

# Should We Have War Crimes Trials?

By Neil Sheehan

*The New York Times Book Review* March 28, 1971, pp. BR1 ff.

## AGAINST THE CRIME OF SILENCE

Edited by John Duffet.  
672 pp. New York: Simon & Schuster-Clarion. Paper, \$3:95.

## AIR WAR -- VIETNAM

By Frank Harvey.  
192 pp. New York Bantam.  
Paper, 75 cents.

## ATROCITIES EN VIETNAM

By Edward S. Herman.  
Illustrated. 104 pp. Philadelphia:  
Pilgrim Press. Paper, \$1.95.

## AT WAR WITH ASIA

By Noam Chomsky.  
314 pp. Now York: Pantheon.  
Cloth, \$7.95. Vintage. Paper, \$1.95

## CASUALTIES OF WAR

By Daniel Lang.  
123 pp. New York: McGraw-Hill.  
Cloth, \$4.50. Paper, \$1.50.

## CHEMICAL AND BIOLOGICAL WARFARE

Hearings of the US. Senate  
Committee on Foreign Relations.  
Free from the Committee,  
U.S. Senate Office Building.  
Washington.

## CHEMICAL AND BIOLOGICAL WARFARE

By Seymour M. Hersh.  
354 pp. Indianapolis and New York:  
Bobbs-Merrill. \$7.50.

## ECOCIDE IN INDOCHINA

By Barry Weisberg.  
Illustrated. 241 pp. New York:  
Canfield Press-Harper & Row.  
Paper, \$3.95.

## EFFICIENCY IN DEATH

Sponsored by The Council  
On Economic Priorities.  
Illustrated. 233 pp. New York:  
Harper & Row. Paper, \$1.50.

## IN THE NAME OF AMERICA

Research Director, Seymour Melman.  
421 pp. New York: Clergy & Laymen  
Concerned About Vietnam, Room 547,  
475 Riverside Drive, New York 10027.  
Cloth, \$4.95. Paper, \$2.95.

## THE INDOCHINA STORY

By The Committee of Concerned  
Asian Scholars.  
348 pp. Now York: Pantheon.  
Cloth, \$8.95. Bantam. Paper, \$1.25.

## MILITARISM, U.S.A.

By Col. James A. Donovan.  
265 pp. New York: Charles Scribner's  
Sons. Cloth, \$6.95. Paper, \$2.95.

## THE MILITARY HALF

By Jonathan Schell.  
224 pp. New York: Alfred A. Knopf.  
Cloth, \$4.95. Vintage. Paper, \$1.65.

## MY LAI 4

By Seymour M. Hersh.  
210 pp. New York: Random House.  
Cloth, \$5.95. Vintage. Paper, \$1.95.

CHEMICAL AND BIOLOGICAL  
WARFARE

Edited by Steven Rose.  
209 pp. Boston: Beacon Press.  
Cloth, \$7.50. Paper, \$1.95.

CHEMICAL WARFARE

By Maj. Frederic J. Brown.  
355 pp. Princeton. N.J.:  
Princeton University Press. \$11.

CONVERSATIONS  
WITH AMERICANS

By Mark Lane.  
248 pp. New York: Simon & Schuster.  
\$6.95.

CRIMES OF WAR

Edited by Richard A. Falk,  
Gabriel Kolko and Robert J. Lifton.  
608 pp. New York: Random House.  
Available late April.

DEFOLIATION .

By Thomas Whiteside.  
168 pp. New York: Friends of the  
Earth-Ballantine. Paper, 85 cents.

THE DESTRUCTION OF INDOCHINA

By The Stanford Biology Study Group.  
Box 3724. Stanford, Calif. 94305.  
Paper, 25 cents.

NUREMBERG AND VIETNAM

By Telford Taylor.  
A New York Times Book.  
224 pp. Chicago: Quadrangle Books.  
Cloth, 95.95. Paper, \$1.95.

ONE MORNING IN THE WAR

By Richard Hammer.  
207 pp. New York: Coward, McCann &  
Geoghegan. Cloth, \$5.95. Paper, \$3.95.

REFUGEE AND CIVILIAN  
WAR CASUALTY

PROBLEMS IN INDOCHINA  
Staff Report of the U.S. Senate  
Subcommittee on Refugees.  
By Dale S. de Haan and Jerry Tinker.  
Free from the Subcommittee,  
U.S. Senate Office Building,  
Washington.

REFUGEE AND CIVILIAN  
WAR CASUALTY

PROBLEMS IN LAOS  
AND CAMBODIA  
Hearing of the U.S. Senate  
Subcommittee on Refugees.  
Free from the Subcommittee,  
U.S. Senate Office Building,  
Washington.

REVOLUTIONARY NON-VIOLENCE

By David Dellinger.  
390 pp. Indianapolis and New York:  
Bobbs-Merrill. Cloth, \$7.50;  
New York: Anchor. Paper, \$2.50.

The Book Review received the accompanying bibliography from Mr. Mark Sacharoff, assistant professor of English at Temple University and sent the books to Neil Sheehan for review.

