War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Resister, by Anthony A. D' Amato,* (with Harvey L. Gould,* * Larry D. Woods**), 57 California Law Review 1055 (1969) Code A69d

The case of Captain Howard B. Levy—the Green Beret "Medic" Case FN1—at first seemed like hundreds of similar cases involving American servicemen being prosecuted for resistance to military orders involving Vietnam. Captain Levy had refused an order to teach dermatology to Special Forces (Green Beret) medics in the United States who were preparing for service in Vietnam, on the ground that his teaching would be "prostituted" by the Green Berets who in his opinion would commit war crimes once they arrived in Vietnam. The law officer for the military court, surprisingly, and on his own initiative, thereupon called for a private session in which he would hear evidence on the "Nuremberg defense"—the charge that the Green Berets were committing war crimes in Vietnam and that the government cannot constitutionally [page 1056]
place a soldier against his will in substantial jeopardy of becoming implicated in such crimes. This decision by the law officer lifted Levy's case out of the ordinary and gave it historical significance. After hearing the evidence, the law officer ruled that none of it was admissible in open court. The net effect was to suggest to the public that an American military court was willing to be open minded about the introduction of a war-crimes allegation but that such a defense in fact had no intrinsic merit.

A closer look at the law officer's ruling reveals otherwise. The law officer held the proffered evidence inadmissible not on the merits but because it was strictly irrelevant to Captain Levy's own circumstances. Although there was testimony in the private session that Green Berets were engaging in criminal activity in Vietnam that violated international laws of warfare, there was no evidence that the *medics* among the Green Beret troops were themselves engaged in war crimes or that their medical *training* was being prostituted by being utilized in criminal activity. FN2 While narrowly conceived, this ruling is reasonable inasmuch as Captain Levy was not himself in danger of serving in Vietnam as a member of the Green Berets, and his particular medical expertise, taught in this country, could only serve to ameliorate whatever wartime crimes they might commit. Thus the Levy case may have been the weakest possible situation to introduce a "Nuremberg defense." On the other hand, the case does stand for the important precedent that a war-crimes defense is available, in relevant circumstances, to in-service resisters.

Much has been published in recent years concerning aspects of the legality of the American involvement in Vietnam, FN3 creating confusion and an understandable readership reaction that any attempt to discuss "law" and Vietnam is either frustrating or phony! FN4 Most writers have discussed these issues in terms abstracted from probable justiciability, calling the entire war effort illegal because it is a war of aggression in violation of the United Nations Charter or an undeclared war in violation of the United States Constitution. FN5 Surely no judge would
[FN1057] have the temerity to invalidate the entire war effort on such conclusory grounds as these. FN6 However, if we move out of metaphysics and into the narrow question of whether some *methods* of conducting war are illegal, the area of inquiry is arguably justiciable and susceptible of adversary legal argumentation. In this age of blind progress, when man has reached the potential of summary destructability of the whole human race by thermonuclear weapons, virulent germ warfare, nerve gas, or the somewhat slower processes of environmental pollution, it is possible that some American judges

may be ready to review the judgments of military leaders on matters they say are related to national security. A military decision to use chemical and gas weapons in Vietnam, for example, might in an appropriate case be examined by an American court in light of the international laws of warfare relating to such weaponry and the possible shortsightedness of such deployment as a precedent that some day may really imperil American security.

It is with such considerations in mind that we propose to discuss first the concept of "war crimes" as articulated at Nuremberg and elsewhere, and to consider the legal applicability of this body of international law in domestic American courts. Following that, in the second part of our essay, we present the kinds of evidence needed to substantiate claims of the commission of war crimes. We then consider possible defenses to allegations of war crimes, and close with a discussion of the justiciability of war crimes questions in American courts in possible service-resister cases.

I
APPLICABILITYOF THE LAWS OF WARFARE TO AMERICAN LAW

A most authoritative capsule statement of the content of war crimes under international law is that found in the Charter of the International Military Tribunal at Nuremberg FN7 and affirmed by a unanimous resolution of the General Assembly of the United Nations: FN8

> War crimes [are] violations of the laws or customs of war [which] include, but [are] not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or [FN1058] private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

More specific formulations of the laws of war are found in international treaties. The United States is a party to twelve conventions pertinent to land warfare FN9 which typically contain very detailed provisions. FN10 Despite the particularity of these conventions, courts dealing with war-crimes cases have not adopted an overly technical approach but rather have looked to substantial violations that contradict the underlying humane purpose of these laws. In *In Re Yamashita,* FN11 for example, a 1946 case involving the conviction of a Japanese commander for failure to restrain his troops from committing war crimes against civilians, the United States Supreme Court placed decisive weight on the "purpose of the law of war" to "protect civilian populations and prisoners of war from brutality."

The laws of warfare are part of American law, enforceable in American courts, not only because the United States is party to most of the major multilateral conventions on the conduct of military hostilities but also because the laws of warfare are incorporated in international customary law, which under the Constitution is part of American law. FN12 This international customary law, in turn, derives much of its content from major international conventions. FN18 Thus, while the United States is not a party to the Geneva Protocol of 1925 on Poisonous Gases and Bacteriological Warfare, FN14 for example, the substance of this convention has nevertheless passed into the customary laws of warfare and is in that manner binding on the United States. FN15

[page 1059] Although the United States is subject to the laws of warfare, any given conflict has to be examined specifically to determine the applicability of the various international conventions and to determine whether it is in fact a "war" for legal purposes. The Geneva Conventions of 1949, FN16 which constitute an important source for much of the laws of land warfare to be examined later in this essay, were ratified by the United States, FN17 the Soviet Union, FN18 Communist China, FN19 and both North FN20 and South Vietnam FN21. It would be most difficult for the United States to argue that the Geneva Conventions of 1949 do not apply vis-a-vis the National Liberation Front which is not a party, inasmuch as the United States has consistently characterized the NLF as a political arm of Hanoi in the South. Indeed the United States would probably resist any attempt by the NLF to ratify the Convention, on the ground that the NLF is not an independent political state or entity. In any event, the United States has never denied nor contested the applicability of the international law of warfare to the American military engagements in Vietnam. In a 1966 memorandum on Vietnam the Department of State said that

> a formal declaration of war would not place any obligations on either side in the conflict by which that side would not be bound in any event. The rules of international law concerning the conduct of hostilities in an international armed conflict apply regardless of any declaration of war FN22

In 1965 President Johnson directed Secretary Rusk to inform the international committee of the Red Cross that the United States was abiding [page 1060] by the "humanitarian principles" of the 1949 Geneva convention and that it expected "other parties" in the Vietnamese war to do the same. FN23 The N.L.F. "presence" at the Paris Peace talks removes any final doubt that it has achieved belligerent status and thus is entitled to the benefits, and burdens, of the laws of war. FN24 Finally, the laws of war continually apply to both sides in a conflict irrespective of whether one side has committed or is committing frequent violations of these laws. FN25

The international laws of warfare apply to military combat situations however characterized by the parties. The Geneva Conventions of 1949 specifically state their applicability to "all cases of declared war or of any other armed conflict...even if the state of war is not recognized by one of [the Parties]." FN26 Nor is a declaration of war needed; the United States Army *Field Manual* holds:

> As the customary law of war applies to cases of international armed conflict and to the forcible occupation of enemy territory generally as well as to declared war in its strict sense, a declaration of war is not an essential condition of the application of this body of law. Similarly, treaties relating to "war" may become operative notwithstanding the absence of a formal declaration of war. FN27

Insofar as it may become necessary to procure a judicial determination that war, or even armed conflict, exists in Vietnam, American courts have historically displayed a common sense approach to determining whether a state of war or armed conflict was occurring or had occurred in foreign lands. FN28

[page 1061] Once it is agreed that the laws of warfare apply to the United States generally and in the Vietnamese war in particular, a more vexing problem concerning the applicability of the international law of war crimes to American courts remains-the image that many jurists have of the Nuremberg judgments as representing the application of *ex post facto* law to the Nazi defendants after the Second World

War. Of course, even if the Nuremberg tribunal had articulated laws of war for the first time the Nuremberg precedents nevertheless stand for all combat situations since then. It is worthy of note that on December 11, 1946, the United States joined in a unanimous General Assembly resolution affirming "the principles of international law recognized by the Charter of the Nuremberg tribunal and the judgment of the tribunal." FN29 Despite these arguments, however, American courts might be reluctant to invoke a precedent that itself was tainted by a retroactive application of criminal law. Thus it is important here to analyze the Nuremberg judgments closely to see if this jurisprudential objection is well founded.

Analysis of the September 30, 1946 verdict and sentencing of the major Nazi war criminals at Nuremberg indicates that the Allied prosecutors may have done themselves a disservice in their zeal to introduce the new crimes of "crimes against peace" and "crimes against humanity." Ultimately, the tribunals handed down what were principally convictions of traditional "war crimes," crimes which had been invoked after the first world war FN30 and which were so generally regarded as an established part of international law that no significant objection to their inclusion was made at Nuremberg. The twenty two defendants were indicted variously on four counts: (1) Conspiracy to wage wars of aggression; (2) initiating or waging wars of aggression ("crimes against peace"); (3) war crimes; and (4) crimes against humanity. The final sentencing can be summarized as follows: FN31

(page 1062)

Defendant	*Counts*				*Sentence*
	(1)	*(2)*	*(3)*	*(4)*	
Goering	1	1	1	1	D
Hess	1	1	0	0	C
von Ribbentrop	1	1	1	1	D
Keitel	1	1	1	1	D
Kaltenbrunner	0		1	1	D
Rosenberg	1	1	1	1	D
Frank	0		1	1	D
Frick	0	1	1	1	D
Streicher	0			1	D
Funk	0	1	1	1	C
Schacht	0	0			Acquitted
Doenitz	0	1	1		A
Raeder	1	1	1		C
von Schirach	0			1	B
Sauckel	0	0	1	1	D
Jodl	1	1	1	1	D
von Papen	0	0			Acquitted
Seyss-Inquart	0	1	1	1	D
Speer	0	0	1	1	B
von Neurath	1	1	1	1	B
Fritzsche	0		0	0	Acquitted
Bormann	0		1	1	D (in absentia)
Total Indictments	22	16	18	18	
Total Convictions	8	12	16	16	

Key

0 = Indicted but not convicted
1 = Indicted and convicted
A = Ten years imprisonment
B = Fifteen to twenty years imprisonment
C = Life imprisonment
D = Death by hanging

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The table reveals the following configurations:
All defendants except Hess FN32 who were convicted of the innovative crime of waging aggressive warfare (under counts l or 2) were *also* convicted of the traditional "war crimes" indictment (count 3). Hess, [page 1063] the sole exception of twelve, did not receive the death penalty.

