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## Prosecuting the "Fog of War?"

Christopher D. Booth

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# NOTES

## **Prosecuting the “Fog of War?”<sup>1</sup> Examining the Legal Implications of an Alleged Massacre of South Korean Civilians by U.S. Forces During the Opening Days of the Korean War in the Village of No Gun Ri**

### ABSTRACT

*In the Fall of 1999, the Associated Press reported a story of an alleged massacre of Korean civilians, conducted by U.S. troops at the beginning of the Korean War in the hamlet of No Gun Ri. The story had an incendiary effect, both in the United States and abroad. The story of an incident from half-a-century ago caused many to reexamine the conduct of American forces in that war, the current security arrangements in East Asia, the U.S.-R.O.K. relationship, and the wisdom and ability of modern Americans to investigate, evaluate, and judge historical events from our current historical and cultural perspective.*

*International law has developed a detailed body of law dealing with war crimes through the Nuremberg Charter and the Geneva Conventions. Prosecution of war criminals by International Tribunals has been nearly non-existent since the end of the Second World War. International law appears to eliminate the defense of “superior orders,” but U.S. military law is not so clear. It seems highly doubtful that the United*

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1. The Prussian strategist of the Napoleonic Era, Karl Von Clausewitz is often credited with introducing the concept of “the fog of war.” The “fog of war” refers to the constant “uncertainty” that develops due to a lack of complete data, inaccurate information, and the frequent “friction” or chaos that results from a partial picture, the rapid pace of modern combat, and the unquantifiable human factors. KARL VON CLAUSEWITZ, *VOM KRIEGE* [ON WAR] 51-53, 75 (O.J. Matthijs Jolles trans., Random House Modern Library Edition 1943) (1832). Clausewitz is considered required reading at all the service war colleges, and his insight has been seen as critical for operational planning by military commanders. In fact, ON WAR “became the Rosetta Stone for the post-Vietnam military.” Col. Harry G. Summers, Jr., *Foreward* to KARL VON CLAUSEWITZ, *WAR, POLITICS, AND POWER: SELECTIONS FROM ON WAR, AND I BELIEVE AND PROFESS*, at ix (Edward M. Collins trans., Regnery Publ’g 1997) (1965).

*States would allow an international body to determine the fates of any accused in this incident.*

*This note seeks to investigate the tangle of U.S. military law, International law, and political calculations that must be considered in developing a solution to the No Gun Ri Massacre. It also reviews the evidence and the on-going investigations as they currently stand. Finally, it offers suggestions for what the government should do if and when it determines that the situation has moved from mere allegations to verifiable facts.*

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### I. INTRODUCTION

Reprehensible conduct by military forces that could be considered criminal and thereby a war crime<sup>2</sup> was an all too common event during the past century, and seems to continue with frequency into this new one. For example, in Chechnya earlier this year, Russian forces apparently undertook a ruse that blatantly violated the Hague Convention,<sup>3</sup> promising Chechen fighters safe passage out of Grozny, but instead directing them into a minefield (apparently killing hundreds) and opening fire on the survivors.<sup>4</sup>

"It would be idle to deny that many incidents of gross and 'grave breaches' of the international law governing conduct in civil and international armed conflicts have occurred since the adoption of the Geneva Convention in 1950.<sup>5</sup> Indeed, outside the *ad hoc* war crime tribunals for the former Yugoslavia and Rwanda, there have been no international attempts to prosecute war criminals.<sup>6</sup> The prosecution of those accused of war crimes have been treated, if at all, by national courts as violations of

2. A war crime "means an act that remains criminal even though committed in the course of war, because it lies outside the area of immunity prescribed by the laws of war." See Telford Taylor, *War Crimes, in WAR, MORALITY, & THE MILITARY PROFESSION* 365, 366 (Malham M. Wakin ed., 1986) (General Telford Taylor served as the American Chief Prosecutor at Nuremberg). For discussion of the laws of war see *infra* notes 202-223 and accompanying text.

3. Convention Respecting the Laws and Customs of War on Land (Hague, IV), Oct. 18, 1907, art. 23, TREATIES & OTHER INT'L AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, U.S. DEPT' OF STATE, PUB. NO. 8407, 631, 648 (1968). Article 23(b) especially forbids forces to "kill or wound treacherously individuals belonging to the hostile nation," and 23(f) forbids the improper use of "a flag of truce."

4. *World News Tonight: Russian commanders say they are in control of Grozny* (ABC television broadcast, Feb. 4, 2000). "The Russians were boasting about what they did." *Id.* "[A general said] We tricked them . . . that[s] how the question of Grozny was solved." *Id.* See also David Hoffman, *New Evidence of Russian Atrocities; Videotape Shows Mass Grave in Chechnya*, THE WASHINGTON POST, Feb. 26, 2000, at A15 ("The videotape showing the mass grave . . . many of whom were bound and tied at the ankles . . . was the latest in a string of claims against Russian troops of war crimes and atrocities in the war against Chechen separatists.").

5. G.I.A.D. Draper, *The Modern Pattern of War Criminality, in WAR CRIMES IN INTERNATIONAL LAW* 141, 159 (Yoram Dinstein & Mala Tabory eds., 1996) [hereinafter Draper].

6. Timothy L.H. McCormack, *From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime, in THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES* 31, 62-63 (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997).

state law.<sup>7</sup> Given the admittedly spotty enforcement of international law or even national law in prosecuting suspected war criminals over the last half century, why has there been such international interest in an incident that if it occurred, took place half a century ago during the opening days of the Korean War?

This paper will attempt to address this question, as well as several others. In Part II, the historical record and the events at No Gun Ri will be scrutinized. Part III will examine the jurisdiction of the military justice system. Part IV will determine whether any crimes were committed at No Gun Ri under U.S. law, and if so, which laws apply. In addition, Part IV will consider the international agreements the United States is party to, and which of these, if any, apply to this incident. Part V will discuss the so-called "Superior Orders" defense, a claim that can be anticipated to be raised in any war crimes trial. Part VI will evaluate the options available to the United States if the Army inspection team currently investigating determines that war crimes occurred. Finally, Part VII will offer this author's conclusions as to what course the U.S. government should pursue, as well as the likely outcome of this controversy.

## II. WHAT HAPPENED AT NO GUN RI?

Before examining the specific legal issues that a newly discovered war crime would present at this time, several questions must be addressed. First, why is there any interest in events that if they occurred, did so some fifty years ago? Upon establishing why such interest exists, we must next examine the events that preceded the apparent massacre. No war crime is committed spontaneously, and any investigation must subjectively evaluate the time, place, manner, and events that led to the breach of national and international law. Having established the context for the incident, the specific details of the episode can be appraised. Finally, this particular event has generated dual investigations by the United States and South Korean governments. The history of previous inquiries and the current explorations will be examined in the conclusion of this section.

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7. Roger S. Clark, *Nuremberg and Tokyo in Contemporary Perspective*, in *THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES* 171, 186-87 (Those national courts have also been asked to act in lieu of other states).

A. *Why Does this Matter, and Why is there Concern  
Half a Century After these Alleged  
Events Occurred?*

Perhaps the primary reason that both the U.S. military and government are interested in determining whether the alleged events occurred, and whether U.S. forces were involved, is that if this massacre took place, it was perpetrated by Americans.<sup>8</sup> This country appears to take its burden of moral leadership as the "world's sole remaining superpower" and most successful democracy seriously, and consequently holds its military (both its leaders and soldiers) to a higher standard of conduct than may be expected of the Russians or others. Additionally, there is the concern that the appearance of a cover-up by the U.S. government could harm our relations with South Korea, or other important allies.<sup>9</sup> The allegations of this war crime have been widely reported by the press of nations friendly to the United States,<sup>10</sup> and have been used for propaganda purposes by the North Koreans<sup>11</sup> and others opposed<sup>12</sup> to the presence of the United States in the region.

8. *Nightline: Secretary of the Army Louis Caldera Discusses Army's Investigation into What Happened at No Gun Ri* (ABC television broadcast, Oct. 22, 1999). Secretary Caldera said the investigation was important because the American government owed the public an explanation of what occurred. *Id.*

9. Transcript: Secretary of the Army Louis Caldera Holds Briefing on Events at No Gun Ri During the Korean War; DEFENSE DEPARTMENT REGULAR NEWS BRIEFING, Washington, D.C. (Federal Document Clearing House Political Transcripts, Sept. 30, 1999) [hereinafter FDCH Transcript].

10. See, e.g., Sang-Hun Choe et. al., *Bridge of Shame*, TORONTO STAR, Sept. 30, 1999, at 1; *U.S. Team Meets Korean-War Massacre Victims*, AGENCE FRANCE PRESSE, Oct. 29, 1999; *Korean War Killing Inquiry*, THE GUARDIAN (London), Oct. 30, 1999, at 17.

11. See, e.g., The Korean Central News Agency (KCNA), <http://www.kcna.co.jp/index/intro.htm> (last visited December 21, 1999) ("The Korean Central News Agency is the one and only state-run agency of the Democratic People's Republic of Korea (DPRK). It speaks for the Workers' Party of Korea and the DPRK government."). A spokesman for the Foreign Ministry of the DPRK claimed that the South Koreans were engaged in a cover-up proving "the South Korean authorities are pro-American flunkeyists and traitors who are not interested in the destinies of the nation and their fellow countrymen. *Id.* The spokesman continued, "[w]e will square accounts with the U.S. for all their crimes against our people and make them pay for the blood." *Id.* Additionally the KNCA reported "mass uprisings" and "demonstrations" on numerous occasions throughout North Korea protesting the alleged massacre, clearly demonstrating the totalitarian regime's intent to use this incident for their own political purposes. *Id.*

12. Calvin Sims, *South Koreans Call on U.S. to Apologize for Killings*, N.Y. TIMES, Oct. 2, 1999, at A6. Protesters at the American military headquarters in Seoul "said violence by United States soldiers in South Korea is not just a thing of the past, but continues today." *Id.* The article also reported on calls for prosecution of the No Gun Ri veterans by "[t]he Rev. Moon Bae Gol, director of a group called the Committee to Stop Crime by the United States Military." *Id.*

The motivation for the U.S. military in getting to the bottom of the events at No Gun Ri likely stems from another incident that occurred eighteen years after these alleged events. The incident, known simply as My Lai, stands as a totem for a mass of horror, recriminations, and distrust between the political leadership, the military, and the public at large.<sup>13</sup> On March 16, 1968, U.S. soldiers engaged in wanton criminal conduct on an appalling scale in which company-sized forces operating in a series of hamlets in the village of Son My killed up to 504 Vietnamese civilians.<sup>14</sup> This shameful incident is viewed as having "stained the honor of the U.S. Army" and has affected senior leadership

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13. If the massacre at No Gun Ri was conducted by Americans it "would rank as the century's second deadliest . . . bloodbath . . . committed by U.S. troops, trailing only the 1968 My Lai massacre in Vietnam, where G.I.s killed up to 500 noncombatants." Mark Thompson, *The Bridge at No Gun Ri: Did Panicky American G.I.s Massacre Korean Civilians at the Beginning of the Korean War?*, TIME, Oct. 11, 1999, at 42.

14. Companies generally consist of three platoons, each of which are made up of between thirty and forty men. See LAWRENCE P. CROCKER, ARMY OFFICER'S GUIDE 480-81 (45th ed. 1990). In the hamlet of My Lai, a platoon led by 2LT William Calley, Jr. is alleged to have killed 347 people. NEIL SHEEHAN, A BRIGHT SHINING LIE: JOHN PAUL VANN AND AMERICA IN VIETNAM 689 (1988). The Criminal Investigative Division of the U.S. Army reported that another 90 villagers were killed at a second hamlet by soldiers in another company of Calley's battalion, also of the American Division that same day. *Id.* Some of the soldiers there that day refused to participate in the atrocities. *Id.* Many were involved in the killing of women, children, and the elderly. *Id.* They raped, beat, and killed some of their victims. *Id.* They destroyed livestock, poisoned the hamlets' wells, and herded many of the Vietnamese peasants into drainage ditches where they were gunned down. *Id.* 2LT Calley was charged with personally killing 109 Vietnamese. *Id.*

Perhaps the only comfort that the military can take in the entire sickening episode was that the investigation of the incident began through a letter written by a recently discharged soldier, Ron Ridenhour. Stanley Bates, *My Lai and Vietnam: The Issues of Responsibility*, in INDIVIDUAL AND COLLECTIVE RESPONSIBILITY 191, 201 (Peter A. French ed., 2d rev. ed. 1998). His conscience would not allow the crime to go uninvestigated. *Id.* Said Ridenhour:

I wanted to get those (responsible at My Lai) people. I wanted to reveal what they did. My God, when I first came home, I would tell my friends about this and cry—literally cry. As far as I was concerned, it was a reflection on me, on every American, on the ideals that we supposedly represent.

*Id.* Similarly, an American helicopter pilot, Warrant Officer Hugh Thompson, Jr., landed at My Lai on March 16, and attempted to intervene and stop the killing. DAVID L. ANDERSON, FACING MY LAI: MOVING BEYOND THE MASSACRE 10-11 (1998). He notified his chain of command about the war crimes he witnessed, and attempted to force an investigation through his report (though it was not acted upon). *Id.* These few examples of personal courage in the face of such evil are used as illustrations in current Army ethical training. *Id.*



decisions,<sup>15</sup> the Army's training,<sup>16</sup> its policies such as the Rules of Engagement,<sup>17</sup> and its culture.<sup>18</sup> This incident has particularly sensitized the military<sup>19</sup> to suggestions of wrongdoing,<sup>20</sup> and it likely helps further explain the interest in fully investigating the No Gun Ri incident, and may even indicate the military investigators' willingness to recommend prosecutions.<sup>21</sup>

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15. RICK ATKINSON, *CRUSADE: THE UNTOLD STORY OF THE PERSIAN GULF WAR 453* (1993). Generals Powell and Schwarzkopf had both served in the Americal Division (the Division responsible for the My Lai massacre) during Vietnam and they had internalized lessons from that failure of leadership. *Id.* They wished to avoid any incident that could possibly be interpreted in such a light, nor did they wish to place "aggressive young troops in proximity with potentially hostile civilians." *Id.* This directly affected their decision-making on the pursuit of the retreating Iraqi Army and destroying it in its retreat. *Id.*

16. Army Reserve Officer Training Corps (ROTC) training follows guidelines set forth in Cadet Command Regulation 145-3 appendix D, as a training guide. Letter from MAJ William R. Anderson, Executive Officer, College of William & Mary, Revolutionary Guard Battalion, Army ROTC, to Christopher D. Booth (Feb. 22, 2000) (on file with author). The program of instruction is currently undergoing revision, but as it now stands cadets must complete six blocks of ethics instruction: Apply Characteristics of Profession of Officer Service, Identify Ways Values Affect Leader Obligations, Comply with Joint Ethics Regulation Requirements, Create a Climate that Fosters Ethical Behavior, Apply the Just War Tradition, and Resolve an Ethical Dilemma. *Id.* Additionally, two blocks of leadership instruction have an ethical component: Enforce EO/Sexual Harassment Program, and Comply with Code of Conduct in Combat Operations and Captivity. *Id.* See also *supra* note 14; see generally MILITARY LEADERSHIP, FM 22-100 (1983); MILITARY PROFESSIONALISM: PLATOON AND SQUAD INSTRUCTION, TC 22-9-1 (1986) (For Army manuals that address these types of issues and training).

17. See generally Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1 (1994).

18. FACING MY LAI, *supra* note 14, at 182 (quoting Gen. Walter Boomer, U.S.M.C.). My Lai is a continuing topic of discussion in the military, and the military believes it can never be forgotten or covered in just a few classes. *Id.*

19. Perhaps the most significant outcome of My Lai was the law of war and its prohibitions against killing noncombatants became a constant consideration in the minds of commanders. Few were likely to disregard the breaches of that law and ignore the moral and legal responsibilities they now understood themselves to carry. And cynics might add, neither would they disregard the career-ending damage a cover-up, once discovered, would wreck.

GARY D. SOLIS, *SON THANG: AN AMERICAN WAR CRIME* 59 (1997).

20. See AL SANTOLI, *LEADING THE WAY: HOW VIETNAM VETERANS REBUILT THE U.S. MILITARY, AN ORAL HISTORY* 119-28 (1993) ("[a]n important element of rebuilding the Army was the integration of the study of ethics and philosophy of leadership in Officer Training Courses").

