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SYMPOSIUM: WAR AND THE UNITED STATES MILITARY: Military Justice, Civilian Clemency: The Sentences of Marine Corps War Crimes in South Vietnam

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LEXISNEXIS SUMMARY:

... On the night of September 23rd, 1966, near Chu Lai, South Vietnam, a nine-man ambush patrol from the 1st Battalion, 5th Marines, left Hill 22. ... For a soldier to strike a prisoner is a war crime. ... Are soldiers and marines likely to be willing to find guilt for the homicide of the enemy and the noncombatant? In terms of the Vietnam War, for killing the VC and the NVA--"Charlie"? If willing to find guilt, can their condemnation extend to a meaningful punishment? For killing Vietnamese? ... His conviction and sentence were approved through all military appellate levels and he was confined in the Military Disciplinary Barracks at Fort Leavenworth, Kansas, for a period of twelve years and one month --the longest period of confinement served by any marine for a war crime committed during that conflict. ... In U.S. Federal District Courts in 1969, to select a random year during the Vietnam conflict, thirty-three percent of the civilian homicide cases that went to trial resulted in acquittal or dismissal, a rate essentially the same as found in Marine Corps courts throughout the war for the same offense. ...

TEXT:

[*59] I. MILITARY JUSTICE

On the night of September 23rd, 1966, near Chu Lai, South Vietnam, a nine-man ambush patrol from the 1st Battalion, 5th Marines, left Hill 22. The patrol's assigned leader, Sgt. Ronald L. Vogel, was viewed as ineffective by the marines he ostensibly led. Instead of following his lead, they turned to twenty-year-old, combat-experienced, Private First Class John D. Potter, Jr. Despite his junior rank, Potter exercised "bush rank" and effectively assumed command of the patrol. A senior marine officer has commented that, "At this date and time in Vietnam, this type of jury-rigging was unfortunately not unusual." n1 The patrol's Navy corpsman, Hospitalman Jon R. Bretag, later testified:

[Potter] said that this would be a raid instead of an ambush. . . . We were to beat up the people, tear up the hooches, and kill, if necessary. . . . He told us to . . . take our insignias off, make sure our covers are on [and he] assigned [*60] us numbers. He said if you want to get somebody, don't mention his name, call him by number. . . . The entire squad moved out. n2

Entering the hamlet of Xuan Ngoc-2, the marines seized Dao Quang Thinh. Accusing him of being Viet Cong, they dragged him from his rough hut and began to beat him. Other members of the patrol pulled his three-year-old child from the arms of his wife, and then four of them raped her.

Minutes later, three patrol members shot the husband, the child, the husband's sister, and her child. Hearing the sister moan, Bretag exclaimed, "Damn, she's still alive!" n3 Potter fired another burst of automatic fire into her at point blank range. He then tossed a hand grenade onto the bodies in an attempt to cover the patrol's atrocities and "to make it look good." n4 Still not finished, the patrol shot the rape victim, Bui Thi Huong and left her for dead. But, amazingly, she lived to testify at their courts-martial.

Upon returning to their battalion area, their company commander sought details of their reported "enemy contact." Suspicious, he ordered their new platoon leader, Second Lieutenant Stephen J. Talty, to go back to the scene of the contact with the patrol. Once there, Talty quickly realized what had happened and directed efforts to disguise what had occurred. As the patrol was doing so, one of the previously wounded children was discovered to be still alive. Potter raised his rifle butt over the wounded child, saying, "Someone count for me." Vogel counted to three as Potter repeatedly slammed his rifle butt into the child's head, killing him. n5

Later that same morning, the rape victim was carried by her villagers to the marine base for treatment of her gunshot wounds. The Navy doctor immediately reported her wounding and rape. When confronted by the company commander, Lieutenant Talty, a marine for all of ten months, confessed all.

The 1949 Geneva Conventions describe crimes, war crimes, and grave breaches. n6 Grave breaches are the most serious of war crimes--murder, torture, and rape, to name but three. Thus, for a soldier to strike his squad leader is a crime. For a soldier to strike a prisoner is a war crime. For a [*61] soldier to kill a prisoner is a grave breach. The 1949 Conventions require signatory states to enact domestic legislation punishing grave breaches. n7 The United States employs the Uniform Code of Military Justice (UCMJ), applicable to all U.S. armed forces, as the required domestic legislative vehicle for punishing grave breaches. Article 18 of the Code specifies that, "General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial . . . and may adjudge any punishment permitted by the law of war." n8

But no penal legislation can answer the question of the effectiveness of that legislation. Having complied with the letter of the Geneva Conventions, does the UCMJ execute the law of war in an effective and responsible way? It is, after all, applied by soldiers against soldiers; by marines against--marines, and so forth. There is an intrinsic imperative within each armed service to not only enforce military criminal law, but to also maintain discipline and good order by seeing that offenders are tried and effectively punished. But how effective is the Code when employed as the enforcement vehicle for customary international law--for the law of armed conflict? How realistic is it to expect soldiers and marines, those who most often encounter the enemy on a one-to-one basis, to punish their own for offenses against either enemy prisoners or foreign nationals who are noncombatants? For it is soldiers and marines who comprise the jurors, who hear the accused's plea of "not guilty," and who determine the accused's culpability for the homicide of the enemy prisoner and foreign noncombatant. Equally significant, if guilt is found, it is soldiers and marines who assess the punishment to be imposed for the wrongful acts. n9

Are soldiers and marines likely to be willing to find guilt for the homicide of the enemy and the noncombatant? In terms of the Vietnam War, for killing the VC and the NVA--"Charlie"? If willing to find guilt, can their condemnation extend to a meaningful punishment? For killing Vietnamese?

For what was arguably the most horrific war crime committed by marines during the Vietnam War, PFC John Potter was convicted of five counts of premeditated murder, rape, and the attempted rape of a second Vietnamese woman. He was sentenced, in the combat zone and by a Marine Corps general court-martial composed of marine officers, to confinement at hard labor for life, reduction to private, loss of all pay and allowances, and a dishonorable discharge. His conviction and sentence were approved through all military appellate levels and he was confined in the Military Disciplinary Barracks at Fort Leavenworth, Kansas, for a period of twelve years and one [*62] month n10 --the longest period of confinement served by any marine for a war crime committed during that conflict. n11

Potter's sentence and the time he actually served, along with the sentences imposed upon and served by twenty-seven other marines who were also tried for the homicide of Vietnamese noncombatants, provide a window through which the effectiveness of the UCMJ and America's dedication to the principles of the Geneva Conventions may be viewed.

Was the severity of Potter's Marine-imposed sentence, confinement for life, typical of Marine Corps court-martial sentences for war crimes in Vietnam? And was the disparity between the trial court's sentence and the twelve years actually served similarly typical? Were other Vietnam war crimes by American troops met with similarly harsh sentences, then similarly reduced by review and clemency authorities working in the United States?

II. GENEVA AND MILITARY LAW

It is well settled that an individual's war crimes, specifically grave breaches, may be punished in the municipal courts of any state having custody of the offender. n12 Indeed, the duty of a state to punish violations of the customary law of war is itself a matter of the law of nations. Following World War I, the principle of first competence of municipal courts to try law of war violations was upheld by treaty. n13 That was recognition that "war crimes in the narrower sense of the term are at the same time violations of national (municipal) law in so far as they constitute crimes according to the general criminal law of the State. . . ." n14

[*63] With the Geneva Conventions of 1949, what had previously been a national option became a duty of contracting parties: a duty to provide "effective penal sanctions" for grave breaches under the signatories' own municipal law. n15 Contracting states agreed to search out those alleged to have committed grave breaches and to bring them before their own courts, or hand them to another contracting party making out a prima facie case. n16 "Thus," Professor Schwarzenberger wrote, "in these Conventions, a universal criminal jurisdiction of a mandatory character under internationally postulated municipal law has been created." n17 The fact that trial and punishment are left to municipal law does not deprive the crime and its sanction of its international character. The state is simply executing an aspect of international law, functioning as an organ of the international community. n18

Although Schwarzenberger's asserted universal jurisdiction remains elusive, the 1949 Conventions raise the principle of universal jurisdiction over war crimes in treaty form, making them triable in municipal courts. It is then that, as Professor Lauterpacht notes, that "rights and duties created by international law are directly applicable to individuals through the instrumentality of municipal courts. . . ." n19

