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Westmoreland v. CBS: The Law of War and the Order of Battle Controversy

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Westmoreland v. CBS: The Law of War and the Order of Battle Controversy

*Stephen B. Young**

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I. INTRODUCTION

Nine years after the 1973 Paris Peace Agreements ended United States participation in the Vietnam War, CBS television reporter Mike Wallace publicly accused General William Westmoreland, the former commander of United States forces in Vietnam, of serious and inexcusable deceit with regard to Westmoreland's official conduct during that war. On a news program aired on January 23, 1982, Wallace claimed that Westmoreland's alleged deceit had assisted Communist military forces in obtaining battlefield success in the Tet Offensive of 1968.¹

According to CBS, Westmoreland had engaged in a conspiracy to suppress and alter critical intelligence concerning the Communist enemy. CBS alleged that Westmoreland had deceived not only the United States people but also his superiors in the Joint Chiefs of Staff, the United States Congress and President Lyndon Johnson² when Westmoreland adopted an estimate of enemy strength—what the military calls the Order of Battle³—that was lower than it might have been had Westmoreland included certain Communist civilian organizations in the tabulation. CBS claimed that Westmoreland's motivation in refusing to authorize the proposed higher overall strength figures had been crassly political. By showing Communist combat strength as less than it actually had been, CBS alleged, Westmoreland had intentionally nourished hope among decision-makers in Washington that the South Vietnamese and their United States allies were on a road to victory. According to CBS, these hopes were illusory. The result of Westmoreland's supposed deceit was, therefore, only to prolong a useless and tragic conflict.

This Article will contend that the law of war obligated Westmoreland to accept lower numbers for the military Order of Battle because the persons under consideration for inclusion were arguably noncombatant civilians entitled to the protections that the law of war reserved for nonbelligerents. To support this conclusion, this Article will first discuss the necessary distinction, as embodied in the law of war, between combatants and noncombatants. Next, it will discuss the circumstances of

1. *The Uncounted Enemy: A Vietnam Deception* (CBS documentary, Jan. 23, 1982).

2. R. ADLER, *RECKLESS DISREGARD* 5-6 (1986).

3. The Order of Battle served to identify the enemy units so that American commanders might know against whom they were fighting and how strong their opponents might be; to avoid surprise; and to select appropriate tactics to defeat enemy units in battle.

combat that Westmoreland discovered when United States forces entered the war to fight one-on-one with Vietnamese Communist units. It will then discuss Westmoreland's personal obligations under the law of war and present the record of his response to those obligations. Finally, this Article will conclude with an analysis of the controversy over who was to be included in the Order of Battle.

Neither CBS nor Westmoreland's other critics, on whom CBS relied for the accuracy of its allegations, ever expressed concern over application of the law of war to the the Order of Battle dispute. Westmoreland did express such a concern, and this concern guided his decision-making in the dispute.

The controversy over how Westmoreland's Command, the United States Military Assistance Command Vietnam (MACV), should have defined the enemy in the Vietnam War and estimated the enemy's strength arose in May 1967, when Major General Joseph McChristian, the MACV Chief of Intelligence Analysis and Assessment, proposed reporting sharply increased enemy troop strength. In particular, McChristian suggested reporting an increase in the number of Communist supporters in guerrilla and other irregular units.

Part-time and unarmed Communist supporters living in rural villages and hamlets had been organized into units denominated as self-defense and secret self-defense forces. Self-defense units undertook various security duties in Communist-controlled communities. Secret self-defense units included persons performing self-defense functions but living in government-controlled areas. Their participation in the Communist-led insurgency was to be kept secret.

For several years before May 1967, the MACV had included the self-defense and secret self-defense forces in its Order of Battle estimates of the total Communist effort. The number of individuals the MACV had ascribed to those forces had not changed in several years, however, because the MACV did not take them seriously and paid them no attention.

The MACV had taken its original Order of Battle figures from the South Vietnamese nationalists' estimates of enemy strength and unit organization. The South Vietnamese had included the self-defense and secret self-defense groups in their list of enemy forces. The South Vietnamese, in turn, had taken their original Order of Battle information from the French Expeditionary forces that had fought the Vietnamese Communists from 1946 to 1954, when the South Vietnamese had terminated French participation in the country's defense. Thus, French colonial officers, who were not excessively concerned for fine distinctions between combatant and noncombatant rural Vietnamese, had

made the original decision to include the self-defense and secret self-defense in the Order of Battle. The MACV had taken for granted the inclusion of these forces in the Order of Battle and had not analyzed its legality under the law of war until General Westmoreland did so in the summer of 1967.⁴

In May of that year Major General Joseph McChristian proposed to his commander, General Westmoreland, that the MACV sharply increase Order of Battle estimates to account for new information regarding the self-defense and secret self-defense units. Westmoreland disagreed, stating that the Order of Battle should identify participants in self-defense and secret self-defense units only if they were combatants, a precondition for classification that the law of war required. Westmoreland's refusal to agree with McChristian's proposal set in motion a series of contentious meetings between military subordinates of Westmoreland, officers in the Pentagon, and civilian analysts at the Central Intelligence Agency (CIA) to resolve the issue of how best to report the strength of enemy forces in South Vietnam. These bureaucratic struggles resulted in the adoption of Westmoreland's perspective: the MACV did not include the self-defense and secret self-defense units in the Order of Battle because the units did not consist of combatants, but the MACV did mention the units' possible assistance to the enemy.⁵ That Westmoreland knowingly advocated presenting an Order of Battle smaller than it might have been had it included the self-defense and secret self-defense units is uncontroverted.

Removing the self-defense and secret self-defense organizations from the Order of Battle did not imply that the United States would ignore these units' potential and actual contributions to the Communist war effort. The MACV removed the units from the scheme of classification not to hide such units from analysis but to place them in another reporting system—one designed especially to measure progress and regression in guerrilla warfare. This system, the Hamlet Evaluation Survey, attempted to measure the respective degrees of government and Communist control and organization of the population by estimating the impact on the war of Communist supporters in the self-defense and secret self-defense formations. Forming a relevant assessment of progress in the Vietnam War required use of both the Order of Battle and the Hamlet

4. See Major T.L. Cabbage, *Westmoreland v. CBS: Was Intelligence Corrupted by Policy Demands?* 8-14 (U.S. Army War College May 1987) (paper presented at the Intelligence and Military Operations Conference).

5. MACV Briefing on Enemy Order of Battle, Nov. 24, 1967, Joint Exhibit No. 277, at 5, 8, *Westmoreland v. CBS* [hereinafter Joint Exhibit No. 277].

Evaluation Survey: one to measure results in the war of attrition fought against main force Communist units and another to measure the pace of pacification and nation-building.

On its news program aired on January 23, 1982, however, CBS reported that Westmoreland had wanted to delete the self-defense and secret self-defense formations from the Order of Battle for ignoble political reasons—to mislead his superiors and the United States public. Although CBS presented direct testimony that political reasons were a sufficient motivation to delete the self-defense and secret self-defense organizations from the Order of Battle, Westmoreland felt that CBS's position had been misleading. Contesting the published characterization of his motivations, Westmoreland sued CBS for defamation.⁶ Westmoreland's counsel did not attempt to introduce the law of war obligations as an explanation for Westmoreland's behavior. Westmoreland's counsel merely denied the CBS allegations and failed to supplant them with alternate explanations for Westmoreland's conduct.

The Westmoreland trial ended in a compromise settlement between Westmoreland and CBS. The terms of the settlement were sufficiently vague as to leave unresolved in the public mind the question whether Westmoreland had in fact an acceptable explanation for his conduct. The Vietnam War had generated so much dissent and controversy that many Americans readily came to believe the worst about the political leaders and military commanders who had led them into a war that was not won. When CBS fed on and encouraged such suspicions with its allegations of a conspiracy to distort the Order of Battle, public opinion placed a heavy burden on Westmoreland to account persuasively for his conduct.

A persuasive explanation of the Order of Battle controversy exists. It lies in the reasons why Westmoreland actually resisted the effort to have the Order of Battle enlarged to include higher estimates for the self-defense and secret self-defense units. Unfortunately, commentators have yet to explain publicly this aspect of the controversy.

Interestingly, an astute observer of the Westmoreland trial noticed the key to Westmoreland's motivation in arguing for lower figures in the Order of Battle. In her account of the trial, Renata Adler observed:

As for the question of including the grandmothers and the children who were members of the village self-defense units, . . . if the [CBS] program

6. *Westmoreland v. CBS*, 596 F. Supp. 1170 (S.D.N.Y. 1984) (motion for summary judgment). For a lengthy account of General Westmoreland's defamation suit against CBS, see B. BREWIN & S. SHAW, *VIETNAM ON TRIAL: WESTMORELAND VS. CBS* (1987).

was right . . . [in alleging] that these grandmothers and children *must* be included in the Order of Battle, the inescapable conclusion is that these people were in fact army. And if they were army, and enemy army, the opposing army is hardly to blame for trying to kill them before being killed by them. . . . If CBS was right, then these "civilians" were Order of Battle soldiers, and what appeared to be an indiscriminate massacre of noncombatants becomes more like an act of war.⁷

What Renata Adler surmised to be a logical and moral truth constitutes the law of war, which bound Westmoreland in his capacity as commander of United States forces fighting in South Vietnam. One can find the proper explanation for Westmoreland's conduct in the legal requirement that he separate, as best he could, civilians from enemy combatants, the better to protect civilian lives and property.

II. THE LAW OF WAR

A. *Generally*

As with all law, the law of war constrains human behavior to achieve an end. The end that the law of war seeks to achieve, however fitfully, is reduction of the use of violence. The law's objective is to reduce violence to the minimum amount necessary to impose one's will on an adversary.

Commentators often refer to the principle that encapsulates this policy of minimal force necessary to attain one's objective as "proportionality."⁸ To be proportional, the military means used must not be excessive in relation to the ends sought. The use of unnecessarily violent force violates the rule of proportionality. Proportionality also demands that combatants use force against that which directly negates or impedes the efficacy of their force. The proper objects of force are the force and will of the adversary. Defining the limits of what is adversarial, therefore, becomes central to the legitimate use of force and constitutes an important part of the law of war.

The corollary principle that in war, combatants must distinguish civilian lives and livelihoods from adversarial, military lives and endeavors arises from the reasoning behind proportionality. This principle evolved with the rise of the nation-state as the principal form of human political organization, a process that began in the seventeenth century with the rise of absolute monarchies in Western Europe and culminated in the twentieth century with the creation of the United Nations as the legal

7. R. ADLER, *supra* note 2, at 36.

8. See M. WALZER, *JUST AND UNJUST WARS* 119-20 (1977).

regime for international order.⁹

The eighteenth century French political philosopher Jean-Jacques Rousseau first noted the need to distinguish between the armed forces of a sovereign government and the inhabitants of territory in which war is occurring. He wrote:

War then is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; . . . Finally, each State can have for enemies only other States, and not men; . . .

. . . The object of the war being the destruction of the hostile State, the other side has a right to kill its defenders, while they are bearing arms; but as soon as they lay them down and surrender, they cease to be enemies or instruments of the enemy, and become once more merely men, whose life no one has any right to take. Sometimes it is possible to kill the State without killing a single one of its members; and war gives no right which is not necessary to the gaining of its object.¹⁰

During Rousseau's lifetime the Swiss writer Emmerich de Vattel wrote an elegantly articulated treatise on the law of nations.¹¹ Vattel admitted that states may consider women and children who are subjects of a hostile state to be enemies. Vattel pointed out, however, that such a classification does not justify treating women and children like men who bear arms or who are capable of bearing them.¹² For Vattel, the law of nations, which should constrain the actions of sovereigns, establishes rights in the conduct of war that extend only as far as necessity and the exigency of the case demand, but no further.¹³ Whatever a sovereign does beyond the demands of necessity is "faulty, and will be condemned at the tribunal of conscience."¹⁴ For example, wrote Vattel, it is not necessary to use force against women, children, the aged and the sick because they offer no resistance. Consequently, he concluded, we have "no right to treat their persons ill, or use any violence against them, much less to take away their lives."¹⁵ Persons capable of bearing arms may live in perfect safety as if they were friends of an occupying military force,

9. See E. ROSENBLAD, INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT 53 (1979).

10. J. ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 10-11 (G. Cole trans. 1950).

11. E. DE VATTEL, THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE (Northampton, Mass. 1820).

12. *Id.* at 388.

13. *Id.* at 412.

14. *Id.*

15. *Id.* at 417.

provided they submit to the rules and regulations that the predominant power imposes on them.¹⁶ Regarding rights of waste, destruction and pillage, Vattel concluded that "[a]ll damage done to the enemy unnecessarily, every hostility which does not tend to procure victory, and put an end to the war, is a licentiousness condemned by the law of nature."¹⁷

In 1836 Henry Wheaton wrote an analysis of international law.¹⁸ In it he stated that Vattel's position, which distinguished between those who fought in a war and those who did not in order to direct force only against the former, had been adopted "by the unanimous concurrence of all the publicists of the present age."¹⁹ He summarized the emerging law of war as follows:

Those who are actually in arms, and continue to resist, may be lawfully killed; but the inhabitants of the enemy's country who are not in arms, or who, being in arms, submit and surrender themselves, may not be slain, because their destruction is not necessary for obtaining the just ends of war.²⁰

Under this view, members of the civil government, women, children, cultivators of the earth, artisans, laborers, merchants, men of science and letters, and generally all other public and private individuals engaged in the ordinary civil pursuits of life are spared the direct effects of military operations.²¹

The United States protected noncombatants from the use of force in war long before other nations did so. In April 1863, during the United States Civil War, General Halleck of the Union Army promulgated a code of war utilizing rules drafted by Francis Lieber, a professor of international law at Columbia University.²² Article 22 of Halleck's code states:

Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile

16. *Id.* at 418.

17. *Id.* at 434.

18. H. WHEATON, *ELEMENTS OF INTERNATIONAL LAW* (Da Capo Press 1972) (1st ed. Philadelphia 1836).

19. *Id.* at 249.

20. *Id.* at 250.

21. *Id.* at 251-52.

22. Instructions for the Government of Armies of the United States in the Field (prepared by Dr. Francis Lieber and promulgated as General Orders No. 100 by President Lincoln, Apr. 24, 1863), *reprinted in* LIEBER'S CODE AND THE LAW OF WAR 45-71 (R. Hartigan ed. 1983).

country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property and honor as much as the exigencies of war will admit.²³

In 1868 European powers recognized the principle of protecting civilians. The preamble to the Declaration of St. Petersburg Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight noted that combatants must strike a balance between "the necessities of war" and "the laws of humanity."²⁴ The preamble also said that "the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy."²⁵

To sustain the principle of distinction separating combatants from noncombatants, it became necessary for states to require that persons seeking protection intended for civilian populations not conduct themselves as members of a sovereign armed force. In 1880 the Institute of International Law adopted the Oxford Manual, article 1 of which states: "The state of war does not admit of acts of violence, save between the armed forces of belligerent States. Persons not forming part of a belligerent armed force should abstain from such acts."²⁶

B. *The Hague Conventions*

In 1899 a conference of sovereign states convened at the Hague to draft provisions limiting the conduct of armies during times of war. The states agreed to declarations regarding the use of balloons,²⁷ asphyxiating gases,²⁸ and expanding bullets²⁹ and adopted a convention regarding recognized laws and customs of land warfare.³⁰ In 1907 a second conference

23. *Id.* at 49.

24. Declaration Renouncing the Use in Time of War of Explosive Projectiles under 400 Grammes Weight, Dec. 11, 1868, preamble, 138 Parry's T.S. 297, *reprinted in THE LAWS OF ARMED CONFLICTS* 95 (D. Schindler & J. Toman eds. 1981).

25. *Id.*

26. INSTITUTE OF INTERNATIONAL LAW, OXFORD MANUAL (1880), *reprinted in THE LAWS OF ARMED CONFLICTS*, *supra* note 24, at 37.

27. Declaration Respecting the Prohibition of Discharge of Projectiles from Balloons, July 29, 1899, 187 Parry's T.S. 456.

