

1971

Inhumanity into Custom

Henry Jr. Burns

Recommended Citation

Henry Jr. Burns, *Inhumanity into Custom*, 5 INT'L L. 111 (1971)
<https://scholar.smu.edu/til/vol5/iss1/9>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

“Inhumanity Into Custom?”

General Introduction

Tactics and Change – Guerilla Warfare

The continuing investigations of alleged atrocities in Vietnam brings out a penetrating question. Are the laws of war outmoded? More specifically, are the present doctrines sufficient to deal with the kind of war that is being fought in Southeast Asia? Do they provide adequate guidance for this “guerilla type” conflict? Hugo Grotius aptly states the nature of the problem: “Whence it appears inhumanity was turned into custom . . . (it was) no wonder if old men were also killed.”¹ Speaking in a different age, Grotius was commenting on Thracian, Macedonian, and Roman military conduct. They killed women and children as well as old men, without discrimination. What prompted his remark was the fact that the princes in command “were never esteemed to be of a cruel nature.”²

Indiscriminate killing of noncombatants, not to mention women and children, is abhorrent to the mind of modern civilized man. Memories of the Nuremberg trials are still fresh. For a commander to order such atrocities is unthinkable. For him to permit it to happen is almost as bad. The individual has enormous responsibilities in this regard. Military obedience as an absolute duty has been rejected.

In 1804, Chief Justice Marshall laid it down as the law of the United States that military orders are no justification for known unlawful conduct.³ General Yamashita, Japanese Commander in the Philippines at the end of

*Mr. Burns is an Instructor in the Center for the Study of Crime, Delinquency and Corrections, Southern Illinois University, Carbondale. Professor Burns has correctional institution experience in Ohio and Kentucky, and was formerly Deputy Commissioner of the Kentucky Department of Corrections. Mr. Burns has a B.S. Degree from Eastern Kentucky University, holds Masters Degrees from Miami (Ohio) University, and Southern Illinois University, and presently is a candidate for the Ph.D. in Government at SIU.

¹HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE*, trans. A. C. Campbell (London: M. Walter Dunne, Publisher, 1901), 328.

²GROTIUS, 328. *See also*, JOHN BASSETT MOORE, *INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS* (New York: The MacMillan Co., 1924), 6.

³*Little v. Barreme*, 2 Cranch 170 (1804).

World War II, was executed, not for what he himself did, but for failing to give and enforce orders to check excesses of troops under his command.⁴

The basic principle of conduct is that illegal orders are not obligatory. The difficulty of distinguishing whether an order is illegal or not may make a decision doubtful and dangerous. To disobey an unlawful command is lawful. However, this must be understood as being limited to those orders plainly in violation of the well known customs of the army or laws of the country.

Common sense would dictate that otherwise the commands of a superior must meet with unhesitating and instant obedience. Particular cases in which disobedience may be justified on the plea of unlawfulness of command are difficult to determine in advance. Each must be considered and judged in connection with the necessity of military obedience.⁵ During regular war this problem is difficult. In a "guerilla type" conflict it becomes even more complex.

One factor which enlarges the question today is the almost instantaneous world-wide communication system. When the armies of Scipio Africanus and Hannibal were engaged in battle, there was no network representative with his portable video-tape record to take war back home to his viewers. He is there today, but transmits an image—not the real war—for the real war can only be felt. This transparent portrait is brought to every living room. The world becomes an enormous jury.

As part of its pastime, this jury serves as "Monday-morning quarterback" to second-guess the military commanders and other decision makers. However, on a battlefield, against an enemy who obeys no law but the law of survival, the war is real. A potential exists for "inhumanity to be turned into custom." There a man is judged by his peers. Those who judge are the same individuals who contribute to his continued existence as a living human being. The jury is local, it is competent to judge, and is representative.

Whatever occurred at Songmy village on March 16, 1968, is certainly important. However, its meaning in terms of an evolving attitude may have more valuable implications. A continued disregard for the rules when life itself is at stake may lead to further breakdown in discipline. For example, throwing away the rulebook in the interest of survival may in turn lead to it being disregarded in the rear area where the problem of survival is not as great.

At home, the policeman who accepts a bottle of whiskey from the store

⁴*In Re Yamashita*, 327 U. S. 1 (1946).

⁵WILLIAM C. DEHART, *OBSERVATIONS ON MILITARY LAW* (New York: D. Appleton and Co., 1862), p. 165.

owner on his beat may be violating departmental rules. His knowledge that the precinct captain enjoyed an expense-paid vacation from a local gambler does not make his acceptance of the bottle any more nearly correct. The same can be said for the individual who deals in illegal currency and narcotics in Vietnam. He may find comfort in the knowledge that higher command is condoning violations of several laws and customs. Potential thus exists for a breakdown in the command structure.

By looking back into history today's happenings may come into sharper focus. Alexander the Great was magnificent on the battlefield.⁶ Scipio Africanus has been described as a greater military leader than Napoleon.⁷ Both were successful field commanders and each is noted for fair treatment. Yet, both of these men operated under customs which permitted wanton destruction and massacre. That was the acceptable mode of conduct. In more recent times incidents have occurred which cause one to wonder whether perhaps the laws and rules of war have not been shoved into the background temporarily. This is especially noticeable when the engagement breaks down into small unit conflict or more individual type warfare.

