v Parker.*

[115]Henderson, "Courts-Martial and the Constitution," 304.

[116]UCMJ, Art. 25.

[117]*cf.*, Federal Rule of Criminal Procedure 23 which *requires* trial by jury unless waived by the defendant with approval of the court and consent of the government. UCMJ Article 25 leaves the option entirely to the accused.

Military practice is "much more protective"[118] of the individual's right to a speedy trial than is U.S. federal practice. Under Vietnam-era military law, in the absence of a defense request for continuance, an accused in pretrial confinement must have been brought to trial within ninety days. Failure to meet that burden resulted in dismissal of charges.[119]

The sixth amendment's right to counsel was first statutorily assured the military accused in 1920.[120] Today, and at the time of the Son Thang trials, military standards for provision of counsel equal or exceed those that prevail in the U.S. civilian community.[121] Every military accused facing possible criminal conviction, regardless of financial status, is provided, without charge, from pretrial stages to final appeal, appointed military counsel.[122] That counsel must be a law school diplomate, the member of a civilian bar, a graduate of a judge advocate's training course, and certified competent by his service's judge advocate general. A defense counsel must meet the standard of "customary skill and knowledge which normally prevails...within the range of competence demanded of attorneys in criminal cases."[123] Every accused may additionally request a military lawyer of his own selection and, if that counsel is reasonably available, as is often the case, the requested counsel must be made available — not instead of, but in addition to, the appointed counsel.[124] The military accused may also hire, at his own expense, civilian counsel.[125] Under the law applicable during the Vietnam War, then, it was possible for an accused to

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[118]ABA, Comparative Analysis, 120.
[119]*U.S. v Jacoby*; *U.S. v Burton*, 44 CMR 166 (USCMA, 1971); UCMJ, Art. 33.
[120]Wiener, "Courts-Martial and the Bill of Rights," pt. II, 300.
[121]Cox, "The Army, the Courts, and the Constitution," 26.
[122]UCMJ, Arts. 27, 32, 38, 49, 70; *U.S. v Booker*, 5 MJ 238 (USCMA, 1972).
[123]*U.S. v Rivas*, 3 MJ 282, 289 (USCMA, 1977).
[124]UCMJ, Art. 26; *U.S. v Vanderpool*, 16 CMR 135 (USCMA, 1954).
[125]*U.S. v Sears*, 20 CMR 377 (USCMA, 1956).

simultaneously be represented by three lawyers: appointed counsel, requested counsel, and civilian counsel.*

At the height of the war civilian lawyers frequently represented military clients in Vietnam. (More than one civilian lawyer withdrew his demand to view the scene of the alleged offense upon being issued a helmet and flak jacket.)[126] Civilian lawyers often waive their fees to defend military clients. Like witnesses, civilian attorneys were brought to and from Vietnam on government aircraft and billeted in officer's quarters at the convening unit's headquarters.

The last of the Bill of Rights of possible application to service persons, the eighth amendment, prohibits cruel and unusual punishment. That other aspect of the amendment prohibiting excessive bail has never pertained to the armed services.[127] Suggesting a weak explanation for the military's exclusion of bail, one publicist offered:

> Since the purpose of the bail requirement is to allow an accused to remain free until and unless he is convicted of a crime, the requirement is inappropriate in the military where the individual has no freedom of movement but rather is at all times subject to control by his superiors.[128]

A more likely explanation is that bail was not previously available to service members and the drafters of the UCMJ felt no need to establish the practice. Its constituency, after all, was limited and suspect and its omission had the additional benefit of mollifying those against the Code's withdrawal of authority from commanding officers — who are also the confining authorities who would be involved in the bail process, were it mandated. In British military

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* The Manual for Courts-Martial, 1984 (Wash.: GPO, 1984), amended this right, limiting an accused to two lawyers: one military counsel and civilian counsel.

[126]Col. Thomas P. Casey, Colorado, to author, Wash., 9 Oct. 1989, Marines and Military Law in Vietnam collection, Marine Corps Historical Center, Wash.

[127]*Levy v Resor*, 37 CMR 399 (USCMA, 1967); *DeChamplain v Lovelace*, 48 CMR 506 (USCMA, 1974).

[128]Henderson, "Courts-Martial and the Constitution," 316.

practice, bail is available only to the convicted person whose denied appeal is being further appealed to the House of Lords.[129]

In lieu of bail, UCMJ Article 13 provides that an accused's pretrial confinement not be "any more rigorous than the circumstances require to insure his presence" at trial. Defense counsels regularly petition convening/confining authorities to release on their own recognizance their clients awaiting trial, arguing the military standard: that the accused would be present for trial and presented no threat to command discipline and safety.[130] Such petitions are seldom successful.

As for cruel and unusual punishment, flogging remained legal under U.S. military law until 1861; branding until 1872.[131] Today, the UCMJ prohibits all corporal punishment.[132]

Until the 1984 *Manual for Courts-Martial* revisions, all sentences to confinement specified that such confinement was to be "at hard labor." Asked the meaning of the term, Felix E. Larkin,* the Code's principal author replied: "Hard labor, I think, generally is construed to mean work while in confinement."

Mr. Gavin**: "Well, what kind of work?"
Colonel Dinsmore***: "Trimming lawns, picking up garbage, digging ditches, maybe....Improving the roads around posts, general police work – just the ordinary run of housekeeping..."
Mr. Gavin: "What about this rock-pile business...?"
Colonel Dinsmore: "Never heard of it, sir."[133]

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[129]Courts-Martial (Appeals) Act, 1968, par. 42.
[130]*U.S. v Malia*, 6 MJ 65 (USCMA, 1978).
[131]Wiener, "Courts-Martial and the Bill of Rights," pt. II, 290.
[132]Art. 55. *U.S. v Wappler*, 9 CMR 23 (USCMA, 1953), holds that Art. 55 "grant[s] protection covering even wider limits [than] afforded by the Eighth Amendment."
* Assistant General Counsel, Department of Defense, testifying on 23 March 1949 before a House of Representatives subcommittee of the Committee on Armed Forces, examining provisions of the proposed UCMJ.
** U.S. Representative, member of the subcommittee.
*** Member of the UCMJ drafting committee.
[133]Index and Legislative History: UCMJ, 972-73.

In practice, "confinement at hard labor" entailed general area police and light maintenance, often on details outside the confines of the brig. Digging ditches and breaking rocks were not among a military prisoner's tasks. Long-term prisoners who consent to enrollment commonly participate in civilian education programs and training courses such as furniture repair and industrial arts. Under the UCMJ, hard labor has never been onerous labor, and since 1984 the term has been excised from courtroom usage, although the practice continues, in fact.[134]

By the time of the Vietnam War the court-martial had developed into a court of general criminal jurisdiction, trying capital felonies throughout the world, "an integral part of the federal judiciary."[135] The U.S. Chief Justice of that period said, "the Court of Military Appeals can be an effective guarantor of our citizens' rights to due process when they are subjected to trial by court-martial."[136]

5.2.d. Military Procedure and Procedural Models If the rights of an individual contained in the Bill of Rights by-and-large pertain to service personnel, and if courts-martial are a part of the federal judiciary, why is a separate military criminal code and code of procedure necessary? Why not simply employ the civilian criminal law and procedure contained in Title 18, Crimes and Criminal Procedure, of the United States Code?

In fact, and due partly to the British tradition of subordination of the military to civil authority, criminal law and procedure in courts-martial have more closely

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[134]Manual for Courts-Martial, 1984, R.C.M. 1113 (d)(2)(B).

[135]Robert E. Quinn, "Some Comparisons Between Courts-Martial and Civilian Practice," 46 Military L. Rev. 77,96 (1969).

[136]Warren, "The Bill of Rights and the Military," 189.

assimilated that of common law courts than any other independent U.S. court system.[137]

> Before 1916, the entire body of jury-trial rules, as practiced by the Federal Courts, was the lawful guide for courts-martial. But in that year a wholesome and flexible independence was given by empowering the President to make the rules.[138]

Since the signing of the Constitution the Congress[139] and, since 1916 the President as commander-in-chief, through authority vested in him by Congress, have had the power to provide for the trial and punishment of military offenses, including the enactment of rules of evidence and procedure. That power is separate and independent from Congress' similar authority over civil courts.[140] Significantly, while Congress has always had discretion to regulate military courts, including the authority to "confer upon lower Federal courts jurisdiction with regard to military...offenses, it has not done so."[141] Nor has Congress ever made courts-martial proceedings subject to *direct* review by Federal courts.[142] Instead, recognizing that military society is distinct from civilian society, with differing goals and needs, Congress has promulgated and maintained separate codes of criminal law and procedure for the two.

Military society does differ significantly from civilian society. What has been written of multinational law might also be said of military versus civilian law: "[N]ational legal institutions, like most other things national, differ infinitely,...what works well in one country would work ill,

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[137]John H. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law, 3d ed., vol. 1 (Boston: Little, Brown, 1940), 99.

[138]Ibid.

[139]U.S. Constitution, Art. I, Sec. 8, clause 14.

[140]*Dynes v Hoover*, 61 U.S. 838, 839, 20 How. 65 (1857), citing as authority England's Mutiny Act of 1689.

[141]Index and Legislative History: UCMJ, 118.

[142]Ibid., 117.

or not at all, in another..."[143] "[T]he unique nature of military life with its extraordinary risks, stresses, and lifestyle, coupled with the need for discipline, mandates a separate legal system."[144] The U.S. Supreme Court recognizes that the "military is, 'by necessity, a specialized society separate from civilian society.'"[145] The U.S. Civil War leader, General William Tecumseh Sherman, himself a lawyer, wrote:

> [T]he civil courts...belong to a totally different system of jurisprudence. The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation. Those objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common.[146]

Similar distinctions apply to rules of criminal procedure, since "procedural rules can be seen as no more than technical devices to make possible the direct sanctioning processes of law."[147]

The drafters of the UCMJ, while recognizing that they could not ignore the military circumstances of its operation, consciously designed the UCMJ to resemble the U.S. civilian federal court system.[148] Although it was impractical to engraft the civilian rules of evidence and procedure, with their continuously changing construction and differing interpretation from district to district, the UCMJ specifies that:

> The procedure, including modes of proof, in cases before courts-martial...shall, so far as...practicable, apply the principles of law and rules of evidence generally

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[143]Carleton K. Allen, Legal Duties and Other Essays in Jurisprudence (Oxford: Clarendon Press, 1931), 253.

[144]Gilligan and Lederer, Court-Martial Procedure, vol. 1, 4.

[145]*Brown v Glines*, 354, citing *Parker v Levy*, 743.

[146]Quoted in Index and Legislative History: UCMJ, 780.

[147]Roger Cotterrell, The Politics of Jurisprudence (London: Butterworths, 1989), 66.

[148]Index and Legislative History: UCMJ, 606.

> recognized in the trial of criminal cases in the United States district courts...[149]

The Court of Military Appeals, from its initial opinions, looked to the civilian federal courts for precedent,[150] seeking independent systems of law and procedure able to meet the demands of its specialized society while remaining as close as possible to its civilian, democratic jurisprudential foundations.

Unspoken in either the legislative history of the 1950 UCMJ or its subsequent modifications is a recognition that the shape of its criminal process affects the substance of its criminal law. Many of the original Code's provisions were refinements of prior military regulations, but there also was much that was new. Each of the Code's two major revisions, effective in 1969 and 1984, added further changes in both process and substance. While neither drafters nor revisionists explicitly considered it, the criminal process system, or model, that the military employs depends upon value choices reflected in that process. Procedural fairness and equity call for employment of the criminal process model best-suited to the particular society's criminal justice needs. Several civilian models reflect aspects of the U.S. military's approach to criminal procedure.

Packer's well-known and often criticized "due process" model,[151] for example, has many elements found in the military process: presumption of innocence, unrestrained availability of counsel, procedural impediments to conviction, and insistence on formal, adjudicative, adversary fact-finding in public forums by impartial tribunals, with a low demand for finality and a broad appellate system. Differing from

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[149]Art. 36.(a), UCMJ, 1950. Subsequent versions of the Code repeat the point in slightly varying language.

[150]Quinn, "The United States Court of Military Appeals and Military Due Process," 242; *e.g., U.S. v Knudson*, 16 CMR 161 (USCMA, 1954): "We have repeatedly held that Federal practice applies to court-martial procedures if not incompatible with military law ..."

[151]Herbert L. Packer, The Limits of the Criminal Sanction (Stanford: Stanford University Press, 1969), 157, 161, 163-65, 172, 228-29, 232-35.

Packer's due process model, military procedure avoids significant anti-authoritarian limitations on official power, and severely limits collateral attack upon its judgements.

The U.S. military model is functionally akin to the European process in the investigatory and pretrial stages[152]: both present liberal advance disclosure of issues and evidence, encouraging fact-finding impartiality and efficiency – though the military process stresses content, relegating form to a secondary importance, unlike the continental system.

Damaska's common law-based "adversary" model also finds congruence in the military process:[153] evidentiary barriers to conviction, with complex strictures on admissibility of evidence, and a lay jury rather than a professional tribunal. Unlike some adversary models, the UCMJ does not require jury unanimity for conviction, thereby easing the prosecutorial burden.

In deciding which, if any, model might better meet the court-martial's procedural needs there are no statistical comparisons,[154] nor theoretical writings by military or civilian authors defining the military model in practice. Civilians, one suspects, have little interest in theorizing on the military process, and military authors have not been prone to the creation of conceptual models. Instead, military criminal procedure merely evolves, its theoretical bases unstated, its unknowing practice that it is "better to borrow or adopt parts of foreign procedures and not the whole..."[155] The resulting military model remains unique.

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[152]See Leonard H. Leigh, "Liberty and Efficiency in the Criminal Process-The Significance of Models," 26 International and Comparative L. Quarterly 516 (1977).

[153]Mirjan Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study," 121 University of Pennsylvania L. Rev. 506, 512-13, 522-30, 536-42. (1973).

[154]Ibid., 509, fn. 3.

[155]Leigh, "Liberty and Efficiency in the Criminal Process," 518.

5.3. Son Thang War Crimes at Court-Martial

Pretrial hearings — Article 32 investigations — precede every GCM to determine whether probable cause exists to believe a crime was committed and that those charged committed it. On 12 March, 1970, a joint Article 32 investigation was called to order. At the same time a "Secret" message was sent to Marine Corps headquarters in Washington, D.C., noting the fact and reporting that the verbatim record would be used as a war crimes investigative report, as required by a MACV* directive.[156] The five accused, Herrod, Schwarz, Green, Boyd, and Krichten, confined since 23 February, were present at the investigation, each represented by assigned military defense counsel. Two lawyer-captains represented the government. The investigating officer was an experienced lawyer, a major from the SJA's office.

The killer team's platoon leader, a very green second lieutenant who was the grandson of a former Chief of Naval Operations, related his recollection of the events of 19 February. Asked about the rules of engagement, he testified:

> I was never briefed on the rules....most of it is common sense as to who you can shoot and who you can't shoot....[I]f we spot someone at night, we kill them; if the VC spot someone, they'll kill them....Most of them [villagers] won't even go to the bathroom at night, out of the hootches....So, it's just been a company policy that anything that moves at night, we kill.[157]

He also related hearing, on the night of the charged killings, "a long burst of heavy automatic weapons fire....I thought it was an M-60 machine gun."[158] Though the patrol's M-16 rifles were capable of automatic fire, like a machine gun,

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* Military Advisory Command, Vietnam, Directive 20-4, Inspections and Investigations: War Crimes, dated 10 July 1970.

[156]Son Thang daily report, number 6; From: 1st Marine Division commander, To: Commandant of the Marine Corps (Hereafter: Son Thang daily report). These numbered messages, classified "Secret - Marine Corps Eyes Only," continued for four months, in lesser frequency as the trials progressed, keeping Washington informed of case-related events.

[157]Record of pretrial investigation, 536.

[158]Ibid., 511.

the patrol had no actual machine gun, the sound of which is different from an M-16 and distinctive to the experienced ear. Nor had any of the accused mentioned machine gun fire in their various pretrial statements. The Schwarz, Boyd, and Krichten statements specifically denied receiving enemy fire of *any* nature.

The patrol's platoon sergeant, on his second tour of Vietnam duty, testified that the patrol had been the first led by Herrod, and that after the team left the company area that night, he too heard long bursts of machine gun fire.[159]

A squad leader, who again testified to hearing a machine gun, related that upon the patrol's return Green had referred to the rest of the team as "cold-blooded killers."[160] Asked what the other patrol members had said, the squad leader replied, "They said they ran into some gooks....They weren't supposed to be out, so they just blew them away....Gooks are gooks. That's all there is to it."[161] He also reluctantly confirmed having heard Herrod say the patrol had lined up its victims then, Herrod reportedly said: "Now, when I count to three, I'll open up and the rest of you open up."[162]

Lieutenant Ambort, the company commander, also testified to hearing machine gun fire,[163] then freely described his briefing of Herrod:

> ...More or less a pep talk....I told Herrod I didn't want any more casualties....I reminded him of the 12th and of this day, the 19th [when casualties were suffered], and I told him to "pay the little bastards back." I told him to go out and get some....to shoot first and ask questions later, shoot anything that's moving around...[164]

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[159]Ibid., 567, 552.
[160]Ibid., 595.
[161]Ibid., 592-93.
[162]Ibid., 595-96.
[163]Ibid., 623, 634, 668.
[164]Ibid., 619-20. This account differs in minor detail from the account on page 1, herein. The page 1 account is from *U.S. v Schwarz,* verbatim record of trial, 348, rather than the verbatim record of pretrial investigation.

Asked about the rules of engagement, Ambort replied, "I remember some officer gave me some publication — about a thousand pages long, so I didn't get through it."[165] He later added, "That was the rules of engagement: anything moving around out there — blow it away."[166]

After twelve days of sworn testimony and chaotic wrangling among the eight judge advocates, the Article 32 investigation closed. The government had presented its probable cause case. No accused took the stand. The investigating officer dryly noted that Green read magazines during much of the proceedings.

Twenty-seven days later, in written reports, the investigating officer recommended that all five patrol members be tried by general court-martial, charged with sixteen specifications (counts) of premeditated murder in violation of UCMJ Article 118. In a separate, unrequired recommendation, Lieutenant Colonel Cooper, the accuseds' battalion commander, recommended that Herrod and Schwarz be charged with unpremeditated murder, Green and Boyd with manslaughter, and Krichten be charged not at all.[167] Cooper's several contemporaneous newspaper interviews were similarly at pains to defend his men.[168] The investigating officer later wrote of Cooper, "He could never quite accept as true that his Marines could commit murder."[169] The commanding general, to whom both recommendations were directed, disregarded Cooper's.

With My Lai then a major story, press interest in the Son Thang cases was intense,[170] but the prosecutions proceeded normally. The SJA, responsible for overseeing the cases'

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[165]Record of pretrial investigation, 659.
[166]Ibid., 676.
[167]Son Thang daily report #19.
[168]*e.g.*, Los Angeles Times, 27 February 1970; Pacific Stars & Stripes, 1 March 1970, 6.
[169]Col. Robert J. Blum, North Carolina, to author, Wash., 2 March 1989.
[170]Col. Robert M. Lucy, Interviewer un-named, 24 June 1970, Tape recording #4814, Oral History Collection, Marine Corps Historical Center, Wash.

resolution, recalled, "I don't remember any pressure from anybody to do anything other than to bring them to trial.... We were not going to put it under the table. We were going to bring everything out in the open and get it done."[171]

5.3.a. The United States v Pvt. Michael A. Schwarz Death is the maximum punishment authorized by the UCMJ for murder. But the court-martial convening authority, the 1st Marine Division's commanding general, referred Schwarz' case to trial with the special instruction that it was to be a non-capital case, thus limiting the maximum punishment to confinement for life.[172] Two months before trial the commanding general also granted Schwarz' co-accused, Krichten, immunity from prosecution in return for his testimony in the trials of the remaining four accused.[173]

On June 15, one hundred and seventeen days after the alleged murders, Schwarz went to trial. Unsuccessful in his effort to retain a civilian lawyer,[174] he was represented by twenty-eight-year-old Marine Captain Daniel H. LeGear, Jr., who had graduated from law school three years before.[175] The prosecutor ("trial counsel," in military practice) was Franz P. Jevne, a captain of twenty-seven, also three years from law school. Jevne was assisted by another captain-judge advocate of similar experience.

The military judge, one of three or four Marines in Vietnam certified to sit in GCMs, was Lieutenant Colonel Paul A.A. St.Amour. An experienced jurist respected by convening authorities, he had, on occasion, differed with those

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[171]Col. Robert M. Lucy, Interview by author, 22 June 1991, London-St.Louis, tape recording, author's collection.

[172]Charge Sheet, p. 4, record of trial, *U.S. v Schwarz* , 174.

[173]Son Thang daily report #17. Whether transactional or use immunity was granted is unreported.

[174]Ibid.

[175]USMC, Combined Lineal List, 1971, 85. At that time, a marine judge advocate's first nine months of active duty were spent solely in training.

officers over the conduct of trials.[176] As in any jurisdiction, the military judge could exert significant influence over the trial of the case.

In an initial day-long evidentiary hearing, defense counsel LeGear fought to keep Schwarz' damming pre-trial statement, with its admission of the crimes, out of evidence. After calling several witnesses, he argued that the statement had been coerced by the company commander's — Ambort's — conversation with the killer team the day after the patrol. Ambort had assembled the five, told them that events had become serious, and that it would be best to tell the truth. Shortly after that exhortation all five gave written, sworn, exculpatory statements to the battalion operations officer, first assigned to investigate the allegations. After his own examination of the crime scene, and upon learning of Ambort's meeting with the team, the operations officer had feared Ambort's conversation with them had tainted their initial statements. Three days after Ambort's conversation, and with well-documented opportunity to retract or amend their initial statements, Schwarz, Boyd, and Krichten made their written admissions. Green and Herrod stood by their original exculpatory accounts.

According to defense counsel LeGear, Ambort's words had improperly influenced the men into making their incriminating statements; the subsequent written opportunity to amend, and the re-advisement of rights that Schwarz signed were, LeGear urged, ineffective in the face of Ambort's suggestive remarks and the strain under which Schwarz had been functioning.[177]

It was a slim reed upon which to base a motion to exclude evidence and the statement was admitted. The members would eventually read Schwarz' sworn, hand-written admission that he and the others had committed war crimes by firing on

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[176]It is not uncommon for strong-minded convening authorities to grumble about equally strong-minded military judges and their handling of courts-martial, usually to no effect.

[177]Record of trial, *U.S. v Schwarz,* 153-56.

unresisting, noncombatant women and children at three locations in Son Thang. Schwarz' statement added that "it was deside back at the cp [command post] that we would say we had resived sniper fire."(Sic.)[178]

Under military rules of evidence the judge's ruling only admitted the statement into evidence; the defense could still argue the probative value, or "weight" it should be given, in an effort to persuade the members to disregard its contents.[179]

At the same pretrial hearing the government offered photographs into evidence. The Marines who had discovered the crime the next day helped the Son Thang villagers bury the victims.* Before doing so a corpsman took nine color photographs of the dead. The defense counsel argued the photos' inflammatory nature while the trial counsel declaimed their probativeness to show the victim's lack of resistance and cause of death.[180] The military judge, perhaps recalling an admonition from judge's school that juries should be allowed to view an accused's "handiwork," admitted the photos into evidence.[181] Between the photos, the accused's incriminating statement, and Krichten's anticipated immunized testimony, it was going to be a difficult trial for the defense.

A panel of eight officer members was then seated: a colonel, two lieutenant colonels, and five majors. Six of the eight had served in infantry units, though not in Vietnam. The trial on the merits proceeded rapidly.

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[178]Record of pretrial investigation, exhibit 47.

[179]Manual for Courts-Martial, 1969, par. 140.a.(2).

* Thus precluding autopsies. That the victims were in fact dead, and causes of death, elements of the charged offenses, were established through medical testimony based upon the photographs of the bodies.

[180]Record of trial, *U.S. v Schwarz,* 40-43.

[181]In support of such admission, *U.S. v Mobley*, 28 MJ 1024 (AFCMR, 1989); *Purtell v State* , 761 S.W. 2d 360 (Tex. Crim. App., 1988), cert. denied, 109 S.Ct. 1972 (1989).

Lieutenant Colonel St.Amour, the military judge, recalls the prosecution and defense lawyers:

> Neither Jevne nor LeGear struck me as being professionally distinctive. Frankly, these [judge advocates] were obviously young and inexperienced, determined to get on as best they could with what was no easy task under very trying conditions.[182]

Throughout the trial two civilian lawyers, representing patrol leader Herrod, sat in the back of the cramped courtroom, previewing the government's evidence. They reportedly agreed with St.Amour's unimpressed assessment, and wondered at the defense counsel's failure to highlight ambiguities and contradictions in the case, and his lack of witness cross-examination.[183]

In its case-in-chief the defense position was that, contrary to the accused's written statement, the killer team had been fired upon by the VC, after all. Schwarz had only obeyed the orders of Herrod to fire, attempting to avoid hitting the villagers who were between the patrol and the enemy.

Defense witness Ambort, under cross-examination, wounded the defense case by again relating his "pay the little bastards back" briefing of the patrol.[184] Neither Ambort nor other defense witnesses, however, were asked about having heard machine gun fire from Son Thang.

The battalion commander, Lieutenant Colonel Cooper, also testified for the defense — unusual in itself — and stressed the dangerous nature of the Son Thang area. On another tack, LeGear asked Cooper:

Q. "In your battalion and throughout your Marine Corps career, have you ever given any instruction regarding when the individual Marine has

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[182]Lt.Col. Paul A.A. St.Amour, Maine, to author, London, 4 March 1991.

[183]Herrod, Blue's Bastards, 154-55. Herrod's account, however, is riddled with inaccuracies and misstatements. His detailed account of his court-martial (159-209), with lengthy and erroneous testimonial quotations, despite the lack of a verbatim trial record, are typical. As a whole, his book must be considered unreliable and highly suspect.

[184]Record of trial, *U.S. v Schwarz*, 348.

a duty to disobey an order?"