28. Declaration Respecting the Prohibition of the Use of Projectiles Diffusing Asphyxiating Gases, July 29, 1899, 187 Parry's T.S. 453, *reprinted in DOCUMENTS ON THE LAWS OF WAR* 36 (A. Roberts & R. Guelff eds. 1982).

29. Declaration Respecting the Prohibition of the Use of Expanding Bullets, July 29, 1899, 187 Parry's T.S. 459, *reprinted in DOCUMENTS ON THE LAWS OF WAR*, *supra* note 28, at 40.

30. Hague Convention II Respecting the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403, 1 Bevans 247, *reprinted in THE LAWS OF*

occurred at the Hague to implement a suggestion of United States President Theodore Roosevelt that states place limits on the quantities of weapons they purchase to fight their wars. The participating states failed to agree on arms limitations at the second conference, but they did manage to adopt thirteen conventions and one declaration. The fourth convention (Hague Convention IV) restated with slight modifications the provisions of the convention the states had adopted in 1899 and became the first generally acknowledged, contractually binding international code of legal warfare.³¹ It gave definitive expression as international law to the principle of distinction in warfare.

Chapter 1 of section I of Hague Convention IV incorporates the principle of distinction by setting forth a definition of belligerents. The definition states that belligerents are the proper objects of warfare.³² In general, the provisions of Hague Convention IV reflect a desire to define belligerents as those individuals responsive to the commands of a sovereign political power. Their status as belligerents arises from their function as agents of the entity that has war powers—the sovereign state. Other individuals not acting as agents are not entitled to make war. Under Hague Convention IV, the rights of warfare thus pertain only to certain persons: (1) those serving in armies; (2) those in militias and volunteer units if they are under the command of a person responsible for their behavior, wear a fixed distinctive emblem recognizable at a distance, carry arms openly and conduct their operations in accordance with the laws and customs of war; and (3) peaceful inhabitants of a territory if they take up arms spontaneously to resist invading troops and, in so doing, carry their arms openly and respect the laws and customs of war. This definition separates those who make war from those who do not.³³

Under the Hague Convention IV nonbelligerents are entitled to protection from belligerents, who must follow specific duties specified in the Convention such as the obligation in article 22 to agree that means of injuring the enemy are limited.³⁴ Article 23 goes on to protect enemy property from destruction and seizure, unless the necessities of war imperatively demand the property, and to safeguard the legal rights of citizens of the hostile party in a war.³⁵ Belligerents cannot, under article

ARMED CONFLICTS, *supra* note 24, at 63.

31. Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 28, at 44 [hereinafter cited as Hague Convention IV].

32. Hague Convention IV, *supra* note 31, arts. 1-3.

33. *Id.* art. 1.

34. *Id.* art. 22.

35. *Id.* art. 23.

23(h) of Hague Convention IV, abolish, suspend or declare inadmissible in court the rights and actions of nationals of the hostile party.³⁶ Article 25 prohibits belligerents from attacking or bombing, by whatever means, undefended towns, villages, dwellings or buildings.³⁷ Nonbelligerent structures are thus set apart from properties that a party can lawfully attack or bomb. Except when they are to set in motion a ground assault simultaneously, article 26 requires commanders to do everything in their power to warn residents of an incipient bombardment.³⁸

Under article 27, those besieged by a hostile force can mark with distinctive and visible signs buildings dedicated to religion, art, science or charitable purposes and historic monuments and hospitals.³⁹ As long as the besieged residents are not using these places for military purposes, the sites are off-limits to wanton bombardments. Besieging commanders must take all necessary steps to spare, as far as possible, such structures. Article 28 prohibits pillage in all circumstances.⁴⁰

Section III of Hague Convention IV protects the daily circumstances of civilian populations from belligerent abuse. Article 43 requires an army that has occupied hostile territory to restore and ensure public order and safety for the people of the territory while respecting laws previously in force.⁴¹ The Convention forbids belligerents from compelling residents of an occupied territory to furnish information about the hostile army. Under article 46 a belligerent must respect the family honor, rights, lives, private property, religious convictions, and practices of persons in occupied territories.⁴² Under article 50 a belligerent may not inflict a penalty on people of an occupied territory to punish them for the acts of others, unless the people were jointly and severally responsible for the wrong.⁴³ Article 53 restricts belligerents to the confiscation of the hostile state's property only if it involves cash, funds, realizable securities, arms, stores and supplies, means of transport and other movable property that the belligerents might use for military operations.⁴⁴ The ninth convention of the 1907 Hague Conference includes analogous provisions regulating naval bombardment in articles 1 and 2.⁴⁵

36. *Id.* art. 23(h).

37. *Id.* art. 25.

38. *Id.* art. 26.

39. *Id.* art. 27.

40. *Id.* art. 28.

41. *Id.* art. 43.

42. *Id.* art. 46.

43. *Id.* art. 50.

44. *Id.* art. 53.

45. Hague Convention IX Respecting Bombardments by Naval Forces in Time of

C. *The Geneva Conventions*

After World War II the United Nations made a major effort in Geneva to codify numerous provisions giving protection during hostilities to the wounded or sick on land or sea, to prisoners of war and to civilians.⁴⁶ With a premonition of conflicts to come, each convention that the United Nations promulgated in Geneva (Geneva Conventions) contains an article that sets minimum rules for the restraint of violence in armed conflicts not of an international character. Previously, the law of war—for example, the Hague Convention IV—had not applied to civil wars where domestic factions struggled to seize the sovereign powers of a state. These conflicts were not between or among states and thus did not call for the application of laws binding only on sovereigns in their relations inter se. In 1949, however, an article common to the four Geneva conventions brought such conflicts within a state under some rules of legal restraint. The principal rule that article 3 of each convention sets forth requires that “[p]ersons taking no active part in the hostilities” should “in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth, wealth or any other similar criteria.”⁴⁷ Belligerents are to avoid subjecting non-combatants to violence to life and person and, in particular, to murder of all kinds, mutilation, cruel treatment, torture, and outrages on personal dignity, including humiliating and degrading treatment. Tribunals other than regularly constituted courts using the judicial guarantees recognized as indispensable by all civilized peoples are not to condemn non-combatants to penal sentences and executions.

War, Oct. 18, 1907, arts. 1-2, 205 Parry's T.S. 345, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 28, at 94, 95.

46. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 28, at 171-92 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 28, at 194-213 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 28, at 216-70 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 28, at 272-326 [hereinafter Fourth Geneva Convention] (the Geneva Conventions entered into force for the United States on February 2, 1956) [collectively hereinafter Geneva Conventions].

47. *Id.*

In perhaps the most explicit expression of the principle of distinction to date, the governments meeting in Geneva drafted and adopted a special convention, the fourth Geneva Convention, to protect civilian persons in times of war.⁴⁸ The fourth Geneva Convention applies to "persons," an inclusive category not requiring a cumbersome or subtle application to factual situations.⁴⁹ To maintain definitively the principle of distinction, article 4 of the fourth Geneva convention provides that if the third Geneva convention, which concerns the humane treatment of prisoners of war, protects certain individuals (that is, if the persons are belligerents), then those persons cannot avail themselves of the protections that the fourth Geneva convention mandates for the safety of civilians.⁵⁰ A person whose welfare is subject to the discretion of an enemy power is to be either a belligerent, in which case the third Geneva convention applies, or a nonbelligerent, in which case the fourth Geneva convention applies.

The third Geneva Convention specifies the proper treatment for prisoners of war in conflicts of an international character.⁵¹ In setting forth who can avail themselves of such treatment, the third Geneva Convention necessarily affirms the principle of distinction between belligerents and nonbelligerents. The third Geneva Convention retained the definition of belligerent from the Hague Convention noted above, but includes several additions.⁵² Of subsequent relevance to Westmoreland in the Vietnam War is the third Geneva Convention's inclusion of organized resistance movements in the definition of belligerents. The third Geneva Convention mandates, however, that parties should treat such movements as belligerents only if the movements are under the command of a superior responsible for their behavior, have a fixed distinctive sign recognizable at a distance, carry their arms openly, and conduct their operations in accordance with the laws and customs of war.⁵³ Again, the attempt was to fashion international rules of warfare that narrowed the category of participants to those accepting an agency relationship vis-à-vis a political entity exercising sovereign powers.

To provide for cases where determination of belligerent status is in doubt, article 5 of the third Geneva Convention requires that a competent tribunal, not field commanders or soldiers in the heat of battle,

48. Fourth Geneva Convention, *supra* note 46.

49. *Id.* art. 4.

50. *Id.*

51. Third Geneva Convention, *supra* note 46.

52. *Id.* art. 4.

53. *Id.* art. 4(A)(2).

should determine whether persons who have committed belligerent acts in fact belong to belligerent forces or units listed in article 5 of the third Geneva Convention and thus deserve protection.⁵⁴

Part two of the fourth Geneva Convention, which covers "the whole of the populations of the countries in conflict," includes expansive provisions.⁵⁵ It provides in article 15 that countries can establish neutral zones for the wounded, sick, and civilians who take no part in hostilities.⁵⁶ It provides that belligerents must leave civilian hospitals unharmed. Under article 27, the fourth Geneva Convention provides that protected persons are entitled in all circumstances to respect for their person, honor, family rights, religious convictions and practices, and manners and customs.⁵⁷ It provides that belligerents shall at all times treat protected persons humanely, and that belligerents shall protect such persons, especially against all acts of violence or threats thereof and against insults and public curiosity. The fourth Geneva Convention reiterates earlier prohibitions in the Hague Convention against pillage, compulsory obtaining of information, and collective punishment.⁵⁸ It also prohibits reprisals⁵⁹ and the taking of hostages.⁶⁰

When United States combat forces entered South Vietnam in mid-1965 to prevent Communist soldiers from establishing control over large areas of the country, the law of war had thus long recognized the principle of distinction between civilians and belligerents in order to confine warfare within the limits necessary for attacking or resisting a sovereign enemy and its military agents and instrumentalities.

III. CIRCUMSTANCES SURROUNDING THE WAR IN SOUTH VIETNAM

The Vietnam War did not conform to the principles and distinctions that Western European sovereigns and their legal advisors had drawn up previously to govern conflicts between unified and centralized nation-state authorities. It began as an insurgency in late 1959 and 1960, not as an invasion of an army of disciplined Communist soldiers in uniforms openly carrying arms. The Communists secretly smuggled political cadre, military commanders and arms and material into South Vietnam from Communist North Vietnam, but the Communists organized few

54. *Id.* art. 5.

55. Fourth Geneva Convention, *supra* note 46, art. 13.

56. *Id.* art. 15.

57. *Id.* art. 27.

58. *Id.* arts. 31, 33.

59. *Id.* art. 33.

60. *Id.* art. 34.

open and notorious battlefield engagements.⁶¹ Ambushes, nighttime hit-and-run attacks on government posts, assassinations and political subversion constituted the principal means of attack against the South Vietnamese Government.⁶²

The early phase of the war borrowed theories from the Chinese Communist leader Mao Zedong. Mao Zedong had advocated what the Communists call a people's war, involving the extensive use of guerrilla units and combined political-military subversion of a government apparatus. In a people's war the insurgent aggressor attacks all forces sustaining a governing administration, including the administration's economic, cultural, diplomatic, psychological, political, administrative and educational structures as well as the administration's armed forces and police. Guerrilla war is total war; nothing is exempt from its assault as long as the measures taken cripple the government's will to persevere in the struggle.⁶³

In this type of warfare, the population of the state under siege becomes an instrument of insurrection and, therefore, of military significance, quite contrary to the customs and procedures of land warfare that the nation-states of nineteenth century Europe developed, which used only autonomously constituted armies to conduct warfare. To guerrilla leadership, all persons are potential agents of dissent and opposition to the governing authorities. Their contributions to street protest, to monetary coffers, to intelligence gathering, to part-time combat and to service as full-time soldiers are all valuable and solicited by the insurgent. Insurgency makes it difficult to know just who the government's enemy is.⁶⁴

61. CUOC KHANG CHIEN CHONG MY, CUU NUOC, 1954-1975: NHUNG SU KIEN QUAN (The Anti-U.S. Resistance War for National Salvation, 1954-1975: Military Events), at 29-34 (People's Army Publishing House, Hanoi 1980) (Joint Publications Research Service trans. No. 80968, June 3, 1982) [hereinafter People's Army History]. See 1 U.S. DEP'T OF STATE, A THREAT TO THE PEACE: NORTH VIET-NAM'S EFFORT TO CONQUER SOUTH VIET-NAM (Dec. 1961).

62. See R. THOMPSON, DEFEATING COMMUNIST INSURGENCY (1966); G. TANHAM, WAR WITHOUT GUNS: AMERICAN CIVILIANS IN RURAL VIETNAM (1966); J. RACE, WAR COMES TO LONG AN: REVOLUTIONARY CONFLICT IN A VIETNAMESE PROVINCE (1972).

63. See MAO ZEDONG, ON GUERRILLA WARFARE (S. Griffin trans. 1961); VO NGUYEN GIAP, PEOPLE'S WAR, PEOPLE'S ARMY (1961); CHE GUEVARA, GUERRILLA WARFARE (1961); G. TANHAM, COMMUNIST REVOLUTIONARY WARFARE: THE VIETMINH IN INDOCHINA (1961); R. THOMPSON, REVOLUTIONARY WAR IN WORLD STRATEGY, 1945-1969 (1970).

64. See F. WEST, THE VILLAGE (1972); W. ANDREWS, THE VILLAGE WAR: VIETNAMESE COMMUNIST REVOLUNTIONARY ACTIVITIES IN DINH TUONG PROVINCE

Guerrilla warfare thus blurs the distinction between civilians and belligerents.⁶⁵ A guerrilla fighter can be more belligerent than a civilian, but he can also be less belligerent than armed and uniformed soldiers serving full-time in dedicated military units that house and feed them. Should a state intern a captured guerrilla as a prisoner of war for the duration of a conflict and then repatriate the guerrilla, or try and possibly punish the guerrilla as a criminal for revolt against a legitimate government?⁶⁶

The law of war as codified in the Hague and the Geneva Conventions presumes that nation-states, which are the sole parties authorized to make war, each maintain a monopoly of the means of violence within their respective territories. The law of war presumes that local militias, private armies, mafias, and feudal lords with armed personal retainers are absent in the modern sovereign state.⁶⁷ Only two options for participating in war are legally available under the law of war: (1) service in the organized armed forces of a state and (2) inactivity as a citizen.

This monopoly of violence in the hands of states, when compounded by the increasing sophistication and destructive power of the weaponry available to modern state authorities, has created an imbalance between states and their domestic challengers. Successful opposition to the determined exercise of state authority has become more and more improbable. Thus the Bolsheviks could seize power in Russia only in the turmoil of war and civic dissension. Hitler organized his own semi-military forces, the Brownshirts, to counter the police presence used by the Weimar Republic to maintain democratic procedures. This private army, by its simple existence and through its public activities, weakened the power that Germany's constitutional authorities held. To conquer China, Mao Zedong and his followers required both their own armed forces and the chaos that a foreign invasion produced.

Guerrilla warfare is calculated to redress the unequal balance of forces between a governing administration and insurgents. First, hiding the guerrilla fighters among the people or in remote areas and then using them in hit-and-run tactics to strike government representatives where

1960-1964 (1973).

65. See Trainin, *Questions of Guerrilla Warfare in the Law of War*, 40 AM. J. INT'L L. 534 (1946).

66. The case of *Lawless v. Republic of Ireland*, 1961 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Ct. Hum. Rts.) 438, held that it was lawful to detain a citizen without charges or trial when the government was fighting a secret army engaged in violence and unconstitutional activity.

67. See Reisman, *Private Armies in a Global War System: Prologue to Decision*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 252 (J. Moore ed. 1974).

they are weak or unsuspecting deny government forces the tactical advantages that come from amassing troops for armed engagements. A government cannot fight that which it cannot find. Guerrilla tactics render useless a government's superiority in terms of men and arms. Second, by preventing government forces from establishing a monopoly of violence, guerrilla units call into question a government's claim to sovereignty. Sovereign status derives from a sovereign's demonstrated efficacy in ruling a territory.⁶⁸ Vitiating that efficacy makes a sovereignty shrink to mere war-lord status. Third, by preventing government forces from winning decisive victories, guerrillas prolong the struggle, bringing on frustration and increasingly diminishing the will of a government's supporters to sustain a relentless defense. Fourth, through political involvement of ordinary people in a movement to change a government, guerrillas generate good will and moral support both domestically and in foreign countries. This support provides the guerrillas with men, money and weapons and further frustrates those who seek to carry out the governing administration's wishes.