In American municipal law, the Constitution grants Congress the right to define and punish "offenses against the Law of Nations." n20 This authority extends, of course, to the law of armed conflict. Courts martial, while having no specific jurisdiction set apart under the constitution, do have a constitutional source, for courts-martial are established under Congress's constitutional power to make rules for the government and regulation of the armed forces. n21 As early as 1818, while battles with the American Indian continued, two Englishmen, Arbuthnot and Armbrister, were court-martialed and executed as "accomplices of the savages," contrary to the laws and usages of war. n22

By the time of the Vietnam War, the basic rights and duties contained in the Geneva and Hague conventions, particularly as to grave breaches described in the 1949 Geneva Conventions, were themselves incorporated [*64] into customary international law, making them binding even on non-signatories. n23

It was under the UCMJ, however, that Marine Lance Corporal Denzil R. Allen was convicted. His general court-martial found him guilty of executing in cold blood two elderly Vietnamese noncombatants on one day, and another two noncombatants the following day, plus cutting the throat of a fifth noncombatant victim. He was charged with five violations of UCMJ Article 118, murder. In September, 1968, Allen's Marine jury of combat experienced peers sentenced him to a dishonorable discharge and confinement at hard labor for life. This punishment was for his UCMJ violations--and his grave breaches of the Geneva Convention protecting noncombatant civilians. n24 The commanding general who convened Allen's court-martial, carrying out the terms of the pretrial agreement (plea bargain) reached with Allen, reduced the period of confinement to twenty years. After Allen was returned to the States to serve his sentence, clemency action further reduced his sentence to seven years. He was released after having actually served a total of two years and eleven months. n25

Throughout the Vietnam conflict, as today, the murder of a noncombatant was not only a violation of the law of war, but an offense under U.S. military law, the Uniform Code of Military Justice, as well. n26 Until 1996, there was no U.S. statute, state or federal, that in precise terms made punishable the commission of a war crime. n27 Until that year, it was the position of the U.S. that its municipal criminal law was sufficient to the task, and the government correctly noted that "violations of the law of war . . . will usually constitute violations of the Uniform Code of Military Justice and . . . will be prosecuted under that Code." n28 The War Crimes Act of 1996 n29 is the only non-military law making commission of a war crime a civilian domestic crime. n30 [*65] This federal legislation was designed to close the gap previously existing when war crimes were discovered only after a service member's discharge and loss of

UCMJ jurisdiction. The My Lai incident highlighted this lacuna that allowed former soldiers to escape trial for their acknowledged infractions while in uniform.

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

The military court, by punishing the acts, executes international law even if it applies . . . its own military law. The legal basis of the trial is international law, which establishes the individual responsibility of the person committing the act of illegitimate warfare. n31

In U.S. practice, grave breaches are virtually always tried by general court-martial without being denominated war crimes, *per se*. n32 Although the murder or manslaughter of a noncombatant may be a war crime, war crimes are charged as such only if "they are committed by enemy nationals or by persons serving the interests of the enemy state." n33 Accordingly, PFC John Potter's offenses, and LCpl. Denzil Allen's offenses, war crimes by any definition, were simply tried as ordinary offenses under the UCMJ, if such horrific acts may be described as "ordinary."

Of course, there were other Potters and Allens in Vietnam; other war crimes committed by American troops, discovered and undiscovered. n34 But determining how many war crimes were committed is problematic, at best.

To detail U.S. war crime convictions in the Vietnam conflict does not suggest an American military disdainful of the law, or out of control. On the contrary. "For American forces such actions were aberrations, in direct violation of U.S. military law and specific MACV directives." n35 The record of court-martial convictions confirms the U.S. determination to try any discovered violation of the law of armed conflict and, upon conviction, to appropriately punish depredations. The record leaves no doubt that from the conflict's outset the U.S. had in place a regime of instructions, directives, and [*66] orders designed to reveal, investigate, and prosecute alleged war crimes. n36 While no system, military or civilian, can be perfect, the American scheme of military justice, which has greatly matured in the years since the UCMJ was introduced, functioned well in the stress of foreign combat.

For the Viet Cong (VC) and the North Vietnamese Army (NVA), the "tactic of 'political struggle' included the use of terror to isolate the people from their government. . . . Selected assassination of government officials was official policy." n37 Grave breaches not only went unpunished, they were mandated. "The primary objective of the violence program was to make the political struggle movement possible. The terror program was central to the violence program. . . ." n38 The U.S. ground effort in South Vietnam was closely covered by print and television reporters who, late in the war, particularly, were often hostile to U.S. military objectives. The VC and NVA had no similar agents to document their illicit activities which were, in any event, just another facet of their combat strategy.

Examples of VC and NVA war crimes are many. New York Times reporter Malcolm Brown, for example, has detailed the VC murder, including by beheading, of scores of South Vietnamese soldiers in the Ca Mau Peninsula in February 1962. n39

The VC's massacre of civilian Montagnard villagers at Dak Son, near the Cambodian border, on December 5, 1967, has been widely reported. Employing grenades and flame-throwers, 252 men, women, and children were killed, and many more wounded. The entire refugee hamlet was burned to the ground. n40

On August 30, 1970, the NVA mortared the An Hoa orphanage, in Da Nang, then stormed the wards, killing fifteen and wounding forty-five, mostly children. The senior administrator, Tri Nguyen, a Buddhist monk, was executed in the courtyard. n41

The enemy's most notorious atrocity was carried out during Tet, 1968, in Hue. Upon infiltrating the former Imperial City in the early morning of [*67] January 31, political cadres organized "the worst bloodbath of the conflict." n42 From previously compiled lists of target victims--local politicians, civilian functionaries, and uncooperative merchants, among others--the VC went house-to-house, assembling their victims. Precise numbers will never be known. In the ensuing twenty-seven day U.S. effort to re-take the city, its near-total destruction forever covered bodies, gravesites, and potential documentation of what the enemy had done. Eventually, in and around the city, searchers found 2,810 bodies. They had been shot, clubbed to death and, often, buried alive. Another 2,000 Hue Vietnamese remain missing, doubtless murdered by the VC. In his history of Vietnam, Stanley Karnow writes of the nearly 5,000 victims, "Balanced accounts have made it clear . . . that the Communist butchery in Hue did take place--perhaps on an even larger scale than reported during the war." n43

Countless enemy war crimes of much less magnitude were a constant feature of that conflict, so many that most went undocumented. Virtually every American veteran is aware of VC or NVA atrocities that occurred where he fought.

III. DISCOVERING U.S. WAR CRIMES IN A SEA OF BIAS

Assessing the true extent of battlefield war crimes in any conflict is impossible since significant offenses go unreported and undiscovered. Merely assessing the number of Vietnam convictions for breach of the law of war is problematic. n44 Only the Army kept count of its war crimes cases; no other armed service did so. n45 There was no central, all-service reporting authority. Major General George Prugh, Vietnam-era Judge Advocate General of the Army writes,

[General Westmoreland's headquarters] had considered establishing special war crimes teams and having the Army maintain centralized files...for all services, but this was not done because the laws prohibiting war crimes and the . . . machinery for investigating and punishing such offenses were judged adequate. n46

Nor can one make a determination of the number of war crimes that were prosecuted by reviewing appellate court-martial records. Not all cases are appealed; not all appellate opinions that are rendered are published; and those that are published do not refer to the offenses as war crimes--if the [*68] underlying factual basis of the appeal is described at all. n47 Instead, the offenses are described merely as murder, assault, rape, *et cetera*. A few discovered war crimes, as in one instance involving dismissal of charges ostensibly for reasons of national security, were not even prosecuted. n48

No official, Defense Department-published record of U.S. war crimes exists. There does exist an authoritative, if unofficial, all-service record of convictions for serious offenses involving Vietnamese victims--but not all such offenses are necessarily war crimes. One U.S. soldier whose case figures in the totals, for example, was convicted of murdering a Vietnamese drug dealer. n49 Still, the number of South Vietnamese victims of serious crime is revealing. The following tables are based on Department of Defense and Department of the Army figures.

COURT-MARTIAL CONVICTIONS INVOLVING VIETNAMESE VICTIMS, 1965-73 n50

OFFENSE	ARMY	NAVY	USMC	USAF
Murder	41	3	27	0
Rape	25	1	16	0
Mutilation of a corpse	2	0	1	0
Manslaughter	26	2	15	1

The next table indicates war crimes trials, but only reflects offenses alleged against U.S. Army personnel.