By Neil Sheehan

“The tragic story of Vietnam is not, in truth, a tale of malevolent men bent upon conquest for personal gain or imperial glory. It is the story of an entire generation of leaders (and an entire generation of followers) so conditioned by the tensions of the cold war years that they were unable to perceive in 1965 (and later) that the Communist adversary was no longer a monolith . . . Lyndon Johnson, though disturbingly volatile, was not in his worst moments an evil man in the Hitlerian sense . . . Set against these facts, the easy designation of individuals as deliberate or imputed ‘war criminals’ is shockingly glib, even if one allows for the inexperience of the young.” -- Townsend Hoopes, the former Under Secretary of the Air Force, January, 1970.

Is the accusation glib? Or is it too unpleasant to think about? Do you have to be Hitlerian to be a war criminal? Or can you qualify as a well-intentioned President of the United States? Even when I saw those signs during the March on the Pentagon in 1967, “Hey, Hey L.B.J. How many kids did you kill today?” they didn’t make me think that Lyndon Johnson, the President of the United States, might be a war criminal. A misguided man perhaps, an egomaniac at worst, but not a war criminal. That would have been just too much. Kids do get killed in war. Besides, I’d never read the laws governing the conduct of war, although I had watched the war for three years in Vietnam and had written about it for five. Apparently, a lot of the men in Saigon and Washington who were directing the war didn’t read those laws either, or if they did, they interpreted them rather loosely. Now a lot of other people are examining our behavior in Vietnam in the light of these laws. Mark Sacharoff, an assistant professor of English at Temple University, has gathered their work together into this bibliography. By this simple act he has significantly widened our consciousness. If you credit as factual only a fraction of the information assembled here about what happened in Vietnam, and if you apply the laws of war to American conduct there, then the leaders of the United States for the past six years at least, including the incumbent President, Richard Milhous Nixon, may well be guilty of war crimes.

There is the stuff of five Dreyfus affairs in that thought. This is what makes the growing literature on alleged war crimes in Vietnam so important. This bibliography represents the beginning of what promises to be a long and painful inquest into what we are doing in Southeast Asia. The more perspective we gain on our behavior, the uglier our conduct appears. At first it had seemed unfortunate and sad we were caught in the quicksand of Indochina. Then our conduct had appeared stupid and brutal, the quagmire was of our own making, the Vietnamese were the victims and we were the executioners. Now we’re finding out that we may have taken life, not merely as cruel and stubborn warriors, but as criminals. We are conditioned as a nation to believe that only our enemies commit war crimes. Certainly the enemy in Indochina has perpetrated crimes. The enemy’s war crimes, however, will not wash us clean if we too are war criminals.

What are the laws of war? One learns that there is a whole body of such laws, ranging from specific military regulations like the Army’s Field Manual 27-10, “The Law of Land Warfare,” to the provisions of the Hague and Geneva Conventions, which are United States law by virtue of Senate ratification, to the broad principles laid down by the Nuremberg and Tokyo war crimes tribunals. These laws say that all is not fair in war, that

there are limits to what belligerent man may do to mankind. As the Hague Convention of 1907 put it, "The right of belligerents to adopt means of injuring the enemy is not unlimited." In other words, some acts in war are illegal and they aren't all as obviously illegal as the massacre of several hundred Vietnamese villagers at Mylai. Let's take a look at our conduct in Vietnam through the viewing glass of these laws. The Army Field Manual says that it is illegal to attack hospitals. We routinely bombed and shelled them. The destruction of Vietcong and North Vietnamese Army Hospitals in the South Vietnamese countryside was announced at the daily press briefings, the Five o'Clock Follies, by American military spokesmen in Saigon.

So somebody may have committed a war crime in attacking those hospitals. The Manual also says that a military commander acquires responsibility for war crimes if he knows they are being committed, "or should have knowledge, through reports received by him or through other means," and he fails to take action to stop them. President Johnson kept two wire-service teletypes in his office and he read the newspapers like a bear. There are thus grounds for believing that he may have known his Air Force and artillery were blowing up enemy hospitals. He was the Commander in Chief. Did his knowledge make him a war criminal? The Army Manual says that "every violation of the law of war is a war crime."

Let's proceed to one of the basic tactics the United States used to prosecute the war in South Vietnam -unrestricted air and artillery bombardments of peasant hamlets. Since 1965, a minimum of 150,000 Vietnamese civilians, an average of 68 men, women and children every day for the past six years, have been killed in the south by American military action or by weapons supplied to the Saigon forces by the United States. Another 350,000 Vietnamese civilians have been wounded or permanently maimed. This is a very conservative estimate. It is based on official figures assembled by Senator Edward M. Kennedy's Senate Subcommittee on Refugees and on a study for the Subcommittee by those eminent government auditors, the General Accounting Office. The real toll may be much higher. This conservative attitude makes the documentation put together by the Senator and his staff aides, Jerry Tinker and Dale S. de Haan. among the most impressive in the bibliography. Many, perhaps the majority, of those half million civilian casualties were caused by the air and artillery bombardments of peasant hamlets authorized by the American military and civilian leaders in Saigon and Washington.