Guerrilla warfare is a strategy designed to outflank the position that a ruling authority holds so that guerrillas can obtain political power without relying extensively on conventional armed forces and traditional military tactics. The strategy forces a status of semi-belligerency on the civilian populace of the country in dispute.

As Mao Zedong and North Vietnam's General Giap recognized, however, dispersed guerrilla forces can sap a government's ability and will to persevere without necessarily bringing the government to final collapse or causing it to surrender to the insurgents. Larger, more conventional forces organized along the lines that the law of war recognizes may be necessary for an insurgency to seize and hold towns, cities and transportation routes. As guerrilla warfare becomes successful for the insurgent, it takes on a mixed character of conventional and unconventional modes of combat.

In 1965 Westmoreland faced a war in transition. What had begun in 1959 as a campaign of political subversion and low-level terrorism had escalated through 1963 into a classic guerrilla war where, in Mao Zedong's dictum, the Communist fighters were the fish swimming in the sea of the South Vietnamese people. With the overthrow and murder of South Vietnam's authoritarian President Ngo Dinh Diem on November 1, 1963, political chaos descended on South Vietnam for several years. A

68. See C. FENWICK, *INTERNATIONAL LAW* 125 (4th ed. 1965); J. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 142 (4th ed. 1949).

series of *coups d'états* brought revolving door governments to Saigon as government military units became defeatist and poorly led. Street demonstrations between rival Buddhist and Catholic adherents further undermined each government's credibility. Taking advantage of the deteriorating government position, Communist units grew in number and size, fighting less in the guerrilla mode and more in conventional battles from fixed locations with heavy weapons and much ammunition. Resupply and support services for the Communist forces, now more like an army than ever, became more cumbersome.⁶⁹

In late 1964, eager for victory, the North Vietnamese began sending units of their own army into South Vietnam for the *coup de grâce*—seizure of the highland mountains in the middle of the country. In response, United States President Lyndon Johnson authorized a bombing campaign of North Vietnam to demonstrate resolve that the United States would not abandon South Vietnam and to impede the southward movement of North Vietnamese forces. Then, during May and June of 1965, conventional Communist units defeated soundly a large number of South Vietnam's regular army battalions, leaving South Vietnam without adequate defenses against the growing Communist power.⁷⁰ Westmoreland then requested United States and third country combat units to resist the Communist attacks. In July 1965 President Johnson decided to commit forty-four such battalions with appropriate support units to the war effort and, thereafter, to send Westmoreland additional forces as needed to prevent the Communist conquest of South Vietnam.⁷¹

At that time Communist forces were organized in a variety of units with different allocations of armaments and separate functions. Some units consisted entirely of highly trained and heavily-armed men serving as full-time assault troops. Of these units, some were entirely commanded and staffed by North Vietnamese soldiers, whom the Communists had recruited, trained and sent from North Vietnam to South Vietnam. In many cases these units were part of the People's Army of North Vietnam and retained their unit identification name after they entered South Vietnam. Other such main force units consisted of South Vietnamese men recruited and trained in South Vietnam and led either by North Vietnamese officers or by South Vietnamese followers of the

69. U.S. DEP'T OF STATE, PUB. NO. 7839, AGGRESSION FROM THE NORTH: THE RECORD OF NORTH VIET-NAM'S CAMPAIGN TO CONQUER SOUTH VIET-NAM 14-15 (Feb. 1965).

70. 3 PENTAGON PAPERS 438-40 (Sen. Gravel ed. 1971).

71. *Id.* at 471, 476, 477.

Communist leadership in North Vietnam. These South Vietnamese units most frequently carried names that the Communist-led but nominally independent National Front for Liberation of South Vietnam (NLF) had given them. In addition, the Communists organized rear-echelon, noncombat, military units to supply the armed units assigned to permanent combat responsibilities with food, ammunition transportation and communications.⁷²

Regional NLF commanders organized less well-equipped guerrilla units from South Vietnamese supporters of the NLF. These units operated generally within the confines of an assigned village, district or province. When not engaged in fighting, the soldiers in these units lived in and among South Vietnam's rural population, where they could find security to do so.⁷³

The NLF also organized unarmed units to assist the guerrilla bands in controlling the rural population. These auxiliary units were called self-defense and secret self-defense units and assault youth teams, and their service to the Communists was nominal; many of them were women, children and the elderly.⁷⁴

An unarmed, non-military structure of political cadre directed the entire Communist effort. These cadre included secret adherents living undetected amidst civilian populations and individuals assigned public roles in Communist-controlled villages. The cadre set goals for Communist efforts, shaped Communist propaganda campaigns, recruited new members for the NLF from among uncommitted South Vietnamese and collected money and supplies to finance the Communist war effort.⁷⁵

Supporters of the Communist war effort thus included everyone from completely hidden and unknown civilian spies and sympathizers through unarmed gophers and part-time soldiers to full-time, battle-tested belligerents. The principle of distinction in the law of war does not recognize such a continuum; rather, it merely demands, somewhat simplistically, that military commanders separate combatants from noncombatants.⁷⁶

72. Joint Exhibit No. 277, *supra* note 5, at 3-4.

73. *Id.* at 4-6.

74. *Id.*

75. *Id.* at 7-8.

76. See J. BOND, *THE RULES OF RIOT: INTERNAL CONFLICT AND THE LAW OF WAR* 31-39 (1974).

IV. WESTMORELAND'S OBLIGATIONS UNDER THE LAW OF WAR

As American combat units entered the conflict in South Vietnam, the application of the law of war to the conflict became unclear. Was the Vietnam War an international war, to which the Hague and Geneva Conventions would apply? Or was the war a civil conflict to which only the law of South Vietnam, article 3 of the Geneva Conventions, and United States laws regulating the conduct of United States soldiers would apply?

Legal commentators were unable to revolve this issue. Two law review notes written in 1965, for example, provided no clear answer. After considering whether North Vietnam and the NLF should be bound fully by the Geneva Conventions and common article 3 in particular, one commentator concluded: "The fact that there is legitimate disagreement over the applicability of the Geneva Convention suggests that the virtually universal adherence to the [Geneva] Convention is misleading."⁷⁷ Similarly, another author concluded, "But it is fairly clear that under present circumstances the full benefits of the [Geneva] Convention do not apply in all cases in which participants in the Vietnamese conflict are captured by another participant."⁷⁸ As late as 1970 and 1971, legal commentators continued to debate how the Geneva Conventions applied, if at all, to the Vietnam conflict, such as whether they applied to Vietnamese inhabitants of My Lai when they were confronted by United States combat troops.⁷⁹

Several participants in the Vietnam conflict resolved any doubts as far as their own actions were concerned. Unilateral declarations by several governments that their forces would observe the provisions of the Geneva Conventions brought into effect certain applications of the Geneva Conventions. On June 11, 1965, the International Committee of the Red Cross (ICRC), which is responsible for the due implementation of the third Geneva Convention, asked North Vietnam, South Vietnam, the NLF and the United States each to clarify its willingness to adhere to

77. Note, *The Geneva Convention and the Treatment of Prisoners of War in Vietnam*, 80 HARV. L. REV. 851, 868 (1967). See generally 2 THE VIETNAM WAR AND INTERNATIONAL LAW (R. Falk ed. 1969).

78. Note, *The Geneva Convention of 1949: Application in the Vietnamese Conflict*, 5 VA. J. INT'L L. 243, 249 (1964).

79. See Rubin, *Legal Aspects of the My Lai Incident*, 49 OR. L. REV. 260 (1970); Paust, *Legal Aspects of the My Lai Incident: A Response to Professor Rubin*, 50 OR. L. REV. 138 (1971). See also D. KHAIRALLAH, *INSURRECTION UNDER INTERNATIONAL LAW* 203-10 (1973).

the four Geneva Conventions.⁸⁰ The ICRC noted that “[p]arties to the conflict shall respect and protect civilians taking no part in the hostilities, they shall abstain from attack against such persons and subject them to no form of violence.”⁸¹

On August 10, 1965, United States Secretary of State Dean Rusk replied for the United States: “The United States Government has always abided by the humanitarian principles enunciated in the Geneva conventions and will continue to do so. In regard to the hostilities in Viet Nam, the United States Government is applying the provisions of the Geneva Conventions. . . .”⁸² Secretary of State Rusk also noted, however, that

those involved in aggression against the Republic of Viet Nam rely heavily on disguise and disregard generally accepted principles of warfare. From the outset it has therefore been difficult to develop programs and procedures to resolve fully all the problems arising in the application of the provisions of the Conventions. Continued refinement of these programs and procedures in the light of experience will thus undoubtedly be necessary.⁸³

On August 11, 1965, South Vietnam’s Foreign Minister, Doctor Tran Van Do, replied to the ICRC that the South Vietnamese Government was fully prepared to (1) respect the provisions of the Geneva Conventions, which it had ratified, (2) cooperate with the ICRC, and (3) provide “the most humane treatment” to Viet Cong prisoners, who were Communist supporters with South Vietnamese citizenship.⁸⁴

On August 31, 1965, the North Vietnamese Minister of Foreign Affairs sent a letter that did not reply to the ICRC inquiry but which instead accused the United States of committing war crimes and crimes against humanity in its military actions. In particular, the letter asserted that Americans had “indiscriminately bombed hospitals, schools, road transport stations, markets, villages, fishing vessels, churches [and] pago-

80. Letter from ICRC to the Governments of the Democratic Republic of Vietnam, the Republic of Vietnam, the United States, and the National Liberation Front of South Vietnam (June 11, 1965), *reprinted in* 4 I.L.M. 1171 (1965).

81. *Id.* at 1172.

82. Letter from Secretary of State Dean Rusk to Samuel Gonard, President of ICRC (Aug. 10, 1965), *reprinted in* 53 DEP’T ST. BULL. 447 (1965).

83. *Id.* During its own civil war, the United States Government had conceded belligerency rights to soldiers of the Confederate Armies, granting them prisoner of war status rather than traitor status out of humane generosity rather than under compulsion of law. *Stevens v. Griffith*, 111 U.S. 48, 51 (1884).

84. Letter from Dr. Tran Van Do, Minister of Foreign Affairs of the Republic of Viet Nam, to André Durand, Delegate General of ICRC (Aug. 11, 1965) (original text in French), *reprinted in* 4 I.L.M. 1174 (1965).

das, . . . massacring large numbers of innocent civilians” in violation of the fourth Geneva Convention.⁸⁵ The North Vietnamese thereby noted their partial agreement with the third Geneva Convention on the protection of prisoners of war, a reservation that left them free to deny prisoner of war status to United States pilots convicted of war crimes.⁸⁶ The Minister of Foreign Affairs reiterated, however, that the North Vietnamese intended to treat prisoners humanely in accordance with domestic law. In other words, the North Vietnamese stopped short of adhering to the international law of war.

The NLF did not reply to the ICRC but gave assurances that it would treat its prisoners humanely.⁸⁷ The NLF spokesperson denied the applicability of the Geneva Conventions to the NLF in its operations because it was an insurgent force that had not participated in adopting those legal instruments.⁸⁸ At a 1966 conference in Manila, all states opposing North Vietnam’s campaign of violent attack against South Vietnam’s right of self-determination declared that the Geneva Conventions applied to the conflict in Vietnam.⁸⁹

The law of war contained in the Hague and the Geneva Conventions applies directly to the Government of the United States and does not directly bind individuals working for that Government. Though human rights declarations and conventions provide individuals with claims to protection from abuse by sovereign governments, international law remains primarily a law that declares the rights and obligations of sovereign states. The domestic laws that sovereigns enact govern individuals.⁹⁰

In one area of behavior, however, individuals are directly responsible to the international community for the consequences of their actions. If individuals commit war crimes or crimes against humanity, as defined by the multi-state tribunal established at Nuremberg after World War II, then the individuals must stand trial and, if found guilty of such crimes, suffer punishment.⁹¹

Article 6(b) of the Charter of the International Military Tribunal

85. Letter from the North Vietnamese Minister of Foreign Affairs to the ICRC (Aug. 31, 1965), *reprinted in* 5 INT’L REV. RED CROSS 527 (1965).

86. THE LAW OF WAR 164 (R. Miller ed. 1975).

87. 5 INT’L REV. RED CROSS 638 (1965).

88. *Id.*

89. See 2 PENTAGON PAPERS, *supra* note 70, at 607-08.

90. See J. BOND, *supra* note 76, at 49, 61; U.N. CHARTER art. 2(7); Charter of the Organization of American States, Apr. 30, 1948, art. 18, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3. See also J. BRIERLY, *supra* note 68, at 48-50.

91. London Agreement on War Criminals, Aug. 8, 1945, 3 U.S.T. 1238, E.A.S. No. 472, 82 U.N.T.S. 280.

(Nuremberg Charter), which created the tribunal to try individual leaders of the Nazi Government and the Nazi army who had fought in World War II, defined "war crimes."⁹² Article 6(b) prohibits "devastation not justified by military necessity," murder or ill-treatment of civilian populations and wanton destruction of villages.⁹³ The United Nations General Assembly affirmed the terms of the article in the following year.⁹⁴

The United States Government, through the Department of the Army, promulgated Field Manual 27-10 (Manual) to clarify international legal restraints, as contained in the Hague and Geneva Conventions, on the conduct of hostilities.⁹⁵ The Manual describes its purpose as being "to provide authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land."⁹⁶ The Manual then adds a cautionary note of legal formalism: "[T]hose provisions of the Manual which are neither statutes nor the text of treaties to which the United States is a party should not be considered binding upon courts and tribunals applying the law of war."⁹⁷ The basic effect of the law of war, according to the Manual, is to "place[] limits on the exercise of a belligerent's power . . . and [to require] 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."⁹⁸ The United States Government has also adopted the Uniform Code of Military Justice, which provides for the punishment of military officers and enlisted personnel who break the law and commit crimes.⁹⁹

In Chapter 3 the Manual reiterates the Geneva Conventions provisions relating to prisoners of war. In Chapter 5 the Manual sets forth Geneva Conventions provisions as they relate to civilian populations. Section 56 of the Manual provides further guidance on the extent of permissible devastation wrought by United States forces:

The measure of permissible devastation is found in the strict necessities of war. Devastation as an end in itself or as a separate measure of war is not

92. *Id.* Charter of the International Military Tribunal, art. 6(b).

93. *Id.*

94. G.A. Res. 95, 1(2) U.N. GAOR (55th plen. mtg.) at 1144, U.N. Doc. A/236 (1946).

95. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (1956) [hereinafter FM 27-10].

96. *Id.* at 3.

97. *Id.*

98. *Id.*

99. 10 U.S.C. § 801-940 (1982).

sanctioned by the law of war. There must be some reasonable close connection between the destruction of property and the overcoming of the enemy's army.¹⁰⁰

Chapter 8 of the Manual discusses war crimes. It defines war crime very broadly to include any violation of the law of war committed by an individual, including individuals who conspire, incite or attempt to commit war crimes.¹⁰¹ In section 501 the Manual makes commanders such as Westmoreland responsible for war crimes their subordinates commit, such as when "troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war."¹⁰² Under section 501 a commander is responsible for all war crimes committed pursuant to his directive. He is also responsible for all war crimes committed by persons under his control if he had actual knowledge, or should have had actual knowledge, of the commission or the attempted or planned commission of such crimes, and if he failed to take the necessary and reasonable steps to ensure compliance with the law of war and to punish violations thereof.¹⁰³

In section 504 the Manual lists examples of war crimes. The list includes "firing on localities which are undefended and without military significance," "use of civilian clothing by troops to conceal their military character during battle," and "pillage or purposeless destruction."¹⁰⁴

The United States Supreme Court opinion *In re Yamashita* provided an additional source of guidance to Westmoreland concerning his responsibility to prevent his subordinates from committing war crimes.¹⁰⁵ The case involved General Yamashita, who was in command of the Fourteenth Army Group of Imperial Japanese Forces in the Philippines at the end of World War II when United States forces landed there to recapture the country from the Japanese. After his surrender, the United States put Yamashita on trial before a United States military court. The United States charged Yamashita with personal responsibility for one hundred and twenty-three alleged acts of violence, cruelty and homicide committed by forces under his command, including the deaths of 25,000 unarmed noncombatants in the Batangas Province without cause or trial.¹⁰⁶ The United States Supreme Court, after hearing Yamashita's

100. FM 27-10, *supra* note 95, at 23.

101. *Id.* at 178.

