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WAR CRIMES LAW AND AMERICAN WARS
IN THE TWENTIETH CENTURY ASIA

HERBERT P. BIX

I

The first comprehensive attempt to codify the laws of modern warfare in multilateral treaties came at the end of the Nineteenth century when Russian Czar, Nicholas II, called the Hague Peace Conference of 1899.1 Diplomats, admirals and generals from twenty-six states gathered at The Hague and eventually produced the "Convention with Respect to the Laws and Customs of War on Land." Signed by all the major European powers, Mexico, Japan, Siam, Persia, and the United States, the Convention clarified general principles and defined both approved and prohibited conduct in waging war.

First of all, clear identification of combatants was stressed so as to spare non-combatants from harm. Mistreatment of noncombatant civilians under belligerent occupation was prohibited. Murder, torture, corporeal punishment, and mutilation of prisoners of war were outlawed. Forbidden also were pillage, the killing of enemy soldiers who had surrendered, wanton destruction of property in enemy territory, "projectiles diffusing asphyxiating or deleterious gases," expanding bullets, and the bombardment of undefended cities. The Hague treaty did not specify how the laws of warfare would be enforced, nor how violations should be addressed and violators penalized. Its emphasis was on general principles of conduct.2

In 1907, again at the Czar's urging, over forty nations signed a second Hague Convention on the rules of land warfare which slightly revised some of the provisions of the first, strengthened protections for army personnel, members of "militia and volunteer corps" and civilians in occupied territories, and provided for the payment of compensation for violations. The Russian legal scholar Feodor F. de Martens, in his preambles to the 1899 and 1907 Conventions, noted the limitations of the treaty and called attention to the grounding of its authority, ultimately, in the "principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

1 See Geoffrey Best, "Peace Conferences and the Century of total War: the 1899 Hague Conference and What Came After," in International Affairs-Royal Institute of International Affairs, Vol. 75, No. 3 (July 1999). The conferences occurred at a time when racism and chauvinism, grounded in social Darwinian ideas and inflamed by newspapers and periodicals, were poisoning the European political environment. Heightened nationalism, new strategic theories and technologies of warfare, and the Anglo-German naval arms race all made the danger of a future European war palpable.


“Martens Clause” put states, which act for reasons of power and interest, on notice that in peace as in war every human being remained under the protection of “elementary considerations of humanity.” His “clause” became a foundation of ethical thought on modern warfare, carried significance into the immediate post-World War II period, and still is an important influence, for example in present-day human rights debate.

Seven years after the second Hague Peace Conference the “Great War” of 1914-18 erupted. Its cost, on both sides, was an estimated nine to ten million combatants dead, and 21 million wounded, of whom 12 million were permanently disabled. Civilian casualties were fewer than combatant ones. Gross violations of the Hague Regulations were committed, by both sides. On the Western front, however, the belligerents generally conformed in respect to the treatment of prisoners of war.

The Great War, largely static in nature and limited geographically as to land fighting, demonstrated that the existing rules were inadequate, made so by such deadly advances as poison gas, submarines, long-distance artillery, tanks, and military aircraft. At its end heavy bombers for the terrorization and destruction of cities were in the planning stage, but the weapons already deployed on the battlefield had rendered the very notion of undefended places meaningless. Consequently, when the war ended, rather than attempt to make modern war itself more “civilized,” the victorious Allied powers preferred to develop a new international legal order based on the sanctity of treaties.

Interest in the development of the laws of war waned following the Great War and was replaced by efforts to prevent war from occurring. The League of Nations, as its Covenant (1919) stated, sought “to achieve international peace and security by the acceptance of obligations not to resort to war... [and] by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and by the maintenance of... a scrupulous respect for all treaty obligations...”