Every defendant, except Streicher and von Schirach, who was convicted of the "crime against humanity" (count 4) was also convicted of the traditional "war crimes" count.

This interdependence of counts 3 and 4 is bolstered by the way the final verdicts were read in open court on October 1, 1946. For each defendant except Streicher and von Schirach, counts 3 and 4 were considered together under the paragraph heading "War Crimes and Crimes against Humanity." This followed the way the evidence was presented at trial as well as the pattern of article 6 of the Charter of the International Military Tribunal. FN33 For the rubric "crimes against humanity" was explicitly considered in article 6, and by the tribunal itself during its proceedings, as comprehending the most heinous of the war crimes in addition to innovatively making criminal the murder or maltreatment of the German government's own citizens (such as Jews, Jehovah's Witnesses, Freemasons, and political opponents of the Nazi regime). FN34 Content analysis of the tribunal's verdicts, furthermore, shows that except for Streicher and von Schirach each defendant convicted under count 4 could be said to have been convicted under an aggravated war-crimes charge amounting to a "crime against humanity." With respect to four of these defendants—Keitel, Sauchel, Jodl, and Speer—there is no mention in the verdict of crimes against German citizens and thus their conviction under count 4 was solely an aggravated version of the traditional war crimes indictment.

Thus, despite criticism of the Nuremberg trials relating to the major war criminals on *nulle poena sine lege* grounds, the overwhelming component of the verdicts was the traditional "war crimes" charge. In this essay, therefore, the Nuremberg precedents are referred to solely as establishing the international law of "war crimes," and not the more dubious and propagandistic "crimes against peace" and "crimes against humanity" which unfortunately have served to weaken the popular image of the validity of the Nuremberg proceedings.

A second source of possible judicial reluctance to accept or give much weight to a war-crimes defense in American civilian or military courts is a feeling, usually not articulated, that the international law of war crimes is not "real" law but rather the embodiment of an abstract idealism out of touch with such brutal facts as are revealed in the Vietnamese war. War is, in other words, an all-out struggle, and there is no room for judicial intervention in its processes even granting that after the war is over a Nuremberg-type trial might be held. The reply
[page 1064] that American courts must apply this law insofar as it is reflected in treaties to which the United States is a party is itself an ineffective rejoinder inasmuch as judicial attitude plays a significant role not only in the ultimate disposition of cases but also in the preliminary decision whether to hear argument. The controversies in many branches of the law dealing with "standing" and "political questions" attest to the delicacy of judicial attitude as a factor in determining whether to hear certain types of arguments. Thus, it may be more effective to argue that the concept of war crimes in international law reflects an extremely realistic philosophy of law, warfare, and social control, which serves the best interests of the United States.

To begin with, the laws of warfare implicitly acknowledge, and realistically discount, the question of the legality of commencement of military hostilities. Although resort to the "threat or use of force" is illegal in international relations under the United Nations Charter, FN35 even a state which starts a flagrant war of aggression is entitled to the benefit of the laws of warfare and must accept its burdens. FN36 At Nuremberg, the allied tribunals rejected the argument of several prosecutors that everything the German and Japanese militarists did during the war was criminal because the war itself was an act of aggression. FN37 Second, the laws of warfare, like the whole of international law, express the reciprocal self-interest of the governments that conceived them and support them. It may not be overly cynical to point out that the many provisions relating to the treatment of prisoners of war that are listed in the United States Army *Field Manual* may operate to defuse incipient resistance on the part of soldiers by assuring them, at least on paper, that if captured by the enemy they will be given prisoner-of-war-treatment. Similarly, rules designed to protect civilians in part may have operated to give governments greater freedom of action in mobilizing civilians to support and pay for standing armies and armaments. A government thus may have been willing to pay the price of a limitation of legal methods of warfare to obtain greater access to war-making ability. To the extent that this may have been one of the many motives involved, we should not fail to extract the price of compliance from governments that are involved in warfare. Third, by helping to preserve lives of captured soldiers and the infrastructure of the [page 1065] civilian economy of both sides, the laws of warfare help not only to restore peace but also to justify the battle. FN38 Finally the laws of warfare provide a legal means of removing from the scene leading enemy commanders via post-war military criminal tribunals, thus facilitating postwar governance of the losing side.

But can they really be "laws" when it is notorious that they are frequently flouted and violated during wartime? Nearly any promulgated law of general applicability that is consistent on its face FN39 exerts some pressure toward compliance with its terms. Imagine the simplest of laws-a "stop sign" at a street intersection in a town in which every driver goes through the intersection without bringing his vehicle to a complete stop. Does this habit of disobedience mean that the stop sign is not really a law? Of course, it may be argued pedantically that it is a law because it *might* be enforced some day. More important, however, it may be observed that the drivers in this imaginary town slow down and proceed with caution when approaching the corner with the stop sign, even though they do not comply with its terms. If so, the sign influences human behavior. Indeed, its main purpose-to prevent traffic accidents at that corner-may be completely fulfilled despite the total lack of literal compliance.

In wartime, some soldiers and commanders may disobey the laws of warfare listed in their field manuals; but some may do so only in special circumstances, and others may refrain from doing so altogether. A soldier who disobeys is gambling that his side will eventually win so that the enemy will not try him for war crimes, that he will not be captured by the enemy during the war and identified as a war criminal, and that his own side, though winning, will not court-martial him. FN40 In addition, he must consider that his own side might suffer from his acts by virtue of reciprocal disobedience of the laws of warfare by the adversaries. In World War pressures such as these caused considerable compliance with the laws of war even by German commanders in the darkest days of their battle. FN41 Moreover, the considerable [FN1066] resistance of German generals evidently forced Hitler to put into writing such orders as that of October 18, 1942, commanding the execution of captured British commandoes in

Africa. FN42 Reports from Vietnam suggest that American military officers take considerable pains to avoid any *overt* departure from the laws respecting treatment of prisoners. FN43 What violations a field commander will not commit openly or in the absence of written orders from a superior effectively reduces the number of instances that he will have occasion to contravene the laws of warfare. Thus the laws of warfare, like all laws, at least operate to make the prescribed conduct more difficult than if there were no law at all.

It is perhaps a failure to look upon the laws of warfare as embodying pressures toward behavioral conformity, coupled with an overreaching attempt to appear realistic, that lead Professor McDougal to articulate a doctrine of the laws of war that tends to relativize them out of existence. Yet his "policy-oriented jurisprudence" FN44 on the laws of [page 1067] war cannot be bypassed as it is by far the most comprehensive and important statement to be offered in this field in recent times. FN45

Professor McDougal views the laws of warfare, and international law generally, as guides to alternative policies for decisionmakers. "Legal rules," he once wrote, "exhaust their effective power when they guide a decisionmaker to relevant factors and indicate presumptive weightings." FN46 When a military commander chooses to follow a policy coincident with the requirements of the laws of warfare, he does so not because of any prescriptive element of "oughtness" in the law itself but because he deems the law appropriate and in the common interest. FN47 In Professor McDougal's system, what is reasonable to the decisionmaker is legal. FN48

In search of some standards of reasonableness, Professor McDougal articulates broader generalizations which account for specific laws. For the laws of warfare, he combines two admittedly "complementary" generalizations-military necessity and the minimum destruction of values FN49-into the single "fundamental policy" of the "minimizing of unnecessary destruction of values." FN50 Obviously this formula gives great latitude to the military commander on the spot. Anything he chooses to do, by virtue of the fact that he has decided to do it despite its costs, can be rationalized as an application of the principle of minimizing unnecessary destruction. Nor does Professor McDougal stop with the military commander. He writes that we must refer to the political purposes of the belligerent since these general political objectives affect and determine the legality of the more specific military applications of the formula. FN51 But already the Vietnam war seems to undermine the usefulness of this approach. For the American political [page 1068] objectives in Vietnam have undergone numerous ambiguous changes, FN52 the most recent objective being a withdraw from Vietnam consistent with the security of loyal South Vietnamese citizens to whom the United States had promised that it would never withdraw until the war was won by the American-Saigon coalition. Indeed, the notion of a clear military objective, which apparently seems to be an important aspect of Professor McDougal's view of the laws of warfare, may have vanished after 1945. The limited wars fought since then in the shadow of potential nuclear conflagration have made it almost impossible to articulate any consistent strategy of political-military "victory." FN53

Just as the concept of military necessity grows to global breadth if we adopt a subjective standard and generalize to the political level, so too Professor McDougal's formula of minimizing unnecessary destruction could justify any military action the more it is divorced from specific rules regulating the conduct of hostilities. If we postulate as legitimate the Allied demand upon Japan in 1945 of

unconditional surrender, then the atomic bombings of Hiroshima and Nagasaki would appear to have been reasonable steps toward that goal. FN54 On the other hand, by rejecting vague generalizations and subjective standards of reasonableness, a court might appraise the atomic bombing-particularly the *second* "demonstration" bombing of Nagasaki-in terms closely analogous to traditional prohibitions of blind aerial bombardment of undefended non-military population centers. FN55 At Nuremberg, Professor McDougal's view of the laws of warfare, may have vanished conviction since it would have been nearly impossible to prove the requisite criminal intent if a defendant's state of mind had been an element in judging whether his underlying act was reasonable or was criminal. Rather, the Nuremberg judgments are replete with citations of multilateral conventions particularizing the international laws of war.

[page 1069] Claims made by various defendants that their actions were dictated by military necessity or were reasonable in light of military or political objectives were met with strict citations by the prosecutors and the tribunals of the laws of warfare and an unwillingness on the part of the court to second-guess the defendants' phenomenological perspectives. FN56

Professor McDougal's reasonableness test, balancing the complementary prescriptions of military necessity and minimum destruction of values, is not unlike attempts to rewrite the American Bill of Rights into a simple balancing test between freedom of individual action and the public interest in national security. FN57 A moment's reflection will demonstrate that this is precisely the evaluation that public prosecutors make before deciding to prosecute cases involving the exercise of speech or religion, and their decision probably reflects the majority opinion of the public. The Bill of Rights, however, is anti-majoritarian; it safeguards "unreasonable" speech, religion, assembly, and privacy. Similarly, although the laws of warfare must seem at times to be highly unreasonable to military commanders or political leaders, they fulfill the function of drawing lines between permissible and impermissible conduct in a way which would be impossible for such generalized notions as military necessity or minimum destruction of values.