102. *Id.*

103. *Id.*

104. *Id.* at 180.

105. *In re Yamashita*, 327 U.S. 1 (1945).

106. *Id.* at 14.

plea that his trial was illegal, held that because the purpose of the law of war is to protect civilian populations and prisoners of war from brutality, commanders cannot neglect to take reasonable measures for the protection of such persons.¹⁰⁷ The Court thus found that the fourth Hague Convention imposed an affirmative duty on commanders to protect civilian populations.¹⁰⁸

The nature of the United States presence in Vietnam also constrained General Westmoreland's actions as a commander. United States forces were present in Vietnam at the invitation of the South Vietnamese Government, and they were subordinate to its sovereignty.¹⁰⁹ United States forces were not invaders or belligerents opposing the Government of South Vietnam. They were present to support the South Vietnamese Government and to help it defeat an armed attack on its sovereign authority. The United States and the South Vietnamese had agreed on December 23, 1950, when the French were still fighting the Communists and before the States of North Vietnam (the Democratic Republic of Vietnam) and South Vietnam (the Republic of Vietnam) had emerged with autonomous legal personalities under international law, that United States forces would serve in the above-mentioned capacity.¹¹⁰ Successor South Vietnamese Governments, which relied heavily on United States military and economic assistance, had honored the agreement. United States forces thus could not wage war against the South Vietnamese Government or its nationals.

V. WESTMORELAND'S RESPONSE

Nothing in the Manual or the provisions of the Hague and Geneva Conventions gave Westmoreland clear rules to follow in the novel combat situations that he faced when United States forces arrived to fight in the fluid, complex, partially guerrilla, partially conventional war then being waged in South Vietnam. The Hague and Geneva Conventions were designed to apply where the distinction between belligerents and civilians is self-evident. This conceptual distinction was often hard to make when confronting the war tactics that the Vietnamese Communist Party used. Nevertheless, Westmoreland took several important steps to ensure that his forces would observe the principle of distinction basic to the law of war.

107. *Id.* at 15.

108. *Id.*

109. G. PRUGH, VIETNAM STUDIES: LAW AT WAR: VIETNAM 1964-1973 (Dep't of the Army 1975).

110. *Id.* at 149 (Appendix I, Pentilateral Agreement, Dec. 23, 1950).

A. *Westmoreland's Strategy*

Westmoreland first sought authority from his superiors to pursue a strategy of force deployment that would minimize civilian casualties. On June 7, 1965, Westmoreland spelled out to the United States Joint Chiefs of Staff in Washington a concept of deploying United States combat forces away from the people of South Vietnam in search and destroy missions designed to find and then fight in isolated combat either large, conventional enemy units or defended, self-contained enemy military bases. Both targets were legitimate under the law of war.¹¹¹ The phrase "search and destroy" encapsulated the older infantry formula for tactical deployment drawn from decades of experience in conventional warfare "find 'em, fix 'em and fight 'em."

In this part of Westmoreland's strategy, United States forces would first prevent large Communist units from capturing populated areas and would then drive the Communist units out of South Vietnamese territory. As a consequence, the military forces of the South Vietnamese Government would concentrate their security efforts more successfully on pacification of populated areas. As the South Vietnamese population gained a sense of security and United States forces drove the main Communist units out of the country, South Vietnamese forces would gradually assume the burden of fighting enemy forces and United States troops would return home. Under this strategy United States troops would not carry the ground war to North Vietnam; they would only provide a temporary shield behind which South Vietnamese forces would grow in size and competence and behind which elected and appointed South Vietnamese Government officials could organize the rural areas and thus defeat the insurgency component of the Communist war effort.

Few commentators have recognized that the United States and South Vietnam had largely achieved these goals by the time United States forces withdrew from Vietnam in 1972 and Communist forces invaded South Vietnam in the Easter Offensive of that year.¹¹² In his book recounting the North Vietnamese conquest of South Vietnam, Communist General Van Tien Dung reveals that the 1973 to 1975 build-up of Communist forces that attacked South Vietnam in the latter year included no guerrilla component.¹¹³ There were no guerrilla forces to mention because South Vietnamese force had defeated them. General Dung even

111. 3 PENTAGON PAPERS, *supra* note 70, at 471.

112. See W. COLBY, *HONORABLE MEN: MY LIFE IN THE CIA* 248-88 (1978).

113. VAN TIEN DUNG, *OUR GREAT SPRING VICTORY: AN ACCOUNT OF THE LIBERATION OF SOUTH VIETNAM 12-14* (J. Spragens, Jr. trans. 1977).

admitted that by 1973 South Vietnamese forces “had taken a stride ahead in organizational strength.”¹¹⁴ This was a euphemism for North Vietnam’s military defeat within South Vietnam by the end of 1972. The only way the Communist leadership could accomplish its goal of territorial conquest was to invade with North Vietnam’s entire army three years later. Another Communist document, an official history of the war written by the North Vietnamese army, confirms Dung’s admissions.¹¹⁵

In June 1973 the Central Committee (Committee) of the Vietnamese Communist Party met to review the situation and plan the ultimate conquest of South Vietnam, even though the recently signed Paris Peace Agreement made such a goal illegal. The Committee concluded that the pacification program of the South Vietnamese Government had seized control of the populated areas and needed to be defeated. This indicated the Communists had conceded that, by 1973, they did not control the population of South Vietnam.¹¹⁶ As the Committee observed:

[T]here were some policies we were not yet able to carry out, so we still allowed the loss of population and land; had not yet been able to overcome the imbalance between the main-force troops and the local troops and between the concentrated forces and the military and guerrilla forces; the rate of the buildup of the strategic rear area was still slow; and difficulties were being encountered in building-up the liberated areas.¹¹⁷

The Communists had not penetrated South Vietnamese Government areas very deeply, according to this history, and they had not coordinated their political forces in South Vietnam.

The NLF leader who defected to the West after the North Vietnamese victory, Truong Nhu Tang, confirmed General Dung’s admissions, albeit obliquely. After 1970, he wrote, the structure of the NLF became less central to the war effort.¹¹⁸ As a NLF leader, Tang had found himself stranded that year in the middle of the wilderness in Cambodia, driven out of South Vietnam. By the end of 1971 the only Communist successes that NLF Chairman Huynh Tan Phat could report in his annual address to the NLF leadership had occurred in Laos and Cambodia. Phat had to acknowledge that the pacification program had devastated the NLF infrastructure within South Vietnam.¹¹⁹ In

114. *Id.* at 9.

115. People’s Army History, *supra* note 61, at 161-62.

116. *Id.* at 161.

117. *Id.* at 162.

118. TRUONG NHU TANG, A VIETCONG MEMOIR 189-93 (1985).

119. *Id.* at 201.

North Vietnam, Communist general Vo Nguyen Giap no longer spoke of waging a guerrilla and political war but of fighting only a regular war with North Vietnamese troops. The Communists had lost the guerrilla war; Giap had only the main force war as a tactical means to impose his will on South Vietnam.

As early as 1969, the year United States troops began to withdraw from Vietnam, the Communists had faced serious setbacks. The history of the war that the North Vietnamese Army wrote acknowledged subsequently that the Communist Party's Politbureau had admitted in April 1969 to encountering many difficulties with regard to troop strength and assured access to supplies—key indicators of weakness for Communist forces.¹²⁰

When United States troops entered South Vietnam in 1965 to contain a growing Communist main force military drive, however, future success had been hard to envision. On June 14, 1965, Westmoreland elaborated on his concept of tactical operations.¹²¹ He wrote Washington that the people of South Vietnam needed two different kinds of security: first, security from large Communist combat forces, including those arriving from outside the country; and second, protection from guerrillas, assassins, terrorists and informers. Westmoreland stated that United States forces would contribute to providing security against the first kind of threat, but added that only the South Vietnamese could succeed in providing the second kind of security.¹²² He thus proposed to deploy all United States armed forces and the Marine and Airborne battalions of the South Vietnamese armed forces against what he called "hard core" North Vietnamese and Viet Cong forces, so as to permit the concentration of other South Vietnamese forces in heavily populated areas.¹²³ "We should," he wrote, "generally concentrate United States forces away from major population centers and whenever possible do the bulk of our fighting in more remote areas."¹²⁴ He noted that he did not envision United States forces ever taking exclusive control or responsibility for any province of South Vietnam.¹²⁵ His goal was to seek the progressive destruction of the Viet Cong and North Vietnamese main force battalions.

120. People's Army History, *supra* note 61, at 115.

121. Message from General Westmoreland to Admiral Sharp, June 14, 1965, reprinted in 2 VIETNAM: THE DEFINITIVE DOCUMENTATION OF HUMAN DECISIONS 378 (G. Porter ed. 1979).

122. *Id.* at 379.

123. *Id.*

124. *Id.*

125. *Id.*

The war effort was thus bifurcated. One thrust was to defeat so-called main force enemy units—what commentators used to call the war of the big battalions; the second thrust was to defeat a rural insurgency, the so-called other war or pacification program. Westmoreland's strategy was to respond to complexity with complexity. In 1965 the struggle with the Communists had escalated into a two-tiered effort with large mobile units supported and supplied by a North Vietnamese logistics capability and divorced from South Vietnam's civilian population on one level and smaller guerrilla units living near or in the midst of the civilian population on the other. The search and destroy strategy took the war to the most militarily destructive enemy units within South Vietnam and left South Vietnamese soldiers, with their superior knowledge of the population, free to concentrate on fighting the Communists hiding in populated areas.

On June 26, 1965, the United States Government authorized Westmoreland to

commit [United States] forces to combat, independent of or in conjunction with [South Vietnamese] forces in any situation in which use of such troops is requested by an appropriate [South Vietnamese] commander and when, in [Westmoreland's] judgment, their use is necessary to strengthen the relative position of [South Vietnamese] forces.¹²⁶

At this time Westmoreland formalized operational procedures for United States combat units so they might pursue search and destroy missions independent from or in conjunction with South Vietnamese military forces. He adopted a technique of deployment in tactical areas of responsibility (TAORs).¹²⁷ He assigned each unit to an area drawn on a map. The unit's combat operations were confined to that area. TAORs fell within the confines both of South Vietnamese provinces, which were concurrently military zones commanded by a military officer serving both as zone commander and as province chief, and of military regions commanded by a South Vietnamese General in which South Vietnamese divisional units engaged in combat. Assigning TAORs to United States units provided a mechanism to coordinate with this South Vietnamese structure to prevent the United States units from carrying the war to places at cross-purposes with their Vietnamese allies. TAORs were also assigned to South Vietnamese units so that all would know which unit was primarily responsible for military activity in a given area. United States commanders made the assignment of TAORs jointly with

126. 2 PENTAGON PAPERS, *supra* note 70, at 363.

127. *Id.* at 356; 3 PENTAGON PAPERS, *supra* note 70, at 459.

Vietnamese commanders. By defining a TAOR to exclude heavily populated areas, they could keep United States combat units away from South Vietnam's population centers.

In 1965 and 1966, however, when United States troops commenced combat operations in South Vietnam, not every TAOR assigned to United States combat units completely excluded South Vietnamese civilians. At the time, many Communist main force units were hugging populated areas of the country, especially in the coastal zones of Military Regions I and II in Central Vietnam. Consequently, the fighting did not follow the principle of distinction as neatly as Westmoreland had initially contemplated in United States force augmentation request of June 1965.¹²⁸ The fighting did harm civilian villages, causing many casualties and precipitating the flight of hundreds of thousands of civilians away from the fighting into refugee camps.

In 1967 Westmoreland deployed, in consultation with South Vietnam's military leaders, nearly all United States forces farther and farther away from populated areas as the American forces penetrated Communist base areas and pushed Communist forces toward the country's borders. By 1971 nearly all refugees had resettled in their villages as the Communist insurgency was defeated.¹²⁹

B. *Westmoreland's Rules of Engagement*

Though not demanded by the law of war or Field Manual 27-10, Westmoreland prescribed limitations on his troop's use of weaponry in

128. See 2 PENTAGON PAPERS, *supra* note 70, at 534-35; L. WALT, STRANGE WAR, STRANGE STRATEGY: A GENERAL'S REPORT ON VIETNAM 24-31 (1970); F. WEST, *supra* note 64. As Marine Lieutenant General Lewis Walt relates, Marine units fighting in this populated coastal strip of South Vietnam learned to work in small units assigned to hamlets and villages in order to cooperate closely with South Vietnamese village and hamlet defenders. WALT, *supra*, at 105-12.

129. During these years I served in South Vietnam as a member of the CORDS component of MACV. CORDS was a special organization designed to execute in close cooperation with the South Vietnamese a program of village development and rural security. On the United States side, it was responsible for all the pacification programs. During 1967 and 1968 I attended CORDS Vietnamese language training. In 1968 and 1969 I served as Deputy District Advisor in Vinh Long province. In 1969 I was assigned to be Chief of Village Development for CORDS. In that position, I visited villages throughout South Vietnam where refugees had been resettled, the insurgency defeated, and the rural economy was regenerating. For the origins of the CORDS organization, see R. KOMER, BUREAUCRACY AT WAR (1986). For a brief reference to my work, see W. COLBY, *supra* note 112, at 261. For a discussion of village development, see Young, *Power Towards the People: Local Development in Vietnam, 1968-71*, in ELECTORAL POLITICS IN SOUTH VIETNAM 77 (J. Donnell and C. Joiner eds. 1974).

combat. Similarly, the Joint Chiefs of Staff in Washington set limits on ground operations near the borders of South Vietnam and on air raids near North Vietnam's border with the People's Republic of China in order to preclude unwanted international incidents resulting from United States attacks on neutral states.¹³⁰

In his review of United States conduct of the Vietnam war, Guenter Lewy concluded that "[i]mpeccable rules of engagement, based on applicable legal provisions were issued, but their observance was often inadequate and the [United States] command failed to take reasonable steps to make sure that they would be properly enforced."¹³¹ He also concluded less harshly, however, that the "MACV can justly be faulted with failing to take all possible measures to enforce these rules, but such negligence is a far cry from having a genocidal intent to destroy the people of South Vietnam."¹³²

Other commentators have been more appreciative than Lewy of the restrictions Westmoreland imposed on his forces to limit their discretion over the use of force. James E. Bond, for example, praised MACV requirements for the classification of suspects to protect the rights of civilians.¹³³

On September 17, 1965, Westmoreland wrote his subordinate commanders and instructed them to reduce and prevent civilian casualties.¹³⁴ He ordered that "a conscious effort must be made to minimize battle casualties among those non-combatants who must be brought back into fold in the course of time" and that "the application of U.S. military

130. An Analysis of the Evolution of MACV Rules of Engagement Pertaining to Ground Operations 1965-69 (unclassified), at 1 (documents provided by Vincent Denna, Historian, Southeast Asia Branch, Center of Military History, Dep't of Army, Wash. D.C.) [hereinafter Dep't of Army Documents]. The Joint Chiefs also set specifications that the very destructive B-52 bombing missions inside South Vietnam attack no target within one kilometer of a locality inhabited by noncombatants.

131. G. LEWY, *AMERICA IN VIETNAM* 268 (1978). See also T. TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* (1970); Solf, *A Response to Telford Taylor's "Nuremberg and Vietnam: An American Tragedy,"* in 4 *THE VIETNAM WAR AND INTERNATIONAL LAW* 421 (R. Falk ed. 1976).

132. G. LEWY, *supra* note 131, at 302.

133. J. BOND, *supra* note 76, at 163. Telford Taylor described the Rules of Engagement as follows: "On their face, as regards the laws of war, the directives are virtually impeccable." Taylor, *Nuremberg and Vietnam: Who is Responsible for War Crimes?*, in 3 *THE VIETNAM WAR AND INTERNATIONAL LAW* 377, 387 (R. Falk ed. 1972).