ALLEGATIONS AGAINST ARMY PERSONNEL, OTHER THAN MY LAI, 1965-75 n51

ALLEGATIONS MADE	PRE-MY LAI	POST-MY LAI	TOTAL
Unsubstantiated/unfounded	19	144	163
Substantiated	31	47	78
Total	50	191	241
Cases referred to court-martial:			
Convicted	22	14	36
Acquitted/dismissed	15	5	20
Offenses of which convicted:			
Murder/manslaughter	6	3	9
Rape	3	0	3
Mutilation	3	2	5

[*69] Other war crime tabulations, said to be from official sources, vary in minor ways. There is, however, no way of determining which figures are accurate. n52 Still, other official tabulations, cover only a portion of the war, n53 or fail to reflect a reliable source. n54 How a war crime/non-war crime distinction was made by military officials is nowhere specified in the tables, although directives in effect throughout the Vietnam War describe war crimes in

terms of 1949 Geneva Convention grave breaches. n55 In any event, the number of war crimes indicated in the two foregoing tables, which present the best estimates available, is so low as to make doubtful their reliability as indicators of actual war crime offenses. A rough number of Army war crimes trials may be known, but ultimately the number of Vietnam war crimes cannot even be accurately estimated.

Accepting that the number of war crimes committed by American forces in South Vietnam cannot be estimated, what of those that were discovered? What degree of punishment was imposed on those who were tried and convicted--almost always for the murder of Vietnamese noncombatants? After all, accused and accuser were from the same proscribed circle; they were, in a sense, "family." Other than the victims, all concerned were of the military community and, moreover, were of the brotherhood that had fought and risked all in Vietnam. How likely was a military jury to impose punishment upon one of their own? As a former Chief Judge of the Court of Appeals of the Armed Forces has said, "there are certain biases and prejudices in favor of letting the war criminal go, if you try him in the battle [*70] zone. . . ." n56 Professor Telford Taylor, a retired Army Reserve Brigadier General, as well as a former Nuremberg chief counsel, wrote:

[It is a] doubtful question . . . whether an Army general court-martial is an appropriate judicial forum . . . for the trial of [battlefield war crime] cases. On the face of things the charges are simple enough . . . but, as has been seen, the simplicity is deceptive. n57

The issue of race exacerbated the problem of sentencing soldiers and marines. Among American forces in South Vietnam, the Mere Gook Rule was a common prejudice, universally known and widely accepted, as well as reflecting casual, unthinking racism and cultural arrogance. "So you begin to think they're all your enemies. And that all of them are something not quite human. . . . You give them names to depersonalize them, to categorize them. . . . They become dinks and slopes and slants and gooks. . . ." n58 "The rule in Vietnam was the M.G.R.- the 'mere gook rule': that it was no crime to kill or torture or rob or maim a Vietnamese because he was a mere gook." n59 "The trouble is no one sees the Vietnamese as people. They're not people. Therefore it doesn't matter what you do to them." n60

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

The most disturbing factor we encountered was the low regard in which some of the men held the Vietnamese . . . considering them subhuman, on the level of dogs. . . . Some of the men never referred to Vietnamese as anything but "gooks". . . . We thought perhaps the units had included an unusual number of men of inferior quality. . . . The result [of a personnel analysis] concluded that the men . . . were about average as compared with other units in the Army." n61

Given such a mindset, how likely was a military jury in Vietnam to hold a military accused to normal standards of guilt and innocence? Indeed, what was a "normal standard" in such a situation? If convictions were had, how likely were sentences to be skewed?

There are often questions in the public mind regarding the efficacy of the military justice system. Lieutenant Kelly Flynn, the amorous B-52 pilot, and [*71] the Aviano, Italy cable car case involving a low-flying Marine Corps jet, and numerous accounts of military sexual harassment, are but a few examples that raise questions regarding the military's willingness to police itself. This notwithstanding the fact that there are similar questions regarding the civilian justice system, raised by the O.J. Simpson, JonBenet Ramsey, and Los Angeles police corruption cases, for example.

Nevertheless, in Vietnam, Army general courts-martial convicted ninety-five soldiers of the murder or manslaughter of Vietnamese noncombatants. Marine Corps courts martial convicted twenty-seven men of the same charges. While no single record has been found of the sentences imposed in the Army convictions, there is an administrative record of the Marine Corps cases.

IV. DISCOVERING SENTENCES IN A SEA OF CASES

Punishment--sentencing after conviction--is the threat that enforces the criminal law. In a philosophical sense, "the general justifying aim of sentencing . . . of those who break the criminal law is . . . to restore the balance which the offense disturbed." n62 The sentencing process is symbolic expression of the society's denunciation of the offense and a reaffirmation of the law and its values. This applies, of course, to military society no less than to civilian.

A severity of sentence in proportion to the gravity of the offense is a key underlying structure of the criminal law. n63 But the notion of proportionality presumes a settled criteria of seriousness of cases, a ranking of severity of sen-

tences, and an accepted relationship of cases and sentences. Those are not always present in battlefield war crime cases. Nevertheless, although proportionality begs the question of *whose* ideas of seriousness, severity, and relationship, it remains a legitimate sentencing goal.

Of the 122 soldiers and marines convicted of the murder or manslaughter of noncombatants, then, one would hope for generally consistent punishments. As Professor H.L.A. Hart notes, "principles of justice or fairness between different offenders require . . . morally similar offenses to be treated alike." n64 How consistent were the sentences imposed?

As it is impossible to determine the number of battlefield war crimes committed in Vietnam, so it is impossible to determine the sentences of all who were convicted of such crimes. The Vietnam-era court-martial records of both the Army and the Marine Corps are incomplete and, often, missing entirely. Congressional guidance as to how court-martial records are to be [*72] maintained or disposed of is scant. n65 Were it not for surviving secondary records and official correspondence that sometimes names those convicted, even numbers of convictions would be unavailable.

Marine Corps court-martial statistics are representative examples which, because of their lesser number, are more accessible than Army records. Marine trial statistics of the Vietnam era are located in the Washington Navy Yard, in the offices of the Navy-Marine Corps Court of Criminal Appeals. n66 The record of court-martial appeals is contained on hand-written three-by-five note cards; appeals received after 1970 are usually typed, although still on three-by-five cards, sometimes with accompanying marginalia informally pencilled in. Cards are filed not alphabetically, but by numerical case number, sequentially assigned when the record of trial was received for appellate review. Prior to July 1967, the court-martial statistics compiled by the Navy (which include Marine Corps courts) fail to differentiate Vietnam trials from Navy and Marine trials world-wide. n67 Researchers looking for a specific case must first check the hand-written annual log of cases received, name-by-name. Finding the accused's name, one then determines the accused's case number, recorded in the log beside the name. Next, one locates the corresponding card number in the nearby card file for that year's cases. If one is unaware of the year the case was reviewed, its location is considerably more difficult, since the entire series of logs, 1965 to 1973, would have to be reviewed.

The case number for each appeal is also recorded on those same three-by-five cards, allowing for the required written request to the National Records Repository in Suitland, Maryland, for the record of trial sought. A dismayingly high percentage of Vietnam-era records of trial are "missing." A researcher, having no recourse but to rely on unknown government clerks in Suitland, cannot determine for themselves if a missing record is mis-filed, checked out and never returned, or just unaccountably lost in the years since the Vietnam conflict ended. Although verbatim court-martial records are often lacking, other appellate records at least reflect sentences imposed, primarily in the volumes of military appellate cases.

But no appellate record details the sentence actually served by one convicted of a battlefield war crime. Again looking to Marine Corps records as being representative, individual histories of time actually served are maintained by the Navy Clemency and Parole Board (NC&PB), originally located in Ballston, Virginia, now in the Washington Navy Yard, not far from the office housing Navy appellate records. When initially examined by the [*73] author in 1987, those NC&PB records, also on hand-written three-by-five cards, were as incomplete as are records of trial. Since 1987, access to NC&PB records had been repeatedly denied with the explanation that they have been destroyed in accordance with government regulations regarding retention of outdated records. Access to the records, which in fact are not destroyed, was finally gained through the intervention of individuals with whom the author had served and who are now assigned to NC&PB.

