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

STEPHEN B. YOUNG

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Nine years after the 1973 Paris Peace Agreements ended US participation in the Vietnam War, CBS television reporter Mike Wallace publicly accused General William Westmoreland, the former commander of US forces in Vietnam, of serious and inexcusable deceit with regard to Westmoreland's official conduct during that war. During a CBS television documentary program aired on 23 January 1982, Wallace claimed that Westmoreland had engaged in a conspiracy to suppress and alter critical intelligence concerning the enemy.[1] CBS alleged that Westmoreland had deceived not only the American people but also his superiors on the Joint Chiefs of Staff, the US Congress, and President Lyndon Johnson when Westmoreland adopted an estimate of enemy strength—an Order of Battle—that was lower than it might have been had Westmoreland included certain communist civilian organizations in the tabulation.[2]

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 was, CBS alleged, Westmoreland had intentionally nourished hope among decisionmakers in Washington that the South Vietnamese and their US allies were on the 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.

As I will contend in this article, however, the law of war obligated Westmoreland to accept lower numbers for the military Order of Battle—the OB—because the persons under consideration for inclusion were arguably

noncombatant civilians entitled to the protections that the law of war reserves for nonbelligerents. It is important to note that neither CBS nor Westmoreland's other critics, on whom CBS relied for the accuracy of its allegations, ever expressed concern over the application of the law of war to the OB dispute. But Westmoreland did express such concern, and this concern guided his decisions. Unfortunately, however, the law of war aspect did not arise as an issue during the trial itself.

Background of the Order of Battle Situation

Part-time and unarmed communist supporters living in rural villages and hamlets had been organized into units denominated as youth assault teams, self-defense forces, and secret self-defense forces. Self-defense units undertook various security duties in communist-controlled areas. 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.

Well prior to May 1967 when the Order of Battle dispute arose, MACV had included the self-defense and secret self-defense forces in its OB estimates of the total enemy effort. The number of individuals MACV had ascribed to those part-time forces had not changed in several years, however, because the staff did not take them seriously. MACV had taken its original OB 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 OB information from the French expeditionary forces that had fought the Vietnamese communists from 1946 to 1954. 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 an OB. MACV had taken for granted the inclusion of these forces in its OB and had not analyzed its legality under the law of war until General Westmoreland did so in the summer of 1967.[3]

In May of that year Major General Joseph A. McChristian, the MACV J-2, proposed to his commander, General Westmoreland, that MACV

Stephen B. Young is an attorney with the law firm of Hillstrom Bale Anderson, Young, in Minneapolis, Minnesota. He received his A.B. degree from Harvard College in 1967 and the J.D. degree from Harvard Law School in 1974. Mr. Young is a Visiting Professor of Law at the University of Minnesota Law School and a Professor of Law at Hamline University School of Law. During the Vietnam War he was a deputy district adviser and then chief, village government office, with MACV/CORDS. He was also special assistant to the minister/counselor for economic affairs in the US Embassy.

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sharply increase OB estimates to account for new information regarding the self-defense and secret self-defense units. Westmoreland disagreed, stating that the OB should identify participants in self-defense and secret self-defense units only if they were combatants, a classification precondition that the law of war required. Westmoreland's rejection of McChristian's proposal set in motion a series of contentious meetings among military subordinates of Westmoreland, officers in the Pentagon, and civilian analysts at the CIA to resolve the issue of how best to report the strength of all enemy forces in South Vietnam. These bureaucratic struggles resulted in the adoption of Westmoreland's perspective: MACV did not include the self-defense and secret self-defense units in the Order of Battle because their members were not legally combatants. However, mention of the units' possible assistance to the sanctioned enemy was included.[4] That Westmoreland knowingly advocated presenting an OB smaller than it might have been had it included the self-defense and secret self-defense units is, of course, freely acknowledged.

Removing the self-defense and secret self-defense organizations from the OB did not imply that the United States would ignore these units' potential and actual contributions to the enemy's war effort. MACV removed the units from the scheme of classification not to hide such units from analysis but to place them in another reporting system, the Hamlet Evaluation Survey, designed as part of the CORDS (Civil Operations Rural Development Support) program by Robert Komer especially to measure progress and regression in the guerrilla war. The Hamlet Evaluation Survey attempted to measure the respective degrees of government and enemy 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 total war effort required use of both the OB and the Hamlet Evaluation Survey: one to measure results in the shooting war fought against main force communist units and the other to measure the pace of pacification and nation-building.