Seeking to remedy deficiencies in the Covenant, the Kellogg-Briand Pact (1928) outlawed “aggressive [i.e. unjust] war” and the use of military force as instruments of national policy for settling disputes among states, but did not make war in “self-defense” a crime and never addressed the causes of war. The League marked an important step forward toward amelioration of belligerency, but unfortunately was undermined by United States nonparticipation. War crimes law was advanced, however, by two new international agreements: the Geneva Protocol of 1925 banning poison gas and bacteriological weapons, and the two Geneva (Red Cross) Conventions of 1929: one explicating correct treatment of wounded and sick soldiers, the other strengthening provisions in the Hague treaty pertaining to prisoners of war. These, however, were the only successful attempts at updating the rules of warfare in the decade and

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5 Howard Ball, Prosecuting War Crimes and Genocide: The Twentieth Century Experience (Lawrence, Kansas: Univ. Press of Kansas, 1999), p. 17.
6 Perhaps this was because the armies on both sides shared the same racial and religious heritage, and could recognize something of themselves in the “enemy.”
8 Cited in Ball, Prosecuting War Crimes and Genocide, p. 30.
a half after World War I.

In 1933, the German people (with relatively few exceptions) embraced the practices and ideology of Nazism, and six years later Nazi Germany initiated World War II by invading Poland. Japan entered the war, formally allied with Germany and Italy, in December 1941.

The death, suffering and physical destruction during World War II were enormous and, just as lamentable, were not confined to combatant units. When the war ended in 1945, Europe had suffered total human losses far greater than in World War I. More than fifty million people were officially underestimated by governments to have been killed worldwide (i.e. Europe, Asia, and the Pacific), making World War II the most destructive war in history. In Asia and the Pacific, with the notable exception of Japan, accurate war death totals were never really calculated. It can be said with certainty that China sustained the heaviest casualties at the hand of Japan, including over 10 million killed. The Japanese invasion combined with grain seizures by Chinese troops "to feed the army and finance the war" produced food shortages which took the lives of additional millions. The Asian human losses resulting from famine during World War II still need to be studied.

The provisions of the Hague treaties had again fallen far behind developments in weapons technology, and now had to be rethought, restated, and extended. Moreover, they had never attempted to address the problem of modern war, in which urban areas are targeted for...
destruction because their industrial, transport, and communication complexes abet the national war effort, and all the resources of the state are mobilized for fighting. Neither had the authors and signatories of the Hague conventions foreseen the systematic genocide that Nazi Germany, waging "totalitarian" war for lebensraum, had practiced at home and all over conquered Europe and the invaded areas of the Soviet Union.12

These glaring defects in the existing laws of warfare resulted, first, in the drafting of the London (or Nuremberg) Charter, based on the London Agreement of 1946, which established the new categories of "crimes against peace" and "crimes against humanity." For the first time individuals exercising high authority, as well as institutions and governments, were made liable not only for violations of the laws and customs of warfare but also for planning and waging wars of aggression. Modeled after the example of the Nuremberg Charter, the International Military Tribunal for the Far East concentrated on only one of the new categories of offense--crimes against peace--plus violations of the Hague and Geneva Conventions. Owing mainly to the dominant role of the United States, the convening authority of the Tokyo tribunal, General Douglas MacArthur (Supreme Commander of the Allied Powers), granted total immunity to Japan's wartime head of state, the Showa emperor, and made a number of other concessions to expediency that compromised principles of justice and equitability.13

Succeeding Nuremberg and Tokyo in altering the scope and focus of international law came two other carefully deliberated events which reflected lessons drawn from German criminal behavior in World War II: the Universal Declaration of Human Rights and the Genocide Convention, both signed under the aegis of the United Nations in 1948.14 The next year fifty-nine states, including the leading Western governments, signed four new Geneva Conventions, widening the scope of protections for civilians in wartime by extending to them "the rights which previous conventions had recognized as inhering in members of the armed forces with respect to humane treatment at the hands of belligerents."15 The 1949 Conventions also extended rules for humane treatment to all parties in a civil or internal war regardless of the cause they fight for. Combatants were expressly prohibited from doing violence to "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms."

II

During the 1920s and early 1930s, Japan took an active role in the proceedings of the League of Nations and the international conferences dedicated to naval arms reduction. The

12 On the distinction between modern war—"a statement about the means of fighting"—and the sort of "totalitarian" or "total war" waged by the Axis nations, German and Japan, see Hew Strachan, "On Total War and Modern War," in The International History Review, Vol. XXII, No. 2 (June 2000).

13 Concessions to expediency included the Tribunal's failure to pursue crimes against humanity and the Japanese army's use of poison gas in China even though Appendix D to the Indictment clearly specified chemical warfare as a violation of international law. Japanese crimes committed against Koreans in Korea were also not adjudicated.