A. "...In my 20 years commissioned service, I know of no time or period of instruction where an individual Marine was told when he could disobey an order....During the instruction to the men on the rules of engagement, the subject of war crimes was briefly mentioned, but as far as I know no instruction given...would indicate to a man on any certain occasion that he could disobey an order."[185]

Taking the stand in his own defense, Schwarz conceded that he, unlike Lieutenant Colonel Cooper, had received instruction that some orders could be disobeyed.[186] Explaining why he had nevertheless obeyed Herrod's orders, Schwarz testified:

> I figured there had to be some reason that the team leader yelled, "Open up." He just wouldn't yell, "Open up" for no reason....He kept yelling the order to reload and fire again....I thought he knew what he was doing, because he ordered it.[187]

Attempting, under cross-examination, to rationalize his written statement that the patrol had received no fire, and his in-court testimony that they had, Schwarz was asked:

Q. "Which one of those statements is true, Private Schwarz?"
A. "Both of them, sir."
Q. "Both of them are true?"
A. "Yes, sir. The statement says 'in my opinion.' My opinion is we could have, yet we could not have, taken sniper fire."[188]

Following that lame explanation, he repeated that in firing at the enemy muzzle flashes coming from directly behind the Son Thang victims he had tried to fire between the villagers.[189] The military judge, referring to "this absurd defense,"[190] asks: "What was [defense counsel] LeGear to do? He played out the game as best he could..."[191]

In his closing argument the trial counsel summarized the defenses his opponent had offered:

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[185]Ibid., 390-91.
[186]Ibid., 414-15.
[187]Ibid., 423, 427, 429.
[188]Ibid., 418. In fact, his statement says no such thing.
[189]Ibid., 428.
[190]St.Amour, to author, 4 March 1991.
[191]Ibid.

> The first defense: that Schwarz did knowingly participate in those three shootings, knowing what he was doing but believing that it was okay because he was doing it pursuant to a lawful order. Or defense #2: in the alternative, that Schwarz *didn't* knowingly participate in each of these shootings. Rather, that on each of the three occasions he was firing at the attacking enemy and it was just a mistake that the 16 women and children at the three different locations just happened to be in the line of fire. Gentlemen, I ask you to note the inconsistencies of these defenses.[192]

At the court-martial's conclusion the panel had been reduced to seven officers, one of their number having been removed in mid-trial. (That juror, in the officer's club, had told a prosecution witness that he had done a good job and that he, the juror, had been on another panel involving premeditated murder. That accused, he said, had been "a real shitbird."[193] Upon learning of the conversation, judge St.Amour and both counsel questioned the major, on the record. Despite his assurances that he could decide the present case solely on the evidence, he was immediately dismissed.)

After being instructed by the military judge, the court closed for the members' deliberations. Upon reopening, Schwarz was found guilty of twelve of the sixteen counts of premeditated murder.[194] Although not specified, he apparently was found not guilty of the counts arising at the second hut where testimony indicated Schwarz could have still been inside when the team fired on its four occupant-victims.

Immediately following findings, the sentencing phase of the trial began. In military practice, sentencing is by the same members who decide guilt. Like the findings stage, the sentencing stage is adversarial, both sides offering evidence relevant to sentencing and arguing before the court. Because the evidence the prosecution may introduce is statutorily limited to data from the accused's official record, the

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[192]Record of trial, *U.S. v Schwarz,* 505-06.

[193]Ibid., 271-76.

[194]Staff Judge Advocate's review of GCM, case of Pvt. Michael A. Schwarz, par. 2, n.d., contained in record of trial, *U.S. v Schwarz.*, vol. I.

procedure favors the defense. But in this instance, the prosecution presented evidence of Schwarz' three prior courts-martial, which the members could consider in formulating an appropriate sentence.[195] The defense, in mitigation and extenuation, offered a letter from Schwarz' mother saying that he was a good son and father. Schwarz again took the stand and made a brief statement of regret.

Schwarz was sentenced to a dishonorable discharge from the Marine Corps, loss of all pay and allowances, and to be confined at hard labor for life.

Neither war crimes nor the law of war were explicitly mentioned during the court-martial, but the conviction was clearly for war crimes and the law of war had just as clearly been executed.

Private First Class Boyd, the next killer team member scheduled to be tried, was coincidentally outside the courtroom when Schwarz' sentence was announced. He broke into tears and had to be physically restrained from entering the courtroom. "I want to look at them," he cried. "I just want to look at the pigs."[196] Boyd's court-martial began the next day.

5.3.b. The United States v PFC Thomas R. Boyd Unlike Schwarz, Boyd was charged with sixteen counts of *un*premeditated murder. The military judge again was Lieutenant Colonel St.Amour.

In U.S. military practice a judge is not necessarily disqualified for having presided in a related case. It is a discretionary matter for the judge involved, subject to appellate review.[197] If in the earlier case the judge had determined that a witness had lied, or that he would not believe a witness to be called in the second trial,

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[195]Manual for Courts-Martial, 1969, par. 75b(2), and 75d.

[196]Phoenix Gazette, 22 June 1970.

[197]*U.S. v Elzy*, 25 MJ 416 (USCMA, 1988).

disqualification *would* result. If the accused in the later case was heavily implicated in the initial trail, recusal might be called for.[198] While disqualification might have been an issue in Boyd's court-martial, the matter was not raised by the defense and the military judge did not recuse himself. Practically speaking, there were so few general court-martial judges in Vietnam that the question of judge disqualification was delicately approached by all concerned.

For the first time, a Son Thang accused would be represented by a civilian lawyer. Mr. Howard Trockman, "an outspoken critic of the Vietnamese war,"[199] had been referred to the case by a friend. He undertook Boyd's defense *pro bono publico*.

On 22 June the court was convened. In a bold move Boyd and his lawyers, Trockman and Marine captain Michael P. Merrill, opted for trial by judge alone. Along with Herrod's civilian lawyers, Trockman had attended the final two days of Schwarz' trial. Though Boyd would have been tried by a fresh panel, Trockman was displeased by the military jurors:

> I was impressed with the demeanor of the judge...However, I had much concern over the [members]... who, I felt, were tightly bonded together as a "law and order" group which had little regard for Schwarz' defense of having carried out his leader's order....[200]

Though concerned with the reception of Schwarz' obedience to orders defense, at the same time, Trockman said, "I was certain that this defense would not 'fly'."[201]

The day before trial Trockman sought out the military judge. "I asked him, simply, whether he would be willing to try the case solo...and if he could hear the evidence... 'fresh' without, in any way, being affected by the previous

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[198]Gilligan and Lederer, Court-Martial Procedure, vol. I, 525-26.
[199]Howard P. Trockman, Indiana, to author, London, 17 April 1991.
[200]Ibid.
[201]Ibid.

trial..."[202] Based on St.Amour's affirmative response, the accused requested trial without members.

The court-martial lasted but two days, sped by the lack of members and need for their instruction, or to have them leave the courtroom whenever evidentiary arguments arose. Krichten, again testifying for the government, swore that Boyd, with whom he had served in the same squad for seven months, "fired well over heads when they [the victims] were already on the deck....He was aiming over the people by about five feet and was the last to fire in all three shootings."[203] Krichten had not mentioned those facts in his written statements, nor in the Schwarz trial. That testimony from the principal prosecution witness, of which the defense had advance notice,[204] made Boyd's defense considerably easier. Lieutenant Colonel St.Amour, however, writes that Krichten's assertions were not dispositive:

> My intuitive feeling at trial and now was/is that Boyd did...shoot at one or more of the victims. However, there was insufficient evidence introduced to this effect. Boyd's guilt was simply not established beyond a reasonable doubt. Krichten's testimony that Boyd fired above the victim's heads was at best of marginal credibility.[205]

Later, Schwarz' civilian appellate lawyers also took note of Krichten's testimony, referring to him in their appellate brief as "a remarkable Marine...able to describe in detail the positions of every man in his patrol in each of three occasions....a characterless weakling whose incredible memory was exceeded only by his desire to save his own skin."[206] Even Herrod thought "he was lying."[207]

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[202]Ibid.

[203]Stars and Stripes, 24 June 1970.

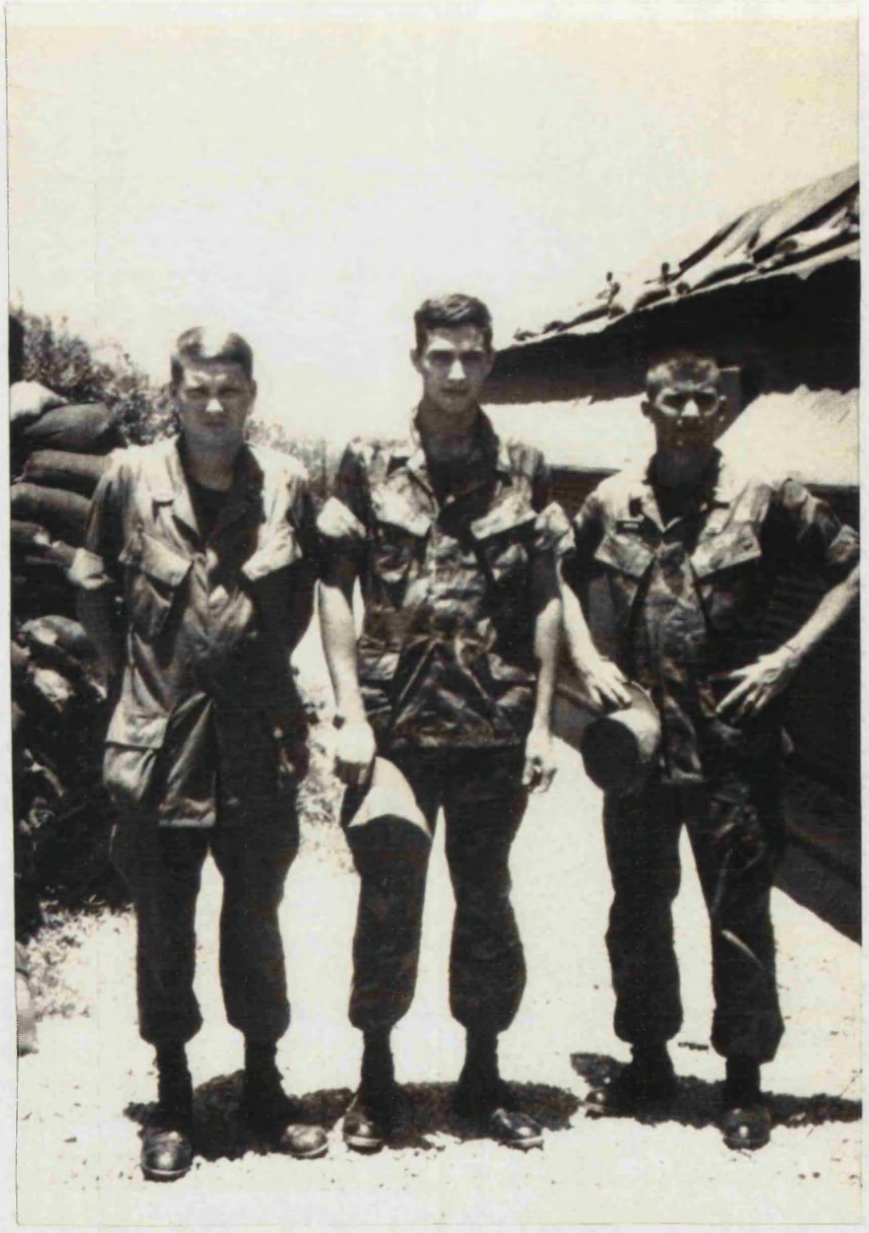
[204]Trockman, to author, 17 April 1991.

[205]St.Amour, to author, 4 March 1991.

[206]Brief for appellant at 8, *U.S. v Schwarz.*

[207]Herrod, Blue's Bastards, 156.

Pvt. Michael A. Schwarz, outside the court-room on the second day of his court-martial.



L.-R.: 1stLt. Louis R. Ambort, Pvt. Randell D. Herrod, and 1stLt. Oliver L. North, outside the courtroom during Pvt. Herrod's court-martial.

Since verbatim records are not required in military cases resulting in acquittal,[208] it is not possible to assess prosecution and defense tactics. The crucial fact was that guilt was not established beyond a reasonable doubt in the mind of the fact finder.[209] After less than two full days of trial, the military judge acquitted Boyd of all charges.

5.3.c. The United States v PFC Samuel G. Green, Jr. Green was black – one of only two blacks involved in the Son Thang incident. The other, Captain Robert C. Williams, was Herrod's originally-appointed defense counsel. His responsibilities, however, were soon assumed by Herrod's civilian lawyers. In 1970, blacks constituted about 13 percent of the draft-age American population and 11.2 percent of Marine Corps enlisted strength.[210] The Marines had reputedly undergone greater integration in the twenty years preceding the Vietnam War "than the larger society managed in over 100 years."[211] Still, blacks, often lacking a basis for deferment, were more likely than whites to be drafted, to serve in infantry units and, hence, to be killed or wounded.[212] For example, the Marine Corps' 11.2 percent overall black population constituted 20.1 percent of its infantry population.[213] As the Vietnam War's unpopularity grew in the U.S. civilian community and the world at large, so did unrest grow in the military. "By 1970, black unrest had

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[208]Art. 54(a), UCMJ.

[209]For an exposition of the military judge's decision-making process (which appears reflective of any civilian jurist's) see, Alley, "Determinants of Military Judicial Decisions."

[210]Martin Binkin and Mark J. Eitelberg, Blacks and the Military (Wash.: The Brookings Institution, 1982), 42-43.

[211]Ronald W. Perry, Racial Discrimination and Military Justice (NY: Praeger, 1977), 80.

[212]Palmer, The 25-Year War, 83.

[213]Binkin and Eitelberg, Blacks and the Military, 172.

begun to hinder the fighting effort,"[214] and racial violence became a major problem in the combat zone.[215]

But military justice in Vietnam was apparently blind to race. Unlike civilian jails, black and white prisoners were represented in equal proportions in military brigs, sentences were unaffected by race, and there was no evidence of institutional racism in disciplinary enforcement.[216]

On 13 August, seven weeks after Boyd's acquittal, the United States opened its case against Green who, like Boyd, was charged with sixteen counts of *un*premeditated murder. Once again the military judge was Lieutenant Colonel St.Amour – the now-stronger case for his disqualification or recusal notwithstanding. The prosecution team was the same that had already tried the case twice. Like Schwarz, Green had unsuccessfully attempted to retain a civilian lawyer[217] and instead went to trial represented by twenty-eight year-old Marine Captain John J. Hargrove. Green requested a members panel that included enlisted members and his case was heard by two lieutenant colonels, a major, and two first sergeants. Although none of the five had served in an infantry unit in Vietnam,[218] three were on second tours of Vietnam duty.[219]

Like many trial records of that era, the verbatim record of Green's court-martial has been lost. It is possible to discern the trial events, however, through interview of his defense counsel and study of the appellate opinion and briefs.

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[214]Ibid., 37.

[215]For details of racial violence including murders, fraggings, and intramural firefights see, Solis, Marines and Military Law in Vietnam, 110-11; 127-31; 134-38; 193-96.

[216]Perry, Racial Discrimination and Military Justice, 75, 82-83.

[217]Son Thang daily report #12.

[218]James H. Webb, "The Sad Conviction of Sam Green," 26 *Res Ipsa Loquitur* 11, 18 (Winter 1974).

[219]*U.S. v Samuel G. Green, Jr.*, 11.

Defense counsel Hargrove* initially moved for a change of venue, based upon prejudicial pretrial publicity. The jurors were *voir dired* and all acknowledged having read or heard about the case. Armed Services Vietnam radio station records, and newspaper clips, were offered in support of the motion, which was nevertheless denied.[220]

The government was now wary of its own witness's testimony after Krichten essentially aided in gaining Boyd's acquittal. The prosecution proceeded against Green not on the theory that he had personally killed any particular victim, but that he was guilty of murder as a principal by virtue of having aided and abetted those who actually shot the victims.[221] "He *was* pretty much a principal," defense counsel Hargrove later conceded. "He was out there and he was part of the whole situation."[222] Over defense objection, the nine color photos of the victims were admitted into evidence. Again, Krichten testified that he didn't see Green shoot any particular victim, although he did observe him fire *at* them.[223] Presumably the battalion operations officer was called to testify as to Green's response when he challenged his, Green's, initial assertions of enemy fire: "What do I care about a gook woman or child," Green had said. "It's them or me. If they get in my way, that's too bad."[224]

The defense was similar to that which had succeeded in the Boyd trial: put the government to its proof, bolstered by stressing Green's youth – eighteen – his newness to the Marine Corps – less than six months at the time of the killings – his short time in Vietnam – ten days – and that

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* Hargrove has gone on to a distinguished career as a federal judge.

[220]*U.S. v Green*, 14.

[221]Ibid., 5.

[222]John J. Hargrove, Interview by author, 29 Aug. 1991, London-California, tape recording, author's collection.

[223]*U.S. v Green*, 11, 12.

[224]Record of pretrial investigation, 232.

the Son Thang patrol was the first in which he had participated. Hargrove recalled:

> Herrod and Schwarz were really the primary actors....I just tried to highlight the actions of the other guys; keep Green in the background. He was there, but we weren't sure what he did....Krichten helped out when he said, "I really didn't see Green shoot anybody. I can't say that I saw Green point his weapon and fire and someone fell." But he did say that Green did shoot.[225]

Hargrove urged that combat neophyte Green believed Herrod's orders to fire on the victims were lawful.[226] Judge St.Amour notes that while Green may have honestly believed Herrod's orders to be legal, that is legally insufficient. "There is a pivotal and crucial difference," St.Amour points out, "between 'honest belief' and 'reasonable belief.'"[227]

Lieutenant Colonel Cooper again testified for the defense that, in his experience, he never recalled a Marine receiving instruction on when not to obey an order; Marines, he said, are taught to *always* obey orders.[228] Like Schwarz, Green opted to ignore available testimonial evidence that machine gun fire had been heard in the Son Thang area while the patrol was there.[229]

After both sides rested there were no specially requested defense instructions. Even after twice being queried by the military judge on the specific point – a broad hint that a trial lawyer should heed – the defense specifically declined to request an instruction on accomplice testimony.[230] Such an instruction would have warned the members to accept Krichten's testimony, the government's principal proof, only with great caution. That instruction's absence would be later noted, to Green's legal detriment.

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[225]Hargrove interview.
[226]*U.S. v Green*, 5, 8.
[227]St.Amour, to author, 4 March 1991.
[228]Webb, "The Sad Conviction of Sam Green," 16.
[229]Garrison, to author, 22 Aug. 1988.
[230]*U.S. v Green*, 12, 17.

Green was convicted of fifteen of the sixteen counts, acquitted of the count concerning which testimony indicated Herrod and Schwarz, alone, had killed a woman.[231] Apparently giving Green the benefit of his youth and inexperience in their sentence, the members sentenced him to reduction to private, loss of all pay, a dishonorable discharge, and confinement at hard labor for only five years. There are no sentence guidelines or mandatory minimum sentencing statutes in military law,[232] and laymen are often hard put to fashion appropriate sentences.[233] Unlike British military procedure, the U.S. military judge (judge advocate, in British practice) does not advise the members on the appropriate level of sentence.[234]

Now, only the patrol leader remained to be tried.

5.3.d. The United States v Pvt. Randell D. Herrod Death had been excluded as a possible punishment when the convening authority referred Herrod's case to trial as non-capital. He stood accused of sixteen counts of premeditated murder.

Herrod, a six-foot, four-inch tall, twenty-one-year-old,[235] was defended by civilian attorneys Gene Stipe and Denzil D. Garrison, both state senators from Herrod's home, Oklahoma, where public interest in the case was high.* Garrison had served in Korea with Herrod's uncle and responded to the uncle's request for assistance, bringing Stipe, an experienced trial lawyer, into the case. "[We] received no fee for our services....[and] spent a

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[231]Ibid., 4.

[232]James K. Gardner, "Apples and Oranges: A Comparison of Civilian and Military Trial Courts," 38 Federal Bar News and J. 192, 197 (May 1991).

[233]Robert D. Byers, "The Court-Martial As A Sentencing Agency: Milestone or Millstone," 41 Military L. Rev. 81, 84 (1968).

[234]Rowe, Defence, 21.

[235]Ben Bradlee, Jr., Guts and Glory: The Rise and Fall of Oliver North (NY: Donald I. Fine, 1988), 87.

* 160,000 Oklahomans petitioned the Marine Corps to release the "unjustly confined" Son Thang accused. Lewy, America in Vietnam, 356.

considerable amount of our own money on the trial...," Garrison recalled.[236] Stipe and Garrison also brought two other civilian lawyers to DaNang to act as research and trial assistants. Herrod's military lawyer would also assist in the defense, as would other Marine defense lawyers in the SJA's office[237] – the latter in an unofficial capacity. In a tactically sound maneuver, Stipe, the lead counsel, had previously delayed Herrod's trial date, pleading an inability to prepare before July.[238] In the meantime, he became familiar with the government's case, having seen it presented at least once.

Herrod's court-martial began on 20 August. For the most significant of the Son Thang trials there was a new prosecution team: Marine Captains Charles E. Brown and Gary E. Bushell, both twenty-eight-years-old and practicing lawyers for three years, and Captain James L. Skiles, twenty-seven, with two years experience.[239] Captain Jevne, lead prosecutor in the three previous Son Thang trials had returned to the United States, his tour of Vietnam duty having ended.[240]

There would be a new military judge, as well. On the eve of trial and before his Vietnam tour of duty was scheduled to end, Lieutenant Colonel St.Amour was unexpectedly transferred. He believes his relocation was directly related to official dissatisfaction with his performance in the Son Thang cases, which suggests his recent acquittal of Boyd. "And if you really want to stir up the muck," St.Amour suggests, "ask Faw [Brigadier General Duane L. Faw, Director of the Judge Advocate Division at that time, overseeing all Marine lawyers] whether or not my transfer to Japan was in any way related to the pending Herrod

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[236]Garrison, to author, 22 Aug. 1988.
[237]Lt.Col. Paul J. Laveroni, South Carolina, to author, Wash., 1 Oct. 1987.
[238]Son Thang daily report #26.
[239]USMC, Combined Lineal List, 1971, 84, 87.
[240]Charles E. Brown, Ohio, to author, London, 13 Nov. 1991.

trial..."[241] Asked about St.Amour's implication, and the appearance of having manipulated judging assignments, General Faw diplomatically responds: "He was simply out of place as a military judge in a combat environment and I moved him to where both he and the military could be better served by his talents."[242] Defense counsel Stipe took another, not unreasonable, view: "We had cause to be concerned about command influence, because the general had just fired the judge and run his butt plumb out of the country!"[243] Military judges lack tenure, however, permitting their reassignment for virtually any reason, contrary as that may be to an independent judiciary.[244] Whether or not there was an improper manipulation of judicial assignments the new military judge was Navy Commander Keith B. Lawrence. Marine Corps cases were usually tried by Marine Corps judges, but the sister services did occasionally provide judges and counsel for each other's cases, and Commander Lawrence had previously heard a number of Marine cases. As allowed by the *Manual For Courts-Martial,*[245] Stipe rigorously examined the new military judge in an effort to determine and ensure his fairness. "The Code has got a provision that enables you to *voir dire* the judge; it's a hell of a tool," Stipe said. "We don't have anything similar to that in civilian practice....I spent three days, I think, *voir dire*-ing this one."[246]

From the outset the Herrod defense was clearly going to be aggressively pressed home. Pretrial motions were numerous, each supported by witnesses and legal authority. There were motions for a new pretrial investigation (denied), a change of venue (denied), production of service records and

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[241]Lt.Col. Paul A.A. St.Amour, Maine, to author, London, 14 Feb. 1991.
[242]BGen. Duane L. Faw, California, to author, London,13 July 1991.
[243]Gene Stipe, interview by author, 14 Dec. 1990, Virginia-Oklahoma, tape recording, author's collection.
[244]Gilligan and Lederer, Court-Martial Procedure, vol. I, 555.
[245]Manual for Courts-Martial, 1969, par. 62b.
[246]Stipe interview.

billeting assignments of those involved in the case (records denied/billeting granted), production of all messages mentioning the case, including classified messages (granted), suppression of the nine photographs (granted – a significant defense victory), release of Herrod from confinement (denied), "relief from all of the other oppressive procedures of the UCMJ" (denied), for the Marine Corps to hire and pay for attendance of a civilian psychiatrist (granted), for an all-enlisted panel (denied), and numerous other motions, the disposal of which took five days.[247]

Late on 24 August the government opened it's case-in-chief before a panel of one colonel, four majors and a captain. Less than eight in-court hours later the government rested.

Presentation of the defense case took three days. Lieutenant Colonel Cooper, who had completed his Vietnam duty and returned to the U.S., returned to Vietnam to testify in Herrod's behalf.[248] Stipe also presented and stressed evidence of an American machine gun having been re-captured from the VC in the Son Thang area, after the incident. He augmented that evidence with the testimony of those who had heard machine gun fire while Herrod's patrol was in Son Thang, buttressing the defense contention that the killer team had been returning enemy fire and the victims were killed in crossfires. "...A very important facet of evidence," said co-defense counsel Garrison. "Schwarz and Green did not have that testimony to corroborate their story."[249] Unaware of the machine gun evidence, Major Theer, the battalion operations officer and a prosecution witness, never rebutted it by explaining that the machine gun had actually been re-captured fifteen miles southwest of Son Thang.[250] The prosecution, unaware of the machine gun's existence until raised by the

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[247]Summarized record of trial, *U.S. v Randell D. Herrod.*
[248]Cooper, to author, 12 Sept. 1988.
[249]Garrison, to author, 22 Aug. 1988.
[250]Theer, to author, 24 Feb. 1989.

defense, did not contest or inquire into the place of its recapture.