21. Great criticism was leveled at President Nixon and the U.S. Army for not fully prosecuting those responsible for the My Lai massacre. *Id.* at 12. 2LT Calley was the only soldier convicted of any crimes, and he served a total of four and a half months in a military prison. *Id.* This limited and lenient treatment of those involved was seen by many as a cover-up and a denigration of the military justice system. *Id.*

B. *The Situation Faced by the American Army in Korea During the Initial Weeks of Fighting Was One of Chaos, Lack of Proper Equipment, and Near Panic*

At 4 a.m., on June 25, 1950, forces of the North Korean People's Army (NKPA) crossed the 38th Parallel and began their invasion of the Republic of (South) Korea.<sup>22</sup> By June 30th, President Truman and his advisors concluded that the United States would intervene with "any and all" ground forces required to prevent a communist victory on the Korean peninsula.<sup>23</sup> The Eighth Army, consisting of four U.S. Army divisions conducting garrison duty on the Japanese home islands, constituted the available U.S. ground forces in the region.<sup>24</sup> Conservative estimates put the Eighth Army at only "40 percent combat effective" strength.<sup>25</sup> "The United States, following demobilization from World War II, was in poor shape to go to war, especially in Asia. What postwar planning there had been was for a global, European, nuclear war; to many the development of [nuclear weapons] had [rendered conventional forces] obsolete."<sup>26</sup>

U.S. forces in Japan spent little time on training, and officers were constantly faced with maintaining discipline due to the lax attitude of many of the draftees that made up the occupying

22. DONALD KNOX, *THE KOREAN WAR: PUSAN TO CHOSIN, AN ORAL HISTORY* 5 (1985).

23. CLAY BLAIR, *THE FORGOTTEN WAR: AMERICA IN KOREA 1950-1953* 84-87 (1987).

24. Garrison duty in this case meant providing a U.S. presence in occupied Japan. *Id.* at 88. Soldiers were supposed to conduct training and maintain a combat focus, but generally the forces maintained low readiness with most their time spent on activities such as administration, parades, and other light activities. *Id.*

25. *Id.* "Combat effective" is not defined in this source. In modern Army parlance, however, the concept is taken to be an assessment of the overall training level of the unit, the condition of its equipment (which is further evaluated on the basis of whether it has any "deadline deficiencies" meaning that it fails FM 10-20 standards for being able to perform at a Fully Mission Capable (FMC) level), and the number of personnel it has measured against the number it has assigned in its Modified Table of Organization and Equipment (MTO&E). The author is conversant with this subject having served on active duty as an Army officer in a variety of staff and troop positions in Armor, Cavalry, Aviation, and Headquarters units stationed in Korea, the United States, and the Middle East, from 1994-1998. Those experiences included: the compiling and reporting of unit evaluation reports to Division level headquarters, assignments supervising and commanding Troop level units responsible for the maintenance and upkeep of combat vehicles, the management and accountability of supplies at Troop and Battalion level, and the management of personnel at Troop and Battalion level.

26. SWAFFORD JOHNSON, *HISTORY OF THE U.S. CAVALRY* 181 (1985).

army.<sup>27</sup> The American soldiers were in a "state of psychic disarmament" and were thus not properly prepared for combat.<sup>28</sup> The weapons and equipment they were issued were in many cases inoperable, incompatible with other systems, or in other ways non-functional.<sup>29</sup> For example, the 2.36 inch bazooka used by U.S. troops was described by soldiers as a "piece of failed [World War II] trash" that "gravediggers . . . often found ground up in the bodies of GIs because it could not stop tanks."<sup>30</sup>

The first U.S. forces to see combat were a hastily assembled unit of 400 infantrymen named Task Force Smith.<sup>31</sup> This unit had high morale, and bravely engaged a North Korean armored force in the first U.S. action of the war on July 5th.<sup>32</sup> Task Force Smith suffered from all the problems endemic to U.S. forces as a whole. For example, every 2.36-inch bazooka they fired at the North Korean tanks was either a dud, or bounced ineffectively off of the communist armor.<sup>33</sup> Ultimately, this heroic road-block attempt (facing odds of 20:1)<sup>34</sup> was futile, with the Task Force suffering over 185 men killed, captured, wounded, or missing, while the North Koreans were at the most inconvenienced rather than deterred in their advance.<sup>35</sup> The defeat of Task Force Smith and the attendant rumors "ate like a cancer into the combat morale" of U.S. forces landing in Korea that July, with many soldiers worrying about the effectiveness of their equipment, tactics<sup>36</sup> and chance of success against the NKPA.<sup>37</sup> The

27. Problems included fighting, excess drinking, rampant venereal disease, disobedience of lawful orders, soldiers chronically late for formation, and those who chose to go AWOL (absent without leave). KNOX, *supra* note 22, at 9.

28. Col. Carl F. Bernard, *Commentary, Perspective on Warfare: We were a Speed Bump for the North Koreans. If civilians were massacred at No Gun Ri, it was by untrained and under-equipped U.S. soldiers under brutal assault*, L.A. TIMES, Oct. 8, 1999, at B9.

29. BLAIR, *supra* note 23, at 92. The equipment assigned to the 34th Regiment of the 24th Division, was "a national disgrace." *Id.* "Between 25 and 50 percent of our small arms were unserviceable." *Id.*

30. Bernard, *supra* note 28.

31. KNOX, *supra* note 22, at 13.

32. BLAIR, *supra* note 23, at 101-03.

33. KNOX, *supra* note 22, at 30.

34. Col. David H. Hackworth, *Making the Same Dumb Mistakes*, NEWSWEEK, Oct. 18, 1993, at 43.

35. BLAIR, *supra* note 23, at 103.

36. The Air Force, like the Army, suffered from a similar lack of training and equipment. *Id.* at 99. Close air support (aircraft supporting ground forces) was a low priority in the Air Force. *Id.* Task Force Smith received no assistance from the Air Force, and its lack of preparations showed at the time. *Id.* For example, on July 3, U.S. fighters bombed ROK (South Korean) forces at Pyongtaek and Suwon, destroyed a ROK ammunitions train, the railroad depots at both towns, half of Pyongtaek proper, and 30 ROK trucks. *Id.* Total casualties exceeded 200 friendly forces killed. *Id.*

37. *Id.*

reprehensible situation that these initial forces faced left such a lasting impression on the military<sup>38</sup> that Army leaders of the 1990's preached the mantra of "no more Task Force Smiths."<sup>39</sup>

The first weeks of the Korean War were disastrous for the American forces. The end of the first week's combat found the NKPA having advanced fifty miles, and the U.S. having suffered 3,000 casualties.<sup>40</sup> By July 22, the end of the second week in Korea, the 24th Infantry Division (24th IN) could account for only 8,660 of its 15,965 men.<sup>41</sup> The 1st Cavalry Division (1CD) was hastily assembled aboard a convoy of British and American ships.<sup>42</sup> Initially the Eighth Army planned on using the division for an amphibious landing, but the situation had deteriorated to such an extent that they were disembarked at Pusan, where they pushed forward to relieve the badly mauled 24th IN.<sup>43</sup> There they began to assume blocking positions on July 22.<sup>44</sup> The 1CD was perhaps in poorer shape than the 24th was when it initially deployed to Korea. The division had only 11,000 soldiers of its assigned strength of 18,500, and had lost 750 Non-commissioned officers<sup>45</sup> to fill-out the 24th when that division had first been sent from Japan.<sup>46</sup> Additionally, many considered the division leadership to be "too old" and to have little experience in leading soldiers. Positions on the Division and regimental staffs were

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38. Hackworth, *supra* note 34. Hackworth compares the ambush of the U.S. Army Rangers and Delta Force commandos in the failed raid in Mogadishu, Somalia in 1993, with the disaster of Task Force Smith. *Id.* Hackworth blames the Clinton administration for poor planning, equipment, and leadership. *Id.* Seventeen soldiers died, 77 were wounded, and one was taken prisoner in the Somali firefight. Michael Elliot et. al., *Bloodbath: What Went Wrong? The Making of a Fiasco*, NEWSWEEK, Oct. 18, 1993, at 32.

39. Richard Lardner, *The Glow Is Gone From the Army*, AIR FORCE MAGAZINE, Apr. 1994, at 62. The Army Chief of Staff Gen. Gordon R. Sullivan "is determined that his troops be trained and ready for combat. He preaches that there will be 'no more Task Force Smiths,' a grim reference to the ill-trained and poorly supplied Army unit wiped out in the early days of the Korean War."

40. BLAIR, *supra* note 23, at 115.

41. *Id.* at 141.

42. KNOX, *supra* note 22, at 63.

43. By the second week of the war the 24th Division's own commanding general had been captured by the NKPA, and two regiments had been completely eliminated, with captured prisoners forced to broadcast statements over a captured Seoul radio station. Bernard, *supra* note 28.

44. *Id.*

45. Non-commissioned officers (NCOs) are often called "the backbone of the Army" because of their critical role as leaders at the small unit level. LTC CROCKER, *supra* note 14, at 274-75. These sergeants (and corporals) supervise and direct the enlisted soldiers at the team, squad, and platoon level (granted this is a superficial explanation and NCO's have a role at higher level organizations). *Id.* Additionally, they serve as conduits for the commands of their commissioned officers, and in many cases their greater experience allows them to make valuable suggestions to their officers. *Id.*

46. BLAIR, *supra* note 23, at 157.

considered to be easy “going away presents” for senior officers preparing to retire.<sup>47</sup>

A sergeant in one of the battalions of the 1CD, described the experience of his unit in its first week in Korea:

I lost a lot of kids—snipers, mortars, artillery. By the time we got to Taegu, everybody was either withdrawing, in the hands of the medics, or dead. Taegu had been bombed and shelled and was on fire. There was no transportation for us. Trucks were full up bringing back the dead.<sup>48</sup>

The initial encounters by the division with the NKPA did not go well for the Americans. In heavy fighting<sup>49</sup> the NKPA overwhelmed three of the four infantry battalions of the division engaged on July 25th.<sup>50</sup>

The Second Squadron Seventh U.S. Cavalry (2/7) was a typical battalion in the First Cavalry Division, made up of “green”<sup>51</sup> troops suffering the same problems that the other U.S. forces experienced.<sup>52</sup> With a storied legacy dating back to its service with Gen. George Custer in the 1870’s, through service against Pancho Villa in Mexico, and against the Japanese in the Pacific, the 2/7 was not without its share of glory and historic pedigree.<sup>53</sup> The unit did not acquit itself well when “flung willy-nilly into battle” against the NKPA, where it buckled and began a “chaotic withdrawal” on the 25th.<sup>54</sup> The entire division began to retreat from the North Korean onslaught, and the mood could be characterized as one of panic. Said one soldier, “The feeling was that no one was accountable to anyone. It looked like it was going to be every man for himself, and when the time came, make sure you got your [self] out in one piece.”<sup>55</sup>

47. *Id.* at 159.

48. KNOX, *supra* note 22, at 65.

49. As an example, artillerymen had to resort to fighting off North Korean attackers with their small arms, while firing their artillery pieces on fire missions. BLAIR, *supra* note 23, at 159.

50. *Id.*

51. To be green means “marked by inexperience or immaturity; lacking training, knowledge, or experience.” WEBSTER’S NEW INT’L DICTIONARY 996 (3d ed. 1993).

52. Bernard, *supra* note 28.

53. See generally JOHNSON, *supra* note 26.

54. BLAIR, *supra* note 23, at 159 (quoting the 7th Cavalry’s own historian).

55. KNOX, *supra* note 22, at 68.

C. *The Specific Events that Apparently Occurred  
at No Gun Ri*<sup>56</sup>

It was under these circumstances that the 2/7 Cavalry found itself in a little hamlet known as No Gun Ri. Panicked,<sup>57</sup> missing 119 of its 600 soldiers, and in some cases abandoning their weapons during their first encounter with the North Koreans,<sup>58</sup> the battalion finally regrouped and began to take up defensive positions in the vicinity of the village.<sup>59</sup> The records for H

56. This author has attempted to establish a chronology of the events that occurred based on a variety of secondary sources. Currently the U.S. Army's Inspector General is conducting a formal investigation that is seeking to establish what precisely occurred between July 26 and July 29, 1950. See *infra* notes 107-118 and accompanying text (discussing the ongoing investigation).

Since the original publication of the AP's story, many people have investigated the allegations. The accounts of several of the supposed eyewitnesses have been examined. The story given by Ed Daily, widely quoted in many of the original articles, was spectacularly debunked by the *New York Times*, who determined that he was not in the 7th Cavalry at the time of the event, and had in fact falsified much of his wartime record. See, e.g., Editorial, *No Gun Ri: The Tricks of Memory*, DALLAS MORNING NEWS, Jun. 18, 2000, at 2J; David Hughes, Editorial, *The Massacre That Never Was: Reports of Slaughter of Korean Civilians Don't Stand Up to Closer Inspection*, DENV. ROCKY MOUNTAIN NEWS, Jun. 11, 2000, at 1B.

This author, however, disputes the conclusion drawn by many of those dismissing the existence of a massacre merely through the discrediting of a single witness, or even casting doubt on all of the servicemen's memories. Physical as well as documentary evidence suggest that the events occurred. The South Korean investigators submitted a summary of their initial investigation to the Korean National Assembly. *U.S. Troops Killed Refugees During War, Probe Concludes*, CHI. TRIB., Aug. 18, 2000, at 12. After reviewing "690 documents, tracing] the U.S. military maneuvers, and interview[ing] 140 survivors, relatives and villagers," the investigators concluded that U.S. troops killed a large number of refugees at No Gun Ri. *Id.*

57. General Day, Commander of the 1st Cavalry Division in 1950, wrote in a 1958 report that several 7th Cavalry units, had "behav[ed] badly when they received the order to withdraw . . . [and had become] somewhat hysterical." Michael Dobbs, *Shoot them All; Half a century after the Korean War, members of the 7th Cavalry Regiment had hoped for recognition; instead they are having to account for what happened at No Gun Ri*, WASH. POST, Feb. 6, 2000, (Magazine), at 13.

58. Bernard, *supra* note 28.

The 2nd battalion, an untrained unit, scattered in panic. That evening, 119 of its men were still missing. In this frantic departure from its position . . . the battalion left behind a switchboard, an emergency lighting unit and weapons of all types. After daylight, truck drivers and platoon sergeants returned to the scene and recovered 14 machine guns, nine radios, 120 M-1 rifles, 26 carbines, seven Browning automatic rifles and six 60-mm mortars.

*Id.* (quoting from the official Army history). In this author's opinion, the small arms listed would suffice to outfit a standard infantry rifle company of the time.

59. *Nightline: Investigation Into Why Army Killed South Korean Civilians at No Gun Ri in July of 1950* (ABC television broadcast, Oct. 21, 1999).

Company<sup>60</sup> have not survived, and the entries in the official log of the 2/7 Cavalry are missing for the period from July 26 through July 28, 1950.<sup>61</sup>

Not only did the soldiers of the ICD have the North Koreans to contend with, but their avenues of retreat were being overwhelmed by thousands of South Korean refugees struggling south to avoid the NKPA advance.<sup>62</sup> The movement of these refugees columns created additional logistical difficulties for U.S. troops who needed to move equipment and injured personnel to the rear and bring resupplies forward, and at the same time conduct a retreat while in heavy contact with a determined enemy. At this same time, the North Koreans began to take advantage of the chaos created by the civilians and used them for their own ends as well. Most ominously, the NKPA began to infiltrate artillery spotters and Special Forces troops in these refugee groups in order to get behind the U.S. and ROK forces and attack them from the rear.<sup>63</sup> As early as July 22, an American journalist wrote the following account in *The New York Times*, "The American G.I. is now beginning to eye with suspicion any Korean civilian . . . Watch those guys in white!—the customary peasant dress—is the cry often heard near the front."<sup>64</sup>

The Eighth Army and its divisions began to instruct their units in the harshest terms on how to deal with civilians in their areas of operation. On July 24th the 1CD headquarters issued an explicit order, "*No refugees to cross the front line. Fire everyone trying to cross lines.*"<sup>65</sup> Use discretion in case of women and children."<sup>66</sup> In the unit adjacent to the 1CD, the 25th Infantry Division, the commanding general instructed his forces that all friendly civilians were to be evacuated, and all remaining "civilians seen in this area [were] to be considered as enemy and action taken accordingly" (which was changed by his staff to

60. H Company 2/7 Cav. is the unit that is allegedly responsible for the No Gun Ri massacre. See *infra* notes 81-92.

61. Michael Dobbs & Roberto Suro, *Army Dismissed Massacre Allegation; Koreans Sought Redress for Five Years; Cohen Orders Probe*, WASH. POST, Oct. 1, 1999, at A1.