14 The Genocide Convention eliminated the connection with wartime atrocities by stating that the "Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." Cited in Theodor Meron, "The Humanization of Humanitarian Law," in The American Journal of International Law, Vol. 94, No. 2 (April 2000), p. 263.

latter were viewed sourly by military hawks who were more interested in enhancing than reducing national war power. The London Naval Treaty that weakened the Imperial Navy through a tonnage allotment that favored the fleets of the U.S. and Great Britain were unpopular, accepted reluctantly by some naval officers, bitterly by others. As for the League of Nations, Geneva was far away, measured geopolitically. When, in 1932-33, the League turned into a diplomatic roadblock by opposing Japan’s take over of Manchuria, Japan walked out. The international censure it earned at that early stage of its aggressive expansion was as nothing, however, against the uproar four years later when the Nanking massacre occurred.

In December 1937, the Shanghai Expeditionary Force, operating in conjunction with the Tenth Army, captured and occupied Nationalist China’s capital, Nanking. Japanese troop discipline had loosened dangerously on the march to Nanking; and now it collapsed. Front-line units began to execute, en masse, Chinese military prisoners of war and unarmed deserters who had surrendered. An unprecedented, unplanned rampage ensued. For over two months the atrocities continued: arson, pillage, murder, and rape. The total number of Chinese atrocity-victims within the walled city and its surrounding rural districts remains in hot dispute to this day. The best Japanese estimates put the figure at “no fewer than 200,000”; Chinese accounts range higher.

From its outset, the Nanking massacre was known to Imperial Headquarters and various government organs in Tokyo but the situation received serious attention only after strong protests from the government of the United States, whose embassy had been entered and property and flag damaged. At that time, public opposition to the war with China was virtually non-existent in Japan. Journalistic self-censorship reinforced official censorship, and the incident was effectively covered up, pushed out of sight and out of mind. Widespread public exposure to the truth did not occur until the Tokyo war crimes trial (1946-48), and even then the story of Nanking was not followed up.

General Matsui Iwane had held overall command of the Central China Area Army, and had been responsible for supervising Lt. Gen. Prince Asaka Yasuhito, Emperor Hirohito’s granduncle who was on the scene at the height of the atrocities. Both generals denied that the atrocities really occurred. Matsui was indicted and tried at the Tokyo war crimes trial following Japan’s defeat, and in 1948 was executed. Asaka was never even indicted.

As for General Asaka’s well-briefed, always attentive imperial nephew and supreme commander, the Showa Emperor Hirohito had ordered the capture and occupation of Nanking. Privately he may have been upset by the breakdown of military order and discipline, but publicly he expressed neither concern nor interest. No public documentary trace exists of an imperial order setting an investigation in motion. While the murders and rapes committed by Hirohito’s imperial troops at Nanking echoed all over the world, Hirohito expressed neither surprise nor concern. But he was not altogether silent. He spoke out energetically enough in praise of his generals and admirals at Nanking, urging them on to greater victories in the national project to induce Chinese “self-reflection.”

The guilty verdicts for the German and Japanese defendants in the early post-World War II war crimes trials were just, but the victorious Allies had also violated international law, though no nation in the world had done so on a scale comparable to Germany’s, or (in Justice Robert Jackson’s words) in ways “so calculated, so malignant, and so devastating” as Germany’s. Yet only Axis violators went before international tribunals. The world would have benefited from closer scrutiny and important adjudication of Allied violations of the Hague
laws of civilized warfare, especially in Asia and the Pacific. But in this as in other wars to the victors belonged the right to try.

III

American journalist Ernie Pyle, after covering World War II in Europe, wrote home from the Pacific in February 1945: "In Europe we felt that our enemies, horrible and deadly as they were, were still people. But out here ... the Japanese were looked upon as ... subhuman and repulsive; the way some people feel about cockroaches or mice." Pyle, who often revealed himself as racist in his writings, was probably, at the same time, aware that prewar American racism (and "anti-Orientalism") prepared a rich soil for shaping wartime hatred of the Japanese. The military humiliations the Japanese had inflicted on the U.S. at Pearl Harbor and Britain at Singapore intensified the hatred.