First Lieutenant Oliver L. North, who was to gain notoriety as a lieutenant colonel seventeen years later, was a defense witness. He paid his own way from the U.S. east coast to DaNang to testify in behalf of Herrod, who had saved his life in combat thirteen months before, earning the Silver Star Medal in the process. "I couldn't believe Randy was guilty," North wrote. "[O]nly a coward would murder unarmed civilians, and Randy Herrod was certainly no coward."[251]

Finally Herrod, "a true liar," in the opinion of Lieutenant Colonel St.Amour,[252] took the stand. He repeated that the victims had been killed in crossfires between his team and the enemy. He told the members: "I do not now, and I did not then, feel that I had killed anyone it wasn't necessary to kill."[253]

Defense counsel Stipe was later asked if his defense theory included obedience to a superior's — Ambort's — orders. He laughed and replied:

> I wouldn't describe our defense as one of superior orders....We did throw it in there, just for the jury to consider. You never know what a jury sinks their hooks in, to justify their acquittal....We had a defense with a *lot* of options for the jury....[254]

Asked if he had considered the law of war in formulating the defense strategy, Stipe replied: "We never did frame it in the context of a violation of the Geneva Convention. First of all, because we had a more immediate problem: it was *our* government that we were having to tangle with. *They* were the problem!"[255]

The court-martial lasted twelve days. Before resting, the defense made several motions for mistrial based upon

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[251]Oliver L. North, Under Fire (NY: Harper Collins, 1991), 122.
[252]Lt.Col. Paul A.A. St.Amour, Maine, to author, London, 22 May 1991.
[253]Bradlee, Guts and Glory, 92.
[254]Stipe interview.
[255]Ibid.

purported prosecutorial misconduct, as well as renewing motions previously denied, motions to dismiss, and for acquittal based upon Herrod's asserted but unsupported lack of mental responsibility. All were denied by the military judge.[256]

After closing arguments, the members were instructed and retired to deliberate. Upon returning they announced their findings: as to all charges, not guilty. "We walked the patrol leader," Garrison said, seemingly amazed.[257]

The officer who conducted the Son Thang pretrial investigation opined that the acquittal was based upon Herrod's Silver Star Medal, the "mere gook rule,"[258] and the judge's exclusion of the photographs of the victims.[259] Lieutenant Colonel St.Amour uncharitably said of the verdict, "The best defense in a court-martial has always been a weak trial counsel along with an inadequate military judge."[260] The military judge himself described the acquittal as one of "public policy."[261]

> The court was simply not willing to convict a young corporal (sic)....There was an element of self-defense, but I did not feel it was a strong element...because it lacked reasonableness....In summary, there was adequate evidence of guilt to have supported a conviction, but the court concluded that to convict would result in an injustice.[262]

Trial lawyers seldom ask jurors upon what facts they based their verdicts, for their answers are often disturbingly unrelated to the evidence. Nevertheless, upon being asked, a surviving Herrod juror,* either not recalling or not

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[256]Summarized record of trial, *U.S. v Herrod.*

[257]Robert Timberg, "The Private War of Ollie and Jim," Esquire, March 1988, 144, 152.

[258]Col. Robert J. Blum, North Carolina, to author, Wash., n.d.

[259]Col. Robert J. Blum, North Carolina, to author, Wash., 20 Feb. 1989.

[260]St.Amour, to author, 14 Feb. 1991.

[261]Capt. Keith D. Lawrence, Pennsylvania, to author, London, 19 March 1991.

[262]Ibid.

* By 1989, three of the six jurors had died.

appreciating the distinction between honest belief and reasonable belief, said:

> Personally, I remember waiting, when the prosecution rested, for the defense counsel to move for a directed verdict of not guilty. I simply did not see where a crime had been committed....the prosecution had failed to show any deliberate act of unprovoked killing and had been unable to overcome defense testimony that Herrod and his team truly believed themselves to be under hostile attack....Herrod's civilian lawyers did a brilliant job.[263]

Another juror related that "the defense regarding the machine gun fire the patrol was subjected to was probably the most persuasive fact in the verdict....The prosecution did not contest the MG fire."[264] But a third juror had a contrary recollection of the case:

> There was certainly enough evidence to convict....My impression was that he was certainly guilty. He had a good defense and they had succeeded in discrediting some of the witnesses...and creating some reasonable doubt in the minds of some of the more senior members of the court.[265]

Under the UCMJ, conviction requires only a two-thirds majority vote of the members. Their initial vote was three for conviction, three for acquittal. As they then considered the lesser included offenses, the vote swung not toward conviction of a lesser offense, as one might expect, but toward acquittal.[266] After three hours' deliberation they reached their 'not guilty' verdict.

Herrod was immediately released from confinement. In a muted ceremony he was presented the Silver Star Medal, award of which had been delayed pending the outcome of his trial. A few days later he was returned to the U.S. and discharged

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[263]Maj. David W. Hardiman, Oregon, to author, London, 20 June 1991.

[264]Maj. Albert G. Borlan, California, to author, London, 24 June 1991.

[265]Lt.Col. John J. McDermott, interview by author, 17 Dec. 1990, Virginia-California, tape recording, author's collection.

[266]Borlan, to author, 24 June 1991.

from the Marine Corps, his enlistment having expired while his charges were pending.[267]

On 30 August 1970, the Son Thang courts-martial were concluded. Whether or not justice had been fully served, the 1949 Geneva Conventions had been complied with. The U.S., upon learning of a grave breach of the Conventions had identified those responsible, utilized already-enacted municipal legislation to bring them to trial, and imposed penal sanctions upon those convicted.

Do the court-martial results contradict an assertion that American courts-martial were the effective workings of the law of war? They do not. Unlike the post-World War I Leipzig trials, the Son Thang courts-martial were in no way show trials. As demonstrated by the Schwarz verdict and sentence, each trial held the genuine potential of findings of guilt and imposition of substantial penalties. The fact that two of the four courts resulted in acquittal, rather than indicating official connivance or juridical charade, reflects the unpredictable course of particular cases in the common law system; the negligible sentence of the Green case reflects the vagaries of the lay jury which, in U.S. military practice, imposes sentence as well as determining guilt or innocence. While one might hope for uniformity of outcome and sentence, they cannot be ordered, even in courts-martial. The best one may expect are fair trials with vigorous representation on both sides, results occurring as they may. So it was in the Son Thang trials.

The men involved in the process made little of their law of war roles but played their parts effectively. The U.S. Uniform Code of Military Justice fulfilled its international law function with equal effectiveness, its criminal sanctions

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[267]Col. Peter N. Kress, Virginia, to author, Wash., 24 Jan. 1989, Marines and Military Law in Vietnam collection, Marine Corps Historical Center, Wash.; and Washington Post (Wash.), 23 Dec. 1986.

timely brought to bear in the combat zone. *Quod erat demonstrandum.*

CHAPTER 6. POST-TRIAL ISSUES AND APPELLATE RESOLUTIONS

History keeps her secrets longer than most of us. But she has one secret that I will reveal to you... Sometimes there are no winners at all.

John le Carré, *The Secret Pilgrim*

Press coverage of the Son Thang murders ended with the final court-martial, but the cases were not concluded. In many respects the UCMJ grants convicted service personnel broader appellate rights than those convicted in civilian jurisdictions. The Son Thang trials and their verdicts had raised basic questions about the effectiveness of courts-martial in trying war crimes committed by one's own troops. Some of those questions were answered in the appellate opinions.

This chapter also addresses those questions by briefly reviewing the tactics employed in the courts-martial, examining them for law of war issues.

If, as some contend, courts-martial and the military appellate system are inappropriate for the trial of war crimes, what *is* an appropriate forum? Historical efforts to establish an international criminal court where war crimes might otherwise be tried are surveyed and the efficacy of establishing such a court examined.

If courts-martial *are* appropriate for the trial of war crimes, the resulting sentences should reflect the seriousness of the offenses. The punishments imposed for war crimes committed in Vietnam raise questions in that regard. The issue of sentences, and whether the Son Thang sanctions met the purposes and goals of criminal sentencing, are examined and compared to sentences imposed for similar offenses in other jurisdictions, military and civilian.

Military appellate rights and the appellate process, *circa* 1970, are examined. The appellate outcomes of the Son Thang cases are detailed, including one which did not reach

the appellate stage because it did not go to trial: that of Lieutenant Ambort, whose case may have fallen short of international law's mandate to prosecute war crimes.

Only when the last Son Thang appeal was decided were the courts-martial concluded, and even after that there were echoes still to be heard.

6.1. The Son Thang Trials *Redux*

A lesson learned from the Son Thang cases is that trial-experienced judge advocates, familiar with the law of war, are best-suited to try war crimes charges. Review of the Son Thang proceedings illustrates that more effective prosecutions — and defenses — might have resulted could that lesson have been observed.

6.1.a. Judge Advocates in the Combat Zone No contested trial unfolds as planned. One may question the Son Thang lawyers' tactics, but judicial rulings and the evidence appear to have decided, as they should have, three of the four cases.

If the Marine Corps judge advocates had a shared shortcoming, it was one beyond their remedy: a lack of trial experience. "They are usually fresh out of law school, and assigned to the courtroom for one or two years before being rotated to their next assignment."[1] Any advocate in a contested, multiple murder trial, only a year or two from law school, might have been overwhelmed. As the 1st Marine Division's Staff Judge Advocate said, "They were not real experienced lawyers, there's no doubt about that....But they were getting experience in a hurry..."[2] Finally, they did creditable, professional work, even if it involved a degree of on-the-job training.

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[1]Gardner, "Apples and Oranges: A Comparison of Civilian and Military Trial Courts," 197.

[2]Lucy interview, 22 June 1991.

While subject to rocket assaults and sapper attacks, with meager law libraries and technical support, and few seasoned lawyers to turn to for advice, they conducted major contested trials as if in a civilian forum. But reflecting their training and experience, they appear to have been insufficiently mindful of the law of war issues and defenses available in such cases.

6.1.b. Trial Tactics and Fact Finders' Choices In defending Schwarz, Captain LeGear heard the testimony of numerous witnesses at the pretrial investigation describe hearing machine gun fire in the area of Son Thang. If correct, such fire could only have come from the enemy, buttressing Schwarz' in-court assertion that the victims were killed in a crossfire when he and the other Marines returned fire. But at trial LeGear did not raise the matter of machine gun fire. Without that testimony his central argument that Schwarz was returning enemy fire pursuant to Herrod's orders lacked essential substantiating evidence.

There was little that LeGear could do to counter Krichten's immunized eyewitness testimony that there had been no enemy fire and that Schwarz had fired on the victims. Schwarz' own written statement to the same effect confirmed the government's witness. LeGear argued well but in vain to keep that damning statement from the members. The judge's ruling admitting the statement might as easily have been decided otherwise, had he considered it coerced by Lieutenant Ambort's exhortation to admit all. The record of trial shows it to have been a close issue.

Nor could prosecutorial experience have countered Krichten's unexpectedly pro-defense testimony in the Boyd trial that the accused, Krichten's squadmate in combat for seven months, had fired over, but not at, the victims. If the military judge discounted Krichten's assertion and still was not convinced beyond a reasonable doubt of Boyd's guilt, as the judge has since confirmed, one suspects that nothing

would have convinced him. Boyd's written statement[3] was no less damning than Schwarz' and the evidence convicting Schwarz, presented by the same prosecutors, was no different than in Boyd's trial. Nor does the civilian defense counsel's in-court argument that Boyd was actually a pacifist, opposed to the taking of life,[4] seem overwhelmingly persuasive. Again, the judge might just have easily found Boyd guilty. Or might Schwarz, too, have been acquitted, had he been tried by military judge alone?

Green's defense was that of putting the government to its proof, a legitimate, if passive, tactic. Defense counsel Captain Hargrove, like Captain LeGear, made no mention of the several witnesses who heard machine gun fire emanating from Son Thang. At least the government had no self-inculpatory written statement with which to bludgeon Green. Hargrove had Green's inexperience as a Marine and combat veteran to argue. If the defense was ineffective in influencing the jurors, it apparently was telling in affecting their formulation of Green's sentence to five years confinement for the murder of fifteen women and children.

The trial of Herrod remains the most intriguing of the four. The prosecution team in the first three courts-martial was disbanded shortly before Herrod's trial, the lead prosecutor no longer involved. The Marine Corps judge was unexpectedly replaced by a Navy judge whose ruling on a key issue – photo admissibility – may have reflected a different evidentiary orientation. A five-lawyer civilian team, led by experienced trial lawyers, defended the accused. Herrod aided his cause by maintaining his innocence from apprehension to trial, consistently adhering to a plausible account, unshaken by admissions and accusations of his co-accused. An articulate high school graduate, Herrod was a good witness in his own defense, as well.

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[3]Pretrial investigation exhibit 38.
[4]Trockman, to author, 17 April 1991.

Until recent years, the practice of law in military courtrooms has, for the most part, been free of motions, other than to exclude evidence. The few other motions were invariably presented orally. That was the case in 1970, in Vietnam, where no Marine judge advocate had secretary, clerk, or copy machine. The sixteen written pretrial motions entered by Herrod's civilian defense team, its three motions during trial, and five motions for mistrial, would have distracted a prosecution unused to such a paper flurry.

In the final analysis, the more experienced Herrod defense lawyers simply presented the more persuasive case to the finders of fact.

6.1.c. Law of War and the Son Thang Trials The chief of the U.S. Army's International Law Branch points out that "the average judge advocate, regardless of service, has a very inadequate knowledge of the law of war, particularly for trial purposes....[T]he average civilian attorney has even less..."[5]

What defenses may be raised in a U.S. court-martial trying offenses that sound in international law and the customary law of war? Because grave breaches are charged as ordinary UCMJ offenses are defense counsel limited to those special defenses usual to U.S. military law,[6] or may law of war defenses be employed, as well?

In discussing the Nuremberg Tribunals, the U.S. manual on international law recites the general affirmative defenses to war crime charges: insanity, self-defense, mistake of fact, self-defense, mistake of fact, ignorance of the law,

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[5]W. Hays Parks, interview by author, 12 Dec. 1990, the Pentagon, tape recording, author's collection.

[6]"Special defenses, sometimes called affirmative defenses, are those which, although not denying that the objective acts charged were committed by the accused, do deny, either wholly or partially, criminal responsibility for those acts." Manual for Courts-Martial, 1969, par. 214. Unlike general defenses applicable to common-law or statutory crimes, special defenses apply to individual offenses, are usually statutory in origin, and usually place a burden of proof on the defendant to show that he acted reasonably.

duress, "and the like."[7] The manual then cites as war crime *special* defenses: military necessity, obsoleteness of the law, acts done in accordance with municipal law, acts done in an official capacity, reprisal, and superior orders.[8] Although several of the special defenses may be considered no longer viable – military necessity, act of state, acts in accordance with municipal law – or inapplicable to battlefield war crimes – obsoleteness of the law and, probably, reprisal – the manual makes no statement as to the applicability of the listed special defenses in court-martial war crimes adjudication. What, then, is the U.S. position as to available defenses at court-martial?

As is often the case in American military jurisprudence, English military law suggests guidance: "One consequence of formulating English law in terms of international law is that the latter may itself provide a defence..."[9] U.S. military law, incorporating customary law of war in formulating its prohibitions, similarly allows for law of war's concomitant international law defenses.

Indicative of that position, U.S. military courts apply defenses provided for in treaties that are not found in military law.[10] Courts-martial both explicitly and implicitly give application to defenses not acknowledged in the *Manual for Courts-Martial*.[11] In the Vietnam-era case of *Levy v Resor*,[12] for example, the military judge *sua sponte* solicited evidence on what was there referred to as the "Nuremberg defense" – the charge that U.S. Green Berets were committing war crimes in Vietnam and the government could not place a soldier (the accused, Levy) against his will in substantial

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[7]Dept. of the Army, International Law, vol. II, 245.

[8]Ibid., 246-51.

[9]Rowe, "Murder and the Law of War," 223.

[10]*U.S. v Carter*, 36 CMR 433 (USCMA, 1966) (Quinn, J. concurring.)

[11]Eugene R. Milhizer, "Necessity and the Military Justice System: A Proposed Special Defense," 121 Military L. Rev. 95, 97, 103, (1988).

[12]37 CMR 399. The appellate opinion solely considers the issue of bail in military law, foregoing discussion of the dismissed "Nuremberg defense."

jeopardy of being implicated in such crimes. That defense was rejected but "the case does stand for the important precedent that a war-crimes defense is available, in relevant circumstances ..."[13]

In a recent opinion, the Chief Judge of the Court of Military Appeals applied an until-then novel defense, noting support for the defense by commentators, and its employment in other court systems. "With all this in mind," he wrote, that defense "must be recognized in military justice."[14] No less may be said of law of war defenses.

Even without that appellate holding, and without *Levy v Resor*, the Nuremberg Charter, the Far East IMT, and the Royal Warrant of 14 June 1945 under which British military courts tried lesser Nuremberg cases, are precedent for the judicial relaxation of technical rules in war crimes cases.

If international law defenses were to be explicitly recognized in military law it would merely require a new *Manual* subparagraph setting forth those defenses or, more likely, adoption of them by judicial decision.[15] To provide for members' consideration of special defenses on findings, model instructions would be added to the *Military Judges' Benchbook*,[16] as well.

In addition to law of war defenses, explicitly recognized or not, any affirmative general defense provided in military law would continue to apply. "In broad terms, an accused may be said to have a defense when it appears that he should not be held legally responsible for the crime charged,"[17] and he cannot be denied every opportunity to

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[13]Anthony A. D'Amato, Harvey L. Gould, and Larry D. Woods, "War Crimes and Vietnam: The 'Nuremberg Defense' and the Military Service Resister," 57 California L. Rev. 1055, 1056 (1969).

[14]*U.S. v Byrd*, 24 MJ 286, 292-93 (USCMA, 1987).

[15]Milhizer, "Necessity and the Military Justice System," 118.

[16]Dept. of the Army, Pam. 27-9 (Wash.: GPO, 1982), Chapter 5, Special and Other Defenses.

[17]Edward M. Byrne, Military Law, 3d ed. (Maryland: Naval Institute Press, 1981), 121.

present evidence to negate the existence of every element of the offense.[18]

Finally, the employment of international law defenses does not raise an issue of potentially inconsistent or antithetical defenses. Customary international law applies *except* where there are conflicting treaties, statutes, or constitutional provisions.[19] The UCMJ is federal statutory law against which, therefore, conflicting international law defenses would fail. Similarly, the *Manual for Courts-Martial*, wherein military defenses are listed, has the force of law.[20] The *Manual*'s listing is neither exclusive nor exhaustive, and admits other defenses, including international law defenses not conflicting with treaties, statutes, or constitutional provisions. As long as defenses are consistent at trial no problem is presented.

Professor Wigmore points out that "courts-martial...have always been allowed to pursue a more liberal course...than do, habitually, the civil tribunals."[21] That liberality is reflected in the long-standing employment of international law defenses in U.S. courts-martial, despite their lack of explicit mention in the *Manual for Courts-Martial*.

Had the lawyers trying the Son Thang cases, civilian and military, been more familiar with the law of war there were related issues they might have raised. The defense of duress, particularly, could have been asserted by Schwarz, Boyd, and Green. Faced by their leader, Herrod, brandishing a loaded grenade launcher and pistol while forcefully and repeatedly commanding obedience to his orders, subordinates

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[18]*U.S. v Huff*, 22 CMR 37 (USCMA, 1956).

[19]*Farmer v Roundtree*, 149 F.Supp. 327 (D.C. Tenn., 1953), *cert.* den. 357 U.S. 906.

[20]Gilligan and Lederer, Court-Martial Procedure, vol. I, 27. This force of law is raised by Art. 36 of the Code, wherein Congress grants the President, by whose order the Manual is published, authority to prescribe court-martial procedure and modes of proof.

[21]Wigmore, A Treatise on the Anglo-American System of Evidence, 3d ed., vol. I, 100.

might reasonably have argued that they feared for their lives had they not obeyed.

The defense of reprisal might have been raised, as well – although that defense requires the proponent to admit having intentionally fired on the victims. While the patrol's actions did not comport with the law of war's strictures regarding reprisals, "the killing of reprisal victims or hostages in order to guarantee the peaceful conduct in the future of the populations of occupied territories was legal [according to some Nuremberg decisions]."[22] Might not the entire patrol have asserted their actions to have been taken with such considerations in mind? Shortly before the patrol, a member of their company was killed by an explosive device set by guerrillas local to Son Thang. The efficacy of a reprisal defense is questionable in this instance, but it was a colorable issue that might reasonably have been presented for the fact finders' consideration.

Related to, but distinct from, the defense of superior orders is the argument that combat soldiers, having been trained and accustomed to follow orders without question lack the *mens rea* necessary for conviction of a battlefield criminal act. Linked to the absence of *mens rea* is the defense peculiar to 1970 U.S. military law, partial mental responsibility. (See section 4.2.c.) But like duress and reprisal, *mens rea* and mental responsibility issues were unexplored.

6.1.d. The Military Jury in A Combat Zone An American law review article critical of Green's conviction* asserts that combat-related charges should be decided only by combat-experienced jurors:

> Combat is a unique experience....To understand the reactions of a person in Green's situation, a trier of

[22]U.N. War Crimes Commission, Law Reports of Trials of War Criminals, vol. XV, 178.

* The only discussion of the Son Thang case in a law-oriented journal.

> fact should have some understanding of the immense difficulties and frustrations inherent in small-unit infantry operations. ...The composition of the court at Green's trial was clearly prejudicial to his case.[23]

Oliver North, self-styled seeker of justice, writes that he warned Herrod's civilian lawyers: "I urged them to object to anyone assigned to the court...who wasn't a combat officer or NCO, because only men who had served in combat could appreciate the pressures that Herrod must have been under."[24]

General P.X. Kelley, an infantryman, Vietnam combat veteran, and former Commandant of the Marine Corps (1983-87), agrees: "Combat is a very different, very stressful, very trying, very emotional period, and you have to have people [on juries] who can weigh all of that..."[25] Professor L.C. Green adds:

> It may even be questioned whether a military code, manual or directions to courts-martial drafted by lawyers...who carry military ranks merely because they serve in the Judge Advocate's...Departments, but who have no idea of the realities of service life particularly in action, are the proper persons to be responsible for preparing these regulations...[26]

Such a criterion for war crimes fact-finders, however, would have excluded most of the Nuremberg and Far East tribunal judges, several Calley jurors, and most of the Vietnam War's military judges. Combat is a unique and emotional experience, but such a viewpoint suggests that its effects cannot be appreciated by any except those who experience it firsthand as infantrymen.

More than 448,000 Marines served in Vietnam. Far fewer, although in the combat zone, actually saw combat — one study asserts that no more than seventy-one percent of all Vietnam veterans saw any combat at all.[27] Combat itself may be defined

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[23]Webb, "The Sad Conviction of Sam Green," 18. Webb is a Marine infantry veteran of Vietnam.

[24]North, Under Fire, 123.

[25]Kelley interview, 12 Dec. 1990.

[26]Green, "Superior Orders and the Reasonable Man," 101.

[27]Randy Martin, "Who Went to War," in Ghislaine Boulanger and Charles Kadushin, eds., The Vietnam Veteran Redefined (London: Lawrence Erlbaum, 1986), 18.

on a sliding scale. At what point on such a scale would one merit "war crime juror" status?

In fact, the officers and enlisted men who decided the Son Thang cases were as random, as much the peers of the accused, as any civilian jury is of a civilian accused. One need not be a business executive to be a fair juror in a white collar crime case, nor a police constable to decide a charge of excessive force in an arrest. To require only combat-experienced fact finders in war crimes cases injects elements not meant for inclusion in the weighing of guilt and innocence. A civilian judge on the U.S. Court of Military Appeals makes the point that "there are certain biases and prejudices in favor of letting the war criminal go, if you try him in the battle zone...."[28] Better to let the member selection system, evolved over many years, function in war crimes cases as in any other. Complaints will persist, but "the traditional jury has never given complete satisfaction anywhere."[29] Combat zone juries are no exception, but neither do they require special qualifications not imposed by the UCMJ.

6.2 International Legal Obligations

Municipal law provides for the enforcement and punishment of law of war violations. Customary international law allows nations to try their own soldiers before its military courts. If, under that scheme, the Son Thang trial results leave one dissatisfied, where else might those accused have been tried? An international criminal court does not exist, though not for lack of international interest and effort.

6.2.a. International Criminal Law and its Forum Is there an international criminal law? Most authorities aver that

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[28]Cox interview, 7 Dec. 1990.

[29]Morris Ploscowe, "The Development of Present-Day Criminal Procedures in Europe and America," 48 Harvard L. Rev. 433, 472 (1935).

there is, "recognized by many different countries and self-contained legal systems..."[30] Others hold that "despite all the talk...the prospects of anything real or similar to a criminal code of the kind that exists within a nation are minimal."[31] Clearly there does exist an international law of war. But international criminal law might be described as being in a transitional stage, "a twilight zone,"[32] still evolving from a phase of law between nations to a phase involving new forms of cooperation and organization.[33]

There is a long record of effort to create an international criminal law and, concomitantly, a court within which it may be applied.[34] "The problem of an International Criminal Court, in particular with reference to the punishment of war crimes, has been an almost continuous subject of discussion since the first World War."[35]

> [T]he United States has played an ambivalent role, now that of just another national-interest-pursuing state... and at other times that of an idealistically inclined nation, determined to bring about the legal and political ordering of freedom, justice, equality, and human dignity."[36]

Following World War I, the League of Nations called for the Permanent Court of International Justice (PCIJ) to become the locus for trials of international crimes and war crimes in particular. In 1920 the Advisory Committee of Jurists, under the auspices of the League, also proposed that an international criminal court be established.[37] From 1922 to

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[30]Friedlander, "Problems of Enforcing International Criminal Law," in Bassiouni, International Criminal Law, vol. III, 13.

[31]Green, "Is There An International Criminal Law?", 261.

[32]Gerhard O.W. Mueller, "International Criminal Law: *Civitas Maxima*," 15 Case Western J. of International L., 1, 2 (1983).

[33]Leonard J. Hippchen and Yong S. Yim, Terrorism, International Crime, and Arms Control (Illinois: Charles Thomas, 1982), 144.

[34]For a detailed account of that history see, Ferencz, An International Criminal Court, vol. I, 36-46.

[35]Lauterpacht, "The Law of Nations and the Punishment of War Crimes," 80.

[36]Sweeney, The International Legal System: Cases and Materials, 1292.

[37]Bridge, "The Case For an International Court of Criminal Justice," 1267.

1926 the International Law Association prepared a draft statute for a criminal chamber of the PCIJ; a draft international criminal code was prepared by the Inter-Parliamentary Union, as well.[38] In 1928 the International Association for Penal Law accepted a similar code, while a 1937 international conference produced a convention for creation of an international criminal court.[39] Following the Second World War, the U.N. War Crimes Commission called for establishment of a continuing international war crimes tribunal, separate from the Tokyo and Nuremberg tribunals.[40] Those efforts yielded no concrete results.

In 1949, the U.N. General Assembly approved, in principle, establishment of an international criminal court and appointed successive committees in 1951 and 1953 to produce a draft statute. But the International Law Commission, which oversaw those efforts, admitted to "a certain lack of enthusiasm"[41] for portions of the task. The major states have not actively supported formative efforts and, in the words of one delegate, "the hesitancy it [the U.N.] displayed was a confession of impotence."[42]

Despite this "wearisome history,"[43] and the intermittent suspension of U.N. efforts,[44] promising work continues toward establishing both a code of crimes against peace and an international criminal court within the United Nations system.[45]

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[38]U.N. International Law Commission, Historical Survey of the Question of International Criminal Jurisdiction, 2-4.

