

MAR 15 1971

THE NEW YORK TIMES,

Calley Judge Bars Any Finding Of 'Involuntary Manslaughter'

By HMER BIGART

Special to The New York Times

FORT BENNING, Ga., March 14 — The jury in the court-martial of First Lieut. William L. Calley Jr. must convict or acquit him of premeditated murder, murder or voluntary manslaughter in the alleged mass killing of Vietnamese civilians at Mylai, the military judge said today.

The judge, Col. Reid W. Kennedy, thus ruled out any jury finding that Lieutenant Calley was guilty merely of involuntary manslaughter or a lesser offense in the charges of killing 70 Vietnamese civilians at a ditch outside Mylai and 30 others at the southern edge of the hamlet.

Colonel Kennedy's decision, given to counsel for both sides during a courtroom discussion of the instructions he will give to the jury later this week, was a blow to the defense.

For it left the jurors with no alternative but to acquit Lieutenant Calley or punish him severely. It gave them no chance to apply the "mere gook rule"—the passing of a lighter sentence on the ground that "mere gooks" had been killed.

At one time today, Judge Kennedy said that he would instruct the jury that it could find Lieutenant Calley guilty of involuntary manslaughter on the main counts. Involuntary manslaughter connotes unintentional negligent killing. The maximum punishment generally imposed by courts-martial for involuntary manslaughter is three years.

Judge Changes Mind

But after a recess, Judge Kennedy told the lawyers, "Involuntary manslaughter is out."

He said that he would instruct the jury that it could acquit or convict Lieutenant Calley on the lesser offense of assault with intent to commit murder on an additional specification involving the death of a child.

A witness, Charles Sledge, who was a member of Lieutenant Calley's platoon during the assault on Mylai March 16, 1968, had testified that he saw Lieutenant Calley seize a small boy who had crawled out of a pile of corpses in the ditch. The witness said that Lieutenant Calley grabbed the boy by the wrist, threw him back into the ditch and then fired into the ditch.

But Judge Kennedy said that no one had seen the child slain.

On the final charge — that Lieutenant Calley murdered a Vietnamese male in white robes who might have been a monk or a priest — Judge Kennedy said that he would tell the jury it must acquit Lieutenant Calley on this charge unless it was

satisfied that Lieutenant Calley had shot the man.

In his testimony, Lieutenant Calley admitted "butt-stroking" the man [clubbing him in the face with his rifle] but denied shooting him.

Other Instructions

If they jury decides that Lieutenant Calley killed only one of the 100 persons allegedly slaughtered in the ditch and on the edge of the hamlet, it may bring in a verdict of guilty said Judge Kennedy. He said that the Government need not prove that "no less than 70" and "no less than 30" were killed at those sites.

He also said that he would instruct the jury that the killing of unresisting civilians violated one of the basic rules of war.

He said that he would instruct the jury to use "extreme caution" in evaluating the credibility of Capt. Ernest L. Medina an important witness called by the court in the final week of testimony.

This instruction was requested by the defense. Lieutenant Calley has insisted that he was ordered to kill civilians by his company commander, Captain Medina, who faces court-martial on charges of responsibility for the killings at Mylai, has denied issuing such orders.

Colonel Kennedy refused a defense request that the jury be instructed to regard the inhabitants of Mylai as "enemies."

He also refused to tell the jury to disregard the "farmer-in-the-well" incident that preceded Mylai. Lieutenant Calley, according to witnesses, had a Vietnamese farmer thrown into a well and then shot him.

Colonel Kennedy said that he would tell the jury that the testimony was usable in weighing the "mental condition" of Lieutenant Calley.