Japanese propagandists reciprocated, portraying the Anglo-American as barbarians "who mutilated Japanese corpses for 'souvenirs,' killed prisoners on the battlefield," and after murderously bombing densely populated areas with incendiary bombs, at the last used nuclear weapons to destroy two undefended cities.

These American and Japanese perceptions undoubtedly contributed to the dehumanization manifested in the Pacific area wartime atrocities. Consider Guadalcanal, a battle that began in August 1942 and lasted for six months. There the Americans became convinced that every Japanese had to be killed because an aspect of their inherent racial treacherousness was that they never stopped fighting even when they were hopelessly defeated. They used suicide as their ultimate weapon—crazy, "uncivilized," but effective when carried out human-bomb style. Such fanaticism deserved no quarter.

Long after the battle on Guadalcanal in the southern Solomons ended, famed American aviation pioneer and hero Charles Lindbergh visited the South Pacific "theater" of operations as an "observer" for a U.S. aircraft company. He noted in his diary more than one conversation with command and combat officers detailing U.S. violations of the laws and conventions of war.

On June 21, 1944, a general told Lindbergh of a sergeant who complained that in over two years in the Theater he had never seen real combat. Invited to join a patrol into enemy-held territory that evening: "[t]he sergeant saw no Jap to shoot, but members of the patrol took a prisoner. The Jap prisoner was brought to the sergeant with the statement that here was his opportunity ...." The sergeant protested: he could not kill a defenseless prisoner. So, Lindbergh's account finishes, two members of the patrol took over, offered the Japanese prisoner a smoke, and when he began to inhale "an arm was thrown around his head" and his throat "slit from ear to ear." "The entire procedure was thoroughly approved by the general giving the account."
Two days later, June 26, Lindbergh flew to Hollandia, New Guinea, where he spent the night. The evening talk with a group of American officers

... drifted to prisoners of war and the small percentage of Japanese soldiers taken prisoner. “Oh, we could take more if we wanted to.” “But our boys don’t like to take prisoners.” “We had a couple of thousand down at __________, but only a hundred or two were turned in. They had an accident with the rest. It doesn’t encourage the rest to surrender when they hear of their buddies being marched out on the flying field and machine guns turned loose on them.”

“Or after a couple of them get shot with their hands up in the air,” another officer chimed in.... The talk drifted to air combats and parachute jumps. All of the pilots insisted it was proper to shoot [at] enemy airmen coming down in their parachutes. However, several said that they themselves would not do it. “The Japs started it. If they want to play that way, we can too.” Accounts were given of American airmen shot down hanging from their parachutes by the Japanese.20

On July 13, at MacArthur’s headquarters in Brisbane, Australia, Lindbergh had supper with Philip La Follette, a former governor of Wisconsin. The table conversation

... turned to the atrocities committed by the Japanese and by our own men. It was freely admitted that some of our soldiers tortured Jap prisoners and were as cruel and barbaric at times as the Japs themselves. Our men think nothing of shooting a Japanese prisoner or a soldier attempting to surrender. They treat the Jap with less respect than they would give to an animal, and these acts are condoned by almost everyone. We claim to be fighting for civilization, but the more I see of this war in the Pacific the less right I think we have to claim to be civilized. In fact, I am not sure that our record in this respect stands so very much higher than the Japs.”21

Finally, on July 21, Lindbergh wrote of the Japanese “stronghold on the cliffs of Biak,” where hundreds of Japanese soldiers, were “still holding out in caves and crevices,” and had repelled repeated American attacks, inflicting

... nearly one hundred casualties on our infantrymen.... If positions were reversed and our troops held out so courageously and well, their defense would be recorded as one of the most glorious examples of tenacity, bravery, and sacrifice in the history of our nation. But, sitting in the security and relative luxury of our quarters, I listen to American Army officers refer to these Japanese soldiers as “yellow sons of bitches.” Their desire is to exterminate the Jap ruthlessly, even cruelly. I have not heard a word of respect or compassion spoken of our enemy since I came here.... What is courage for us is fanaticism for him. We hold his examples of atrocity screamingly to the heavens while we cover up our own and condone them as just retribution for his acts.22

The capricious individual behavior that Lindbergh recorded was more than inhumane; it was criminal. But of far greater historical importance were American strategic bombing,
massive firepower, and high weapons technology.

