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THE PUNISHMENT OF WAR CRIMES: HAVE WE LEARNED THE LESSONS OF VIETNAM?

by

GUENTER LEWY

When Secretary of the Army Howard H. Callaway in 1974 released the main portions of the report of the Peers Inquiry, the Army's review of the My Lai massacre, he stated:

The release of this report concludes a dark chapter in the Army's history. It is an incident from which the Army has learned a good deal. The lessons have been acted upon. Army training has been revised to emphasize the personal responsibility of each soldier and officer to obey the laws of land warfare and the provisions of the Geneva and Hague Conventions.¹

What are these changes and what is their significance?

Before the uproar caused by the My Lai incident, training in the Geneva Conventions and other provisions of the law of war was often perfunctory. Army Regulation 350-216, dated 28 September 1967, required one hour of instruction during basic training and an annual refresher period. Upon arrival in Vietnam all military personnel received an orientation in the Geneva Conventions and were given four information cards—"The Enemy in Your Hands," "Nine Rules," "Code of Conduct," and "Geneva Conventions"—which emphasized humane treatment of prisoners and noncombatants. Yet the instructional materials used paid little if any attention to war crimes and to the problem of illegal orders.² An order issued in July 1968 by the Commanding General, Fleet Marine Force, stressed the importance of

scrupulous and compassionate conduct toward Vietnamese civilians and of firm but humane treatment of Vietcong captives or suspects, but it did not deal with the duty to refuse unlawful orders.³ During a court-martial resulting from an atrocity killing in which several Marines were involved, the commanding officer of their battalion testified that "in my 20 years of commissioned service, I know of no time period of instruction where an individual Marine was told when he could disobey an order."⁴

The Peers Inquiry found that the training received by the men of Task Force Barker, the unit involved in the My Lai massacre, both during basic training and during in-country orientation, had been deficient with regard to the proper treatment of civilians and the responsibility for reporting war crimes and atrocities.⁵ Nor was this an isolated case. An inspection of US Army, Vietnam in May and June 1969 noted that about half of all personnel had not received their required annual training in the Geneva and Hague Conventions.⁶ At that time, the pressure to achieve body-count and the free use of heavy weapons in populated areas probably made this kind of instruction academic. The Staff Judge Advocate of the US Military Assistance Command, Vietnam (MACV) during the period July 1966 to July 1967 recalls that it was "frustrating to attempt to teach and apply the laws of war in the situation which prevailed there."⁷

The final report of the Peers Inquiry, submitted in March 1970, listed marginal

training in the law of war as a contributory cause of the My Lai massacre. During a press conference held in December 1969, Army Chief of Staff William C. Westmoreland had denied the need to issue any new instructions to the troops serving in Vietnam as a result of that incident.⁸ But the message of the Peers Inquiry was difficult to ignore, and a business-as-usual attitude no longer sufficed. New instructions, issued on 28 May 1970, extended the time required to be devoted to training in the Geneva and Hague Conventions and stipulated that such instruction be given by teams of legally qualified and combat-experienced commanders, "preferably combat arms officers with counter-insurgency experience."⁹ The Army Judge Advocate General School employed such a combined team in completely revising the instructional lesson plan for this training.

Some have viewed the law of war as an unnecessary and unrealistic device that inhibits the combat commander in the accomplishment of his mission. Instruction in this subject generally has been abstract and theoretical. The revised lesson plan issued on 8 October 1970 represents a concerted effort to be practical and to relate instruction to specific types of combat situations encountered in Vietnam. Making this instruction a team effort by legally qualified and combat-experienced commanders was intended to demonstrate the compatibility of the law of war and the realities of actual warfare. The central theme was that observance of the humanitarian conventions regulating warfare "is consistent with the effective conduct of hostilities."¹⁰

Entirely new is a section dealing with illegal orders and the responsibility of the soldier to disobey such orders. It states, in part:

While an American soldier must obey promptly all legal orders, he must also disobey an order which requires him to commit a criminal act in violation of the law of war. . . . An order to execute a prisoner or detainee is clearly illegal. An order to torture or abuse a prisoner to get him to talk is clearly illegal. . . . What about an order to

cut ears off the enemy dead to prove a body count? This order is illegal, too.¹¹

What should a soldier do when given an illegal order such as "Shoot every man, woman, and child in sight"? He should first try to get the order rescinded, but if the person giving it persists, then he has to disregard it. The new section makes it clear that acting under superior orders is no defense to criminal charges. Soldiers are to be instructed:

The lack of courage to disregard an illegal order, or a mistaken fear that you could be court-martialed for disobedience of orders is not a defense to a charge of murder, pillage or any other war crime.¹²

Soldiers are also reminded of their obligation to report all violations of the law of war. If someone in the chain of command above them is allegedly involved in a crime, the soldier can use other channels such as the chaplain or staff judge advocate.

A special appendix deals with the obligations of battalion and brigade commanders. They are instructed to insure that their orders are clear and unmistakable in meaning. An order to "take care" of a prisoner might be interpreted by a soldier as an order to kill the prisoner. Commanding officers must take positive steps to keep themselves fully informed of what their men are doing, and officers who fail to so inform themselves are derelict in their duty:

Faulty staff procedures do not excuse you as a commander from ultimate responsibility. . . . In short, the officer who sees no evil and hears no evil may nevertheless be charged with the knowledge of evil.¹³

Such was the fate of German and Japanese commanders charged, convicted, and executed after World War II. It is an officer's duty to see that the law of war is obeyed. Moreover, brutalities inflicted on noncombatants, and the wanton, unnecessary burning of their homes, generate adverse

world opinion and erode domestic public support for the war effort. Winning over the local population is especially crucial in a counterinsurgency war. In such a setting, "our purpose is not to lay waste to the country as the Romans did to Carthage, and bury its people forever beneath the salted earth." Commanders have to maintain discipline and control over their troops to be able to deal with the strains of combat:

Your men, scared, tired, and having their comrades killed, may not respond entirely rationally unless you, by your bearing and conduct, have previously established the control essential to assure their proper response at the moment of testing.¹⁴

The new instruction plan states that individuals have been convicted for "such violations as beating a prisoner or applying electric shocks, dunking his head into a barrel of water, or putting a plastic bag over his head to make him talk." No American soldier can be allowed to commit such brutal acts. Moreover, "combat experience proves that intelligence secured by torture is unreliable."¹⁵ The same point is stressed in the revised manual dealing with intelligence interrogation, which forbids threats against uncooperative prisoners. Using and carrying out threats constitute "violations of international law and may result in prosecution under the Uniform Code of Military Justice." The inability to carry out threats of violence renders an interrogator ineffective. Threats of force are unwise techniques of interrogation "from both legal and moral viewpoints."¹⁶

Training in the law of war today also employs six color films which portray in a highly vivid and realistic manner the dilemmas faced by men in combat and teach the correct way of handling such situations. Responses to these films are reported to be good. The service academies and officer training schools teach the law of war in a new and provocative way that emphasizes the responsibility of the soldier to disobey plainly unlawful orders. As one participant reports, "few classes go by without dissent which

often reaches considerable magnitude." It is especially difficult "to get to men who have seen atrocities by the enemy."¹⁷

Other lessons drawn from the prosecution of war crimes in Vietnam involve certain basic problems of the system of military justice and of contemporary law enforcement generally. Military courts in the 1960's and early 1970's mirrored the attitudes toward crime and punishment then existing in American society. There prevailed the same tendency to downgrade individual responsibility and to focus instead on underlying causes of crime. Procedural rules made it difficult to obtain convictions, and punishment was often excessively lenient. In July 1971, the Commanding General, US Army Vietnam, complained that the military justice system was seen by many as too "permissive and over-zealous of the rights of individuals." Some military judges were "overly liberal in findings and sentencing," and an "overly stringent interpretation and application of provisions concerning rules of evidence and probable cause" prevailed. Many young military leaders feared that they were not being backed up by the judicial system.

As a consequence, not only can there be reluctance on their part to bring violations to the attention of superiors, but a number of these same young leaders are prone to relaxing their standards and condoning serious breaches of discipline in an effort to "sweep it under the rug."¹⁸

While these remarks had special relevance to the problem of drug abuse and the decline in discipline experienced during the last years of disengagement from Vietnam, they also applied to the broader situation.