The United States Government tried and hanged in 1946 a Japanese general, Tomoyuki Yamashita, because he was held responsible for the deaths of more than 25,000 noncombatants killed by his troops in the Philippines.

Can a moral and legal distinction be drawn between those killings in World War II, for which General Yamashita paid with his life, and the civilian deaths ordered or condoned by American leaders during the Vietnam War? Again, if you accept only a portion of the evidence presented in this bibliography, and compare that evidence to the laws of war, the probable answer is, No. And President Nixon has spread this unrestricted bombing through Laos and Cambodia. killing and wounding unknown tens of thousands of civilians in those countries.

Looking back, one realizes that the war-crimes issue was always present. Our vision was so narrowly focused on the unfolding details of the war that we lacked the perspective to see it, or when the problem was held up to us, we paid no heed. This lesson becomes clear in reading the proceedings of the Russell Tribunal now published in "Against the Crime of Silence." The proceedings were widely dismissed in 1967 as a combination of kookery and leftist propaganda. They should not have been. Although the proceedings were one-sided, the perspective was there.

One saw the substance all the time in Vietnam in the bombing and shelling of the peasant hamlets. In November, 1965, I found five fishing hamlets on the coast of Quangngai Province in central Vietnam, not far from Mylai, which had been ravaged over the previous two months by the five inch guns of United States Navy destroyers and by American and South Vietnamese fighter-bombers. The local Vietnamese officials told me that at least 184 civilians had been killed. After a day of interviewing the survivors among the ruins, I concluded that a reasonable estimate might run as high as 600 dead. American Army officers working in the province told me that the most serious resistance the Vietcong guerrillas in the hamlets had offered was sniper fire. The hamlets and all their inhabitants had been attacked just because the Vietcong were present. I discovered that another 10 hamlets in the province had also been gutted and about 25 others severely damaged, all for like reasons.

Making the peasants pay so dearly for the presence of guerrillas in their hamlets, regardless of whether they sympathized with the Vietcong, seemed unnecessarily brutal and politically counter-productive to me, since this Hun-like treatment would alienate them from the Saigon authorities and the American forces. No common-sense military purpose seemed to be served. When I wrote my story describing the agony of the fisher folk, however, it did not occur to me that I had discovered a possible war crime. The thought also does not seem to have occurred to my editors or to most readers of The Times. None of the similar stories that I and other reporters wrote later on provoked any outrage, except among that minority with the field of vision to see what was happening. As Lieutenant Calley told the prosecutor at Fort Benning, "It wasn't any big deal, sir."

Reading through the news dispatches from 1965, 1966 and 1967 that Seymour Melman of Columbia and Richard Falk of Princeton assembled to document accusations of war crimes made by The Clergy and Laymen Concerned About Vietnam, "In the Name of America," is to view those scenes again in this new and disturbing perspective. Frank Harvey, in "Air War - Vietnam," recounts with the power of anecdotal narrative the casual destruction of peasant hamlets in the Mekong Delta by the United States Air Force. Usually the excuse was that a squad or so of guerrillas might be present in the hamlet or the mere location of the hamlet in guerrilla-dominated territory. Harvey is a convincing witness because he concludes with a defense of the war.

You might argue that this destruction, and concomitant loss of civilian life, were not deliberate, that they were among those haphazard horrors of war. The record says otherwise. American Embassy in Saigon distributed to correspondents a Rand

Corporation study on the air and artillery bombardments. The study concluded that the peasants blamed the Vietcong when their hamlets were blasted and their relatives killed; in effect, that shrapnel, white phosphorous and napalm were good political medicine. The study was dismissed by reporters as macabre proof that the government could always find a think-tank to tell it what it wanted to think.

In the summer of 1966, however, a lengthy secret study of the pacification program. was done for the Embassy and military headquarters in Saigon by some of the most experienced Americans in the country. One of the study's recommendations was that this practice of unrestricted bombing and shelling should be carefully reexamined. According to the study there was evidence that the practice was driving hundreds of thousands of refugees into urban slums and squalid camps, causing unnecessary death and suffering. and angering the peasantry. The proposal for a re-examination was vetoed at the highest levels of American authority in Saigon.

By deciding not to reconsider, the American leadership in Saigon was deciding to ordain the practice, to establish a de facto policy. During those earlier years at least, the policy was not acknowledged in writing, as far as I know, but neither can there be any doubt that this was the way things were to be done and that those American military and civilian leaders directing the war knew the grim cost of their decision not to look. Why did they establish the policy? Because devastation had become a fundamental element in their strategy to win the war.