The great fire attack on Tokyo took place from midnight on March 9, 1945 into the early morning hours of the 10th. Precedent for the indiscriminate fire bombing had been provided by the Allied bombing raids on German cities, which had been an important factor in reducing Germany's war capability. Three hundred and thirty-four B-29s flying from Saipan turned a 40-square kilometer working-class area of Tokyo into a raging inferno. Using newly developed napalm incendiary bombs, the American bombardiers flying from Saipan created a fire wall around the targeted area into which later waves of planes dropped approximately 190,000 regular incendiaries. More than 100,000 people were killed in the night attack, another 100,000 were wounded, about 250,000 houses were destroyed, and a million people made homeless. American strategic bombing would continue for five months, totally contravening all the Hague rules of warfare designed to maintain discrimination between combatants and others.

IV

The Korean War of 1950-53 began as a civil conflict which the Truman administration immediately internationalized and waged on the basis of so called "presidential war powers." At the beginning of the war and often throughout, the inadequacies of the Geneva conventions just revised, as well as the limitations of American-style "modern war" when waged against an Asian people fighting on and for their own homeland, were vividly exposed.

The American problem was, above all, who is our enemy and who is not? For here, as later in Vietnam, it was common for the forces opposing the United States to dress as civilians and to mingle among the refugees. American bombers quickly destroyed every strategic target in North Korea and parts of the South, inflicting heavy civilian casualties and generating huge numbers of refugees. But the North Korean supply base was geographically removed in China and the Soviet Union, and consequently, to General Douglas MacArthur's vociferous bitterness, off-limits to U.S. attack.

During late July and August of 1950 the Americans were in full retreat southward, headed to Pusan, followed and often surrounded by hundreds and thousands of white clad South Korean old men, women and children who were also fleeing the North Korean advance. Convinced that enemy combatants had mingled with the refugees and were endangering the retreat by clogging it up, the American senior command authorized field officers to fire directly on the hurrying crowds. Such orders were altogether in violation of international law.

On August 3, Maj. Gen. Hobart R. Gay, of the First Cavalry Division, ordered his men to blow up the last bridge over the Naktong River, although it was still packed with refugees struggling to cross. That same day American troops at the village of Tuksong-dong blew up another bridge, taking more civilian lives. At many other places American troops made machine gun and mortar attacks on fleeing refugees.

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The largest confirmed massacre of non-combatants took place at a railway bridge near the hamlet of Nogun Ri, 120 kilometers southeast of Seoul. Hundreds of Korean refugees walking south had been ordered, by retreating American troops of the 24th Division, off the highway and onto a railroad track, and had then taken shelter beneath the arches of the steel and concrete bridge. There they huddled for three days, June 26 through 29. American planes strafed the area, killing an estimated 100 refugees still walking down the railroad tracks. Then, poorly trained and led American soldiers of the 7th Cavalry Regiment of the First Cavalry Division, dug in at the location, loosed rifle and machine gun fire. They aimed directly at the trapped refugees, whom they had been ordered to regard as transformed into dangerous armed enemies. They killed about 200 refugees, possibly more.

Three weeks earlier, South Korean troops, all technically under General MacArthur's operational control, murdered 1,800 Korean political prisoners near the town of Taegon, then pushed the bodies into a mass grave. An American CIA operative witnessed and reported this atrocity. It was also photographed, but in Washington the Joint Chiefs of Staff chose to cover it up. American officers witnessed the murder by South Korean military police of more than 2,000 leftist political prisoners at Dokchon in early July. MacArthur, when informed of the atrocity, referred the report to U.S. diplomats for "such action as you deem appropriate." U.S. ambassador John Muccio did indeed try to persuade President Syngman Rhee to end the illegal summary executions but to no avail.

The Pentagon concealed all of these incidents for half a century. It has also long been known that Marines, in their retreat from the Yalu River in December 1950, opened fire on an estimated 3,500 refugees; and in May 1953 American bombers blasted five North Korean dams, flooding valleys, destroying rice crops and food stocks, and drowning large numbers of people. These actions too were criminal offenses against the laws of war, but only No Gun Ri was investigated. The US government refused to formally apologize to South Korea, claiming that its army and air force had not ordered non-combatants killed.