At times, charges brought were not commensurate with the seriousness of the offense, and sentences adjudged by courts-martial in Vietnam sometimes were so light as to eliminate any deterrent effect. This fact may well have contributed to an attitude of laxity and indifference regarding war crimes.

For example, during the night of 2 June 1968, two female nurses captured by a company of the Americal Division were subjected to multiple rapes, sodomy, and other mistreatment; the following morning one of the two nurses was killed. The company commander was only 60 feet from the scene of the murder. In the words of the court of review, "If the appellant did not hear the three shots (fired when his troops were not engaged in battle), he must have been intentionally deaf." He also knew what had transpired during the night, as was evident from his remark to one of his men concerning the remaining female detainee: "If she's taken back to the MI [military intelligence] interrogation and she tells what happened in the field we'll all swing for it."¹⁹

The company commander's conduct and his failure to report this atrocity should probably have led to a war-crime charge of being an accessory to rape and murder of a detainee. One of the judges of the court of review cited the words of General MacArthur with regard to the case of Yamashita, which he felt were "shamefully applicable here": "Rarely has so cruel and wanton a record been spread to public gaze."²⁰ At the very least, the captain's disregard of the duty of a commander to properly supervise his men amounted to what the Nuremberg tribunal in the *High Command* case characterized as "criminal negligence"—that is, "personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence." Instead, the captain was charged with and convicted of failing to report the nonbattle death of a detainee and dereliction of duty in failing to protect a female Oriental in the custody of his unit, and he was sentenced to a reprimand and fine of \$2500. In view of his good previous record, the court of review reduced the fine to \$1200. It is difficult to believe that such punishment could have a significant deterrent effect.

The review process mandated by the Uniform Code of Military Justice often further undercut punishment. As in the civilian system of justice, prisoners were often released on parole after serving only

small parts of their sentences. The secretaries of the military services, like governors who wield the power of pardon or commutation, used their legal prerogative to grant clemency. The best-known example of outright political intrusion in the judicial process is probably the conduct of President Nixon and Secretary of the Army Callaway in the case of Lieutenant William Calley. Three days after Calley had been found guilty of three counts of premeditated murder of not less than 22 Vietnamese and had been sentenced to life imprisonment, the President ordered that, pending the outcome of the military review process, Calley would remain under house arrest. On 15 April 1974, the Secretary of the Army reduced Calley's sentence to 10 years. Seven months later Calley was released on parole; of his original sentence of life imprisonment at hard labor he had served 3½ years under house arrest.²¹

The disparity created by the review process between the sentence initially adjudged by the court-martial and the sentence ultimately served is also illustrated by the cases of 27 Marines convicted of the murder of Vietnamese nationals. The average time served by the 12 Marines sentenced to confinement at hard labor for life (for whom full data are available) was 6½ years. In only four of the 27 cases, all involving sentences of five years or less, was the initially adjudged sentence actually served.²² Retribution is not the only, and perhaps not even the primary, purpose of legal punishment. Yet, in view of the viciousness of some of the crimes,

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resulting in sentences of 20 years or more in 18 of the 27 cases, the leniency demonstrated in the review process was bound to lead to complaints that such actions amounted to disregard for the rule of law and weakened the deterrent effect of punishment.

However, history shows the tendency of courts-martial to assess relatively severe sentences so that convening commanders will have the option and opportunity to reduce them during review. Parole action, too, does not appear to have been handled in any unusual way. As of 21 May 1971, 29 Army personnel had been convicted of war crimes in Vietnam, and confinement had been adjudged against 15 of them. Data, available for 13 of these men, show that on the average they served 51.5 percent of their sentences before being released as a result of parole or clemency action.²³ This rate is similar to that of the inmates of federal prisons, who during the fiscal year 1969 served 52.2 percent of their sentences.²⁴ It is well known that civilian parole boards often act as much in response to political pressures and the currents of public opinion as to the severity of the crime or the conduct of the prisoners,²⁵ and the situation was probably no different in the case of servicemen convicted of atrocities or war crimes in Vietnam. In short, in order to account for light sentences and early release on parole for such men there is no need for the hypothesis of the "mere-gook rule," the attitude that the killing of Vietnamese was of little importance because they were only "gooks."