This discussion will cover selected historical incidents in terms of more recent events for purposes of comparison. It will also include a brief resumé of some cases which relate to unlawful orders. The point is that acceptable conduct can evolve into customary behavior. In time of war the circumstances which can contribute the most to survival are the most readily acceptable. It is in times like these when "inhumanity could turn into custom," because the will to survive is so strong.

Time and Tactics—Similarities and Extremes

Alexander the Great

At the time he succeeded to the throne of Macedonia in 336 B. C., Alexander the Great was twenty-one years old. He died twelve years later, having conquered the ancient world of his day. Alexander had a certain moral quality which distinguished him from contemporaries—his compassion. He held rape and violence in great contempt. For example, upon hearing that two soldiers had taken liberties with the wives of some mercenary soldiers, he wrote the general in command: "... (in the event they are convicted) to punish them and put them to death as wild beasts born for

⁶See J. F. C. FULLER, *THE GENERALSHIP OF ALEXANDER THE GREAT* (London: Eyre & Spottiswoode, 1958).

⁷See B. H. LIDDELL HART, *A GREATER THAN NAPOLEON: SCIPIO AFRICANUS* (Boston: Little, Brown, and Co., 1927).

the destruction of mankind.”⁸ Still, war in this period carried with it utter havoc and devastation. “Fruit-trees were cut down, cornfields were trampled, houses were burned, every kind of wanton ravage was brought. . .”⁹ Nevertheless, it was improper to go outside certain bounds after the military objective was attained.

Alexander could be vicious himself if the occasion demanded. He discovered a plot against his life in which the son of a general was implicated. The person involved, one of his own officers, had reportedly also been involved in similar conspiracy earlier. He confessed that he had heard of the plan, and because of his failure to report it was convicted and executed. Alexander then sent a task force to assassinate the father.

Later, during an after-dinner drinking bout, Alexander was bitterly criticized for the deaths. One of his own father Philip’s old soldiers, Cleitus, became insulting. Both Alexander and Cleitus lost their composure. Others in the group tried to keep them from fighting. When Cleitus broke away from the officer who had attempted to keep the peace and advanced threateningly, Alexander killed him.¹⁰

Scipio Africanus

Publius Cornelius Scipio, like Alexander, was something of a paradox. On the one hand he would permit the ruthless massacre of townspeople and then set free thousands of prisoners. Born in Rome in 235 B. C., Scipio was the son of a general, and became a general himself at twenty-four. Both his father and his uncle were Roman generals, and both were killed in Spain. Young Scipio’s first major battle was in Spain.¹¹

Massacre of the citizenry may be revolting to modern man, but it was the normal custom during the time of Scipio and Alexander and for many centuries thereafter.¹² The purpose was to completely stop all will to resist. However, once the opposing commander surrendered, the troops would stop the massacre on a signal from their own leader.

After Scipio’s first major battle, he set free ten thousand male prisoners and restored their property. But at the same time, he declared about two thousand artisans to be the property of Rome. He promised to free them after the war was over if they “showed goodwill and industry in their several crafts.”¹³

After the objective was secure no more killing was allowed. The purpose

⁸*Supra*, note 6 at 56.

⁹*Id.* at 63.

¹⁰*Id.*, at 64.

¹¹*Supra*, note 5 at 1-7.

¹²*Id.*, at 37.

¹³*Id.*, at 37.

of the massacre was plain. Once the commander was sure the resistance was at an end, then the people were not to be mistreated.

Scipio became embroiled in a controversy about undue force after surrender which seriously threatened his career.¹⁴ It involved an ally. He called on Quintus Pleminius to help in the attack on Locri and afterward left him in command there when he had to return to Sicily. Pleminius abused his trust. Scipio's regular troops undertook to check Pleminius and his local force in their rape of Locri. A confrontation ensued and several of the regulars were ordered stripped and beaten. Other regulars came to their aid, attacking Pleminius and leaving him nearly dead. Scipio immediately returned, held a court of inquiry, acquitted his errant commander and restored him to command. He pronounced the regulars guilty, ordered them into chains and prepared for return to Rome. When Scipio departed, Pleminius had the regulars dragged before him and tortured to death, refusing even to allow their mangled bodies to be buried. This almost cost Scipio his command, for there were several Senators who were incensed at the incident and favored relieving him.

Brigadier General Smith

Coming closer to the present, an incident in the Philippines at the turn of the century brought the United States Senate to attention and prompted a resolution of inquiry.¹⁵ What moved the Senate is not known exactly, however the report which was made by the Secretary of War in reply to the resolution is thorough. It seems the Senate wanted to know the nature and circumstances of a court-martial. Six officers, ranking from Brigadier General down to First Lieutenant, were tried by general court-martial in the Philippines. Brigadier General Jacob H. Smith, U. S. Army, was charged with "Conduct to the prejudice of good order and military Discipline."¹⁶ The remainder, a major, a captain, and three first lieutenants, were tried on similar charges, but under quite different specifications. For purposes of this discussion the case of General Smith will be sufficient. The remaining offenses were all of the same general nature. They involved administering the "water-cure" to insurgents as a means of extracting information from them.¹⁷ The general's offense was quite different.