Despite overwhelming American material and technological superiority, an expenditure of "surface-delivered munitions" greater than in World War II, and the "splashing [of napalm] all over the civilian population," the war developed into a costly stalemate. With Chinese and North Korean armies deeply dug-in, able to re-equip, and constantly improving their underground defenses, the Americans could find no satisfactory way out. Both sides

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suffered heavy casualties. Eventually, positional warfare became the norm and forcing the enemy to accept a compromise peace (read truce), rather than face escalation of the fighting to the nuclear level, became the object.

The shooting stopped and a truce line was established, but the armies did not go home.

V

Beneath the U.S. debacle in Korea lay the contradiction between modern warfare, waged American-style, with heavy reliance on strategic bombing and massive firepower rather than manpower, and international war crimes law, which mandates discrimination between combatants and non-combatants. The Japanese had found at Shanghai and Nanking in 1937 that determining who is an enemy can sometimes be difficult. The U.S. learned the same lesson in Korea. It confronted the problem again in Vietnam, and far more destructively.

In the U.S.-created puppet state of “South Vietnam” more than half the population by 1965 supported the insurgents, and from the beginning there had been no stable front lines. By the third year of the Johnson administration’s steady escalation of the American effort, the “enemy” was in control of most of the countryside of South Vietnam and the protection of non-combatants had become an impossible, criminal joke. Unable to identify the “enemy,” the American forces directed massive artillery and air power almost blindly. They concentrated on uprooting the civilian population and herding them into fortified hamlets. In this way huge “free-fire zones” were created where limits on killing were removed and there was no need to identify who was a non-combatant because anyone remaining was presumed to be an enemy.

Chemical defoliants were used extensively to kill the concealing foliage of the jungle—and “collaterally” as the innocuous U.S. military expression had it, the rice fields, gardens, and orchards that happened to be nearby. Allegedly non-poisonous gases were dumped onto hamlets where the elusive “enemy” might be hiding in cellars and tunnels; many babies, small children, and elderly people died in these attacks, for the gases were really toxic. It could truly be said that the Americans were waging war on the land itself, and on all who lived there.

Nevertheless, the Vietnam War refused to go well for the Americans. The ground fighting was difficult, deadly, and hopelessly deadlocked. Discipline rotted, insubordination spread, and racial tensions erupted into frequent rioting. A fifth of the ground troops became addicted to heroin, which was in abundant supply and very cheap. Alcohol and marijuana use spread widely. The deterioration of the U.S. military in Vietnam was not total of course, and some units were less affected. The breakdown was, however, severe and, as the historian Gabriel Kolko has noted, altogether without precedent in American military experience.

In this situation there occurred an incident that illuminated for many Americans the true nature of the Vietnam War.

Early on the morning of March 16, 1968, during the last stage of the Vietnamese Tet offensive, Charlie Company, first platoon, led by Lt. William L. Calley but under the direct

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command of Capt. Ernest Medina, went into the tiny hamlet of My Lai, a part of Son My village in Quang Ngai province, a “Vietcong” stronghold. The hamlet was designated “Pinkville” on American military maps. The soldiers, numbering 105, were on a “search and destroy” mission, seeking to trap the Vietcong’s 48th Local Force Battalion. For over a month they had patrolled the fields and villages in “Vietcong country.” They had seen civilians and had taken casualties; never once, however, had they encountered the enemy. Now their morale was low; their degree of frustration high. They were young men, mostly high school graduates, deeply embittered and inclined to transfer their aggression to the Vietnamese civilians they encountered.33

The day before this operation Capt. Medina (after having been briefed by his immediate superior, Lt. Col. Frank Barker) met with his men. He told them that My Lai was enemy controlled. The men of Charlie Company were entitled to revenge for the comrades they had lost. His orders were to seize the hamlet, clean it out, and raze it to the ground. Lt. Calley spoke also. That evening many of the soldiers, unclear about what lay ahead, went to their bunkers and prepared for their mission by getting drunk on whiskey and beer, smoking heroin and marijuana. Some were still drunk when a few hours later they pulled out for Pinkville.