II
EVIDENCE OF WAR CRIMES

In the first part of this Article we have attempted to show that the body of international laws relating to war crimes is applicable to soldiers in United States forces and to these soldiers in the Vietnamese war. American courts may nevertheless be reluctant to entertain a Nuremberg defense because they fear that the restrictive rules of evidence and the nature of the evidence itself will render the defense impractical and inconclusory. Consequently, in this part we discuss the special rules of evidence that are used in war crimes trials and then marshal the available relevant evidence, sufficient to meet the standards of proof at Nuremberg, that American forces commit war crimes in Vietnam.

A. Admissible Evidence

American courts are familiar with highly technical and restrictive rules of evidence, which are nonetheless workable because courts most [page 1070] of the time deal with cases arising out of events physically proximate to the court. The accessibility of witnesses, documents, photographs, and even sites, allows

the luxury of complex verification and authentication procedures. But where the facts offered for proof in a case involve alleged war crimes committed in a foreign combat zone, the usual luxuries of evidentiary verification must be modified. FN58 Not only is the locus of the evidence in a foreign country, but also other branches of the government, particularly the executive and military, may be expected to resist judicial probing into as sensitive a subject as war crimes. FN59 Our purpose in this section is to show that there is indeed ample precedent for judicial relaxation of the technical rules of evidence in war-crimes cases, particularly for the type of cases relying on Nuremberg defenses envisaged in the present essay.

The Nuremberg Charter explicitly exempted the tribunal from "technical rules of evidence." FN60 It also permitted the tribunal to take judicial notice of "official government documents," FN61 and the tribunal broadly interpreted this permission to allow judicial notice of any and all evidence collected and presented by any Allied power. FN62 A great mass of documentary material was introduced at the trials: orders and directives purportedly signed by the defendants themselves, copies of speeches, diaries, record books, photographs, motion pictures, depositions, popular books and excerpts therefrom, personal affidavits, investigating commission reports, and quotations from speeches, letters and statements of famous men. FN63 The prosecution introduced affidavits of expert witnesses at many points in the trials, and the evidence was
[page 1071] allowed. FN64 The judges at many points stated that they would assign probative weight to the evidence in accordance with the manner in which it was authenticated FN65 and many of the exchanges between counsel and judges concerned the question of probative value. FN66

The various national trials of lesser war criminals following Nuremberg made even more explicit the evidentiary latitude afforded courts in war-crimes cases. A British Royal Warrant of 14 June 1945 relaxed evidentiary rules for British military courts for trials involving alleged violations of the laws and usages of war, specifically allowing the court to "take into consideration any oral statement or any document appearing on the face of it to be authentic," allowing hearsay evidence if the witness were "unable...to attend without undue delay" or if a document could not be produced "without undue delay," and admitting "any document purporting to have been signed or issued officially by any member of any Allied or enemy force." FN67 The British trials conducted under this warrant made clear what may be a fundamentally important factor in all war crimes trials-that although one or two affidavits or documents might not be authentic, nevertheless if the overwhelming preponderance of the evidence points to the commission of war crimes it would be unjust *not* to admit all purportedly authentic evidence, and leave it to the judges to determine its value. FN68 Because of the difficulty of getting unimpeachable evidence of facts [page 1072] that occur during the vast disruption of war, this approach best fulfills the purpose of judicial inquiry in such cases. FN69

In light of the nearly complete United States control over the trials of alleged Japanese war criminals, Japanese proceedings provide the best precedents for American courts in war-crimes cases. The major Japanese defendants were tried by the International Military Tribunal for the Far East, a court established, chartered, and approved by General Douglas MacArthur, who as Supreme Allied Commander for postwar Japan also appointed the judges. Its charter provided that the Tokyo tribunal "shall not be bound by technical rules of evidence," and in particular may admit as evidence:

1) A document, regardless of its security classification and without proof of its issuance or signature, which appears to the Tribunal to have been signed or issued by any officer, department, agency or member of the armed forces of any government.
2) A report which appears to the Tribunal to have been signed or issued by the International Red Cross or a member thereof, or by a doctor of medicine or any medical personnel, or by an investigator or intelligence officer, or by any other person who appears to the Tribunal to have personal knowledge of the matters contained in the report.
3) An affidavit, deposition or other signed statement.
4) A diary, letter or other document, including sworn or unsworn statements which appear to the Tribunal to contain information relating to the charge.
5) A copy of a document or other secondary evidence of its contents, if the original is not immediately available. FN70

General MacArthur also set up the United States Military Commission for Manila which tried General Yamashita for permitting his men to commit war crimes and massacre civilians, a case important because of the fact that it reached the United States Supreme Court. At the trial, numerous affidavits, depositions, letters, documents, and newspaper articles, admitted over the objections of the defense, FN71 formed the basis for General Yamashita's conviction. FN72 Yet the Supreme Court held [page 1073] that there was no denial of due process. FN73 Both *In re Yamashita* and the charter of the Tokyo tribunal therefore stand as important precedents in American law for the relaxation of strict rules of evidence in cases involving allegations of war crimes.

It must be noted, for present purposes, that the existing evidentiary precedents are all from cases in which individual defendants were charged with the commission of war crimes. The present essay, however, does not concern such cases. Rather, it concerns cases which involve the question of whether a serviceman may resist assignment to Vietnam, or to a specific combat zone or division in Vietnam, on the grounds that other persons in Vietnam are committing war crimes or that there is a pattern of violation of the laws of war in a combat zone to which the resister may be sent. The permissibility of relaxing evidentiary standards in such a case, however, follows a fortiori from the precedents just examined. A court should allow such a serviceman at least as much latitude as prosecutors receive in war-crimes cases where the burden is on the prosecutors to prove beyond a reasonable doubt the commission of war crimes.

B. Required and Available Evidence

The purpose of this subsection on the legally required and factually available evidence of war crimes in Vietnam is not to prove facts or to make judgments better left to courts, but to outline the kinds and availability of evidence, and the legal arguments necessary to support a reasonable allegation by an American service resister that American forces commit war crimes in Vietnam. We shall here present examples of the kinds of evidence that would be relevant to the substantive law of war crimes that should satisfy the Nuremberg criteria of sufficiency and admissibility.
We make no attempt here to cover all the possible violations of the laws of warfare in the complex Vietnam war. For example, we shall not deal with the issues of defoliation and crop destruction *per se,*

forced dislocation of refugees in South Vietnam, pillage, conditions in prisoner-of-war camps, or the care and medical treatment of civilian war victims. FN74 The murder of civilians, such as the American massacre of the villagers of Songmy on March 16, 1968, is so obviously a capital violation of the laws of war as to need no extended comment here. FN75 [page 1074] Instead we shall concentrate on three basic and illustrative categories that are crucial to Vietnam and that also may be extrapolated to other possible future situations: murder or torture of prisoners of war, aerial bombardment of non-military targets, and the use of prohibited weapons of warfare. For each of these we shall attempt to summarize the relevant international law, with particular reference to the Nuremberg precedents, and indicate the kinds of substantive evidence available with respect to its violation in Vietnam.

Considerable use will be made in this subsection of testimony given before the Bertrand Russell International War Crimes Tribunal whose hearings were held in Copenhagen and Stockholm in 1967 and whose findings and principal evidence were recorded in a book published in 1968. FN76 Although this was an unofficial "tribunal," FN77 the proceedings were at least as formal as many of the commissions and meetings which produced affidavits, depositions, and written testimony that were admitted in the various post-World War war crimes trials. Additionally there is evidence of consistency of the witnesses' testimony at the Russell proceedings and in books, newspapers, and before American courts. FN78 Most importantly, the great detail and close questioning by members of the panel at Copenhagen and Stockholm of the many witnesses' testimony give that testimony high credibility value, for at Nuremberg and Tokyo, it will be recalled, the tribunals placed decisive weight on the intrinsic credibility of testimony. Finally, the factual correlation between the substance of testimony produced at the Russell proceedings and evidence of others reported elsewhere (newspapers, books, etc.) lends credibility to the whole.

1. *Prisoners of War*
    a. The Law

Although there is variety and complexity in the laws of war concerning [page 1075] the standards of incarceration and treatment of prisoners of war, FN79 it is perfectly clear that murder or torture of such persons is a war crime. FN80 According to the Nuremberg precedents, FN81 captors may not shoot prisoners even though they are in a combat zone, require a guard, consume supplies, slow up troop movements, and appear certain to be set free by their own forces in an imminent invasion. The Hague Conventions of 1907 require that prisoners be humanely treated FN82 and the Geneva Convention of 1949 prohibits "causing death or seriously endangering the health of a prisoner of war." FN83 In particular it stipulates that "no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever." FN84 Both combatants and non-combatants are entitled to prisoner-of-war status. FN85 Although captured civilians do not share all the rights of prisoners of war, they have the same right against killing or torture. FN86 While the law is less certain with respect to partisan guerrillas, the grounds for uncertainty do not seem applicable in Vietnam, FN87 and in any event any captured person has the right to a fair [page 1076] judicial determination of his status before maltreatment or execution. FN88 It follows that a captured person cannot be tortured for the purpose of determining his status. All four Geneva conventions of 1949 provide that all persons "taking no active part in the hostilities, including members of armed forces who have laid down their arms," shall be protected at all times and places against

"violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture." FN89

The foregoing standards obviously apply to the treatment of persons captured in Vietnam by American soldiers. The question remains whether murder or torture of prisoners by South Vietnamese troops engages American responsibility. First, article 12 of the 1949 Geneva Prisoners of War Convention sets forth the duties of American soldiers who turn over prisoners to South Vietnamese soldiers:

> Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.... Nevertheless, if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with. FN90