134. USMACV, Directive No. 525-4, Tactics and Techniques for the Employment of US Forces in the Republic of Vietnam, Sept. 17, 1965, *quoted in* Dep't of Army Documents, *supra* note 130, at 1.

force in Vietnam must be carefully controlled at all times."¹³⁵ The implementation of these restrictions would require, he said, "the exercise of judgment and restraint not formerly expected of soldiers."¹³⁶

Westmoreland directed his staff Judge Advocate, Colonel George S. Prugh, to work with other MACV staff sections to formulate rules of engagement. Because knowledge of these rules was so important to legal conduct of hostilities, and because there was frequent rotation of individuals through command positions, Westmoreland directed that the rules of engagement be reviewed and republished for the entire MACV command every six months. Approximately every six weeks Westmoreland himself would meet with his top battlefield commanders at Nha Trang or Cam Ranh to discuss developments in the ground war. He recalls emphasizing at every meeting the importance of avoiding civilian casualties and adhering to the principle of distinction, now embodied in the rules of engagement.¹³⁷

On September 7, 1965, MACV headquarters issued Directive 525-3 entitled *Combat Operations: Minimizing Non-combatant Battle Casualties*, which instructed United States combat commanders to "strike a balance between the force necessary to accomplish their mission . . . and the high importance of reducing to a minimum the casualties inflicted on the non-combatant populace."¹³⁸ It directed commanders at every echelon to consider "both the military and psychological objective of each operation."¹³⁹ It also stated that preplanned airstrikes in populated areas and reconnaissance by fire into hamlets were militarily counterproductive in this kind of war.¹⁴⁰ Commanders were to reduce civilian casualties through indoctrination of troops, adoption of judicious military measures, better intelligence collection, civic action, psychological outreach operations and close coordination with the South Vietnamese.¹⁴¹

On September 17, 1965, MACV headquarters issued Directive No. 525-4 entitled *Tactics and Techniques for the Employment of US Forces*

135. *Id.*

136. *Id.*

137. Letter from General William Westmoreland to Stephen Young (Oct. 10, 1987). For confirmation of this recollection, see 1 DEP'T OF THE ARMY, REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT 9-14 to 9-15 (March 1970) [hereinafter MY LAI REPORT].

138. USMACV, Directive No. 525-3, *Combat Operations: Minimizing Non-Combatant Battle Casualties*, Sept. 7, 1965, *quoted in* Dep't of Army Documents, *supra* note 130, at 2.

139. *Id.* at 15.

140. *Id.* at 15-16.

141. *Id.* at 16.

in the Republic of Vietnam. The MACV intended this directive to promote the humane interest of protecting civilians within the combat zone.¹⁴²

Directive 95-2 of July 2, 1965, which the MACV updated on December 20, 1965, specified how commanders were to employ tactical air strikes.¹⁴³ This directive emphasized the need to reduce incidents involving friendly forces, noncombatant casualties and civilian property damage, although it sought within those strictures to obtain the full productivity of United States air power in the effort to defeat Communist main force units. A central technique used to control tactical air strikes required the validation and approval of potential targets.¹⁴⁴ All strikes on preplanned targets required the approval of a South Vietnamese province chief or other senior South Vietnamese military commander. The United States warned United States commanders, however, that South Vietnamese decision-makers might not always comply with United States targeting criteria.¹⁴⁵

Directive 95-2 required that appropriate South Vietnamese authorities approve even air strikes made in support of United States units then in active combat or made by an airborne observer who achieves positive identification of the enemy.¹⁴⁶ Where United States forces desired to make air strikes in close proximity of hamlets or villages, they had to make the strikes at the direction of an airborne forward air controller and only after receiving South Vietnamese approval.¹⁴⁷ The directive permitted air attacks without prior warning to the inhabitants of hamlets and villages only in conjunction with a ground assault and only if, in the judgment of the assault commander, a warning would jeopardize the mission.¹⁴⁸

Regarding interdiction and harassment air strikes, which are strikes that are neither preplanned nor in support of ground troops in combat, United States forces could not strike a target area that included a hamlet or a village until appropriate United States and South Vietnamese authorities had approved the strike at that location. This requirement ap-

142. Dep't of Army Documents, *supra* note 130, at 1.

143. USMACV, Directive No. 95-2, Employment of and Operational Restrictions on US Military Air Delivered Firepower in RVN, Dec. 20, 1965, *quoted in* Dep't of Army Documents, *supra* note 130, at 2-4.

144. *Id.* at 2.

145. *Id.* at 3.

146. *Id.*

147. *Id.* at 4.

148. *Id.*

plied even when "light fire is received from the village or hamlet."¹⁴⁹ If United States and South Vietnamese authorities approved such a strike, they would then take control from the pilots and given it to airborne or ground controllers, and the forces were to warn the inhabitants of the target area using leaflets or loudspeakers in sufficient time for the inhabitants to evacuate the area in advance of the air strike. Similar rules governed the delivery of direct fire by United States armed helicopters.¹⁵⁰

If a South Vietnamese province chief designated an area as a specified strike zone, United States forces could conduct air strikes in the area without further approval.¹⁵¹ In these zones, also called free fire zones, anyone who remained was considered an enemy combatant and United States forces could conduct operations there without violating the principle of distinction.¹⁵² When the authorities updated a similar directive on June 28, 1966, Westmoreland ordered: "Due to widespread intermingling of friendly forces and populations with enemy forces, [South Vietnamese Government] political and tactical approval of *all* strikes within [South Vietnam] is required."¹⁵³

Similar restrictions existed on artillery, mortar and naval gunfire attacks.¹⁵⁴ Westmoreland ordered that such attacks ensure that friendly forces and civilians are not endangered and that "property of friendly forces, [the South Vietnamese] and friendly civilians [are] not destroyed or damaged."¹⁵⁵ An observer had to control all attacks against villages or hamlets, even when known enemy targets were present in such areas, and United States forces could execute such attacks only after the South Vietnamese Province Chief or District Chief had approved the shelling. When not associated with the maneuver of ground forces, the shelling of villages and hamlets required prior warning to the inhabitants "even though fire is received from them."¹⁵⁶

149. *Id.*

150. *Id.*

151. *Id.*

152. G. LEWY, *supra* note 131, at 105; W. WESTMORELAND, A SOLDIER REPORTS 147 (1976).

153. Annex D to USMACV, Directive No. 95-4, Restrictions and Rules of Engagement, RVN, June 28, 1966, *quoted in* Dep't of Army Documents, *supra* note 130, at 5 (emphasis in original).

154. MACV Letter 01448 of Nov. 7, 1965; USMACV, Directive No. 95-2, Dec. 20, 1965. *See* Dep't of Army Documents, *supra* note 130, at 8.

155. USMACV, Directive No. 525-18, Combat Operations: Conduct of Artillery/Mortar and Naval Gunfire, Oct. 19, 1966, *quoted in* Dep't of Army Documents, *supra* note 130, at 9.

156. *Id.* at 10.

Populated areas were subject to attack without warning if the attack was in conjunction with a ground operation moving ground troops through the area and the ground commander concluded that warning would jeopardize his mission. Directive 525-9 of February 2, 1966, sought to protect the property of South Vietnamese civilians.¹⁵⁷ It stated: "That people have lived under [Viet Cong] control does not make them irrevocably hostile . . . [and] to treat them as the enemy and deny them essential resources is incompatible with [United States and South Vietnamese] objectives."¹⁵⁸ The directive prohibited the destruction of civilian dwellings.¹⁵⁹

In a message of October 7, 1966, Westmoreland pointed out to his subordinates that Communist soldiers sought to provoke United States troops into inflicting casualties on innocent civilians and thus gain a propaganda advantage by shooting at United States forces from hamlets or fields in which large numbers of Vietnamese were working. Westmoreland urged commanders to ensure that their troops practiced "the utmost of fire discipline."¹⁶⁰ Westmoreland said: "We must become the masters and not the victims of the Viet Cong tactic."¹⁶¹ Westmoreland exhorted his commanders to presume that the Vietnamese populace was friendly until it demonstrated otherwise.¹⁶²

Not everyone agreed that Westmoreland's rules of engagement were desirable. In his study of United States tactics in Vietnam, Lewy noted that combat soldiers resented waiting for bureaucratic approval before making strikes.¹⁶³ On reading Westmoreland's rules of engagement after the war was over, conservative Republican Senator Barry Goldwater said: "I am ashamed of my country for [placing] such restrictions . . . upon men who were trained to fight, men who were trained to make decisions to win war, and men who were risking their lives."¹⁶⁴

157. USMACV, Directive No. 525-9, Combat Operations: Control, Disposition, and Safeguarding of Vietnamese Property and Food Supplies, Feb. 2, 1966, *quoted in* Dep't of Army Documents, *supra* note 130, at 16.

158. *Id.*

159. *Id.*

160. G. LEWY, *supra* note 131, at 102.

161. *Id.*

162. *Id.* at 106.

163. *Id.* at 303.

164. *Id.* Since the Vietnam War, adherence to rules of engagement has become increasingly important to the United States military services. In September 1983 the services refused to follow instructions from the staff of the National Security Council to schedule shelling by battleships and air strikes on villages in Lebanon if such communities were used as places from which to shoot at United States Marines then stationed in Beirut. The services, through a staff attorney, pointed out that such instructions were

C. *Westmoreland's Treatment of Prisoners of War*

It was the United States position that the third Geneva Convention applied to the conflict then raging in South Vietnam. United States forces were to presume that all persons they took captive were prisoners of war, subject to immediate screening by South Vietnamese and United States intelligence staffs for proper disposition. Custody of detained persons was the sole responsibility of the South Vietnamese Government, because the South Vietnamese Government was the legal authority with rights to maintain civil order in the country. Thus, as the fighting intensified, more persons came into the custody of the South Vietnamese Government.

In 1965, however, the Government of South Vietnam had no facilities suitable for the confinement and care of prisoners of war.¹⁶⁵ The total capacity of South Vietnam's prisons and jails was 21,400 persons. During 1965 South Vietnam had confined some 24,878 war-related prisoners.¹⁶⁶ In December 1965, 18,786 persons were still in South Vietnamese custody. Average confinement for a prisoner lasted six months.¹⁶⁷ As United States and South Vietnamese forces apprehended new persons, the South Vietnamese released old prisoners to make room for the new ones.

On November 27, 1965, Westmoreland's headquarters proposed a plan for implementation of the Geneva Conventions.¹⁶⁸ They proposed that the South Vietnamese construct five prisoner of war camps. South Vietnamese military police would staff the camps and United States military police advisors assigned to each camp would promote adherence to the levels of treatment specified in the third Geneva Convention. In November 1965 Westmoreland personally urged the Chief of Staff of the South Vietnamese Armed Forces to insist that his forces adhere to the Geneva Conventions while fighting the war.¹⁶⁹ The South Vietnamese then adopted the program that the United States had proposed and built the camps. They later expanded the camps. By December 11, 1971, the South Vietnamese Government held 35,665 prisoners of war in six camps. Of these, United States units had captured 13,365.¹⁷⁰

illegal. Subsequently, proper rules of engagement were drawn up to permit restricted air strikes and salvos from the battleships. N.Y. Times, Jan. 19, 1988, at 10.

165. G. PRUGH, *supra* note 109, at 63.

166. *Id.* at 64.

167. *Id.*

168. *Id.* at 67.

169. *Id.* at 75.

170. *Id.* at 67.

In August 1966 Westmoreland again wrote his commanders to describe "active command interest" in complying with international law concerning prisoners of war.¹⁷¹ In October 1966 Westmoreland distributed to United States forces a MACV Command information bulletin with instruction on application of the Geneva Conventions.¹⁷² On January 5, 1968, the ICRC wrote: "We are convinced that in the context of the war in Vietnam the [United States] forces are devoting a major effort to the spread of knowledge of the Geneva Conventions."¹⁷³

At United States insistence, South Vietnam permitted representatives of the ICRC to visit South Vietnam's prisons and prisoner of war camps.¹⁷⁴ South Vietnam granted mailing privileges to the prisoners and gave families of Viet Cong prisoners of war visitation rights to the camps. South Vietnam also established a dispensary with a resident doctor for each camp.¹⁷⁵

D. *Westmoreland's Policies Concerning the Apprehension of Individuals*

Westmoreland ordered that all United States soldiers arriving in South Vietnam be issued an instructions card for the soldiers to carry with them at all times.¹⁷⁶ The card provided directions for the apprehension of prisoners and instructed each soldier that he must comply with the third Geneva Convention and that he could not mistreat, humiliate or degrade a prisoner, take his personal effects or deny him medical treatment. United States soldiers were to take prisoners to the place their commanders designated and guard the prisoners carefully. The card carried simple Vietnamese expressions for use in stopping a prisoner.¹⁷⁷

The back of the card said, among other things: "But [the prisoner] must also be treated at all times as a human being. He must not be tortured, killed, mutilated, or degraded, even if he refuses to talk. . . . MISTREATMENT OF ANY CAPTIVE IS A CRIMINAL OFFENSE. EVERY SOLDIER IS PERSONALLY RESPONSIBLE

171. *Id.* at 75.

172. *Id.*

173. Letter of Samuel A. Gonard, President of ICRC, to W. Averell Harriman, U.S. Ambassador at Large, Jan. 5, 1968, *quoted in* G. PRUGH, *supra* note 109, at 76.

174. G. PRUGH, *supra* note 109, at 68.

175. *Id.* at 69.

176. *Id.* at 75.

177. *Id.* at 143 (Appendix H, "The Enemy in Your Hands") (reproduction of 3x5 card of instructions issued to all troops).

FOR THE ENEMY IN HIS HANDS."¹⁷⁸ Most importantly, the card instructed all United States military personnel that "ALL PERSONS IN YOUR HANDS, WHETHER SUSPECTS, CIVILIANS, OR COMBAT CAPTIVES, MUST BE PROTECTED AGAINST VIOLENCE, INSULTS, CURIOSITY, AND REPRISALS OF ANY KIND." It admonished United States soldiers to "[l]eave punishment to the courts and judges."¹⁷⁹

E. *Westmoreland's Interrogation Practices*

United States units holding captives were to hold captives only long enough to obtain from them any legitimate tactical intelligence they might possess. The United States units were then to take the captives to an interrogation center staffed jointly by United States and South Vietnamese intelligence specialists.¹⁸⁰ These specialists classified the detainees and sent them for further processing depending on their status. They sent prisoners of war to prisoner of war camps; they released innocent civilians and returned them to the place of capture; they turned civilian suspects over to South Vietnamese police and judicial officials for detention, possible trial, and, if found guilty, punishment; they sent those members of the enemy apparatus who sought forgiveness for their belligerent status to a Chieu Hoi center where the prisoners benefited from the South Vietnamese Government's amnesty program.¹⁸¹

The MACV first codified its policy regarding the classification of prisoners in Directive 381-11 of March 5, 1966.¹⁸² The MACV concluded that it would accord prisoner of war status to captured South Vietnamese nationals fighting for the Communists even though such nationals were not legally entitled to prisoner of war status because they were rebels against their sovereign.¹⁸³ Suspected Viet Cong captured in circumstances that precluded their being considered as openly notorious belligerents were to be treated as civilian criminal defendants.¹⁸⁴ The ICRC complimented the MACV for this policy, saying it was

a brilliant expression of a liberal and realistic attitude. . . . This text could

178. *Id.* at 144 (emphasis and capital letters in original).

179. *Id.*

180. *Id.* at 65-66.

181. *Id.* at 66.

182. *Id.* See USMACV, Directive No. 381-11, Exploitation of Human Sources and Captured Documents, Aug. 5, 1968 (later version of Directive No. 381-11 of Mar. 5, 1966), reprinted in G. PRUGH, *supra* note 109, at 127.