With Lt. Calley, and Capt. Medina leading by example, and everyone shouting and yelling, the American soldiers went in shooting. Of a village population of seven hundred, nearly five hundred unarmed, non-combatant civilians were killed—virtually every woman, child, infant, and old man in the hamlet. Some of the unarmed, unresisting villagers tried to escape by running to their bunkers, but were killed by explosives tossed in after them. Others ran back to their homes and were killed in their homes. Many were forced into drainage ditches and shot there. Not all members of Charlie Company took part in the slaughter; some feigned participating; some simply held back. A machine gunner ordered to fire point blank into a huddled group refused. Calley then ordered another soldier to use the weapon.

At least twenty women and girls were raped at gunpoint, and then murdered. To insure that the village water supply would be ruined, dead bodies were thrown into the wells. Other corpses were mutilated with bayonets. Wounded Vietnamese civilians were either left to die or dispatched with a shot to the head. It lasted for about four hours, during which time everything combustible was set on fire. Throughout the carnage, American helicopter gunships whirled overhead. An army photographer on the ground took pictures but did nothing whatever to protect any civilians. One helicopter pilot, Chief Warrant Officer Hugh C. Thompson, Jr., witnessing the murders from the air, radioed a report to his headquarters, then put his helicopter down and saved a number of Vietnamese children. Meanwhile other soldiers of the same strike force to which Charlie Company belonged committed a separate massacre of civilians four kilometers from My Lai, at My Khe.34 My Lai was reported right away but worse was happening elsewhere that never received attention in the Western media.

The cover-up began almost immediately. Fraudulent reports were concocted. Every command level up to division commander (23rd Infantry “Americal” Division, Major General Samuel Koster) placed careerist concerns first and joined the cover-up. But on March 29, 1969, Ronald Ridenhour—a Vietnam war veteran who knew many of the men of Charlie


34 Olson and Roberts, My Lai: A Brief History with Documents, p. 162. The material in this and the following paragraphs is drawn from Olson and Roberts unless otherwise indicated.
Company--put the evidence together and wrote a letter to American political leaders, telling them what had happened. Eight months later, on November 13, 1969, the My Lai story finally broke in the American press. Official investigations ensued. The army investigation led to the filing of “war crimes and obstruction of justice charges against two generals, four full colonels, four lieutenant colonels, four majors, six captains, and eight lieutenants.”35 The courts martial which tried these men were loaded with Vietnam veterans. Only one officer was convicted: Lt. Calley was sentenced to life imprisonment, but subsequently was paroled by the Secretary of the Army and granted Nixon’s presidential pardon. General Koster received only administrative sanctions. The Pentagon thus went on record as unwilling to enforce even the most lenient version of the command responsibility doctrine against its own officers.

News of the My Lai massacre touched off a national debate in the United States on President Johnson’s war policies. At its height in 1970, Telford Taylor, former chief counsel at the Nuremberg trials, published a book comparing Nuremberg and Vietnam and suggesting that America’s involvement in Vietnam was in some respects criminal.36 Critics had long been saying that the dropping of millions of tons of bombs on North Vietnam, the saturation bombing of the rural population in South Vietnam, massive napalm strikes, and the use of ground attacks to systematically destroy whole villages and disrupt economic life violated international law. Voluminous evidence was produced to support these charges.37

My Lai, though a glaring atrocity, was within the larger pattern of American conduct toward Vietnamese civilians. The highest decision-makers in the Johnson (and later Nixon) administration, ordering disproportionate use of military force and disregarding civilian lives (“collateral casualties”), waged warfare on the very society the United States professed to be protecting. The “Yamashita precedent” concerning the responsibility of military commanders for troops under their control was also recollected. Questions were raised as to how war crimes trials might also be held for high civilian officials who could be charged with having committed war crimes.38 Those questions were answered by the failure to bring presidents and their top policy-makers to justice for violating international law. Ultimately, the My Lai massacre turned American attention away from the need to confront and reverse the morally untenable, medieval legibus solutus proposition that princes are above the laws and may do as they like. This consequence was perhaps a final atrocity.