Various war-crimes courts have held that knowingly releasing prisoners to someone else who will murder them is a war crime. FN91 Second, active [page 1077] complicity by American troops in the torture or murder of prisoners, even if the actual physical acts are carried out by South Vietnamese soldiers and "interrogators," would be a direct violation of the laws of war by the Americans. FN92 Third, it may at least be argued that to the extent that the Saigon government has been under the effective control of, if not owing its very existence to, the United States, the latter is responsible for the war crimes of the South Vietnamese. FN93 Finally, the Supreme Court's reasoning in *In re Yamashita* obligates American officers and soldiers to take "reasonable" and "appropriate" measures to prevent violations of the law of war "which are likely to attend the occupation of hostile territory by an uncontrolled soldiery." FN94 Whatever the precise relationship between American and South Vietnamese forces, if there is "to some extent" FN95 authority of the former over the latter, *In re Yamashita* imposes a positive obligation to take steps to stop the commission of war crimes by the South Vietnamese. FN96

b. *The Evidence*

Four former experienced American combat soldiers at the Russell proceedings offered direct evidence of the murder of prisoners by Americans. FN97 They gave detailed accounts of the beheading [page 1078] FN98 and shooting FN99 of wounded prisoners, and the murder of prisoners by pushing them out of helicopters. FNl00 They characterized these actions as "everyday thing[s]," FNl0l "expected" combat behavior, FNl02, the result of orders given in basic training, FN103 or instruction in special classes, FN104 and "standard operating policy."FN105 The soldiers responsible told their superiors that the prisoners were killed while attempting to escape. FNl06 Later, on September 29, 1969, a former Green Beret soldier stated on a television interview on WPIX-TV in New York City that he personally shot a prisoner while in South Vietnam and witnessed other shootings. FNl07 Evidence from sources other than former soldiers is available to substantiate these charges, FNl08 though it has less credibility value than direct testimony.

Another former American soldier, Peter Martinsen, who served as interrogator with the 541st Military Intelligence Detachment in Vietnam [page 1079] from September 1966 to June 1967, FN109 described to the Russell tribunal his own beating of a prisoner FN110 and stated that he subsequently released the prisoner to an American lieutenant FN111 who wired a field telephone generator to the prisoner's genitals and administered electric shocks. FN112 The field-telephone method, which has been confirmed by other accounts in books and newspapers as a distinctly American contribution to the history of torture, FN113 was according to Martinsen used on women as well as men, FN114 and involved "hundreds of [American] interrogators" who participated in the torture of captured Vietnamese prisoners of war. FN115

There is substantial, undenied evidence of South Vietnamese torture and murder of prisoners of war. Methods of torture include mutilation, FN116 disembowlment, FN117 near-drowning, FN118 bamboo slivers under fingenails, FN119 smothering with wet towels, FN120 dragging the prisoner behind a moving vehicle, FN121 pouring water with hot pepper into the nose, FN122 wire-cage confinement, FN123 and rice-paddy strangulation FN124 After torture, the captors usually execute the prisoner.FN125 Peter Hamill, correspondent for the New York Post, wrote in 1966 that there are no huge prisoner-of-war camps springing up in South Vietnam as there were during the second World War; prisoners are "usually executed."FN126 A New York Times correspondent similarly observed in 1969 "the relatively [page 1080] low number of prisoners claimed by either side." FN127 He reported that "South Korean and South Vietnamese soldiers have a particularly widespread reputation for killing prisoners; Americans less so." FN128

Apart from the general political argument suggested earlier FN129 that the United States might be responsible for everything done by the Saigon regime, what is the actual American involvement in these South Vietnamese actions? First, there is considerable evidence that prisoners captured by American soldiers are "handed over" to the South Vietnamese for torture and execution. FN130 As this does not discharge American responsibility, FN131 perhaps the reason for the practice is that stated by a former "Green Berets" sergeant:

> [L]et your [South Vietnamese] counterpart do it. ...The idea being that, since you are an American, it could be resented-your torturing or killing these people. In other words, you don't want the charge of prejudice or racism thrown at you. FN132

Second, there is testimony that much of the torture is done under the direction FN133 or supervision FN134 of American soldiers, that in some cases Americans are in complete control, FN135 and that some of the methods of torturing were taught to the South Vietnamese by Americans. FN136 Finally, there is much evidence indicating that American soldiers are often witnesses to these acts, FN137 and that either through choice or circumstances [page1081], they do nothing about it. FN138

2. *Bombardment of Non-Military Targets*

a. The Law

The involvement of the United States in acts of aerial bombardment is beyond question as the United States has been in sole command of the airplanes enjoying virtually uncontested flights over Vietnam.

Though much of the following evidentiary examples concern North Vietnam, where the bombing substantially ended in March, 1968, the issue as to North Vietnam is far from moot as there are hundreds of men now in prison or threatened with imprisonment who refused to serve in Vietnam prior to 1968. FN139 Moreover, it is important to examine carefully the issue of aerial bombardment because the United States, perhaps in part as a result of its vast inventory of planes and bombs, may again resort to bombing in North Vietnam, FN140 Laos, FN141 or elsewhere, and of course because the bombing continues in South Vietnam.

Under the traditional approach to the war-crimes concept, no legal issue is presented with respect to the bombing of genuinely strategic military targets such as factories, ammunition depots, oil refineries, airports, and-particularly in the Vietnam context-roads, bridges, viaducts, railroad tracks, trucks, trains, tunnels, and any other transportation [page1082] facilities. FN142 Furthermore, we assume that accidental and incidental damage to non-military and non-strategic targets is not a war crime. FN143

Quite different is deliberate—or more precisely non-accidental—bombing of targets having no military or strategic value. Some such targets are specifically banned under the traditional international laws of warfare. The Geneva conventions of 1949 prohibit any attack against hospitals or mobile medical units whether they have as patients wounded soldiers FN144 or civilians. FNl45 The 1907 Hague Regulations do not contain as blanket a prohibition, but cast a wider net:

> In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. FNl46

The Charter of the International Military Tribunal at Nuremberg, FNl47 includes in its definition of war crimes the "murder, ill-treatment...of civilian population of or in occupied territory" and the "wanton destruction of cities, towns, or villages." FNl48 In the *Shimoda Case,* FNl49 the District Court of Tokyo in a long and reasoned judgment found the aerial target prohibitions of non-military objectives to include "schools, churches, temples, shrines, hospitals, and private houses." FNl5O Not included in this list, but assimilable under the category of "wanton destruction," are dikes the opening or bombing of which would flood and ruin vast areas. Professor Kolko has reported the Allied warnings of 1945 to Seyss-Inquart, the German High Commissioner in Holland, warning him to stop the opening of dikes, which openings had resulted in mass hardship and destruction. FNl5l General Eisenhower wrote on April 23, 1945, to German Commander Blaskowitz, a subordinate of Seyss-Inquart, to cease opening the dikes immediately, and if he fails [page 1083] "he and each responsible member of his command" will be considered by Eisenhower "as violators of the laws of war who must face the certain consequences of their acts."FN152 In Churchill's memoirs it is stated that Seyss-Inquart agreed to stop further flooding. FNl53 In the Nuremberg judgment against Seyss-Inquart there is no mention of the dikes incident, thus indicating the tribunal's satisfaction with his immediate capitulation to the Eisenhower demand.FN154 It is clear that had Seyss-Inquart not agreed on this point, the most important charge against him would have been his opening of the Holland dikes. Since Seyss-Inquart was sentenced to death by hanging for other war crimes, we may conclude that the opening of dikes was so clearly a war crime-in Eisenhower's view if not in Seyss-Inquart's as well-that it was never totally committed. Even in total war, some acts may be so clearly criminal that they are not done and post-war criminal

proceedings therefore will have no occasion to charge a defendant for such a crime and establish a substantive precedent that it is illegal.

One might look at the list of prohibited targets-schools, churches, hospitals, private homes, dikes-and conclude simply that all targets that are not military objectives are illegitimate targets. Such a generalization was attempted in the Hague Rules of Air Warfare of 1923, a careful document that according to Greenspan "has strong persuasive authority" but nevertheless is not binding since it was not ratified by any state. FN155 The Hague Rules allowed aerial bombardment "only when directed at a military objective," while prohibiting terror bombing FN156 and the bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighborhood of land forces or military objectives. FN157 The apparent acceptability of this neat generalization was shattered, however, by the German attacks on "enemy morale" during World War II and the British response in kind as a consequence of "the enemy's adoption of a campaign of unrestricted air warfare." FN158 On the other hand, even the Allied air raids and the German V -rocket bombardments of the Second World War were not specifically directed to non-military targets but rather constituted a "blind" bombardment of cities having important military targets, many of which were concealed. [page 1084] Despite this conduct by some parties to the Second World War, and despite the difficulty of articulating a workable rule restricting terrorist aerial bombing, there is authority for a prohibition of "blind" bombardment, FN159 Even Professor McDougal would circumscribe "strategic bombing" to effect the "minimization of unnecessary discrepancies between the dimensions of assigned target areas and those of the specific material establishments within such areas which are determined to be military objectives."FN160 He agrees with the late Judge Lauterpacht that unless there is some limitation deliberate terror bombing "comes too close to rendering pointless all legal limitations on the exercise of violence."FN161 Regardless of the ultimate resolution of this question it can be said, at the very least, that if war crimes exist at all they include the deliberate seeking out and bombing of specific schools, hospitals, dikes, churches, and private residences removed from "military targets." Such a conclusion does not challenge directly the notions of strategic bombing or terror bombing, but rather places the emphasis on the deliberate selection of traditionally proscribed non-military targets.

b. The Evidence

The tonnage of bombs dropped into Vietnam, an agricultural country slightly larger in size than New York State, has exceeded the total tonnage of all the Allied bombing in the European and Asian theatres in World War II, including the atomic bombs. Have all these bombs fallen upon military objectives? Harrison Salisbury, a *New York Times* correspondent distinguished for accuracy and ideological neutrality, visited North Vietnam at the end of 1966 and surveyed the wreckage, looking in particular for evidence of military installations. He concluded, "When you totaled all the 'military objectives' in North Vietnam, they didn't total much."FN162 Let us first consider North Vietnam, looking at the American bombing partly through Salisbury's eyes.