183. G. PRUGH, *supra* note 109, at 66.

184. *Id.* at 66, 129-31.

very well be a most important one in the history of humanitarian law, for it is the first time . . . that a government goes far beyond the requirements of the Geneva Convention in an official instruction to its armed forces.¹⁸⁵

F. *Westmoreland's Policies Concerning the Reporting of War Crimes*

On March 25, 1966, the MACV issued Directive 20-4, which required United States soldiers to report war crimes, both those that enemy forces committed, and those that United States military personnel committed on hostile military or civilian personnel.¹⁸⁶ The directive authorized brigade commanders with judge advocates assigned to their staffs to investigate war crimes; it also authorized army officers with general court martial jurisdictions to do the same. The directive stated bluntly that the willful killing, torture or inhuman treatment, or the willful infliction of great suffering or serious injury, to persons taking no active part in hostilities constituted a war crime.¹⁸⁷ The directive also prohibited firing on undefended localities, pillage or purposeless destruction.¹⁸⁸ In addition, all personnel having knowledge of war crimes had an obligation to report them. The MACV reaffirmed the prohibition against war crimes on November 9, 1967, in Directive 27-5,¹⁸⁹ and issued four additional related directives during the war.¹⁹⁰

Westmoreland demonstrated in the above ways before the Order of Battle controversy occurred in 1967 that he was acting in compliance with the principle of distinction to separate and protect civilians from belligerents.

VI. THE ORDER OF BATTLE CONTROVERSY

Controversy over who the United States should include in the Order of Battle arose in the middle of 1967 when more accurate information on enemy operations became available from documents and Viet Cong records captured in 1966. As of 1965, with the introduction of United States combat forces to fight a war of search-and-destroy missions seek-

185. *Id.* at 66.

186. USMACV, Directive No. 20-4, Inspections and Investigations: War Crimes, Mar. 25, 1966, *quoted in* Dep't of Army Documents, *supra* note 130, at 17. *See* G. PRUGH, *supra* note 109, at 72, 136.

187. G. PRUGH, *supra* note 109, at 73.

188. *Id.*

189. USMACV, Directive No. 27-5, Legal Services: War Crimes and other Prohibited Acts, Nov. 9, 1967, *quoted in* Dep't of Army Documents, *supra* note 130, at 20.

190. G. PRUGH, *supra* note 109, at 73.

ing out main force Communist units, the United States recorded Communist capability as consisting of combat companies, combat support units and other irregulars. For example, when the 1965 study group of the Joint Chiefs of Staff examined prospects for success under the proposed search-and-destroy strategy, it noted that Communist forces consisted of 48,500 men in combat companies and 17,600 in combat support operations.¹⁹¹

Major General Joseph McChristian, who later testified against Westmoreland in the trial of Westmoreland's defamation suit against CBS, was the Chief of Intelligence for the MACV at the time United States forces entered Vietnam. In his history of military intelligence in Vietnam from 1965 to 1967, McChristian reported that six months elapsed from the time the United States decided to commit its combat forces to the Vietnam conflict and the release of the first issue of the Military Assistance Command J-2 Order of Battle Summary.¹⁹² The summary consisted of thirteen pages with information organized in two parts. Part I listed enemy units identified as main forces or local forces and as Viet Cong or North Vietnamese. It described the existence of units as part of the enemy's fighting force as "confirmed, probable, or possible."¹⁹³ Part II provided a recapitulation of enemy forces and total enemy personnel strength located in each military region of South Vietnam.¹⁹⁴

McChristian wrote that the MACV changed the format of the Order of Battle report constantly. The MACV added new sections concerning such subjects as Communist units newly arrived in South Vietnam, the continued validity of treating Communist battalions as combat-effective, and cover names that the Communists gave to their various units.¹⁹⁵ The MACV later changed the categories of enemy forces so as to use the headings "maneuver, combat support, administrative service, irregular, and political."¹⁹⁶

Preparation of the Order of Battle involved many people. McChristian wrote:

Our order of battle reporting was reviewed by all members of the national intelligence community. Military Assistance Command statistics and holdings concerning the enemy forces often were questioned. Several factors

191. 4 PENTAGON PAPERS, *supra* note 70, at 294-95.

192. J. MCCHRISTIAN, VIETNAM STUDIES: THE ROLE OF MILITARY INTELLIGENCE, 1965-1967, at 129 (Dep't of Army 1974).

193. *Id.* at 129-30.

194. *Id.* at 130.

195. *Id.*

196. *Id.* at 131.

contributed to this problem. Separate reporting channels existed between component commands and government agencies and their headquarters back in the United States. Everyone was forwarding order of battle information to his superiors in Washington without approval from the MACV commander.¹⁹⁷

The Office of the Secretary of Defense in the Pentagon first reviewed McChristians' work product. Next, the Joint Chiefs of Staff sent a team to Saigon to determine the validity of McChristian's statistics. The Chairman of the Joint Chiefs of Staff then directed that they have a special conference to review the criteria, terminology and definitions that the MACV used in the Order of Battle reports.¹⁹⁸ By the end of McChristian's tour of duty in the MACV, seventy-five offices received a total of 425 copies of the Order of Battle report.¹⁹⁹ In September 1966 the principal categories in McChristian's Order of Battle were as follows: Communist Regulars (110,000), Guerrilla-militia (103,573), Service Troops (18,553) and Political Cadre (39,175) for a total of 271,301.²⁰⁰

In late 1966 a CIA analyst in Washington D.C. reviewed captured Communist documents which indicated that the number of individuals claimed by the NLF as their organized supporters and followers in the hamlets and villages was much larger than the number of guerrilla-militia participants shown on the MACV Order of Battle. The analyst, Samuel Adams, later wrote in *Harper's Magazine* that his review was "the biggest intelligence find of the war—by far."²⁰¹ In planning United States war strategy, statistics were important and, to Adams, "the most important figure of all was the size of the enemy army—that order of battle number, 270,000."²⁰² If one added Adams' numbers for the irregular component of the Order of Battle to the enemy Order of Battle, the size of the enemy force doubled. "We'd be fighting a war twice as big as the one we thought we were fighting."²⁰³ Adams added, "[T]he addition of 200,000 men to the enemy order of battle meant that somebody had to find an extra 600,000 troops for our side. This would put President Johnson in a very tight fix—either quit the war or send more

197. *Id.* at 127.

198. *Id.* at 128.

199. *Id.* at 131.

200. Cabbage, *supra* note 4, at 8.

201. Adams, *Vietnam Cover-up: Playing War With Numbers*, HARPER'S MAG., May 1975, at 43.

202. *Id.* at 43-44.

203. *Id.* at 44.

soldiers."²⁰⁴

Adams reported his views to his superiors, expecting great things to happen. To his chagrin, nothing occurred. He later wrote: "I was aghast. Here I had come up with 200,000 additional enemy troops, and the CIA hadn't even bothered to ask me about it, let alone tell anybody else. I got rather angry. . . ."²⁰⁵

Adams never addressed the question whether all the persons included in the new documents deserved classification as enemy troops under the law of war. He told a colleague: "Can you believe it? Here we are in the middle of a guerrilla war, and we haven't even bothered to count the number of guerrillas."²⁰⁶ As noted above, by pursuing a strategy of guerrilla warfare, the North Vietnamese Communists did not acknowledge as valid the principle of distinction, though for propaganda purposes they hypocritically accused United States forces of committing crimes against humanity in violation of the principle of distinction. The putative combatants that Adam's research emphasized were residents of hamlets and villages who may well have been unarmed supporters or part-time supporters or not even that.

Adams' article also failed to indicate whether Adams had considered the separation of functions between United States combat forces and the pacification program, and between United States combat forces and the South Vietnamese Government's obligation to secure the rural population. Adams apparently did not consider the propriety of including participants in the self-defense and the secret self-defense organizations in the manpower pool measured by the Hamlet Evaluation Survey as the insurgency base available to the Communists.²⁰⁷

In any case, a controversy over the MACV's Order of Battle had now arisen. The Chairman of the Joint Chiefs of Staff ordered a review of how the MACV had formulated the Order of Battle so that the CIA and the military command in the field could come to agreement on the num-

204. *Id.*

205. *Id.*

206. *Id.* at 62.

207. To give Adams some credit, he did acknowledge that classifying the enemy in a guerrilla war is not a foolproof science. He admitted:

The questions arose in the intelligence community's mind as to whether to count a guy that stuck a pungi stick in the ground as part of the Order of Battle. That is among the problems which arose. *It is very difficult to decide who to count. . . .* Now even in the guerrillas . . . you are not absolutely sure how many guerrillas to count. The same problem arises with the self-defense . . . [and] secret self-defense. . . . *It is very difficult to decide who to count.*

R. ADLER, *supra* note 2, at 194-95.

bers. In February 1967 McChristian and his subordinate responsible for preparing the Order of Battle, Colonel Gains Hawkins, attended a conference in Honolulu to discuss the different perspectives. Hawkins agreed that the reported numbers were too low. He said, "You know, there's a lot more of those little bastards out there than we thought there were."²⁰⁸

The participants at the conference agreed that while the MACV could not measure with precision the number of irregular fighters, the MACV should account for such fighters in the Order of Battle.²⁰⁹ During the next several months Hawkins looked at the newly available intelligence on the irregular fighters and produced seventy pages of reports detailing his findings. The Ritz Report analyzed intelligence on the self-defense and the secret self-defense organizations.²¹⁰ The Corral Report described the political cadre structure.²¹¹ A major United States search and destroy operation near South Vietnam's border with Cambodia in early 1967 had uncovered large collections of Communist documents in what was the principal region of Communist forces in South Vietnam.²¹² Hawkins estimated that the Communists had a total of 198,000 for the irregular forces, including guerrilla, self-defense and secret self-defense units. This estimate was higher than the figure of 103,573 that the Order of Battle reports had used for that category of combatants, but it was still less than the 300,000 estimate that Adams had calculated for the category.²¹³ Similarly, the study showed that Communist political cadre included at least 90,000 persons and not the 39,000 persons used previously.

McChristian now wanted to increase the number of enemy listed in the Order of Battle. Like Adams, he did not ask whether the law of war limited his discretion in defining who was the enemy. Like Adams, he did not reflect on the advantages of listing in the Order of Battle those combat forces that the United States military had special responsibility to seek out and destroy, while separately listing in the Hamlet Evaluation Survey Reports the dimensions of the insurgency base that the Government of South Vietnam was determined to address with economic, political, social and police measures.

McChristian had learned too much about insurgencies. He considered the guerrilla fighter to be the enemy just as he considered the regular

208. Adams, *supra* note 201, at 62.

209. Cabbage, *supra* note 4, at 19.

210. *Id.* at 89.

211. *Id.*

212. See *The War: The Organization Man*, TIME, Aug. 25, 1967, at 21-22.

213. Cabbage, *supra* note 4, at 20-21.

soldier in uniform, marching in formation, to be the enemy. He later wrote:

Even though a guerrilla may not carry a weapon, he certainly knows how to sharpen and replace a pungi stake or to use a hand grenade made from a beer can. A good intelligence officer must avoid preconceived ideas when it comes to estimating the enemy. In Vietnam, it was necessary to discard temporarily many of the conceptions that our military education and experiences had engendered.²¹⁴

McChristian wanted to count everyone on the other side, so to speak, as part of the enemy, regardless of the law of war's emphasis on the need to distinguish combatants from noncombatants.

McChristian also wanted all United States intelligence efforts in Vietnam to report to the MACV. He was convinced that in times of war, battlefield commanders must exercise unity of command in matters of military intelligence.²¹⁵ By placing all members of the enemy, including political cadre, in the MACV Order of Battle, McChristian laid the foundation for bureaucratic control of all intelligence that bore on enemy capabilities. The role of other organizations in pacification and intelligence-gathering would diminish correspondingly. McChristian seems to have assumed as well that it was the MACV's responsibility to defeat the guerrillas as well as the main force Communist units. In this he did not fully assent to Westmoreland's bifurcated allocation of responsibility between the United States and the South Vietnamese. McChristian has written:

The military problem of defeating the North Vietnamese Army and the Viet Cong main force units on the battlefield was complicated by their utilization of a highly centralized political movement. The Viet Cong infrastructure . . . , composed of men, women, and children, operated as the enemy's supply service, intelligence network, and local guerrilla force as well as a shadow government in each village in Vietnam. If victory on the battlefield was to be translated into a just and lasting peace, the infrastructure had to be neutralized.²¹⁶

The job of reducing the threat to the infrastructure would be accomplished after McChristian left Vietnam, but by the CORDS organization advising the South Vietnamese Government.

Westmoreland established the CORDS organization at the same time

214. J. McCHRISTIAN, *supra* note 192, at 10. See also Cabbage, *supra* note 4, at 85.

215. J. McCHRISTIAN, *supra* note 192, at 8.

216. *Id.* at 13.

that McChristian completed his tour in South Vietnam. This new structure resulted in the centralization of command in Westmoreland to fight the main force war and the pacification war and a separation into two sub-commands of the main force search-and-destroy effort and the tasks of nation-building.

In mid-May 1967, as he was about to end his tour of service in the MACV, McChristian asked Westmoreland to approve a cable to Washington increasing the numbers in the Order of Battle as proposed by McChristian's staff to reflect the newly studied intelligence on irregulars and political cadre. The request came at the end of McChristian's tour and reflected his parochial understanding of how the United States intended to fight the war. General Westmoreland refused to approve the cable.²¹⁷

On May 19, 1967, the MACV held a briefing on the issue, at which time they showed higher figures for self-defense and secret self-defense organizations. A memorandum issued after the meeting and used as Exhibit 1519 in the *Westmoreland v. CBS* trial, stated:

[T]he advisability of releasing the information presented in a [Viet Cong] Irregular Forces strength in South Vietnam briefing without further refinement was questioned. J-2 [General McChristian] will pull together representatives from IO and J-3 to analyze this study in depth and to determine how this information should be presented both officially and publicly. [Westmoreland] requested specifically that those irregular forces that are armed be identified.²¹⁸

Years later, at the trial of his suit against CBS, Westmoreland recalled that he had said to McChristian at the time: "Joe, we're not fighting those people. They're civilians. They don't belong in the numerical strength of the enemy."²¹⁹ Westmoreland recalled that he only wanted to "keep book" on the people he wanted his troops to destroy. Going after the armed Viet Cong was fair game, he thought.²²⁰

Remarkably, when confronted with the controversy over the proper place in the Order of Battle for irregular combatants, Westmoreland demanded exactly what the principle of distinction required. He wanted to know which units were armed and which were not. Those that were unarmed were presumptively noncombatants and deserved treatment dif-

217. See B. BREWIN & S. SHAW, *supra* note 6, at 18.

218. Memorandum for Record, May 19, 1967, Joint Exhibit No. 1519, *Westmoreland v. CBS*, quoted in B. BREWIN & S. SHAW, *supra* note 6, at 280 [hereinafter Joint Exhibit No. 1519].

219. B. BREWIN & S. SHAW, *supra* note 6, at 265.

220. Cabbage, *supra* note 4, at 120.

ferent from that designated for belligerents.²²¹ Westmoreland later recalled:

In May of 1967 I directed that armed categories of the enemy be listed separately from unarmed or quasi military. There were some such non-military elements in the sketchy and incomplete so-called Order of Battle that we had received from the South Vietnamese. Since the figures for these categories were static for over a year, I did not concentrate on them until a huge increase was reported following several months of study by my intelligence staff. Since the Military Order of Battle represented to my subordinate Commanders and their troops the forces we were trying to destroy, I considered it improper, if not dangerous, to include civilians in that category. It was American policy to avoid civilian casualties by every practical means and to neglect that matter would be totally at odds with the spirit of the law of war and the Geneva Conventions.²²²

Follow-up briefings on how to classify members of the self-defense and the secret self-defense occurred on May 28 and June 14, 1967.²²³ Westmoreland's strategic thinking about the nature of the Communist threat to South Vietnam and how best to contain it reflected his own concerns, not the statistical presentations contained in McChristian's Order of Battle reports. In his mind Westmoreland had drawn as a fundamental point of analytical departure a distinction between enemy combat units and the insurgency base in the rural areas from which the Communists could recruit new soldiers for their combat units. He later recalled:

We had several types of enemy to deal with: his combat forces and their logistical support plus his "political cadre," made up of communist functionaries, part-time defenders of hamlets and villages, and their supporters. As I assumed command in Vietnam from my predecessor, I inherited a system under which our order of battle lumped together all of these groups to come up with a single total estimate of enemy strength.