VI

Even before Pearl Harbor, Nanking had become the place name for Japanese atrocities during its war with China. Decades later, My Lai became the symbol of the American war against the people of Vietnam. Throughout most of the Cold War, the Japanese people rejected clarification of the facts surrounding Nanking. Their response eventually became forgetfulness and denial. By contrast, in the United States during the debate over American involvement in Vietnam, the My Lai atrocity was fully reported in the mass media, and once publicly disclosed, was never denied. The Japanese confrontation with the Imperial Army's atrocities in China was displaced in time and delegated to an international war crimes tribunal for handling; the American response to My Lai was handled at home, by family and neighbors, as it were.

At the time of the My Lai disclosures, American domestic opposition to the Vietnam War was strong and growing. Many American military leaders, anticipating even less public support ahead, were ready to get out of Vietnam. As in late 1930s Japan during the first and second Konoe cabinets, so in late 1960s-early 1970s U.S.A., it was high civilian officials, starting with Presidents Lyndon Johnson and Richard Nixon and certain of their key advisers—including Robert McNamara, McGeorge and William Bundy, Walt Rostow, and Henry Kissenger—who pushed for continued war and refused to publicly acknowledge the stalemate and defeat in South Vietnam.

Ultimately, mainstream America simply shifted blame for My Lai downward onto the lowest-ranking responsible officer, a second lieutenant. The lesson drawn from the incident was that My Lai was an isolated event, not the general practice. To some degree, that rationalization was also used by the assorted Japanese Nanking deniers and apologists. Overvaluing their group identity, they insisted on preserving the ethnocentric myth of Japan's essential national purity and goodness.39

In the last two decades of the twentieth century interest in war crimes, far from waning, became more insistent and populist as satellite-communications-technology provided television viewers all over the globe with close-up, real-time scenes of atrocities that in earlier periods would have been witnessed only by those physically involved. In the 1980s the apartheid regime in South Africa became the target of international condemnation and was subjected to economic sanctions for its “human rights” violations. In the 1990s, following the end of the Cold War, the collapse of the Soviet Union, and the Gulf War, public outrage mounted in affluent Western nations at ethnic conflicts in the Balkans.

These concerns found formal statement in 1993 with the establishment by the U.N. Security Council of the International Criminal Tribunal for the Former Yugoslavia (ICTY). This Tribunal still convenes at The Hague, and over its life to date has indicted dozens of alleged war criminals, including for the first time an active head of state, Slobodan Milosevic. In 1998 the ICTY scored another first when it found an individual guilty of rape—with rape defined as a war crime. In late 1994, the United Nations created the International Criminal Tribunal for Rwanda (ICTR) and authorized it to “prosecute individuals responsible for

genocide and other serious violations of humanitarian law during the 1994 civil war in Rwanda."

As these courts have pursued their stated purposes, they have clarified the definition and scope of war crimes and crimes against humanity, and laid down precedents which will influence their own future procedures and those of other international courts that may in good time be created. War crimes law, in other words, is steadily creating its own case law. Nevertheless, terrible atrocities have continued, and the granting of immunity to dictators and heads of state who have committed crimes against their own people and others has even increased in the last two decades of the twentieth century.

The Rome Statute of 1998, establishing an independent International Criminal Court (ICC) may help to check both trends. The ICC will have jurisdiction over a narrow range of "crimes of universal jurisdiction"—war crimes (including "aggression"), genocide, and crimes against humanity—but its main objective will be to end impunity for the perpetrators of mass atrocities.40 When sixty nations sign the treaty, the court will begin to operate and leaders of all major states, including those which have expressed strong reservations against it, could someday be liable to accountability for violation of the laws of war.

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Over the decades since Nanking and My Lai, other places have given other names to outrages. Considering the vast inequalities of power, wealth, and resources among states, and the often blind ambitions of their leaders, it seems unlikely that warfare will soon wither away and be abandoned. We must hope that the efforts made in the 20th century to ameliorate the cruelty of warfare and punish states and individuals who perpetrate atrocities and human rights violations will continue, and be supported by the development of mass movements that make such punishment a principal cause. Then eventually, before the 21st century ends, our collective experience in struggling to make warfare more humane will lead, in ways we cannot now foresee, to a more peaceful world. If this is unlikely, at least it is not obviously impossible.

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