In its television documentary, 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 US public. Although CBS presented evidence that political reasons figured in Westmoreland's motivation in deleting the self-defense and secret self-defense organizations from the OB, Westmoreland regarded CBS's position as culpubly misleading. Contesting the published characterization of his motivations, he sued CBS for defamation.[5] During the trial, Westmoreland's counsel did not attempt to introduce the law of war obligations as an explanation for his behavior. They concluded it was sufficient merely to deny the CBS allegations but failed to supplant them with alternate explanations for Westmoreland's conduct.

As Westmoreland's legal team prepared for trial, I suggested in a phone conversation with Dan M. Burt, lead attorney for the General, that the law of war be introduced to the jury and to the public at large as the real explanation for the decision taken by General Westmoreland during the Vietnam War. Burt rejected my advice. First he stated emphatically that he would win the case by exploiting weaknesses in CBS's position. No affirmative defense of Westmoreland's actions would be necessary he had concluded. Second, Burt argued that introduction of the law of war would permit CBS to have a public relations field-day exploiting the My Lai murders of civilians as typical of combat under Westmoreland's command. Burt did not want his case associated with My Lai and its attendant emotions and misperceptions.

In my judgment as a lawyer, Burt was mistaken in his conclusions. His failure to introduce the law of war at the trial cost General Westmoreland full recovery in that lawsuit.

The Westmoreland-CBS trial ended in a compromise settlement. The terms of the settlement were sufficiently vague as to leave unresolved in the public mind the question of 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 OB controversy does indeed exist. It lies in the reasons why Westmoreland actually resisted the effort to have the OB 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 the general's motivation in arguing for lower figures in the OB. Renata Adler, in her account of the trial, 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 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.[6]

What Renata Adler surmised to be a logical and moral truth goes directly to the heart of the law of war, which bound Westmoreland in his capacity as commander of US 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.

The Complex Status of Enemy Forces

When US 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 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. The Vietnam War, however, did not conform to the neat principles and distinctions that Western European sovereigns and their legal advisors had drawn up previously to govern conflicts between unified and centralized nation-states. The war had begun as an insurgency ostensibly organized by a political movement alternately called the National Liberation Front for South Vietnam (NLF) or the Viet Cong (VC), not as an invasion by an army of conventional soldiers in uniform, openly carrying arms. The communists secretly smuggled political cadre, military commanders, and arms and materiel into South Vietnam from North Vietnam, but they instigated few open battlefield engagements. Ambushes, nighttime hit-and-run attacks on government posts, assassinations, and political subversion constituted the principal means of attack against the South Vietnamese government during this early period dating from 1959.[7]

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 19th-century Europe developed. These states used only uniformed, separately constituted armies to conduct warfare. In the eyes of a guerrilla leadership, however, *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 thus solicited by the insurgent leadership. Insurgency makes it difficult to know just who is the government's enemy.[8] It thus blurs the distinction between civilians and belligerents. A guerrilla fighter can be more a belligerent than a civilian, but he can also be less of a belligerent than an armed and uniformed soldier serving full-time in dedicated military units that billet and feed him.

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, maintain a monopoly on the means of organized group violence within their respective territories. The law of war presumes that local militias, private armies, gangs, and feudal lords with armed personal retainers no longer exist in the modern sovereign state.[9] Thus, only two statuses during war are legally

available under the law of war: (1) service in the organized armed forces of a state and (2) inactivity as a civilian.

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 1 November 1963 by South Vietnamese dissidents, political chaos descended on that country for several years. Taking advantage of the deteriorating government position, NLF units grew in number and size, fighting less in the guerrilla mode and more in conventional battles from fixed locations with heavy weapons. Resupply and support services for the NLF forces, now more like an army than ever, became more cumbersome.[10]

In late 1964, eager for victory, the North Vietnamese began sending units of their own army into South Vietnam for the coup de grace—seizure of the mountain highlands in the middle of the country. To thwart the communist design, President Johnson in July 1965 decided to commit 44 US combat battalions, with appropriate support units, to the war effort; thereafter, he sent Westmoreland additional forces as needed to prevent the communist conquest of South Vietnam.[11]