[39]Bridge, "The Case For an International Court of Criminal Justice," 1268.

[40]U.N., Historical Survey of the Question of International Criminal Jurisdiction, 4.

[41]Sir Ian Sinclair, The International Law Commission (Cambridge: Grotius Publications, 1987), 56.

[42]U.N., Yearbook of the International Law Commission, 1950, vol. II (NY: U.N., 1957), 247.

[43]Best, Nuremberg and After, 13.

[44]*e.g.*, G.A. Res. 1187, 12 U.N. GAOR Supp. 18, 52, U.N. Doc. A/3805 (1957).

[45]Stephen C. McCafrey, "Current Developments - The Forty-second Session of the International Law Commission," 84 AJIL 930 (1990). Also see: M. Cherif Bassiouni, A Draft International Criminal Code and Draft Statute for an International Criminal

The Nuremberg and Tokyo tribunals remain the only international trials sounding in international criminal law. For the foreseeable future, "the likelihood of setting up an international criminal court is very remote."[46]

6.2.b. The Impediment to an International Criminal Law

The comparative success of the International Court of Justice, although a civil forum, demonstrates that it is possible to devise an international court and an effective procedure. Lord Shawcross, chief Nuremberg prosecutor, warns that "international law will be a dead letter unless we give criminal jurisdiction to the International Court of Justice and set up a mechanism for enforcing its judgements."[47] Why, then, the chronic lack of progress in codifying international criminal law and providing for its forum?

> Most observers agree that extradition is the key to the control of international criminality, but extradition often is tied to a political axis. Absent treaty or convention, extradition practice depends upon comity and reciprocity. This has not proved to be an effective counter to criminal activity....[48]

Nations are unwilling to surrender jurisdiction over their nationals and fear the possible extradition and punishment of their own heads of state.[49]

Most countries deny extradition for military offenses such as desertion and draft dodging, though not necessarily for those accused of war crimes.[50] That exception is not always clear, however.

Tribunal (Dordrecht: Martinus Nijhoff, 1987) for a recent and excellent international criminal law bibliography, and listing of instruments on creation of an international criminal court.

[46]Brownlie, Principles of Public International Law, 564.

[47]Strobe Talbott, "When Monsters Stay Home," Time, 15 April 1991, 24.

[48]Friedlander, "Problems of Enforcing International Criminal Law," in Bassiouni, International Criminal Law, vol. III, 17. To the same effect: Howard, Restraints on War, 156; and Ferencz, An International Criminal Court, 44-46, 85-86.

[49]Green, "Is There an International Criminal Law?", 252. To the same effect: Bassiouni, A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal, 5.

[50]Ibid., 257.

> Even though war criminals are proceeded against under the ordinary criminal law of the state the offense may still be regarded as political by a state...and such states may refuse extradition because of the usual exception of "political offense" in extradition treaties.[51]

With states thus unwilling to give up a portion of their sovereign power to a central authority, enforcement of international norms has, by default and necessity, reverted to municipal legal systems.[52]

6.2.c. Court-Martial: An Appropriate Forum? The legal system employed by the U.S. to enforce law of war norms remains, most often, court-martial. Professor Telford Taylor, a retired U.S. Army Reserve brigadier general and former Nuremberg chief counsel urges, however, that it is a:

> ...doubtful question...whether an Army general court-martial is an appropriate judicial forum...for the trial of [battlefield war crime] cases. On the face of things the charges are simple enough...but, as has been seen, the simplicity is deceptive...[53]

Taylor, who did not practice general military law, and whose uniformed tenure predates the UCMJ, suggests that trial be by military commission, instead. He justifies his lack of confidence in courts-martial by citing potential command influence in members selection,* the legal complexity of the ubiquitous superior orders defense, and the political implications of war crimes prosecutions. It may be argued that the My Lai prosecution demonstrated that Taylor's first two concerns are unwarranted. At the trial level, at least, his final concern also appears questionable. The Son Thang prosecutions only reinforce that view.

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[51]Wright, "War Criminals," 273.

[52]Gary Komarow, "Individual Responsibility under International Law: the Nuremburg (sic) Principles in Domestic Legal Systems," 29 International and Comparative L. Quarterly 20, 22 (1980).

[53]Taylor, Nuremberg and Vietnam, 158. Columbia University Professor Leonard B. Boudin agrees with Taylor, in: "War Crimes and Vietnam: The Mote in Whose Eye?", 84 Harvard L. Rev. 1940, 1944 fn.19 (1971).

* Had he known of the precipitous transfer of Lt.Col St.Amour shortly before he was to judge the Herrod trial Taylor probably would have cited command influence in judge selection, as well.

Those more closely and more recently involved in the court-martial process reject suggestions that battlefield war crimes are beyond the ability of courts-martial to effectively litigate and punish. Waldemar Solf, then-Chief of the Judge Advocate General's International Affairs Division, in comparing courts-martial with the commissions urged by Telford Taylor, wrote:

> After all, an ordinary court-martial...is hedged in with procedural limitations, exclusionary rules of evidence, and due process standards. These procedural safeguards were deliberately curtailed in the regulations established for war crimes military commissions during and after World War II.[54]

Solf's successor, W. Hays Parks, asks, "If you can walk in and prove a violation of [UCMJ] Article 118, [murder], with its rather simple elements...why complicate things by going to a military tribunal or military commission...?"[55] The Director of the Marine Corps' Judge Advocate Division, Brigadier General Michael E. Rich, notes:

> We've got to distinguish between law of war on the higher level, on the political level, and law of war on the battlefield level....Yes, if we'd tried Ho Chi Minh or Giap for their law of war violations...we wouldn't court-martial them. We'd have a Nuremberg-type tribunal. But if we want to talk about prosecuting [combat personnel] for murder, rape, robbery, assault, whatever, you don't need Nuremberg for that. It's just a regular criminal proceeding...[56]

A military court's suitability to try war crimes may be debated, but there is much to recommend its employment and no compelling evidence to demonstrate its inferiority.

6.2.d. <u>Law, War Crimes, and Punishment</u> At a high level of generality, the criminal law may be viewed as a system of norms supported by potential sanctions, concerned with the prevention of harms and, ultimately, the security and existence of the community. Punishment — sentencing after

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[54]Solf, "A Response to Telford Taylor's 'Nuremberg and Vietnam'," 61.
[55]Parks interview, 12 Dec. 1990.
[56]Rich interview, 26 Aug. 1990.

conviction – is the threat enforcing the criminal law. On a utilitarian level, sanctions provide a motive for obeying the law. In a philosophical sense, "the general justifying aim of sentencing...of those who break the criminal law is...to restore the balance which the offense disturbed."[57] The sentencing process may be viewed as a symbolic expression of society's denunciation of the offense and a reaffirmation of the law and its values.[58]

> What we have ended up with, then, is a conception of punishment as a social practice within a community, geared towards the pursuit of (which entails respect for) a plurality of the community's central goals and values ...with an importantly symbolic aspect.[59]

This applies, of course, to military society no less than to civilian.

Justification for the institutions of criminal law and sentencing, Professor Andrew Ashworth contends, resides in general deterrence and public protection.[60] Apropos of that view, Lord Lane writes:

> [T]he Court has to ask itself...what is the minimum sentence possible, first of all to punish the defendant for his crime, secondly to mark the disapproval of the community...and thirdly, sufficient to act as a deterrent in future to this man and to anyone else...?[61]

Battlefield war crimes, however, are not usually premeditated, but are sudden, impulsive crimes of violence – the type of crime, most jurists would agree, not deterred by lengthy sentences.[62]

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[57]Andrew Ashworth, Sentencing and Penal Policy (London: Weidenfeld and Nicolson, 1983), 16-17.

[58]Ibid., 300.

[59]Nicola Lacey, State Punishment (London: Routledge, 1988), 200.

[60]Andrew Ashworth, Principles of Criminal Law (Oxford: Clarendon Press, 1991), 11, 13.

[61]*R v Hitchcock* (1982) 4 Cr App R (S) 160, 161.

[62]Ashworth, Sentencing and Penal Policy, 341, 343; and, Christopher J. Emmins, A Practical Approach to Sentencing (London: Blackstone Press, 1985), 263.

If deterrent sentences are of questionable impact in such cases, then at least proportionality – a severity of sentence in proportion to the gravity of the offense[63] and a key underlying structure of the criminal law[64] – may be sought. But the notion of proportionality presumes a settled criteria of seriousness of cases, a ranking of severity of sentences, and an accepted relationship of cases and sentences.[65] Those are not always present in battlefield war crime cases. Nevertheless, although proportionality begs the question of *whose* ideas of seriousness, severity, and relationship, it remains a legitimate sentencing goal.

Four Son Thang defendants had been tried, with starkly disparate trial and sentencing results and, as Professor H.L.A. Hart notes, "principles of justice and fairness between different offenders require...morally similar offences to be treated alike."[66]

> To say that the law against murder is justly applied is to say that it is impartially applied to all those...who are alike in having done what the law forbids; no prejudice or interest has deflected the administrator from treating them 'equally'. [67]

But despite impartial application of the military law, questionable outcomes had obtained. Was the system deficient, then? No. The criminal law of statutes and textbooks seldom reflects its actual enforcement in social situations. "[W]e must consider the interaction between the law itself and discretion in the criminal process...to understand the reality of the criminal law."[68]

Sentences imposed at trial often reflect the beliefs and experiences of the sentencers rather than rational

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[63]Ibid., Emmins, 264.

[64]Ashworth, Principles of Criminal Law, 16.

[65]Ashworth, Sentencing and Penal Policy, 22.

[66]H.L.A. Hart, Law, Liberty, and Morality (Oxford: Oxford University Press, 1963), 37.

[67]H.L.A. Hart, The Concept of Law (Oxford: Clarendon Press, 1961), 156.

[68]Ashworth, Principles of Criminal Law, 4.

differences in either offences or offenders[69] and society's presumption of a value-neutral rationality in sentencing engenders unfulfilled expectations. "[T]his value attached... to rationality and consistency also generates severe embarrassment about...moral luck, an inevitability...with which every political theory must learn to live."[70] The acquittal of patrol leader Herrod after conviction of two of his subordinates may be considered an example of embarrassing "moral luck,"* as may be Green's sentence to five years confinement for the same acts that brought Schwarz a life sentence.

Acquittals and unequal sentences are hardly unique, being documented in numerous studies.[71] One author rationalizes such results by noting that "although the impact of the *threat* of punishment must be equal or not disproportionately different for different offenders, the impact of *enforcement* may be unequal."[72] As to post-trial clemency action, there is little research in the area, but rather than evening out sentence differences, it apparently "makes disparity in time served as great as the discrepancies in time imposed."[73]

Besides trial, which represents the threat of punishment, an appropriate response to criminality must encompass enforcement – actual punishment – the "appropriate

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[69]Barbara Hudson, Justice Through Punishment (London: Macmillan Education, 1987), 47.

[70]Lacey, State Punishment, 167.

* An aspect of moral luck is "jury nullification"- a panel's recognition of guilt but refusal to return a guilty finding, notwithstanding. See, Gilligan and Lederer, Court-Martial Procedure, vol. 1, 611, 884. Moral luck is explored in: Bernard Williams, Moral Luck (London: Cambridge University Press, 1981); and Thomas Nagel, Mortal Questions (London: Cambridge University Press, 1979), ch. 3, Moral Luck.

[71]Roger Hood and Richard Sparks, Key Issues in Criminology (London: Weidenfeld and Nicolson, 1970), 141-56, *e.g.*, cite six such studies from the U.S. and England. Hudson, Justice Through Punishment, 43-48, notes another six.

[72]Lacey, State Punishment, 193. Italics in original.

[73]Hudson, Justice Through Punishment, 46.

penal sanctions" spoken of by the 1949 Conventions.[74] How "appropriate" were the punishments for U.S. war crimes in Vietnam? An answer may be determined by examining the few reported, identifiable war crime prosecutions — limited in the case of the Marine Corps almost exclusively to trials for the murder of Vietnamese noncombatants. No other law of war offense is traceable in sufficient degree to yield meaningful or quantifiable comparisons.

During the Vietnam War, twenty-seven Marines were convicted of murdering noncombatants.[75] In several of those cases there were multiple victims or associated crimes, such as aggravated assault or rape. In 15 of the 27 convictions, among attendant punishments such as dishonorable discharge, reduction in grade, and loss of pay, the sentence imposed at trial included confinement for life; three other cases included confinement for 20, 30, and 50 years. Only in 7 of the 27 cases was the confinement imposed less than 10 years.[76] Those are substantial sentences.

Trial-level sentences do not tell the whole story, however. In military practice, unlike civilian forums, appeals are of right, and sentences are often mitigated at the appellate level. That was so in cases involving the murder of noncombatants. After appellate-level mitigation the 27 sentences were: confinement for life in only two cases; 30 years confinement in another; 20 to 30 years in five others; 10 to 20 years in three others; 5 to 10 in five others; less than 5 years confinement in ten cases; and two convictions set aside, one by reason of procedural error, the other for insanity.[77] Although some sentences were

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[74]Some authorities suggest that crime prevention does not, by itself, require formal punishment. *e.g.*, R.A. Duff, Trials and Punishments (Cambridge: Cambridge University Press, 1986; reprint, 1991), 165.

[75]Parks, "Crimes in Hostilities," pt. I, 14. Ninety-five Army personnel were similarly convicted of murder and manslaughter. Lewy, America in Vietnam, 325.

[76]BGen. John R. DeBarr, Wash., to Guenter Lewy, Massachusetts, 9 March 1976. Marines and Military Law collection, Marine Corps Historical Center, Washington.

[77]Lewy, America in Vietnam, table 10-5, p. 458.

significantly lessened, the range of penalties remained generally high.

Case comparisons are suspect, but that range of mitigated court-martial sentence is comparable to or higher than trial-level sentences in American civilian jurisdictions. In the first half of 1970, the same period as the Son Thang trials, 132 homicide convictions in Pennsylvania state courts resulted in sentences ranging from probation (in 37 cases), to confinement for life (in 3 cases). Other Pennsylvania sentences for homicide were confinement for 1 year (in 45 cases), 2 years (in 18 cases), 3 to 4 years (in 14 cases), 5 years (in 7 cases), 6 or more years (in 7 cases), and one sentence to death.[78] The mitigated Marine Corps war crime sentences — imposed under active service conditions in a combat zone, one might note — cover a similar, or higher, span. There is no practical means of determining what, if any, sentence reductions resulted from appellate action in the Pennsylvania cases.

In U.S. Federal District Courts in 1973, the first year such statistics were compiled, sentences for the 25 convicted first and second degree murderers ranged from probation (in 2 cases), to confinement for 3 to 5 years (in 3 cases), to 5 years and over — the breakdown is no more specific — in 20 cases.[79] These sentences appear no more harsh than the mitigated sentences imposed upon Marines.

How do court-martial sentences for murdering Vietnamese noncombatants compare with sentences imposed in the same period upon U.S. personnel for murdering fellow-American soldiers? In five such convictions for *pre*meditated murder, 5 sentences to confinement for life resulted, reduced on

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[78]Franklin E. Zimring, Joel Eigen, and Sheila O'Malley, "Punishing Homicide in Philadelphia," 43 Chicago L.Rev. 227, Table VI, 234 (1976). The table's percentages have been translated into discrete numbers, here.

[79]Michael J. Hindelang and others, eds., Sourcebook of Criminal Justice Statistics, 1973 (Wash.: GPO/U.S. Dept. of Justice, 1973), Table 5.38. The rudimentary breakdown lists seven punishment categories: 1 year and under; 1-3 years; 3-5 years; 5 years and over; probation; fine; and other.

appeal to 30 years in one case, to 15 years in another; in two other cases the life sentences were set aside for new sentence or trial proceedings.[80]

But most court-martial convictions for killing Vietnamese were for *un*premeditated murder. In eleven convictions of U.S. personnel for the *un*premeditated murder of other U.S. personnel, four resulted in sentences to life, one of those reduced on appeal to 45 years, two reduced to 30 years; the seven other sentences were: confinement for 18 years (reduced to 2); two for 15 and one for 10 years (those three being set aside for new trials); two for 5 years; another for 15 months.[81] Although there undeniably were occasional sentences reflecting a shameful xenophobia,[82] there is no striking dissimilarity between the range of these sentences for unpremeditated murder and those imposed for the murder of Vietnamese noncombatants — the latter sentences may even tend to be more severe.

Acquittals can be as revealing as sentences imposed, since acquittals may indicate the reluctance of a court to convict, let alone sentence an accused. Sixteen Marines, or thirty-seven percent of those tried for murdering Vietnamese noncombatants, were acquitted or had their charges judicially dismissed.[83] In U.S. District Courts in 1969, thirty-three percent of the homicide cases that went to trial resulted in

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[80]Respectively, *U.S. v Thomas*, 41 CMR 828 (NCMR, 1970); *U.S. v Brandy*, 40 CMR 674 (ACMR, 1969); *U.S. v Walker*, 41 CMR 632 (ACMR, 1969); *U.S. v Newsome*, 43 CMR 695 (ACMR, 1970); *U.S. v Jones*, 44 CMR 818 (ACMR, 1969).

[81]Respectively, *U.S. v Chappell*; *U.S. v Wimberly*, 42 CMR 242 (ACMR, 1970); *U.S. v White*, 40 CMR 883 (ACMR, 1969); *U.S. v Jackson*, 40 CMR 355 (ACMR, 1969); *U.S. v Richardson*, 43 CMR 742 (ACMR, 1971); *U.S. v Roman and Santiago-Ruiz*, 40 CMR 561 (ACMR, 1969); *U.S. v Hurt*, 41 CMR 206 (USCMA, 1970); *U.S. v Butler*, 40 CMR 207 (USCMA, 1969); *U.S. v Butler*, 39 CMR 824 (NBR, 1968); *U.S. v Thibeault*, 43 CMR 704 (ACMR, 1971).

[82]*e.g., U.S. v Bumgarner*, 43 CMR 559 (ACMR, 1970), in which conviction for the unpremeditated murder of three Vietnamese noncombatants resulted in a reduction in grade from sergeant to private, and forfeiture of $97 per month for six months. No discharge or confinement was imposed.

[83]DeBarr, to Lewy, 9 March, 1976, enclosure 8.

acquittal or dismissal,[84] a rate essentially the same as found in Marine Corps courts throughout the war for the same offense.

Whether the mitigated court-martial sentences constitute an "appropriate penal sanction" for grave breaches constituting the crime of murder may be arguable. One writer suggests, "it may be concluded, then, that the United States has provided effective penal sanctions for the grave breach involved in willfully killing civilians..."[85] Another contends the final sentences merely demonstrate that:

> the military system is not capable of handling objectively the investigation and punishment of alleged war crimes in Vietnam....[A]n International Criminal Court would be the only acceptable alternative to what is now at best a national embarrassment.[86]

But sentence comparisons, state, federal, and military,* suggest not a national embarrassment as much as a sentencing incoherence. The sentences of American soldiers, whether for the murder of Vietnamese or for other Americans, range from severe to lenient; from the expected to the dismaying, without consistency or pattern. Sentencing results from the same period are similarly mixed when U.S. soldiers murdered other than Vietnamese or fellow-soldiers.[87] The authors of a study of punishments imposed in civilian murder convictions point out, "the more culpable offense does not always receive the more severe punishment....[T]he huge differences in sanctions within the murder category would appear to offend

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[84]U.S. Dept. of Commerce, Statistical Abstract of the United States 1970 (Washington: GPO, 1970), table 236, p.153.

[85]Rubin, "Legal Aspects of the My Lai Incident," 269.

[86]Comment, "Punishment for War Crimes,"1346, fn. 203.

* General court-martial convictions *are* federal convictions.

[87]In the U.S., for murdering his wife and her lover, a soldier was sentenced to confinement for 5 years, reduced on appeal to 2 years, *U.S. v Griggs*, 41 CMR 541 (ACMR, 1969); for murdering a Canadian soldier in Germany, a U.S. soldier was sentenced to 30 years confinement, *U.S. v Stevenson*, 41 CMR 69 (ACMR, 1969); for murdering an Okinawan prostitute, 18 years, *U.S. v Nichols*, 46 CMR 1316 (ACMR, 1973); for murdering an American lover, 1 year, reduced to 7 months, *U.S. v Small*, 45 CMR 700 (ACMR, 1972).

any colorably coherent theory of punishment."[88] Nor are sentencing practices any less disjointed in English practice.[89]

Sentences for U.S. war crimes in Vietnam, rather than being a factor of the victim's nationality, merely reflect the disarray in sentencing, generally. "Disparity in sentencing, with similar crimes receiving wildly dissimilar sentences, is an unavoidable feature of a judicial system charged with ascertaining the individual circumstances and needs of offenders."[90]

Colonel Robert Lucy, the 1st Marine Division's Staff Judge Advocate at the outset of the Son Thang trials, became counsel to the Assistant Secretary of the Navy in late 1970. He recalls:

> It was always disappointing to me...how the sentences were just sliced to pieces....[T]hat was because of the political climate of the time....There was a feeling in Washington...congressional pressure to cut back on a lot of the sentences...[91]

Such an impression, however, reflects an unawareness of similarly "sliced to pieces" sentences imposed in venues other than those trying offenses committed in Vietnam. In courts-martial involving the murder of Vietnamese noncombatants — war crimes tried under U.S. military law — the sentences imposed at trial and subsequent to clemency action were in general conformity with sentences in similar prosecutions involving both American and other foreign victims. The concept of proportionality aside, the sentences reflected society's denunciation of the acts involved, and reaffirmed the criminal law.

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[88]Zimring, Eigen, and O'Malley, "Punishing Homicide in Philadelphia," 242.

[89]Hood and Sparks, Key Issues in Criminology, 142, 147-51. Saying, "the evidence pointing to disparities in sentencing among the judiciary at all levels is overwhelming," the authors detail five British studies reflecting such disparities.

[90]Hudson, Justice Through Punishment, 27.

[91]Lucy interview, 22 June 1991.

6.3. The Son Thang Appeals

Article 60, UCMJ, in effect in 1970, reads: "After a trial by court-martial the record shall be forwarded to the convening authority, and action thereon may be taken..." Article 61: "The convening authority shall refer the record...to his staff judge advocate...who shall submit his written opinion thereon..."*

The Son Thang convening authority was the commander of the 1st Marine Division, Major General Charles F. Widdecke, a taciturn, even dour, man.** Upon receiving his SJA's reviews and recommendations regarding the Schwarz and Green trials Widdecke would decide to reduce or let stand the findings and sentences in their cases, before forwarding the record to the Navy Court of Military Review, next step in the appellate process. According to his Assistant Division Commander, Brigadier General Simmons, Widdecke was troubled by the pending decisions, considering the Son Thang verdicts "inequitable" and "appalling."[92] Widdecke's review of the cases would be the first of, potentially, three legal reviews.

6.3.a. The U.S. Military Appellate System, 1970 Under then-applicable law, before being executed, court-martial sentences required review by the court's convening authority through a comprehensive summary and analysis of the case's legal issues.[93] Any court-martial resulting in a sentence including a punitive discharge from the service – a bad conduct or dishonorable discharge – additionally required a second review and affirmation by a Court of Military Review

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* Requirement for post-trial review by the convening authority was eliminated by the Military Justice Act of 1983.

** Widdecke died in 1973.

[92]Simmons interview, 10 May 1990.

[93]*U.S. v Griffin*, 24 CMR 16 (USCMA, 1957); *U.S. v Vara*, 25 CMR 155 (USCMA, 1958).

in Washington, D.C.[94] Throughout the appellate process, the court-martial's sentence could not, and yet today may not, be increased, nor a not-guilty finding be disturbed.[95]

> [T]he military review system is more protective of rights of convicted persons than state or federal review systems because several military reviews are automatic. Moreover, some military reviews correct factual errors and exercise clemency as well as reviewing questions of law and "clearly erroneous" factual findings.[96]

Major General Widdecke, convening authority of the Schwarz and Green courts, was located at his division headquarters near DaNang, where the cases were tried. His post-trial reviews were prepared in the office of his Staff Judge Advocate (SJA).[97] In such reviews the trial evidence was discussed, contested issues examined and their resolution considered for legal correctness. The sentence was reviewed to ensure it did not exceed the permitted maximum and that it was appropriate to the charges of which the accused stood convicted. No substantial error being found in the conduct of the trial, evidentiary rulings of the court, nor the sentence, the SJA would recommend that the convening authority approve the proceedings. A form was provided that merely required the convening authority's signature to carry out the recommendations.

Most convening authority reviews resulted in approval. If, however, substantial error was found, or proof of guilt fell below the required standard of beyond a reasonable doubt, the SJA was obligated to recommend that the findings and sentence be disapproved and 'not guilty' findings be substituted. He could also recommend that a sentence considered excessive be reduced. Thus, the convening authority's review examined the law, the facts, and the

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[94]Manual For Courts-Martial, 1969, Ch. XX, specifies appellate review procedures in effect during the Son Thang cases.

[95]Ibid., par. 88.a.; UCMJ, Arts. 62.(b), and 63.(b).

[96]Shanor and Terrell, Military Law in A Nutshell, 124-24.

[97]UCMJ, Articles 61, 65(b).

sentence. "The convening authority's primary concern is whether any error may have materially prejudiced the rights of the accused."[98] Disapproval of guilty findings was unusual at the convening authority's level, but not unheard of. Sentence reductions were common.

Approved records of trial involving sentences of confinement of a year or more were required to be forwarded to the Court of Military Review (CMR), in Washington, for another review *ab initio*. CMR's jurisdiction was, and remains today, mandatory and automatic.[99] CMR is actually an assembly of several appellate courts. Each armed service has its own CMR, each service's CMR having several panels of three appellate judges. During the Vietnam War, when case loads were at an all-time high, the Navy Court of Military Review (NCMR) — which also decides Marine Corps appeals — consisted of three panels. The panels usually sit separately but occasionally sit *en banc*. NCMR judges are senior military lawyers, Marine colonels and Navy captains.

General courts-martial in which punitive discharges are imposed, as in the two Son Thang convictions, require CMR's appellate review as a matter of law.[100] Such reviews are carried out by judge advocates assigned to that armed service's appellate review activity, co-located with its CMR. Again, each service has its own appellate review activity, staffed by judge advocates of that service. Army appeals, in other words, are reviewed and briefed by Army appellate lawyers and decided by Army appellate judges. Appellate defense counsel, provided the accused without cost, review the record of trial for bases for legal attack. Under applicable Vietnam-era military law, issues could be raised at the appellate level even if not raised at trial. As in the convening authority's review, the facts, the law, and the

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[98]Byrne, Military Law, 412.