I remember asking one of the most senior American generals in the late summer of 1966 if he was not worried by all the civilian casualties that the bombing and shelling were causing. "Yes. it is a problem," he said, "but it does deprive the enemy of the population, doesn't it?" A survey of refugees commissioned later that year by the Pentagon indicated that 54 per cent of those in Dinhtuong Province in the Mekong Delta were fleeing their hamlets in fear of bombing and shelling. So this was the game. The firepower that only American technology can muster, the General Motors of death we invented in World War II, was to defeat the Vietnamese Communists by outright military attrition, the body count, and by obliterating their strategic base, the rural population.

If you destroyed the rural society, you destroyed the resources the enemy needed to fight. You deprived him of recruits in the South, of the food and the intelligence the peasantry provide; you reversed Mao Tsetung's axiom by drying up the sea (the peasantry) in which the guerrillas swam.

All of those directives issued by the American military headquarters in Saigon about taking care to avoid civilian casualties, about protecting the livestock and the homes of the peasantry, were the sort of pharisaic prattle you hear from many American institutions. Whenever you say the institution is not behaving as it says it should, the institution can always point to a directive and say you must be mistaken. (General Electric had directives forbidding price fixing when some of its vice presidents were convicted of price fixing.) No one was fooling himself when he marked off those "free-fire zones," and ordered those "preplanned air strikes" and that harassing and interdiction

fire by the artillery. People and their homes were dehumanized into grid coordinates on a targeting map. Those other formalities, like obtaining clearance from the Vietnamese province chief before you bombed a hamlet, were stratagems to avoid responsibility, because he almost never refused permission. (Such legal fictions, by the way, are expressly forbidden by the laws of war.)

Out in the countryside the captains and majors did not disguise the design. One day in a heavily-populated province in the Mekong Delta, a young Army captain swept his hand across the map over a couple of dozen hamlets in guerrilla-dominated territory near the provincial capital and remarked that the peasants were evacuating them and moving in near town. Why? I asked. "Because it's not healthy out there. We're shelling the hell out of them," he said.

By 1967, this policy of unrestricted air and artillery bombardments had been orchestrated with search and destroy operations by ground troops, B-52 strikes, and crop destruction with chemical herbicides into a strategy that was progressively laying waste much of the countryside. (The question of whether herbicides were dumped on the landscape to an extent that may constitute a separate war crime is treated at length in several of the books Mr. Sacharoff lists.) That year Jonathan Schell went to Quangngai to document the creeping destruction of the rural society in a two-part article that first appeared in *The New Yorker* magazine. It was later published with a title of understated irony, "The Military Half." Schell estimated that by this time about 70 per cent of the 450 hamlets in the province had been destroyed.

Did the military and civilian leaders directing the war from Washington know what was happening in Vietnam? How could they have avoided knowing? The newspapers, magazine articles like Schell's and the reports of the Kennedy Subcommittee indicated the extent of what was being done in their name. The statistics alone are enough to tell the tale: five million refugees, nearly a third of South Vietnam's population of 16 million people, and that conservative estimate of the civilian casualties from what is called "friendly" military action, of at least 150,000 dead and 350,000 wounded or maimed.

These peasant hamlets, one must bear in mind, were not being plowed under because American or South Vietnamese ground troops were attempting to seize them from the enemy in pitched battles. The hamlets were being bombarded in the absence of ground combat.

One might argue that though regrettable, though even immoral, the indiscriminate air and artillery bombardments of civilians in Vietnam were not a war crime. The Allies engaged in terror bombing of Japanese and German cities in World War II. Look at the incendiary raids on Dresden and Tokyo and the nuclear holocausts of Hiroshima and Nagasaki. None of the defendants at the Nuremberg and Tokyo trials were convicted of war crimes involving the bombing of civilian populations, because the prosecutors had done the same thing. By custom, therefore, one might argue, terror bombing is an accepted practice of war. Similarly, in the Korean War, the United States Air Force bombed Korean towns and cities.

But is Vietnam the same kind of war? There is good reason to think that it is not. In World War II opposing industrialized societies were fighting a war of survival. In this context of total war, the cities inevitably became targets to be destroyed. They contained the industries that fueled their opponent's war machine and the workers who manned the factories. The worker was as much a combatant as the uniformed soldier. Korea was also, more or less, a conventional conflict between uniformed armies, although bombing practices there would bear examination in the perspective of history.

In Vietnam, however, the most advanced technological nation in the world intervened in a civil war in a primitive, agricultural country. The Vietnamese Communists possess negligible industry, no air force of any size, and no intercontinental missiles that pose a threat to the survival of the United States. The intervention was, rather, undertaken for reasons of domestic politics and foreign policy, to avoid the repercussions at home of losing a war to Communists and to maintain a position of power and influence for the United States in Southeast Asia.

Moreover, as the literature in Sacharoff's bibliography amply documents, the use of the air weapon underwent a subtle and important change in South Vietnam from the previous two wars. Air power, and artillery as a corollary weapon, were directed by an occupying power, the United States, at the civilian population in the rural areas of the country under occupation. The targets of the bombs and shells were the noncombatants themselves, because it was believed that their existence was important to the enemy. Air power became a distinct weapon of terror to empty the countryside. Samuel P. Huntington, of Harvard, has even coined a marvelously American euphemism for the technique -- "forced-draft urbanization and modernization." Some of us prefer a quotation from Tacitus that the late Bernard Fall was fond of citing: "Where they make a desert they call it peace."