The several Navy brigs and Army stockades where long-term military prisoners previously served their sentences have been closed, except for the Disciplinary Barracks, Leavenworth, Kansas. The location of records for those closed facilities is undetermined. Inquiry to the Leavenworth D.B. regarding release dates of its Marine Corps Vietnam-era prisoners returns one to the NC&PB.

Recent inspection of the NC&PB card file finds records that allow examination of the efficacy of court-martial sentencing involving war crimes. A table reflecting the sentences imposed at trial is shown on the following page. The period of confinement actually served is available in all but one of the twenty-seven Marine Corps cases. The records are sufficient to allow an examination and comparison of sentences imposed in civilian and military cases, and an examination of sentences imposed by race of victim. Portions of the table on the next page appeared in Guenter Lewy's landmark work, *America in Vietnam*. n68

Even without knowing the specifics of particular cases, a cursory review of the table reveals a disparity of military sentences, from two years to life, each sentence for the offenses of murder or manslaughter. Such a dissimilarity should raise questions regarding the legitimacy not of the court-martial process, but of the clemency and parole system.

It is no surprise that trial sentences, military or civilian, often reflect the beliefs and experiences of the sentencers, rather than rational differences in either offenses or offenders. Society's presumption of a value-neutral rationality in sentencing thus leads to unfulfilled expectations. "This value attached . . . to rationality and consistency also generates severe embarrassment about . . . moral luck, an inevitability . . . with which every political theory must learn to live." n69

Acquittals and unequal sentences are hardly unique in similar and even related cases. Such sentences are documented in numerous studies. n70 One author rationalizes such results by noting that "although the impact of the [*74] threat of punishment must be equal or not disproportionately different for different offenders, the impact of enforcement may be unequal." n71

Post-trial clemency actions, on the other hand, are unique, varying from case to case. There is little research into the dynamics of the clemency process, but rather than evening sentence differences it apparently "makes disparity in time served as great as the discrepancies in time imposed." n72

Besides trial, which represents the threat of punishment, an appropriate response to criminality must encompass enforcement--actual punishment--the "appropriate penal sanctions" spoken of in the 1949 Geneva Conventions. n73 How "appropriate" were the punishments for U.S. war crimes in Vietnam? An answer is suggested by examining the few identifiable war crime prosecutions--limited in the case of the Marine Corps almost exclusively to courts-martial for the murder of Vietnamese noncombatants shown in the following table. No other law of war offense is traceable in sufficient degree to yield meaningful or quantifiable comparisons.

Sentencing of Marines Convicted of the Murder/Manslaughter of Vietnamese Noncombatants, 1965-1971

Individual	Sentence at Trial, in yrs	Sentence approved by CA	Sentence Approved By NCMR	Action by USCMA	Sentence After parole (P) or clemency (C), in yrs	Confinem't Actually Served
M. McGee	10	10	7	App.denied	C:6yr, 6 mo	6 yrs, 6 mo.
F.C.Schultz	Life	Life	25	Affirmed	C: 6	6 yrs
T.L.Wilson	5	5	5	App.denied	C: denied	5 yrs
S.J.Luczko	Life	Life	3	App.denied	?	unavailable
C. Keenan	Life	25	5	App.denied	C:2yr, 9 mo	2 yrs, 1/2 mo.
J.H. Boyd	4	4	4	App.denied	C: denied	3 yrs, 1/2 mo.
J.D. Potter	Life	Life	Life	App.denied	C: 12	12 yrs, 1 mo.
R.L. Vogel	50	35	10	?	C: 8	9 yrs, 1/2 mo.
C.Ferguson	Life	35	5	App.denied	C:2yr, 5 mo	2yrs, 10 mo.

Sentencing of Marines Convicted of the Murder/Manslaughter
of Vietnamese Noncombatants, 1965-1971

Individual	Sentence at Trial, in yrs	Sentence approved by CA	Sentence Approved By NCMR	Action by USCMA	Sentence After parole (P) or clemency (C), in yrs	Confinem't Actually Served
E.P.Boltik	30	30	Dis. insane	n/a	n/a	n/a
Two Two	10	5	5	No petition	C: 4	3yrs, 7 1/2 mo
Wilkerson	Life	30	30	App.denied	C: 3	2 yrs, 1/2 mo.
Hamilton	Life	Life	Life	App.denied	C: 9	8 yrs, 9 mo.
R.E.Wilson	Life	20	20	App.denied	C:7yr, 1 mo	7 yrs, 1 mo.
D.R. Allen	Life	20	20	App.denied	C: 7	2yrs, 11 mo.
J. Belknap	2	2	2	App.denied	C: denied	1yr, 3 mo.
Licciardo	2	2	2	?	C: denied	1yr, 4 mo.
J. Maushart	2	2	2	App.denied	?	1yr, 4 mo.
S.D. Crider	Life	Life	3	App.denied	?	3yrs, 8 1/2 mo
R.J. Reese	Life	30	3	App.denied	?	2 yrs, 4 mo.
D.W. Parr	4	1 yr, 3 mo.	8 mo.	No petition	C: denied	7 mo. +
F. Sikorski	Life	30	15	10 years	P: 3	3 yrs.
M. Stamats	Life	40	15	App.denied	P: 3 9/12	3 yrs, 8 mo.
S.G.Green	5	1	1	App.denied	C: denied	8 1/2 mo.
M.Schwarz	Life	1	1	No petition	C: denied	9 1/2 mo.
J.H. Jones	20	20	Dismissed	n/a	n/a	n/a
R.T. Taylor	Life	25	25	App.denied	C: 19	7 yrs, 8 mo.

Sentencing of Marines Convicted of the Murder/Manslaughter
of Vietnamese Noncombatants, 1965-1971

Individual	Sentence at Trial, in yrs	Sentence approved by CA	Sentence Approved By NCMR	Action by USCMA	Sentence After parole (P) or clemency (C), in yrs	Confinem't Actually Served
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Sentence at Trial = the sentence imposed by the Marine Corps general court-martial in Vietnam that heard case.

Sentence Approved by CA = the sentence approved by the commanding general who initiated the court-martial and who, with his SJA's written advice, first reviewed the trial and its sentence. CAs have the authority to reduce a court-martial sentence but cannot increase punishment.

Sentence Approved by NCMR = the sentence approved after a legal review of case by (for sailors and marines) the Navy-Marine Corps Court of Criminal Appeals, in Washington, D.C. Lawyer counsel represents accused throughout this review.

Action by USCMA = the action taken following another, de novo, appellate review by U.S. Court of Military Appeals, the 3-civilian judge highest military appellate court. (Now the 3-judge Court of Appeals for the Armed Forces.)

Sentence after review by clemency and/or parole boards = sentence reductions awarded upon the periodic, statutory reviews conducted by civilian boards.

Confinement actually served = determined by physical review of surviving Naval Clemency and Parole Board records.

Dis. Insane = case dismissed when the prisoner was found to be legally insane.

? = instances in which records are incomplete, missing, or not made available.

[*75] As the foregoing table illustrates, twenty-seven marines were convicted at courts-martial of murdering noncombatants. n74 In several of those cases [*76] there were multiple victims or associated crimes, such as aggravated assault or rape. Did the punishment imposed at trial reflect the seriousness of the offenses? Or were the sentences "wrist slaps" reflective of a dismissive opinion of the Vietnamese victims--the Mere Gook Rule? Do the court-martial results contradict an assertion that American military courts were the effective workings of the law of war and multilateral treaties to which the U.S. is a party? Unlike some of the sentences approved upon appellate review, and some for which clemency were granted, the trial sentences and the sentences approved by the convening authorities--in the combat zone--do not contradict that assertion of effectiveness.

In the twenty-seven cases shown, among attendant punishments such as dishonorable discharge, reduction in grade, and loss of all pay and allowances, the sentences imposed at trial included confinement for life; three cases included confinement for 20, 30, and 50 years. Only in seven of the twenty-seven cases was the confinement imposed less than 10 years. Overall, these are substantial sentences.