[99]UCMJ, Arts. 66(b), 67(a).

[100]UCMJ, Art. 65.(b), in the Vietnam era; now Art. 66.(b).

sentence are examined for error.[101] Most cases, lacking a basis for attack, are routinely form-briefed, the absence of grounds noted, appeal not pressed. Those cases that do go forward are fully briefed by opposing appellate counsel and submitted, in the case of Marine Corps appeals, to an NCMR panel for decision. Significant cases are orally argued before the panel. CMR appeals are carried out without the presence of the convicted servicemen and only rarely are civilian lawyers involved.

The quality of military appellate counsel, in the Naval Service at least, is uneven; too often Navy or Marine Corps judge advocates failing to gain promotion are assigned to the appellate review activity to close out their careers, although that fact applies only in a minority of appellate assignments. Still, sometimes a less-than-expected quality of legal skill may be evidenced in briefs or oral argument. The appellate judges, however, are usually excellent jurists of demonstrated aptitude.

Neither appellate counsel nor judges hesitate to "bust," or overturn, a sentence or conviction, when warranted. Despite the appellate review activities being staffed by military lawyers, there is no pressure to preserve convictions. Similarly, CMR judges suffer no career harm because of their legal decisions, even if viewed as generally anti-prosecution. (*i.e.*, anti-government.) Indeed, the careers of most CMR judges are assured before they are considered for such assignment and several have gone on to their service's senior legal position.

While this somewhat idealized description of appellate practice does not consider "the force of personality, impact of reputation of colleagues, and debits and credits

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[101] *e.g.*, *U.S. v Landry*, 14 USCMA 553 (1964).

accumulated from past compromises...,"[102] it reasonably describes the second level of court-martial review.

In 1970, the Court of Military Appeals, or "COMA," was the third and final appellate level for military cases.* Situated in its own Washington, D.C., courthouse, COMA consisted of three civilian judges, appointed for staggered fifteen year terms by the President, subject to confirmation by the Senate.[103] COMA judges usually come from the ranks of prominent practicing lawyers or judges. Cases reach COMA either by direction of an armed service judge advocate general, or by decision of COMA for "good cause shown."[104]

Neither the Schwarz nor Green appeals reached COMA, however; CMR did render opinions in both cases — but both men had already been freed from confinement and discharged from the Marine Corps before CMR's judgements were issued. Nor was there an appeal in the case of the officer who set in motion the Son Thang killer team, for he was never tried.

6.3.b. 1st Lt. Lewis R. Ambort Ambort, the company commander, told the departing patrol: "Don't let them get us any more. I want you to pay these little bastards back." Major Theer, who first investigated the allegations of murder, testified, "If the commanding officer said something, I'm sure that the men would...take it as authoritative. Like your father speaking to you."

Many years earlier, in approving the court-martial conviction of a U.S. officer during the Philippine insurrection of 1901, President Theodore Roosevelt wrote: "Loose and violent talk by an officer...is always likely to

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[102]Alley, "Determinants of Military Judicial Decisions," contains detailed discussion of the appellate process at the CMR level.

* Current military law provides for final appeal to the U.S. Supreme Court in certain restricted circumstances. (UCMJ, Art. 67a.) Through 1991, however, the Court had decided only one military case under its certiorari authority. In most instances COMA, now comprised of five judges, one of them a woman, remains the final appellate forum.

[103]Quinn, "The United States Court of Military Appeals and Individual Rights in the Military Service," 494.

[104]UCMJ, Art. 67(a).

excite to wrongdoing those among his subordinates whose wills are weak or whose passions are strong."[105] The U.S. law of war field manual reads, "direct incitement...as well as complicity in the commission of...war crimes are punishable."[106] British military law is similar.[107] The 1949 Geneva Conventions call for "penal sanctions for persons committing, or ordering to be committed" grave breaches.[108]

Failure of the U.S. to prosecute Paul Meadlo, a confessed principal in the My Lai murders who was given immunity in exchange for testimony, has been raised as a possible violation of Geneva treaty obligations to prosecute those commiting grave breaches.[109] A similar question applies to the failure to prosecute Krichten, granted immunity for testimony regarding events in Son Thang. Where immunity is conferred in war crime trials as a necessary aspect of prosecutorial discretion, however, close examination of the legal issues involved makes clear that:

> the decision to forego prosecution...does not... contravene any minimum standard of international justice....[T]he federal grant of immunity is consistent with national norms regulating the practice. These determinations are important because the Geneva Conventions themselves provide minimal guidance in defining the contours of the prosecutorial obligation.[110]

But Lieutenant Ambort was not offered immunity; he simply was not prosecuted for his actions related to the Son Thang killings.

> [Commanders are] bound to act so as to prevent such killings....This is a crucial aspect of what is called "command responsibility"....It is a large responsibility; for the general policy of the army, expressed through its officers, the climate they create by their day-to-day actions, has far more to do with the incidence of "extra"

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[105]*U.S. v BGen. Jacob H. Smith*, 17.

[106]Dept. of the Army, Law of Land Warfare, par. 500.

[107]HMSO, Manual of Military Law, pt. III, par. 631.

[108]Arts. 49, 50, 129, and 146, respectively.

[109]Comment, "Punishment for War Crimes: Duty or Discretion?", 1312.

[110]Ibid., 1339.

> killing than does the intensity of the actual fighting.[111]

Was that failure to prosecute Ambort a breach of U.S. treaty obligations? If his conduct is assessed as having been criminal, the answer is yes.

In describing a principal, the *Manual for Courts-Martial, 1969,* points out:

> There must be an intent to aid or encourage the persons who commit the crime. The aider and abettor must share the criminal intent....but...to make one liable as a principal...the offense committed must be one...likely to result as a natural or probable consequence...[112]

Based upon his aggressive, goading patrol briefing should Ambort have been tried along with his men? "Certainly it would depend," one authority notes,

> on the circumstances of the remark, [and] the recipient....[I]f that...company commander were briefing his troop for a combat assault — troops eighteen years old who have been trained to respect and obey every word uttered by their company commander [he may be criminally liable for their subsequent acts].[113]

To what extent did Ambort's guiding and conspiratorial role in the attempt to cover-up the incident call for prosecution? There appears to have been sufficient evidence to charge Ambort as a principal to unpremeditated murder (a violation of Article 77, UCMJ) and, by his initially assisting the offenders in order to hinder or prevent their apprehension, as an accessory after the fact (Article 78).

In fact, he was only charged with failure to report a possible war crime, as required by written, standing orders, and dereliction of duty in "negligently failing to take effective measures to minimize noncombatant casualties...and making no effort to insure that all personnel in [his] company were aware of rules of engagement."[114] He was also

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[111]Walzer, Just and Unjust Wars, 308.

[112]Par. 156, describing the offense encompassed by Art. 77, UCMJ. The maximum punishment for conviction as a principal is that authorized for the completed offense.

[113]Parks, "Command Responsibility for War Crimes," 78.

[114]Son Thang daily report #13.

charged with making a false statement with intent to deceive: that the killer team captured an enemy rifle during their Son Thang foray.[115]

Since Ambort's charges, although less serious than they might have been, still potentially merited a general court-martial, they were referred to an Article 32 investigation, the pretrial hearing to determine probable cause. The investigation was conducted by the division's assistant SJA, Lieutenant Colonel James P. King. Two months before the first patrol member's trial, King recommended that Ambort merely receive nonjudicial punishment for having made a false official statement.[116]

An honorable, ethical, and conscientious officer, King later became commander of all Marine Corps lawyers, eventually retiring as a brigadier general. Today he harbors second thoughts about his decision to recommend that Ambort not be tried:

> I agonized over the recommendation as I believed it to be close – very close!! But given the testimony that I heard from Ambort himself and the analysis of criminal intent...Ambort's conduct amounted...to a high (very high) degree of negligence but did not amount to an order to kill women with children in their arms. His words came perilously close....[T]his was a close call, one I'm not sure was the correct one....I believed then and believe now that no...court-martial then in RVN would have convicted him. In retrospect, maybe he should have been tried....I could have been wrong, but I called it as I saw it.[117]

The commanding general accepted King's recommendation and personally conducted Ambort's nonjudicial punishment on 15 May 1970. The punishment imposed was a letter of reprimand and forfeiture of five-hundred dollars pay[118] – the maximum sentence permitted at such a proceeding for one of Ambort's grade. A letter of reprimand effectively ends a military

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[115]Ibid.

[116]Son Thang daily report #15.

[117]BGen. James P. King, NY, to author, London, 20 Jan. 1991.

[118]Son Thang daily report #18.

career but was insignificant to one who, like Ambort, had no such aspirations.

Thirteen months later, Ambort was honorably discharged from the Marine Corps, eventually becoming an electrical contractor in southern California.[119]

6.3.c. Pvt. Michael A. Schwarz A civilian law firm from Schwarz' home state submitted a brief for the convening authority's consideration in his review of the case. To expedite review, the brief's two authors wrote, they would avoid "technical discussion of abstruse legal concepts" and limit their analysis to "simple logic and plain common sense."[120] Indeed they did. Citing no case, evidentiary rule, or legal authority, they merely argued that in light of Herrod's acquittal, fair play required that Schwarz' conviction be set aside. Treading a fine line just short of alleging incompetence on the part of Schwarz' trial defense counsel, they related the evidence not adduced by Schwarz' counsel that *was* adduced by Herrod's, and urged that the Herrod evidence now be applied to the Schwarz case, *pari passu*.

The SJA's review of Schwarz' case responded to the civilian firm's brief in detail, as well as to the trial testimony, the contested issues, and judicial rulings. The review concluded that there had been no prejudicial error. However, the review noted, the evidence revealed that Schwarz:

> was carrying out the orders of his patrol leader. While the orders...were patently illegal, there is no evidence the accused entered into a pre-planned conspiracy to commit murder. Another consideration is the accused's low level of basic intelligence...[121]

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[119]Lewis R. Ambort, California, to author, London, 15 May 1992.
[120]Brief for appellant at 1, *U.S. v Schwarz*.
[121]Staff Judge Advocate's review, *U.S. v Schwarz*, 27.

Taking these factors into consideration, the SJA recommended that as a matter of clemency Schwarz' sentence to confinement at hard labor for life be reduced to twenty years.

Brigadier General Simmons, assistant division commander to Major General Widdecke, the convening authority, relates that Widdecke found his SJA's review and recommendation disquieting. "Why is it that the person who seems that he should be most guilty is acquitted...? How do you restore some kind of equity? And," said General Simmons, "I think that's what he eventually tried to do...."[122] In a message to his superiors in the U.S., Widdecke wrote: "A careful study of the record of trial...has revealed certain mitigating factors..."[123] He went on to detail the lack of a proper patrol briefing, Schwarz' short time with the unit, the combat environment, *and* the sentence and verdicts in the companion cases. Even considering Schwarz' egregious prior disciplinary record, wrote Widdecke, "the sentence awarded by the court appeared disproportionate..."[124]

With that warning to brace themselves, Widdecke approved the findings of guilt and the sentence, except that portion relating to confinement, which he reduced to one year. On 2 April 1971, Schwarz was released from confinement and dishonorably discharged from the Marine Corps.[125] As Professor Ashworth says, "the idea of moral accountancy may...be said to underlie some of the practices of mitigation of sentence..."[126]

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[122]Simmons interview, 10 May 1990.

[123]USMC, CG 1st MarDiv "Secret-Marine Corps Eyes Only" message 151000Z Dec 70, Marine Corps Historical Center, Wash., and author's collection.

[124]Ibid.

[125]"In the Uproar Over Calley's Conviction," U.S. News & World Report, 19 April 1971, 20. Schwarz also served 3 months, 20 days pretrial confinement. for which he received sentence credit.

[126]Ashworth, Sentencing and Penal Policy, 306. Similarly, H.L.A. Hart suggests: "...good reason for administering a less severe penalty is made out if the situation or mental state of the convicted criminal is such that...his ability to control his actions is thought to have been impaired or weakened otherwise than by his own action, so that

Having been convicted of war crimes involving the murder of twelve Vietnamese noncombatants, Schwarz served nine months and eleven days post-trial confinement. While that is dismaying, it may be what H.L.A. Hart refers to in suggesting that an intelligible standard of behavior may remain, despite absence of a sanction to maintain that standard:[127] the American prohibition against the killing of noncombatants remains effective, the brevity of Schwarz' punishment notwithstanding.

Despite Schwarz' release and discharge, the military appellate process continued. At NCMR, four errors in his court-martial were briefed and argued, two of which were significant: "The military judge failed to properly define the defense issues," and "The convening authority erred in failing to consider the subsequent acquittal of Private Herrod as *res judicata* in this case."[128]

The first assignment of error referred to a defense-alleged failure of the trial judge to submit the issue of obedience to orders to the members. But the appellate court quoted the instruction given the members:*

> ...if you find beyond a reasonable doubt that the accused under the circumstances of his age, understanding and military experience could not have honestly believed the orders issued by his team leader to be legal...then the killing alleged was without justification. A Marine is a reasoning agent who is under a duty to exercise judgement in obeying orders to the extent that where such orders are...palpably illegal on their face then the act of obedience to such orders will not justify acts pursuant to such illegal orders.[129]

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conformity to the law...was a matter of special difficulty for him..." Punishment and Responsibility (Oxford: Clarendon Press, 1968), 15.

[127]Hart, The Concept of Law, 34.

[128]*U.S. v Schwarz*, 45 CMR 852 (NCMR, 1971), 2. The other two assigned errors: Denial of due process in the judge's failure to fully advise Schwarz of his rights to counsel and to properly excuse absent defense counsel; and abuse of judicial discretion in admitting color photos of the victims.

* Appendix C recites the Vietnam-era standard instruction.

[129]*U.S. v Schwarz*, 9.

The appellate court found the instruction legally correct and sufficient to have put the issue before the fact finders, and noted that "by their conviction of the accused, the [trial] court...found as a matter of fact that the accused could not have honestly and reasonably believed that Herrod's order to kill...was legal,"[130]

Although not addressed by the appellate court, the outcome would have been no different had Schwarz' offenses been considered in relation to mistake of law/mistake of fact doctrine: a defense "when it [the mistake] negatives the existence of a mental state essential to the crime charged."[131] The killing of unarmed noncombatants would not have been legal even under the facts purportedly believed by Schwarz – that Herrod had valid authority to order the killings, a mistake of law, for "his mistake should avail him only if it is *objectively reasonable* under the circumstances."[132]

The appellate court further found that the evidence did *not* establish that the patrol had been instructed to "shoot anything that moved" in the villes, nor to remove unarmed Vietnamese from their huts and shoot them. Nor did the evidence establish, held the court, that the patrol was under enemy fire, nor that Schwarz believed he was under a duty to obey Herrod's orders to kill the victims. "[W]e are persuaded that the evidence of record clearly supported the court-martial's rejection of the defense claim that the accused's conduct was justified by Private Herrod's order."[133]

Finally, the court addressed the issue of *res judicata:*

> The doctrine of *res judicata* as it pertains in military trials provides that a matter put in issue and finally determined by a court of competent jurisdiction cannot be

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[130]Ibid.

[131]LaFave and Scott, Criminal Law, 2d ed., 406. To the same effect, *U.S. v McDowell*, 41 CMR 487 (ACMR, 1969).

[132]*U.S. v Barker*, 546 F.2d 940, 947-48 (1976), italics in original. To the same effect, Manual for Courts-Martial, 1969, par. 154(a)(4).

[133]*U.S. v Schwarz*, 10.

> disputed between the same parties in a subsequent trial....In cases involving a crime impossible of sole commission but requiring concurrence of intent or action between two or more parties, adjudication of issues in a trial of one of those essential parties may be pleaded in defense by another who was not joined in the first proceeding...[134]

But, continued the court, Schwarz was tried on the alternate theories that he was either the actual perpetrator of all or some of the killings, or a principal to them by having aided and abetted the actual killers. The UCMJ makes aiding and abetting an offense separately punishable, without regard to the conviction or acquittal of the actual perpetrator of the offense.[135] Quoting a federal opinion, the military court continued:

> And the acquittal of the principal presents no impediment to the trial and conviction of a person charged with aiding and abetting....This is because one who aids or abets the commission of a crime is guilty as a principal of a substantive, independent offense.[136]

"It follows," CMR concluded, "that the...assignment of error is found to be without merit and is denied. The findings of guilty and the sentence approved on review below are affirmed."[137]

Nowhere in the convening authority's review or appellate opinion were war crimes directly referred to.

6.3.d. Pvt. Samuel G. Green, Jr. Like Schwarz, Green's confinement was reduced by the convening authority to one year, he was released, and dishonorably discharged.[138] As in

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[134]Ibid., 13.

[135]Art. 77. Case law is to the same effect: *U.S. v Marsh,* 32 CMR 252 (USCMA, 1962). A case involving issues quite similar to Schwarz', decided similarly, is *U.S. v Keenan.* British criminal law is also in accord. Michael J. Allen, Textbook on Criminal Law (Blackstone Press: London, 1991), 165; also as to separately-tried conspirators: *D.D.P. v Shannon* [1975] A.C. 717, [1974] 2 All E.R. 1009, HL.

[136]*U.S. v Schwarz,* 14, citing *von Patzoll v U.S.,* 163 F.2d 216, 218-19 (CA 10 1949), cert. den., 68 S. Ct 110.

[137]Ibid., 15.

[138]USMC, CG 1st MarDiv "Secret-Marine Corps Eyes Only" message 151001Z Dec 70, Marine Corps Historical Center, Wash., and author's collection.

Schwarz' case, his military appellate lawyers continued to attack his conviction. The assignments of error were essentially the same as those raised by Schwarz, with two relatively unimportant additions.[139] Obedience to orders and *res judicata*, again the major issues, were disposed of as in the Schwarz case, the two opinions sometimes employing the same language. (Different panels considered the two cases.)

One judge dissented, noting that Green's conviction was as an aider and abettor, not a principal; the prosecution admittedly proffered no evidence directly linking Green to any specific victim's death. Urging that Green, on his first combat patrol, "was a pure novice,"[140] the dissenting judge contended:

> [I]f at the time of the action herein the accused did aid and abet the killers but was laboring under the apprehension that he was acting within the scope of, and fulfilling his mission, he could be guilty of no offense under the aider-abettor-principal theory for he would be wanting in the requisite criminal intent.[141]

The issue, in the dissent, then became the reasonableness of Green's asserted belief that Herrod's orders to fire were legal. That belief, contended the dissenting judge, should not have been measured by the instruction's "man of ordinary sense and understanding," but on Green's actual belief. "The issue to be decided...was <u>whether the accused</u> – not a fictional person – did <u>in fact believe the orders</u> given the team were legal..."[142] Or, as another writer phrases it, it is "a general principle of morality and the criminal law that people ought to be judged on the facts as they believed them to be."[143]

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[139]*U.S. v Green*, 4. Earlier, in *Green v Convening Authority*, 42 CMR 178 (USCMA, 1970), Green unsuccessfully sought to terminate proceedings against him through a writ of prohibition filed by civilian lawyers on his behalf.

[140]Ibid., *U.S. v Green*, (Jones, J., dissenting).

[141]Ibid.

[142]Ibid. Underlining in original.

[143]Rupert Cross, "Centenary Reflections on Prince's Case," 91 <u>Law Quarterly Rev.</u> 540 (1975).

Neither the UCMJ, the *Manual for Courts-Martial,* the *Law of Land Warfare* field manual, the British *Manual of Military Law,* nor the Charter of the IMT specifically address the point raised by the dissent: is the reasonableness of obeying an illegal order to be measured by the belief of the fictional reasonable man/reasonable woman of ordinary sense and understanding? Or by the actual, subjective belief of the particular accused who obeyed the order?

But the point of the dissent is merely the hoary tort-law question of reasonableness, cloaked in law of war terms. As in numerous behavioral assessments necessary in criminal law, the reasonable man standard is the only practical means of judging the conduct of an accused, for conditional subjectivism cannot disregard volitional criminal acts.[144] "We would punish him all the same," writes an American jurist. "The social concern is with the deed...rather than with the mental state that accompanies it."[145] He continues:

> ...there is no anomaly in sometimes imposing criminal liability on the pure of heart or the empty of mind. The criminal law is an instrument of social control....To decide [mental states] would require a type of investigation that is not conducted in criminal trials...[146]

Harshly put, but correct. Oliver Wendell Holmes agrees that "Public policy sacrifices the individual to the general good."[147] Along the same line, Professor Ashworth writes:

> The belief principle has not, generally speaking, been applied where the mistake is as to what is permissible under the criminal law....English law has generally allowed the maxim [ignorance of the law affords no

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[144]Glanville Williams, "*Finis* For *Novus Actus?*", The Cambridge L.J. (1989), 391, 392.

[145]Posner, The Problems of Jurisprudence, 168-69.

[146]Ibid., 176-77.

[147]Oliver W. Holmes, Jr., The Common Law (Boston: Little, Brown, 1881), 48.

> excuse] to prevail in order to...reinforce the law's function of declaring minimum standards of behavior.[148]

It is apparent, then, that the majority in the Green case applied the proper legal standard. "A guilty condition of mind is not excluded by ignorance that the act in question constitutes a crime."[149]

Following his discharge, Green pursued a collateral attack on his military conviction in the civilian courts of his home state. That attack was driven by James H. Webb, a highly-decorated Marine veteran of Vietnam who, after retiring for physical disability, became an attorney. Webb believed Green's conviction unjust and adopted his cause. The collateral attack was unsuccessful and, in July 1975, Green shot and killed himself.

Webb rose to become the United States' Secretary of the Navy in 1987. While in that politically powerful office he oversaw the posthumous upgrading of Green's discharge from dishonorable to general.[150] The record does not reveal the basis for such clemency.

Coda With the dismissal of Green's collateral attack the Son Thang incident was over. Son Thang was the worst known war crime committed by Marines in Vietnam. The courts-martial of the killer team demonstrated that, whether denominated UCMJ violations or war crimes, discovered battlefield excesses are vigorously prosecuted by the United States. Acquittals – negligible sentences, too – are part and parcel of the common law's adversarial system that should not detract from the integrity of the process itself.

> In some cases mere formal conviction may be sufficient to preserve the reality and efficacy of the standards of the

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[148]Andrew Ashworth, "Belief, Intent, and Criminal Liability," in John Eekelaar and John Bell, eds., Oxford Essays in Jurisprudence, Third Series (Oxford: Clarendon Press, 1987), 10-11.

[149]Greenspan, Modern Law of Land Warfare, 486.

[150]James H. Webb, Jr, Virginia, to author, London, 22 May 1991; and Timberg, "The Private War of Ollie and Jim," 152.

> criminal law....This is not a question of righting the wrong done in the compensatory sense of making good the loss to the particular victim....Nor is it exclusively a matter of deterrence, individual or general. It has principally to do with a collective need to underpin, recognize and maintain the...standards of the criminal law...[151]

Finally, it bears reminding that "war is not a series of case studies that can be scrutinized with objectivity....War is the suffering and death of people you know, set against a background of suffering and death of people you do not."[152]

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[151]Lacey, State Punishment, 182-83.

[152]James R. McDonough, Platoon Leader (NY: Bantam Books, 1985), 139.

CHAPTER 7. LITERATURE SURVEY AND SOURCES

"As for official historians, they concentrate on the writing of history and reflect only sporadically on its application..."

Eliot A. Cohen and John Gooch, *Military Misfortunes*

The law of war remains relevant on today's battlefield and will be equally so on tomorrow's battlefield. Advances in weapons, more effective tactics, and increased international concern for the welfare of war's participants and victims is unlikely to reduce the individual soldier's combat role. As long as one nation's infantry meets an enemy infantry, as long as armed combatants interact with civilian populations, war crimes and grave breaches may be anticipated.

Accordingly, the study and refinement of means to limit and control warfare's violence remains relevant. Whether war be global or limited, internal or international, declared or not, the law will continue to play a part in armed conflict.

Throughout recent history the study and discussion of law of war has been constant. Particularly in the twentieth century there has been a plethora of conventions, treaties, protocols, cases, studies, reports, books, and articles on the subject. In this chapter, some of the recently published law of war literature consulted in writing this dissertation is noted. Included are books, textbooks, and articles. Also mentioned is the wide variety of material, collectively referred to as "archival" material, that has been consulted. Finally, the sources unique to the writing of this dissertation are briefly discussed.

7.1. Law of War Literature

The literature takes the usual distinctive forms: texts, articles, and documents, each form surprisingly extensive, much of it very recent. The sampling consulted in this

writing overlooks many excellent works; no single effort can encompass them all. Mention is made of a few considered to be of significant worth.

Scholarly writing on the law of war, an academic staple long before the turn of this century, enjoyed a quantitative and qualitative renaissance following the Great War. The terms of the Treaty of Versailles, mandating individual punishment for war crimes, and the formation of the League of Nations were, by themselves, the basis for many writings.

World War II again increased interest and output in the subject. The post-war trials of Axis personnel of both high-station and rear rank raised that output exponentially. While the United Nations has remained more aloof from the law of war than its precursor, the League of Nations, the U.N. has generated considerable interest in peripheral issues such as international criminal law and its forums.

The Vietnam War, besides providing scholars a critical target, re-visited numerous law of war issues, revived academic interest in the topic, and produced innumerable writings. One suspects that the Gulf War will eventually add to the law of war literature, as well.

7.1.a. Law of War Books Many English-language books discuss the law of war but few are dedicated specifically to the subject. Among those that are, the more informative and contemporary include *Humanity in Warfare* and *The Law of War*.[1] The latter, perhaps intended as a textbook, lacks the authority of the former but presents the fundamental law of war for the lawyer or law student in readable, authoritative fashion. The former is a less academic but an equally readable, highly instructive general history addressed to the layman. Professor Peter Rowe's *Defence, the Legal Implications*, is an excellent contemporary work, particularly valuable for its portrait of the British military legal

[1]Geoffrey Best and Ingrid D. DeLupis, respectively.

system. Another excellent, though less current study, is Greenspan's *The Modern Law of Land Warfare*. Like Professor Georg Schwarzenberger's outstanding treatise, *The Law of Armed Conflict*,[2] the Greenspan book is out of print and not easily located. *Nuremberg and Vietnam: an American Tragedy*, by Nuremberg prosecutor and Columbia University professor Telford Taylor, discusses many pertinent law of war issues. The book's title, however, reflects the author's unconcealed ideological slant – a bias not uncommon in American-published legal works concerning the Vietnam War.[3]

All of the foregoing books, and others,[4] discuss law of war issues in a depth and completeness that only book-length texts can offer.