One key to understanding this use of airpower in South Vietnam is to compare the unrestricted bombing in the south with the elaborate restrictions that surrounded the air campaign against North Vietnam.

Although the North Vietnamese may not believe it, in the North a conscious effort was made to bomb only military, and what limited industrial targets were available, and to weigh probable civilian casualties against the military advantages to be gained from a particular air strike. The ultimate objective of the air campaign against the North was, to be sure, political rather than military. It sought to intimidate the North Vietnamese into withdrawing their forces from the South and taking the Vietcong guerrillas along with them. And undoubtedly the restrictions were also designed to escape the unfavorable publicity that would result from severe civilian casualties in the North.

The mere fact that an attempt was made to avoid them throws into sharp understanding the very different motives that lay behind the bombing in the south and the inherent acceptance of great civilian suffering. When Harrison Salisbury, an assistant managing editor of The New York Times, visited North Vietnam in December, 1966, to write his



memorable series of articles on the destruction wrought by American air raids there (civilian homes, schools, hospitals and churches had been wrecked because the air campaign had never been the surgical operation Pentagon propaganda portrayed it as being), the most severe example of civilian deaths the North Vietnamese claimed was 89 in the town of Nandin southeast of Hanoi, from six months of bombing, less than half the official South Vietnamese estimate of the number of civilians killed in the five hamlets I found on the coast of Quangngai Province in 1965.

Did the employment of the air weapon and the artillery in South Vietnam thus exceed the limits sanctioned by the laws of war?

The United States Army Field Manual says: "The law of war. . . requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry." The Manual goes on to explain what is meant by "actually necessary for military purposes," i.e. military necessity. "The prohibitory effect of the law of war is not minimized by 'military necessity' which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. Military necessity has been rejected as a defense for acts forbidden by the customary or conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity." In short, if you can demonstrate certain measures are required to defeat the enemy, and those measures are not specifically forbidden by the laws of war, you employ them.

Assuming that the use of air power in South Vietnam was not specifically forbidden by the laws of war, was this means necessary to defeat the enemy? He could have been deprived of the rural population by another, more humane method, This would have involved putting sufficient American ground troops in South Vietnam to occupy most of the countryside and thereby gain control over the rural hamlets. National mobilization and the dispatch of upwards of 600,000 troops to South Vietnam was proposed by the Joint Chiefs of Staff and rejected by President Johnson and his advisers, because this strategy would have meant higher draft calls, wage and price controls, and other measures that would have been unpopular with the American public. So there are grounds for believing that the use of the air weapon in the South was not a military necessity but a political convenience, a substitute for sufficient infantrymen to hold the countryside.

I am not saying that garrisoning South Vietnam with ground troops would have made the war a sensible enterprise. I am suggesting that the war's impact upon the Vietnamese might have been more merciful. The Marines, because of their pre-World-War II experience with pacification in Central America and the Caribbean, did make an attempt to hold a good many of the hamlets in central Vietnamese provinces where they operated. Life for a Vietnamese farmer within these zones was safer than for his brethren in other regions.

In any case, to address the basic question of legal sanctions, it appears that the employment of air and artillery to terrorize the peasantry and raze the countryside was an act specifically forbidden by the laws of war. The Geneva Convention of 1949 Relative to 'the Protection of Civilian Persons in Time of War states:

“The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons [civilians] in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

“No protected person may be punished for an offense he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

“Pillage is prohibited.

“Reprisals against protected persons and their property we prohibited.”

The paragraphs seem to be a reasonably fair description of what was inflicted upon much of the South Vietnamese peasantry by the United States. The Army Field Manual is more specific. “The measure of permissible devastation is found in the strict necessities of war,” it says. “Devastation as an end in itself *or as a separate measure of war* [italics added] is not sanctioned by the law of war.”

The adoption of devastation as a basic element of strategy also deems to have led American leaders into what may be related war crimes against South Vietnamese civilians. The Geneva Convention of 1949 states that a belligerent power has a duty, in so far as it is able, to care for the victims of war.

“The wounded and the sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect. As far as military considerations allow. each party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.”

The consignment of Vietnamese civilian war wounded to provincial hospitals that were little better than charnel houses has been a national scandal for the United States. The reports of the Kennedy Subcommittee describe the scenes of two wounded to a bed, no sheets or mattresses, no showers, filthy toilets, open sewers and swarms of flies spreading infection. In contrast, the United States military hospitals are models of medical science. Given the wide publicity the deplorable conditions in these Vietnamese civilian hospitals have received over the years, would it be possible for the responsible leaders of the United States to contend that the neglect was not deliberate?