At that time enemy forces were organized in a variety of units differentiated by function, status, national affiliation, etc. Some units consisted of highly trained and heavily armed men serving as full-time assault troops. Of these units, some were solely commanded and manned by North Vietnamese, whom the North had recruited, trained, and sent from North to South Vietnam. In many cases these units were part of the People's Army of North Vietnam, retaining their unit identification after they entered the South. Other such mainforce units consisted of South Vietnamese men recruited and trained in South Vietnam and led either by North Vietnamese officers or by South Vietnamese loyal to the Northern leadership. These South Vietnamese units most frequently carried names that the communist-led but nominally independent NLF had given them. In addition, the enemy organized rear-echelon service units to supply food, ammunition, transportation, and communications to the armed units assigned to permanent combat responsibilities.[12]

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 cover.[13] The NLF also organized unarmed units to assist their guerrilla bands in controlling the rural population. As mentioned earlier, such auxiliary units were called

self-defense, secret self-defense units, and youth assault teams. Their service to the cause was nominal; many of them were women, children, and the elderly.[14] It was these auxiliary units that became the crux of the Order of Battle controversy.

An unarmed, non-military structure of political cadre directed the entire enemy effort. This cadre included secret adherents living undetected amidst civilian populations and individuals assigned public roles in NLF-controlled villages. The cadre set goals for NLF efforts, shaped their propaganda campaigns, recruited new members for the NLF from among uncommitted South Vietnamese, and collected money and supplies to fuel the communist war effort.[15]

Supporters of the integrated communist war effort thus included everyone from completely hidden and unknown civilian spies and sympathizers through unarmed gofers 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.[16]

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 was 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 laws of South Vietnam, Article 3 of the Geneva Conventions, and US laws regulating the conduct of American soldiers would apply? Legal commentators were unable to revolve this issue. Two law review notes written in 1965, for example, provided no clear answer.[17]

Several participants in the Vietnam conflict resolved any doubts as far as their own actions were concerned. Unilateral declarations by several governments concerning their forces brought into effect certain applications of the Geneva Conventions. On 11 June 1965, the International Committee of the Red Cross, 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 the four Geneva Conventions.[18] The Red Cross noted that "parties 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."[19]

On 10 August 1965, 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."[20] But Secretary Rusk also noted 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.[21]

In addition to Geneva Convention constraints, the nature of the US political presence in Vietnam also constrained General Westmoreland's actions as a commander. US forces were present in Vietnam at the invitation of the South Vietnamese government, and they were subordinate to its sovereignty.

On 11 August 1965, South Vietnam's Foreign Minister, Tran Van Do, replied to the Red Cross 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 Red Cross, and (3) provide "the most humane treatment" to Viet Cong prisoners, who were communist supporters with South Vietnamese citizenship.[22]

Nothing in Field Manual 27-10, *The Law of Land Warfare*, or the provisions of the Hague and Geneva Conventions gave Westmoreland clear rules to follow in the novel combat situations that he faced when US forces arrived to fight in the fluid, complex, partially guerrilla, partially conventional war then being waged in South Vietnam. The Hague and Geneva Conventions, as we have noted, 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 used by the insurgent enemy. Nevertheless, Westmoreland took numerous important steps to ensure that his forces would observe the principle of distinction basic to the law of war.[23]

The Order of Battle Controversy

In late 1966, Samuel Adams, a CIA analyst in Washington, 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. Adams later wrote in *Harper's* magazine that his discovery was "the biggest intelligence find of the war—by far."[24] To Adams, "the most important figure of all was the size of the enemy army—that order of battle number, 270,000."[25] If one added in Adams' numbers for the irregular component to the enemy OB, the size of the enemy force doubled. "We'd be fighting a war twice as big as the one we thought we were fighting."[26] Continuing, Adams claimed that "the 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 soldiers."[27] Adams reported his views to his superiors, expecting great things to happen. To his chagrin, none did. 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."[28]

Adams never addressed the question of whether all the persons included in the new documents deserved classification as enemy troops under the law of war. He demanded of 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."[29] As noted earlier, in pursuing a strategy of guerrilla warfare the North Vietnamese did not acknowledge as valid the principle of distinction between belligerents and civilians, though for propaganda purposes they hypocritically accused US forces of committing crimes against humanity in violation of the principle of distinction. The alleged combatants celebrated by Adams were residents of hamlets and villages who may well have been unarmed supporters or part-time supporters, and possibly not even that.