¹⁴*Id.*, at 109-113.

¹⁵Report of the Secretary of War, Courts-Martial in the Philippine Islands, 57th Cong., 2d Sess., 1903, Document No. 213, 1-150.

¹⁶*Id.*, U.S., Congress, Senate, Courts-Martial in the Philippine Islands, 2-3.

¹⁷The water cure simply involved forcing this person to consume an excessive amount of water. The general practice was for the individual to be stripped of his clothing above the waist, laid on the floor and force-fed the water. From witness accounts it was extremely painful and usually resulted in the person "talking."

General Smith was commander of the Sixth Separate Brigade, Division of the Philippines. Under this command was a Major L. W. T. Waller of the U. S. Marine Corps. Part of Smith's responsibility was the island of Samar where a continuing insurrection was taking place. It had been active for more than a year. Major Waller was in charge of a sub-territorial district. He was stationed at Balangiga and operated against the enemy on the southern part of the island. Apparently a massacre occurred at Balangiga in September, 1901. The Americans were eating when attacked from behind "and butchered and their bodies when found by their comrades the next day had been mutilated and treated with indescribable indignities."¹⁸ In the aftermath, General Smith gave an order to kill and burn, and to take no prisoners.¹⁹ His court-martial followed.

Although Smith pleaded "Not Guilty," he submitted to the court a statement of facts which is very close to the same as that outlined in the specifications. In it he said:

... he did instruct him (Major Waller) not to burden himself with prisoners of which he (Smith) already had so many that the efficiency of his command was impaired; that he did tell him that he wanted him to kill and burn in the interior and hostile country; and did further instruct him that: the interior of Samar must be made a howling wilderness; and did further instruct him that he wanted all persons killed who were capable of bearing arms and were actively engaged in hostilities against the United States; and that he did designate the age limit of 10 years, as boys of that age were actively engaged in hostilities against the United States authorities, and were equally dangerous as an enemy as those of more mature age.²⁰

Major Waller did not follow the General's instructions. At least the record shows that no natives were killed except during actual battle engagements. However, the report of the Army Judge Advocate General to the Secretary of War leaves some doubt. He said that armed bodies of insurgents were attacked and defeated, but the composition of these parties at the instant they were attacked is unknown. He continued:

If noncombatants were present with an armed body of the enemy, the responsibility for any injury suffered by them during the progress of the engagement rests, not with the attacking party, but with the enemy. The mere existence of a state of war is a sufficient notice to noncombatant inhabitants to remove from the theater of active military operations.²¹

Waller testified that "in one attack there were two children killed, but that was because they were in a fortified place and we had to assault it."²²

¹⁸U. S., Congress, Senate, Courts-Martial in the Philippine Islands, 4.

¹⁹U. S., Congress, Senate, Courts-Martial in the Philippine Islands, 6.

²⁰U. S., Congress, Senate, Courts-Martial in the Philippine Islands, 6-7.

²¹*Id.*, at 14.

²²*Id.*, at 14.

Although testimony revealed that "no very youthful men or boys" were found among the dead, the Judge Advocate said:

If boys, under what is generally accepted by civilized states as the military age, form part of the enemy's forces, their youth confers no immunity, and they may be wounded or killed during the progress of an engagement in which they take part as members of the enemy's combatant forces.²³

In spite of that, the Judge Advocate said Smith's orders served to incite revengeful feelings among his own troops which would "give occasion for unjust and inconsiderate retaliation." The natural consequence would be "to remove the belligerents further and further from the mitigating rules of a regular war, and by rapid steps lead them nearer to the internecine war of savages."²⁴

However, in the same report there are indications that the regular rules of war were forgotten. It described the methods used by the insurrectionary forces, all of which had been enumerated in the testimony.

The dead were mutilated. A smoldering fire was found still burning around the head of a captain's body at Balangiga. A deep face wound of a dead lieutenant had been filled with jam. One of the enlisted men had his abdomen cut open and codfish flour had been put in the wound. No prisoners of war were taken, and noncombatants were put to death. Poison was used. Flags of truce were not respected and persons travelling under their protection were killed. Personnel of these forces was composed in numerous instances of males under military age. They were old enough to assist in the military operations, but not sufficiently mature in point of intelligence and experience to correctly apply or even to understand the rules of civilized warfare.²⁵

General Smith was found guilty of the specification and of the charge. He was sentenced to be "admonished by the reviewing authority."²⁶ The court admitted it was lenient because evidence showed that the General did not mean everything his language implied, his subordinates did not gather such a meaning, and in fact those orders were never executed.