A similar war crime may have been committed against civilians forcibly evacuated from their homes. These persons would appear to fall under the category of internees in the Geneva Convention of 1949. The Convention lays out in great detail the obligation of a belligerent power to provide such persons with adequate food, housing and medical care. Here is an excerpt from a report to the Kennedy Subcommittee by a team from the General Accounting Office which inspected so-called refugee camps in South Vietnam last summer. The excerpt describes a camp in Quangnam Province on the central coast:

“At this location, there were about 2,070 people. We were informed that only 883 were recognized as refugees and that they would receive temporary benefits. We were advised that these people were all Vietcong families and that they were relocated by force in February or March 1970. These people are under heavy guard by the Vietnamese military.

“During our inspection, we observed there were no latrines, no usable wells, no classrooms, and no medical facilities. The shelters were crudely constructed from a variety of waste material, such as empty ammunition boxes and cardboard. We observed that the number of shelters would not adequately house these people.. .The [American] refugee adviser stated that there were no plans to improve the living conditions at this site.”

The fact that these persons are being held by the South Vietnamese authorities apparently does not absolve the United States of responsibility under the laws of war. Legally they remain our refugees. As the Army Field Manual explains:

“The restrictions placed upon the authority of a belligerent government cannot be avoided by a system of using a puppet government, central or local, to carry out acts which would be unlawful if performed directly by the occupant. Acts induced or compelled by the occupant are nonetheless its acts.” The Saigon regime is not a puppet government, but it is a client regime whose existence is dependent upon the United States. A good argument could be made that because of this client relationship, the United States induces these acts. Telford Taylor of Columbia, the former chief American prosecutor of Nuremberg, quantifies the neglect of the civilian war wounded and refugees. In “Nuremberg and Vietnam: An American Tragedy,” he notes that the United States spent, at the most, a quarter-billion dollars to ease the civilian plight over the three years from 1965 through 1967. You will think this is a lot of money, until he tells you the amount was less than four per cent of the cost of air operations over the same period.

What about a relationship between the use of airpower and artillery in South Vietnam and the garden variety war crimes that many of the books in this bibliography allege the individual acts of torture and murder of prisoners and civilians by American soldiers, the burning of peasant huts in “Zippo raids,” the looting and the rape? Did the conduct of the war as approved at the highest levels create an atmosphere in which the lives of the Vietnamese were so cheapened that they became sub-humans in the eyes of the soldier? If so, did this atmosphere help to incite these individual war crimes given the traditional racism of Americans towards Asians the dinks, the gooks, the slopeheads and the

psychological stress upon the soldier of fighting in a country where much of the population is hostile, where women and children do set mines and booby-traps and shoot at you?

The two accounts of the Mylai massacre mentioned in this bibliography, Richard Hammer's "One Morning in the War" and Seymour Hersh's "My Lai 4," as well as the testimony that has emerged at the court martial of Lieutenant Calley, of practices like driving civilians ahead of the troops to detonate mines with their bodies suggest that the general conduct of the war did contribute to these individual atrocities.

The word Lieutenant Calley used to describe the act of slaughtering the 102 men, women and children for whose deaths he is being held responsible evokes this atmosphere in uncanny fashion. He told the prosecutor that he was ordered "to waste the Vietnamese... waste, waste them, Sir." Were this just Lieutenant Calley speaking the word would not carry much meaning, but the word is from the argot of the American soldier in Vietnam. Human beings are "wasted" there, they are "blown away." Soldiers have a unique ability to find words to describe the reality of their wars.

Given such an atmosphere, the massacre at Mylai would be a departure from the norm only in that it consisted of the direct murder by rifle and machine gun fire of several hundred Vietnamese civilians at one time. The soldiers in Lieutenant Calley's platoon, whose moral sense led them to disregard his orders and not participate in the killings, do not appear to have been shocked by the lesser, individual atrocities that occurred prior to Mylai. Looked at coldly, Lieutenant Calley and the soldiers who did join him in the massacre were doing with their rifles what was done every day for reasons of strategy with bombs and artillery shells. There are Calleys in every army. What makes them dangerous is a set of circumstances in which their homicidal aberrations can run amok. The laws of war say that it is the responsibility of the highest leadership to do all in its power to prevent such circumstances from occurring.

Both the Army Field Manual and the Nuremberg Principles address this central issue in delineating when a claim of superior orders can constitute a defense against a charge of war crimes. "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, *provided a moral choice was in fact possible for him*" [italics added], the Nuremberg Principles say. The Army Field Manual is a bit more elaborate. "In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the Armed Forces; that the latter cannot be expected, in condition of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal," the Manual says.

Curiously, Lieutenant Calley's lawyers have claimed that he has a robot-like personality incapable of resisting any orders from his superior, Capt. Ernest Medina, but they have not sought to defend Calley on the grounds that, given the general atmosphere in which

the war was being conducted, and his interpretation of his orders that morning in Mylai, he may not have been capable of a moral choice. They may have hesitated to do so because they would have had to put the entire command structure from President Johnson on down in the witness chair. Telford Taylor notes in his book that a court martial at Fort Benning is too limited a forum for such a far-reaching inquiry.