During the last few years public opinion in this country appears to have shifted toward a desire for more severe punishment of criminals. Work release and early parole are less popular. If this trend persists, it too will probably in due time be reflected in the system of military justice. A more punitive attitude toward lawbreakers is, of course, not the only change that may be appropriate in the handling of servicemen involved in war crimes. The more fundamental issue is whether the Vietnam experience calls into question the ability of the military to police its own observance of the humanitarian provisions of the law of war.

The record of the military in this regard is mixed. Investigative agencies such as the Army's Criminal Investigation Division and the Naval Investigative Service appear to have performed in a professional manner. So did, by and large, the services' legal officers—members of the Judge Advocate General's Corps. The difficulties encountered by the judge advocates in the processing of war crimes were often formidable. Security conditions made travel to the scenes of crimes hazardous; the 12-month tour of duty and the reluctance of commanders to relieve men from operations in progress greatly complicated the assembling of all key persons needed for trial; villagers required as witnesses were hard to locate or were dead as a result of combat; offenses at times did not come to light until long after an incident had occurred, and by then principal suspects or witnesses were often no longer subject to military jurisdiction. Yet, the offenses that came to the attention of the judge advocates were generally prosecuted promptly and efficiently.

The real problem for the military system of justice in Vietnam was to get hard evidence of what was going on in the field, for the system of reporting war crimes in effect required commanders to report their own deficiencies; there existed no independent check on the adherence of units in the field to the law of war. Let us take the example of a company commander whose men burned the huts of a hamlet in retaliation for sniper fire received from that hamlet. In order to report this incident as a violation of the rules of engagement and a war crime, the commander would have had to acknowledge that he had been unable to control his men properly. In such a situation it was far more likely that the officer, by seizing on the pretext of family shelters (present in most villages in Vietnam), would report the incident as having taken place in a fortified hamlet, where the burning of the huts was the unavoidable by-product of destroying "enemy bunkers and fortifications." The commander of the battalion, hovering above the scene in his helicopter, would have had to acknowledge that he, too, was not in complete control of

his troops, and so on up the chain of command.

A typical commander probably reacted in much the same way to an incident during a sweep through a hamlet in which a trigger-happy soldier killed a Vietnamese later found to be an innocent villager. Instead of reporting that the poorly disciplined soldier firing the shots had failed to shout the required warning and had killed without military necessity, the platoon leader, under pressure to produce body-count and not anxious to admit the absence of good fire discipline in his unit, would far more likely report the incident as "1 VC suspect shot while evading." Many Vietcong undoubtedly did attempt to escape and failed to heed warnings to stop, but the frequency with which the phrase "shot while evading" appears in after-action reports seems to indicate that the expression was used in other instances as well.

Of course, the act on the part of an officer in covering up for his men was not necessarily a mask for ineffective leadership. In some Vietcong-dominated areas such as the coastal lowlands of Quang Nam and Quang Ngai provinces, for example, where the line between combatants and noncombatants was extremely fuzzy, the nature of the war was such that the soldier, in order to survive, often had to shoot first and ask questions later. Junior officers shared the frustrations and anger experienced by their men and therefore tried to help them when they got into trouble, at times concealing crimes out of loyalty to their men.²⁶

A study of problem areas in Vietnam, prepared for the Army Chief of Staff after the My Lai affair had surfaced, stated:

The number of allegations regarding tactical excesses not all of which can be discounted as deliberate falsehoods, and the relatively small number of reported investigations of such offenses in the field indicate that there have been some gaps in the effectiveness of supervision and correction.²⁷

In late 1969 the Assistant Judge Advocate General of the Army suggested to the MACV

Staff Judge Advocate that MACV open a war crimes office in order to provide fuller surveillance. The Staff Judge Advocate replied on 11 December 1969 that in his view the prevailing system was adequate. No surveillance, he said, could prevent an incident like My Lai unless one were to have observers at the platoon and company levels; no reporting system could be effective unless personnel carried out orders to report such incidents; there thus was no way to prevent individual war crimes and no way to ensure that all were reported. He concluded: "There are clear directives and adequate instruction extant; . . . organized society has exactly the same problems with respect to domestic crimes."²⁸