Elihu Root, Secretary of War, transmitted the record and proceedings of the trial to President Theodore Roosevelt. In his cover letter, the Secretary submitted that Smith's orders were justified "by the history and conditions of the warfare with the cruel and treacherous savages who inhabited the island and their entire disregard of the laws of war."²⁷ In addition, he cited as precedent an order given by General Washington in 1779.

In a campaign against the Six Nations, Washington had ordered General Sullivan to seek total destruction and devastation. The order said "... you

²³*Id.*

²⁴*Id.*, at 16.

²⁵*Id.*, at 9.

²⁶*Id.*, at 3.

²⁷*Id.*, at 3-5.

will not by any means listen to overtures of peace before the total ruin of their settlement is effected. . .” Mr. Root cited also another precedent involving orders given by General William T. Sherman after an incident at Fort Phil Kearney (Nebraska) in 1866, much more severe than those given by General Smith; and the Secretary recommended that Smith be retired.

President Roosevelt approved the findings and sentence of the court-martial. He noted the “. . . well-nigh intolerable provocations (the Army) has received from the cruelty, treachery, and total disregard of the rules and customs of civilized warfare on the part of its foes.”²⁸ While the President said that he approved “employment of the sternest measures necessary to put a stop to such atrocities. . .,” he nevertheless acknowledged the need for using legitimate and honorable methods. He pointed to General Smith’s overall record as being good, but warned that loose and violent talk by an officer of high rank is likely to excite subordinates to wrong-doing. In ordering that General Smith be retired from active service, the President noted that “it is deeply to be regretted that he should have so acted in this instance as to interfere with his further usefulness in the Army.”²⁹

Major Waller did not follow General Smith’s orders. It is not known why. The fact that the orders were issued is revealing. Those orders exhibit a hopelessness and a desperation which this type of conflict can assume. Scipio and Alexander used the massacre to insure that all resistance was crushed. Afterward they prohibited further excesses. In the day-to-day struggle against an enemy who obeys no laws, the natural reaction is to survive at all costs. Survival itself is difficult when resistance cannot be suppressed completely. A characteristic of guerilla warfare is the continuity of armed conflict. Apparently, for the Romans the shock of massacre eliminated the need for more force. Instinctively, General Smith may have seen his solution as the only means left for survival.

Complications with Orders

Are They Legal?

The question of whether or not General Smith’s order was legal never was raised. However, legality of orders is important to the discussion and will be covered briefly. Disobedience of orders is one of the most severe offenses known to the military code. It is punishable in all armies by the harshest penalties. Unhesitating obedience is the very foundation of mili-

²⁸*Id.*, 5-6.

²⁹*Id.*

tary discipline. It has generally been conceded, however, that a subordinate is justified in disobeying an unlawful military order.³⁰ Indeed, it is imperative that he do so, for to obey may make him liable. The difficulty is to determine the legality or illegality. Decision-making under fire with death all around complicates the process of reasoning in this regard. Even in less extreme circumstances, this is a most important event.

The Supreme Court Has Ruled. . . .

Chief Justice Marshall made this indelibly clear in 1804. The case involved instructions from the President of the United States. The Court held that the commander of a U. S. ship of war, in obeying instructions from the President, acts at his own peril. If those instructions are not strictly warranted by law, he is answerable in damages to any person injured in their execution. The Chief Justice declared that, "the instructions cannot change the nature of the transaction, nor legalize an act which, without those instructions, would have been a plain trespass."³¹

In the War of 1812, when a militiaman failed to report for duty, he was convicted by court-martial and fined \$96. His defense was based on the contention that the order calling up the militia was illegal. The Court, speaking through Mr. Justice Story, held:

A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. . . . While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighting the evidence of the facts . . . the hostile enterprise may be accomplished without the means of resistance.³²

Another case involved a Marine private whose enlistment expired while aboard ship on an expedition exploring the Sandwich Islands. He refused to respond to duty, was put under arrest and later transferred to an island prison. Mr. Justice Woodbury delivered the opinion of the Court, holding that:

A public officer, invested with certain discretionary powers, never has been, and never should be, made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty. . . . But for acts beyond his jurisdiction, or attended by circumstances of excessive severity, arising from ill-will, a depraved disposition, or vindictive feeling, he can claim no exemption and should be allowed none under color of his office, however elevated or however humble the victim.³³

In 1851 the Court ruled that a military officer can never justify himself

³⁰ROLLIN A. IVES, A TREATISE ON MILITARY LAW (New York: D. Van Nostrand, 1879), p. 241.

³¹Little v. Barreme, 2 Cranch 170, 179 (1804).

³²Martin v. Mott, 12 Wheaton 19, 30 (1827).