Nevertheless, the question of higher responsibility hangs over Mylai. It hangs over the individual atrocities described in these books. It hangs over the use of airpower and artillery to lay waste the Vietnamese villages, if that, too, constitutes a war crime and the greatest one of all. Many would contend, as Townsend Hoopes did in an exchange of articles with two reporters for the Village Voice who accused him and his colleagues of being war criminals, that raising the issue of war crimes in Vietnam is absurd and unwarranted in the context of a democracy like the United States. Worse, many would argue, it is vindictive, capable of perversion into a new McCarthyism. Hoopes was a Deputy Assistant Secretary of Defense and Under Secretary of the Air Force in the Johnson Administration. He wrote an admired account of the inside events behind the March 31, 1968, decision to restrict the bombing of North Vietnam and open peace negotiations. His view is important because it appears to be widely held.

Hoopes argued that since the President is elected, since the war was prosecuted from well-meaning if mistaken motives, since Congress voted the funds and there was broad public support at the outset, no official should acquire criminal liability. Judgment, he said, should be confined to voting the Government out of office. Attacking this position in his introduction to the Russell Tribunal proceedings, Noam Chomsky of M.I.T. states that Hoopes is claiming an immunity for American leaders which this country denied to the leaders of Japan and Germany. Marcus Raskin, co-director of the Institute for Policy Studies in Washington, the think-tank of the New Left, asserts that Congress cannot be held responsible as a body because many Congressmen voted funds merely to ensure that American soldiers had the means to defend themselves. Telford Taylor, a mugwump Democrat, remarks that though good intentions may be mitigating circumstances, they do not negate the fact of a crime, if one occurred.

Taken to its logical end, the Hoopes argument also means that all Americans were responsible for the actual conduct of the war. If so, then the adult majorities of Japan and Germany should have been punished for war crimes. They applauded the beginning of World War II. And if everyone is responsible, of course no one is responsible. The Nuremberg and Tokyo tribunals rejected Hoopes's argument by making a distinction between those in the audience and those who held power, as do the laws of war. The Army Manual denies a collective copout: "The fact that a person who committed an act which constitutes a war crime acted as the head of a State or as a responsible government official does not relieve him from responsibility for his act."

(Hyperbole in describing what war crimes may have taken place in Vietnam seems just as unhelpful as the Hoopes argument. Chomsky in "At War With Asia," accuses the United States of intending genocide in Vietnam. So do Richard Falk, the international legal scholar, and Gabriel Kolko, the revisionist historian, both of whom have otherwise

diamond-cutting minds, in "War Crimes and the American Conscience," the published proceedings of a Washington symposium on war crimes last year. Genocide does not appear to be an accurate characterization of American conduct in Vietnam. The story is more complicated and the facts do not support the charge. The population of the country has grown despite the war, from an estimated 15 million in 1962 to about 17 million now.)

But how is this country to determine whether war crimes were really committed in Vietnam and who is responsible for them?

Not even the wildest of anticommunist politicians has predicted the conquest of the United States by the Vietcong guerrillas and the North Vietnamese army. So it seems equally outlandish to imagine that a tribunal with the power of those at Tokyo and Nuremberg will ever sit in judgment on the leaders of this country.

The Army, the principal service involved in the Vietnam war, has shown that it will not enforce military law and judge itself. The dismissal of charges against Maj. Gen. Samuel W. Koster, the division commander of the troops at Mylai, demonstrated that the current leadership of the Army considers Lieutenant Calley and Captain Medina to be its only real war criminals. Barring unforeseen disclosures, no one more important than a few captains, a major and a colonel or two are likely to join Calley and Medina in the dock. For the Army had a good case against General Koster, who was in his helicopter over the Mylai area that morning. What the Army lacked was the will to prosecute.

Perhaps it is expecting too much of human nature to think that the Army would sit in judgment on its own conduct in Vietnam. A command structure so traumatized, so emotionally defensive because of its failure in Vietnam, is not, except under great outside duress, about to begin charging members of the inner circle with war crimes.

Indeed, the military services are in the greatest danger of becoming the scapegoats of a public witch-hunt that could come from the left over the war crimes issue if responsible men do not prevail. Mark Lane's collection of purported eyewitness accounts of atrocities in Vietnam, "Conversations with Americans," is an example of the kind of scurrilous attack that is already being made. The military have few defenders in the current climate. Much of the intellectual community and many of the students are almost childishly indiscriminate in their assaults. A number of the former senior civilian officials of the country, who have changed their minds about the war they helped to prosecute, are now all too eager to blame everything on the generals.

Professional soldiers, whose frame of reference is almost by nature circumscribed, are being criticized for not having displayed the kind of broad wisdom and judgment self-proclaimed statesmen did not exhibit. If the generals did commit war crimes in Vietnam, they did so with the knowledge and consent of the civilians. If seeking to pacify with the fire and the sword of the 20<sup>th</sup> century, airplanes and howitzers, constituted a war crime, then the civilians helped to induce this crime by denying the generals sufficient troops to garrison the countryside.

