

Nuremberg in Son My

By TELFORD TAYLOR

The ultimate question of "guilt" in the trials of the Son My troops is how far what they did departed from general American military practice in Vietnam as they had witnessed it. This may not be germane to the question of legality under the Geneva Conventions or the Articles of War. But the defense of superior orders has its true base not in technicality but in equity. It is properly invoked by the low-ranking soldier in mitigation of punishment for conduct, even though unlawful, that is not too far removed from the behavior authorized or encouraged by his superiors.

On their face, as regards the laws of war, the military directives for the conduct of the Vietnam war are impeccable. All troops arriving in Vietnam are to receive "information cards," covering treatment of "The Enemy in Your Hands," and stressing "humanitarian treatment and respect for the Vietnamese people." The "Rules of Engagement" issued by the American commander in Vietnam, then Gen. William Westmoreland, instructed the troops to "use your fire power with care and discrimination, particularly in populated areas." Directly pertinent to Son My was the directive on minimization of civilian casualties, which called for protection of the inhabitant "whether at any one time he lives in a VC or GVN [Government of Vietnam] controlled hamlet."

But the question remains whether the picture painted by these directives bears any resemblance to the face of war in Vietnam. Of what use is an hour or two of lectures on the Geneva Conventions if the soldier sent into combat sees them flouted on every side?

The Army leadership can hardly have been blind to the probable consequences to civilians of a massive employment of American troops in Vietnam. Indeed, Lt. Gen. Peers called attention in his official report on Son My to the dangers to noncombatants from "frequent employment of massive fire power" and from "the intermingling of the nonuniformed foe and the populace," and declared that: "Early in the conflict, these factors and many others associated with this unique war caused great concern at the highest levels for the protection of noncombatants and the minimization of casualties to those persons not directly involved." But how did this concern manifest itself, other than in the bland

Do Not the Principles Of the German Trials Apply to Vietnam?

language of the various directives and "rules of engagement"?

During the Second World War, the German Army in occupied Europe faced conditions that, in some countries, were not totally dissimilar to those prevailing in Vietnam, and had a like mission of "pacification." There, too, villages were destroyed and the inhabitants killed, and after the war a number of field marshals and generals implicated in the actions were brought to trial at Nuremberg in the so-called "High Command case." In summing up at the close of the trial, the prosecution dealt with this same issue of comparative responsibility as between the troops and their leaders:

"Somewhere, there is unmitigated responsibility for these atrocities. Is it to be borne by the troops? It is to be borne primarily by the hundreds of subordinates who played a minor role in this pattern of crime? We think it is clear that that is not where the deepest responsibility lies. Men in the mass, particularly when organized and disciplined in armies, must be expected to yield to prestige, authority, the power of example, and soldiers are bound to be powerfully influenced by the examples set by their commanders. That is why . . . the only way in which the behavior of the German troops in the recent war can be made comprehensible as the behavior of human beings is by a full exposure of the criminal doctrines and orders which were pressed on them from above by these defendants and others. . . . If a decision is to be rendered here which may perhaps help to prevent the repetition of such events, it is important above all else that responsibility be fixed where it truly belongs."

General Peers was directed to investigate only what happened after Son My—specifically "the adequacy of . . . investigations or inquiries and subsequent reviews and reports within the chain of command," and "whether any suppression or withholding of information by persons involved in the incident had taken place." But so far as is publicly known, the Army has undertaken no general investigation of the killings themselves, to

determine the level of responsibility for the conditions that gave rise to Son My or the many similar though smaller incidents.

Now the Son My court-martial proceedings carry the prospect of inquiry into those ominous problems—into body counts, and zippo raids, and free-fire zones, and "mere gook rules." The motive force will be the defendants' effort to shake off culpability either by showing that what they did was not "wrong," however unlawful, or that if wrong, others more highly placed were primarily responsible. Such an inquiry is unlikely to be either complete or dispassionate.

Both in fairness to the defendants and in response to the public need, accordingly, there is much to be said for trying the Son My cases before a special military commission, to which able civilian judges and lawyers, outside the military chain of command, might be appointed. As has been seen, the defense of superior orders does not eliminate criminal responsibility but rather shifts it upward, and that is the direction in which an ordinary court-martial will be least anxious to look.

Whatever the limits and standards of culpability for civilians in Washington, the proximity and immediate authority of the military commanders ties the burden of responsibility much more tightly to their shoulders. From General Westmoreland down they were constantly in Vietnam, and splendidly equipped with helicopters and other aircraft, which gave them a degree of mobility unprecedented in earlier wars, and consequently endowed them with every opportunity to keep the course of the fighting and its consequences under close and constant observation. Communications were generally rapid and efficient, so that the flow of information and orders was unimpeded.

Whether or not individuals are held to criminal account is perhaps not the most important question posed by the Vietnam war today. But the Son My courts-martial are shaping the question for us, and they cannot be fairly determined without full inquiry into the higher responsibilities. Little as its leaders seem to realize, this is the only road to the Army's salvation and moral health.

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