62. KNOX, *supra* note 22, at 71.

63. *Nightline*, Oct. 22, 1999, *supra* note 8. Sec. Caldera said, "North Koreans did use refugees both to push them out in front of landmines in order to test the ground, did infiltrate them and carry weapons, carry heavy guns in their oxcarts so that they could get behind the retreating US and South Korean forces, and then attack them from the rear." *Id.*

64. Elizabeth Becker, *Pentagon Says It Can Find No Proof of Massacre*, N.Y. TIMES, Sept. 30, 1999, at A16 (quoting Walter Sullivan, N.Y. TIMES, July 22, 1950).

65. Sang-Hun Choe et al., *G.I.'s Tell of a U.S. Massacre in Korean War*, N.Y. TIMES, Sept. 30, 1999 at A16.

66. *Id.*

"considered as unfriendly and shot").<sup>67</sup> Finally, on the morning of July 26, the commanding unit, the Eighth Army, radioed all units along the front with the message: "No, repeat no, refugees will be permitted to cross battle lines at any time."<sup>68</sup>

July 26th found several hundred civilians grouped in the vicinity of the 2/7 defenses. The battalion sent an interpreter and a jeep to instruct the refugees to disperse because they were interfering with the unit's operations.<sup>69</sup> The delegation apparently suffered casualties from sniper fire, and the civilians did not disperse.<sup>70</sup> The Americans were attempting to direct the throng off of the southbound dirt road and onto a parallel railroad track.<sup>71</sup> Civilian and soldier accounts recall that American planes then began to strafe an area where some of the civilians were resting.<sup>72</sup> This attack may have been a mistake due to pilot error, as several veterans suggest that a company commander had requested an air strike against North Korean artillery several miles up the road.<sup>73</sup> Declassified military documents indicate, however, that it was not uncommon for Air Force jets in 1950 to attack groups of Koreans in civilian dress, traveling on the Korean roads, on the suspicion that they harbored enemy infiltrators.<sup>74</sup> Several veterans claim that they had been attempting to direct the civilians when the planes struck, and that they, along with the refugees, immediately sought cover from the attack, although the veterans later slipped out.<sup>75</sup>

The civilians located cover under a railroad bridge, described as an overpass with two large openings, which are twenty-three feet wide, thirty feet high, and eighty feet long.<sup>76</sup> The soldiers in the 2/7 were familiar with the rumors of NKPA soldiers posing as peasants. They were also aware that their commander, a well-respected World War II veteran, had specifically warned Company H to be on the lookout for such a subterfuge.<sup>77</sup> A retiree who served as a lieutenant in the 2/7 at the time remembers that riflemen began to fire upon the refugees as they sought cover in

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67. *Id.*

68. Joseph L. Galloway, *New Light on an Old Atrocity*, U.S. NEWS & WORLD REPORT, Oct. 11, 1999, at 49.

69. *See Nightline*, Oct. 21, 1999, *supra* note 59, for interview with Herman Patterson, veteran of 2/7.

70. *See id.*

71. Sang-Hun Choe et al., *supra* note 65, at A1.

72. *See id.*

73. *See id.*

74. Sang-Hun Choe, et al., *Korean War Documents Say U.S. Jets Hit Civilians*, WASH. POST, Dec. 29, 1999, at A20.

75. Sang-Hun Choe, et al., *supra* note 65.

76. *See id.*

77. Dobbs, *supra* note 57, at 12.



the tunnels.<sup>78</sup> The lieutenant stopped the company's fire and led a Korean boy under the bridge to join the other refugees. He said that in his opinion there were no North Koreans mixed in with the terrified peasants.<sup>79</sup>

That evening, Company H, the heavy-weapons company, was ordered to take up positions and aim their machine-guns at the civilians hiding under the bridge.<sup>80</sup> At some point, someone gave the soldiers the order to fire upon the refugees. Accounts differ, but several veterans suggest that the company commander, CPT Chandler, gave the order, but only after discussing it with the battalion headquarters on the radio.<sup>81</sup> The company may have received orders from the battalion or its higher headquarters that were transmitted by a runner, a situation that would have likely added to the confusion on the battlefield.<sup>82</sup> Who gave the initial order may be difficult to resolve given the intervening years and the deaths of many of the participants.<sup>83</sup>

Some of the 2/7 veterans remember firing in response to muzzle flashes spotted from beneath the darkened railroad arches.<sup>84</sup> Others admit that what they may have seen were bullets fired by Americans ricocheting off of the concrete walls, thus appearing to originate from within the tunnels.<sup>85</sup> Some veterans report that up to half of the company refused to fire or else intentionally fired high.<sup>86</sup> While several veterans claim that they found at least seven North Korean bodies in the tunnels, others deny this, and twenty-four Korean survivors interviewed by the Associated Press individually agreed that there were no NKPA soldiers with them under the overpass.<sup>87</sup>

Korean survivors of the tunnel describe three days and nights of sporadic shooting, with refugees using bodies of dead loved ones as protection from the American bullets.<sup>88</sup> Many of the survivors were permanently disfigured and tell of conditions

78. Sang-Hun Choe, et al., *supra* note 65, quoting Retired COL. Robert M. Carroll.

79. *See id.*

80. *See id.*

81. Charles J. Hanley & Martha Mendoza, *Big Question Remains: Who Cleared Killings*, DENV. ROCKY MOUNTAIN NEWS, Oct. 3, 1999, at 42A.

82. Dobbs, *supra* note 57, at 13.

83. Hanley & Mendoza, *supra* note 81. CPT Chandler died in 1970. *Id.* Other battalion officers were killed during the war. *Id.* The battalion commander, Herbert Heyer, is 88 years old and in poor health, and he denied knowledge of the killings to reporters from the Associated Press. *Id.*

84. Mark Thompson, *The Bridge at No Gun Ri; Did Panicky G.I.s Massacre Korean Civilians at the Beginning of the Korean War?*, TIME, Oct. 11, 1999, at 42.

85. Dobbs, *supra* note 57, at 23.

86. Thompson, *supra* note 84, at 42.

87. Sang-Hun Choe, et al., *supra* note 65.

88. B.J. Lee, *I Still Hear Screams*, NEWSWEEK, Oct. 11, 1999, at 59.

so poor that they were forced to drink from a bloodstained stream that ran through the tunnels.<sup>89</sup> Although most of the H Company veterans deny that they fired on the tunnel for three days, Army records do not show the unit leaving the area until the 29th, which indicates that other units in the battalion may have been rotated in to guard the culverts.<sup>90</sup> Surprisingly, some of the survivors recount U.S. medics treating them after the first day.<sup>91</sup> Exact numbers of casualties have not been determined, but at the time survivors compiled a list of 122 known victims, and many suggest it was as high as 300.<sup>92</sup> Whatever the actual facts are, it is clear that something occurred.<sup>93</sup> The bridge at No Gun Ri still stands, and for "49 years its concrete was deeply scarred by bullets" until September 1999, when railroad workers were instructed to patch the holes.<sup>94</sup> Concerned over allegations of a possible cover-up, Korean officials have since offered to remove the new plaster.<sup>95</sup>

*D. Investigating the Facts: The Current U.S. Investigation,  
as Well as the Korean and U.S. Government Responses  
to the Allegations in the Past*

The investigation over the past half-century of the No Gun Ri incident has been anything but direct. Many of the civilian victims were concerned that they would face reprisals by the military governments that ran South Korea if they came forward with claims.<sup>96</sup> At least one individual attempted to file a claim with the U.S. Military Petitions Office in the 1960s, but missed an application deadline.<sup>97</sup> Another remembers the local police in the 1970s warning villagers not to discuss the incident. One quoted

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89. See Sang-Hun Choe, *Four Scarred Koreans tell of U.S. Massacre*, THE RECORD (BERGEN COUNTY, NJ), Nov. 13, 1999, at A12.

90. Dobbs, *supra* note 57.

91. *See id.*

92. *See id.*

93. Interestingly, the North Koreans apparently discovered the massacre site and published a contemporaneous report on August 2, 1950 to their propaganda officers to publicize the U.S. actions among their soldiers. Sang-Hun Choe & Martha Mendoza, *Captured Papers Reveal U.S. Was Told of Killings*, THE GUARDIAN (LONDON), June 16, 2000, at 22. The American high command had translated copies of the North Korean document "almost immediately after the incident," raising some question today about U.S. claims of having no knowledge at the time. *Id.*

94. Sang-Hun Choe, et al., *supra* note 65.

95. *Korean War Killing Inquiry*, THE GUARDIAN (LONDON), Oct. 30, 1999, at 17.

96. *Memories of Dead Children Fuel Search for the Truth at No Gun Ri*, THE DESERET NEWS (Salt Lake City, UT), Oct. 7, 1999, at A9.

97. *See id.*

a police officer as saying, "If you continue to talk about No Gun Ri, you and your children will be branded as communists."<sup>98</sup>

By 1994, Korean survivor groups felt that the climate had changed sufficiently in their country following the end of power of the authoritarian regimes, and began to petition the South Korean and U.S. governments.<sup>99</sup> A series of denials and rebuffs followed over the next five years.<sup>100</sup> Eventually the allegations came to the attention of the National Council of Churches (NCC) in the United States in December 1998. The NCC was asked by its counterpart, the National Council of Churches in Korea, to request a response from the Pentagon to the civilian allegations.<sup>101</sup> In March 1999, the U.S. Army Center for Military History responded to the NCC request, stating that based on its review of its records "it had found no information to substantiate" the claims of the survivors.<sup>102</sup> The Associated Press [A.P.] picked up wind of the story concerning a possible massacre carried out by U.S. soldiers in the Korean War, and began its own investigation.<sup>103</sup> The A.P. contacted veterans who supported the Korean accounts,<sup>104</sup> and together with the documentary evidence that the Army archives had found to be insufficient (but which in fact corroborated much of the testimony), published an incendiary story on September 30, 1999, which forced the Pentagon to reexamine the case.<sup>105</sup>

U.S. Defense Secretary William Cohen ordered the Secretary of the Army to begin a full investigation of the incident.<sup>106</sup> The South Korean government also began an inquiry of its own.<sup>107</sup> The U.S. Army Inspector General (IG) was delegated the task of

98. *Id.*

99. Michael Dobbs & Roberto Suro, *Army Dismissed Massacre Allegation; Koreans Sought Redress for Five Years*, WASH. POST, Oct. 1, 1999, at A1.

100. *See id.* "In August 1997, a claim signed by the 30 petitioners was filed with South Korea's Government Compensation Committee . . . A lower-level South Korean compensation committee said people were killed at No Gun Ri but it had no proof of American involvement. In April 1998, the national panel rejected the case, saying a five-year statute of limitations expired long ago." Sang-Hun Choe, et al., *supra* note 65.

101. *No Gun Ri Survivors to Meet with Pentagon Officials*, U.S. NEWSWIRE, Nov. 11, 1999.

102. Elizabeth Becker, *Pentagon Says It Can Find No Proof of Massacre*, N.Y. TIMES, Sept. 30, 1999, at A16.

103. Sims, *supra* note 12.

104. *Nightline*, *supra* note 8. The A.P. conducted an 18 month investigation.

105. Dobbs and Suro, *supra* note 99.

106. *Nightline*, *supra* note 59.

107. Doug Struck, *In Korea, a 49-Year-Old Ghost Rises; Seoul and Washington Warily Investigating Massacre of Civilians*, INT'L HERALD TRIB. (Neuilly-sur-Seine, France), Oct. 29, 1999, at 6. Some "are skeptical of the arrangement of dual investigations, in which American officials will research U.S. records and interview former GIs, and South Koreans will delve into the survivors' accounts." *Id.*

conducting the inquiry, and the Secretary of the Army approved a four-phase plan intended to culminate in a written report to the public.<sup>108</sup> The military has established both a website and a toll free number in order to gather information,<sup>109</sup> and members of the IG Review Team have visited the alleged massacre site and spoken with survivors.<sup>110</sup> Secretary of the U.S. Army Louis Caldera anticipates that the investigation will take at least a year to complete;<sup>111</sup> he has also stated that the investigation has been granted extraordinary resources, but that it will not investigate "every firefight, every battle" in which it may be alleged that U.S. soldiers killed civilians.<sup>112</sup>

The Army's Inspector General, Lt. Gen. Michael Ackerman, leads the IG Review Team, but ultimately the team reports to Assistant Secretary of the Army for Manpower and Reserve Affairs, Patrick T. Henry<sup>113</sup>, who is overseeing its progress. Fortunately or unfortunately, depending on one's perspective, the No Gun Ri investigators have several other recent investigations they can rely on as examples. One such study was the examination of "The Mystery of the Hungarian 'Gold Train.'"<sup>114</sup> There, the U.S. government probed<sup>115</sup> the apparent theft of the contents of a trainload of valuables, seized by the Nazis from Jewish victims in Hungary in 1945, and looted by American Forces who captured the train.<sup>116</sup> In addition, the military's Inspectors General have developed procedures to adequately investigate high profile, complex, and politically sensitive incidents in a professional, speedy, and objective manner. The

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108. *Army Outlines Phases of No Gun Ri Review*, ARMY NEWS SERVICE, Nov. 23, 1999, available at <http://www.dtic.mil/armylink/news/Nov1999/a19991123nogun.html> [hereinafter *Army Outline*]. The review incorporates the following phases: Phase I - Preparation; Phase II - Research and Interviews; Phase III - Review and Analysis; Phase IV - Final Report. *Id.*

109. *Id.*

110. THE GUARDIAN (LONDON), *supra* note 95.

111. FDCH Transcript, *supra* note 9, at 8.

112. *U.S. to Limit Its Probe of Korea Claims*, CHI. TRIB., Jan. 10, 2000, at 11.

113. *Army Outline*, *supra* note 108.

114. *Progress Report on: The Mystery of the Hungarian "Gold Train," Draft*, Oct. 7, 1999, available at <http://www.pcha.gov/goldtrainfinaltoconvert.html>. The progress report is a product of the Presidential Advisory Commission on Holocaust Assets in the United States (PCHA). *Id.*

115. *Presidential Advisory Commission on Holocaust Assets in the US, Commissioners*, available at <http://www.pcha.gov/commissioners.htm> (last visited Dec. 20, 1999). Interestingly, Asst. Sec. Henry who is supervising the No Gun Ri investigation also served on the Gold Train panel himself. *Id.*

116. Michael Dobbs, *Tarnished Gold; U.S. Report Says G.I.'s Liberated, Then Looted Nazi Train Carrying Assets of Hungarian Jews*, WASH. POST, Oct. 15, 1999, at A23.

investigation of the Tailhook Naval Convention is one such contemporary example.<sup>117</sup>

### III. U.S. JURISDICTION FOR PROSECUTION OF CURRENT AND FORMER ARMED SERVICES MEMBERS FOR CRIMINAL CONDUCT

The usual ubiquitous "Pentagon sources" have expressed differing opinions as to whether or not the United States would consider granting immunity to the U.S. veterans.<sup>118</sup> Some suggest that the military does not intend to allow "wrongdoing [to be] overlooked"<sup>119</sup> and is still considering criminal prosecution. The ability of the U.S. government to bring charges is not clear-cut, and the myriad of issues surrounding a criminal indictment make it a highly complex problem. This note will first examine the jurisdictional issues and then review the legal basis for any charges to be brought.

#### A. *Military Courts Have Sole Jurisdiction Over Armed Forces Members During Wartime, Whether in Friendly or Hostile Territory Outside the United States*

A pistol shot fired by a Union soldier in the "insurgent" state of Tennessee<sup>120</sup> during the closing days of the United States Civil War rings down through history to reach us today. Corporal Pryor Coleman, Company G, 1<sup>st</sup> Tennessee Cavalry Volunteers,<sup>121</sup>

117. See OFFICE OF THE INSPECTOR GEN., THE TAILHOOK REPORT (St. Martin's Press 1993) [hereinafter REPORT]. The Tailhook Association Convention was a yearly symposium conducted by;

a private, nonprofit social/professional organization of naval aviators, contractors, and others involved in naval aviation, [that had] hosted an annual professional conference at the Las Vegas Hilton for decades. The U.S. Navy ha[d] consistently provided significant support and cooperation to the conference and to the Association. While the quality and usefulness of the conference has been unchallenged, the social or 'party' aspects of the conference have been growing increasingly out of control in the years before 1991.

*Id.* at vii.

It was this atmosphere that apparently led to gross misconduct by many of the participants that attended the 1991 conference, conduct which included sexual harassment, assault, and battery of female aviators attending *Tailhook* as well as civilians who were in many cases unconnected to the Conference. See *id.* at 16-17.

118. Paul Richter, *Deal Weighed in Korean War Slaying Probe*, L.A. TIMES, Oct. 23, 1999, at A1 (explaining that "Pentagon officials . . . are considering granting an unprecedented blanket immunity.").