³³Wilkes v. Dinsman, 7 Howard 88, 129, 130 (1849).

for doing something unlawful by producing the order of a superior. This case involved a Lieutenant Colonel Mitchell, who was part of a task force moving into the Mexican State of Chihuahua. Traders were accompanying the group, following in the rear and doing business with the inhabitants. In hostile territory, one of the traders wanted to break off and "be on his own." Acting on orders from his commander, Colonel Mitchell prevented this. The trader was thus compelled to continue with the American force, against his will. Mr. Justice Taney delivered the opinion of the court, holding that "the (superior) order may palliate, but it cannot justify."³⁴

Along this same line, the Nuremberg trials rejected the "act of state" dogma.³⁵ An act of a government is not considered an act of state when it purports to authorize an individual to do something beyond the state's competence in international law. The individual actor is responsible.³⁶

Another Slant

Look at the picture now from another angle. General Tomoyuki Yamashita was charged with unlawfully disregarding and failing to discharge his duty to control members of his command.³⁷ As a result, they committed atrocities in the Philippines nearing the close of World War II. The record shows that the conflict there had deteriorated to a guerilla-type action. In addition, Yamashita could not effectively function because of the tricky chain-of-command structure. Yet he was executed—not for issuing unlawful orders, but for failing to prevent his command from committing unlawful acts.

All of this must make it plain that deciding as to the legality or illegality of an order is difficult. If a questioning atmosphere should develop wherein most orders are examined as to legality, chaos would result. In a combat situation in which the lives of many may depend upon split-second decisions, an order must be carried out at once unless it is clearly and obviously illegal.

But what of all the rest? There are cases in which the individual has a wide latitude. He must decide himself "how far to go." This is perhaps the most difficult. Should a chain of circumstances incite to more violence than

³⁴Mitchell v. Harmony, 13 Howard 115, 137 (1851).

³⁵Quincy Wright, *War Criminals*, AM. J. INT'L. L., XXXIX (April, 1945), 265.

³⁶The individual cannot shelter himself behind his official position in order to be freed from punishment. See FRED E. INBAU, JAMES R. THOMPSON and CLAUDE R. SOWLE, *CASES AND COMMENTS ON CRIMINAL JUSTICE, VOL. I: CRIMINAL LAW* (Mineola, N. Y.: The Foundation Press, Inc., 1968), 126.

³⁷*In Re Yamashita*, 327 U. S. 25 (1946). See also, for example: JOHN DEANE POTTER, A SOLDIER MUST HANG (London: Frederick Muller Ltd., 1963), p. 199. Also ARTHUR SWINSON, *FOUR SAMUAI* (London: Hutchinson and Co., 1968), 230.

necessary, the individual may rationalize its use. The responsibility is great for a young soldier. And it always is the individual who presses the trigger in an infantry assault. This may have been the situation which bothered Grotius—the process of "inhumanity turning into custom." Maybe that same thing is happening in Vietnam.

Vietnam—The Assault on Songmy³⁸

The Situation and the Participants

It is important to get the sequence of events surrounding the Songmy incident in perspective. First, the location has been called "Pinkville," "Mylai," and "Song My." Actually, the village is shown on French maps as Truongan. The residents use that name. On later U. S. Military maps, the name was changed to Songmy. This is the name the army is using, and the one that has been chosen to be used throughout this paper. The incident took place in a place known as "Mylai Hamlet Number 4." There are six "Mylai" hamlets in the general area of Songmy.³⁹

The attacking force consisted of three infantry companies, each with three platoons. It took place on March 16, 1968. The Department of the Army received the incriminating letter from a former soldier sometime in early April, 1969. By his own admission, the writer of this letter knew of the incident only by hearsay. The Army began an investigation through regular command channels immediately. Later, in August of 1969, responsibility was transferred to the Provost Marshal General. Still later, the entire matter was turned over to Lieutenant General William R. Peers and a group of high-ranking army officers. Peers issued a report in mid-March, 1970.

In Vietnam, the term "free fire zone" indicates an area where American artillery and aircraft can strike at will. Soldiers can fire on anything that moves, because the people have been warned to get out. It is assumed that all who remain are enemy. Another term in use is "search and destroy." The destroy part apparently resembles early Roman tactics, in that an entire village is frequently destroyed by burning it. Describing an operation which occurred in late November, 1969, a lieutenant said:

³⁸In gathering material for this part of the paper, much use has been made of the newspapers. Because of this, a word of warning is in order. Probably the best is one that was used by Franz Boas, a great linguist and anthropologist. He once remarked that we could read our newspapers with much more satisfaction if our language, like the Indian idiom *Kwakiutl*, compelled us to say whether a report is based on self experience, on inference, or on hearsay, or whether the reporter has dreamed it. Roman Jakobson, *Franz Boas' Approach to Language*, INTERNATIONAL JOURNAL OF AMERICAN LINGUISTICS, Vol. X, No. 4, p. 192 (October 1944).

³⁹New York Times, November 26, 1969, 10.