Adams' article also failed to indicate whether he had considered the separate reportage on enemy numbers attendant upon the separation of functions between the combat effort and the pacification program. He apparently did not consider the dubious propriety of including in the OB the effectiveness of the same self-defense and the secret self-defense organization members already included in the Hamlet Evaluation Survey.[30]

As we saw earlier, the actual controversy over how MACV should define the enemy in the Vietnam War and estimate his strength arose in May 1967 when Major General McChristian 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. In February 1967, McChristian and his subordinate responsible for preparing the OB, Colonel Gains Hawkins, attended a conference in Honolulu to discuss Adams' perspective on how to define the enemy. Hawkins agreed that MACV's reported numbers were too low. He said, "You know, there's a lot more of those . . . bastards out there than we thought there were."[31]

The participants at the conference reached the conclusion that while MACV could not measure with precision the number of irregular fighters, it should account for such fighters in the Order of Battle.[32] Legal considerations did not enter their calculus. Nor McChristian's. He considered the guerrilla fighter to be the enemy just as he considered the regular 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.[33]

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

In mid-May 1967, as he was about to end his tour as MACV's J-2, McChristian asked Westmoreland to approve a cable to Washington increasing the numbers in the OB as proposed by McChristian's staff to reflect the newly studied intelligence on irregulars and political cadre. General Westmoreland refused to approve the cable and asked for a briefing on the issue.[34]

A memorandum issued after the briefing (used as Exhibit 1519 in the *Westmoreland* v. *CBS* trial) stated:

> The 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 [Information Officer] 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.[35]

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."[36] Westmoreland recalled that he wanted to "keep book" only on the people he wanted his troops to destroy. The armed Viet Cong were the fair game.[37]

Remarkably, when confronted with the controversy over the proper place in the OB 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 required different reportage and treatment than that designated for belligerents.[38] 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 nonmilitary 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.[39]

Follow-up briefings on how to classify members of the self-defense and secret self-defense forces occurred on 28 May and 14 June 1967.[40] Westmoreland's approach to the nature of the communist threat to South Vietnam and how best to contain it reflected his strategic thinking. It refused to be driven by the statistical presentations contained in McChristian's OB 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 wrote:

> 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 of other elements.[41]

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 OB to be a measure of the enemy's capability to wage war using all persons at its disposal, whether military or civilian. MACV, on the other hand, considered the OB 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, or provide them with an excuse, to kill civilians in violation of the law of war. Major General Phillip B. Davidson, Jr., who succeeded McChristian, agreed with Westmoreland that there was no necessity to include the self-defense, secret self-defense, and political cadre in MACV's OB.[42]

To resolve the dispute over whom the OB should include, a special national intelligence estimate was ordered for presentation to President Lyndon 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 the CIA's George Carver, Adams' supervisor. Robert Komer, founder of the new CORDS organization conceived to achieve better results in pacification, suggested the form of the compromise to Carver. Komer believed deeply that US combat forces were not the best answer—neither militarily nor politically—to the problems posed by the enemy organization in the countryside. He believed that the OB 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 OB, which would reflect only the threat from enemy ground forces. In this way Westmoreland would have a "clean" conventional OB in compliance with the law of war, and the pacification program would have its own unique index—the Hamlet Evaluation Survey previously discussed—to measure results in what was called "the other war."[43]

Under this approach, the estimates of communist irregulars would increase, but potential noncombatants in the insurgency base would not appear in the military OB. At his trial Westmoreland testified that he sought the deletion of self-defense and secret self-defense forces because he had "wanted to purify the so-called order of battle so that it would be an order of battle in fact."[44] He stated: "I felt it was important that we sort out the enemy organization so that there would be no ambiguity in whom we were fighting, with cognizance of the fact that there were other elements in South Vietnam associated with the communist cause."[45]

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.[46]

MACV announced this result publicly at its headquarters on 24 November 1967, including the fact that it would now remove self-defense and secret self-defense units from the Order of Battle.[47] The briefing presented enemy capabilities as follows: regular forces of 118,000, consisting of 54,000 men in North 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.[48] The briefing continued: "Information from the documents captured this year strongly

suggests that the guerrilla forces have been considerably larger than we had believed."[49] The old OB had included 112,000 "irregulars," *including potential noncombatant forces*, while the new OB included 70,000 to 90,000 "guerrillas"—a superficial decrease in communist combatant strength.[50]

