

Impact of Calley Trial

War Crimes Conviction Raises Series Of Legal Conflicts for Foot Soldiers

By FRED P. GRAHAM MAR 31 1971
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WASHINGTON, March 30—Historically, war crimes trials have been the business of victors. The United States has broken with the tradition by convicting in midwar one of its own men, First Lieut. William L. Calley Jr., of murdering Vietnamese civilians, and thus has confronted its foot soldiers and its commanders with a series of legal conflicts. As so often happens, the pinch appears to be primarily upon the foot soldiers. Lieutenant Calley's conviction demonstrated, if there was any doubt, that the excuse that "I was just following orders" will not work. He contended that he had been ordered to "waste" the villagers at Mylai, but the Uniform Code of Military Justice says that this is no defense if "a man of ordinary sense and understanding would know [the order] to be illegal."

To anyone who has served in the infantry, the thought of a soldier in the field standing around pondering the legality of a superior's order is bizarre enough to demonstrate the unfairness of this rule.

This unfairness was academic so long as atrocity trials were mostly reserved for the losing side, but now that Lieutenant Calley has been convicted and cries of "scapegoat" are being heard, the legal plight of the soldier in Vietnam has been brought into sharp focus.

Choice for the Jury

In the Calley case itself, the jury could either have disbelieved his contention that he had acted under orders when he shot women and children at close range, or decided that he should have realized that any such order was illegal and should be disobeyed.

But the case could have been much more difficult. Lieutenant Calley's immediate superior, Capt. Ernest L. Medina, denied issuing orders to shoot the civilians but acknowledged ordering the lieutenant to use the Vietnamese as "guides" across suspected mine fields.

There was also testimony that it was common practice in some United States units to burn the houses, kill all the animals and poison the fields and wells of villages suspected of harboring Vietcong.

These tactics and others ordered in Vietnam — the shelling of hospitals, the bombing of villages, the defoliation of forests — are arguably in violation of the laws of war.

Thus Lieutenant Calley and others could conceivably have been court-martialed for acts done under orders that were not palpably illegal. This has led many persons to insist that the scrutiny of Mylai must now range up the line of command, to include the generals and perhaps their civilian superiors.

Adrian S. Fisher, dean of Georgetown Law School and a technical adviser to the United

States judges at the Nuremberg war crimes trial after World War II, has said that the American military high command must now "taste the cup" of guilt that it forced upon the Japanese after that war.

Appearing this morning on the National Broadcasting Company's "Today" show, Dean Fisher pointed out that the United States hanged Gen. Tomoyuki Yamayita, the Japanese commander in the Philippines, for atrocities committed by troops under his command.

General Yamashita's communications with the offending garrison at Manila were erratic. But the Supreme Court upheld a death sentence that was based on the theory that a commander must take steps to see that his men do not commit atrocities.

Thus the inquiry up the chain of command should question why the killings were not prevented, Dean Fisher said. In fact, the prosecution has concentrated on the troops in the field, and its focus has been narrowly on the events of Mylai and their aftermath.

Of the 25 enlisted men and officers originally charged with participating in the massacre or attempting to cover it up, two enlisted men have been tried and acquitted. Charges against 19 have been dropped, including those against the division commander, Maj. Gen. Samuel W. Koster, who had been accused of covering up the massacre.

3 Officers Face Trial

Three officers are yet to be tried: Captain Medina, Col. Oran K. Henderson, the former brigade commander of the troops at Mylai, and Col. Ernest M. Kotouc, the brigade's intelligence officer. All are charged with crimes at the scene or attempting to cover them up.

The dismissal of the charges against General Koster—after he had been punished administratively—is a strong hint that the Pentagon has no stomach for a broadening of the Mylai question to include the "Yamashita" issue.

The obvious reason is to shield the high officers from the conflicting pressures inherent in ordering military operations that could later result in charges of war crimes.

But this leaves the foot soldier facing similar legal conflicts. He will almost surely be court-martialed for disobeying orders, and he could be court-martialed for following them.

It is the prospect of drafting young men and sending them into this quagmire of risks and duties that has produced the complaints that Lieutenant Calley was used as a scapegoat, while the generals protected their own.

As the lieutenant's lawyer put it yesterday, he was a victim of a system that "dragged him out of his home, taught him to kill, sent him overseas to kill, gave him automatic weapons to kill . . . then comes back and appoints the judge, the prosecutors, the jury and tries him."