What we try to do is to get all the people out of the village before we start burning. Because of the psychological effect of course, they don't want to go—that's their home and all. So, what we do is to get them all out of the village and out of sight before we burn it so they won't have to stand and watch their houses burn.⁴⁰

Whatever happened at Songmy was attributable to a loosely knit unit called "Task Force Barker." This group consisted of an artillery battery and three rifle companies whose mission was to "search and destroy." Lieutenant Colonel Frank A. Barker, Jr. was in command. One of his rifle companies was commanded by Captain Ernest L. Medina. Lieutenant William L. Calley was a platoon leader in Medina's company. Barker's superior in the chain of command was Colonel Oran K. Henderson, Commander of the Eleventh Brigade, a unit of the Americal Division. He had been in this command for only one day when the incident occurred.⁴¹

The Americal Division, itself a patchwork organization, was commanded by Major General Samuel W. Koster. The Division had been put together in the autumn of 1967 from three separate brigades. Each continued to act rather independently until nearly a year after the incident at Songmy. Staffing at division headquarters was thin. In the field, the units were continually plagued with transfers of personnel to and from the United States. With a faulty replacement system and operating in a fluid situation in hostile territory, it is only reasonable to expect that training was poor. Most of the troops sent into the Songmy operation were seeing their first major combat.⁴²

Inconsistencies

It is not easy to piece together a logical sequence of what happened. To indicate the complexity, one may look at three separate statements about the artillery preparation before the assault began. According to Captain Medina, artillery fire would "soften-up" the objective. In his briefing, he said this would last for ten minutes.⁴³ Army Secretary Stanley R. Resor said the artillery preparation was three minutes in length.⁴⁴ However, a Vietnamese civilian who was there—on the receiving end of the attack—said the artillery barrage lasted for an hour.⁴⁵

Much has been said about the briefing prior to the mission into Songmy. Colonel Barker informed his staff that most of the civilians—and all of the women and children—would be out of the village by the time the sweep

⁴⁰*Id.* November 26, 1969, 10.

⁴¹*Id.* November 30, 1969, 1.

⁴²"The Generals Accused," *Newsweek*, March 30, 1970, 19-20.

⁴³*New York Times*, December 1, 1969, 1.

⁴⁴*Id.*, November 27, 1969, 18.

⁴⁵*Id.*, November 17, 1969, 1.

began. He told them only Vietcong and sympathizers would remain. It was then left to the individual company commanders to brief their own units.

Captain Medina claims that he later assembled his entire company and told them essentially the same, but in greater detail. In addition, he warned that they could expect to encounter the 48th Vietcong Battalion. The artillery barrage would be followed by suppressive fire over the entire area from helicopter gunships. Only then was the assault to take place. He told the men to destroy the village, the buildings, and livestock. They were told to expect to be outnumbered and "to go in shooting like hell."⁴⁶

With regard to women and children still being there, the Captain said recently:

If I had any reason whatsoever to believe that there would be any child or any innocent noncombatant . . . precautionary steps such as leaflet drops in the area, loud-speaker broadcasts at the same time that the combat patrol is coming in, warning the people not to move, not to run, to assemble in a particular area, insuring that each individual soldier knew and understood specifically that they would not shoot a non-armed civilian.⁴⁷

Upon landing at Songmy himself, Medina at first thought that they were unopposed. When informed by a helicopter pilot that the company was receiving small arms fire, he informed all three platoons by radio. He went into the village only once, and later reported seeing 20 to 28 dead. Medina said he believed that they had been killed by "artillery fire, fire from the gunships or small arms fire."⁴⁸ At one point he received a radio report from higher command which warned that civilians were in the village and some of them "might have been shot." He was ordered to have all platoons try to make sure they did not shoot any civilians. After the action was over, the platoon leaders reported in the negative when asked if any civilians had been killed. Medina said they estimated a total of 128 Vietcong killed.⁴⁹

The day after the Songmy assault, Colonel Henderson caught up with Captain Medina's unit. He told 30 or 40 of the men that from the reports he had received, some civilians might have been killed—perhaps needlessly. The Colonel pointed out that this overshadowed to a degree any success they had achieved in the operation. It concerned him as brigade commander, for he did not expect his soldiers to kill civilians. He asked whether anyone in the group had observed shooting or killing of civilians. Reportedly there was a general negative reply. Then the commander pointed his finger at random to three or four men in turn, asking them the same question. The answer "No, sir," came back, loud and clear.⁵⁰

⁴⁶*Id.*, December 11, 1969, 1. See also December 1, 19, 1.

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰*Id.*, November 30, 1969, 28.

Eyewitness Accounts

Michael Bernhardt, a rifleman, claims that he did not fire his weapon at all, but kept it slung on his shoulder with the muzzle pointing to the ground. He insists that Captain Medina was explicit and matter of fact during the briefing. To Bernhardt there was no doubt: "The village and its inhabitants would be destroyed." However, he forgot what ended the shooting, but recalls that it lasted for thirty minutes. Despite his recall of the time involved, he could not remember if he took part in the burning of Songmy. On the other hand, he remembered a soldier who laughed when he pressed the trigger, and perhaps a dozen men impressed him as having gone berserk. It was Bernhardt who described the battle to Ronald Ridenhour, the individual who is credited with causing the investigation to be opened. This took place in November of 1968, eight months after the incident, and sixteen months before Ridenhour wrote the Secretary of Defense and others.⁵¹

Bernhardt, now at Fort Dix, New Jersey, said of the incident:

They would get the people together and gather them in groups. Then they would shoot them with rifles and machine guns. Going through the village, I saw a lot of bodies in these things that looked like bomb craters. I actually saw them shoot some of them. I saw them shoot a group in a ditch, about 20 of them.⁵²

He continued to contradict himself. In one interview he said it took over half an hour to wipe out the village. In another he said the time was "15 to 20 minutes." After saying that he had seen 20 killed, later in the same interview he raised this to 100. He then recalled that a body count of over 300 civilians was circulating through the company.