[page 1085] Salisbury visited the remains of the Polish Friendship School in Hanoi, which was bombed and wrecked in two raids over ten days apart, FN163 and then visited the victims of this bombing—children who had severe hemorrhages from bomb fragments. FN164 Four Russell tribunal commissions of inquiry composed of doctors, lawyers, and scientists from many countries, visited throughout North

Vietnam and compiled statistical and photographical evidence. FN165 They reported that up to the end of 1966, American aircraft had attacked the following types and numbers of schools: 301 schools of the second degree, 24 schools of the third degree, 29 kindergarten schools, ten primary schools, 20 technical and professional secondary schools, three universities, two primary seminaries, and one advanced seminary. FN166 When the second commission of inquiry was in North Vietnam on January 20, 1967, a plane attacked the classroom of the Tan Thanh school in the province of Ninh Binh with an air-to-ground missile, killing two teachers, 17 children (six to eight years old), and wounding seven others. FN167 In an underdeveloped country where villages are largely composed of huts made of bamboo and straw, a school may present an attractive target since it "is one of the few modern buildings, and therefore perfectly visible from the air." FN168

A Japanese commission of inquiry reported to the Russell tribunal that the internationally known Hansen's disease hospital at Quynh Lap, the Quang Binh provincial hospital, and the Ha Tinh provincial hospital were targets of bombing missions 39 times, 13 times, and 17 times respectively. FN169 A French surgeon reported that he visited the Viet Tri Hospital which was bombed on August 11 and 14, 1966, and again bombed on January 18, 1967, with explosive and fragmentation bombs. FN170 This same hospital was visited independently by a correspondent for *Life Magazine,* who described the fragmentation bombs used as cluster-bomb units-bursting cannisters that scatter explosive balls which in turn spray steel pellets coated with napalm over a wide area.FN171 Mary McCarthy, who visited Hanoi, reported of "ghost hospitals" and described the wreck of Hoa Binh Hospital. FN172 The Russell [page 1086] tribunal commissions reported that American aircraft had bombed and strafed 12 province hospitals, seven specialized hospitals, 22 district hospitals, 29 village infirmary-maternity homes, and ten others-a total of 9,072 hospital beds-between 1965 and 1967. FN173

Mary McCarthy, FN174 Harrison Salisbury, FN175 and the Russell tribunal commissions, FN176 have all reported and described the bombing of the famous Vietnamese leprosarium at Quyuh Lap. Although this health center is known throughout the world of medicine and science, is marked by the red cross, and has given fame to the small town of Quyuh Lap where it is the only notable structure, it was the target of 39 separate bombing missions.FN177 Mary McCarthy reports seeing photographs of the "pandemonic scenes as doctors and attendants sought to carry lepers to safety on their backs and on stretchers." FN178 She reports the North Vietnamese statistics of 160 demolished secluded buildings which had housed more than 2,000 lepers. FN179 The Americans used all types of bombs and strafed with machineguns the fleeing lepers. FN180 The North Vietnamese Ministry of Public Health made repeated statements after the early attacks, calling attention to the nature of the destruction and attempting in vain to dissuade the United States attacks. FN181 Three bombing and strafing missions also completely destroyed the Thanh Hoa tuberculosis sanatorium, the second most important sanatorium in North Vietnam. FN182 It covered two and a half hectares, contained 30 buildings, and was well-marked with many large Red Cross flags. FN183

The second Russell tribunal commission of inquiry submitted documents and photographs on the bombing destruction of ten churches in North Vietnam. FN184 According to Vietnamese sources, Americans destroyed more than 80 churches and more than 30 pagodas from the air since 1965.FN185 Visiting Hanoi, Salisbury found that "the churches whose towers rose above the

landscape had suffered repeated damage.” [page 1087] FN186 He inspected the *St.* Francis Xavier Cathedral, "bombed into a shattered hulk on April 24, 1966." FN187

North Vietnam is a land of dikes and dams. A member of the second commission of inquiry reported to the Russell tribunal that he was in Nam Dinh when it was bombed on December 31, 1966, and that contrary to the American report that the railroad junction in that city had been hit, "not a single bomb hit the railroad junction;" rather, "they all struck the dam which protects the city from floods of the Black River." FN188 Harrison Salisbury reports that the whole city of Nan Dinh is six to fourteen feet below water level during the rainy season, and that its dikes showed evidence of large craters and filled-in portions indicating bombing at tacks. FN189 He found similar evidence of repeated bombing of the dikes and water-control works in the Phat Diem region.FN190 At the Russell hearings it was reported that Americans twice bombed the dike at Traly, in Thai Binh province.FN191 Americans also bombed the dike in Quang Binh province several times, destroying 1,500 hectares of paddy fields.FN192 The second Japanese investigation team reported that 100 bombs fell on the dike along the Thuond River, including attacks during repairs.FN193 Japanese investigation teams provided many other examples at the Russell hearings.FN194 A reporter for the *Christian Science Monitor* published an eyewitness account of almost daily attacks on dikes along the Red River delta area where "no military targets are visible." FN195

After March, 1968, the bombing of North Vietnam was limited to the narrow southern panhandle of that country; nevertheless, actual bombing missions were increased. FN196 At the same time, as Lawrence Petrowski observes, far fewer American planes were shot down, indicating the likelihood that the bombing was directed at civilian targets in [page 1088] the heavily populated areas. FN197 A retired Air Force captain familiar with operations in Vietnam explained to Petrowski that the normal procedure was to allow low echelon personnel to assign targets to airborne squadrons which were unable to hit primary objectives or had ordnance left over from their first strike. FN198 "Often, all area targets, even the most questionable targets like fishing villages, rice paddies, or clusters of huts with seemingly normal activity around them, had been hit several times, even scores of times."FN199

As for South Vietnam itself, a predominantly rural country outside of Saigon, newspapers frequently report the bombing of villages-sometimes mistaken bombing of "friendly" villages, FN200 often bombing of villages in which there are mostly women and children and few if any Viet Cong, FN20l and usually heavy bombing of villages in areas that have been declared to be "free-fire zones." FN202 Two journalists who flew daily with the American forward air control have reported:

> In August, 1967, during Operation Benton, the "pacification" camps became so full that Army units in the field were ordered not to "generate" any more refugees. ...[N]ow peasants were not warned before an air strike was called in on their village. They were killed in their villages because there was no room for them in the swamped pacification camps. The usual warnings by helicopter loudspeaker or air dropped leaflets were stopped. ...Village after village was destroyed from the air as a matter of *de facto* policy. Air strikes on civilians became a matter of routine. It was under these circumstances of official acquiescence to the destruction of the countryside and its people that the massacre of Songmy occurred. FN203

Other reports have indicated the deliberate bombing in South Vietnam of sampans, often carrying only fleeing women and children, FN204 as well [page1089] as hospitals FN205 and schools. FN206

Official American response to the evidence of bombing of nonmilitary targets has either been to deny the allegations FN207—an expectable response since to admit them would be to involve the highest levels of command in criminal guilt—or to claim that the bombing of such targets was "accidental." FN208 Some observers accept the Pentagon's position that the bombing is restricted to military objectives and that there is a sincere intent to avoid civilian casualties. FN209 These observers add that "without access to classified information and to the pilots' briefing rooms, it would be rather fatuous to enter into the factual side of the bombing debate." FN210 To the contrary, it would be a bold departure from the Nuremberg precedents to make the issue of guilt turn on briefing sessions and classified information. Whatever such sources might or might not reveal about motivation, it is the resulting conduct that counts. The major Nazi war criminals convicted of conspiracy to wage wars of aggression were found guilty at Nuremberg on the basis of their presence at meetings and their positions of responsibility; their intent was inferred from the subsequent patterns of conduct. The Belsen trial specifically established the rule that a systematic course of conduct sufficed to prove intent. FN211

Although evidence is concededly limited, there are in addition several factors which indicate that the American bombing of non-military targets in Vietnam is not accidental. In the first place, repeated bombing missions against the same target, such as the 39 separate missions that bombed the leper colony and sanatorium at Quyuh Lap, belie the explanation that the bombing was accidental, FN212 particularly inasmuch as the [page 1090] United States has used reconnaissance flights extensively. FN213 Second, the military has repeatedly claimed that its bombing is extremely accurate, FN214 a position which is certainly credible in light of American technology. Third, psychological motivations probably influence bomber pilots to sometimes attack dramatic non-military targets:

> A bomb dropped into a leafy jungle produces no visible result. ...
> A hit on a big hydroelectric dam is another matter. There is a huge explosion visible from anywhere above. The dam can be seen to fall. The waters can be seen to pour out through the breach and drown out huge areas of farmland, and villages, in its path. The pilot who takes out a hydroelectric dam gets back home with a feeling of accomplishment. Novels are written and films are made of such exploits. FN215

Fourth, and most important, there is massive evidence of the use in Vietnam of antipersonnel bombs, FN216 which have an insignificant effect upon fixed military or economic installations but are effective against personnel in dense population centers. FN211 These bombs are often equipped [page 1091] with delayed-action fuses, the very notion of which is incompatible with an intent to strike against military targets in the traditional sense. FN218 These four factors lead inevitably to the conclusion that the bombing of non-military targets cannot persuasively be described as accidental.

3. Chemical Warfare FN219

a. The Law.

The Geneva Protocol of 1925 states that the "use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials, or devices, has been justly condemned by the general opinion of the

civilized world," and prohibits among the parties the use of such weapons. FN220 By virtue of the number of parties to this treaty FN221 as well as the expressions of adherence to its underlying principles by nonparties such as the United States, FN222 the Protocol has created customary international law binding upon all countries. FN223 The practice of states subsequent to 1925 has generally confirmed the status of the principles of the Protocol in customary international law. FN224 Except for the widely condemned use of gas by Italy against Ethiopia in 1935-36 [page 1092] and some small gas attacks by Japan against Chinese forces between 1937 and 1943, FN225 the belligerents did not use gas in the otherwise "total" Second World War. FN226 On June 8, 1943, President Roosevelt declared that the United States would not use gas unless enemy forces first used it, adding that "use of such weapons has been outlawed by the general opinion of civilized mankind." FN227 President Nixon recently reaffirmed this statement in calling upon the United States Senate to ratify the Geneva Protocol. FN228

In contrast to its application to the treatment of prisoners of war and bombardment of non-military targets, the Geneva Protocol gives rise to problems of legal interpretation in the Vietnam context. It is not clear whether defoliants, napalm, "tear gas," and "riot-control" gas are the types of "gas" outlawed by the laws of war. A respectable argument can be made that the only practical legal distinction is that between gas and no-gas FN229 and thus the use of gas of any kind is illegal. FN230 Minimally, however, the Geneva Protocol of 1925 and subsequent [page 1093] practice reflects a revulsion against the *kinds* and *uses* of gases employed in the first world war. Placing the Protocol in its 1925 context does not limit its proscriptions only to the use of gases used in the first world war; to do so would be to circumscribe absurdly the broad legislative goals of the nations that drew up and signed the Protocol. Clearly they were aware of new technology which would result in weapons analogous to, but not the same as, mustard, chlorine, and related gases. The Protocol specifically outlawed the use of "asphyxiating, poisonous or other gases, and...all analogous liquids, materials or devices." FN281 However, it is reasonable to assume that the "gases and analogous liquids" the signatories contemplated were those that could and did result in fatalities or near-fatalities. Excluded might be a hypothetical psychochemical gas which rendered its victims temporarily tranquil with no side or aftereffects. Under this interpretation, which is less extensive than one reading the Protocol as banning all gases, the question becomes an evidentiary and factual one-whether the gases, liquids or sprays used by the United States in Vietnam are lethal and hence illegal. FN282

b. The Evidence.