Official military publications present authoritative, if largely uncritical, documentation of the law of war.[5] The British *Law of War on Land*, the third volume of the *Manual of Military Law*, is particularly useful in offering detailed interpretations and case citations in unusually readable official prose. Although especially valuable, it remains out of print and difficult to locate. Despite being decidedly dated, Britain's 1912 law of war manual remains helpful.[6] Prugh's *Law at War: Vietnam, 1964-1973* is a brief but valuable official source, written by a soldier-scholar who

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[2]Schwarzenberger, International Law: As Applied by International Courts and Tribunals, vol. II, The Law of Armed Conflict. Yet another excellent out-of-print treatise is: Oppenheim, International Law: A Treatise, vol I, Peace; and vol. II, Disputes, War and Neutrality, 8th ed.

[3]*e.g.*, Standard, Aggression: Our Asian Disaster, Donald A. Wells, War Crimes and Laws of War (NY: University Press of America, 1984); and any post-1965 book or article written or edited by the prolific Professor R.A. Falk.

[4]*e.g.*, Bishop, Justice Under Fire.

[5]Dept. of the Army, Pamphlet 27-161-1, Law of Peace, vol. I (Wash.: GPO, 1979); Pamphlet 27-161-2, International Law, vol. II; and Field Manual 27-10, The Law of Land Warfare. Previous editions of the latter manual were issued in 1940 and 1914. Although denominated as pamphlets, they are securely bound and hundreds of pages in length.

[6]Edmonds and Oppenheim, Land Warfare: An Exposition of the Laws and Usages of War on Land for the Guidance of Officers of His Majesty's Army.

was the U.S. Army's senior lawyer in Vietnam and, later, Judge Advocate General of the Army. Major General Prugh is recognized as a law of war expert.

Several volumes published by the United Nations are invaluable in presenting authoritative law of war-related histories and, particularly, accounts of the post-World War II Nuremberg and Control Council 10 trials.[7] The U.N. histories are well-documented and annotated. The International Committee of the Red Cross, among its many publications on the subject, has published a useful, if somewhat shallow, guide to the law of war.[8]

The official record of the Nuremberg International Military Tribunal, that initial trial of twenty-four major German war criminals, was published by the IMT in four languages.[9] The "subsequent proceedings," held under authority of Control Council Law No. 10 and involving thirteen trials of 181 major German war criminals, have been exhaustively documented, as well.[10] These official volumes are valuable for their full discussion of law of war trial issues and their documentation of precedent. Many other books have considered the legal aspects of the Nuremberg trials, some of them particularly helpful in interpreting and understanding the trials' outcomes.[11] Nuremberg also resulted in some

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[7]History of the United Nations War Crimes Commission and the Development of the Laws of War; The Charter and Judgement of the Nürnberg Tribunal; and Law Reports of Trial of War Criminals, vols. I-XV, a particularly instructive series.

[8]Kalshoven, Constraints on the Waging of War.

[9]Trials of the Major War Criminals Before the International Military Tribunal, vols. I-33.

[10]The U.S., GPO version: Trials of War Criminals Before the Nurenberg Military Tribunals, vols. I-XV. The British version: The Trial of Major German War Criminals (London, H.M.S.O., 1946), 23 vols.

[11]*e.g.*, Ginsburgs and Kudriavtsev, The Nuremberg Trial and International Law; Robert E. Conot, Justice at Nuremberg (London: Weidenfeld and Nicolson, 1983); and Appleman, Military Tribunals and International Crimes.

substandard or superficial (or both) books of little value to either scholar or general reader.[12]

The Tokyo trials – the IMT for the Far East, that tried twenty-eight accused Japanese war criminals[13] – and the subsequent Far East trials, are not as well-documented as the Nuremberg trials but, because of their more controversial trial procedure, are of lesser legal academic interest.[14]

Among the many other books covering diverse law of war issues are several of particular interest. Addressing specific subject areas such as the issue of obedience of superior orders,[15] or suggesting the documentary bases for the law of war,[16] these works add significantly to the understanding of that law.

The Vietnam War resulted in several useful books in which a variety of voices are presented in a single volume,[17] providing one with a broad choice of viewpoints. Those fortunate enough to read French and German will discover a large number of equally valuable works.

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[12]To name but two: Arnold C. Brackman, The Other Nuremberg (NY: William Morrow, 1987); and, Smith, Reaching Judgement at Nuremberg.

[13]R. John Pritchard and Sonia M. Zaide, eds., The Tokyo War Crimes Trial (London: Garland Publishing, 1981), 22 vols.

[14]An excellent treatment of the initial trials is: Röling and Rüter, The Tokyo Judgement, vols. I-II. The subsequent trials receive creditable layman's treatment in: Piccigallo, The Japanese on Trial. Descriptive of the Yamashita trial, which preceded the Far East IMT, an excellent legal analysis of the commander's responsibility for his troops' actions is found in: Lael, The Yamashita Precedent: War Crimes and Command Responsibility.

[15]Keijzer, Military Obedience, is especially helpful in addressing the practical, military aspects this multifaceted issue. Green, Superior Orders in National and International Law approaches the issue from a purely legal standpoint.

[16]Roberts and Guelff, eds., Documents on the Laws of War makes pertinent conventions, protocols, and declarations available in one volume. Friedman, ed., The Law of War: A Documentary History, vols. I-II, offers a variety of useful reference documents.

[17]Falk, ed., The Vietnam War and International Law, vols. 1-4, published under the auspices of the Center of International Studies at Princeton University, and edited by prolific anti-war academic Falk, these volumes are especially wide-ranging in their balanced presentation of well-reasoned legal viewpoints. Also useful: Dinstein, ed., International Law At A Time of Perplexity. A less ambitious but still valuable work is, Trooboff, ed., Law and Responsibility in Warfare.

7.1.b. Law of War Textbooks Textbooks – books intended exclusively for instructional use – are often incisive guides to the law of war. The works of Professor Ian Brownlie, although not law of war texts *per se*, are excellent in explaining many concepts of contemporary international law that bear on the subject.[18] While some public international law textbooks in general use tend to be rather basic,[19] or evidence a bias against the efficacy of the law of war,[20] others nicely cover some law of war issues.[21]

The instructional departments of U.S. military academies and schools have produced textbooks that, while not always directed toward legal issues, address law of war concepts.[22] Often, they also provide a participant's view, helpful in illuminating aspects of the law that academics might overlook. These books are not generally available in the U.K., however.

Nor should law of war students limit themselves solely to international law textbooks. Those relating to

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[18]International Law and the Use of Force by States, the standard, is exceptionally well-written, comprehensive, and penetrating. Also valuable is his basic text, Principles of Public International Law, 4th ed. Of lesser application is Brownlie's System of the Law of Nations: State Responsibility, pt.I.

[19]David H. Ott, Public International Law in the Modern World (London: Pitman Publishing, 1987).

[20]Cassese, International Law in A Divided World.

[21]Sweeney, Oliver, and Leech, Cases and Materials on the International Legal System, 3d ed., a textbook employed at the U.S. Naval Academy, is notable. Equally so is Schachter, International Law in Theory and Practice; and, Bassiouni, ed., International Criminal Law, vol. I, Crimes, and vol. III, Enforcement. Five other examples are: Harris, Cases and Materials on International Law, 3d ed.; Akehurst, A Modern Introduction to International Law; Ingrid D. DeLupis, International Law and the Independent State, 2d ed. (Aldershot: Gower, 1987); James L. Brierly, The Law of Nations, 6th ed., ed. Humphrey Waldock (Oxford: Clarendon Press, 1989); and Wallace, International Law, the latter being a concise but lucid treatment.

[22]Hartle, Moral Issues in Military Decision Making, by a West Point philosophy professor; Malham M. Wakin, ed., War, Morality, and the Military Profession, 2d ed. (Colorado: Westview Press, 1986), a U.S. Air Force Academy text; Matthews and Brown, eds. The Parameters of Military Ethics, a U.S. Army War College textbook; and Axinn, A Moral Military, the latter not as incisive as the others but in use in various U.S. war studies courses.

disciplines associated only with certain aspects of the law of war offer insights and perceptions not noted elsewhere.[23]

7.1.c. Law of War-Related Books In addition to the works already mentioned, many volumes, the subjects of which, again, are not the law of war, are helpful in understanding the application of that law in the Vietnam War. The best scholarly general account of U.S. involvement in the war is Professor Guenter Lewy's *America in Vietnam*. Superbly researched, it is comprehensive, reliable, and perceptive.

The My Lai incident, so similar to the Son Thang incident, resulted in numerous books, a few of which have much to say about the American soldiers' understanding and exercise of the law of war.[24] *Crimes of Obedience*, by two sociologists,[25] concentrates on My Lai and is excellent in presenting extra-legal aspects of the obedience to superior orders issue. *Four Hours in My Lai*[26] is a particularly clear and comprehensive layman's account of the event and its subsequent cover-up.

The memoirs of U.S. Army generals who served in Vietnam provide firsthand accounts of law of war issues, though seldom denominated as such by the authors. A few memoirs are refreshingly, even surprisingly, frank and candid.[27] That cannot be said of General Westmoreland's autobiography, which evidences a selective recollection and debatable

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[23]Clark, Waging War; and Bull, Kingsbury, and Roberts, Hugo Grotius and International Relations are examples. Glad, ed., Psychological Dimensions of War, is another. International humanitarian law is well-covered in such books as: McCoubrey, International Humanitarian Law; Lauterpacht, International Law and Human Rights, though dated; and Sieghart, The International Law of Human Rights.

[24]Peers, The My Lai Inquiry; Goldstein, Marshall, and Schwartz, The My Lai Massacre and its Cover-up; and Hammer, The Court-Martial of Lt. Calley, which offers an excellent layman's account of the trial and the trial tactics involved.

[25]Kelman and Hamilton.

[26]Bilton and Sim.

[27]Particularly Palmer, The Twenty-Five Year War; and, Davidson, Vietnam at War. Kinnard, The War Managers, is somewhat less revealing.

interpretations of portions of the record.[28] Other than General Lewis Walt,[29] no senior Marine Corps officer has published memoirs. Walt's account sheds no light on legal issues.

Blue's Bastards, by Son Thang patrol leader Randell Herrod, written nearly twenty years after the event, is entirely unreliable, more fiction than fact. It does offer an interesting view of Herrod's self-serving recollection of events and the other court-martial actors.

For those wishing to become familiar with contemporary U.S. military justice there are only a few guides, although those few are authoritative and quite good,[30] Gilligan and Lederer's recent two-volume *Court-Martial Procedure*, in particular. The current *Manual for Courts-Martial, United States*, remains the most authoritative guide.

These few titles are, of course, far from exhaustive. The reader will be aware of several, if not many, others that might have been included. Those noted are among the titles consulted and considered particularly worthy of attention, however.

No single volume has been encountered that discusses contemporary law of war, applies it to a case, and examines law of war through that application. It is submitted that this dissertation fills that gap. Through the Son Thang incident and resulting courts-martial one may review and determine the efficacy of U.S. military law in executing the law of war. Through the four courts-martial one may also examine the path of the law of war from convention to courtroom. Many works examine one end of that continuum or the other. None have been found that illustrate the

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[28]A Soldier Reports.

[29]Gen. Lewis W. Walt, Strange War, Strange Strategy (NY: Funk & Wagnalls, 1970).

[30]Byrne, Military Law, 3d ed., now dated by publication of the Manual for Courts-Martial, 1984; and Gilligan and Lederer, Court-Martial Procedure, vols. 1-2.

transformation of the law of war from treaty to application and through appeal.

7.1.d. Law of War Journal Articles For every book on the law of war there are several journal articles. Like books, the publication of articles peaks during and immediately after wars, but the flow never entirely stops. The *British Year Book of International Law,* the *American Journal of International Law,* and the *International and Comparative Law Quarterly* frequently carry authoritative law of war articles. So does the less rigorously academic journal of the International Society of Military Law and the Law of War, *Revue de Droit Pénal Militaire et de Droit de la Guerre.* The *Revue* publishes articles in several languages in the same volume. The U.S. armed forces publish law-oriented journals which occasionally carry law of war articles.[31] The quality of article is uneven, but often is quite high.[32]

A number of excellent articles set out the relationship of international law/law of war to municipal law systems and the individual — a basis for understanding war zone prosecutions.[33] These treatises, despite the age of some, remain valuable guides.

Á propos of the Son Thang incident, several articles examine the issue of superior orders in post-World War II law, illustrating the continuing vitality of that defense.[34]

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[31]Military Law Review (Army); Naval Law Review (formerly, Journal of the Judge Advocate General); and Air Force Law Review.

[32]*e.g.*. Parks, "Command Responsibility for War Crimes," and "Air War and the Law of War"; Alley, "Determinants of Military Judicial Decisions"; Smith, "New Protections for Victims of International Armed Conflicts."

[33]Baxter, "The Municipal and International Law Basis of Jurisdiction Over War Crimes"; Garner, "Punishment of Offenders Against the Laws and Customs of War"; Kelsen, "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals"; Lauterpacht, "The Law of Nations and the Punishment of War Crimes"; Comment, "Punishment for War Crimes: Duty — or Discretion?"; and Hooker and Savasten, "The Geneva Convention of 1949: Application in the Vietnamese Conflict."

[34]Green, "Superior Orders and the Reasonable Man"; Wilner, "Superior Orders as a Defense to Violations of International Criminal Law"; Beaumont, "Duress as a Defense to

The My Lai incident, in which obedience to superior orders was a central issue, has been extensively examined in several excellent pieces.[35] The legal status of the My Lai civilians and, by extension, the Son Thang civilians, is made clearer in several articles, as well.[36]

An overlooked article by the prosecutor of Calley's immediate commanding officer, Captain Medina, is instructive: in *Command Criminal Responsibility: A Plea for a Workable Standard*,[37] one suspects the author of attempting to distance himself from Medina's questionable prosecution tactics by pleading a lack of applicable norms regarding a commander's personal criminal responsibility.[38] In fact, such norms are reasonably clear. (See sections 2.1.b. and 4.3.c.) The article is nevertheless useful for its inside view of the failed Medina prosecution and some of its legal hurdles.

Those interested in the epistemology of the military legal system,[39] or its comparative ontology,[40] have several

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Murder"; and particularly instructive, Daniel, "The Defense of Superior Orders," by the tenacious prosecutor of Lt. Calley.

[35]Among them, Rubin, "Legal Aspects of the My Lai Incident"; Norman G. Cooper, "My Lai and Military Justice-To What Effect?", 59 Military L. Rev. 93 (1973); Boudin, "War Crimes and Vietnam: The Mote in Whose Eye?"; and Paust, "My Lai and Vietnam: Norms, Myths and Leader Responsibility."

[36]Nurick, "The Distinction Between Combatant and Noncombatant in the Law of War"; Paulson and Banta, "The Killings at My Lai"; Gehring, "Loss of Civilian Protections Under the Fourth Geneva Convention and Protocol I"; and Carnahan, "The Law of War in the United States Court of Military Appeals."

[37]Col. William G. Eckhardt, 97 Military L. Rev. 1 (1982). Eckhardt unsuccessfully prosecuted two other My Lai cases, Hutto and Kotouc, as well.

[38]Three excellent articles addressing much the same subject are, Parks, "Command Responsibility for War Crimes", comprehensive in its coverage; Franklin A. Hart, "Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraised," 25 Naval War College Review 19 (1972); and, O'Brien, "The Law of War, Command Responsibility and Vietnam."

[39]Henderson, "Courts-Martial and the Constitution: The Original Understanding"; and the more perceptive, Wiener, "Courts-Martial and the Bill of Rights: The Original Practice," pts. I and II. Early writings on military law are reviewed in: William C. Mott, John E. Hartnett, and Kenneth B. Morton, "A Survey of the Literature of Military Law-A Selective Bibliography," 6 Vanderbilt L. Rev. 333 (1953); and: John E. Hartnett, "Survey Extended-The Literature of Military Law Since 1952," 12 Vanderbilt L. Rev. 369 (1959).

scholarly sources from which to choose. The dynamics of the military system are explored in military journal articles,[41] but not in academically rigorous fashion.

In several significant areas the law of war has evolved so as to overtake journal articles published during or prior to World War II. In this dissertation an attempt is made to locate authority primarily in recent pieces. But a few contemporary articles reveal a lack of understanding of the military legal system,[42] are overly facile,[43] or exhibit poor legal reasoning.[44]

Any article by W. Hays Parks, Chief of the International Law Branch, International Affairs Division, Department of the Army, merits attention.[45] Probably America's leading law of war expert, he writes knowledgeable, incisive, comprehensive articles on the law of war.

7.2. Law of War Archival Material

In a case study, sources other than the strictly legal are crucial to forming a contextual framework. Where "closed" communities are concerned – police, intelligence, political, or military societies, for example – discovery and acquisition of information can be problematic. Merely knowing what documentation is available is a significant

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[40]Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study"; and: Ploscowe, "The Development of Present-Day Criminal Procedures in Europe and America."

[41]Quinn, both "Some Comparisons Between Courts-Martial and Civilian Practice," and, "The United States Court of Military Appeals and Military Due Process"; Brookshire, "Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction"; Alley, "Determinants of Military Judicial Decisions."

[42]Sutherland, "The Constitution: The Civilian, and Military Justice."

[43]Cox, "The Army, the Courts, and the Constitution: The Evolution of Military Justice."

[44]Paust, "After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts"; Richard C. Johnson, "Unlawful Command Influence: A Question of Balance," JAG Journal March-April 1965, 87; Philip E. Lower, "Operational Law: A Commander's Responsibility," Military Review Sept. 1987, 28 - all three written by judge advocates and published in military journals.

[45]"Command Responsibility for War Crimes"; "Crimes in Hostilities," pts. I and II; and "Air War and the Law of War."

matter; knowing how to locate and secure that closed community's documentation, even more significant.

7.2.a. Military and Civilian Appellate Opinions Many appellate opinions have been referred to and quoted here, the bulk of them military opinions. General courts-martial are federal trials,[46] open to the public,[47] their appellate opinions available in published compilations. Beginning in 1951, when the UCMJ was first implemented, and continuing until 1975, appellate opinions appear in a series of fifty *Court-Martial Reporter* volumes, referred to as "C.M.R.s." CMRs contain appellate opinions of the armed service courts of military review and the military high court, the Court of Military Appeals (COMA). For several years COMA also published its own reports in separate COMA reporters, but that series, now discontinued, is not in general distribution.

In 1975 a new series of reporters, the *Military Justice Reporter*, or "M.J.s," succeeded the CMRs when a new government publishing contract was entered into. The MJs continue to publish most military appellate opinions. Some opinions, considered not of significant interest to the legal community, go unpublished. Copies of unpublished opinions usually may be obtained from the office of the judge advocate general of the armed service involved or, more easily, from the COMA library in Washington, D.C. Some military opinions are important in understanding the law of war as it is enforced in the U.S. armed services.[48]

British and American civilian appellate opinions relating to the law of war require only the usual citations for their location. So, too, opinions of the International

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[46]*Middendorf v Henry.*

[47]Manual for Courts-Martial, 1969, par. 53.e.

[48]*U.S. v Calley* (all three appellate opinions, civilian and military); *U.S. v Griffen*; *U.S. v Keenan*; *U.S. v Schultz.*

Court of Justice and opinions contained in the International Law Reporter.

7.2.b. Marine Corps Court-Martial Records Verbatim records of trial are crucial in relating the Son Thang incident. Records of trial are stored in repositories near Washington, D.C. Access to Marine Corps court-martial transcripts is through the Promulgation Section, Office of the Judge Advocate General of the Navy, in Washington. Presuming the researcher's access to the records system, location of Vietnam-era records still is not assured, however.

To obtain a record the court-martial number, by which records are stored, is required. Court-martial numbers are shown in reported opinions. If the case is unreported, an incomplete, hand-written, Promulgation Office card file must be searched to determine the case number. Even with a case number, many records are unavailable because lost, stolen, or mis-filed. Thus the third, final volume of the *Schwarz* record is lost, with its instructions and exhibits. The *Green*, and *Boyd* records are lost *in toto*.

Having obtained a case number, a request is submitted and forwarded to the repository. Several days later the record may be located and made available.

7.2.c. The Marine Corps Historical Center The MCHC, in Washington, D.C., is a rich archival source, particularly in relation to the Vietnam War. In addition to a large and specialized military library, MCHC holds many Vietnam-era documentary and tactical records. Its Oral History Section maintains hundreds of tape-recorded interviews, many recorded in Vietnam. The interviews of senior officers have been transcribed and bound. The Vietnam War's combat chronologies, and message files of major Marine units, held in the Archives Section, are contemporary records that establish a reliable picture of combat actions more dependable than a participant's recollection. Casualty

records and selected personnel files are available in the Research Section.

Unlike access to court-martial records, which is severely limited even to judge advocates, any researcher may examine and usually photocopy MCHC holdings.

7.2.d. Library Sources Major law libraries hold most of the non-military cases, books, and articles already mentioned. In the U.S. the Library of Congress, in Washington, D.C., is a source of otherwise unavailable books and records. In London, the Institute of Advanced Legal Studies holds many difficult-to-find works.

Specialized libraries in the U.S. also provide important archival material. The libraries of the Court of Military Appeals, the Navy Historical Center, and the Department of Defense (the Pentagon), all in Washington, D.C., and the Marine Corps Command and Staff College, in Quantico, Virginia, were profitably consulted, as was the small library of the International Society for Military Law and the Law of War, in Brussels. The libraries of the U.S. Military Academy, at West Point, New York, and the U.S. Naval Academy, at Annapolis, Maryland, were of lesser help because they contain little unique material. Several of the libraries mentioned require special permission for entry.*

The library of the Army's School of the Judge Advocate General, in Charlottesville, Virginia, is the most complete military law library in the U.S. In addition to its many books, it holds several thousand theses completed by judge advocate graduates of the School's year-long career course in military law. They, too, are excellent sources.[49]

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* Those of West Point, Annapolis, the Pentagon, the Army's JAG School, and the Marine Command and Staff College.

[49] *e.g.*, Williams, "The Army Lawyer as an International Law Instructor: Dissemination of the Conventions"; and Norene, "Obedience to Orders as a Defense to a Criminal Act."

7.3. Unique Law of War Sources

Writer/researchers often bring unique personal experience to their projects, crucial in assembling needed data and gaining access to otherwise closed sources. Such was the instant case.

7.3.a. Military Background The author was a Marine with twenty-three years active service, five as a line officer, eighteen as a judge advocate. One-and-a-half tours of duty were served in Vietnam as a line officer. Marines under his command were charged with offenses in the nature of war crimes – not grave breaches – involving Vietnamese noncombatants. As a judge advocate the author participated in 800 courts-martial and held most of the legal billets described herein.

7.3.b. Previous Writings Besides essays and reviews in the professional journal, *Marine Corps Gazette*, the author researched and wrote the Marine Corps' official history of military law in Vietnam,[50] completed in 1989 while assigned to the Marine Corps Historical Center. That assignment provides an enduring access to MCHC archival material, and opens doors to related sources.

7.3.c. Official Sources The combination of prior writings and a military legal career make official research sources available that might open to others only with difficulty. Preparing an official history, for instance, required contacting all surviving Marine Corps lawyers who served in Vietnam. Many of them were also willing to assist in the present writing. Navy and Court of Military Appeals sources were also opened, as were Pentagon offices, Military Academy and Naval Academy sources.

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[50]Solis, Marines and Military Law.

7.3.d. Unofficial Sources Many participants in the Son Thang courts-martial are friends or former co-workers of the author. Some have gone on to other positions related to military or international law, providing a further-expanded network of sources. Former Marines or judge advocates include the current Chief, International Law Branch, of the Department of the Army; a past Secretary of the Navy; a current board member of the International Society for Military Law and the Law of War; and the current Clerk of the U.S. Supreme Court. All provided material for this dissertation.

Most of the judge advocates and civilian lawyers who participated in the Son Thang courts-martial assisted, as well. Through them previously undiscovered sources emerged, such as the 900-page, verbatim Son Thang Article 32 pretrial investigation, stored in a garage for eighteen years. Article 32 investigations are not retained in official record systems. Photographs, letters, and other documents lost to official archives were similarly located. Unofficial contacts facilitated the loan of records of trial, message and correspondence files, and military records, and individuals were willing to be interviewed regarding usually undiscussed subjects.

In conducting research involving material and records of a specialized nature, such as courts-martial, it has proved a significant advantage to be of the society that produces and employs that material and those records.

CHAPTER 8. SUMMARY, CONCLUSIONS, RECOMMENDATIONS

"We should perhaps not so much complain that the law of war does not work well, as marvel that it works at all."

Geoffrey Best, *Humanity in Warfare*

Were a judge advocate-participant in the Son Thang trials asked how he came to be in that rough combat zone courtroom, trying Marines for multiple murder, he would have thought it an odd question. When members of a U.S. armed force kill noncombatants — or anyone else — Article 118 of the Uniform Code of Military Justice (UCMJ) is violated and prosecution by general court-martial must follow, the military lawyer might have responded. The law of war? Yes, that too is involved, but not, he might say, in an overt way.

It is an indication of the evolutionary process of the law of nations, in a sense demonstrating the inevitability of its maturation and incorporation into the municipal law of modern states, that officers of the court could be the contemporary enforcing agents of the law of war without explicitly invoking it. So fully are aspects of the law of war incorporated into American military law, and the military justice codes of other nations, that its presence may go unnoticed.

In this chapter the events discussed in preceding sections are summarized. From that review, general conclusions are offered. Drawing from the summary and conclusions, recommendations are made to improve future prosecutions of battlefield war crimes committed by both friendly and the enemy forces.

8.1 Summary

Like most law, public international law arose from custom. Custom, along with general principles of law, conventions, judicial decisions, and the writings of scholars, form a body

of jurisprudence around which case law and treaty-made law have developed, forming contemporary international law.

International law has no central law-making authority or inherent enforcement mechanism, those functions necessarily being left to the states embracing the system. Enforcement of international law, if imperfect, is nevertheless tangible, carried out by the political systems that employ that law, it being in the best interests of nations to honor their international obligations. World public opinion, as well as inter-state commercial, economic, and political endeavors, often turn on the observance of international norms.

An aspect of customary international law is its application to individuals in criminal forums. Piracy, slave trade, breach of blockade, carriage of contraband — through custom and state practice, crimes for which an accused is held personally liable under international law, that law enforced by the municipal courts of any nation capturing violators. Such prosecutions are an exception to usual rules of criminal jurisdiction, but the duty of a state to punish such violations of international law is itself a matter of international law. Whether punishment is carried out by application of a state's own municipal law, or directly, without domestic legislation, is left to each state. By either means, it is international law which is enforced.