V. MILITARY VERSUS CIVILIAN SENTENCES, AND APPELLATE REVIEW

Trial-level sentences do not tell the whole story, however. In military practice, unlike civilian forums, appeals are of right, n75 and sentences are often mitigated at the appellate level. That was so in the marine cases involving the murder of noncombatants. After military appellate-level mitigation, the twenty-seven sentences were: confinement for life in only two cases; thirty years confinement in another; twenty to thirty years in five others; ten to twenty years in three others; five to ten in five others; less than five years confinement in ten cases; and two convictions set aside, one by reason of procedural error, the other for insanity. n76 Although some sentences were significantly lessened, the range of penalties remained generally high. And one should recall that sentence reductions upon appeal are a result of judicial findings, legal error, or discrepancy in the conviction below. n77 Such reductions are not subjective grants of dispensation.

Case comparisons are suspect, but that range of mitigated court-martial sentence remains comparable to or higher than trial-level sentences in American civilian jurisdictions. In the first half of 1970, for example, when [*77] several of the twenty-seven marines were tried, 132 homicide convictions in Pennsylvania state courts resulted in sentences ranging from probation (in thirty-seven cases), to confinement for life (in three cases). Other Pennsylvania sentences for homicide were confinement for one year (in forty-five cases), two years (in eighteen cases), three to four years (in fourteen cases), five years (in seven cases), six or more years (in seven cases), and one sentence of death. n78 The mitigated Marine Corps war crime sentences--imposed under active service conditions in a combat zone, one should note--cover a similar, or even higher, span. There is no practical means of determining what, if any, sentence reductions resulted from appellate action in the Pennsylvania cases.

In U.S. Federal District Courts in 1973, the first year such statistics were compiled, sentences for the twenty-five convicted first and second degree murderers ranged from probation (in two cases), to confinement for three to five years (in three cases), to five years and over--the breakdown is no more specific--in twenty cases. n79 These federal sentences, like the state sentences, are no more harsh than the mitigated sentences imposed upon marines.

How do court-martial sentences for murdering Vietnamese noncombatants compare with sentences imposed in the same period upon U.S. personnel for murdering fellow-American soldiers? In five such convictions for premeditated murder, five sentences of confinement for life resulted, reduced on appeal to thirty years in one case, to fifteen years in another; in two other cases the life sentences were set aside for new sentence or trial proceedings. n80 In other words, there was no appreciable difference in the court-martial sentence whether the victim was American or Vietnamese.

But most court-martial convictions for killing Vietnamese noncombatants were for unpremeditated murder. In eleven Vietnam-era convictions of U.S. personnel for the unpremeditated murder of other U.S. personnel, four resulted in sentences to life, one of those reduced on appeal to forty-five years, two reduced to thirty years; the seven other sentences were: confinement for eighteen years (eventually reduced to two); two confined for fifteen years, and one for ten years (each of those three being set aside for new trials); two confined for five years; another for fifteen months. n81 [*78] Although there undeniably were occasional military sentences reflecting a shameful xenophobia, n82 there is no striking dissimilarity between the range of these military sentences for unpremeditated murder of Americans and those imposed for the murder of Vietnamese noncombatants--the latter sentences may even tend to be more severe.

Acquittals can be as revealing as sentences imposed, since acquittals may indicate the reluctance of a court to convict, let alone sentence an accused. Sixteen marines, or thirty-seven percent of those tried for murdering Vietnamese noncombatants, were acquitted or had their charges judicially dismissed. n83 In U.S. Federal District Courts in 1969, to select a random year during the Vietnam conflict, thirty-three percent of the civilian homicide cases that went to trial resulted in acquittal or dismissal, n84 a rate essentially the same as found in Marine Corps courts throughout the war for the same offense.

VI. COMBAT SENTENCES, STATESIDE CLEMENCY

Whether the military's mitigated court-martial sentences constitute the "appropriate penal sanction" called for by the Geneva Conventions is arguable. One writer suggests, "it may be concluded, then, that the United States has provided effective penal sanctions for the grave breach involved in willfully killing civilians." n85 But another contends that the final sentences merely demonstrate that

the military system is not capable of handling objectively the investigation and punishment of alleged war crimes in Vietnam. . . . An International Criminal Court would be the only acceptable alternative to what is now at best a national embarrassment. n86

But sentence comparisons, at the state, federal, and military levels (general court-martial convictions are federal convictions, of course), suggest not a national embarrassment as much as a sentencing incoherence. The sentences of American soldiers and marines, whether for the murder of [*79] Vietnamese or for other Americans, were generally severe, if lacking in a discernible pattern. Sentencing results from the same period are similarly mixed when U.S. soldiers murdered other than Vietnamese or fellow-soldiers. n87

But a certain inconsistency in sentences is neither unusual nor limited to courts-martial. As the authors of a study of punishments imposed in civilian murder convictions point out, "the more culpable offense does not always receive the more severe punishment. . . . The huge differences in sanctions within the murder category would appear to offend any colorably coherent theory of punishment." n88 Another writer correctly adds, "Disparity in sentencing, with similar crimes receiving wildly dissimilar sentences, is an unavoidable feature of a judicial system charged with ascertaining the individual circumstances and needs of offenders." n89

A senior Marine Corps judge advocate who later became counsel to the Assistant Secretary of the Navy recalled, "It was always disappointing to me . . . how the sentences were just sliced to pieces . . . That was because of the political climate of the time. . . . There was a feeling in Washington . . . [of] congressional pressure to cut back on a lot of the sentences. . . ." n90

Such an impression, however, reflects an unawareness of similarly "sliced to pieces" sentences imposed in venues beyond Vietnam. In courts-martial involving the murder of Vietnamese noncombatants--war crimes tried under U.S. military law--the sentences imposed at trial and prior to clemency action were clearly in conformity with or even greater than sentences in similar prosecutions involving both American and other foreign victims. The trial-level military sentences fully reflected not only civilian society's denunciation of the acts involved, and reaffirmed the criminal law. They also reflected military society's denunciation. As Professor John Norton Moore has written: "The tradition of judicial review runs deep in the American system. It is not every [criminal] issue, however, which is constitutionally entrusted to the judiciary or which is suitable for judicial action." n91 Sentence clemency is such an issue.

The Supreme Court held in its Vietnam-era decision, *Parker v. Levy*, "the military establishment is subject to the control of the civilian [*80] Commander in Chief and the civilian departmental heads under him, and its function is to carry out the policies made by those civilian superiors." n92

Included among those civilian-made policies is the court-martial clemency and parole program, provided for in federal law, n93 in case law, n94 and promulgated in military regulations. n95 The President of the United States may delegate to the service Secretaries all functions, duties, and powers of confirmation of courts-martial in all cases except those extending to loss of life. Federal law further allows the service Secretaries to "provide a system of parole for offenders who are confined in military correctional facilities. . . ." n96 and directs that the Secretaries shall "establish . . . a system for the remission or suspension of the unexecuted part of the sentences of selected offenders." n97 Finally, the U.S. Code allows service Secretaries to further assign their functions, powers, and duties to Under and Assistant service Secretaries. n98

Each armed service's clemency and parole boards typically consist of five members. The chairperson is a civilian experienced in corrections, with a knowledge of military personnel policies. The four other board members are active duty officers in the grade of major, lieutenant colonel, or colonel. At least one of the officers is a judge advocate--a military lawyer. n99

Prisoners are eligible for clemency after having served specified periods of their confinement. For example, if the prisoner's sentence is ten years or more, but less than twenty years, by service regulation clemency consideration will be no later than two years from the date confinement began and reconsideration will be annually thereafter. If the sentence is from twenty to thirty years, clemency consideration will be no later than three years into the prisoner's confinement. If it is thirty years or more, consideration will be no later than five years into the prisoner's confinement. n100

Additionally, when "exceptional circumstances exist or for other good cause" n101 the board may consider a prisoner serving a sentence of *any length* for clemency *any time* prior to completing his sentence. In other words, [*81] despite pages of specific guidelines, the board has an essentially free hand to act in any case at any time.

Generally, a prisoner is eligible for parole consideration after having served one-third of his period of confinement. But as in clemency regulations, the board "may waive any parole eligibility requirement. . . ." n102 Standards for consideration for both clemency and parole span the factors one might anticipate, from combat service to prior criminality, from the protection of society to deterrence.