The evidence suggests that the various toxic gases and liquids used by the United States in Vietnam are lethal and thus come under the proscriptions of customary international law and the Geneva Protocol. Although the *names* of such gases—"tear gas" and "riot-control gas"—suggest only temporary debilitation, in fact their effect depends upon their degree of saturation in the air and upon the victim's physical [page 1094] characteristics. FN233 According to Dr. David Hilding of the Yale Medical School, the eye-irritation and nausea-inducing gases which the United States admits it uses in Vietnam FN234 "probably produce the designed effect in a few persons of the proper weight, height, and general condition, but the dosage for others will be wrong." FN235 Babies will "writhe in horrible cramps" until their strength "is unequal to the stress and they turn black and blue and die." FN236 One of the "riot-control" gases—DM (adamsite), used alone or more frequently in combination with CN

(tear gas) FN237—was described by a Canadian doctor working in Vietnam as having about a ten percent mortality rate in adults and a 90 percent mortality rate in children.FN238 These figures may be compared with the ten percent mortality rate that has been ascribed to the gases used in World War I in 1915. FN239 (CS, an extra-strength tear gas that induces choking as well as tears, has substantially replaced use of these two gases.)

A primary use of these gases in Vietnam has been to flush persons out of the intricate tunnels and shelters constructed by the Viet Cong and civilians hiding from the shells, bombs, and napalm used above ground. FN240 In this manner, very high concentrations of the gas build up in the enclosures. In January 1966, in a well-documented incident, an Australian soldier trapped in a tunnel was killed by tear gas even though he was wearing a gas mask. FN241 There was medical testimony at the Russell hearings that the gas concentration in tunnels and hideouts is mortal. FN242 Professor M.F. Kahn of the Faculty of Medicine of Paris [page 1095] has reported of hundreds of civilian deaths resulting from the use of "tear gas" and "riot-control gas" in the tunnels and shelters of South Vietnam. FN243 But even open-air use can be lethal; it was reported to the Russell tribunal that American use of gas against the village of Vinh Quang in South Vietnam on September 5, 1965, resulted in 35 deaths, nearly all women and children. FN244 Although the Departments of State and Defense have claimed that tear gas and riot-control gas was used in Vietnam solely as a humanitarian weapon to separate the Viet Cong from innocent civilians in villages where the civilians were used as shields, FN245 it has been reported that the American command in Saigon told the Pentagon in the spring of 1969 "that tear gas had rarely been used to save civilian lives." FN246 The greatest amount of CS had been used against enemy camps, bunkers and caves. FN247 It has been further reported that gas attacks are used as a prelude to fragmentation bombs in order to force the enemy out into the open. FN248 Because the gases used by the United States in Vietnam are lethal in some concentrations, and because they have been used in the manner which the Geneva Protocol was designed to prevent, such gases appear to be used in violation of the laws of war

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The United States also freely admits that it uses defoliant and herbicide sprays extensively in South Vietnam and that their use will not be curtailed as a result of President Nixon's statement reaffirming the renunciation of the first use of lethal or incapacitating chemicals. FN249 Although not technically "gases," these spray chemicals ejected in mist or cloud-like form are covered by the language of the Geneva Protocol which applies to "gases, and...all analogous liquids, materials or devices." FN250 The defoliant and herbicide sprays have been condemned by some writers as directed against the civilian population's food supply. FN251 We take no position here on the legality of such a [page 1096] use, FN252 but rather suggest that the direct effects of spraying can be lethal to some victims depending upon concentration and personal characteristics. The most common sprays FN253 contain arsenic and calcium cyanamide, FN254 which are virulent poisons. FN255 It was reported to the Russell tribunal that a spraying of Cocong, Ben Tre Province, in June, 1966, caused toxic symptoms in 5,000 villagers; 900 developed high fevers with violent purging and loose bowels, and some died. FN256 Moreover, the eating of sprayed foods can be lethal, particularly to children who may not heed the warnings of the NLF not to eat sprayed fruits. FN257

Napalm FN258 and supernapalm, FN259 used extensively by the United States in Vietnam, FN260 might arguably be considered "analogous liquids, materials or devices" within the prohibitions of the

Geneva Protocol. FN261 This argument, however, is open to the objection that, as a liquid, napalm was not contemplated in the Geneva Protocol which addressed itself primarily to gases. A different approach might be to recognize [page 1097] that napalm emits large quantities of carbon monoxide when it burns, a deadly asphyxiating gas that is at least equally effective in terms of the number of victims killed or injured as the direct burning by napalm itself. FN262 Indeed, the carbon monoxide gas spreads over a wider area than the burning napalm. FN263 Thus, as a lethal-gas-producing "device"-to use the term of the Geneva Protocol-napalm may come within the prohibition of the laws of war even though its most obvious and dramatic effect is combustion.

In this part of the paper we have discussed the rules of evidence for proof of war crimes, the evidence legally required for such proof, and examples of the available evidence. In the following two sections we discuss government defenses to war-crimes allegations and whether the service resister will be able to fashion a suit that will be held procedurally and substantively justiciable.

III
DEFENSES TO WAR-CRIME ALLEGATIONS

The international law of war crimes contains several general so-called "defenses" that might be raised to counteract claims that war crimes are being or have been committed in Vietnam. In this section we shall consider briefly those defenses that might be relevant to a service resister's claim that American soldiers abroad are committing war crimes. We shall consider the concepts of reprisals and *tu quoque,* military necessity, obedience to superior orders, ignorance of the law, and duress.

A. Reprisals and Tu Quoque

In defense of a war crimes accusation, a belligerent sometimes claims the right of reprisal. It argues that since the other side commits war crimes, it may do so in return, as a punishment, or to deter the other side from doing so again. FN264 It sometimes also raises a defense of *tu quoque:* as both sides are committing the alleged violation, it is not a [page 1098] war crime after all. FN265 Although there is considerable controversy as to the meaning and breadth of these defenses, FN266 it is minimally clear that if they are valid defenses at all, they relate only to acts committed by both sides that are similar, proportional, usually geographically contiguous, and, in the case of reprisals, acts done in specific retaliation for a prior illegal act by the other side. FN267 Absent these limitations, any war crime would immediately lead to a complete abandonment of all legal restraints on war activities of both sides, by virtue of war crimes of escalating gravity by each side in turn. The various Nuremberg trials considering these defenses have accordingly interpreted strictly the requirements of similarity and proportionality. FN268

The Nuremberg tribunal rarely heard the defense of reprisals for war-crimes violations, not-as one commentator has implied-because the Allies did not commit such crimes, FN269 but rather because the Allies probably decided not to prosecute defendants who might have had legitimate reprisal or *tu quoque* defenses to avoid the embarrassment that such revelations would cause. Notably absent were prosecutions of Axis bomber-pilots, perhaps because the Allies themselves engaged in area bombing. But then the doctrine of *tu quoque* cannot be summarily dismissed as it has been by some writers

FN270 who say that no criminal can defend himself on the basis that others are not being prosecuted for a similar crime. In fact, in the judgment for Admiral Doenitz, the Nuremberg tribunal stated that Doenitz violated the laws of maritime war relating to the rescue of shipwrecked survivors, but that "in view of' a statement of Admiral Nimitz that the United States engaged in unrestricted submarine warfare in the Pacific Ocean the tribunal in sentencing would not assess this particular violation of Doenitz. FN271

In any event, the concepts of legitimate reprisals and *tu quoque* appear inapposite when applied to the Vietnamese war. There is no evidence that either the North Vietnamese or the Viet Cong have engaged in the use of gas or chemical warfare. Despite some terror bombing activities in which they have been engaged, notably around Saigon, they have not engaged in bombing remotely proportional to the American bombing of non-military targets in North and South Vietnam [page 1099]. As for prisoners of war, it has not been publicly alleged that captured American soldiers have been tortured or murdered. FN272 But even if they were, the 1949 Geneva Prisoners of War Convention flatly prohibits reprisals against prisoners of war, FN273 echoing the 1929 Geneva Convention that was upheld by a United States Military Commission in the *Dostler Case* of 1945. FN274

B. Military Necessity

Another possible defense is military necessity. FN275 It is true that the United States Military Tribunal at Nuremberg held in the *Hostages Case* FN276 that "military necessity or expediency do not justify a violation of positive rules [*i.e.*, the laws of war]"-although, as the tribunal pointed out, FN277 this generalization does not apply when the particular conventional law of war itself contains a military-necessity exception. FN278 The law on necessity might be changing to allow a defense of military necessity to a prohibited war crime when the immediate *survival* of the actor-as opposed to a military advantage FN279-is at stake. FN280 To the [page 1100] extent that this modification is in effect, it would be applicable in Vietnam, if at all, only to the killing of prisoners by American soldiers in combat zones. The United States certainly could not raise necessity as a defense to aerial bombardment, gas warfare, or the torturing or ki1ling of prisoners of war by Americans or South Vietnamese troops. As for the killing of prisoners in combat zones, the exigencies of the immediate situation-the lack of a reasonable alternative, the inability to transport the prisoners out of the zone by helicopter, the danger to the captors of leaving wounded and disarmed prisoners alone in the jungle, for example-would have to be proved in justification. FN281 Consequently, it is not at all clear that military necessity is a plausible defense in this type of situation.