The criminal prosecution of individuals charged with committing war crimes is an instance of the enforcement of international norms through a state's municipal courts.

8.1.a. War: Its Law, Its Crimes Commencing in the mid-seventeenth century, the rise of modern states brought state-executed war. Today, wars are usually fought for political ends, raising a need for rules pointing to a furtherance, rather than a hindrance of those ends. Unchecked indiscriminate violence would inevitably prevent the political *rapprochement* and realignment that follows war.

Usually, the definition of war crimes is vague, given the wide variety of possible offenses. "Criminal acts against soldiers or civilians of another country," is one definition.[1] "Acts that remain criminal even though committed in the course of war, lying outside the immunity prescribed by the laws of war," is another.[2] The more specific the definition the more clearly like common criminal offenses war crimes sound.

In applying the law of war to individuals, the competence of states to try accused war criminals, including their own nationals, has become accepted customary law. The forum for such trials might be international tribunal, civilian municipal court, or military court – most frequently the latter.

The most notable application of the law of war in recent times, the Nuremberg Trials, were international tribunals. Those Trials were followed by numerous related national tribunals and commissions. Through the less-heralded trials under Allied Control Council Law No. 10, many lower-ranking accuseds were tried for *malum in se,* battlefield war crimes. Other post-World War II war crimes trials included the military commission that tried General Yamashita, found guilty of failure to control his troops and permitting their atrocities.

Although legal opinion remains divided as to the justice of the Yamashita trial and the IMTs, they represent the high-water mark of the law of war. They reaffirmed the validity of international law of war norms and demonstrated that there remains the risk, however remote, of prosecution for war crimes.

In 1949, 58 nations signed four Geneva Conventions pertaining to the wounded, sick, and shipwrecked, to POWs,

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[1]*Handel v Artukovic.*

[2]Taylor, Nuremberg and Vietnam, 21.

and to civilians.[3] One hundred and sixty-five nations have ratified those Conventions, making them "adhered to by more states than any other agreements on the laws of war."[4] The 1949 Conventions remain the clearest statement of today's law of war. The "common articles" of the 1949 Conventions charge signatory states to search for, arrest, and bring to trial those committing the grave breaches defined in the 1949 Conventions — in effect postulating universal criminal jurisdiction of a mandatory character. Most often that entails states employing existing municipal criminal law and institutional machinery in prosecuting grave breaches — military law in the case of the United States, contained in its UCMJ.

In some nations where trial is by court-martial, the charges are brought as violations of the military code involved, without requiring war crime charges *per se*. Such was the case in the trial of four U.S. Marines tried for the murder of sixteen Vietnamese noncombatants in the hamlet of Son Thang, in 1970.

8.1.b. U.S. Forces and the Son Thang Patrol Criminal jurisdiction is usually territorial. Yet throughout the Vietnam War, by U.S.-South Vietnamese agreement, U.S. servicemen charged with murdering South Vietnamese civilians in South Vietnam were tried by U.S. military courts.

The My Lai incident had not yet gone to trial, but came to light three months before the Son Thang incident occurred. It has been argued that the killing of the My Lai victims, citizens of a U.S. co-belligerent, was not a war crime because 1949 Geneva Convention IV, relating to civilians, specifically excludes co-belligerents from its inventory of protected persons. That argument might apply equally to the Son Thang victims. But in both instances the law of war was

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[3]Roberts and Guelff, Documents on the Law of War, 326-31.
[4]Ibid., 169.

violated and grave breaches committed. Were the My Lai and Son Thang captives the enemy, protected by the POW convention? "Should any doubt arise as to whether persons...belong to any of the categories [of POW] enumerated," the Convention reads, "...such persons shall enjoy the protection of the present Convention..."[5] The argument that U.S. forces at My Lai ought reasonably to have considered the Vietnamese villagers to be suspected VC, and protected persons, is compelling in the case of both My Lai Son Thang.

In early 1970, the 1st Battalion, 7th Marines (1/7), part of the 1st Marine Division, was led by a promising but untested commander. The battalion's junior officers were energetic but inexperienced. First Lieutenant Lewis R. Ambort commanded Company B. Ambort was aggressive, cocky, and given to inflating his company's combat reports. On 19 February 1970, a nighttime patrol was formed from Marines of the second platoon of Company B, 1/7. Referred to within the company as a "killer team," the patrol's mission was only vaguely understood, even by those who directed its formation. Essentially, the killer team was to move through the surrounding area, which included the village of Son Thang, hoping to encounter the VC and engage them in combat. The patrol's guiding standard was simply, and erroneously, "anything that moves at night is fair game."[6]

The five-man killer team was led by Lance Corporal Randell Herrod, a combat veteran recommended for award of the prestigious Silver Star medal for previous combat valor. Herrod was also awaiting confirmation of a prior court-martial for unauthorized absence, for which he would shortly be reduced to the grade of private. Patrol leaders were usually noncommissioned officers and Herrod's casual

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[5]Art. 5.

[6]Testimony of battalion commander, Lt.Col. Charles G. Cooper in record of trial, *U.S. v Schwarz*, 290.

selection as leader reflects an odd departure from the standard practice. Apparently he was designated leader because of his experience and because no one more senior had volunteered. Had there been no volunteers a patrol leader would have been appointed — almost certainly a corporal or sergeant.

The other team members included Private Michael Schwarz, a markedly unintelligent individual. Trailing an egregious disciplinary record, Schwarz had joined Company B only five days previously.

Private First Class Samuel Green had served two years civilian confinement before enlisting in the Marines less than six months previously. He had joined Company B only a week before and it was his first combat patrol.

Private First Class Thomas Boyd and Lance Corporal Michael Krichten had unremarkable records. They had been together in the same squad for seven months, the only two patrol members who knew each other before the day of the patrol.

Prior to the killer team's Son Thang patrol Company B, itself on an extended patrol, had been in virtually constant enemy contact. Nine of its number had been killed within the week preceding the Son Thang patrol, another only hours before the killer team was formed. That may account for Lieutenant Ambort's inflammatory guidance to the Son Thang killer team, to "shoot first and ask questions later....Don't let them get us any more," he told them. "I want you to pay these little bastards back."[7]

As darkness fell the patrol approached Son Thang, a hamlet of five or six thatched-roof, bamboo-framed huts. At the first hut they encountered the four occupants were ordered outside. As the Vietnamese, two children and two women, one of them blind, stood before the killer team, one of the women suddenly ran. Herrod shot and wounded her, then

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[7]Testimony of Lt. Ambort, ibid., 348.

ordered Schwarz to "finish her off."[8] At point blank range, Schwarz shot her with his pistol. Herrod then ordered the patrol to kill the remaining three. With only slight hesitation, the patrol opened fire at a range of ten to fifteen feet.

Leaving the four dead Vietnamese where they had fallen, the team moved to a second hut where much the same sequence of events occurred: on Herrod's order, a woman and five children were shot dead by the patrol.

At a third hut six more Vietnamese, two women and four children, were killed, including a child of five or six years, again shot at point blank range by Schwarz at Herrod's order.

There is no evidence of motive or purpose for the killings being voiced by any member of the patrol, either at the time, or later. Court records do not indicate what conversation, if any, transpired during the incident.

Called back to Company B's position, Herrod reported that the killer team had encountered a VC patrol and killed six of the enemy. Lieutenant Ambort, suspecting, if not knowing, the truth, relayed the false report to battalion headquarters, embellishing it by forwarding an enemy weapon captured days before, reporting it captured by Herrod.

The next morning, another patrol discovered the victims' bodies and relayed to battalion headquarters the Vietnamese allegations that Marines had murdered the villagers the night before. As the only unit in that area, Company B was recalled to battalion headquarters and, after written warnings against self-incrimination, the patrol members were questioned. In sworn statements all five reported that they had heard male voices coming from the huts but upon investigation discovered only women and children. While they detained the Vietnamese, the patrol members unanimously said,

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[8]Testimony of LCpl. Krichten, ibid., 286.

they were taken under fire by VC. In returning fire the Vietnamese victims were caught in the crossfire and killed.

Immediately suspicious, the battalion operations officer mounted his own patrol to Son Thang and quickly realized from the location of the bodies and the absence of possible enemy ambush sites that the patrol's account was false. Returning to battalion headquarters, he again advised the patrol members of their rights and asked if they desired to revise their initial statements. Herrod and Green stood by their first statements. Schwarz, however, yielded to questioning and tearfully wrote a lengthy second statement, admitting the criminal actions of the patrol and confirming an absence of enemy fire. He wrote that he had obeyed Herrod's order to fire on the victims. Boyd and Krichten followed with their own similar written admissions. All five were placed in pretrial confinement.

8.1.c. Law of War and Son Thang Trial Issues The acts committed at Son Thang were common war crimes. For hundreds of years wars have been governed, with greater or lesser effectiveness, by rules and laws forbidding such acts. In this century the Treaty of Versailles ending the first world war was the first international effort to try individual war criminals. The resulting Leipzig trials, in which Germany was allowed to try her own citizens for war crimes alleged by the Allies, proved "a farce."[9] But they highlighted issues that were to recur at Nuremberg, and in Vietnam.

As warfare has "matured," ushering in area bombing and mobilization of entire populations, the distinction between civilians and combatants has grown ever more difficult to draw. Today, the civilian-combatant distinction is largely illusory on a strategic level, but remains clear-cut in battlefield situations involving moral choice and criminal intent. The Son Thang civilians, even if considered co-

[9]Wilner, "Superior Orders As A Defense to Violations of International Criminal Law," 134.

belligerent nationals and unprotected persons in terms of the 1949 Geneva Conventions, were not "fair game." If by nothing else they were protected by the criminal law applicable to all U.S. armed service personnel, wherever located. The murder of unresisting, captive women and children, including a blind female and six Vietnamese children under nine years of age, was not without legal remedy.

The Son Thang killings were grave breaches akin to others committed by both sides in the Vietnam War. Assessing the extent of U.S. war crimes in Vietnam is impossible, for many such crimes went unreported and undiscovered. The most reliable indicator, unofficial and perhaps incomplete, reflects seventy-one war-time U.S. court-martial convictions for the murder of Vietnamese noncombatants.[10] Illustrating only one problem of "reliable" statistics, at least one of those convictions, for the murder of a Vietnamese drug dealer, was not a war crime. Statistics relating to lesser law of war offenses are even less authoritative. Ultimately, the number of Vietnam war crimes cannot even be accurately estimated.

A war crimes issue central to two of the Son Thang courts-martial was that of superior orders. Today's U.S. military standard was first enunciated in an 1813 civil case: obedience to superior orders is not a defense if the subordinate knows, or ought to know, that the order is illegal. But under U.S. and British military law, until midway through World War II, the standard was quite different: obedience to orders was an absolute defense, although commanders issuing illegal orders could be punished for their execution.[11] (Ironically, German military law consistently applied the harsher U.S. civil standard.) As the end of the second World War approached and the trial of

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[10]Parks, "Crimes in Hostilities," pt. 1, 18.

[11]War Dept., Rules of Land Warfare, 1914, par. 366; Edmonds and Oppenheim, Land Warfare, par. 443.

German war criminals was considered, the U.S. and Britain revised their law of war manuals to effectively exclude superior orders as a defense to knowingly-committed war crimes.

That rule, contained in the Nuremberg IMT's Charter, was a rule of absolute liability for the commission of war crimes pursuant to orders. In practice, however, the rule was softened by application of a "moral choice," or duress test. In 1956, in its revised *Law of Land Warfare* manual, the stern U.S. position on obedience to orders was eased by injection of a *mens rea* test: the defense of obedience to orders is unavailable unless the accused "did not know and could not reasonably have been expected to know that the act ordered was unlawful."[12] That an individual acted pursuant to orders may be considered in mitigation of punishment, as well.

The subjective element of the defense of superior orders — "did not know" the order's unlawfulness — was central to most U.S. courts-martial involving superior orders in Vietnam. Although much is made of the soldier's difficult position in having to discern the illegal orders from the legal, in fact the problem seldom arises. Most battlefield war crimes are simple *malum in se* offenses displaying illegality as a matter of law — situations recognizable to the dullest layman.

The commander's personal responsibility for ordering war crimes has remained essentially unchanged throughout this century. Commanders who order, or knowingly condone, war crimes may be held criminally liable; not an instance of absolute liability, but an application of a reasonableness test. Applying this standard to the Son Thang case it is apparent that commanders above the company level did not warrant prosecution. It was the five killer team members alone who would face trial for the events at Son Thang, applying the law of war, as well as municipal criminal law.

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[12]Dept. of the Army, The Law of Land Warfare, par. 509.a.

The general court-martial's (GCM's) jurisdictional basis over war crimes is contained in the U.S. Constitution, which gives Congress the right to both punish "offenses against the law of nations,"[13] and to make rules for the government of the armed forces.[14] The UCMJ, which specifically provides for the punishment of war crimes,[15] is federal law[16] enacted by Congress. In application, war crimes by U.S. forces which are also offenses under the UCMJ are charged as those criminal law offenses, rather than as war crimes.

Military justice, once denigrated with some cause, had come far since the initial implementation of the UCMJ in 1951. With its significant 1969 reforms, military justice was further improved and made as fair and just as any common law judicial system. It was that military system that decided the Son Thang cases.

8.1.d. Son Thang Trials and Appeals Eighteen days after being confined, the five Son Thang accused appeared before a joint preliminary inquiry. Over the course of twelve days each accused, represented by appointed military defense counsel, heard the prosecution's probable cause case. Not required to raise a defense or present evidence at that stage, no accused did so. At the investigation's conclusion the hearing officer recommended that the five be tried by GCM, each charged with sixteen counts of premeditated murder.

The first to go to trial was Private Schwarz. Another member of the patrol, Krichten, had been granted immunity in exchange for his testimony. Schwarz, faced with his own handwritten, sworn statement that the patrol had encountered no enemy in Son Thang, and detailing his and his co-actor's conduct there, knew that his best defense was to keep that statement from being entered into evidence. His military

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[13]Art. 1, § 8, clause 10.
[14]Ibid., clause 14.
[15]Art. 18.
[16]Title 10, U.S. Code, ch. 47.

defense counsel argued that because of the strain Schwarz had been under, and the overly-compelling conduct of the battalion's initial investigation, the self-incriminating statement had been improperly coerced. That tack failed and the statement came before the members. Also admitted into evidence over strenuous defense objections were nine color photographs of the dead victims. Krichten's testimony was further damning. Schwarz, taking the stand in his own defense, asserted that the patrol had actually been ambushed and the civilian victims killed in the resulting crossfire directed by Herrod. Unpersuasive in attempting to reconcile that testimony with his contrary written statement, Schwarz was found guilty of twelve counts of unpremeditated murder. Then, after his abysmal disciplinary record was put into evidence, he was sentenced to a dishonorable discharge and confinement at hard labor for life.

The next day, Private First Class Boyd went on trial. Unlike Schwarz, Boyd was represented by a civilian lawyer, appearing without fee. Boyd chose to be tried "judge alone" — without members. Believing the defense of superior orders to be futile, Boyd argued that he had indeed fired, but over the victims' heads. Krichten, the immunized government witness who had been Boyd's squadmate for seven months, surprised the prosecution by corroborating that defense. The military judge acquitted Boyd.

Seven weeks later, Private First Class Green, represented by his military lawyer, was less fortunate. Essentially putting the government to its proof, Green stressed his youth, combat inexperience, and obedience to Herrod's orders to fire. Krichten, again helpful to the defense, testified that Green had fired, but recalled no specific victim being hit by his fire. Despite the erroneous defense testimony of Green's battalion commander that Marines are taught to *always* obey *all* orders, Green was convicted by the members of fifteen counts of unpremeditated murder and

sentenced to a dishonorable discharge and confinement at hard labor for a surprisingly mild five years.

The court-martial of patrol leader Herrod was last to be tried. Represented by two experienced civilian criminal defense lawyers, also acting without fee, the case was heard by a members panel of six officers. Aggressive from the outset, the defense made numerous pretrial motions and vigorously cross-examined the government witnesses. In their case-in-chief the defense postulated that the patrol had been ambushed, and presented evidence of a machine gun captured, they contended, near Son Thang soon after the patrol. Numerous defense witnesses confirmed hearing automatic weapons fire come from Son Thang on the night of the killings. Herrod repeated the story he had consistently held to: the patrol was fired upon by the enemy and the Vietnamese victims were killed in the ensuing crossfire. From pretrial motions to final arguments the prosecuting judge advocates were outclassed by the civilian defense team. Although subsequent juror interviews reveal a deep split in the members' recollections of the evidence, Herrod was found not guilty of all charges.

Following his acquittal he was given his previously-earned Silver Star medal, award of which had been delayed pending the outcome of his trial. He was then returned to the U.S. and honorably discharged to enroll in college.

Six-and-a-half months after the killings, the Son Thang trials were completed, the law of war not having been explicitly raised by either side. But each case had been vigorously prosecuted, with the genuine potential for findings of guilt and imposition of serious penalties — penalties in Schwarz' and Green's cases which were no more or less harsh than those in cases involving the murder of U.S. soldiers by other U.S. soldiers. The victim's nationality was not a factor in the quantum of punishment.

The UCMJ effectively fulfilled its function in identifying and prosecuting those charged with grave breaches

of the law of war. Lacking an international criminal forum, the UCMJ demonstrated its ability to act in the capacity of arbiter and enforcement arm of the law of war.

Upon initial review of the cases, the convening authority mitigated the confinement portions of both Schwarz' and Green's sentences to one year, effectively reducing their imprisonment to time served. The assistant to the convening authority suggests that the reductions were an effort, in light of the two acquittals, particularly Herrod's, to achieve balanced justice. Instead, the reductions raise the question of the overall adequacy of punishment meted out to those convicted of Vietnam war crimes.

Although Schwarz and Green were released from confinement and discharged from the Marine Corps, their cases were forwarded to Washington, D.C. for completion of the military appellate process. The two cases presented similar issues and were similarly decided.

The military appellate court found that the issue of superior orders, contrary to the contention of appellate defense lawyers, had been submitted to the members with sufficient clarity and that, by their verdicts, the members had rejected that defense. Further, the acquittal of Herrod did not raise the doctrine of *res judicata* as to Schwarz and Green; absolving Herrod did not require that they also be acquitted.

A civilian court's 1975 dismissal of Green's collateral attack on his military conviction ended the Son Thang litigation. Soon thereafter, Green shot and killed himself. Schwarz, able to find employment only as a laborer, was last seen in 1987. Herrod dropped out of college, held a variety of jobs and, in 1989, published a fanciful book about his Vietnam experiences.

8.2 Conclusions

The conclusions to be drawn from the Son Thang incident and its subsequent courts-martial are related and are simply stated.

8.2.a. The Law of War is Enforced by Domestic Military Law

As postulated by international legal authorities, particularly since the turn of this century, domestic criminal law can effectively enforce international norms. So also can domestic military law enforce the law of war, including instances where one's own nationals are concerned. Particularly when, as in Son Thang, the offenses involved are battlefield *malum in se* crimes for which international tribunals are unlikely. The laws of war are customary international law, requiring no transfiguration, so rights and duties created by international law and the law of war are directly applicable to individual soldiers through the instrumentality of domestic military law. War crimes are crimes; it is irrelevant whether the charge sounds in law of war or in terms of the military code involved; to execute one is to enforce the other.

8.2.b. The UCMJ is Effective Domestic Military Law

No individual involved in the Son Thang prosecutions indicated a special awareness that he was executing international law of war obligations. When domestic military law and the law of war are coextensive, such an awareness is irrelevant. The UCMJ's incorporation by reference of the law of war is all the jurisdictional grant necessary to transform U.S. military law into law of war, whether or not explicitly acknowledged by those invoking and applying it. The Son Thang courts-martial demonstrate the utility, validity, and practicality of courts-martial in meeting America's obligations under international law and the law of war.

8.2.c. The UCMJ Enforces the Law of War The Leipzig trials illustrate that trying one's own nationals through application of domestic law is not always undertaken in good faith. The Son Thang trials demonstrate that no such assertion can be supported concerning battlefield war crimes committed by U.S. personnel during the Vietnam War. From the initial landing of U.S. troops through their final withdrawal, discovered battlefield war crimes were investigated and vigorously prosecuted.

The Son Thang trials involved virtually every judge advocate assigned to the 1st Marine Division. "Six and-a-half day workweeks, and working at night were routine..."[17] Long hours do not ensure good faith effort, but do suggest a genuine commitment to bring such cases to trial. The manpower expenditure, administrative effort, financial expense, and emotional toll involved in the Son Thang cases reflect the effort to achieve justice. Whether or not one views the results as just, the prosecutions were vigorous and sincere.

8.2.d. American Military Justice: Imperfectly Effective Vigor and sincerity notwithstanding, there are weaknesses in the military justice system where law of war prosecutions are concerned. The Son Thang trials illustrate several of them.

Currently, the personnel implementing the system are those least experienced in its application. Newly commissioned judge advocates, only recently graduated from law school, are those assigned courtroom responsibilities. With seniority and experience they are made administrative or supervisory officers. This makes room for new tyro judge advocates but also perpetuates trial inexperience. In U.S. military courtrooms it is unusual to see a major trying cases; rare to see a lieutenant colonel doing so; a colonel, unheard of. Many junior Marine captains are superior trial

[17]King interview, 5 Nov. 1986.

lawyers, having honed their skills in numerous courtroom contests. But they are not in the majority. It is disquieting to note that the Son Thang accuseds defended by military lawyers were convicted; those defended by civilian lawyers acquitted. In each trial, without exception, every judge advocate representing either the government or an accused was on his first tour of duty and had not tried a case before arriving in Vietnam. A Court of Military Appeals judge urges: "If we get into this situation again, we won't allow inexperienced people to carry the ball. This is an important case — send me your best."[18] There is no provision to do so, however.

Three of the Son Thang accused were discharged either immediately upon acquittal, or after initial review of their trials. Their enlistments had expired while their cases were in progress. Military administrative regulations and judicial opinion[19] provide that one may not be discharged while undergoing disciplinary proceedings. But if war crimes — or any crimes — are discovered after discharge of the suspect, the military loses court-martial jurisdiction and lacks authority to recall suspects to active duty for trial. Lieutenant Calley was only days from discharge when charges against him were signed by a junior Army judge advocate, concerned that Calley might escape military jurisdiction.[20] That potential loss of jurisdiction requires correction.

Since Vietnam, the law of war instruction received by judge advocates has been significantly increased but remains insufficient to create the proficiency necessary to effectively prosecute war crimes, or to recognize their unique issues and defenses. The few hours devoted to the law of war at judge advocate training schools are soon forgotten in the press of more ordinary courtroom encounters. The

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[18]Cox interview, 7 Dec. 1990.

[19]*U.S. v Brown*, 31 CMR 279 (USCMA, 1962); *U.S. v Howard*, 20 MJ 353 (USCMA, 1985).

[20]Hammer, The Court-Martial of Lt. Calley, 31.

several annual refresher courses are available only to a small percentage of judge advocates, with no assurance they will ever have an opportunity to implement the skills gained. Law of war cases, few as they are, call for specialized knowledge applied by a specially trained few.

When battlefield war crimes are again tried, and they assuredly will be, these weaknesses will probably continue, the deficiencies considered too remote and conjectural to require action *today*. Inexperienced judge advocates, having received scant law of war training in the distant past, will again conduct the courts-martial with, one hopes, positive results.

8.3 Recommendations

Several modifications to the U.S. military justice system and military practice would materially enhance the enforcement of law of war and the prosecution of battlefield war crimes. These suggested modifications require a minimum of federal legislation, or change in existing federal law.

One recommendation that might have made a difference if applied in the Son Thang trials involves no more than employment of a tactic already provided for in military law, used in the past but,[21] because of difficulties in its application,[22] is now in disuse: common trials.[23] The Son Thang case was an ideal incident for consideration of such an approach, involving a single act or offense committed by two or more individuals, in concert and in pursuance of a common intent. Though admittedly difficult to control, a common

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[21]*e.g., U.S. v Aikens*, 5 B.R. 331 (1950).

[22]*e.g., U.S. v Petro and Ferrell*, 44 CMR 511 (ACMR, 1971). Common trials are difficult for military judges in terms of control, and difficult for prosecutors in terms of redaction of conflicting written statements, inconsistent pleas, and confrontation issues. See: Manual for Courts-Martial, 1984, Military Rule of Evidence 306; Gilligan and Lederer, Court-Martial Procedure, vol. 1, 248; and *Bruton v U.S.*, 391 U.S. 123 (1969).

[23]Manual for Courts-Martial, 1969, pars. 26.d, and 33.l.

trial is possible in such cases. Other, more substantial changes could make a meaningful difference.

8.3.a. Revise FM 27-10, *The Law of Land Warfare* The basic U.S. law of war manual referred to by units in the field — the guide relied upon by the infantry commander — is Field Manual 27-10, *The Law of Land Warfare*. An Army publication, it is consulted by the Marine Corps, as well.* There are various departmental and service orders on the same subject, but FM 27-10 is held in each battalion Operations Officer's field library and every SJA's office.

FM 27-10 played no direct part in the Son Thang trials. And had its contents been current and more relevant it remains possible that its cautionary guidance regarding noncombatants would have still gone unheeded. But as the sole law of war/international law manual available at the infantry battalion level, it should be as current, comprehensive, and understandable as possible.

The latest in a line of manuals on the subject dating back to 1914, FM 27-10 was issued in July 1956. Since its initial implementation it has seen but one change, in 1976, five pages in length, relating solely to the 1925 Geneva Protocol prohibiting use of poisonous gases and bacteriological weapons. U.S. ratification of that Protocol in 1975 initiated that change.

Since FM 27-10 was issued the 1948 U.N. Convention on genocide, and the 1954 Hague Convention, and Protocol, for the protection of cultural property, all three signed but unratified by the U.S., may well have become customary international law, enforceable against U.S. personnel even without U.S. ratification. The 1977 Protocols I and II, though not ratified, include numerous provisions accepted by the U.S. which are not contained or explained in FM 27-10. The 1977 U.N. Convention on the Prohibition of Military Use

* The Navy and Air Force utilize their own manuals, oriented toward their non-land-bound missions.

of Environmental Modification Techniques, ratified by the U.S. in 1980, goes unmentioned, as does the unratified 1981 U.N. Convention prohibiting or restricting use of certain conventional weapons — some incendiary armaments and booby traps, fléchettes, *et cetera* — considered excessively injurious or indiscriminate.