The total number of enemy reported in the OB thus remained approximately the same, but if one were to add in the numbers provided for self-defense forces, secret self-defense forces, and political cadre (also separately reported as intelligence information available to South Vietnam's national police and implicitly reported in the population categories established by the Hamlet Evaluation Survey), the total manpower available to the enemy was higher than ever reported before.[51] The reporting of enemy combatant soldiers in the OB and less-certain belligerents elsewhere might have misled a casual observer, but it did not mislead those fighting the war. In addition, as we have had frequent occasion to remark, keeping separate lists honored an important principle of the law of war. The CBS documentary maintained, however, that deletion of the self-defense and secret self-defense forces was "a new tactic" of Westmoreland to keep enemy strength figures down.[52] The documentary claimed that Westmoreland "suddenly wanted [those figures] treated as if they didn't exist."[53]

Removing persons from the OB 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; 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.

Westmoreland was, of course, 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, and South Vietnamese police were seeking out enemy espionage and sabotage networks. On the US side, Robert Komer's new organization—CORDS—was being put into place under Westmoreland's supervision to coordinate US support for pacification separately from the main force fighting and from the economic aid mission. Indeed, it was the CORDS staff that invented the system of estimating enemy strength in the struggle for pacification—what we have been referring to as the Hamlet Evaluation Survey. The system served its purpose well by permitting senior US officials in Saigon and Washington to assess the progress being made in building viable civil communities in rural Vietnam.[54]

While no doubt Westmoreland's decision in the OB controversy was an incidental factor helping to temper domestic controversy in the United States at the time, it was indeed politically necessary in Vietnam itself. The principal US objective in the war was to withdraw all American troops from Vietnam and to reintegrate disaffected South Vietnamese under a representative government maintaining independent sovereignty in South Vietnam. To achieve this end, it was mandatory that the United States and South Vietnam avoid driving the rural population to fanatic and unyielding support for the enemy. Westmoreland's decision not to summarily classify as belligerents, and thereby unnecessarily stigmatize and antagonize thousands of rural Vietnamese, was in keeping with this policy.

On 27 December 1967, MACV issued Directive 381-46 concerning the criteria for classification and disposition of detainees.[55] The directive stated that US 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."[56] The directive instructed that US forces should classify a detained member of the self-defense or secret self-defense as a civil detainee if the offending activity 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.[57] US forces were to release such 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. Misclassifying a civilian person as the enemy or a civilian residence as an enemy facility provoked wanton and illegal destruction in a number of cases. Had Westmoreland given in to such temptation and approved the addition of the self-defense and secret self-defense forces to the OB in mid-1967, he would have targeted thousands of rural South Vietnamese for forcible suppression.

Tragically, despite precautions, such savagery occurred on 16 March 1968, when US soldiers killed several hundred South Vietnamese civilians in the hamlet of My Lai.[58] Had Westmoreland included the self-defense and secret self-defense participants in the Order of Battle, he would have provided those guilty of the My Lai massacre with a legal defense for their actions. As it was, at his trial for ordering the killings, Lieutenant William Calley was reduced to arguing 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.[59]

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Contrary to Calley's arguments, the appellate board reviewing Calley's trial ruled 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 could not be collectively branded with belligerent status. [60] The appellate board ruled that summary executions of persons merely under suspicion are illegal under Article 118 of the Uniform Code of Military Justice. The military court thus properly found Calley guilty of the murder of South Vietnamese persons.

Military courts reached similar results in other cases where US soldiers were tried for killing rural Vietnamese in contested parts of the country.[61] In *United States* v. *Schultz*, the defendant argued that 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.[62] 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 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.[63] Given 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.[64]

Prior to Westmoreland's decision of November 1967, MACV and its subordinate commands had included the self-defense and secret self-defense units on their OBs. Thus, from the introduction of US ground combat troops in South Vietnam in 1965 until November 1967, the OB offered a pretext for carrying the war into South Vietnam's hamlets. It is to Westmoreland's credit that when this issue surfaced, he decided to delete those forces. Calley and those guilty of similar crimes failed to observe the distinction between enemies who may be killed in combat without incurring liability for their deaths and innocents whom one may not harm under the law of war.