Given such broad authority, it is not surprising that clemency and parole actions injected substantial reductions in many Vietnam war crime convictions--even with the presence of four senior military officers on each board. PFC, John Potter, sentenced to confinement for life, served only twelve-and-a-half years--a not inconsiderable period, but well below what one might have anticipated, given the horrific nature of his crimes. For the murder of five Vietnamese non-combatants, Lance Corporal Denzil Allen was sentenced by a marine court-martial to confinement for life; he served only two years and eleven months. These reductions, similar to reductions won by others convicted of Vietnam war crimes, were granted by clemency boards and politically appointed Under Secretaries of the Army and the Navy.

Court-martial sentences for Vietnam-era war crimes, imposed by officer and enlisted panels in the combat zone, were substantial, even heavy. Compared to sentences imposed in civilian courtrooms, they were *decidedly* heavy. Nor were there discernible differences in sentences levied for the murder of Americans and those imposed for Vietnamese victims. Military courts fully executed their responsibilities under customary law of armed conflict and the 1949 Geneva Conventions.

Once those military sentences were reviewed in the relative calm of the United States, and once clemency was exercised by clemency and parole panels, the military sentences were often reduced significantly. By 1970, the war had become unpopular. Military confinement facilities were full. The pressures to grant clemency were no doubt significant. But the results remain notable.

There were instances in which the military justice system itself made significant sentence reductions in the appellate process: Vogel's court-imposed fifty-year sentence was cut to ten years; Ferguson's life sentence lessened to five; Schwarz's life sentence became one year. Two-year sentences resulted for multiple murders in the cases of Belknap, Licciardo, and Maushart. To explain that problems of proof resulted in pre-trial agreements in those cases--plea bargains--is no explanation at all. There were no political appointees or civilians involved in those sentences.

But there were also nine Marine Corps cases--one-third of those considered--wherein clemency and parole boards, far from the sound of guns, [*82] granted dramatic reductions in sentences. Among the more obvious examples are Wilkerson's thirty-year sentence, was reduced to two years; Hamilton's life sentence was reduced to eight years and nine months; Allen's twenty-year sentence was reduced to less than three years; Sikorski's fifteen years to three years; and Taylor's confinement for twenty-five years to less than eight.

Vietnam was not the first instance of civilian reductions in court-martial sentences. Congress first provided for court-martial review by civilian authorities in 1786, when they revised the Articles of War following a commander's execution of three soldiers without benefit of trial. n103 Civilian control of the military establishment was well-established by the midnineteenth century, although it was unclear if that control extended to review of military justice decisions by civilian courts.

Any lack of clarity as to review of courts-martial by civilian courts was resolved in 1857, when the Supreme Court decided *Dynes v. Hoover*. n104 The Court held that a court-martial verdict, "when confirmed [through military appellate procedures] is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever." n105 Accordingly, *Dynes* held, that when findings and sentences have been imposed by regularly convened and legally conducted courts-martial, civil courts are in no way involved with such sentences, "nor are they in any way alterable by them." n106

But there was no such limitation on the power of the President, as commander-in-chief, to confirm, modify, or disapprove court martial findings and sentences involving general officers, dismissal of any officer or cadet, or death. n107 Before the first modern Articles of War were published, n108 President Abraham Lincoln frequently reduced the penalties imposed by military tribunals. n109 After World War I, 28,000 courts-martial were reviewed by Special Clemency Boards and hundreds of sentences modified or [*83] disapproved. n110 These clemency boards were comprised solely of military officers, however.

Before the Uniform Code of Military Justice (UCMJ) became law in May 1950, the Articles for the Government of the Navy were the military law of the Navy and, when they were embarked, the Marine Corps. Their source was the Constitution, Article I, section 8, clause 14, giving Congress the power to make rules for the government and regulation of the land and naval forces. n111 Added by Congress in 1909, article 54.(b) of the Articles for the Government of the Navy for the first time provided authority for the Secretary of the Navy to "set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court-martial. . . ." n112 After fifty-one years, the *Dynes* decision was overtaken by federal legislation, at least as to civilian government officials. Nine years later, in 1918, sim-

ilar legislation allowed the Secretary of War to take similar action in regard to Army courts. n13 That legislation was published as article 53, Articles of War, 1917.

The successor to the Articles of War, the UCMJ, replicated both article 54.(b), Articles for the Government of the Navy, and article of war 53, in UCMJ article 74's provision for civilian--Secretarial--review of courts-martial. During the Vietnam era, in 1968, Congress further provided for Secretarial parole and clemency authority. n14 Finally, in 1984, Congress passed legislation allowing the appeal of court-martial decisions directly to a civilian tribunal, the United States Supreme Court. n15

Before that provision, in 1971, Army Lieutenant William Calley was sentenced by court-martial to dismissal from the Army and confinement at hard labor for life. The punishment was reduced to dismissal and twenty years by the court-martial's convening authority. That period of confinement was left undisturbed through two levels of military appellate review. But, in 1974, Calley's reduced sentence was considered by the Secretary of the Army, not as a discretionary matter, but as required by UCMJ article 71.(b): "If in the case of a commissioned officer . . . the sentence of a court-martial extends to dismissal, that part of the sentence . . . may not be executed until approved by the Secretary concerned. . . ." n16 The same article allows for Secretarial commutation, remission, or suspension of the sentence. The Secretary, Howard W. Calloway, halved Calley's confinement to ten years. n17 Seven [*84] months later, Secretary Calloway, now exercising his discretionary authority under UCMJ article 74 ("The Secretary concerned . . . may remit or suspend any part. . . ." n18) paroled Calley, who had completed one-third of his ten-year sentence, virtually all of it served in house arrest.

The UCMJ articles employed in reducing Calley's general court-martial sentence, imposed by Vietnam-experienced Army officers, were only the latest codification of Congressionally authorized civilian review of court-martial verdicts and sentences.

The U.S. Code provisions that allowed reduction of Potter's life sentence to twelve years, the lessening of Schultz's life sentence to six years, and Wilkerson's thirty-year sentence to two years, were recognition of the authority of clemency and parole bodies to mitigate military-imposed sentences.

VII. CONCLUSION

Congressionally authorized clemency action and civilian political involvement in military sentence review are entirely appropriate. Civilian control of our military is a constitutionally-mandated concept proven throughout the existence of our country.

But it should be borne in mind that the military justice system takes the harshest view of war crimes committed by its own. The Vietnam sentences imposed upon those convicted of war crimes provide ample demonstration of the military jury's recognition of the seriousness of such offenses. While the military record is imperfect, those offenses that are discovered and brought to the court-martial bar are dealt with in severe terms. If there is to be a lessening of the military's punishments, let it be accomplished by those civilian superiors and administrators who oversee our nation's defense.

Finally, even where Vietnam war crimes are concerned, it bears reminding that "war is not a series of case studies that can be scrutinized with objectivity. . . . War is the suffering and death of people you know, set against a background of suffering and death of people you do not." n19

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & Procedure
Guilty Pleas
General Overview
International Law
Sovereign States & Individuals
Human Rights
War Crimes
Military & Veterans Law
Warfare

FOOTNOTES:

n1 Letter from Lieutenant General Charles G. Cooper, USMC, to author (Sept. 12, 1988) (on file with the author).

n2 *United States v. Potter*, 39 C.M.R. 791, 793 (1967). All quotes relating to this case are from the Potter record of trial. The records of trial of the companion cases, *Vogel* and *Boyd*, have been lost, as have many other trial records from the Vietnam era.

n3 *Id.* at 794.

n4 *Id.*

n5 *United States v. Vogel*, 39 C.M.R. 160 (1967).

n6 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 50; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 51; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 147 [hereinafter GWS, GWS Sea, GPW, and GC, respectively; or GCs collectively].

n7 GWS art. 49; GWS Sea art. 50; GPW art. 129; GC art. 146.

n8 UNIFORM CODE OF MILITARY JUSTICE art. 18 [hereinafter UCMJ].

n9 UCMJ art. 51(a) (presuming that the accused pleads "not guilty" and opts for a members (jury) court-martial); *but see* UCMJ art. 45 (stating that if an accused pleads guilty or is tried by a judge alone, then findings and sentence are by the court).

n10 U.S. Navy & Marine Corps Clemency and Parole Bd., confinement record files, Washington Navy Yard, Washington, D.C [hereinafter Clemency & Parole Bd.].