The post-World War II *High Command* and *Yamashita* cases, the My Lai *Medina* decision, and the 1977 Protocols, with their differing standards on the subject, have muddied the concept of command responsibility. This topic, too, calls for modification of FM 27-10. Any revision should make clear that in today's law of armed conflict there are two aspects to a commander's potential criminal responsibility: that involving individual criminal activity, for instance, through issuance of manifestly illegal orders, as in the Calley case; and that involving a commander's imputed knowledge and nonfeasance: responsibility for a subordinate's criminal misconduct of which the commander knew or should have known, and about which he takes no action, as in the Medina case. It should be made plain that, in the latter type case, the standard employed in Captain Medina's court-martial, requiring that a commander have *actual* knowledge of a subordinate's misconduct, was in error. The correct standard is one of reasonableness: personal criminal liability follows if the commander knew, or was in possession of facts from which he *should* have known of a subordinate's misconduct. Actual knowledge, of course, will also result in liability. (That clarification should be reflected in an amendment to the *Manual for Courts-Martial*, as well.)

Weapons employment is in need of explanation. How valid is the U.S. presumption of legality of any weapon currently in its supply system? Napalm and depleted uranium munitions come to mind.

New means and methods of warfare should be discussed. Is electronic jamming prior to initiating hostilities itself a hostile act? If an enemy radar installation can be

effectively jammed by electronic means when, if ever, is it a law of war issue to instead destroy the installation, killing its occupants? U.S. medical evacuation helicopters currently mount anti-anti-jamming systems. Is that a prohibited offensive use of medically-marked aircraft, or merely a means of enhancing survivability, permitting the aircraft to execute its mission? Are antipersonnel lasers lawful weapons?

Other aspects of the law of war call for inclusion or clarification. Reprisals, for example, remain lawful but the right to order them, as interpreted by the U.S., is retained in the National Command Authority – the Secretary of Defense and the the President. That fact is not reflected in FM 27-10. Targeting, a concept of increased importance, as evidenced in the Gulf War, is unmentioned, as are psychological operations.

Revision of the 1956 field manual was first initiated by the Judge Advocate General of the Army (JAG) in 1974.[24] Sixteen years later, the immediate-past JAG of the Army ruefully admitted, "That was one of my projects five years ago [as Assistant JAG in 1985]: to get that done or to die at my desk. I died at my desk."[25] The Department of the Army's International Law Branch Chief, responsible for the revision, says, "It hasn't been forgotten. For these past five, six years we've been coordinating very closely with our counterparts in Great Britain, Canada, Australia, New Zealand, to come up with a fairly consistent text..."[26] Indeed, the U.K.'s *Manual of Military Law, part III, The Law of War on Land,* also published in 1956, remains unrevised and that fact is directly related to FM 27-10's lack of revision. Yet, as involved and as political as the process may be, revision should already have been completed.

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[24]MGen George S. Prugh, California, to author, London, 8 Jan. 1992.
[25]Suter interview, 11 Dec. 1990.
[26]Parks interview, 12 Dec. 1990.

8.3.b. Plan Multi-Service War Crimes Teams Had U.S. war crimes teams been operating in Vietnam, staffed with experienced judge advocates specially trained in the disposition of such cases, the outcome of the Son Thang trials might have been different.

In February, 1945, a U.S. Army War Crimes Group (WCG) was established in the European Theater of Operations.[27] It grew to a strength of 2,000 personnel, divided into 19 War Crimes Investigating Teams, each team assigned to conduct the investigation and trial of accused enemy war criminals in its assigned geographical area. A senior member recalls that the WCG was hampered by lack of central control of investigative efforts, and a lack of stenographers, investigators, and transportation.[28] Still, by January 1948, the WCG had tried 489 Germans for battlefield war crimes.

A similar War Crimes Division was formed during the Korean War and encountered problems similar to the WCG. Prisoner exchanges and terms of the truce agreement dictated that no trials be conducted.

"The Army spent little time during Vietnam dealing with enemy war crimes. There was no War Crimes Division or...Group, and no war crimes trials."[29] MACV Directive 20-4, Investigations and War Crimes, was directed toward war crimes by either side but, because no enemy accused was in U.S. custody, it was only utilized in prosecutions of U.S. personnel.

Today, the Army has primary responsibility for the trial of enemy war crimes.[30] Army regulations task the JAG with fulfilling that duty.[31] The JAG, in turn, has designated

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[27]Col. Steven F. Lancaster, "Enemy War Crimes: How to Investigate and Prosecute." (Study Project, U.S. Army War College, 1988). Except where otherwise noted, information regarding the War Crimes Group and Division are from this source.

[28]Col. Burton F. Ellis, California, to author, London, 18 July 1991.

[29]Lancaster, "Enemy War Crimes," 26.

[30]Department of Defense Directive 5100.77, DoD Law of War Program, 10 July 1979, par. E.2.f.

[31]Army Chief of Staff Regulation No. 11-2, 7 May 1975.

twenty-two nine-person war crimes teams, to be manned by Reservists in time of war.[32] There are questions, however, as to the practicality of this plan, the training mission of which is worded to reflect direction toward U.S. war crimes rather than those of the enemy, and whose wartime manning level, 198 personnel, is clearly inadequate to the task assigned.

There were more than 200 judge advocates deployed in the Gulf War.[33] Among that number were several teams of Army Reservist judge advocates, assigned to gather evidence of Iraqi battlefield war crimes.[34] The report of their activities remains classified, though an excised, unclassified version is eventually to be released. The preliminary impression is that, pre-existing Army regulations notwithstanding, the teams were *sui generis* and task-organized.

Realistic plans for the prosecution of war crimes must be formalized in advance of hostilities and once formalized, executed as written. Although the Army is responsible for trials, complementary war crime teams should be planned by the Marine Corps, the other armed service for which significant contact with enemy ground forces may be anticipated. Cross-service attachment of Marines to Army teams is also a possibility. Methods of inter-service coordination of teams should be considered, as well.

In the military *milieu*, planning for contingencies not immediately foreseeable seldom receives the most serious consideration. In the case of war crime trial plans, such an approach will only make prosecutions more difficult. At the

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[32]Dept of the Army Regulation 27-1, Legal Services: Judge Advocate Legal Services, 1 Aug. 1984; Regulation 27-1, Legal Services: JAG Service Organizations, 1 Jan. 1981; and FORSCOM Circular 27-87-1, Legal Services: Reserve Component Legal Training Program, 1 April 1987.

[33]Steven Keeva, "Lawyers in the War Room," A.B.A. Journal 52, 54 (Dec. 1991).

[34]Address by W. Hays Parks, Chief, International Law Branch, Dept. of the Army, British Institute of International and Comparative Law, London, 15 April 1991, tape recording, author's collection.

division or brigade level, constant command support for war crime prosecutions is essential.

8.3.c. Provide for Wartime Modification of the UCMJ Today the UCMJ reflects most of the evidentiary and procedural benefits of the U.S. civilian jurisprudential system. But the Vietnam War demonstrated that application of the UCMJ in a combat zone can be accomplished only unevenly and with difficulty.

Many of those most experienced in its expeditionary employment decry the combat zone results:

> [A] consistent source of concern in recent years has been whether the complex procedure-rich system created by the Code can survive in a major combat environment in which transportation of lawyers and judges is difficult or impossible.[35]

"[T]he Uniform Code of Military Justice is not capable of performing its intended role in times of military stress..."[36] "The system does not work, from a military viewpoint....Under no circumstances will it work in an all-out war, as it is now organized."[37] "It's totally unworkable in a combat environment."[38] "We should get some realists to revise the Uniform Code of Military Justice....In wartime you've got to operate on a different basis..."[39] "[T]he law should provide in advance for an automatic change on the outbreak of war from the peacetime procedure to that of wartime."[40]

The UCMJ should incorporate provisions similar the those in British military law allowing for field general courts-

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[35]Gilligan and Lederer, Court-Martial Procedure, vol. 1, 24.

[36]Westmoreland and Prugh, "Judges in Command," 4.

[37]Col. Donald E. Holben, interview by author,13 Oct. 1986, California, tape 6472, Oral History Collection, Marine Corps Historical Center, Wash.

[38]BGen. William H.J. Tiernan, interview by author, 14 Oct. 1986, California, tape 6484, Oral History Collection, Marine Corps Historical Center, Wash.

[39]Col. Joseph R. Motelewski, interview by author, 24 Feb. 1987, North Carolina, tape 6489, Oral History Collection, Marine Corps Historical Center, Wash.

[40]Archibald King, "Changes in the Uniform Code of Military Justice Necessary to Make it Workable in Time of War," 22 Federal Bar J. 49 (Winter 1962).

martial and, under specified, limited circumstances, allow latitude in the application of some evidentiary and procedural rules.[41] British experience demonstrates the practicality of such provisions and, like much of U.S. military law based upon the British example, provides a proven model. The Son Thang results might have been the no different had such modifications been in place in 1970, but those results would have been achieved with substantially equal justice and, one suspects, considerably less difficulty for both the government and the accused.

8.3.d. Establish Jurisdiction Over Ex-service Personnel A commentator notes that,

> A significant number of servicemen involved [in My Lai] were released from active duty between the time the offenses were allegedly committed and the time they were disclosed. Despite there being no statute of limitations for the prosecution of war crimes, these men will not be brought to trial in any court."[42]

Such dispositions are not in accord with the 1949 Geneva Conventions, ratified by the U.S. and having the force of law.

Court-martial jurisdiction does not survive discharge[43] and it is unconstitutional, the Supreme Court has held, to subject civilians — ex-service personnel, for example — to peacetime trial by military courts.[44] At the same time, U.S. civilian courts lack jurisdiction over offenses committed outside the territorial and maritime limits of the United States. The result is a jurisdictional gap through which

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[41]In British military law: Manual of Military Law, pt. I, ch. III, par. 5; Rules of Procedure (Army), 1972, rule 103.(1); and Army Act of 1955, sec. 224.(1)

[42]Kenneth A. Hook, "Jurisdiction Over Ex-servicemen for Crimes Committed Abroad: The Gap in the Law," 22 Case Western Reserve L. Rev. 279 (1971), 301.

[43]*Toth v Quarles*, 350 U.S. 11 (1955). A line of subsequent 1960 cases also excludes civilians accompanying U.S. forces overseas from military jurisdiction: *Kinsella v U.S. ex rel. Singleton*, 361 U.S. 234; *Grisham v Hagan*, 361 U.S. 278; *McElroy v U.S. ex rel. Guagliardo*, 360 U.S. 281.

[44]*Reid v Covert*, 354 U.S. 1 (1957).

former service personnel, their crimes in uniform discovered only after their discharge, may escape.[45]

Schwarz' enlistment would have been completed three-and-a-half months after his court-martial convened; Herrod's enlistment twenty-eight days after his trial began – not lengthy periods, where the trial of serious crimes are involved. The potential escape without trial of servicemen charged with grave breaches because of administrative lapses in jurisdictional authority is unsatisfactory.

It has been suggested, unconvincingly, that federal district courts already have concurrent jurisdiction with military courts over foreign-committed war crimes;[46] that the President, under authority of the UCMJ, could provide for grand jury indictment and trial of ex-service personnel before a military commission;[47] and that military commissions may try former servicemen for war crimes.[48] Each of these suggestions are materially flawed.

U.S. citizens are not immune from foreign trial for crimes committed in a foreign country, and it is constitutionally permissible to extradite U.S. citizens to the situs of such crimes for trial.[49] But the U.S. recognizes no right of extradition absent a treaty.[50] In the case of South Vietnam, there was no such treaty.[51]

Concerning foreign-based U.S. troops, where a crime is cognizable under host country law but military jurisdiction is unavailable, a Status of Forces Agreement (SOFA)

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[45]*In re Lo dolce*, 106 F. Supp. 455 (W.D.N.Y., 1952), a case in which an ex-serviceman escaped trial for murder.

[46]Paust, "After My Lai: The Case for War Crimes Jurisdiction Over Civilians in Federal District Court."

[47]Paulson and Banta, "The Killings at My Lai: 'Grave Breaches' Under the Geneva Conventions and the Question of Military Jurisdiction."

[48]Comment, "Punishment for War Crimes," 1321.

[49]*Neely v Henkel*, 180 U.S. 109 (1901); *Schooner Exchange v McFaddon.*

[50]18 U.S.C. § 3184 (Supp. V, 1970).

[51]Ibid. There are 135 treaties controlling extradition with 81 countries.

automatically vests jurisdiction in the host state.[52] But, though some U.S. civilians were delivered to South Vietnamese authorities for trial, there was no U.S.-South Vietnam SOFA. The Pentalateral Agreement did function as a SOFA in several significant respects, but it lacked the criminal jurisdictional provisions usually contained in that specialized form of agreement.[53]

Great Britain has remedied this legal lacuna, vesting war crimes jurisdiction in her civilian courts.[54] So could the U.S. "There is no reason why jurisdiction to try persons alleged to be guilty of war crimes should be conferred only on military courts or commissions."[55] During Senate consideration of the 1949 Geneva Conventions this gap in U.S. law was noted by the Army JAG and passage of the minimal remedial legislation needed was urged,[56] but the gap continues.

> Congress should enact legislation conferring jurisdiction on the federal courts to try Americans charged with committing serious crimes abroad, particularly ex-servicemen charged with violations of the UCMJ that are not discovered prior to their discharge.[57]

Obtaining foreign witnesses, serving subpoenas, and taking depositions would remain problems but such legislation would at least make it them problems subject to resolution.

A legislative approach is to amend the UCMJ's jurisdictional Article 3 to establish jurisdiction over ex-service personnel in U.S. district courts.[58] If such a

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[52]Hook, "Jurisdiction Over Ex-servicemen," 292-93.

[53]See Lazareff, Status of Military Forces Under Current International Law, First Part, ch. 2, and Second Part, generally.

[54]Geneva Conventions Act, 5 & 6 Eliz. 2, c. 52 (1957). Par 1.(2): "...a person may be proceeded against...in any place in the United Kingdom as if the offense had been committed in that place." Under the Act, conviction of killing a protected person requires mandatory life imprisonment. (Par. 1.(1)(i)).

[55]*Polyukhovich v The Commonwealth.*

[56]Comment, "Punishment for War Crimes," 1320.

[57]Hook, "Jurisdiction Over Ex-servicemen," 296-97.

[58]S. 761, 89th Cong., 1st Sess., similar to a defeated 1956 bill, cited ibid., 299; and Paulson and Banta, "The Killings at My Lai," 354.

revision and resultant statute were mandated by the Congress the modification would take the form of an Presidential Order amending the *Manual for Courts-Martial*, a usual means of revising the Code and the *Manual*, requiring no further action for implementation. Concomitant legislation amending federal court jurisdiction would also be necessary. This approach reportedly has failed in the past due to Department of Justice objections based upon unspecified administrative problems, and Department of Defense concerns regarding extraterritorial service of process. Without having reviewed the hearings at which these objections were raised, they appear surmountable.

To prevent repetition of escapes from trial for grave breaches, legislation is required. The necessary corrective action is not complicated, and is called for by international treaty, and international law.

Coda

"The record is thus very far from perfect. All that can be said is that it is a better record than that of any other nation...and that it lends a degree of credibility to...orders and regulations that aim to prevent and punish war crimes."[59]

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[59]Bishop, Justice Under Fire, 290.

Appendix A

Glossary of Terms and Abbreviations

ABR — Army Board of Review, precursor of ACMR — the Army Court of Military Review. Until supplanted by ACMR, considered appeals of all Army cases. In August 1969, when the *Manual for Courts-Martial, 1969* became effective, ABR became ACMR. Similarly, NBR (Navy Board of Review) became NCMR and AFBR (Air Force Board of Review) became AFCMR.

ACMR — U.S. Army Court of Military Review. See: CMR.

AFCMR — U.S. Air Force Court of Military Review. See: CMR.

Article 32 — In military practice, a pretrial proceeding closely akin to a civilian pretrial hearing; military analogue to the grand jury proceeding. Named for its position in the 140 articles of the Uniform Code of Military Justice, an Article 32 investigation is an open proceeding, foregoing the grand jury's secrecy. An Article 32 investigation precedes general courts-martial. At the Article 32 the government must present sufficient evidence to convince an investigating (presiding) officer that an offense has been committed and that the accused committed it. It is an excellent discovery vehicle for the accused and his counsel, who need present no evidence. Following the Article 32 investigation the investigating officer submits a written report to the convening authority, recommending the further disposition of the case, if any. The recommendation does not bind the convening authority.

BGen. — Brigadier general; a one-star general.

CMA — See: COMA; USCMA.

CMR — Court of Military Review; military appellate court. Each armed service has its own CMR, served by appellate judge advocates and staffed by military judges from its own service. Each CMR has several panels of military appellate judges. The Marine Corps and Navy combine in the Navy Court of Military Review.

Also: the *Court-Martial Reporter*, the series of bound volumes, numbered 1 through 50, previously printed under government contract, in which most military appellate opinions from 1951 to 1977, from all service courts of military review and the U.S. Court of Military Appeals, are published. The *MJ* series of reporters follows the *CMR* series, which ceased publication in 1975 when the civilian publisher's contract expired. See: MJ.

COMA — The spoken term denoting the U.S. Court of Military Appeals. See: USCMA.

Control Council Law No. 10 — One of the series of laws enacted by the military powers in occupation of Germany, following World War II. It provided for trial within the respective German Zones of Occupation of persons charged with crimes recognized in Article II of the Nuremberg Charter.

Convening authority — In military practice, the officer possessing legal authority, under the Uniform Code of Military Justice, to convene a specified type of court-martial. In the case of special courts-martial and general courts-martial, the convening authority also has the power to appoint qualified court personnel and members. Under procedure in effect until 1984, the convening authority took the initial action (review) on the court-martial record of trial before it was forwarded to the court of military review.

FSB — Fire support base; usually given a name which follows the term, *e.g.*, FSB Dotty. In a combat zone, the base serving as the headquarters area of a battalion- or larger-sized infantry or artillery unit, from which elements of that unit are dispatched on combat missions. Usually containing a helicopter landing zone (LZ), FSBs are interchangeably referred to as LZs, using the same name; *e.g.*, LZ Dotty.

FSB Ross — The FSB at which the headquarters element of the 1st Battalion, 7th Marines (1/7), the Son Thang patrol's parent unit, was located. About thirty kilometers south and sixteen kilometers west of DaNang, near Que Son District Headquarters, it commanded much of the Que Son Valley, the scene of heavy fighting.

GCM — General Court-Martial, one of the three levels of court-martial, the other two being the special court-martial and the summary court-martial. The most serious offenses, including war crimes, are tried by general court-martial.

Gen. — General; a four-star general.

GPO — Government Printing Office, the U.S. government organization that prints and binds most official U.S. manuals and books.

IMT — International Military Tribunal.

JA — Judge Advocate. In military practice, an officer who has graduated from an accredited civilian law school, is a member of some state's bar, completed a military legal training course, and been certified by his/her service's judge advocate general as being competent to act as a military lawyer.

JAD — Judge Advocate Division. That section of U.S. Marine Corps Headquarters having oversight of all Marine Corps legal activities, and which has personnel assignment authority (along with the Headquarters personnel section) over legal personnel. Commanded by a Marine Corps brigadier general who has powers and authority akin to the other armed service's judge advocates general (JAGs). The Marine Corps, by federal law a part of the Naval Service, has no JAG, instead looking to the Navy's JAG in those matters that specifically require the action of a JAG, such as the certification of counsel.

Lt.Col. — Lieutenant colonel.

Lt.Gen. — Lieutenant general; a three-star general.

MACV — Military Assistance Command, Vietnam; the U.S. Army headquarters in Saigon that exercised overall administrative command and, to a degree, tactical command of all military units of all armed services in South Vietnam.

Maj. — Major.

MCM — *Manual for Courts-Martial, United States.* The manual containing rules for courts-martial, military rules of evidence and procedure, and reprinting the Uniform Code of Military Justice. Promulgated by the President as an executive order, it has the force of law pursuant to UCMJ Article 36. Versions have been published and made effective in 1951, 1969, and 1984.

Member — In military practice, an individual ordered to hear a particular court-martial case; essentially the same as a civilian juror. At trial, members decide all issues of fact; issues of law are decided by the military judge. Though not required to be, members are usually commissioned officers, unless the accused requests that enlisted members be included on his/her panel, in which case at least one-third of the members must be enlisted personnel. Members are initially selected by an administrative officer on the staff of the convening authority, the selection being ratified by the convening authority by his signature on the completed roster. A minimum of five members hear general courts-martial. There is no statutory maximum number, but usually no more than six or seven constitute a panel.

MGen. — Major general; a two-star general.

Military judge — In military practice, the court-martial trial judge, with powers similar to those of a federal trial-level judge. At trial, the military judge decides all issues of law, rules on motions, and has overall responsibility for conduct of the proceedings.

MJ — either military judge (see above), or the *Military Justice Reporter*, the regularly appearing series of bound volumes printed under government contract, in which most military appellate opinions, those from all service courts of military review and the U.S. Court of Military Appeals, are published. The *MJ* series of reporters follow the *CMR* series, which ceased publication in 1975. See: CMR.

M79 — A 40mm, smooth-bore, single-shot, shoulder weapon resembling a shotgun, designed to fill the gap between a rifle and a mortar. It fires a variety of anti-personnel rounds; *i.e.*, high explosive, tear gas, and buckshot.

NCM — Navy Court-Martial; the term, followed by a number, identifies a particular court-martial in the Navy appellate system. Every Navy and Marine court-martial has an NCM number. *e.g.*, NCM 70-382 indicates the three hundredth and eighty-second case received for action by the Navy Court of Military Review in the year 1970.

NCMR — Navy Court of Military Review, which considers the appeals of both Marine Corps and Navy cases. See: CMR.

NVA — North Vietnamese Army, connoting organized, uniformed, regular enemy troops, as opposed to VC irregulars.

ROEs — Rules of engagement.

SJA - Staff Judge Advocate. The senior military lawyer on the special staff of a division-, or larger-sized, Marine Corps unit. (Wing, or larger, in the case of aviation units.)

SOFA — Status of Forces Agreement.
Trial counsel — In military practice, the term denoting the military judge advocate assigned as court-martial prosecutor in a particular case; the officer of the court who represents the United States. See: JA.

UCMJ — Uniform Code of Military Justice. The basic statute governing military criminal law in the armed forces. Formulated by the U.S. Congress, enacted by the President, and codified in Chapter 47, Title 10, U.S. Code, it is federal law. It includes the military legal system's jurisdictional basis, substantive offenses, and basic procedural structure. First effective in May 1951, it is periodically amended by Congressional action through Presidential Executive Orders. Major modifications have been made effective in August, 1969 and September, 1984.

USCMA — The United States Court of Military Appeals, the highest military appellate court. It considers appeals from all the military services. Established under Article I of the U.S. Constitution, the Court was created in May 1950. It is composed of five civilian judges (three, during the Vietnam War era) appointed by the President of the United States with the advise and consent of the Senate, and sits in Washington, D.C. See: COMA.

VC — Viet Cong; a contraction of the Vietnamese phrase meaning "Vietnamese Communists." The enemy's irregular, often loosely organized guerrilla force, without uniform or distinctive identifying insignia, that operated throughout South Vietnam, including in U.S. bases and cantonments.

1/7 — Common designation for the first battalion of the seventh Marines; pronounced, "one-seven." A regimental-size infantry unit.

Appendix B

The Nuremberg Principles*

1. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

2. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

3. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.

4. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.[1]

5. Any person charged with a crime under international law has a right to a fair trial on the facts and law.[2]

6. The crimes hereinafter set out are punishable as crimes under international law.

a. Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

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* U.N., Yearbook of the International Law Commission, 1950, vol. II, 374.

[1]In 1954, a revised draft of the Principles was submitted to the General Assembly and Article 4 was substantially changed: "The fact that a person charged with an offense defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order." U.N. Gen. Ass. Off. Rec. 9th Sess., Supp. No. 9, at 10 (A/2693) (1954).

[2]Art. 16 of the Charter sets out such procedure.

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

b. War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

c. Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhumane acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

7. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle 6 is a crime under international law.

Appendix C

Military Judge's Instructions to Members on the Issue of Superior Orders

Vietnam-era instruction:*

"...[W]e've had evidence in the case regarding orders by a superior and the legality thereof. The general rule is that the acts of a subordinate done in good faith and in compliance with a supposed duty or order are justifiable. This justification does not exist however, when these acts are manifestly beyond the scope of his authority, or the order was of such a nature that a man of ordinary sense and understanding would know it to be illegal.

"Thus, the acts of a Marine done in good faith and without malice, in the compliance with the orders of a superior...[are] justifiable, unless such acts are manifestly beyond the scope of his authority, and such that a man of ordinary sense and understanding would know them to be illegal. Therefore, if you find beyond a reasonable doubt that the accused, under the circumstances of his age and military experience could not have honestly believed the order issued by his squad leader to be legal under the laws and usages of war, then the killing of the alleged victim was without justification.

"A Marine is a reasoning agent, who is under a duty to exercise judgement in obeying orders to the extent that, where such orders are manifestly beyond the scope of the authority of the one issuing the order, and are palpably illegal upon their face, then the act of obedience to such orders will not justify acts pursuant to such illegal orders."

Instruction in Effect Since 1984:**

"Note 2. If there is a factual dispute as to whether or not the order was lawful, that dispute must be resolved by the members.... The following instruction should be given in cases where the military judge concludes that the lawfulness of the order presents an issue of fact for determination by the members.

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*From *U.S. v Keenan*, 39 CMR 108, 117, fn. 3 (USCMA, 1969), a case in which the accused was convicted of the premeditated murder of an elderly male Vietnamese noncombatant.

**Dept. of the Army Pamphlet 27-9, Military Judge's Benchbook, (Wash.: GPO, 1986), 3-59.

"An order, to be lawful, must relate to specific military duty and be one which the member of the armed forces is authorized to give. An order is lawful if it is reasonably necessary to safeguard and protect the morale, discipline, and usefulness of the members of a command and is directly connected with the maintenance of good order in the services. (It is illegal if (unrelated to military duty)(its sole purpose is to accomplish some private end)(arbitrary and unreasonable)(given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit)(_____).)

"You may find the accused guilty of failing to obey a lawful order only if you are satisfied beyond reasonable doubt that the order was lawful.

"Note 3. If the military judge determines, as a matter of law, that the order was not lawful, he should dismiss the affected specification, and the members should be so advised.

"Note 4. Paragraph 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable."

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