119. *Id.*

120. *Coleman v. Tennessee*, 97 U.S. 509, 517 (1878).

121. Amended Plea, *The State of Tennessee v. Pryor Coleman* § 21, Transcript of Record *Coleman v. Tennessee*, 97 U.S. 509 (1878) (7 Otto 361-564)

and an accomplice were stationed in the U.S. Military District of East Tennessee, with forces occupying territory in Knox County, in the vicinity of Knoxville.<sup>122</sup> His accomplice, Rufus Chamless,<sup>123</sup> was formerly a resident of the area and apparently hit upon a plan which the two set off to execute, following the consumption of some alcohol at a local still house.<sup>124</sup> At some time between 9 and 10 p.m., March 7, 1865, the two stopped at the farmhouse of Phillip D. Bell, who was then in his sixties.<sup>125</sup> Upon gaining admission to the house, Chamless barred the door and the soldiers demanded money and threatened to kill Mr. Bell if he did not pay them five hundred dollars.<sup>126</sup> Eventually, the situation turned violent and Coleman began to pistol-whip Mr. Bell.<sup>127</sup> Miss Mourning Ann Bell, Bell's youngest daughter, intervened and attempted to prevent further blows.<sup>128</sup> Witnesses explained that Coleman then fired his pistol into Miss Bell's face at point blank range such that "the bullet went in from appearance, about the nose of the face and came out at the back of the head"<sup>129</sup> and "there was blood splattered on the underside of the barrel, just beyond the cylinder."<sup>130</sup> The two intruders then attempted to burn down the house,<sup>131</sup> and failing to do so, fled the scene. Coleman was arrested on March 9th,<sup>132</sup> and found guilty by a military court-martial on May 9, 1865.<sup>133</sup> Although sentenced to hang, the punishment was never carried out. Consequently, the State of Tennessee brought criminal charges on October 2, 1874.<sup>134</sup>

The U.S. Supreme Court overturned the state conviction<sup>135</sup> in *Coleman v. Tennessee*, holding that the murder was solely a matter for the military courts.<sup>136</sup> The court stated that where American forces are engaged in combat, whether in the "enemy's

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*microformed on U.S. Supreme Court Records and Briefs (Scholarly Resources, Inc.) [hereinafter Pryor microfilm].*

122. *Id.* para. 19, at 10.

123. *Id.* para. 37, at 14.

124. *Id.* para. 37, at 14-15.

125. *Id.* para. 41-42, at 16.

126. *Id.* Another witness claimed the amount was \$300. *Id.* para. 39, at 15.

127. *Id.* para. 41, at 16.

128. *Id.*

129. *Id.* para. 37, at 14 (Testimony of J. C. S. Bell, who saw the victim after the shooting). Bell was the brother of the deceased, and interestingly the prosecutor of Coleman. *Id.*

130. *Id.* para. 43, at 16.

131. *Id.* para. 42, at 16.

132. *Id.* para. 21, at 10. Chamless was killed attempting to avoid arrest for his part in the murder. *Id.* para. 43, at 17.

133. *Coleman*, 97 U.S. at 511.

134. *Id.* at 510, 511.

135. *Id.* at 519.

136. *Id.* at 520.

country"<sup>137</sup> or conducting operations in a "friendly country,"<sup>138</sup> the military court system has exclusive jurisdiction to bring criminal prosecutions against its members.<sup>139</sup>

Military jurisdiction does not, however, extend equally to all current and former servicemen, regardless of their military status. Those on active duty are without question subject to the Uniform Code of Military Justice (UCMJ),<sup>140</sup> whereas the law differs with respect to the various classes of former members of the armed services.

#### B. *Retirees and Reservists May be Tried by a Military Court-Martial*

Retirees are generally defined as those with a minimum of twenty years service, who receive retirement pay and benefits.<sup>141</sup> In *Pearson v. Bloss*,<sup>142</sup> the U.S. Air Force Court of Military Review upheld the government's authority to bring charges against a retiree for violations of the UCMJ.<sup>143</sup> Furthermore, the court held that retirees are members of the "land or naval forces" and consequently of the military status subject to trial by court-martial.<sup>144</sup>

The recent case of *Willenbring v. Neurauter* found reservists to be in a similar category,<sup>145</sup> subject to military court-martial. In *Willenbring*, the defendant initially served on active duty, but following the completion of his enlistment, he joined the Army Reserve.<sup>146</sup> While serving as a reservist, the defendant was ordered to active duty in order to stand court-martial for rapes he allegedly committed during his period of active duty.<sup>147</sup> The Court of Appeals for the Armed Forces held that Congress intended for the military to maintain jurisdiction over reservists,

137. *Id.* at 517. Tennessee was considered "enemy" country as it was a Confederate state during the "rebellion." *Id.* at 509, 510.

138. *Id.* at 516 n.1.

139. *See id.* at 520. *See also* 24 Op. Att'y Gen. 570, 574 (1903) ("[W]hen armies of the United States are in hostile territory, and . . . engaged in actual warfare, the jurisdiction of such [military] tribunals over such offenses is exclusive . . .").

140. UNI. CODE OF MIL. JUST. art. 2(a)(1) (1950), 10 U.S.C.A. § 802 (West 1998) ("The following persons are subject to these articles . . . all persons belonging to a regular component of the armed forces . . .").

141. *See generally* CROCKER, *supra* note 14, at 457-66.

142. *Pearson v. Bloss*, 28 M.J. 764 (A.F.C.M.R. 1989). An Air Force enlisted man, who retired after 20 years of active service, was convicted of a variety of larcenous offenses, for stealing military property both before and after his retirement. *Id.* The Court of Military Review upheld the right of the government to subject the defendant to a court-martial. *Id.*

143. *Id.* at 766.

144. *Id.* at 768.

145. *See generally* *Willenbring v. Neurauter*, 48 M.J. 152 (C.A.A.F. 1998).

146. *Id.* at 154.

147. *Id.* at 154-55.

and that the prosecution of Willenbring by a military court-martial was entirely in line with case precedence, legislative intent, and the UCMJ.<sup>148</sup>

C. *Those Discharged Following Completion of their Military Service Do Not Fall Within a Military Court's Jurisdiction*

There is a significant body of law concerning those accused of committing crimes during their time in service, but who are no longer serving in the military. In December 1900, during the American occupation of the Philippines that followed the Spanish American War, Captain (CPT) Brownell, Commander D Company, 26th IN, U.S. Volunteers, ordered and supervised the administration of torture to Father Augustine de la Pena, the parish priest of Dumangas, on the island of Panay.<sup>149</sup> This attempt to gain information on the Filipino insurrection resulted in the priest's death.<sup>150</sup> Elihu Root, Secretary of War, sought to court-martial Capt. Brownell for the murder of Father de la Pena, but the officer had been discharged from military service in the interim.<sup>151</sup> Secretary Root requested an opinion from the United States Attorney General<sup>152</sup> as to the legality of trying him by court-martial.

Attorney General Knox responded that *Coleman* was applicable<sup>153</sup> so only a military court would have jurisdiction over CPT Brownell's conduct in a war-zone, but that this authority was no longer valid given the officer's discharge.<sup>154</sup> Knox cited *Dow v. Johnson*<sup>155</sup> for the proposition that for the "preservation of liberty" and the protection and efficiency of the Army "in service in the field," it is essential that soldiers be only subject to military law.<sup>156</sup>

As with the Army, the Navy<sup>157</sup> could only bring charges against a sailor for violations of the Articles for the Government of

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148. *Id.* at 159-60. The court held that Article 2(d) of the UCMJ was specifically drafted to allow the military to maintain jurisdiction over reservists and others listed. *But see id.* at 170, 174 (stating that Congress did not intend for Article 2(d) to apply to those who had completely terminated their service (those in discharged status) because the legislature was concerned with not disturbing the jurisprudence of *Toth* and *Hirshberg*). *See infra* notes 160-91 and accompanying text for discussion of *Toth* and *Hirshberg*.

149. 24 Op. Att'y Gen. 570 (1903).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 571.

154. *See id.* at 574.

155. 100 U.S. 158 (1879).

156. 24 Op. Att'y Gen. at 574 (quoting *Dow*, 100 U.S. at 166).

157. 31 Op. Att'y Gen. 521, 527 (1919) (citing Articles for the Government of the Navy, REVISED STATUTES, tit. 15, ch. 10, art. 14).



the Navy while he remained in the service.<sup>158</sup> The U.S. Supreme Court affirmed this principal in *Hirshberg v. Cooke*, a case arising out of actions that occurred during World War II.<sup>159</sup> Hirshberg was a Navy enlisted man who was serving his second enlistment, when, in 1942, he was captured on Corregidor by the Japanese.<sup>160</sup> It was alleged that during his time as a prisoner of war, Hirshberg mistreated two other sailors were working under his charge.<sup>161</sup> Hirshberg was eventually freed, and his enlistment ended March 26, 1946. He re-enlisted for an additional four years, but from March 26 to March 27, he was honorably discharged from the previous enlistment until the new one took effect.<sup>162</sup> Sometime in 1947, the Navy learned of the alleged mistreatment and brought charges against Hirshberg,<sup>163</sup> which resulted in his conviction by a court-martial.<sup>164</sup> The sailor claimed that the Navy lacked jurisdiction to prosecute him for actions that occurred before his discharge. Ultimately, his case reached the U.S. Supreme Court.<sup>165</sup> The Navy argued that Hirshberg was "continuously 'in the Navy' except for an interval of a few hours"<sup>166</sup> and therefore jurisdiction over him would be proper.<sup>167</sup> The Supreme Court rejected this argument out of concern that the duration allowing military jurisdiction between service and discharge might be stretched into a constitutionally dubious argument if they established such a precedent in this case.<sup>168</sup>

Prior to the *Hirshberg* case, the government apparently accepted that the military's court-martial jurisdiction over former service members ended upon their completion of service.<sup>169</sup> This principle was followed until the adoption of the UCMJ, with the exception of frauds committed against the government by former service-members, over which Congress had already granted military court-martials continuing jurisdiction.<sup>170</sup> Until the adoption of the UCMJ which attempted to codify a uniform law

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158. *Id.* at 521.

159. United States ex rel. *Hirshberg v. Cooke*, 336 U.S. 210 (1949).

160. *Id.* at 211.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 212.

165. *Id.*

166. *Id.* at 213.

167. *See id.*

168. *See id.*

169. *Id.* at 217.

170. Articles of War 94 of 1948, reprinted in COL. FREDERICK B. WIENER, THE UNIFORM CODE OF MILITARY JUSTICE: EXPLANATION, COMPARATIVE TEXT, & COMMENTARY 232 (1950).

among all the services, the various services had their own disciplinary laws.<sup>171</sup>

In revising the Military Code, Congress attempted to remedy the jurisdictional issue that *Hirshberg* presented by drafting a section of the UCMJ to cover this situation.<sup>172</sup> UCMJ Article Three confirms the military's jurisdiction over service members regardless of a change of status if the crime occurred while subject to the UCMJ.<sup>173</sup> This provision has been upheld as it pertains to reservists,<sup>174</sup> but it was quickly challenged in *Toth v. Quarles* as it applied to those service members who were discharged.<sup>175</sup>

On the night of September 27, 1952, Airman Robert Toth, who was stationed at an Air Force logistics depot in Tageu, Korea, during the Korean War,<sup>176</sup> allegedly shot and killed a male Korean national.<sup>177</sup> Accounts vary, but apparently while serving as Sergeant of the Guard,<sup>178</sup> Toth was alerted that a sentry had apprehended a drunk Korean male in the vicinity of the depot's

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171. *Id.* at 1.

172. Uniform Code of Military Justice, Article 3(a), 70A Stat. 38 (1956) (current version at 10 U.S.C.A. § 803(a) (1998)). For a discussion of the application of the UCMJ to the facts of the No Gun Ri incident, see *supra* notes 94-100 and accompanying text.

173. *Id.* Article 3: Jurisdiction to try certain personnel. *Id.* 3(a) "Subject to the provisions of Article 43" [Statute of limitations] "any person charged with having committed, while in a status which he was subject to this code" [Article 2: Persons Subject to the code—including active duty personnel, reservists during training, retired personnel, others listed] "[a felony] shall not be relieved from amenability to trial by courts-martial by reasons of the termination of said status." *Id.*

174. See *Willenbring v. Neurauter*, 48 M.J. 152, 160 (C.A.A.F. 1998).

175. 350 U.S. 11 (1955).

176. See BLAIR, *supra* note 23, at 59, 975. The Korean conflict began June 25th, 1950 with the North Korean invasion of South Korea, and ended with the Armistice (which is still in force, as there has been no official peace treaty ending the war) on July 27, 1953. *Id.*

177. Return and Answer to Rule to Show Cause, Respondent, *Toth v. Quarles*, 350 U.S. 11 (1955), *microfiched* on U.S. Supreme Court Records and Briefs, card 1 of 7 (Microcard) [hereinafter Return and Answer].

178. Twenty-four hours a day, military headquarter units (at battalion, brigade, division, etc.) maintain a Staff Duty Officer (SDO), and a Staff Duty NCO to be on call for emergencies, maintain radio communications, conduct security checks, and relay information (among other duties). During non-duty hours or times in which the primary staff is not available the Duty Officer often has to make critical decisions and supervise the unit's status until proper commanders have been notified. Units (generally company or platoon level units) performing security at perimeters, depots, motor pools, etc., appoint a Sergeant of the Guard to supervise, check up on, and maintain the guard shifts that are performing the security function. The Sergeant of the Guard generally is required to periodically update the SDO, and is to contact him in the event of an emergency. (Information on general military practice is provided by the author, who served as SDO on numerous occasions while stationed in the United States, as well as forward deployed in Korea.)

bomb dump.<sup>179</sup> He loaded the suspect into a jeep and transported him to Air Police Headquarters; en route they scuffled.<sup>180</sup> After he contacted the officer on duty, Toth was allegedly instructed to return the man to where he was apprehended and shoot him.<sup>181</sup> While sentries were generally allowed to shoot trespassers in secure areas, the facts of this case suggest that the decision to do so was highly questionable.<sup>182</sup> Airman Toth completed his term of service and was discharged on December 8, 1952.<sup>183</sup> The Air Force investigated the incident, and five months later military police arrested Toth at the steel mill he was working at in Pittsburgh and flew him to Korea to face a court-martial.<sup>184</sup> The Air Force believed that the new UCMJ gave them proper jurisdiction over Toth.<sup>185</sup>

The Supreme Court strongly rejected the Air Force's argument because the justices were concerned that such jurisdiction would allow an Article I military panel to supersede the Constitutionally granted judicial function of the Article III courts.<sup>186</sup> The Air Force suggested that the current law created a legal loophole by which ex-servicemen must be tried either by a court-martial or escape prosecution entirely.<sup>187</sup> Justice Black found this argument to be without merit and recommended that any jurisdictional deficiency that existed due to this holding could be remedied by Congressional action granting federal district courts the right to try former military members in such cases.<sup>188</sup> To date, such a solution has not been crafted. It is in this status that the jurisdictional issue has remained, with Congress

179. Affidavits in the Designation of Record, *Toth v. Quarles*, 350 U.S. 11 (1955), microfiched on U.S. Supreme Court Records and Briefs, card 2 of 7 (Microcard).

180. *See id.*

181. *See id.*

182. *See id.* Toth suggested that the Lieutenant was "out to get glory," and that apparently the unit was commended for its handling of security. *Id.* There is no evidence in the record that Toth was ordered to commit the crime by the duty officer, but the author would suggest that another possible motive for any such order would have been a desire for simplicity, to send a message of seriousness, and the concern that "civilians" trespassing were actually saboteurs, a concept that in wartime could easily lead to lethal solutions.

183. Return and Answer, *supra* note 177.

184. *See Toth*, 350 U.S. at 13.

185. *Id.* *See supra* note 172 and accompanying text.

186. *Toth*, 350 U.S. at 14-15.

187. *Id.* at 20-21.