The system seemed to me wrong. In terms of World War II, for example, it was tantamount to arriving at a total strength of the German *Wehrmacht* by including members of the Nazi Party, their secret police, and their home guard. I wanted to change the system so that we would know as precisely as possible what we faced in terms of armed and equipped enemy soldiers, while at the same time recognizing the presence

221. Previously, Westmoreland had taught the law of war and the rules of the Geneva Conventions at the Command and General Staff College in Fort Leavenworth, Kansas. Letter from General William Westmoreland to Stephen Young, Oct. 10, 1987.

222. Westmoreland, Draft of Possible Article for *Parade* 3 (Aug. 16, 1985) (unpublished manuscript provided to author by General Westmoreland).

223. Cabbage, *supra* note 4, at 89-90.

of other elements.²²⁴

The CIA was less concerned, however, with the law of war. They pressed for higher numbers in the Order of Battle. The CIA considered the Order of Battle as a measure of the enemy's capability to wage war using all persons at its disposal, whether military or civilian. Westmoreland called this concept of manpower availability the insurgency base. The MACV, on the other hand, considered the Order of Battle as an identification of the armed military elements of the enemy that its soldiers had license to kill. Westmoreland did not want to encourage or authorize his soldiers to, or provide them with an excuse, to kill civilians in violation of the law of war. Major General Phillip Davidson succeeded McChristian. Davidson agreed with Westmoreland that there was no necessity to include the self-defense, secret self-defense and political cadre in the MACV's Order of Battle.²²⁵

To resolve the dispute over who the Order of Battle should list, a special national intelligence estimate was ordered for presentation to President Johnson. As part of this process, CIA analysts visited Saigon in September, 1967 to argue their point of view with Westmoreland's staff. During that time Westmoreland reached a compromise with George Carver of the CIA, Adams' supervisor. Robert Komer, the founder of the new CORDS organization to press for better results in pacification, suggested the form of the compromise to Carver. Komer believed deeply that United States combat forces were not the best answer to the problem that the Communist organization posed—both militarily and politically—in the countryside. He believed that the Order of Battle list was an inappropriate management tool for pacification. Komer proposed to Carver, therefore, that they separate the civilian component of the insurgency from the military Order of Battle, which would reflect only the threat from Communist ground forces. In this way Westmoreland would have a "clean," conventional Order of Battle in compliance with the law of war, and the pacification program would have its own unique indices to measure results in what it called the other war.²²⁶

Under this theory the estimates of Communist irregulars would increase but potential noncombatants in the insurgency base would not appear in the Order of Battle but would be listed separately in general

224. Prepared Statement by General Westmoreland to the Press 4 (Jan. 26, 1982) (unpublished text provided to author by General Westmoreland).

225. Cabbage, *supra* note 4, at 95.

226. Cabbage, *supra* note 4, at 25. See also N.Y. Times, Oct. 24, 1984, § 2, at 5 (testimony of Lt. Gen. Philip Davidson, Jr.); N.Y. Times, Nov. 10, 1984, § 1, at 9 (testimony of George Carver).

terms. At his trial Westmoreland testified that he sought the deletion of self-defense and secret self-defense forces from the Order of Battle because he had "wanted to purify the so-called order of battle so that it would be an order of battle in fact."²²⁷ He stated: "I felt it was important that we sort out the enemy organization so that there would be no ambiguity in who we were fighting, with cognizance of the fact that there were other elements in South Vietnam associated with the Communist cause."²²⁸

The Special National Intelligence Estimate was finished by November 1967. Referring to the status of the self-defense and the secret self-defense forces, the estimate said:

The self-defense force is described by the Communists as a military organization. It is clear, however, that its organization and mission differ from that of village and hamlet guerrillas. Self-defense forces include people of all ages and a substantial percentage of them are females. They are largely unarmed and only partially trained. The duties of self-defense units include the maintenance of law and order, the construction of bunkers and strong points, warning against the approach of allied forces, and the defense of villages and hamlets in VC-controlled territory. Self-defense forces do not leave their home areas, and members generally perform their duties part-time. Their existence poses an impediment to allied sweeps and pacification, however, and in their defensive role, they inflict casualties on allied forces.

Another element, the secret self-defense forces, operates in government-controlled and contested areas. They provide a residual Communist presence in such areas and support the Communist effort primarily by clandestine intelligence activities.

. . . Though in aggregate numbers these groups are still large and constitute a part of the overall Communist effort, they are not offensive military forces. Hence, they are not included in the military order of battle total.²²⁹

The MACV announced this result publicly at MACV headquarters on November 24, 1967.²³⁰ The briefing presented enemy capabilities as follows: regular forces of 118,000, consisting of 54,000 men in North

227. N.Y. Times, Nov. 17, 1984, at 46, col. 4.

228. *Id.* Then Assistant Secretary of Defense Paul Nitze testified at Westmoreland's trial that "[w]hen you aggregate elephants and flies, you get nonsense." Cabbage, *supra* note 4, at 67.

229. Special National Intelligence Estimate, No. 14.3-67, Capabilities of the Vietnamese Communists for Fighting in South Vietnam 15-16, Nov. 13, 1967 (document available from The LBJ Library, Austin, Texas).

230. Joint Exhibit No. 277, *supra* note 5.

Vietnamese units and 64,000 men in Viet Cong main and local armed units; and administrative service support staffs of 35,000 to 40,000 men, an increase of 10,000 to 15,000 over previous estimates.²³¹ The briefing continued: "Information from the documents captured this year strongly suggests that the guerrilla forces have been considerably larger than we had believed."²³² The MACV announced that it would now remove self-defense and secret self-defense units from the Order of Battle. The old Order of Battle had included 112,000 "irregulars," including those potential noncombatant forces, while the new Order of Battle included 70,000 to 90,000 "guerrillas"—a superficial decrease in Communist strength.²³³

In November 1967 the MACV increased the Order of Battle numbers but removed noncombatant forces. The total number of the enemy reported in the Order of Battle remained approximately the same, but if one added in the numbers provided for self-defense forces, secret self-defense forces and political cadre, the total manpower available to the enemy was higher than ever reported before.²³⁴ The separate listing of enemy soldiers in the Order of Battle and less certain belligerents in another format might have misled a casual observer, but it did not mislead those fighting the war. In addition, keeping separate lists honored an important principle of the law of war.

The CBS documentary maintained that deletion of the self-defense and secret self-defense forces was "a new tactic" of Westmoreland to keep enemy strength figures down.²³⁵ The documentary claimed that Westmoreland "suddenly wanted [the self-defense and secret self-defense figures] treated as if they didn't exist."²³⁶

Of course, Westmoreland was well aware of efforts to fight the other war, the war of pacification. The principal responsibility of the South Vietnamese Government, with considerable assistance from the United States, was the mobilization of the population of rural South Vietnam into a political community under the sovereignty of the Government in Saigon. In 1967 the Government had written a new constitution, presidential elections were underway, village development programs were on the drawing board, cadre teams were promoting development projects,

231. *Id.* at 3.

232. *Id.* at 5.

233. *Id.* at 5-6.

234. N.Y. Times, Nov. 24, 1967, at 2.

235. N.Y. Times, Nov. 17, 1984, at 46, col. 4.

236. Regarding the political cadre, MACV's intelligence staff now took the position that "politicians are normally not arranged in battalions, companies and platoons." Cubbage, *supra* note 4, at 67.

and South Vietnamese police were seeking out Communist networks of espionage and sabotage. On the United States side, a new organization—CORDS—was being put into place under Westmoreland's supervision to coordinate United States support for pacification separately from the main force fighting and from the economic aid mission. The CORDS staff invented a system of estimating enemy strength in the struggle for pacification. Entitled the Hamlet Evaluation Survey, the system also permitted senior United States officials in Saigon and Washington to assess the progress being made in building civil community in rural Vietnam.²³⁷ Thus, South Vietnam's rural communities were not a backwater of strategic concern. The South Vietnamese and United States were by no means ignoring the insurgency threat.

Removing persons from the Order of Battle did not remove them from consideration as to their impact on the war. The war was as political, economic and psychological as it was military; the MACV's Order of Battle addressed only one part of the communist challenge to South Vietnam. As hamlet and village residents, self-defense and secret self-defense members were included in the population to be organized through the many rural security and rural development programs organized by the South Vietnamese Government.

While no doubt Westmoreland's decision in the Order of Battle controversy avoided domestic controversy at the time, it was politically necessary from another point of view. The United States principal objective in the war was to withdraw all United States troops from Vietnam and to reintegrate disaffected South Vietnamese with a representative government maintaining independent sovereignty in South Vietnam. To achieve this end, it was mandatory that the United States and South Vietnam not drive the rural population to fanatic and unyielding support for the Communists. The United States thus devoted millions of dollars to village development. It housed, fed and educated refugees and provided funds to reestablish the refugees' villages once United States and South Vietnamese troops had pushed Communist forces into uninhabited jungles. In addition, the Chieu Hoi program gave members of the Viet Cong amnesty and helped them adjust to political participation in the South Vietnamese state.²³⁸ Finally, constitutional reform opened the South Vietnamese Government structure to participation by dozens of religions and political parties, sects and factions. Westmoreland's decision not to classify summarily, and thereby stigmatize, thousands of rural

237. See G. LEWY, *supra* note 131, at 125, 179, 191-95.

238. See Wosepkat, *Repatriation and the Chieu Hoi Amnesty Approach in Vietnam: Consequences and Prospects*, 5 INT'L LAW. 637 (1971).

Vietnamese as being so hostile to the Government that only their deaths or capture would further United States war aims was in keeping with this policy.

The Phung Hoang or Phoenix Program,²³⁹ a coordinated police effort involving the South Vietnamese Prime Minister's office and other intelligence agencies, consisted of a program to arrest political leaders of the Communist insurgency and to try them for sedition and felonious intent to murder and destroy property. Some commentators have luridly but inaccurately characterized as an assassination campaign this effort to remove from the Communist Party's political leadership some 70,000 to 90,000 individuals.²⁴⁰

In the orders given to United States soldiers regarding treatment of self-defense and secret self-defense participants, the MACV honored removal of the self-defense and the secret self-defense organizations from the Order of Battle because the organizations were not fully confirmed, full-time combatants. On December 27, 1967, the MACV issued Directive 381-46 concerning the criteria for classification and disposition of detainees.²⁴¹ The directive instructed that United States forces should classify a member of the self-defense or the secret self-defense as a combatant and give him prisoner of war status when the member "admits or for whom there is proof of his having participated or engaged in combat or a belligerent act under arms other than an act of terrorism, sabotage, or spying."²⁴² The directive instructed that United States forces should classify a detained member of the self-defense or secret self-defense as a civil detainee if the activity for which the detainee was detained did not involve actual combat or a belligerent act under arms and no proof existed that the detainee ever participated in actual combat or belligerent acts under arms.²⁴³ United States forces were to release civil detainees to the appropriate South Vietnamese civil authorities.

The people of rural Vietnam were the intentional beneficiaries of Westmoreland's decision. MACV Directive 381-46 offered no basis for wanton treatment of South Vietnamese civilians. Crossing an intellectual line and misclassifying a civilian person as the enemy or a civilian residence as an enemy facility provoked wanton and illegal destruction in a

239. See W. COLBY, *supra* note 112, at 266-88.

240. See *id.* at 276-77. See also Congressional Hearings, reprinted in HOUSE COMM. ON FOREIGN AFFAIRS, VIETNAM: POLICY AND PROSPECTS, 1970 (U.S. Gov't Printing Office, Wash., D.C. 1978).

241. *Contemporary Practice of the United States Relating to International Law*, 62 AM. J. INT'L L. 754, 766 (1968) (Directive No. 381-46, Dec. 27, 1967, Annex A).

242. *Id.* at 767, § 4(a)(3).

243. *Id.* at 767, § 4(b)(1)(b).

number of cases. Had Westmoreland given in to such temptation and approved the addition of the self-defense and the secret self-defense forces to the Order of Battle in mid-1967, he would have targeted thousands of rural South Vietnamese for forcible suppression.

Tragically, such savagery occurred on March 16, 1968, when United States soldiers murdered several hundred South Vietnamese civilians in the hamlet of My Lai.²⁴⁴ Had Westmoreland continued previous practices of classification and included the self-defense and secret self-defense participants in the Order of Battle, he would have provided those guilty of the My Lai murders with a legal defense for their actions. As it was, at his trial for ordering those murders, Lieutenant William Calley argued that the victims had no right to life (1) because their sympathy for the Viet Cong was so extensive and so enduring as to make them belligerents, or (2), because his commanders had previously determined the belligerent status of the villagers so as to deny them the protections of the Geneva Conventions.²⁴⁵

To the contrary, the appellate board reviewing Calley's trial before a military court found that individuals participate in irregular warfare as individuals and not as members of a group and that a group, such as the residents of My Lai, cannot be collectively branded with belligerent status as a result.²⁴⁶ The board held that military courts must trace hostile actions by irregulars to individuals one by one and that a military court can only punish such individuals after the Court has properly established the individual's personal guilt for the wrongs.²⁴⁷ The appellate board ruled that summary executions of persons merely under suspicion are illegal under article 118 of the Uniform Code of Military Justice.²⁴⁸ In particular, the appellate board found in Calley's case that "[a] status of being a sympathizer, collaborator, or Viet Cong proper is not such provocation as would mitigate a summary execution down the scale of unlawful homicide to manslaughter."²⁴⁹ The military court thus properly found Calley guilty of the murder of South Vietnamese persons.

Military courts reached similar results in other cases where United States soldiers were tried for killing rural Vietnamese in contested parts of the country.²⁵⁰ In *United States v. Schultz* the defendant argued that

244. See S. HERSCH, MY LAI 4: A REPORT ON THE MASSACRE AND ITS AFTERMATH (1972); MY LAI REPORT, *supra* note 137.

245. *United States v. Calley*, 46 C.M.R. 1131, 1174, *aff'd* 48 C.M.R. 19 (1973).

246. *Id.*

247. *Id.*

248. *Id.* See 10 U.S.C. § 918 (1982).

249. *Calley*, 46 C.M.R. at 1177.

250. See, e.g., *United States v. Keenan*, 18 C.M.A. 108, 39 C.M.R. 108 (1969);

while on ambush in contested territory he had concluded that a light in a house during the night was a signal to the Viet Cong enemy.²⁵¹ The defendant contended that his belief that the occupant of the house was an enemy justified his removal of the occupant from the house and his killing the occupant. The defendant also testified, however, that he had wanted to take a "gook" out and kill him to avenge two of his friends recently killed in the war and another who had been in the hospital then with "his guts blown out."²⁵² The review board noted that even if the victim was an enemy belligerent, the defendant had taken him into custody and thus the victim deserved protection as a prisoner of war.²⁵³ The board ruled, however, that if there was doubt as to the status of an individual as an enemy or an innocent civilian, a soldier must seek a decision from a competent tribunal and not take matters into his own hands.²⁵⁴ Finally, the victim as a civilian was to have been treated with humanity. Under the circumstances of the case, the board concluded, the defendant's actions were unjustifiable under the law of the United States or the laws of war.²⁵⁵

The issue of how to classify for military purposes the self-defense and secret self-defense forces first arose in early 1967. It was resolved by late November of that year with the deletion of those units from the Order of Battle. Prior to that decision, the MACV and, therefore, all United States field commanders, had included the self-defense and secret self-defense units on the Order of Battle. Thus, from the introduction of United States ground combat troops to South Vietnam in 1965 until November 1967, there was a pretext in the Order of Battle for carrying the war into South Vietnam's hamlets. It is to Westmoreland's credit that when faced with this issue, he decided to delete those forces from the Order of Battle. The My Lai murders then took place in March 1968, after the MACV had revised the Order of Battle to exclude irregular village and hamlet units. Calley and those guilty of similar crimes failed to observe the distinction between opponents who may be killed in combat without incurring liability for their deaths and innocents whom one may not harm under the law of war.

Numerous commentators who experienced the Vietnam War firsthand

United States v. Schultz, 18 C.M.A. 133, 39 C.M.R. 133 (1969); United States v. Grif-
fen, 39 C.M.R. 586 (1968); United States v. Potter, 39 C.M.R. 791 (1968).

251. *Schultz*, 39 C.M.R. at 135.

252. *Id.* at 138-39.

253. *Id.* at 136.