n11 Hospitalman Bretag was sentenced to six months confinement for his part in the rape. Another patrol member, Private First Class James H. Boyd, Jr., pleaded guilty to murder and was sentenced to four years confinement and a dishonorable discharge. Sergeant Vogel, convicted as a principal in the murder of one of the children, and in the rape, was sentenced to fifty years confinement at hard labor and a dishonorable discharge. On appeal, Vogel's confinement was reduced by a military appellate court to ten years; after he had served more than nine years, the Secretary of the Navy, further reduced his confinement to eight years and Vogel was released. Two patrol members, acquitted of major charges, were convicted only of assault with intent to commit rape, receiving six months confinement at hard labor. Three others were acquitted of all charges. Lieutenant Talty was acquitted of being an accessory to murder, but convicted of the innocuous charge of making a false report, and sentenced to forfeiture of \$ 500 and dismissal from the Marine Corps. Two years later, upon appellate review, Talty's dismissal was set aside.

n12 GCs, *supra* note 7.

n13 Yves Sandoz, *Penal Aspects of International Humanitarian Law*, 1 INT'L CRIM. L. 214 (1986). Arguably, the Treaty of Vereeniging, ending the Boer War, which reserved the right to try Boers before military tribunals for law of war violations, preceded the Treaty of Versailles in this regard.

n14 Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CAL. L. REV. 530, 531 (1943).

n15 GCs, *supra* note 7.

n16 *Id.*

n17 2 GEORGE SCHWARZENBERGER, *International Law: As Applied by International Courts and Tribunals*, in *THE LAW OF ARMED CONFLICT* 459 (1968).

n18 HANS Kelsen, *PEACE THROUGH LAW* 76 (1944).

n19 Sir Hersch Lauterpacht, *The Subjects of the Law of Nations*, 63 *L. Q. REV.* 438, 448 (1947).

n20 U.S. CONST. art. I, § 8, cl. 10.

n21 *Id.* cl. 14.

n22 3 WHARTON DIGEST, at 326-29.

n23 INGRID D. DELUPIS, *THE LAW OF WAR* 343, 348-49 (1987). *See also* HILAIRE McCoubrey, *INTERNATIONAL HUMANITARIAN LAW* 195 (1990).

n24 *United States v. Allen*, 19 *C.M.A.* 604 (1968), *cert. denied*, 402 *U.S.* 1008 (1971). Caustically referred to by their prosecutors as "The Magnificent Seven," Allen and six other members of his patrol, including LCpls. John D. Belknap, James A. Maushart, and Anthony Licciardo, Jr., were tried by other courts-martial and convicted of the murders. Reflecting their lesser involvement, they were each sentenced to dishonorable discharges and two years confinement at hard labor. A fifth patrol member was found not guilty due to lack of mental responsibility. The sixth was found not guilty.

n25 Clemency & Parole Bd., *supra* note 10.

n26 UCMJ arts. 118, 119.

n27 JOSEPH M. SWEENEY ET AL., *CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM* 849 (3d ed. 1988).

n28 U.S. DEP'T OF THE ARMY, *FIELD MANUAL 27-10, LAW OF LAND WARFARE*, para. 507.b (1956).

n29 18 *U.S.C.* § 2441 (2000).

n30 *Id.* subsections (c)(1), (3), and (4). A war crime is defined as any conduct defined by the 1949 GCs as a grave breach, any violation of the GCs' common article 3, or the willful killing or serious injury of civilians.

n31 Kelsen, *supra* note 18, at 77; *but see* R.R. Baxter, *The Municipal and International Law Basis of Jurisdiction over War Crimes*, 28 *BRIT. Y.B. INT'L L.* 382 (1951).

n32 Leslie C. Green, *Superior Orders and the Reasonable Man*, 8 *CAN. Y.B. INT'L L.* 61 (1970).

n33 Law of Land Warfare, *supra* note 28, at para. 507(b). Rare exceptions were two Army officers involved in the My Lai massacre, Captain Eugene M. Kotouc and First Lieutenant Thomas K. Willingham, who were initially charged with violations of the law of war, *per se*. The specifications of the charges were otherwise worded as ordinary UCMJ offenses. U.S. Army, Preliminary Investigation Into My Lai, testimony of Kotouc (designated by code letters "BX") and Willingham (code letters "WT"), n.p.

n34 LT.GEN. W.R. PEERS, THE MY LAI INQUIRY (1979). Even My Lai's infamous war crimes went unreported to the world for thirteen months.

n35 HARRY G. SUMMERS, JR., THE VIETNAM WAR ALMANAC 90 (1985).

n36 Those orders, too many to recount, started at the Department of Defense level and, in both the Army and Marine Corps, were replicated down the chain of command to battalion level. Those orders, many of which were required to be re-published every six months, and to be read to every soldier and marine, covered every aspect of the law of armed conflict from reporting suspected violations of the law of war to reporting to Washington the results of subsequent disciplinary actions.

n37 SUMMERS, *supra* note 35, at 91. *See* GUENTER LEWY, AMERICA IN VIETNAM 454 tbl.8-1 (1978) (citing a total of 36,725 VC/NVA assassinations).

n38 U.S. Mission in Vietnam, *A Study: Viet Cong Use of Terror*, 7 (Mar. 1967) (Vietnam Archive, Texas Tech Univ., Special Collections Library, The Douglas Pike Collection, Unit III: War Atrocities) [hereinafter Vietnam Archive].

n39 Reporting Vietnam, Part One: American Journalism 1959-1969, at 43-46 (1998).

n40 Vietnam Archive, *supra* note 38385. *See also* SUMMERS, *supra* note 35, at 91.

n41 Vietnam Archive, *supra* note 38, "Viet-nam Bulletin," Sept. 21, 1970.

n42 STANLEY KARNOW, VIETNAM: A HISTORY 543 (1984).

n43 *Id.*

n44 SUMMERS, *supra* note 35, at 91 (citing convictions of 201 soldiers and 77 marines as having been court-martialed for "serious crimes" against Vietnamese civilians); *See* LEWY, *supra* note 37, at 456 (citing 90 Marine convictions for "serious Offenses").

n45 LEWY, *supra* note 37, at 350.

n46 MGEN. GEORGE S. PRUGH, LAW AT WAR: VIETNAM 1964-1973, at 77 (1975).

n47 *United States v. Calley*, 46 C.M.R. 1131 (1973) (referring to Calley's act as war crimes).

n48 GEN. WILLIAM C. WESTMORELAND, A SOLDIER REPORTS 367-68 (1976) (describing the dismissal of charges against seven Army officers, including a colonel, involved in the murder of a South Vietnamese intelligence agent).

n49 *United States v. Stamats*, 45 C.M.R. 765 (1971).

n50 Col. W. Hays Parks, *Crimes in Hostilities*, Part I, MARINE CORPS GAZETTE, Aug. 1976, at 16, 18.

n51 LEWY, *supra* note 37, at 348.

n52 Aubrey M. Daniel, *The Defense of Superior Orders*, 7 U. RICH. L. REV. 477, 495 (1973).

n53 Waldemar A. Solf, *A Response to Telford Taylor's 'Nuremberg and Vietnam: An American Tragedy,'* 5 AKRON L. REV. 43, 67 (1972), reprinted in JOSEPH GOLDSTEIN ET AL., THE MY LAI MASSACRE AND ITS COVER-UP: BEYOND THE REACH OF THE LAW? 15 (1976).

n54 *See, e.g.*, U.S. NEWS & WORLD REPORT, Apr. 19, 1971, at 20. *See also* JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 291 (1974).

n55 *See, e.g.*, MACV Directive 20-4, July 10, 1970, Annex D, Inspections and Investigations: War Crimes.

n56 Interview with The Honorable Walter T. Cox, Judge, U.S. Court of Appeals for the Armed Forces in Washington, D.C. (Dec. 7, 1990).

n57 TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 158 (1970).

n58 RICHARD HAMMER, ONE MORNING IN THE WAR 71 (1970).

n59 RICHARD HAMMER, THE COURT-MARTIAL OF LT. CALLEY 392 (1971).

n60 TAYLOR, *supra* note 57, at 171.

n61 PEERS, *supra* note 34, at 230-31. *See also* PETER KARSTEN, LAW, SOLDIERS, AND COMBAT 35 (1978).

n62 ANDREW ASHWORTH, SENTENCING AND PENAL POLICY 16-18 (1983).

n63 ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 15-16 (1991).

n64 H.L.A. HART, LAW, LIBERTY, AND MORALITY 37 (1963).

