

## Topics: Judgment on Mylai

By TELFORD TAYLOR

What actually happened at Mylai in March of 1968 is and may well remain obscured by the fog of war, the passage of time, and the self-interest of surviving participants. But their accounts have raised questions of the greatest moment—questions that will not be sufficiently answered by trial of a handful of accused soldiers.

Is there any significant difference between killing a babe-in-arms from an aircraft, or by an infantryman's point-blank gunfire? During the Second World War many thousands of infants were burned to death in Berlin, Tokyo, Hamburg and other enemy cities and these were certainly regarded as legitimate military operations. Would that have justified Allied ground forces in entering German and Japanese villages "with guns blazing" and killing off the surviving infants?

### Laws of War

The death of an infant in consequence of military operations does not establish that a war crime has been committed. But there must be a reasonable military basis for the act that causes the death, and in this respect the aviator and the infantryman are in different situations. The former is attacking a functioning part of an enemy war machine with a weapon that cannot discriminate. The latter is part of a

force occupying conquered territory, and is in a position to discriminate among the inhabitants without shooting babies.

Accordingly, the laws of war require that, in dealing with civilians, troops shall take reasonable steps to avoid unnecessary harm to the population.

During the Second World War many American soldiers were court-martialed and severely punished for violating these very same laws of war, and the fact that we are now fighting in Asia instead of Europe is hardly a worthy basis for suspending their operation.

There are, however, features of the Vietnam conflict which make some of the rules unusually difficult of application. No front line separates ally from enemy; the terrain lends itself to clandestine operations; women and children frequently participate; South and North Vietnamese do not label themselves as such, and individuals of the yellow race are hard for our soldiers to identify. No one utterly blind to realities can fail to make allowance for the uncertainties faced by our troops in distinguishing inoffensive non-combatants from hostile partisans.

These circumstances are especially relevant to the well-known problem of whether obedience to a superior's order may be a defense against criminal charges. There is a prevalent but mistaken notion

that such orders were, until the Nuremberg judgments, a complete defense. In fact, military obedience as an absolute duty was rejected by the British courts in the time of Charles II, and in 1804 Chief Justice Marshall laid it down as the law of the United States that military orders are no justification for known unlawful—a principle today embodied in the Army Field Manual.

### Command Responsibility

Superior orders can, however, be invoked by the soldier uninformed about the military situation who relies on the judgment of his commander and is most subject to the pressures of discipline. If such a defense is accepted for a sergeant or lieutenant, however, the consequence is not the elimination of responsibility for what happened, but an upward shift in its locus. It would stultify the whole system to exculpate the underling who followed orders and ignore the superiors who gave them.

In confused and shifting circumstances such as the Vietnam war presents the responsibility of the higher officers for training, doctrine, and practice is, because of those factors, all the greater. It is a pertinent if touchy recollection that, after the Second World War, the Japanese General Yamashita was condemned to death by a court of senior

American officers not for what he himself did, but for failing to give and enforce orders to check the excesses of his troops.

If in fact Mylai was a massacre, was it an isolated episode or symptomatic of a diseased command structure? Are we now unable or unwilling to distinguish friend from foe with reasonable approximation? By what standards are the so-called "fire-free zones" determined, and what has been their consequence? Have racial feelings or the callouses of war rendered our troops generally indifferent to the welfare of the Vietnamese people? Are our generals so immersed in the business of war that they are blind to our announced goals in Vietnam?

It is our Government and those who have supported its policy that most need to resolve these questions, little as this appears to be realized. However persuasive the original justifications for the Vietnam venture may have been, they cannot survive a system under which our friends are in as much danger from American military power as are those against whom it is supposed to be a protection.

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