The inspector general system, among other things, was supposed to serve as a check on the implementation of and compliance with MACV directives. Inspectors general evaluated and recommended corrective action on matters concerning mission performance, discipline, efficiency, and adherence to directives.²⁹ However, inspectors general could conduct investigations only at the direction and request of commanders. In 1972, after investigating the My Lai affair and a series of unauthorized bombings, the House Armed Services Committee concluded:

As long as the Inspector General remains the agent of the commander, acting only upon his direction, and limited by his instructions, this system will fail to reveal incidents which might embarrass the chain of command."³⁰

The record bears out this finding. In July 1968, an inspection of the Americal Division was held, but it failed to detect the My Lai massacre. The unauthorized use of agent Orange by elements of the Americal Division for crop destruction and the unauthorized bombing of North Vietnam in 1971-72 similarly escaped detection by the inspector general. In each case reports were falsified to cover up the violation of directives.

In 1972, Senator Edward M. Kennedy proposed the creation of:

. . . a permanent Military Practices Review Board to advise the Joint Chiefs of Staff on standards and procedures designed to keep U.S. military policies and practices within the bounds of simple humanitarian and international legal obligations, and to monitor the implementation of the rules of engagement governing U.S. armed forces in active combat.³¹

The rules of engagement in Vietnam were generally impeccable, but their implementation by subordinate commands was often poor. Kennedy's suggestion therefore represents a much-needed reform. More recently two Yale Law School professors and a graduate of that school have proposed to vest jurisdiction for the trial and punishment of war crimes in the US District Court for the District of Columbia and responsibility for their prosecution in the Department of Justice.³² This proposal most likely violates constitutional guarantees of trial by an impartial jury of peers and constitutes denial of due process because of the impossibility of compelling the attendance of essential witnesses from other countries. Moreover, it is by no means clear that the record of the system of military justice in dealing with war crimes in Vietnam demonstrates the complete inability of that system to cope with the prosecution of war crimes.

The tension between the exigencies of combat and observance of the law of war has been honestly faced in the revised training materials. Commanders have been put on notice that an attitude of "see no evil and hear no evil" can lead to their prosecution for condoning war crimes. There remains the task of providing an effective supervisory and enforcement mechanism to take the place of the self-policing that worked rather poorly in Vietnam. A small start in this direction was made by the establishment of the Defense Investigative Service on 1 January 1972, which operates under the authority of the Secretary of Defense and can conduct any investigation the Secretary may require. Since 1972 the inspectors general of

the four services no longer report only to their respective military chiefs but also to the civilian service secretaries. A Department of Defense directive issued in November 1974 made the civilian heads of the military services responsible for the prompt reporting and investigation of alleged violations of the law of war by or against members of their respective departments, and responsible as well for periodic review of all programs aimed at preventing violations of the law of war. A primary point of contact in the Joint Chiefs of Staff was established to handle all actions in regard to war crimes.³³

But these reforms probably do not go far enough. It may be necessary to establish a truly independent inspection service, outside of the military chain of command and reporting directly and exclusively to the civilian service secretaries, perhaps analogous to the Pacification Studies Group operated by CORDS (Civil Operations Revolutionary Development Support), the pacification branch of MACV. This group was able to look into any aspect of the pacification effort anywhere, and its reports could be candid and free of bias because it operated outside the regular reporting channels.

Of course no system of inspection can be foolproof, and in the final analysis humane conduct will depend on recognition by the military leadership that violations of the law of war, especially in a counterinsurgency setting, are not conducive to the achievement of military objectives.

NOTES

1. The statement is reproduced in Joseph Goldstein et al., ed., *The My Lai Massacre and Its Cover-Up* (New York: Free Press, 1976), pp. 20-23.

2. See US Department of the Army, *The Geneva Conventions*, Army Subject Schedule 21-18, and *The Hague and Geneva Conventions*, Army Subject Schedule 27-1 (Washington: US Government Printing Office, 20 April 1967).

3. Fleet Marine Force Pacific Order 1610.2A, "Individual Responsibility," 2 July 1968.

4. *U.S. v. Green*, NCM [Navy court-martial] 70-3811, p. 260.

5. US Department of the Army, *Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident, 14 March 1970* (Washington: US Government Printing Office, 1974), I, 4-8, 12-8.