C. *Superior Orders*

The defense of obedience to superior orders is relevant to the service resister's suit because the United States may argue that soldiers in Vietnam and the resister himself when he is in Vietnam cannot be guilty of war crimes if they are following orders. But this position simply misstates the law. If superior orders were a complete defense to the soldier who actually carries out an order to commit a war crime, then only the top commanders, in infinite regress, would ever be guilty of a war crime, and as Professor McDougal wryly observes, the elite would then claim the act-of-state doctrine to absolve themselves. FN282 At the Nuremberg trials nearly every defendant claimed that he was acting under the express

orders of Hitler and/or Himmler. Hardly a single war-crime conviction would have been possible if the defense of superior orders had been allowed. Yet in fact there were many convictions for war crimes involving all ranks of officers and soldiers as well as civilians. FN283 The public little realizes how many war-crimes trials took place; the United States alone conducted 950 cases, trying 3,095 defendants of whom 2,647 were convicted. FN284

Although a soldier is trained to follow orders, he acts at his own peril if he obeys an order to commit a war crime. The Nuremberg Charter specifically provided that [page 1101] The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determine that justice so requires. FN285

The judgments of the tribunal held that this provision correctly stated the international law on the subject. FN286 The charters and regulations of the Tokyo tribunal and of the various national military tribunals of the Allied powers included similar provisions. FN287 In *Levy v. Resor,* FN288 the Army law officer allowed Levy to raise a war-crimes defense to the charge of willful disobedience of a superior order, thus recognizing that superior orders do not protect a soldier against personal jeopardy for a war-crimes conviction. In brief, superior orders cannot be pleaded in exculpation but only in mitigation of a sentence, FN289 and thus the service resister faced with such an argument in an American court can justifiably contend that he has no defense of superior orders.

D. *Ignorance of the Law*

Although "ignorance of the law" is generally not allowed as a defense to criminal prosecutions, courts trying war crimes have been more liberal, recognizing that the pressure of military discipline makes it unreasonable to expect a soldier to adopt a questioning attitude to the legality of all his orders. Such courts have used as standards of guilt actual knowledge or reason to know that the orders are unlawful. FN290 Knowledge may be inferred in cases where the orders are manifestly or obviously unlawful-for example, orders to kill or torture prisoners of war. FN291 On the other hand, a soldier may have a defense of ignorance of the law on the legality of the use of napalm, since this is a difficult legal question even for scholars. Notwithstanding these general principles, the present essay concerns a service resister who is claiming that he does not want to be put into a position where he may receive orders to commit war crimes in Vietnam. Clearly he is not in ignorance of the law. To him, even if not to the average soldier, there would be [page 1102] criminal responsibility for carrying out such orders.

E. Duress

It is important to consider the viewpoints both of the average soldier in Vietnam and of the service resister with respect to the defense of duress. Duress, or the deprivation of any voluntary alternative to commission of an illegal act, is of course a defense to criminal prosecution under any legal system. War-crimes tribunals, however, have commonly required a high degree of compulsion for exemption from liability.FN292 In the Krupp trial, FN293 the United States Military Tribunal held that only the avoidance of a threatened serious and irreparable evil not disproportionately less grave than the act itself would support such a defense. Lacking the degree of compulsion required for exemption, the accused may plead duress in mitigation of his punishment. FN294

Like the doctrine of superior orders, the defense of duress obviously cannot apply in infinite regress so that only the commander-in-chief of the armies can be held guilty of a war crime. Thus, from the standpoint of the argument that war crimes are being committed in Vietnam, the defense of duress—though possibly applicable in some individual cases—cannot be used to excuse the commission of so many crimes. Although it is true that the United States Army may, upon considering duress, choose to prosecute some but not all of the soldiers and officers who are present at the time of the commission of war crimes, FN295 it is clear that a crime was committed irrespective of whom the Army chooses to prosecute.

When we take the perspective of the service resister who argues that he himself may be placed in jeopardy of committing a war crime if sent to a combat zone in Vietnam where such crimes have been and are being committed, the analysis perforce becomes more complex. Considered in the abstract, the argument can be made that a service resister cannot legitimately maintain that assignment to Vietnam will place him in jeopardy of committing a war crime because he will know what acts are war crimes and can simply refrain from doing them. If he cannot refrain, because of duress, then it follows that he cannot be held criminally liable for his acts. However compelling in theory, such an argument is not convincing in the real-world context of military combat. In the first place, a soldier who gives in to the threat of summary court [page 1103] martial and execution by his commanding officer if he does not execute a prisoner of war, may later find, when prosecuted for his act, that he is unable to convince the court that he was under duress. His commanding officer may deny the allegation, other witnesses may not be available, and the court may look with general skepticism upon the defense of duress on the ground that a single commander of a platoon cannot physically coerce every man in his unit simultaneously to commit illegal acts. Second, if an American soldier who has committed a war crime is caught and tried by the *enemy* during the war, he may find it especially hard to prove to the court that he acted under duress. Third, a service resister may know in advance that a certain act would constitute a crime against the laws of war, but he may also believe that once placed in a military company where his fellow soldiers are committing such acts he will not or may not have the courage and fortitude necessary to refrain from such acts himself. A group psychology seems to animate combat units, making it unrealistic for a court in advance to proclaim that each soldier retains his individual will power at all times. FN296 When the facts of the American massacre of the civilian inhabitants of Mylai hamlet in Songmy village in Vietnam became public, Mike Wallace interviewed veteran Paul Meadlo on the Columbia Broadcasting System:

> Q. It's hard for a good many Americans to understand that young, capable, American boys could line up old men, women and children and babies and shoot them down in cold blood. How do you explain that?
> A. I don't know.
> Q. Why did you do it?
> A. Why did I do it? Because I felt like I was ordered to do it, and it seemed like that, at the time I felt like I was doing the right thing, because like I said I lost buddies. I lost a damn good buddy, Bobby Wilson, and it was on my conscience. So after I done it, I felt good, but later on that day, it was gettin' to me. FN297

At Songmy, the American troops had encountered little if any hostile fire, found virtually no enemy soldiers, and suffered only one casualty, apparently a self-inf1icted wound. FN298 Yet squad leader Sergeant Charles West told a *Life Magazine* reporter that

> The yanigans were doing most of the shooting. I call them yanigans because they were running around doing unnecessary shooting. In [page 1104] a lot of cases they weren't even shooting at anything. Some were shooting at the hootches that were already burning, even though there couldn't possibly be anything alive in there. The guys were hollering about "slants." It wasn't just the young guys, older guys were shooting too. They might have been wild for a while, but I don't think they went crazy. If an individual goes crazy, you can't reason with him. Once everything was secured, everything did cease. If these men had been crazy, they would have gone on killing people. FN299

Both Paul Meadlo's and Charles West's descriptions give an impression of individual soldiers being swept up in the activities of the platoon, of a kind of group combat behavior for which it would be unrealistic to apply normal concepts of duress, intentionality, or individual self-control. Fourth, even though a soldier may successfully refrain from engaging in the commission of a war crime, if the other soldiers in his unit are violating the laws of warfare he may find himself accused of being an accomplice in the crime. Indeed there is some risk, particularly if he is tried by an enemy war-crimes court, that the court will infer that he took an active hand in the group criminal behavior. Fifth, a soldier may find that he is forced to participate in the commission of a war crime under the very real threat that if he does not participate he will be assigned to a combat post where there is a virtual certainty of being killed by the enemy. FN300 Even assuming that the soldier could prove the existence of such a threat to a court, the court probably would not accept the threat as amounting to duress on the ground that the potential assignment to the hazardous combat post would in itself be within the legal discretion of the commander. Finally, it is difficult to be certain about what constitutes an "order" in a combat situation such that a soldier could afterwards clearly allege that he did what he was explicitly told to do under the threat of an immediate explicit penalty. Statements of participants in the Songmy massacre indicate the vagueness of the alleged orders to kill the civilian villagers. FN301

With all these considerations in mind, it is unreasonable to place faith on the possible defense of duress as fully protecting a soldier who [page 1105] is placed into a war zone where war crimes are being committed by his fellow soldiers. Consequently, putting aside the questions of justiciability discussed in the following and final part of this Article, American courts ought to permit in-service and even draft resisters to raise offensively or as an affirmative defense the charge that they may be forced to commit war crimes in Vietnam.

IV
JUSTICIABILITY IN AMERICAN COURTS

Up to now for purposes of brevity we have referred in this essay to the service resister refusing orders to report for combat duty in Vietnam on the basis of his possible or probable implication in the commission of war crimes. Let us now view the complainant along a spectrum of possible fact situations. FN302 An American soldier who refuses to obey an order to torture a prisoner of war would face no difficulties in defending himself before a court-martial. Clearly he would have a valid

"Nuremberg defense" based on the argument that the international law of war crimes on this matter is part of American law, FN303 that his military obligation is only to obey "lawful" orders, FN804 that the order given him is unlawful, and that the so-called defense of superior orders is not available to him. FN305 He would face no serious procedural hurdles nor any questions of justiciability.

To discuss the difficulties which aggrieved parties differently situated would have to meet, let us consider the case of a soldier trained in this country in the techniques of torturing prisoners of war and awaiting receipt of combat orders to report for duty in Vietnam as a member of a "Special Forces" interrogation unit. FN306 He asks a federal court for [page 1106] an injunction against the Secretary of Defense to stop the expected orders. First, he must state a possible claim. His claim would be that of a constitutional deprivation of due process of law under the fifth amendment on the ground that he would be placed in a combat situation where there is a significant probability that he will be implicated in the commission of a war crime. As will be recalled from the discussion of this point in the last section of this essay, the claimant may allege that if he is only obeying orders he will still be responsible, and even if he obeys such orders under duress he nevertheless will have to prove such duress as an affirmative defense, and will entail serious risk of being held responsible for the criminal delict in an American court or in a court of the enemy state. In addition, he can claim that it would be a violation of due process to be placed in a position where he may be forced to commit an immoral act even on the assumption that the fact of such coercion would absolve him from actual criminal liability. Even if he is not eventually tried by a court as a war criminal, he still would have committed the crime. The primary delict, to paraphrase *Marbury v. Madison,* FN307 exists even though a court is unavailable to enforce it.

