The Course of

By TELFORD TAYLOR

AS a signatory of the Geneva Convention of 1949, the United States is bound to "search for" and bring to trial all persons who have committed "grave breaches" of the laws of war, and to "enact any legislation necessary to provide effective penal sanctions for persons committing" grave breaches. As the nation which for over a century took the lead in codifying and applying the laws of war, the United States is bound to govern the conduct of its armed forces by the standards that have been applied to the soldiers of Germany, Japan and other nations.

Now that the last of the courts-martial relating to the Mylai killings has concluded, it is time to assess our Government's role and obligations.

Ten enlisted men, one platoon leader and the company commander were charged with criminal responsibility for the Mylai killings. No effort was made to bring to trial any officer at a higher level, or anyone who had left military service prior to public disclosure of the killings. Three of the enlisted men charged were brought to trial; all were acquitted, and thereafter the charges against the others were dropped.

Ably prosecuted, the platoon leader, Lieut. William Calley, was convicted of first-degree murder and sentenced to imprisonment for life, subsequently reduced to 20 years. Strongly defended, the company commander, Capt. Ernest Medina, was acquitted.

Since over a year passed between the Mylai killings and disclosure of the episode, the Army established a high-level board of review, headed by Lieut. Gen. William R. Peers, to inquire into the circumstances of the "cover-up." On the basis of the board's findings, charges of perjury and other derelictions connected with the cover-up were filed against 14 officers, including the divisional commander, a major general.

Thereafter the charges against 13 of the 14 were dismissed without trial. Col. Oran Henderson alone was tried, and acquitted. Captain Medina, who freely admitted that he had concealed the killings, was not charged with the cover-up.

While the several courts-martial were in process, the Peers report was rightly held confidential. The Army has announced that it will not be released, at least until the review of Calley's case is completed. But Pentagon Papers and Anderson papers have now been followed by "Peers papers," and much of the contents of the report have been disclosed in articles by Seymour Hersh in The New Yorker. According to the Hersh account, the Peers report shows that the killings at Mylai were not confined to the men of Calley's platoon, or even of Medina's company, though the Army has never brought charges in connection with these other units, or even acknowledged that they occurred.

Although many persons participated in or were otherwise responsible for the Mylai killings, only Lieutenant Calley has been found guilty. And, although the killings were unlawfully concealed and numerous officers were involved, no one has been found criminally responsible for the cover-up. It is apparent that the Army's procedures for the prevention, detection, and punishment of war crimes have failed abysmally. It is equally apparent that the United States has seriously defaulted on its international obligations under the Geneva Conventions.

Calley's personal guilt is beyond question, but the idea that he alone should bear criminal responsibility is absurd. Certainly no deterrent purpose can be served by punishing only Calley, and so irrational an outcome tends to degrade rather than exalt the judicial process. Under the circumstances, commutation or suspension of Calley's sentence is appropriate, *but only if done for the right reasons*. Any clemency for Calley which implies that what he and the others did at Mylai was "really not so bad" would turn a disgraceful situation into an unspeakable one. The "greatest reason" is to do "the right deed for the wrong reason," T. S. Eliot had Thomas Becket say.

Clemency for Calley should be granted, if at all, on the basis that it is unfitting and unprincipled to punish one man for the crime of many. It should be accompanied by an avowal that the Army's procedures proved inadequate to cope with the problems of the Mylai killings.

Over the years, the United States Army has done as well as most and better than many others in requiring its men to comply with the laws of the war. This generally good record makes it doubly important to perceive the causes of failure in connection with Mylai.

The Government failed to take proper account of the Supreme Court's 1955 decision that ex-servicemen are not answerable to court-martial

Military Justice

for accusations of crime committed while in service. That decision should have stimulated legislative action to confer on the Federal courts, or other suitable tribunals, jurisdiction over such offenses. The Government's failure was a plain breach of our obligation, under the Geneva Conventions, "to enact any legislation necessary to provide effective penal sanctions" for war crimes. The consequence of this failure was that those involved in Mylai who had left the service before the disclosures were immune.

Captain Medina did not personally participate in the mass killings at Mylai, and the charge against him in this respect was based on the well-established doctrine of "command responsibility"—the duty, as described in the Army field manual on the law of land warfare, "to take the necessary and reasonable steps to insure compliance with the laws of war" by his troops. The manual is explicit that this duty attaches when the commander "has actual knowledge, or should have knowledge" that his troops are committing or about to commit war crimes. A commander must not, whether deliberately or negligently, fail to acquire information about his troops' actions necessary for his responsibilities.

But the military judge before whom Medina was tried, in his charge to the jury, omitted the "should have" portion of the rule and instructed the jury that they could not find Medina guilty unless he had "actual knowledge." He also charged them not to find Medina guilty unless they were satisfied that unlawful killings of Mylai villagers took place after the time at which he acquired actual knowledge. Since no one was holding a stopwatch on the morning's doings in Mylai, it is hard to see how a conscientious jury could have made any such finding.

It is clear that the charge virtually dictated acquittal, and that it was squarely contrary to the laws of war as set forth in the Army's own field manual. It is likewise clear that Medina's acquittal effectively immunized all those above him in the chain of command, for if the company captain, within earshot of the killings and in radio communication with the guilty unit, could not be found liable, how could colonels and generals overhead in helicopters?

The fiasco with respect to the cover-up was largely due to the independent authority which the military judicial system gives to the commander of the headquarters to which an accused officer is assigned. In 13 of the 14 cases in which the Peers board recommended charges, the headquarters commanders in substance overruled the board and ordered the charges dismissed.

Apart from the failure of the Army's judicial machinery, there has been an even more serious deficiency in the Government's response to the Mylai disclosures. The several courts-martial have done little to inform the public on the broader questions raised by the episode. What were the antecedent circumstances of training and leadership which made Mylai possible? What are the legal and human consequences of Army operational standards and practices in Southeast Asia, such as "body count" reports, "free-fire" and "free-strike" zones, mass removals of civilians from their homes, crop destruction and defoliation?

Now that the criminal process has run its sorry course, a number of other measures are urgently necessary. These should include:

(1) Review of Calley's sentence in the light of the failure to convict anyone else;

(2) Enactment of legislation authorizing appropriate tribunals to try ex-servicemen accused of crimes committed while in service outside the United States;

(3) Publication of the Peers report and the documents and testimony on which it was based;

(4) Creation of a national commission of inquiry, vested with power to compel testimony and grant immunity, in accordance with the recent recommendations of the Association of the Bar of the City of New York. The commission's range of investigation should include at a minimum the military operational directives in force in Southeast Asia, the standards of training and discipline with regard to observance of the laws of war, and the processes of military justice in dealing with war crimes.

Only by treating the end of the courts-martial as the beginning of serious efforts to confront the facts and learn from experience can the failure of the judicial process be redeemed, and the stain of Mylai lightened.

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