President Johnson and his closest advisers, Robert S. McNamara, Walt W. Rostow, and Dean Rusk, directed the unfolding of the conflict just as President Nixon and his senior advisers now do. The military almost always played a subordinate role. Mr. McNamara, for example, supervised the planning and the execution of the war for the President as the chief of a European General Staff would have done. In 1965 he often said: 'We're going to trade firepower for men.' He had no criminal intent, of course. What he meant was that he planned to expend ten bombs to kill five North Vietnamese soldiers, instead of trading the lives of five American infantrymen for the same job. But when the bombs were targeted on civilians, Mr. McNamara did not cry halt. This is not to say that the generals would be absolved of responsibility, only that the highest, and therefore the greatest, responsibility does not rest with them.

For precisely this reason, one cannot expect the Nixon Administration, of its own accord, to institute any meaningful inquiry into war crimes. Mr. Nixon is using the same airpower tactics in Laos and Cambodia that his predecessor employed in South Vietnam. His strategy of Vietnamization is even more dependent upon the unrestricted use of airpower than was Mr. Johnson's. Mr. Nixon has also sensed even more keenly the political convenience of this weapon. He has calculated correctly that the public will not worry much about the dead, or about their age or sex, so long as the bodies are far enough away that the photographers and the television crews can't get to them too often and so long as they are, most important of all, not American.

The Kennedy Subcommittee estimates that civilian casualties in Laos, which has a population of only three million, are now exceeding 30,000 a year, including more than 10,000 dead. Many of these casualties are attributable to American bombs. Classified military documents specifically talk about bombing villages in Communist-held areas "to deprive the enemy of the population resource." No one knows what the civilian casualty toll is in Cambodia, where the same kind of air attacks are taking place. The Kennedy Subcommittee guesses there are now about a million and a half refugees in Cambodia out of a population of 6.5 million and that civilian casualties are running in the tens of thousands a year.

When I asked a responsible official at the State Department about the refugees he said he didn't have an estimate. Why? I asked. "The Cambodians haven't really asked us for any assistance with refugees and until they do it's not our concern. Our staff in the Embassy is pretty small and they have a lot of other fish to fry." What about the civilian casualties? "The Cambodians haven't been compiling them," he said. "We're dependent on their statistics and they don't keep careful statistics on anything." Really, that's what he said. The new American aid program for Cambodia contains no funds specifically marked for civilian medical relief.

Yet the cleansing of the nation's conscience and the future conduct of the most powerful country in the world towards the weaker peoples of the globe demand a national inquiry into the war crimes question. What is needed is not prison sentences and executions, but

social judgments soberly arrived at, so that if these acts are war crimes, future American leaders will not dare to repeat them.

The sole hope for such a national inquiry would appear to rest with the Congress or a commission of responsible men, with military and judicial experience, appointed by Congress and empowered to subpoena witnesses and examine documents. They might try to answer one fundamental question that I have not attempted to deal with here because the arguments are still so tangled -- whether the United States intervention in Vietnam was itself a violation of the Nuremberg Principles forbidding wars of aggression. There does not seem to be the stomach for such an inquiry in Congress now, but attitudes may change as the full import of the issue becomes known.

If Congress fails to undertake an inquiry that carries the authority of the nation, then hypocrisy will be added to our sins. The Nuremberg judgments upon such diabolical Nazi crimes as the extermination of the Jews will still stand as a monument to international justice. Even under the most critical scrutiny, nothing the United States has perpetrated approaches the satanic evil of Hitler and his followers. The Nazis were in a class by themselves.

But the other, lesser judgments at Nuremberg, and the verdicts at the Tokyo Tribunal will become what many said they were at the time, the pronouncements of victors over vanquished. We ought to remember that at the Tokyo Tribunal, the United States went so far as to establish the legal precedent that any member of a cabinet who learns of war crimes, and subsequently remains in that Government acquires responsibility for those crimes. Under our own criteria, therefore, Orville Freeman, the Secretary of Agriculture under President Johnson, could acquire responsibility for war crimes in Vietnam.

Recently, when I discussed with a Japanese friend the condemnation of General Yamashita for the death of more than 25,000 noncombatants in the Philippines, he remarked: "We Japanese have a saying. The victor is always right."

History shows that men who decide for war, as the Japanese militarists did, cannot demand mercy for themselves. The resort to force is the ultimate act. It is playing God. Those who try force cannot afford to fail. I do not mean to suggest that men should be free to attempt anything in war to ensure victory. Quite the opposite. The laws of war seek to mitigate the evil of war, to save what lives can be saved in the midst of great killing. War nonetheless remains an evil that imposes a unique burden upon those responsible. This will sound cynical to many, but if the Johnson Administration had won the war in Vietnam, few would be searching for war crimes among the physical and human ruins of Indochina. Evidence of murder and brutality on a grand scale would have been hushed in the shouts of success. The resort to force has failed, however, and that failure has helped to make the issue of war crimes in Vietnam a very real and a very fair one to be dealt with. Our failure presents an opportunity for humanity that should not be lost.