188. *Id.* at 21.

seemingly willing to accept this loop hole<sup>189</sup> and recent case law consistently applying *Toth*.<sup>190</sup>

D. *With Jurisdiction Over Retirees Preserved by  
Military Courts and Eliminated for those  
Discharged, an Equal Protection Claim is  
Suggested, But Would Likely be Found  
to be Invalid*

Under the current case law, military retirees may be court-martialed for crimes they committed during their military service.<sup>191</sup> Other soldiers in the retiree's unit, with whom they may have shared a foxhole, along whose side they may have fired their weapon, who may have been fully complicit in the commission of a crime or even given the orders for others to commit, may avoid military jurisdiction due to their status as discharged rather than retired.<sup>192</sup>

From a cursory glance, it may appear that those who fall under military jurisdiction would have an equal protection claim against prosecution. How is it that they may be subject to prosecution for crimes they committed in wartime service, and their neighbor who was involved in the same crimes is not, merely through the seemingly arbitrary distinction of having a different military status? Case law suggests that courts have found this argument to have little or no merit. What this argument appears most similar to is an equal protection claim based on selective prosecution.<sup>193</sup> The Fifth Circuit perhaps best stated the law's view of such a defense when it said: "It has never been held that

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189. See, e.g., *Willenbring v. Neurauter*, 48 M.J. 152, 170 (C.A.A.F. 1998). The federal law has been crafted to remain consistent with both *Toth* and *Hirshberg* regarding those whose "military status [had] completely terminated." *Id.*

190. See *Willenbring*, *supra* notes 145-48, 189; *Smith v. Vanderbush*, 47 M.J. 56, 59-61 (C.A.A.F. 1997). *Vanderbush* held that the Army could not maintain court-martial jurisdiction over a soldier that it had discharged, even though it had begun court-martial proceedings before his discharge from the service. Had the Army acted to "flag" the soldier's records, and prevented his administrative discharge the service could have maintained jurisdiction over the service-member. See *id.* at 61.

191. See *supra* notes 141-48 and accompanying text.

192. See *supra* notes 149-90 and accompanying text.

193. See *Wayte v. United States*, 470 U.S. 598, 608 (1985). Selective prosecution claims are to be judged in accordance with standard equal protection criteria. Plaintiffs must "show both that the passive enforcement system had a discriminatory effect and "a discriminatory purpose." *Id.* *Wayte* involved a challenge to the prosecution of the petitioner for failing to register for the draft with the Selective Service System as being selectively discriminatory. The Court held that the prosecution of only those that made their failure to register a public act of disobedience, and of those who in doing so ignored repeated government requests to properly enroll in the program (such as petitioner), did not constitute an equal protection violation. *Id.*

one who is guilty of a crime cannot be punished merely because others equally guilty have not been prosecuted or convicted."<sup>194</sup>

The situation in which retirees are prosecuted and those discharged are not can be analogized to a similar circumstance in criminal law. It is no defense to claim that one cannot be prosecuted in the jurisdiction merely because others have left the jurisdiction and either cannot be located or else brought into the locale. In this situation, the retirees remain in the military's jurisdiction, while those who were discharged have left it.<sup>195</sup>

IV. IN A PROSECUTION OF THE 2/7 CAVALRY VETERANS  
FOR THE ALLEGED WAR CRIMES COMMITTED AT NO GUN RI,  
WHAT U.S. LAWS WOULD HAVE APPLIED TO THEIR  
BEHAVIOR? ADDITIONALLY, AS THE UNITED STATES IS A  
SIGNATORY TO MANY INTERNATIONAL AGREEMENTS AND  
CONVENTIONS, WHICH OF THESE MAY PROSCRIBE AND  
ADDRESS THE CRIMINAL CONDUCT OR "WAR CRIMES"  
ALLEGED TO HAVE BEEN COMMITTED IN THIS CASE?

Section III of this note established the proposition that in all likelihood the military would only have jurisdiction over those veterans of the No Gun Ri incident who retired from the service.<sup>196</sup> Were the U.S. Army to attempt to bring charges against these retirees, a significant issue would arise over what law would apply to their conduct. The military has its own body of law that could conceivably apply, beginning with the Articles of War, the criminal statutes which the UCMJ replaced.<sup>197</sup> International Law also provides some law that may apply to the retirees' conduct. The Status of Forces Agreement (SOFA) between the United States and the Republic of Korea governs the jurisdiction of the U.S. military and the Korean national courts in the prosecution of American service-members accused of wrongdoing while serving in Korea.<sup>198</sup> Finally, the international community has developed a body of law and custom specifically regarding the laws of war and war crimes in the Geneva Convention and its additional protocols,<sup>199</sup> as well as through

194. *Saunders v. Lowry*, 58 F.2d 158, 159 (5th Cir., 1932). A selective prosecution equal protection claim suggests that the law is not applied equally, and that only certain persons face prosecution. *Id.*

195. *Cf. supra* notes 193-94 for the analogous situation of selective prosecution.

196. *See supra* notes 141-95 and accompanying text.

197. The applicability of the UCMJ is detailed *infra* notes 225-28 and accompanying text.

198. The SOFA is discussed *infra* at notes 242-74 and accompanying text.

199. *See infra* notes 286-318 and accompanying text.

prosecutions conducted by international tribunals in accordance with the Nuremberg Charter.<sup>200</sup>

A. *The Law of Land Warfare*<sup>201</sup>

During the Civil War, the U.S. Army began to consider codifying rules on how war was to be conducted,<sup>202</sup> and on April 24, 1863, it published its first manual prescribing the laws of war in General Orders 100: *Instructions for the Government of Armies of the United States in the Field*.<sup>203</sup> The manual laid the framework for the conduct of the U.S. Army in its dealings with prisoners of war, civilians, and protection of civilian property.<sup>204</sup> The period prior to World War I saw perhaps the greatest number of international conventions, agreements, and charters designed to ensure peace or minimize the horrors of war.<sup>205</sup> In 1914, the U.S. Army revised General Order 100, under the new title *Rules of*

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200. See *infra* notes 275-87 and accompanying text.

201. Taylor, *supra* note 2, at 366. The laws of war are of ancient origin. *Id.* The most important concept they were historically premised on is "that the ravages of war should be mitigated as far as possible by prohibiting needless cruelties, and other acts that spread death and destruction and are not reasonably related to the conduct of hostilities. *Id.* The seeds of such a principle must be nearly as old as human society." *Id.*

202. *Id.* at 67.

In 1863 President Lincoln approved the promulgation by the War Department of the Instructions . . . prepared by Francis Lieber [hence the Instructions are often known as the Lieber Code], a German veteran of the Napoleonic wars, who emigrated to the United States and became professor of law and political science at Columbia University. These comprised 159 articles, covering such subjects as 'military necessity,' 'punishment of crimes against the inhabitants of hostile countries,' 'prisoners of war,' and 'spies.' It was by a military commission appointed in accordance with these instructions that Mary Suratt and the others accused of conspiring to assassinate Lincoln were tried.

*Id.*

203. DONALD A. WELLS, *THE LAWS OF LAND WARFARE: A GUIDE TO THE U.S. ARMY MANUALS 1* (Greenwood Press 1992).

204. *Id.* at 3. Custom should govern the treatment of civilians in time of war. *Id.* at 26.

205. *Id.* at 6-7. The First Geneva Convention established the International Red Cross in 1864. *Id.* A second Convention protecting medical staff was signed in 1868. *Id.* The Conference at St. Petersburg in 1868 aimed to reduce needlessly painful weapons, focusing on explosive or inflammable projectiles. *Id.* The Declaration of Brussels, August 27, 1864 forbade, among other things, poison weapons, the killing of those who have surrendered, the policy of granting no quarter, and weapons designed to promote unnecessary suffering. *Id.* Two Congresses at The Hague in 1899 and 1907 focused on the mistreatment of prisoners of war and the protection of civilians from the bombardment of unfortified cities, and again forbade weapons that were designed to inflict "superfluous injury." *Id.* at 7.

*Land Warfare* (1914).<sup>206</sup> The *Rules of Land Warfare* were further revised in 1934 and 1940.<sup>207</sup>

Prior to World War II, the laws of war<sup>208</sup> were primarily oriented on the conduct of nations rather than individuals.<sup>209</sup> "Individual soldiers who followed orders were exempt from punishment for crimes of war, as were the high government officials who may have given the orders [to do so]."<sup>210</sup> On November 15, 1944, a change was implemented in the Army manual so that individuals, organizations, and government officials were now culpable for violations of the laws of war.<sup>211</sup> There was the *caveat*, however, that actions that were committed pursuant to a superior order may be taken into account in determining culpability or in the mitigation of punishment.<sup>212</sup> This formulation was seen as highly problematic precisely because no guidance was given as to when such orders should be considered, and whether they should be considered "as a defense or merely in mitigation."<sup>213</sup>

Prior to the First World War, the rules of land warfare had always been premised on two main points: first, there was a sharp distinction between combatants and non-combatants, and only combatants were to be targeted, and second, that some weapons and strategies were considered too horrific to pursue.<sup>214</sup> All sides seemed to ignore these practices in World War I and II, and the Army's final revision of the *Law of Land Warfare* in 1956

206. *Id.* at 5, 8. The 1914 manual listed the conventions to which the U.S. considered itself bound. *Id.* This included the 1864 and 1868 Geneva Conferences, the Declaration of St. Petersburg, and the Declaration of Brussels. *Id.* It excluded two of the three Hague Declarations, but included the Geneva Convention of 1906 dealing with the treatment of the wounded and sick.

The Rules of Land Warfare (1914) did recognize that war was still a nasty and violent business, and that civilians would often suffer in its conduct. *Id.* "Military necessity admits of all direct destruction of life or limb of armed enemies and of other persons whose destruction is incidentally [sic] unavoidable in the armed contests of war" [emphasis added]. *Id.* at 36 (quoting General Order 100, Art. 15).

207. *Id.* at 8, 10.

208. The incredibly influential ethical concept of "Just War" had an early development in Christian and European thought, beginning with St. Augustine and elaborated in the thirteenth century by St. Thomas Aquinas. Telford Taylor, *Just and Unjust Wars*, in *WAR, MORALITY, & THE MILITARY PROFESSION* 226, 227-29 (Malham M. Wakin ed., 1986). In the Just War tradition, conduct demonstrating proportionality and *noncombatant* immunity are essential (emphasis added). A. J. COATES, *THE ETHICS OF WAR* 209 (Manchester Univ. Press 1997).

209. See WELLS, *supra* note 203, at 13.

210. *Id.*

211. *Id.*

212. *Id.* at 24 (citing revision of 1944, Rules of Land Warfare ¶ 345.1 (1940)).

213. Telford Taylor, *Superior Orders & Reprisals*, in *WAR, MORALITY, & THE MILITARY PROFESSION* 380, 384 (Malham M. Wakin ed., 1986).

214. WELLS, *supra* note 203, at 13.

appeared to accept the abandonment of these principles in modern custom.<sup>215</sup>

The 1944 revision of the *Law of Land Warfare*<sup>216</sup> would likely be the applicable basis of law to judge the actions of the soldiers at No Gun Ri. Regardless, the latest version of the manual (1956), revised in 1976,<sup>217</sup> is also worth discussing because its principles would likely guide any modern military prosecutors. The 1956 manual recognized the Geneva Convention of 1949 as applicable law, and declared that civilians were to be protected under the laws of nations.<sup>218</sup> Paragraph 498(c) established personal liability for soldiers who commit war crimes.<sup>219</sup> Paragraph 507(b) detailed jurisdiction for those persons charged with war crimes, and interestingly allowed the U.S. to prosecute foreign soldiers for violating the laws of war but did not allow other nations to prosecute U.S. servicemen.<sup>220</sup>

Paragraph 509 addresses the defense of superior orders,<sup>221</sup> stipulating that following superior orders would not constitute a defense to a war crimes charge for an individual. The paragraph also added the caveat "*unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful.*"<sup>222</sup> This last exception creates such a subjective standard that it seems reasonable to predict that a competent defense counsel could establish a reasonable degree of doubt and protect his client from being found guilty under the *Laws of Warfare*. Given the chaotic nature of the events at No Gun Ri, it seems clear that any veterans facing charges for their actions could find some refuge in the apparent inconsistency of paragraph 509. A military lawyer, writing in 1953, seemed to well encompass the attitude of the time on the subject when he wrote that many international lawyers regarded the concept of military necessity as allowing the military to excuse unlawful behavior, and that similarly many military officers regarded the law of war as only so man good intentions, unrelated to the actual conduct of war.<sup>223</sup>

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215. *Id.* "Modern custom allowed deliberate war on non-combatants and the use of any weapons without review." *Id.*

216. The 1944 edition contained the changed perception of command responsibility. *See id.* at 24 (citing Rules of Land Warfare ¶ 345.1 (1994 revision)).

217. *See id.* at 185 (bibliography).

218. *See id.* at 33.

219. *Id.* at 121 (citing FM 27-10 Law of Land Warfare (1956) ¶ 498).

220. *Id.* at 123.

221. *See id.* at 120. It is worth noting that paragraph 509 falls under a section titled "Defenses Not Available."

222. *Id.* (citing ¶ 509) (emphasis added).

223. Major William Gerald Downey, Jr., *The Law of War and Military Necessity*, 47 Am. J. Int'l L. 251, 252 (1953). Major Downey wrote:



B. *The Uniform Code of Military Conduct (UCMJ), and the Articles of War*

The alleged massacre at No Gun Ri occurred in July 1950.<sup>224</sup> On May 5, 1950, President Truman signed House Report 4080, "An Act to unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice."<sup>225</sup> The UCMJ, however, with the exception of Article 67(a)<sup>226</sup> and Section 12,<sup>227</sup> only became effective as a whole on May 31, 1951.<sup>228</sup> The current UCMJ Article 118 (Murder) would not be applicable to the soldiers at No Gun Ri, whereas Article of War 92 (Murder-Rape) would be.<sup>229</sup>

Excluding the jurisdictional scope of the UCMJ,<sup>230</sup> clearly only Article 92 would apply, and its wording gives a court-martial broad discretion in the punishment of unpremeditated murder.<sup>231</sup> Under the common law the repeal of a penal statute, such as the Articles of War, or its replacement by a new act such as the UCMJ had the effect of "expung[ing] the act from the statute books as though it had never existed."<sup>232</sup> This common law rule granted immunity from indictment or prosecution for violations of

To many international lawyers and army officers the terms 'law of war' and 'military necessity' are mutually incompatible. Many army officers consider the law of war as no more than a collection of pious platitudes, valueless, so they think, because it has no force and effect. Some international lawyers regard military necessity as the *bête noire* of international jurisprudence, destroying all legal restriction and allowing uncontrolled brute force to rage rampant over the battlefield or wherever the military have control.

*Id.*

Downey went on to argue that the concepts could be proven to be compatible, but his comments are perhaps most valuable for the insight they offer on the views of his day. *See id.*

224. *See supra* notes 69-95 and accompanying text.

225. WIENER, *supra* note 170, at 1.

226. Article 67 of the UCMJ (1950) concerns the power of Review by the Court of Military Appeals. *Id.* at 164.

227. Act of May 5, 1950, ch. 169, 64 Stat. 147 (dealing with granting of new trials to those accused in cases arising from World War II).

228. Act of May 5, 1950, ch. 169, 64 Stat. 145.

229. Article 92 of the Articles of War (1948) reads: "MURDER RAPE—Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder *not premeditated*, he shall be punished as a *court-martial may direct* (emphasis added)." WIENER, *supra* note 170, at 220-21. Note the discretion granted military court-martials by this Article of War.

230. *See supra* note 140 and accompanying text.

231. *Id.*

232. NORMAN J. SINGER, SUTHERLAND STATUTES & STATUTORY CONSTRUCTION § 23.36 (Clark, Boardman & Callaghan 5th ed. 1993).

the law when it was in operation.<sup>233</sup> Congress found this presumption to be inequitable and passed its first general savings provision in 1871,<sup>234</sup> and the current version as of 1947 is found at 1 U.S.C.A. § 109. Section 109 states that:

The repeal of any statute shall not have the effect to release or extinguish any penalty . . . unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.<sup>235</sup>

The U.S. Supreme Court has held that the general saving clause applies to criminal statutes, thereby allowing the prosecution and punishment of individuals under the laws that existed at the time the crime was committed.<sup>236</sup> This principle has been upheld in cases involving military law or regulations as well.<sup>237</sup>

Article 92 states, "Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct;" however, if the murder was not premeditated, the court-martial may direct other punishment.<sup>238</sup> Federal law prohibits any statute of limitations for offenses that are punishable by death<sup>239</sup> and undoubtedly homicide, as defined by Article 92, meets this criterion.

It seems clear that military prosecutors seeking to charge retired veterans with murder for the actions at No Gun Ri in 1950 would have to bring indictments under the Articles of War rather than the UCMJ<sup>240</sup> and, given Congressional law, the Articles would still fully apply.<sup>241</sup> A novel situation arises because there is no federal statute of limitations for prosecuting murder, a capital crime. Therefore, defendants standing before a U.S. military court-martial in the year 2000, facing allegations of criminal homicide committed in 1950, would be, at the youngest, almost seventy years old.

233. *See id.*

234. *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 660 (1974) (citing 16 Stat. 432 (1871)).

235. 1 U.S.C.A. § 109 (West 1997).