6. *Ibid.*, III, Bk. 1, 317.

7. Letter of Colonel Edward W. Haughney to Captain Robert E. Deso, 22 January 1973, Department of the Army,

Office of the Judge Advocate General, International Affairs Division [see George S. Prugh, *Law at War: Vietnam 1964-1973*, part of the Army's *Vietnam Studies* series (Washington: US Government Printing Office, 1975)].

8. Press conference at Charlotte, N.C., 9 December 1969, cited in *U.S. v. Calley*, 46 CMR [Court Martial Reports] 1131 (ACMR [Army Court of Military Review] 1973), p. 1159.

9. US Department of the Army, *Training, The Geneva Conventions of 1949 and Hague Convention No. IV of 1907*, Army Regulation 350-216 (Washington: US Government Printing Office, 28 May 1970), p. 3.

10. US Department of the Army, *The Geneva Conventions of 1949 and Hague Convention No. IV of 1907*, Army Subject Schedule 27-1 (Washington: US Government Printing Office, 8 October 1970), p. 18.

11. *Ibid.*, p. 10.

12. *Ibid.*, p. 11.

13. *Ibid.*, pp. 15-16.

14. *Ibid.*, pp. 17-18.

15. *Ibid.*, p. 7.

16. US Department of the Army, *Intelligence Interrogation, Field Manual 30-15* (Washington: US Government Printing Office, 1 June 1973), p. 4.

17. Tom Buckley, "The Rules of Land Warfare," *Soldiers* 26 (August 1971), 6-7.

18. CGUSARV to Army Commands, 19 July 1971, US Army Center of Military History.

19. *U.S. v. Goldman*, 43 CMR 77 (ACMR 1970), p. 715.

20. *Ibid.*, p. 716.

21. A federal district court in *Calley v. Callaway*, 382 F. Supp. 650 (1974) had accepted Calley's plea that his rights had been violated by prejudicial publicity, but this judgment was overturned on 10 September 1975 by the US Fifth Circuit Court of Appeals. On 5 April 1976 the US Supreme Court in *Calley v. Hoffmann*, 425 U.S. 911 (1976) denied certiorari.

22. See Table 10-5 in Guenter Lewy, *America in Vietnam* (New York: Oxford Univ. Press, 1978), p. 458.

23. Report of the US Army Judge Advocate General to the White House, 21 May 1971.

24. US Department of Justice, Federal Bureau of Prisons, *Statistical Report: Fiscal Years 1969 and 1970*, Table C-2A, pp. 142-43.

25. David T. Stanley, *Prisoners Among Us: The Problem of Parole* (Washington: Brookings Institution, 1976), p. 68; Marvin E. Frankel, *Criminal Sentences: Law Without Order* (New York: Hill and Wang, 1973), p. 94.

26. See, for example, *U.S. v. Herrod*, NCM 70-2970, pp. 621 ff.

27. US Department of the Army, "Contrast: An Annotated Bibliography (Lessons Learned in Vietnam)," [n.d.], Problem Area: Laws of War; Sub-Area: War Crimes (Deterrence, Detection, and Investigation).

28. Assistant Judge Advocate General Lawrence J. Fuller to MACV Staff Judge Advocate Lawrence H. Williams, 5 December 1969, and reply, 11 December 1969, MACV Historical Documents Collection (on microfilm), US Army Military History Institute, Carlisle Barracks, Pa., film 276.

29. *Conduct of the War in Vietnam* (a report commissioned by the US Army Deputy Chief of Staff for Military Operations, 1971), p. 88.

30. US Congress, House, Committee on Armed Services, Armed Services Investigating Subcommittee, *Unauthorized Bombing of Military Targets in North Vietnam, Report*, 92d Cong., 2d Sess., 15 December 1972, p. 11.

31. US Congress, Senate, Committee on the Judiciary, Subcommittee to Investigate Problems Connected with Refugees and Escapees, *Problems of War Victims in Indochina. Part I: Vietnam, Hearing*, 92d Cong., 2d Sess., 8 May 1972, p. 91.

32. Goldstein et al., p. 11.

33. US Department of Defense, "DOD Program for the Implementation of the Law of War," DOD Directive 5100.77, 5 November 1974.