254. *Id.*

255. *Id.*

have described the law of war's inapplicability to the conflict in Vietnam and the need for more suitable rules. For example, after the My Lai murders became public knowledge, four United States sergeants wrote a letter in support of the killings.²⁵⁶ In his book, *One Morning In The War*, Richard Hammer described with startling realism the compulsion to avoid the limitations that the law of war imposed on United States soldiers in Vietnam.²⁵⁷ Telford Taylor echoed Hammer's sentiment, referring to United States combat infantrymen living by the unwritten rule that they could shoot Vietnamese without question or remorse.²⁵⁸

This treatment of civilians has historical origins. Military leaders, even United States commanders and strategists, have not always been solicitous of civilians. During the United States Civil War, Union General William Sherman said "we are . . . fighting . . . a hostile people, and [we] must make old and young, rich and poor, feel the hard hand of war, as well as their organized armies."²⁵⁹ When General Sherman burned much of Atlanta, Georgia, he defended his action as necessary to sap his enemy's logistics capability.²⁶⁰ In the late nineteenth century the Imperial German army adopted the principle that "[w]hen the most ruthless methods are considered best calculated to lead us to victory, and

256. They wrote: "You know this is a [Viet Cong] village, they are the enemy, they are a part of the enemy's war apparatus. Our job is to destroy the enemy, so kill them . . . I want to come home alive, if I must kill old men, women or children to make myself a little safer, I'll do it without hesitation. Taylor, in 3 VIETNAM WAR AND INTERNATIONAL LAW, *supra* note 133, at 388.

257. Hammer wrote:

Pretty soon you get to hate all these people. You get to fear them, too. They're all out for your ass one way or another, out to take you for everything you've got. You don't know which ones are your enemies. . . . And that all of them are something not quite human, some kind of lower order of creature. You give them names to depersonalize them, to categorize them as you've become convinced they ought to be categorized. They become dinks and slopes and slants and gooks, and you begin to say, and believe, "The only good dink is a dead dink." You echo the comments of your buddies that, "One million of them ain't worth one of us. We should blow up all those slant-eyed bastards."

Id. at 389.

258. *Id.* Taylor described the rule as the "mere gook" rule, stating that you could shoot someone who was only a "mere gook" without question or remorse. *Id.* at 388.

259. Quoted in Adler, *Targets in War: Legal Considerations*, in 3 VIETNAM WAR AND INTERNATIONAL LAW, *supra* note 133, at 301. The zealous God of the Hebrew Old Testament once gave authorization for total war on an enemy: "now go and smite Amalek and utterly destroy all that they have, and spare them not; but slay both man and woman, infant and suckling, ox and sheep, camel and ass." 1 *Samuel* 15:3.

260. P. BORDWELL, *THE LAW OF WAR BETWEEN BELLIGERENTS* 79 (1908).

a swift victory . . . then they must be employed."²⁶¹

In 1902 the Imperial German army declared legitimate the destruction of the "spiritual" power of the enemy through destruction of private property, terrorization of inhabitants and bombardment without notice.²⁶² During World War II the morale of people living in Germany and Japan become a permissible military target for the Allied powers opposed to Berlin and Tokyo. Accordingly, the Allies adopted aerial bombardment of population centers as a tactic of war. The Strategic Bombing Survey, which the United States Government undertook after World War II, noted that the purpose of fire raids on Japan was to "secure the heaviest possible morale and shock effect by widespread attack upon the Japanese civilian population."²⁶³

Gerald Adler expressed well the only moral response to this law of the jungle:

Certainly it is difficult to compel restraint in a situation of continuing death and violence. Nevertheless, the law has always recognized that not all killings are murder. Justifiable or excusable killings are tragic. War is tragic. But war and murder are not synonymous. Whether murder comes from the action of a bullet, a shell, a bomb, a tactical concept, a strategic plan, or a general philosophy, it remains murder. Murder of a child, a town, or a people need not happen. A combatant nation must be prepared to prevent murder from occurring in war or be prepared, individually and collectively, to be judged.²⁶⁴

Although concern for civilian safety principally influenced Westmoreland's decision in the Order of Battle controversy, another consideration also affected his decisions. Chief among his other concerns was the consideration of political realities. McChristian testified on the CBS documentary and during Westmoreland's trial that Westmoreland had refused to approve McChristian's proposal to increase the numbers reported for self-defense and secret self-defense organizations because to do so would have been a "political bombshell."²⁶⁵ The memorandum of a discussion between Westmoreland and McChristian notes that Westmoreland and McChristian discussed the subject of how a public understandably worried about the war's progress would perceive higher

261. Adler, *supra* note 259, in 3 VIETNAM WAR AND INTERNATIONAL LAW, *supra* note 133, at 289.

262. *Id.*

263. *Id.* at 321.

264. *Id.* at 326.

265. See N.Y. Times, Nov. 17, 1984, at 46, col. 4; B. BREWIN & S. SHAW, *supra* note 6, at 318.

numbers.²⁶⁶

It is not inappropriate for a senior military commander to take political realities into consideration. General Eisenhower became senior United States General in the European theater in World War II precisely because he was far more alert than other generals to political issues and needs.²⁶⁷ Since war is the extension of politics by other means, as Clausewitz taught, politics provides the medium in which prospects for success in war are cultured. Commanding generals ignore politics to the peril of their missions.

At Westmoreland's trial, plaintiff's counsel introduced cables from Westmoreland to his immediate superior, Admiral Sharp in Honolulu, to show that Westmoreland had wanted exploration and analysis of the revised figures for the self-defense forces to avoid embarrassment when they were published.²⁶⁸ At trial Westmoreland acknowledged that when McChristian had proposed in May 1967 to increase the Order of Battle estimates, a second concern arose in his mind in addition to the legality of such a characterization of those individuals: if the cable went out without a press briefing to explain such a change in the Order of Battle, the higher estimates would mislead many people and they would misconstrue it as a revelation with inauspicious implications for the United States war effort.²⁶⁹ Sustaining the confidence of soldiers and the home front is vital for any commander. Embarrassments that sap the will to persevere lead to defeat.

However, one must separate the issue of public perception of the Order of Battle controversy from the issue of how to classify members of the self-defense and secret self-defense organizations under the law of war. The political ramifications in the fall of 1967 of the impression that sudden increases in Communist capabilities were occurring were obvious and negative. In mid-July of that year the Gallop Poll showed for the first time that a majority of United States citizens questioned (52%) disapproved of the war as President Johnson was directing it.²⁷⁰ Only 34% of those polled believed that the United States and the South Vietnamese were making progress in the war. By early November of that year 57% of those polled reported that they wanted no United States involvement

266. Joint Exhibit No. 1519, *supra* note 218.

267. S. AMBROSE, *THE SUPREME COMMANDER, THE WAR YEARS OF DWIGHT D. EISENHOWER* 304-08, 311, 323-24 (1978); E. SIXSMITH, *EISENHOWER AS MILITARY COMMANDER* 111, 115 (1973).

268. N.Y. Times, Nov. 17, 1984, at 46, col. 3.

269. Cabbage, *supra* note 4, at 69.

270. *The War: Drift & Dissent*, TIME, Aug. 11, 1967, at 9.

in future Vietnam-type conflicts.²⁷¹

In addition, press coverage of the war was turning increasingly hostile.²⁷² Westmoreland, his deputy General Creighton Abrams and their civilian superior, Ellsworth Bunker had no illusions about the ability of the press to understand and report fairly the subtle permutations of a complex struggle to an increasingly divisive domestic audience. In consultation with Ambassador Bunker, Westmoreland worried about how best to report the decision reached in the Order of Battle Controversy.

On August 21, 1967, Abrams cabled the Joint Chiefs of Staff in Washington his worry that:

[i]f the [Self-defense and Secret Self-defense] strength figures are included in the overall enemy strength, the figure will total 420,000—431,000. This is in sharp contrast to the current overall strength figure of about 299,000 given to the press here . . . We have been projecting an image of success over the recent months and properly so. Now, when we release the figure of 420-432,000, the newsmen will immediately seize on the point that the enemy force had increased about 120-130,000. All the available caveats and explanations will not prevent the press from drawing an erroneous and gloomy conclusion as to the meaning of the increase. All those who have an incorrect view of the war will be reinforced and the task will become more difficult.²⁷³

In November 1967, as the Government released the Special National Intelligence Estimate, Bunker brought a similar concern to the attention of the White House. He warned of

the devastating impact if it should leak out (as these things often do) that despite all our success in grinding down the [Viet Cong and North Vietnamese] here [statistics showed] that they are really much stronger than ever. Despite all caveats, this is the inevitable conclusion which most of the press would reach.²⁷⁴

In November 1967, as Westmoreland and Bunker returned to Washington to report publicly on the war, resolution of the Order of Battle controversy was presented to the press in Saigon. Previously, United States officials had granted *Time* reporters access to the same captured Communist documents that had led to the decision to increase the esti-

271. *The War: Voice from the Silent Center*, TIME, Nov. 3, 1967, at 16.

272. See generally P. BRAESTRUP, *BIG STORY: HOW THE AMERICAN PRESS AND TELEVISION REPORTED AND INTERPRETED THE CRISIS OF TET 1968 IN VIETNAM AND WASHINGTON* (1977).

273. B. BREWIN & S. SHAW, *supra* note 6, at 9.

274. N.Y. Times, Oct. 9, 1984, at B8, col. 4.

mates for the self-defense and secret self-defense organizations.²⁷⁵ *Time* presented a cover story entitled "Inside the Viet Cong," which described the degree of control the NLF had over South Vietnam. The magazine reported that only 60% of South Vietnam's population was under Government control and that the Communists controlled "vast areas of the countryside."²⁷⁶ The article described how the NLF used agents for terror and tax collections. It asked how the United States and the South Vietnamese could secure the countryside. It also depicted accurately Westmoreland's strategy for the South Vietnamese army to concentrate pacification efforts in the populated rural areas.²⁷⁷ Most significantly, the article would not have misled a reader as to the serious threat still challenging the United States and South Vietnam as of late 1967. As the article illustrates, it would be inaccurate to assert that Westmoreland's deletion of the self-defense and secret self-defense organizations from the Order of Battle, a classified document not released to the public, resulted in official mischaracterization of the degree of difficulty remaining for the pacification effort.

Westmoreland and Bunker did not use Order of Battle information in their public remarks to sustain domestic political support for the war effort. *Time* described their message as "not of a clearly foreseeable end to the war but of heartening movement toward that end."²⁷⁸ *Time* quoted Westmoreland and Bunker as saying that of South Vietnam's population, 68% was now under Government control, a gain of 12% in the year, but 17% was under the Communist control and 15% lived in contested areas.²⁷⁹ The figure for the Communist-controlled population would give the Communists ready access to nearly two million people, hardly a negligible threat. To reassure the United States people, Westmoreland and Bunker pointed to the decrease in recruitment of Communist soldiers and the better performance of the South Vietnamese Army.²⁸⁰ *Newsweek* quoted Bunker as placing reliance for optimism on the new constitution and presidential government recently elected in Saigon and on progress in pacification.²⁸¹ Westmoreland said he had reached the point where the end begins to come into view: the pullout of United States troops could begin in two years.²⁸² Westmoreland

275. *The War: The Organization Man*, TIME, Aug. 25, 1967, at 21.

276. *Id.*

277. *Id.* at 21-25.

278. *The War: Progress*, TIME, Nov. 24, 1967, at 22.

279. *Id.*

280. *Id.* at 23.

281. *Live and In Color—the Real LBJ*, NEWSWEEK, Nov. 27, 1967, at 23.

282. *Id.*

predicted:

[T]he Communist infrastructure will be cut up and near collapse; the Vietnamese Government will prove its stability, and the Vietnamese Army will show that it can handle the Viet Cong; [United States] units can begin to phase down as the Vietnamese Army is modernized and develops its capacity to the fullest; the military physical assets, bases and ports will be progressively turned over to the Vietnamese.²⁸³

His prediction came true. Under President Richard Nixon, withdrawal of United States combat forces began in 1969.

Deceit to sustain morale is unacceptable. CBS alleged that Westmoreland had engaged in deceit when he threw roadblocks in the way of a quick expansion of the Order of Battle. If, to the contrary, he had other policy reasons to question presentation of the Order of Battle, then one cannot consider deceit to be his principal motivation.

Significantly, Westmoreland's decision in the Order of Battle controversy anticipated additions to the law of war made in 1977 at a United Nations conference in Geneva. The Conference added provisions to the Geneva Conventions in the form of two protocols (Additional Protocols I and II).²⁸⁴ Additional Protocol I gives belligerent status, and thus the rights and duties of international law, to forces fighting wars of national liberation, which it defines as armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.²⁸⁵ From the perspective of the Communists in the Vietnam War and their sympathiz-

283. *Beginning of the End?*, NEWSWEEK, Dec. 4, 1967, at 28.

284. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Dec. 12, 1977, U.N. Doc. A/32/144, Annexes 1 & 2, reprinted in 16 I.L.M. 1391 (Protocol I), 1442 (Protocol II) (1977); Official Document Section, 72 AM. J. INT'L L. 457 (Protocol I), 502 (Protocol II) (1978) [hereinafter Additional Protocol I and II]. See K. SUTER, AN INTERNATIONAL LAW OF GUERRILLA WARFARE: THE GLOBAL POLITICS OF LAW-MAKING (1984). See also M. BOTH, K. PARTSCHE & W. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICT (1982) (analysis of the protocols); Feith, *Law in the Service of Terror—The Strange Case of Additional Protocol I*, 1 NAT'L INTEREST 36 (1985); Solf, *A Response to Douglas J. Feith's Law in the Service of Terror—The Strange Case of the Additional Protocol*, 20 AKRON L. REV. 261 (1986); Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901 (1986); Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109 (1985); Aldrich, *Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I*, 26 VA. J. INT'L L. 693 (1986).

285. Additional Protocol I, *supra* note 284.

ers, the Vietnam War would have been such a conflict.

Article 45 of Additional Protocol I provides that any persons "who take part in hostilities and fall into the power of an adverse party shall be presumed to be a prisoner of war."²⁸⁶ Article 48 mandates that "[i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."²⁸⁷ Article 50(3) specifies that "[t]he presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."²⁸⁸

As applied to the Order of Battle controversy, these provisions would require that commanders not consider members of the self-defense and secret self-defense to be combatants. Only if the units carried arms openly in military engagements could commanders consider them to be combatants.²⁸⁹ Article 51(3) makes this point very clear: "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."²⁹⁰

Additional Protocol II provides protection for the victims of non-international armed conflicts. It affirms the right of states to use all legitimate means to maintain or reestablish law and order and to defend their national unity and territorial integrity. Under article 4 of Additional Protocol II, all persons who do not take part or who have ceased to take part in hostilities are entitled to respect and human treatment.²⁹¹ Article 13(3) repeats the provision of Article 51(3) of Additional Protocol I that "civilians shall enjoy the protection afforded by this Part unless and for such time as they take a direct part in hostilities."²⁹² The 1977 additions to the law of war thus explicitly preserve the principle of distinction protective of civilians, the same principle that was in Westmoreland's mind when he questioned the belligerency status of the self-defense and secret self-defense units in the Vietnam War.

286. *Id.* art. 45.

287. *Id.* art. 48.

288. *Id.* art. 50(3).

289. *Id.* art. 44(3)a.

290. *Id.* art. 51(3).

291. Additional Protocol II, *supra* note 284, art. 4.

292. *Id.* art. 13(3).

VII. CONCLUSION

Westmoreland's decision to delete the self-defense and the secret self-defense units from the MACV's Order of Battle was a principled one, not an indefensible deceitful one. The decision was the only moral and humane alternative given the circumstances of the controversy. That CBS should have overlooked this aspect of the dispute between Westmoreland and Samuel Adams does not speak well for the network's thoroughness or for its sensitivity to the people of rural South Vietnam.

It may appear Panglossian to apply the rule of law to the conduct of war—even to a foreign-provoked, civil-war surrogate insurgency like the Vietnam War. But is the alternative choice of wanton use of force, with battlefield commanders under no restraint, more acceptable? We should commend General Westmoreland for his efforts, limited by circumstances and human nature as they were, to adhere to the norms of restraint in the most difficult undertaking in recent United States history.