True, numerous commentators who experienced the Vietnam War firsthand have maintained that the law of war was unsuited to the conflict in

Vietnam and that more suitable rules were needed. Telford Taylor acknowledged the sway of the "mere gook" rule, that unwritten injunction whereby combat infantrymen could shoot Vietnamese without question or remorse.[65]

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.[66]

Although concern for civilian safety principally influenced Westmoreland's decision in the OB controversy, another consideration also affected his decision—political realities in the United States. McChristian stated on the CBS documentary and testified during the 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."[67] The memorandum of a discussion between Westmoreland and McChristian notes that they discussed the subject of how a public understandably worried about the war's progress would perceive higher numbers.[68]

As is well-established, however, it is not inappropriate for a senior military commander to take political realities into consideration in the course of his duties. General Eisenhower became senior US commander in the European theater in World War II precisely because he was far more sensitive than other generals to the political aspects of his position.[69] 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, his counsel introduced cables from the general to his immediate superior, Admiral Sharp in Honolulu, to show that Westmoreland had wanted an adequate analytical context for the revised figures for the self-defense forces to avoid embarrassment when they were published.[70] At trial Westmoreland acknowledged that when McChristian had proposed in May 1967 to increase the OB 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 OB, many people would construe the higher estimates as inauspicious for the US war effort.[71] 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 OB controversy from the issue of how to classify members of the self-defense and secret self-defense organizations under the law of war. The negative political ramifications in the fall of 1967 of any public impression that sudden increases in enemy capabilities had occurred were obvious. In mid-July of that year a Gallup Poll showed for the first time that a majority of US citizens questioned (52 percent) disapproved of the war as President Johnson was directing it.[72] Only 34 percent 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 percent of those polled reported that they wanted no US involvement in future Vietnam-type conflicts.[73]

In addition, press coverage of the war was turning increasingly hostile.[74] Westmoreland, his deputy General Creighton W. Abrams, Jr., and their civilian superior, Ambassador Ellsworth Bunker, had no illusions about the ability of the press to understand and report fairly to an increasingly divided domestic audience the subtle permutations of a complex struggle. In his consultation with Ambassador Bunker, Westmoreland expressed worry about how best to report the decision reached in the OB controversy.

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

> If 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.[75]

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."[76]

In the face of these apprehensions, Westmoreland and Bunker returned to Washington in November 1967 to report on the progress of the war.

At the same time, the decision on the Order of Battle question was announced to the press in Saigon. Bunker and Westmoreland did not use OB information in their public remarks in the United States to sustain domestic political support for the war effort. Nor did they understate the magnitude of the threat. *Time* reported Westmoreland and Bunker's statement that of South Vietnam's population, 68 percent were under government control, a gain of 12 percent in the year, but that 17 percent were under communist control and 15 percent lived in contested areas.[77] The figure for the communist-controlled population would give the enemy 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 enemy soldiers and the better performance of the South Vietnamese army.[78] *Newsweek* reported that Bunker found grounds for optimism in the new constitution and presidential government recently elected in Saigon and in progress in pacification.[79] Westmoreland said they had reached the point where the end begins to come into view: the pullout of US troops could begin in two years.[80] Elaborating, he predicted:

> The 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; [US] 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.[81]

Under President Richard Nixon, withdrawal of US combat forces did indeed begin two years later, in 1969. Westmoreland had indulged in no deception of the American people.

Significantly, Westmoreland's decision in the OB controversy anticipated additions to the law of war made in 1977 at a United Nations conference in Geneva. 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."[82] Article 48 mandates that "in 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."[83] Article 50(3) specifies that "the 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."[84] As applied to the OB 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 such.[85]

Conclusion

Westmoreland's decision to delete the self-defense and the secret self-defense units from MACV's Order of Battle was a principled one, not one based on deceit. The decision was the only moral and humane alternative, given the laws of war and the circumstances of the conflict. That CBS should have overlooked this aspect of the dispute between Westmoreland and Samuel Adams does not speak well for the network's investigative thoroughness, its analytical rigor, its fairness, or its elementary concern for human life in the ambiguous circumstances of the war in 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 of wanton use of force, with battlefield commanders under no restraint, more acceptable? We should commend Westmoreland for his efforts, limited by circumstances and human nature as they were, to adhere to the norms of restraint in the most difficult military undertaking in recent United States history. Further, in his clear-sighted perception of the law of war's applicability even in the murky circumstances of guerrilla conflict in the Third World, General Westmoreland serves as an instructive example for the field commander of the future. That commander must perforce lend an attentive ear to his staff judge advocate and political adviser even as he gives rein to his J-2 and J-3. Only thus can he execute his operational mission within the norms of war established by civilized states.