Private Michael Terry told Seymour Hersch of the *London Times*:

They just marched through, shooting everybody. Seems like no one said anything—they just started pulling people out and shooting them. They had them in a group standing over a ditch . . . one officer ordered a kid to machine-gun everybody down, but the kid just couldn't do it. He threw the machine-gun down and the officer picked it up. I don't remember seeing any men in the ditch. Mostly women and kids. Some of them were still breathing—they were pretty bad shot up.⁵³

Terry said that he thought the officers actually did not know whether they were ordered to kill the villagers or not. He mentioned that a lot of the men feel that the South Vietnamese civilians are something less than human. "We just treated them like animals."⁵⁴

⁵¹New York Times Magazine, December 14, 1969, 110-116.

⁵²New York Times, November 20, 1969, 1.

⁵³*Id.*, November 20, 1969, 20.

⁵⁴*Id.*

Leon Stevenson, interviewed by telephone from his home in Montana, stated:

I saw some bodies too, but there were very few where I was, 15 to 20 at the most . . . there was a lot of shooting from the time we got there. The gunships were firing when we went in. There was like a miniature war going on.⁵⁵

Stevenson said that it was difficult for him to determine whether all the firing emanated from the invasion force or whether it represented return fire from the village. He indicated that Medina had not given instructions that civilians be killed. On the other hand, he questioned the innocence of victims, saying, "over there you have to be on one side or the other."

James R. Bergthold of Niagara Falls told of the incident:

We were briefed the night before and were told we were going into an area controlled by the Vietcong for about four years. The captain told us—we weren't given any orders to shoot—that if we saw anyone they might be carrying weapons, so be careful.⁵⁶

Former Army photographer Ronald L. Haeberle told Joseph Eszterhas of the Cleveland Plain Dealer he saw "as many as 30 American soldiers murder as many as 100 South Vietnamese civilians, many of them women and babies, many left in lifeless clumps."⁵⁷

In a telephone interview, William F. Doherty of Boston said that he saw the bodies of "probably more than 100" villagers when his platoon passed through the village during the operation. He said the dead included women and children. He added:

The captain told us in the briefing they were all either North Vietnamese Army, Vietcong, or Vietcong sympathizers. We were told it was clear of everybody (else). . . .⁵⁸

The Saigon government had this to say:

This hamlet was organized by the Communists into a good combat hamlet with good communications and an underground system. The population of the hamlet was forced by the Communists to stay in their places. Task Force Barker met strong resistance. . . .⁵⁹

Paul Meadlo of Terre Haute said that he killed 35 to 40 men, women and children during the attack. Why?

Because I felt like I was ordered to do it . . . (and) I felt like I was doing the right thing, because I lost buddies . . . and it was on my conscience.⁶⁰

Asked how many persons he had killed in the first group of villagers

⁵⁵*Id.*, November 27, 1969, 19.

⁵⁶*Id.*, November 27, 1969, 18.

⁵⁷*Id.*, November 22, 1969, 3.

⁵⁸*Id.*, November 22, 1969, 2.

⁵⁹*Id.*, November 23, 1969, 3.

⁶⁰*Id.*, November 25, 1969, 1.

rounded up, Meadlo said, "I'd say about 15." The second group was "70 to 75 people," and he added, "I must have killed about a third of this."⁶¹

A resident of the village, Do Hoai, said that although the area had been largely under Vietcong control, the villagers bore no arms and had engaged in no hostile action against the Americans. He said the inhabitants were first ordered out of their homes. When the houses had been cleared, the troops dynamited those made of brick and set fire to the wooden structures. Then he said the Vietnamese were gunned down where they stood. He said about 20 soldiers performed the executions. The only people to escape, according to Mr. Do Hoai, were those who had hidden under the bodies of victims until the Americans left.⁶²

Instructions: War Crimes—The Laws of War

Military headquarters in Saigon issued a detailed five-page directive in 1967 on the rules of warfare. It required every soldier witnessing or even hearing of a possible war crime to inform his commanding officer without delay. The penalty for not doing so was specified as two years at hard labor and a dishonorable discharge. Issued on April 27, 1967, the order specifies that all officers and enlisted men are supposed to be briefed on its requirements when they first report for duty in Vietnam. It cites as a grave breach of the 1949 Geneva Conventions, the killing, torturing or injuring of "persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms." The directive said:

Persons discovering war crimes will take all reasonable action under the circumstances to preserve physical evidence, to note identity of witnesses present, and to record (by photograph, sketch, or descriptive notes) the circumstances and surroundings.⁶³

Although it stressed that all soldiers should make an effort to detect and report war crimes, it appealed especially to those in contact with the enemy—and to personnel with intelligence, police, photographic or medical assignments.