236. *Lewisburg Penitentiary*, 417 U.S. at 661 (citing *United States v. Reisinger*, 128 U.S. 398, 402 (1888)).

237. *Goublin v. United States*, 261 F. 5 (9th Cir. 1919) (defendant was charged with violating an act forbidding prostitution near a military camp in World War I).

238. WEINER, *supra* note 170, at 220-21.

239. "An indictment for any offense punishable by death may be found at any time without limitation." 18 U.S.C.A. § 3281 (West 2000).

240. *See supra* notes 229-32 and accompanying text.

241. *See supra* notes 233-39 and accompanying text.

*C. The Status of Forces Agreement (SOFA) Between the  
United States and the Republic of Korea Establishes  
Jurisdiction for Criminal Prosecution of U.S.  
Servicemen by the Respective Nations*

The United States and the Republic of Korea signed a Status of Forces Agreement (SOFA)<sup>242</sup> that became effective in 1967.<sup>243</sup> Article XXII,<sup>244</sup> Section One, establishes the jurisdiction of the U.S.<sup>245</sup> and Korean military authorities<sup>246</sup> to exercise criminal jurisdiction over U.S. armed forces members. Section Three details the applicable rules regarding concurrent jurisdiction between the two authorities.<sup>247</sup> The U.S. military has the primary right to exercise jurisdiction in "offenses arising out of any act or omission done in the performance of official duty."<sup>248</sup> In all other offenses,<sup>249</sup> the Korean authorities have primary jurisdiction.<sup>250</sup> It appears self-evident that actions conducted in combat would logically fall within the "performance of official duty" rubric, thereby ensuring primacy of U.S. military jurisdiction. The state with the primary right of jurisdiction may choose not to exercise this right and may turn over the individual for prosecution by the other state's authorities.<sup>251</sup> Additionally, the state with the primary right may choose not to exercise its jurisdiction and may

242. See also SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 57-59 (1971) (chapter entitled "General Doctrine About the Status of Forces Stationed in a Foreign Country"); JOSEPH M. SNEE & KENNETH A. PYE, STATUS OF FORCES AGREEMENT: CRIMINAL JURISDICTION (Oceana Pub. 1957) (Snee and Pye also examine the development of SOFAs among NATO member nations, with a specific focus on criminal jurisdiction).

243. Agreement under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding the Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1966, U.S.-S. Korea, 17 U.S.T. 1677 [hereinafter SOFA].

244. SOFA, art. XXII, 17 U.S.T. at 1695.

245. SOFA, art. XXII, § 1(a), 17 U.S.T. at 1695. "The military authorities of the United States shall have the right to exercise within the Republic of Korea all criminal and disciplinary jurisdiction conferred on them by the law of the United States over members of the United States armed forces or civilian component, and their dependents . . ." *Id.*

246. SOFA, art. XXII, § 1(b), 17 U.S.T. at 1695. "The authorities of the Republic of Korea shall have jurisdiction over the members of the United States armed forces or civilian component, and their dependents, with respect to offenses committed within the territory of the Republic of Korea and punishable by the law of the Republic of Korea." *Id.*

247. SOFA, art. XXII, 17 U.S.T. at 1695-96.

248. SOFA, art. XXII, § 3(a)(ii), 17 U.S.T. at 1695.

249. SOFA, art. XXII, § 3(a)(i), 17 U.S.T. at 1695 (excepting those against U.S. property and interests).

250. SOFA, art. XXII, § 3(b), 17 U.S.T. at 1696.

251. SOFA, art. XXII, § 3(c), 17 U.S.T. at 1696.

ask the other nation to waive its right to prosecute the individuals.<sup>252</sup>

While serving in the "539th Transportation Truck Company" during the Korean War in June 1951, Wyatt Jennings was found by a court-martial to have committed the "unpremeditated murder of a Korean boy" and an "assault upon a child under the age of sixteen years."<sup>253</sup> Petitioner challenged the jurisdiction of the military courts with a novel argument. Counsel argued that when the United States Armed Forces entered the Korean War on June 30, 1950, they did so "under the banner of the United Nations,"<sup>254</sup> and, therefore, the U.S. military lacked proper jurisdiction to try him for his crimes.<sup>255</sup> "Rejecting [his] argument, that, *inter alia*, the Republic of Korea was a sovereign state and that he should have been tried in one of its courts [rather than by court-martial], the court held [his] theory to be completely devoid of merit" and found him to be, without question, subject to the jurisdiction of the U.S. Army.<sup>256</sup>

*Jennings v. Markley* clearly established that the United States military has the primary jurisdiction for crimes committed by its soldiers abroad during wartime.<sup>257</sup> Interestingly, the facts of *Jennings*<sup>258</sup> are in many ways analogous to the charges that could reasonably be expected to be made in a case brought against former soldiers for the alleged massacre at No Gun Ri: the murder[s] of South Korean nationals by U.S. service-members during the Korean War.

D. *Would Application of the U.S.-R.O.K. Status of Forces Agreement to the Soldiers Accused of Possible War Crimes Violate the Ex Post Facto Constitutional Provision?*

The SOFA between the United States and South Korea was not in effect during the alleged war crimes incident.<sup>259</sup> If the

252. *Id.* In such a case the secondary state "shall give sympathetic consideration" to such a request. *Id.*

253. *Jennings v. Markley*, 186 F. Supp. 611, 613 (S.D. Ind. 1960), *aff'd*, 290 F.2d 892 (7th Cir. 1961).

254. *Id.* at 612; SOFA *supra* note 243.

255. *Jennings*, 186 F.Supp. at 612.

256. Donald T. Kramer, Annotation, *Criminal Jurisdiction of Courts of Foreign Nations Over American Armed Forces Stationed Abroad* § 4, 17 A.L.R. Fed. 725, 737 (1973) (the Seventh Circuit reviewed petitioner's claim that only the International Court of Justice, or the Civil Court of Korea had jurisdiction to try him for his crimes); *Jennings v. Markley*, 290 F.2d 892 (7th Cir. 1961) (finding that the claims had been fully addressed by the District Court, the Circuit affirmed the District Court's ruling).

257. *Jennings*, 186 F. Supp. at 613.

258. *Id.*

259. See *supra* notes 68-91 and accompanying text.

United States military, which would have the primary right to exercise jurisdiction in this type of matter under the SOFA,<sup>260</sup> declined to exercise its jurisdiction and attempted to allow the Republic of Korea to try the Americans, would that violate the Constitution's prohibition against *ex post facto* laws?

The case of *United States v. Brooks*<sup>261</sup> considered whether procedural changes in the Military Rule of Evidence violated soldiers' constitutional rights. The soldier was court-martialed for marijuana use and for rape.<sup>262</sup> The serviceman appealed his conviction, and the case proceeded through a variety of reviews up through the Court of Military Appeals and rehearings.<sup>263</sup> During this arduous process, the Military Rules of Evidence were changed. Specifically, Rule 412, the military's version of the Federal Rules' "rape-shield" provision, was promulgated.<sup>264</sup> At the defendant's rehearing, the military judge denied a defense motion for permission to cross-examine the victim on her past sexual history.<sup>265</sup> The defendant appealed to the U.S. Army Court of Military Review on the claim that the ruling was in error because the change in procedure violated defendant's rights as per the *ex post facto* provision of the Constitution.<sup>266</sup> The court held that even a procedural change that disadvantages a defendant in its application is not *ex post facto*.<sup>267</sup> The change of procedure in appellant's case did not affect his substantive rights because "its application did not affect the crime, the punishment, or the degree of proof necessary to establish [his] guilt."<sup>268</sup>

Retroactive application of a criminal statute by the military courts *does*, however, violate the *ex post facto* clause, as does the retroactive application of a judicial construction of a statute.<sup>269</sup> The issue in *United States v. McDonagh* was whether the defendant was subject to military court-martial for drug trafficking when he conspired with his recruiter to fraudulently

260. See SOFA, *supra* note 244, at 1695.

261. *United States v. Brooks*, 17 M.J. 584 (A.C.M.R. 1983).

262. *Id.* The soldier admitted to using marijuana but denied the charge of rape. *Id.* at 584-85.

263. *Id.*

264. Nonconsensual Sexual Offenses; Relevance of Victim's Behavior or Sexual Predisposition, MIL. R. EVID. 412, STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL at 596 (Lexis Law Pub. 1997); *Brooks*, 17 M.J. at 585, n.3 ("Rule 412 became effective on 1 September 1980").

265. *Brooks*, 17 M.J. at 585.

266. *Id.*

267. *Id.* at 586.

268. *Id.* The *Brooks* court also earlier cited *Gibson v. Mississippi*, 162 U.S. 565, 590 (1896), for the proposition that "the inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime was committed." *Id.*

269. *United States v. McDonagh*, 14 M.J. 415, 419 (C.M.A. 1983).

enlist.<sup>270</sup> The Court of Military Appeals noted the difficulty that the U.S. Supreme Court had previously encountered in defining a substantive versus a procedural change in process sufficient to violate the *ex post facto* provision.<sup>271</sup> The court concluded that no general proposition could be stated for which alterations of procedure would be sufficient to "transgress the constitutional prohibition" because it was always a matter of degree.<sup>272</sup> Ultimately, the "constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation."<sup>273</sup>

Would a court find the application of the SOFA to the actions of soldiers taken in 1950 to have a procedural or a substantive effect on the defendant? It seems reasonable that the granting of jurisdiction to a foreign nation's courts is more significant than the application of the "rape-shield" Rules of Evidence found to be procedural in *Brooks*.<sup>274</sup> Those who committed possibly criminal acts in 1950 did not reasonably contemplate such a change in jurisdiction, and therefore retroactive application would more closely fall under *McDonagh*.<sup>275</sup> Prosecution by the Republic of Korea of the No Gun Ri veterans in accordance with the SOFA seems likely to be a dubious proposition, irrespective of the question of the "sender nation" granting such jurisdiction.

E. *Does the Nuremberg Charter and the International Criminal Tribunal Regime it Established Apply in this Case?*

The Nuremberg Charter<sup>276</sup> was a declaration made by the victorious allied powers<sup>277</sup> that sought to establish a body of international law which would allow for the prosecution of Nazi officials by an international military tribunal. The charter identified three areas of jurisdiction for the tribunal: Crimes

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270. *Id.* at 416. If he had never properly enlisted, defendant would not be subject to military jurisdiction. In this case, however, Congress had recently changed the UCMJ's Article 2, 10 U.S.C. 802, so that anyone who submitted to military authority, even if not properly enlisted, would be considered as falling within military jurisdiction. *Id.* at 416 n.1.

271. *Id.* at 420 (citing *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981)) (holding that for a criminal law to be *ex post facto* it must be retrospective, and it must disadvantage the offender).

272. *Id.* at 420-21.

273. *Id.* at 421.

274. *See supra* notes 261-68 and accompanying text.

275. *See supra* notes 269-73 and accompanying text.

276. Agreement for the prosecution and punishment of the major war criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter *Nuremberg Charter*].

277. The United States, Great Britain, France, and the Soviet Union. *Id.*

Against Peace,<sup>278</sup> War Crimes,<sup>279</sup> and Crimes Against Humanity.<sup>280</sup> The development of this body of law focused on the behavior of states and sought to address the criminal behavior of state actors, while allowing for the criminal prosecution of individuals for their role as state representatives or for their individual conduct.<sup>281</sup> The crimes against peace and humanity primarily focused on state policies and actions, while war crimes were readily applicable to individuals and "had to be limited *stricto sensu* as offenses 'against the laws and customs of war' rather than to be defined more broadly."<sup>282</sup> Following the Nuremberg and Tokyo Trials, the international community has widely accepted the principle that it may define certain behavior of states as criminal.<sup>283</sup> Critics, however, cite the charter as an example of "victor's justice" created *ad hoc* for World War II, and "created *ex post facto* with retroactive jurisdiction."<sup>284</sup>

The basic substance of the Nuremberg Charter is that an international tribunal can prosecute a broad assortment of crimes; but, as a matter of fact, most war crimes that have been prosecuted were brought by states in their own courts, and generally dealt with crimes committed by their armed forces.<sup>285</sup> In the half-a-century since the Nuremberg and Tokyo trials, actual international tribunals have been highly infrequent in practice. Only two tribunals have occurred over the last decade those for Yugoslavia and Rwanda, with the proposed trials of Saddam Hussein and Pol Pot suffering intellectual crib deaths.<sup>286</sup> The legacy of the Nuremberg and Tokyo trials has been the establishment of international norms regarding war crimes and the concept of international cooperation in the enforcement of such norms.<sup>287</sup> The international community, however, has shown "a failure of nerve" in the establishment of any "international machinery" for the enforcement of these same principles.<sup>288</sup>

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278. Nuremberg Charter, *supra* note 276, art. 6(a), 82 U.N.T.S. at 288.

279. Nuremberg Charter, *supra* note 276, art. 6(b), 82 U.N.T.S. at 288.

280. Nuremberg Charter, *supra* note 276, art. 6(c), 82 U.N.T.S. at 288.

281. Gerry J. Simpson, *War Crimes: A Critical Introduction*, in *THE LAW OF WAR CRIMES* 1, 18 (Timothy L. H. McCormack & Gerry J. Simpson eds., 1997).

282. McCormack, *supra* note 6, at 57 (quoting U.N. WAR CRIMES COMMISSION, *HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR*, at 444 (1948)).

283. *See id.* at 58.

284. *Id.*

285. *See id.* at 63.

286. Clark, *supra* note 7, at 184-85.

287. *Id.* at 187.

288. *Id.*

F. *The Geneva Conventions of 1949 and the  
Additional Protocols*

Following the innumerable outrages perpetrated against civilians and those caught in the chaotic destruction of World War II, the international community sought to increase the protections and further define the prohibitions of international law for conduct during wartime. On August 12, 1949, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Convention) was made open for signature, and by the end of the signing period sixty-one nations had signed.<sup>289</sup> The Convention laid out general principles regarding non-combatants,<sup>290</sup> protected persons and occupied territories,<sup>291</sup> the sick and wounded,<sup>292</sup> hospitals,<sup>293</sup> and others. A separate convention, which specifically dealt with Prisoners of War, was promulgated at the same time.<sup>294</sup>

Article 3 of the Convention prohibited the murder of non-combatants as a minimum restriction on combat actions taken by a contracting nation.<sup>295</sup> The machine-gun execution of civilian refugees in a tunnel<sup>296</sup> would appear to meet this minimum threshold. The actions of U.S. forces in 1950, however, would not be covered by the Convention protecting civilians because it did not come into force for the United States until February 2, 1956.<sup>297</sup>

The Geneva Conventions of August 12, 1949 were amended by additional protocols in 1977. The addition most relevant to this discussion is Protocol I relating to the protection of victims of international armed conflicts.<sup>298</sup> An additional convention, Protocol II, covers the protection of victims of *non-international* armed conflicts.<sup>299</sup> Article 51 of Protocol I is designed to protect

289. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* August 12, 1949, 6 U.S.T. 3516 [hereinafter Geneva Convention].

290. Geneva Convention, *supra* note 289, art. 3, 6 U.S.T. at 3518.

291. Geneva convention, *supra* note 289 arts. 4, 27-51, 66-78 6 U.S.T. at 3520, 3536-50, 3558-68.

292. Geneva Convention, *supra* note 289, arts. 14-17, 6 U.S.T. at 3528-30.

293. Geneva Convention, *supra* note 289, arts. 18-23, 6 U.S.T. at 3530-34.

294. Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* August 12, 1949, 6 U.S.T. 3317.

295. Geneva Convention, *supra* note 289, art. 3, 6 U.S.T. at 3518-20.

296. *See supra* notes 80-91 and accompanying text.

297. Geneva Convention, *supra* note 289, 6 U.S.T. at 3695.

298. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

299. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, 1125 U.N.T.S. 609.



civilians by limiting offensive military actions to prohibit the intentional targeting of civilian populations and to minimize combat operations in the vicinity of civilian habitation, cultural objects, or individual groups of civilians.<sup>300</sup> In addition, parties may not attempt to use civilians to shield military objectives from attack, nor use civilians to protect military operations.<sup>301</sup> Violations of any of these provisions by one of the hostile parties does not release<sup>302</sup> the other from their legal obligations in the protection of civilians.<sup>303</sup>

#### G. Protocol I & II and International Tribunals

The Protocols to the Geneva Convention<sup>304</sup> established a category of "grave breaches" and, more specifically, allowed for individual states to determine what actions constitute additional breaches.<sup>305</sup> States are required to develop internal criminal laws to deal with such circumstances, to search for those suspected of such crimes, and to use their internal courts as a forum to try and to sanction those individuals.<sup>306</sup> Nations may elect to extradite their citizens for trial to a foreign state whenever they choose to forego prosecution themselves.<sup>307</sup> States have frequently been unwilling to prosecute suspects themselves;<sup>308</sup>

300. Protocol I, *supra* note 298, art. 51, 1125 U.N.T.S. at 26.

301. *Id.* art. 51(7).