NOTES

This essay is an extensively abridged adaptation of a monograph under the same title appearing in *Vanderbilt Journal of Transnational Law*, 21 (no. 2, 1988), 219-79. For a fuller exposition of background material, legal argumentation, and documentation, consult the original.The account of my advice to Dan M. Burt regarding trial strategy (on the fourth page of this article) was not in the original monograph.

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

2. Renata Adler, *Reckless Disregard* 5-6 (1986). 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.

3. See Major T. L. Cubbage, "Westmoreland v. CBS: Was Intelligence Corrupted by Policy Demands?" 8-14. Paper presented at the Intelligence and Military Operations Conference, U.S. Army War College, May 1987.

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

5. *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).

6. Adler, *supra* note 2, at 36.

7. 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).

8. See F. West, *The Village* (1972); W. Andrews, *The Village War: Vietnamese Communist Revolutionary Activities in Dinh Tuong Province 1960-1964* (1973).

9. 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).

10. U.S. Department of State, Pub. No. 7839, *Aggression From the North: The Record of North Viet-Nam's Campaign to Conquer South Viet-Nam*14-15 (February 1965).

11. 3 *Pentagon Papers* 471, 476, 477 (Sen. Gravel ed. 1971).

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

13. *Id.* at 4-6.

14. *Id.*

15. *Id.* at 7-8.

16. See J. Bond, *The Rules of Riot: Internal Conflict and the Law of War* 31-39 (1974).

17. Note, "The Geneva Convention and the Treatment of Prisoners of War in Vietnam," 80 *Harvard Law Review* 851, 868 (1967). See generally 2 *The Vietnam War and International Law* (R. Falk ed. 1969); note, *The Geneva Convention of 1949: Application in the Vietnamese Conflict, 5 Virginia Journal of International Law* 243, 249 (1964). For a fuller discussion of the implications of the law of war, see pp. 224-32 of my original article appearing in the *Vanderbilt Journal of Transnational Law*.

18. 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 (11 June 1965), reprinted in 4 *International Legal Materials* (hereinafter I.L.M.) 1171 (1965).

19. *Id.* at 1172.

20. Letter from Secretary of State Dean Rusk to Samuel Gonard, President of ICRC (10 August 1965), reprinted in 53 *Department of State Bulletin* 447 (1965).

21. *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).

22. Letter from Dr. Tran Van Do, Minister of Foreign Affairs of the Republic of Viet Nam, to André Durand, Delegate General of ICRC (11 August 1965) (original text in French), reprinted in 4 I.L.M. 1174 (1965). On 31 August 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 against humanity in its military actions. The NLF did not reply to the ICRC, but gave assurances that it would treat its prisoners humanely (5 *International Review of the Red Cross* 638 [1965]).

23. See pp. 244-57 of my original article in the *Vanderbilt Journal of Transnational Law*.

24. Adams, "Vietnam Cover-up: Playing War With Numbers," *Harper's*, May 1975, at 43.

25. *Id.* at 43-44.

26. *Id.* at 44.

27. *Id.*

28. *Id.*

29. *Id.* at 62.

30. To give Adams some credit, he did acknowledge that classifying the enemy in a guerrilla war is not a foolproof science. "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." Adler, *supra* note 2, at 194-95.

31. Adams, *supra* note 24, at 62.

32. Cubbage, *supra* note 3, at 19.

33. Joseph A. McChristian, *The Role of Military Intelligence, 1965-1967*, Vietnam Studies, at 10 (Department of the Army, 1974). See also Cubbage, *supra* note 3, at 85.

34. See B. Brewin & S. Shaw, *supra* note 5, at 18.

35. Memorandum for Record, 19 May 1967, Joint Exhibit No. 1519, *Westmoreland* v. *CBS*, quoted in B. Brewin & S. Shaw, *supra* note 5, at 280 [hereinafter Joint Exhibit No. 1519].