The "Peers Report"

Lieutenant General William R. Peers, after a three-month inquiry, produced a 225-page report on the Songmy incident. A heavily censored version was released to the news media. The panel which Peers headed heard 20,000 pages of testimony, and actually visited the Songmy area.

⁶¹*Id.*, November 25, 1969, 1.

⁶²*Id.*, November 27, 1969, 2.

⁶³New York Times, December 14, 1969, p. 1. Reference is made to Directive 20-4, April 27, 1967. For a later Directive see Directive Number 27-5, November 2, 1967, issued by United States Military Assistance Command, Vietnam, in AM. J. INT'L. L. LXII (July, 1968), 765-766.

The report confirmed that Colonel Barker had told his subordinates that the village would be free except for Vietcong and sympathizers. However, it spoke of a revenge element injected into a later briefing by a lower-ranking officer.

In narrative fashion, the story is told of how American soldiers killed the civilians in three groups. One of these was taken to a trench before they were shot. The incident was apparently witnessed by American pilots and by ground soldiers and Vietnamese. Some witnesses had reported the happenings to their superiors. These reports then made their way up the chain of command. According to Peers, as they were passed from one link of the chain to the next, they were softened or diluted. By the time they reached the division level, it appeared that only 20-28 Vietnamese had been killed, and no further report was made.⁶⁴

As a result of the Peers inquiry, fourteen officers ranking from Major General down to Captain have been charged with commission of varying offenses. Included in this group are the American Division Commander, his assistant, and the chief of staff.⁶⁵ Most are charged with dereliction and failure to obey lawful regulations. These, of course, are in addition to several others charged earlier, whose offenses range from premeditated murder to rape and assault.

Comments and Conclusions

Rules of warfare are based upon a certain degree of utility to the opposing forces.⁶⁶ When the belligerents are state vs. state, the meaning may be rather straightforward. For example, State "A" subscribes to humane interpretations of the customs and rules of war. Since State "B" has confidence in the knowledge that State "A" does actually follow this code, so will she. This seems simple enough, but is this practical in a war of the type being fought in Vietnam?

Without getting too involved in the difference between societies, between states that do and do not subscribe to humane principles, one must look at the war itself. War to the soldier facing the enemy is vastly different from the image of war to everyone else. The soldier is most concerned with survival. For that reason, what is legal varies directly in relation to what contributes to survival. In this framework, the rules of warfare are of use only to the extent that they fit the objective—survival. The military unit is,

⁶⁴New York Times, March 27, 1970, pp. 1, 4. See also "The Generals Accused," Newsweek, March 30, 1970, pp. 18-20.

⁶⁵Major General Samuel W. Koster was commander of the Americal Division. Brigadier General George Young was his assistant. Colonel Nels A. Parson, Jr., was chief of staff. All have been accused of failure to obey lawful regulations and dereliction of duty.

⁶⁶H. B. JACOBINI, *INTERNATIONAL LAW: A TEXT* (Homewood, Ill.: The Dorsey Press, 1968).

after all, composed of individuals all of whom have the desire to survive. The group therefore can change the rules to fit the objective.

It is possible that higher authority is forced by circumstance tacitly to approve survival tactics. The small unit is cohesive, and much depends upon the individual performing "his part." When the individual has to subscribe to extreme measures to insure his own continued existence, the unit itself must approve. This is obvious, because unit survival depends upon teamwork. This argument could be projected upward along the chain of command. It calls for no great amount of logic to understand that an Army Division can only be as successful as its component squads and platoons.

Alexander and Scipio operated under different rules from those of today. Their tactics called for all resistance to be crushed. After that, they would be humane. Where is the elusive line between humane and inhumane? One could reply that it is simply the difference between killing women and children and not killing them. Yet, for women and children to be killed by aircraft dropping bombs on them is not disapproved. The difference is not easy to resolve. Certainly, it can be argued that to kill women and children is abhorrent—no matter how it is done. The tendency, however, is to over-simplify or base conclusions on insufficient evidence, or refuse to look at the overall picture.

As to the Songmy affair itself, it is quite possible that in the heat of battle an individual may become mentally deranged. Crimes are committed in this country every minute of the day by so called "normal" people. Actually, mental illness is one of the nation's biggest problems. Compound the two and there is no limit to where the imagination can lead. To blame whatever happened at Songmy on mental illness, temporary insanity, poor judgment or whatever, would again be to oversimplify the problem. The solution lies elsewhere—if indeed, there is such a solution.

The individual in Vietnam is thrust into a situation in which he is forced to fight a "back-alley brawl" and is expected to obey the "Marquis of Queensbury" rules. If he follows the rules he is told to follow, his chance of losing his own life is greatly enhanced. If he fights to survive, the image taken home by the "network rep" may be that he is a horrible monster. Can this conflict between the real and the apparent be reconciled? In the present set of circumstances it is doubtful. The group—the combat team—approves of survival. They like it. To live long enough to return home in one piece is an objective with which few can find rational fault. Is it any wonder then, that, under such conditions, "inhumanity may turn into custom?"