n65 UCMJ art. 65.(b) ("Records of trial and related documents shall be . . . disposed of as the Secretary concerned may prescribe by regulation.").

n66 Access to Vietnam-era Army cases may be arranged through the U.S. Army Judiciary, Falls Church, Virginia.

n67 Office of the Judge Advocate General of the Navy, Code 64.2.

n68 LEWY, *supra* note 37, at 458 tbl. 10-5.

n69 NICOLA LACEY, STATE PUNISHMENT 167 (1988).

n70 ROGER HOOD & RICHARD SPARKS, KEY ISSUES IN CRIMINOLOGY 141-56 (1970) (citing six such studies from the U.S. and England). *See* BARBARA HUDSON, JUSTICE THROUGH PUNISHMENT: A CRITIQUE OF THE 'JUSTICE' MODEL OF CORRECTIONS 43-48 (1987) (citing another six).

n71 LACEY, *supra* note 69, at 193 (italics in original).

n72 HUDSON, *supra* note 70, at 46.

n73 However, some authorities suggest that crime prevention does not, by itself, require formal punishment. *See, e.g.*, R.A. DUFF, TRIALS AND PUNISHMENTS 165 (1986).

n74 Parks, *supra* note 50, at 14 (stating that ninety-five Army personnel were similarly convicted of murder and manslaughter). *See also* LEWY, *supra* note 37, at 325.

n75 5 *Op. Att'y. Gen.* 508 (1852). ("The sentences of naval courts-martial are incomplete and cannot lawfully be carried into effect until they have received the approval or confirmation of some revisory power."). *Id.* Article 66(b)(1) of the UCMJ requires that a court-martial case be referred to the service's appellate court if the approved sentence extends to death, a dishonorable or bad conduct discharge, or confinement for one year or more. UCMJ art. 66(b)(1). Except in cases involving the death penalty, Article 61 allows an accused to waive or withdraw his right to automatic appellate review. UCMJ art. 61.

n76 LEWY, *supra* note 37, at 458 tbl. 10-5.

n77 UCMJ art. 66(b).

n78 Franklin E. Zimring et al., *Punishing Homicide in Philadelphia: Perspectives on the Death Penalty*, 43 *U. CHI. L. REV.* 227 (1976) (translating the table's percentages into discrete numbers).

n79 MICHAEL J. HINDELANG ET AL., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1973 (1973) (listing seven punishment categories: one year and under; one to three years; three to five years; five years and over; probation; fine; and other).

n80 *See generally* *United States v. Thomas*, 41 *C.M.R.* 828 (1970); *United States v. Brandy*, 40 *C.M.R.* 674 (1969); *United States v. Walker*, 41 *C.M.R.* 632 (1969); *United States v. Newsome*, 43 *C.M.R.* 695 (1970); and *United States v. Jones*, 44 *C.M.R.* 818 (1969).

n81 *See generally* *United States v. Chappell*, 41 *C.M.R.* 236 (1970); *United States v. Wimberly*, 42 *C.M.R.* 242 (1970); *United States v. White*, 40 *C.M.R.* 883 (1969); *United States v. Jackson*, 40 *C.M.R.* 355 (1969); *United States v. Richardson*, 43 *C.M.R.* 742 (1971); *United States v. Roman*, 40 *C.M.R.* 561 (1969); *United*

States v. Hurt, 41 C.M.R. 206 (1970); *United States v. Butler*, 40 C.M.R. 207 (1969); *United States v. Butler*, 39 C.M.R. 824 (1968); *United States v. Thibeault*, 43 C.M.R. 704 (1971).

n82 See, for example, *United States v. Bumgarner*, 43 C.M.R. 559 (1970), in which a conviction for the unpremeditated murder of three Vietnamese noncombatants resulted in a reduction in grade from sergeant to private and forfeiture of \$ 97 per month for six months. No discharge or confinement was imposed. Shortly after the conviction, Bumgarner was reenlisted.

n83 Letter from Brigadier General John R. DeBarr, General Court-Martial Military Judge in Vietnam, to Professor Gunter Lewy (Mar. 9, 1976) (on file with author).

n84 U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 1970, at 153 tbl.236 (1970).

n85 Alfred P. Rubin, *Legal Aspects of the My Lai Incident*, 49 *OR. L. REV.* 260 (1970).

n86 Comment, *Punishment for War Crimes: Duty - or Discretion?*, 69 *MICH. L. REV.* 1312, 1346, n.203 (1971).

n87 See generally *United States v. Griggs*, 41 C.M.R. 541 (1969) (sentencing a soldier to five years of confinement for murdering his wife and her lover; reduced on appeal to two years); *United States v. Stevenson*, 41 C.M.R. 69 (1969) (sentencing a U.S. soldier to thirty years of confinement for murdering a Canadian soldier in Germany); *United States v. Nichols*, 46 C.M.R. 1316 (1973) (sentencing a soldier to 18 years of confinement for murdering an Okinawan prostitute); *United States v. Small*, 45 C.M.R. 700 (1972) (sentencing a soldier to one year for murdering an American lover; reduced to seven months).

n88 Zimring, *supra* note 78, at 242.

n89 HUDSON, *supra* note 70, at 27.

n90 Interview by unnamed Marine with Col. Robert M. Lucy, Washington, D.C. (June 24, 1970).

n91 JOHN NORTON MOORE, *LAW AND THE INDO-CHINA WAR* 598 (1972).

n92 *Parker v. Levy*, 417 U.S. 733, 751 (1974).

n93 10 U.S.C. §§ 871, 952, 953 (2000).

n94 See, e.g., *Sima v. United States*, 96 F.Supp. 932 (Ct. Cl. 1951) (pertaining to the clemency authority of the Secretary and Under Secretary of the Navy).

n95 UCMJ art. 74. See also Army Reg. 27-10, Military Justice, Sec. V, Post-trial (a typical service implementing order).

n96 10 U.S.C. § 952 (2000).

n97 10 U.S.C. § 953 (2000).

n98 *10 U.S.C. § 3013(f)* (2000).

n99 U.S. Army Reg. 15-130, Army Clemency and Parole Bd., para. 2-3.

n100 *Id.* para. 3.1.d.

n101 *Id.* para. 3.1.d.(10) (emphasis supplied).

n102 *Id.* para. 3.1.e.

n103 WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 972 (1920). The revision required that no court-martial sentence "in time of peace, extending to the loss of life . . . [or] . . . either in time of peace or war . . . a general officer [shall] be carried into execution until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before Congress for their confirmation, or disapproval, and their orders on the case."

n104 *61 U.S. 65 (1857), aff'd, 100 U.S. 13 (1879), aff'd, 114 U.S. 564 (1885), aff'd, 116 U.S. 116 (1886), aff'd, 122 U.S. 543 (1887)*. *But see Ex parte Milligan, 71 U.S. 2 (1866)* (suggesting that there was no permanent bar to civilian supervision over a military justice proceeding).

n105 *Dynes v. Hoover, 61 U.S. 65, 81 (1857)*.

n106 *Id.* at 82.

n107 Articles of War, 1917, arts. 48, 49.

n108 U.S. WAR DEP'T, *A MANUAL FOR COURTS-MARTIAL*, at ix (1916). The first Articles of War were passed by the Second Continental Congress in 1775. *See also* WINTHROP, *supra* note 103, at 21-22 (stating that the first "modern" Articles of War may be considered those first enacted in the twentieth century, *i.e.*, Articles of War, 1917, which replaced those of 1874).

n109 1 JONATHAN LURIE, *ARMING MILITARY JUSTICE* 32 n.35 (1992).

n110 *Id.* at 83 n.41.

n111 NAVAL COURTS AND BOARDS, 1937, 1 (1937).

n112 Articles for the Gov. of the Navy, art. 54. (b), Feb. 16, 1909, c. 131, sec. 9, 35 Stat. 621.

n113 U.S. WAR DEP'T, *A MANUAL FOR COURTS-MARTIAL*, 1918, 317 (1918).

n114 *10 U.S.C. §§ 952, 953*.

n115 *28 U.S.C. § 1259* (2000). *See also* UCMJ art. 67a.

n116 UCMJ art. 71(b).

n117 *See* SUMMERS, *supra* note 35, at 258-59.

n118 UCMJ art. 74.

n119 JAMES R. McDONOUGH, PLATOON LEADER 139 (1985).