36. B. Brewin & S. Shaw, *supra* note 5, at 265.

37. Cubbage, *supra* note 3, at 120.

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

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

40. Cubbage, *supra* note 3, at 89-90.

41. Prepared Statement by General Westmoreland to the Press 4 (26 January 1982) (unpublished text provided to author by General Westmoreland).

42. Cubbage, *supra* note 3, at 95.

43. Cubbage, *supra* note 3, at 25. See also *The New York Times*, 24 October 1984, sect. 2, at 5 (LTG Phillip B. Davidson, Jr., testimony); *The New York Times*, 10 November 1984, sect. 1, at 9 (George Carver testimony).

44. *The New York Times*, 17 November 1984, at 46, col. 4.

45. *Id.* Then Assistant Secretary of Defense Paul Nitze testified at Westmoreland's trial that "when you aggregate elephants and flies, you get nonsense." Cubbage, *supra* note 3, at 67.

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

47. Joint Exhibit No. 277, *supra*, note 4.

48. *Id.* at 3.

49. *Id.* at 5.

50. *Id.* at 5-6.

51. *The New York Times*, 24 November 1967, at 2.

52. *The New York Times*, 17 November 1984, at 46, col. 4.

53. 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 3, at 67.

54. Guenter Lewy, *America in Vietnam* 125, 179, 191-95 (1978).

55. "Contemporary Practice of the United States Relating to International Law," 62 *American Journal of International Law* 754, 766 (1968) (Directive No. 381-46, 27 December 1967, Annex A).

56. *Id.* at 767, 4(a)(3).

57. *Id.* at 767, 4(b)(1)(b).

58. See Seymour Hersh, *My Lai 4: A Report on the Massacre and Its Aftermath* (1972); 1 Department of the Army, *Review of the Preliminary Investigations Into the My Lai Incident 9-14 to 9-15* (March 1970).

59. United States v. Calley, 46 C.M.R. 1131, 1174, affirmed 48 C.M.R. 19 (1973).

60. *Id.* See also 10 U.S.C. 918 (1982), and *Calley*, 46 C.M.R. at 1177.

61. See, e.g., United States v. Keenan, 18 C.M.A. 108, 39 C.M.R. 108 (1969); United States v. Schultz, 18 C.M.A. 133, 39 C.M.R. 133 (1969); United States v. Griffen, 39 C.M.R. 586 (1968); United States v. Potter, 39 C.M.R. 791 (1968).

62. Schultz, 39 C.M.R. at 135.

63. *Id.* at 136.

64. *Id.*

65. 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. "Nuremberg and Vietnam: Who is Responsible for War Crimes?" in 3 *The Vietnam War and International Law* 388 (R. Falk ed. 1972).

66. Quoted in Adler, "Targets in War: Legal Considerations," in 3 *The Vietnam War and International Law*, *supra* note 65, at 326.

67. See *The New York Times*, 17 November 1984, at 46, col. 4; B. Brewin & S. Shaw, *supra* note 5, at 318.

68. Joint Exhibit No. 1519, *supra* note 35.

69. Stephen E. 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).

70. *The New York Times*, 17 November 1984, at 46, col. 3.

71. Cubbage, supra note 3, at 69.

72. "The War Drift & Dissent," *Time*, 11 August 1967, at 9.

73. "The War: Voice from the Silent Center," *Time*, 3 November 1967, at 16.

74. See generally Peter Braestrup, *Big Story: How the American Press and Television Reported and Interpreted the Crisis of Tet 1968 in Vietnam and Washington* (1977).

75. B. Brewin & S. Shaw, *supra* note 5, at 9.

76. *The New York Times*, 9 October 1984, at B8, col. 4.

77. "The War: Progress," *Time*, 25 August 1967, at 22.

78. *Id.* at 23.

79. "Live and In Color—The Real LBJ," *Newsweek*, 28 November 1967, at 23.

80. *Id.*

81. "Beginning of the End?" *Newsweek*, 4 December 1967, at 28.

82. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), U.N. Doc. A/32/144, Annexes 1 & 2, reprinted in 16 I.L.M. 1391 (Protocol I), 1442; Official Document Section, 72 *American Journal of International Law* 457 (Protocol I) (1978). Additional Protocol I, art. 45.

83. *Id.* art. 48.

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

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