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attack or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

*Id.*

While not directly stated in this provision, it seems reasonable to assume that military units may not infiltrate forces within civilian refugees in the conduct of a "military operation," as was suggested happened during the Korean War. See *supra* note 56 and accompanying text.

302. *But cf.* MICHAEL J. DAVIDSON, A GUIDE TO MILITARY CRIMINAL LAW 142 (1999). Davidson serves as a member of the Army Judge Advocate Generals (JAG) Corps, and he states that under U.S. military law, "[i]t is not illegal to fire on an enemy who is illegally using civilians as a human shield, although every effort should be made to avoid inflicting civilian casualties. The illegal action would be committed by the enemy force hiding behind the civilian shield, not by the unit forced to return fire through that shield." *Id.*

303. Protocol I, *supra* note 298, art. 51(8), 1125 U.N.T.S. at 27.

304. See *supra* notes 298-99 and accompanying text.

305. Draper, *supra* note 5, at 164-69.

306. *Id.* at 164, 167.

307. *Id.*

308. Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291, 296 (1999).

furthermore, the historical record indicates that it is an exceedingly rare occurrence for a state to willingly hand over its citizens for other nations to prosecute.<sup>309</sup> In addition, the conventions make no mention of superior orders, necessity, duress, mistake,<sup>310</sup> good faith, drunkenness, or many other common defenses. Even the required *mens rea* for many war crimes<sup>311</sup> is obscure. This situation leaves nations obviously more willing to prosecute "their own" rather than submit them to an international body, a situation that "will prevail until an [effective] international criminal jurisdiction" or an "international criminal code"<sup>312</sup> is established.<sup>313</sup> The Convention contains no provisions for trial before an international tribunal.<sup>314</sup> It was geared toward the prosecution of enemy prisoners of war and their trial by the captor nation,<sup>315</sup> a situation which is not analogous to the No Gun Ri case.

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Prosecutions for these offenses were rare until recently; domestic cases mostly involved government prosecution of insurgents for sedition or other acts under domestic law, but both governments and insurgencies were generally unwilling to prosecute or punish their own personnel. Authority to exercise universal jurisdiction to prosecute these crimes was also uncertain; and states other than the territorial state generally abstained from undertaking any such prosecutions. The absence of a community desire to criminalize these acts also contributed to the opposition among states to an international criminal court that would undertake such prosecutions.

*Id.*

309. See *supra* note 286 and accompanying text.

310. Draper, *supra* note 5, at 165.

311. *Id.* at 158.

312. International law has developed no detailed criminal procedure either. "Its principle thrust is that those charged with war crimes be given a fair trial in accordance with the 'broad principles of justice and fair play which underlie all civilized concepts of law and procedure.'" MYRES S. MCDUGAL & FLORENTION P. FELICIANO, *THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION & WORLD PUBLIC ORDER* 721 (1994) (quoting *The Justice Trial*, 6 WAR CRIMES REPORT at 49 (1947)).

313. Draper, *supra* note 5, at 165.

In truth, the international community, to date, has been more concerned with expanding the content of war criminality, in the light of the misbehavior of State agencies in time of war, than with working out the substantive ingredients of those criminal acts in such matters as the mental element and the prohibited act. Nor has it paid much attention to the substantive defenses. We lack a mature and complete system of international penal law, particularly in the part of it governing war criminality.

*Id.* at 158.

314. MCDUGAL & FELICIANO, *supra* note 312, at 731.

315. *Id.* at 730. "The forum, general procedure, and penalties in war crimes trials of enemy prisoners of war must be that to which the armed forces of the captor are subject under its military law." *Id.*

Finding that U.S. forces violated provisions of the Convention and related protocols would be possible, but bringing a prosecution in an international tribunal would be highly problematic. Some have argued in analogous situations that only U.S. military law would apply,<sup>316</sup> rather than any international strictures or conventions.<sup>317</sup> Furthermore, it seems very unlikely that the United States would allow any such body jurisdiction over its citizens,<sup>318</sup> because it is not a signatory to either of the protocols.<sup>319</sup>

#### V. IS THERE A DEFENSE OF "SUPERIOR ORDERS?"

United States, as well as international law, has generally been unwilling to allow individuals to avoid responsibility for war crimes by offering the excuse that they were simply following superior orders.<sup>320</sup> In addition, precedent has been established finding commanders liable for the "grave breaches" committed by their subordinates and forces they command.<sup>321</sup>

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316. Taylor, *supra* note 2, at 372. "In Vietnam, where the American forces are operating primarily on the territory of a presumptive ally (South Vietnam), the question whether or not the laws of war [and the Geneva Convention of 1949] are applicable to a given situation may present considerable difficulties." *Id.* This quotation was obviously written during the United States' involvement in the Vietnam War, but circumstances during the Korean War are sufficiently analogous for this statement to suggest similar concerns about the applicability of international law to the No Gun Ri incident.

317. MG George S. Prugh, then Army Judge Advocate General, is quoted regarding the crimes committed at My Lai, "the victims were citizens of an allied nation" [as were the South Korean refugees at No Gun Ri] "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" and as such were crimes but not war crimes amenable to jurisdiction outside the U.S. or the its allied country. *See SOLIS, supra* note 19, at 57. Under the customary law of war and the Nuremberg Principles, however, the Army itself found My Lai to be "not only crimes by any domestic definition, but also war crimes—grave breaches of the law of war." *Id.* at 58.

318. Paul Richter, *Deal Weighed in Korean War Slaying Probe*, L.A. TIMES, Oct. 23, 1999, at A1. "The United States last year declined to join a proposed new international criminal court that would have had jurisdiction over war crimes." *Id.*

319. *Id.*

320. *See infra* notes 322-36 and accompanying text.

321. *See infra* notes 337-63 and accompanying text.

A. *The Individuals Who Fired Into the Tunnels at No Gun Ri Have Claimed that they Were Following Orders to Do So. What Effect Does this Claim Have on the Determination of their Legal Guilt?*<sup>322</sup>

The No Gun Ri veterans allegedly received orders to engage the refugees huddled under the railroad bridge pursuant to a policy that originated at higher headquarters.<sup>323</sup> The current version of the U.S. Army's Law of War does not recognize the superior orders argument<sup>324</sup> to be an absolute defense to a war crime charge.<sup>325</sup> American military rules have long held that "it is the soldier's duty to obey *lawful* orders, but that he may disobey—and indeed must, under some circumstances—unlawful orders."<sup>326</sup> Gen. Telford Taylor, Chief Prosecutor at Nuremberg, recognized the difficulty that this principle establishes in practice. He noted that, under the pressures of war, subordinates are often in no position to determine the legality of the order, and furthermore, those same pressures inherently require prompt obedience with little time for contemplation.<sup>327</sup> An examination of the decisions of the tribunals following World War II indicate that they often accepted this type of rationale for subordinates arguing the defense of superior orders.<sup>328</sup> The Chief Prosecutor believed that a defense of superior orders creates two distinct paths of analysis: first, a defense based on lack of *knowledge*, and second, a factor in mitigation based on *fear*.<sup>329</sup> Clearly "[s]ome orders are so atrocious, or plainly unlawful, that the subordinate must know" that they are unlawful.<sup>330</sup> Situations, however, often

322. This note will not address the possible defense of military necessity. It seems to this author that any such claim would be highly unlikely to succeed, and it would put the defendants in the distasteful position of arguing that their intentional killing of civilians was somehow justified by a greater military purpose. International law does not generally support this type of claim. For a discussion of the concept of military necessity, see MCDUGAL & FELICANO *supra* note 312, at 520-42.

323. See *supra* notes 65-68, 81-83 and accompanying text.

324. See MCDUGAL & FELICANO, *supra* note 312, at 691. "It may be noted that the term 'superior' has been interpreted to embrace in reference not only formal rank and authority but also effective physical or moral capacity to induce commission of an unlawful act." *Id.*

325. See *supra* notes 221-22 and accompanying text.

326. Taylor, *supra* note 213, at 381.

327. *Id.* at 382.

328. MCDUGAL & FELICIANO, *supra* note 312, at 691. "Examination of the decisions of the war crimes tribunals indicates that by and large the plea of superior orders was assessed in the light of familiar criminal law principles relating to *mens rea* as a basic condition of penal responsibility. Thus, where the court was satisfied that the accused did not in fact know of the illegal quality of the order he executed, he was not held accountable." *Id.*

329. Taylor, *supra* note 213, at 384.

330. *Id.*

do not allow for such certainty, and a lack of knowledge should, therefore, be allowed as a defense.<sup>331</sup> Additionally, there may be cases in which the subordinate may believe that the orders are illegal but is threatened if he does not comply by his superior. Taylor believed that compliance under this type of duress might be a mitigating circumstance.<sup>332</sup> His opinion apparently found expression in the Army's 1956 field manual, which attempts to allow military courts the discretion to take knowledge<sup>333</sup> and fear into account in war crime prosecutions.<sup>334</sup> The Army's policy regarding the defense of superior orders prompted one commentator to remark that, "It would appear that American soldiers have little to fear at home for prosecution for war crimes committed while following superior orders."<sup>335</sup> Given the chaotic nature of the situation at No Gun Ri, as well as the difficulty in

331. *Id.* at 385.

332. *Id.*

333. See *United States v. Calley*, 46 C.M.R. 1131, 1183 (A.C.M.R. 1973). Speaking in the review of the prosecution of 1LT William Calley, of My Lai infamy, the U.S. Army Court of Military Review said:

[t]he law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders. The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.

*Id.*

334. Taylor, *supra* note 213, at 385 (quoting FM 27-10, THE LAW OF WARFARE, at 182, ¶ 509: *Defense of Superior Orders*):

¶ 509 (a). The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, *unless he did not know and could not reasonably have been expected to know* that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of a war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment (emphasis added).

b). In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; . . . At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders.

*Id.*

335. WELLS, *supra* note 203, at 124. "The question of superior orders was sufficiently unanswered that the attempt to conduct a trial of those involved in Son My and My Lai foundered, less from lack of evidence than from lack of diligence in holding soldiers responsible both for orders given and orders received." *Id.* at 123.

establishing exactly who gave or received any orders to fire upon the civilians,<sup>336</sup> it appears likely that the exceptions laid out in the Army's manual would offer veterans a successful defense, or some mitigation of their responsibility.

B. *How Responsible are those that Gave the Orders?*

International and U.S. laws of war hold military commanders to a higher standard of accountability for the conduct of their subordinates than they do the subordinates themselves.<sup>337</sup> The savage war in the Pacific during the final months of World War II is in many ways responsible for the pivotal case in American, as well as international, jurisprudence regarding a commander's liability for the actions taken by forces under his command. The trial by military commission of the Japanese General Tomoyuki Yamashita in 1945 found that he had:

unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and its allies and dependencies, particularly the Philippines; and he thereby violated the laws of war.<sup>338</sup>

The commission found that commanders owe "an affirmative duty to take such measures [as] appropriate [to] protect prisoners of war and the civilian population"<sup>339</sup> and that such a purpose would be defeated if a commander could neglect to "take reasonable measures for their protection."<sup>340</sup> Furthermore, in the absence of such measures, "a commander may be held responsible, even criminally liable, for the [acts] of his troops."<sup>341</sup> The Supreme Court let the military commission's finding stand,<sup>342</sup> and held that the defendant's guarantee of due process was not violated by the lack of procedural safeguards, improper rules of evidence, and the quasi-judicial nature of the body established by fiat by General MacArthur.<sup>343</sup> This holding met withering criticism from two of the Justices, not only because of

336. See *supra* notes 65-91 and accompanying text.

337. DAVIDSON, *supra* note 302, at 150.

338. *Yamashita v. Styer*, 327 U.S. 1, 13-14 (U.S. 1946).

339. *Id.* at 16.

340. *Id.* at 15.

341. *Id.* at 24 n.10.

342. A recent fictionalization of the initial occupation of Japan and the leadership of the Supreme Commander Gen. Douglas MacArthur has examined the *Yamashita* trial and set it as the centerpiece of the novel. See generally JAMES WEBB, *THE EMPEROR'S GENERAL* (1999). The author categorized it as a miscarriage of justice, and as the exercise of the victor's power rather than law. *Id.*

343. *Yamashita*, 327 U.S. at 25.

the due process issue,<sup>344</sup> but also because of the dangerous nature of the command responsibility precedent itself.<sup>345</sup> In Justice Murphy's stinging dissent he said:

He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge. This indictment in effect permitted the military commission to make the crime whatever it willed, dependent upon its biased view as to petitioner's duties and his disregard thereof, a practice reminiscent of that pursued in certain less respected nations in recent years.<sup>346</sup>

...  
In other words, read against the background of military events in the Philippines subsequent to October 9, 1944, these charges amount to this: We the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. In those respects we have succeeded. We have defeated and crushed your forces. And now we charge and condemn you for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking your ability to maintain effective control. Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so widespread we will not bother to charge or prove that you committed, ordered or condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization, which we ourselves created in large part. Our standards of judgment are whatever we wish to make them.<sup>347</sup>

Justice Rutledge quoted Thomas Paine in warning of the danger that this case established when he stated, "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."<sup>348</sup> Some have claimed that this

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344. *Id.* at 27-28 (Murphy, J., dissenting). "No military necessity or other emergency demanded the suspension of the safeguards of due process. Yet petitioner was rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence and summarily sentenced to be hanged." *Id.*

345. *Id.* at 26 (Murphy, J., dissenting), 41 (Rutledge, J., dissenting).

346. *Id.* at 28.

347. *Id.* at 34-35.

348. *Id.* at 81 (Rutledge, J., dissenting).

doctrine has been repudiated as unjust in international law.<sup>349</sup> The prosecutions of suspected war criminals in the Yugoslav War, Crimes Tribunal, however, indicate that the *Yamashita* doctrine may be alive and well:

The fact that any of the [war crimes were] committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.<sup>350</sup>

On March 3, 2000, a Croatian General, Tihomir Blaskic, was sentenced to forty-five years imprisonment for war crimes that occurred during the 1992-1995 Bosnian conflict.<sup>351</sup> The Tribunal found Blaskic liable for superior responsibility pursuant to Article 7(3), holding:

That if a commander lacks knowledge that crimes are about to be or have been committed, such lack of knowledge must be held against him, when it is the result of negligence in the discharge of his duties, taking into account his particular position of command and the circumstances prevailing at the time.<sup>352</sup>

Those circumstances are apparently quite subjective because the court rejected claims made by Blaskic that the communications difficulties and breaks in the chain of command prevented him from being aware of war crimes being committed.<sup>353</sup>

The U.S. Army doctrine is pretty clear as to the degree of culpability commanders assume for acts of their subordinates. Paragraph 501 of the *Law of Land Warfare*, 1956, says "[M]ilitary commanders may be responsible for war crimes committed by subordinate members . . . responsibility may rest not only with the actual perpetrators but also with the commander . . . The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or

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349. Simpson, *supra* note 281, at 14. "On the other hand, General Yamashita was tried and hanged on a doctrine of command responsibility that has since been repudiated because of the injustice of convicting an individual for crimes they did not, and could not, know were being carried out by their subordinates." *Id.*

350. Statute for the Yugoslav War Crimes Tribunal in *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), art. 7(3), U.N. Doc. S/25704, 32 I.L.M. 1159, 1175.

351. Anne Swardson, *Croatian General Gets 45 Years for War Crimes*, WASH. POST, Mar. 4, 2000 at A11.

352. Press Release, The International Criminal Tribunal for the former Yugoslavia, *General Blaskic Found Guilty on All Charges and Sentenced to 45 Years Imprisonment* (JL/P.I.S./474-E Chambre De 1ère Instance) (Mar. 3, 2000) available at <http://www.un.org/icty/pressreal/p474-e.htm>.

353. Swardson, *supra* note 351, at A11.



through other means."<sup>354</sup> This statement sounds very similar to the *Yamashita* rule.<sup>355</sup>

There appears, however, to be another standard that has at least once been followed by U.S. military courts. CPT Ernest Medina was charged with involuntary manslaughter<sup>356</sup> for failing to control his company, which included Lieutenant Calley's platoon,<sup>357</sup> during the My Lai massacre.<sup>358</sup> Accepting the *Yamashita* standard, as well as the *The Law of Land Warfare*, the military judge nevertheless gave the jury an instruction stipulating that the panel could only find Medina guilty if he "possessed *actual* knowledge of the atrocities and failed to act."<sup>359</sup> Evidence demonstrated that Medina was in the vicinity of My Lai<sup>360</sup> and in constant radio contact with his soldiers, however he was ultimately acquitted on the basis that he had no actual knowledge of the massacre being committed by his men.<sup>361</sup>

Most of the senior officers responsible for the alleged orders given at No Gun Ri<sup>362</sup> or those that gave the documented orders not to allow refugees to move through their area of operations<sup>363</sup> are now long dead. The absence of these commanders, the paucity of evidence connecting them to the events at No Gun Ri, the general chaotic nature of the front during the first weeks of the Korean War, and the irregular application of the *Yamashita* standard of command responsibility in actual practice would combine to make the possibility of obtaining a successful conviction of commanders for the actions of Company H extremely tenuous. It, therefore, seems unlikely that the United States would bring, or allow another national or international body to bring, charges based on a theory of command responsibility against any senior officers for the shootings at No Gun Ri.

354. RICHARD HAMMER, *THE COURT-MARTIAL OF LT. CALLEY 14-15* (1971) (quoting *The Law of Land Warfare*, 1956).

355. See *supra* notes 338-41, 345 and accompanying text.

356. For a journalistic account of the 1971 court-martial, see generally MARY MCCARTHY, *MEDINA* (1972); in addition to the charge that his men premeditatedly committed murder at My Lai, the Captain was also charged with personally shooting a woman, shooting a child, and two counts of assaulting a prisoner with a rifle. *Id.* at 3.

357. See *supra* note 14 and accompanying text.

358. DAVIDSON, *supra* note 302, at 151.

359. *Id.*

360. MCCARTHY, *supra* note 356, at 30-31.

361. DAVIDSON, *supra* note 302, at 151.

362. Thompson, *supra* note 84, at 42.

363. See *supra* notes 65-68 and accompanying text.

VI. IF THE ARMY INSPECTOR GENERAL'S INVESTIGATION  
DETERMINES THAT WAR CRIMES WERE COMMITTED AT  
NO GUN RI, WHAT ACTIONS SHOULD THE  
UNITED STATES TAKE?

Given the evidence that is already in the public domain,<sup>364</sup> it appears quite likely that the Army Inspector General's team will determine that U.S. soldiers killed civilians at No Gun Ri. The question that such a determination would raise is: Were these killings a war crime? Assuming that they could be so described, the U.S. government would face at least two more questions requiring an answer. First, would prosecution by a U.S. military court or an international tribunal be in order? Second, and independent of the criminal decision, should the U.S. government consider paying reparations for this incident?

*A. Should the United States Try the 2/7 Cavalry  
Veterans or Consider Allowing an International  
Tribunal to Try them for the Deaths of the Korean  
Civilians Killed Under the Railroad Bridge  
at No Gun Ri?*

Political opinion in the United States is sharply divided regarding what actions the government should take against anyone found to have been responsible for war crimes at No Gun Ri. Some in the government are considering offering blanket immunity in the hopes of encouraging witnesses to come forward and allowing investigators to develop as full a record as possible.<sup>365</sup> Some, including a former U.S. ambassador to South Korea, believe that the Koreans would not object to such a grant provided that it was not used to create an obstacle to a full accounting of the events.<sup>366</sup> On the other hand, some argue that it is unlikely that the U.S. and South Korean governments can be trusted to get to the bottom of the massacre.<sup>367</sup> The *Cleveland Plain Dealer* argued that what is "needed is an international truth

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364. See *supra* notes 57-93 and accompanying text.

365. *Korean War Killing Inquiry*, *supra* note 95, at Foreign Pages 17.

366. Richter, *supra* note 118, A1. "Donald P. Gregg, a former U.S. ambassador to South Korea who is chairman of the Korea Society in New York, said he believes that South Koreans would not object to an immunity 'as long as it is not perceived as sheltering anybody from retribution.'" *Id.*

367. *The Fallout From No Gun Ri; Should the U.S. Apologize for Korean War Casualties?*, CLEVELAND PLAIN DEALER, Nov. 21, 1999, at 4G. "While possible, it is unlikely that the U.S. and South Korean governments will give an honest disclosure of the massacre. It would be too politically humiliating for the United States to admit that its troops committed war crimes, particularly since the massacre at No Gun Ri does not seem to be an isolated event." *Id.*

commission modeled after the commissions that have investigated massacres in Africa, Latin America and Europe.”<sup>368</sup> A former Secretary of the Navy, James Webb, argued in the *Wall Street Journal* against making revisionist moral judgements half a century after the fact, rather the United States should accept that civilians are inevitable casualties in high intensity combat.<sup>369</sup>

The problem of military units operating in and around civilians and built-up areas is not an academic matter for the U.S. military, but rather one that has been faced on numerous occasions in the last decade, from Somalia to Haiti and into Bosnia and Kosovo.<sup>370</sup> The military has been aggressive in training its units in the Rules of Engagement,<sup>371</sup> and prosecuting

368. *Id.*

369. James Webb, Editorial, *The Bridge at No Gun Ri*, WALL ST. J., Oct. 6, 1999, at A22. Discussing the orders not to allow refugees through the American lines, Secretary Webb says:

Such orders, excised from the chaos that created their necessity, fall heavily on the minds and consciences of those who have never been called upon to make the Hobson's choice of combat: Do I protect my men and lose my innocence? Or do I keep my innocence and lose my men? This thin unbreachable line separates those who went to war from those who stayed behind. America is a lovely place to have such debates as we sit in brightly lit offices next to our computers under the whirl of air conditioners and HEPA filters and sip on herbal tea or Snapple. What is a war crime? On whom shall we pass judgment as we peer back through the mists of history? Were civilians killed? Is that enough for condemnation? What standard shall we in our wisdom erect for those who had little hope of even seeing tomorrow when the world turned suddenly ugly and they pressed their faces far into the dirt while mortars twirled overhead and the bullets kicked up dust spots near their eyes? . . . Is deliberately killing a civilian a war crime? It certainly wasn't when we fire-bombed Dresden and Tokyo, taking hundreds of thousands of lives in the name of 'breaking the enemy's will to fight.' Perhaps the greatest anomaly of recent times is that death delivered by a bomb earns one an air medal, while when it comes at the end of a gun it earns one a trip to jail.

*Id.*

Finally Secretary Webb, a Marine combat veteran of Vietnam concludes, "One hopes for a greater sense of wisdom as the facts are assessed and judgments are made. Otherwise, the only lessons seem to be: Make sure you fight in a popular war. Make sure you use bombs instead of bullets. And make sure you win." *Id.*

370. Serving in the military the author can testify to the emphasis placed on Force Protection (preventing terrorist and other attacks against U.S. forces deployed in foreign countries) as well as knowing and enforcing the Rules of Engagement (ROE). For a greater discussion of the ROE, see generally Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1 (1994).

371. The ROE in a general sense define when a soldier may and may not engage a suspected enemy or unidentified individual. The ROE can be adjusted based on intelligence assessments of the current threat, past incidents, and other factors.

those that violate the Rules without good cause.<sup>372</sup> Without a doubt the military leadership has a duty, as well as a concern, that they not send the wrong message to the soldiers on active duty by treating those accused in the No Gun Ri too casually. Legally the Pentagon may have the right to prosecute those retired veterans who may be responsible for the killing of the Korean civilians. Legal distinctions, however, do not answer the fairness questions that have been, and are certain to be raised.<sup>373</sup>

Investigations of fratricide offer an interesting parallel to this situation.<sup>374</sup> One such incident during the Allied invasion of Sicily resulted in the deaths of more than 300 paratroopers.<sup>375</sup> The commanding general of the victimized 82nd Airborne Division, Matthew Ridgway, concluded that an attempt to fix responsibility "would be difficult, cause finger pointing among those potentially responsible, and would prove to be of questionable value. He concluded that they should learn from mistakes made and accept the casualties as the 'inevitable price of war in human life.'"<sup>376</sup>

Certainly the Inspector General should fully investigate the incident and present a full report, which can be expected not to be very flattering towards the United States. Such a report is necessary for domestic, as well as international, political reasons, and morally required for accountability. The few veterans that

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372. See Martins, *supra* note 370, at 17-18 (discussing a case from Somalia).

373. *Korean War Killing Inquiry*, *supra* note 95, at 17. "The inquiry would address the protests of veterans' groups that it would be unfair to punish former soldiers for an incident that occurred half a century ago." *Id.*

374. DAVIDSON, *supra* note 302, at 136-37. As a recent example of a fratricide investigation, Davidson discusses the downing of two U.S. Army Black Hawk helicopters by U.S. Air Force F-15's enforcing the no-fly zone in Iraq on April 14, 1994. *Id.* The investigation focused on the AWACS monitoring plane, which should have controlled the airspace and averted the disaster:

The air force's efforts to hold the F-15 pilot and AWACS crew criminally responsible for the deaths met severe criticism. The disciplinary efforts adversely affected the morale of other AWACS crews and generated charges that the airmen were merely scapegoats to cover up larger, systemic problems. When charges were dropped against the F-15 pilot but not against Wang [the officer in charge of the AWACS] many questioned why Wang alone was facing charges. Members of the AWACS community questioned whether the charging decision reflected an institutional bias in favor of fighter pilots. Ultimately, Wang's acquittal satisfied few and touched off a torrent of criticism that effectively branded the entire military justice system a failure . . . [and led to numerous outside investigations]. . . . As history has shown, except in cases of clear-cut, individualized gross negligence, friendly fire incidents will remain difficult to successfully prosecute and overzealous pursuit of justice following such incidents may cause more harm than good.

*Id.*

375. See *id.* at 135-36.

376. *Id.* at 136.

could be charged should be granted immunity to assist in the investigation and removed from the inherent and legitimate concerns over fairness that such a selective prosecution would entail.

B. *Can a Case be Made for Reparations to the Survivors of the Massacre?*

There is a tradition in international law that nations may make payments to other nations for damages done to that state's citizens, but such payments are made to the other nation itself and not directly to the injured parties.<sup>377</sup> The usual form of such payments is *ex gratia*—implying no legal obligation, but rather made “as a humanitarian or diplomatic gesture.”<sup>378</sup> Such a payment may be distributed by the recipient nation in whatever manner it sees fit,<sup>379</sup> implicitly recognizing the difficulty associated with identifying the proper beneficiaries.<sup>380</sup>

In this case there are many veterans who are adamantly opposed to any discussion of monetary compensation for the victims of No Gun Ri.<sup>381</sup> Since the No Gun Ri investigation began the South Korean Defense Ministry has received petitions for compensation relating to thirty-seven new and previously uninvestigated alleged massacres.<sup>382</sup> Both North and South Korean civilian casualties from the three-year long conflict have been estimated at two million.<sup>383</sup> Certainly the great majority of these deaths would not lead to claims for compensation, but the vast numbers suggest the danger of such a prediction if

377. Harold G. Maier, *Agora: The Downing of Iran Air Flight 655: Ex Gratia Payments & the Iranian Airline Tragedy*, 83 AM. J. INT'L L. 325, 326 (1989).

378. *Id.* at 325.

379. *Id.* at 326.

380. Aviam Soifer, *Redress, Progress & the Benchmark Problem*, 19 B.C. THIRD WORLD L.J. 525, 527 (1998). “To right past wrongs and to make victims, or the descendants of victims, whole again is deeply problematic for many reasons. Not the least of these is the impossibility of defining a baseline and holding to it, as if it were flash frozen, throughout subsequent changes.” *Id.*

381. Dobbs, *supra* note 57.

Few of the 7th Cav veterans believe the Korean survivors are entitled to monetary compensation. Amounts of up to \$150,000 have been suggested by the Korean side. To compensate a country where you lost 40,000 of your own men is nonsense,’ says Herman Patterson. ‘Who compensated me? Nobody.’ I don’t think the Koreans deserve any compensation,’ agrees Kerns. ‘If I had been killed over there, my parents would have gotten \$10,000. Civilians are going to suffer in any war. I haven’t noticed many South Koreans wanting to go and live in North Korea. They got a free country, thanks to us.

*Id.*

382. Sang-Hun Choe, *supra* note 74, at A20.

383. BLAIR, *supra* note 23, at 975.

precedence for recompense is established. Concerns with an unending stream of claims for reparation resulted in a bar to such claims in the peace treaty the United States signed with Japan.<sup>384</sup> For example, American POWs forced to serve as slave laborers for various Japanese industries during their internment have been frustrated in their attempts for any remuneration as a result of that agreement.<sup>385</sup> Although from an individual subjective perspective such a result seems inequitable, it does seem to allow for a bright-line certainty at the macro-level and thereby may serve justifiable public policy concerns.

Ultimately, what many of the survivors are seeking is an admission and apology rather than monetary compensation.<sup>386</sup> South Korean government ministers have said that the Korean people recognize the sacrifice that the United States has made in ensuring their freedom and that a full accounting would not change, but rather would enhance, the integrity of the two countries in public opinion.<sup>387</sup> An apology will obviously not satisfy everyone, but the payment of compensation could open a Pandora's box with little to limit where the fates could scatter the results. Therefore, the Korean government may be best served by a full accounting, with an official apology supplemented by those veterans who are willing to do so, and no monetary compensation.

## VII. CONCLUSION

This note has examined the terrible events that occurred in one small hamlet during the American Army's initial attempts to stem the invading North Korean tide in the first days of the Korean War. All that have been willing to discuss the events at the No Gun Ri Bridge are in agreement that something calamitous happened. The bullet scared walls of the tunnels have stood in mute silence to this fact for half a century. That poor judgment was exercised appears to be without question. That

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384. Doug Struck & Kathryn Tolbert, U.S. *Envoy Rejects POW's Lawsuits Against Japan*, INTERNATIONAL HERALD TRIB., Jan. 18, 2000, at A5.

385. *Id.*

386. Sang-Hun Choe, *S. Korea Seeks U.S. Help in No Gun Ri Probe*, THE SUNDAY GAZETTE MAIL, Oct. 3, 1999, at A17.

387. Kim Yong Geun, *A Korean's View of No Gun Ri*, THE CHRISTIAN SCIENCE MONITOR, Dec. 21, 1999, available at <http://www.csmonitor.com/durable/1999/10/06/text/p8s3.html>. Mr. Geun is the director of the South Korean Ministry of Commerce, Industry, and Energy; Struck, *supra* note 107, at 6 ("[t]he South Korean Foreign Affairs Minister, Hong Soon Young, said in an interview: 'We don't want to lose sight of the fact that the U.S. was here to defend human rights and they were here at the invitation of my government and people.'").

Korean civilians were intentionally killed in a premeditated massacre seems definitively less certain.

American precedence allows the military justice system the right to court-martial those veterans that retired after a full military career for their involvement in the killings. That a prosecution for murder under the Articles of War would result in a conviction seems less certain. Clearly, arguments could be advanced by No Gun Ri veterans suggesting that the superior orders they received constitute a complete defense to the charges, or at the very least a mitigating factor in the consideration of any punishment. U.S. policy, as well as a review of the historical record, make it highly unlikely that these veterans need concern themselves over a prosecution by a foreign nation or an international tribunal.

The American military has taken great strides in its training, its investigation of possible war crimes, and its use of the Rules of Engagement. These changes have made it extremely unlikely that today's professional and volunteer military would allow another No Gun Ri to occur, or in the unlikely event of such a massacre for it to escape detection for such a lengthy period of time. Nevertheless, to preserve an example for the modern military, as well as to meet its domestic and international obligations, the military investigation should have some identifiable purpose and goal. A full accounting of what happened, why it happened, and how to prevent a future occurrence of such an incident is the least that America and her allies can expect from the Inspector General's team. That reparations should be considered, but ultimately rejected, seems a necessary policy decision as well. Ultimately an apology for this terrible, but unfortunately not always uncommon, incident of war seems advisable. Seeking prosecutions, however, would unjustly magnify the tragedy, and would truly be a prosecution of the "fog of war."

*Christopher D. Booth\**

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\* J.D. Candidate, May 2001, Vanderbilt University; B.A. The College of William & Mary. The author was commissioned as a United States Army Officer, branched Armor, and served on active duty from 1994-1998. The author wishes to thank all those who provided assistance in the writing of this note, and make special mention of several deserving of extra commendation: First, Professor Michael Noone, Jr. of the Catholic University of America School of Law, for his help with questions on international, as well as military law; any mistakes in this work on those subjects are purely the fault of the author. Second, Martin Cerjan and Stephen Jordan, both of the Vanderbilt University Law School Library, for their tireless efforts in locating materials as well as their helpful suggestions, which aided the author's research. Finally, the author would like to recognize all those he served with in the United States Army, and those who continue to serve in the defense of this great nation, all of whom are deserving of great thanks.