After stating a claim, the claimant would have to and should be able to meet certain procedural hurdles. He would have to allege and argue that a possible war-crimes conviction would deprive him of life, liberty, or reputation measurable at over the jurisdictional amount of 10,000 dollars.FN308 He would also have to overcome the defense of sovereign immunity. FN309 And he would have to convince the court not to dismiss his case on the ground that he must first exhaust his military remedies.FN310 Finally, after overcoming these initial procedural hurdles, he would have to satisfy the court that he has standing, that the issue is ripe, and that the issues raised are justiciable.

A. Standing and Ripeness

The in-service resister and even the draft refuser have a very personal stake in the controversy because, for the reasons discussed in the [page 1107] previous section, they may be placed in jeopardy of becoming implicated in the commission of a war crime. Consequently, they should be able easily to meet the requirement of standing. The more difficult problem arises with respect to the issue of ripeness.

The draft resister is far from the combat situation in which he may be implicated in a war crime; the in-service resister is closer; and of course the soldier within that combat zone who refuses an order to commit a war crime is there, and has no "ripeness" problem at all. Where the claimant stands on the spectrum from potential draftee to combat soldier is of course a basic factor in a court's willingness to consider his case sufficiently ripe for adjudication. But even more important in deciding the issue of ripeness in a Nuremberg defense case is the court's willingness to recognize—in light of the realities of the American military situation—the difficulty of raising the claim as a serviceman in Vietnam. Clearly there is some degree of probability that even a potential draftee will wind up in a Vietnam combat zone.

FN311 Moreover, the probability is outside the claimant's own control, and hence the lack of ripeness that was indicated in the leading case of *United Public Workers of America* v. *Mitchell* is not present here. FN312 Similarly, with respect to potential *enlistees*, it has been reported that promises of training assignments to applicants considering whether to enlist are routinely broken. FN313 In a regimented military situation where the exigencies of training can preclude for long periods of time any contact with the world outside the training base, or where an order to report immediately to an airplane leaving for Vietnam can come without warning at any time, a soldier or even potential draftee must take advantage of any opportunity that arises to press his case. He may have only one good chance left. Courts should at least be willing to recognize that the claim presented may be the only physically possible opportunity for the claimant to have a judicial hearing on his allegations of deprivation of due process. In such a situation, the claimant's case is as "ripe" as it will ever be and the court should consider his case.

B. Political Question [page 1108]

Implicit to some extent in the previous discussion has been the question whether the issue the claimant raises is of the type that a federal court feels competent to adjudicate. The Supreme Court has attempted to draw a line between the suitability of the plaintiff and the suitability of the issues, a line which at least is roughly workable for purposes of categorization. FN314 The only example of issue-adjudicability for cases originating in federal courts is the much-discussed doctrine of "political questions."

Courts have refused to adjudicate some cases involving Vietnam issues on the ground that they raise political questions. The appellate court for the District of Columbia affirmed a dismissal of Robert Luftig's request for an injunction against the Secretary of Defense on the primary ground that his complaint that the American military effort in Vietnam was entirely illegal presented "political questions." FN315 The Supreme Court denied certiorari under the case name *Mora v. McNamara,* but Justices Douglas and Stewart filed substantial dissenting opinions. FN316 A basic distinction between the *Mora* case and the situation envisaged in the present essay is that *Mora* involved the allocation of powers between President and Congress in engaging the United States in a war, whereas the present situation involves a result that neither Congress nor the President, jointly or severally, may authorize-depriving a citizen of due process of law. In the *Steel Seizure Case,* despite the drama of a highly "political" issue, the doctrine of political questions did not bar the Supreme Court from stopping the President from doing what he had no legal power to do. FN317 In the situation envisaged in the present essay, the claim is that no branch of the government may constitutionally place the claimant in a position where there is a non-frivolous likelihood that he will be forced to participate or become implicated in criminal acts.

Even in cases where there have been adequate grounds for conceding plenary power to the legislative or executive branches, a substantial showing of impact upon the valued personal interests of the claimant has been enough to dissuade federal courts from invoking the doctrine of political questions. FN318 In support of this judicial tendency [page 1109] an argument could be made that, since the possible future criminality of the claimant is involved, it would be a violation of due process of law for a court to exclude-by invocation of such a doctrine as "political questions"-the most highly relevant issues invoked by the claimant. FN319

Apart from the question of the allocation of powers among the three branches of the federal government, the doctrine of "political questions" as expressed in *Baker v. Carr* refers to the element of "judicially discoverable and manageable standards" for resolving a controversy. FN320 In a basic sense the entire present essay has addressed itself to the problem of justiciability raised by this language in *Baker v. Carr.* We have attempted to show clear legal standards of the international law of war and the availability of evidence (appropriate to this *type* of case, as demonstrated in the many "Nuremberg" trials) that would make the controversy manageable by an American court. Consequently, the claims raised in a "Nuremberg defense" should be held justiciable in American courts.

CONCLUSION

In this Article we have attempted to establish first that the international laws of warfare are part of American law, and have argued that these laws, when taken as prohibitions of specific methods of waging war, are a practical and effective means of controlling unnecessary suffering and destruction. Second, we have analyzed these laws as they apply to treatment of prisoners of war, aerial bombardment of nonmilitary targets, and chemical and biological warfare, and have marshalled a portion of the available evidence that American forces commit war crimes in Vietnam. Third, we have discussed the defenses of *tu quoque*, reprisal, military necessity, superior orders, ignorance of the law, and duress, and have concluded that a service resister can state a valid claim that his service in Vietnam may place him in substantial danger of being responsible for commission of war crimes. Finally, we have maintained that in-service and possibly draft resisters raising a "Nuremberg defense" have standing, and raise questions which are both ripe and justiciable. [page 1110] By framing these issues in narrow, justiciable terms, we have attempted to show that American legal institutions can find a way to be responsive to matters which go to the heart of the American commitment to the rule of law in world affairs.

Footnotes

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** J.D. 1969, Northwestern University. J.D. 1969, Northwestern University. Messrs. Gould and Woods assisted in the research for this article under Professor D'Amato's supervision in the Senior Research Program at Northwestern, a joint faculty-student writing program.

FN1. Levy v. Resor, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967); N.Y. Times, May 18, 1967, at 2, col. 3 (ruling to hear evidence of war crimes); Note, 9 HARV. INT'L L.J. 169 (1968). Levy's case is in its first civilian review stage, in the Middle District of Pennsylvania. N. Y. Times, April 20, 1969, at 32, col. 1. Levy finished all but nine days of his two-year military sentence at Fort Leavenworth when Justice William O. Douglas ordered him freed on 1000 dollars bail in August, 1969.
FN2. N.Y. Times, May 26, 1967, at 5, col. 2.
FN3. *See generally* the essays collected in THE VIETNAM WAR AND INTERNATIONAL LAW (R. Falk ed. 1968).
FN4. *Compare* Andonian, *Law and Vietnam*, 54 A.B.A.J. 457 (1968) *with* D'Amato, *Vietnam and Public International Law*, 2 VANDERBILT INT'L L.J. 100 (1969).

FN5. *See, e.g.*, Lawyer's Committee on American Policy Toward Vietnam, *American Policy Vis-A-Vis Vietnam, in Light of our Constitution, The United Nations Charter, The* 1954 *Geneva Accords, and the Southeast Asia Collective Defense Treaty, Memorandum of Law*, 112 CONG. REC. 2666 (1966); Wright, *Legal Aspects of the Viet-Nam Situation*, 60 AM. J. INT'L L. 750 (1966). For a more realistic and highly creative view, see Falk, *International Law and the United States Role* in *the Viet Nam War*, 75 YALE L.J. 1122 (1966).
FN6. It is true that Justices Douglas and Stewart did dissent from the denial of certiorari in Mora v. McNamara, 389 U.S. 934 (1967), a case in which many of the "larger issues" of the Vietnamese war were posited. However, their (minority) position on certiorari is no indication of how they would vote on the merits.
FN7. 1 Trial Maj. War Crim. II, (art. 6(b)) (Int'l Mil. Trib. 1947); 59 Stat. 1547 (1945).
FN8. G.A. Res. 95(1) U.N. Doc. A/236 at 1144 (1946).
FN9. See the listing in U.S. DEP'T OF THE ARMY, THE LAW OF LAND WARFARE § 5 (Field Manual No.27-10, 1963) [hereinafter cited as FIELD MANUAL].
FN10. *E.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 3 U.S.T. 3316, T.I.A.S. No.3364, 75 U.N.T.S. 135, containing 143 articles and 5 annexes.
FN11. 327 U.S. 1, 15 (1946).
FN12. The Paquete Habana, 175 U.S. 677, 700 (1900).
FN13. For a statement of this theory, see D'Amato. *Treaties as a Source of General Rules of International Law*, 3 HARV. INT'L L.J. I (1962); D'Amato, The Concept of Custom in International Law 138-217 (doctoral dissertation in Columbia University Library 1968) (analysis of treaties at Nuremberg trials).
FN14. Protocol Prohibiting the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, of June 17, 1925, 94 L.N.T.S. 65; 3 M. HUDSON, INTERNATIONAL LEGISLATION 1670 (1931).
FN15. *See* D'Amato, *supra* note 13; North Sea Continental Shelf Cases, [1969] I.C.J. 4, 42-43. Whether the multilateral conventions generate rules of customary international law or whether they exist in parallel with customary rules to the same effect, the Nuremberg Tribunal held that provisions in the Hague Conventions of 1907 and the Geneva Conventions of 1929 were applicable to Germany not directly but because they were "regarded as being declaratory of the laws and customs of war," I Trial Maj. War Crim. 255 (Int'l Mil. Trib. 1947), and held the Hague Conventions of 1907 applicable to World War II despite the formal exclusion in those conventions of wars which involved non-parties (Russia was not a party). *See also id.* at 334 (applicable to Czechoslovakia though it was not a party). Even more remarkable was the extensive use of the 1929 Geneva Convention on Prisoners of War, to which Germany itself was not a party; *see* United States v. von Leeb, 11 Trials of War Criminals Before the Nuremberg Military Tribunals 462, 535-38 (1950); *see also* Tanabe Koshiro Case, 11 L. Rep. Trials War Crim. 1, 4 (U.N. War Crimes Comm'n 1947) (applying the Convention to Japan, also a non-party).
FN16. In addition to the Prisoners of War Convention, *supra* note 10, these are: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick. in Armed Forces in the Field, Aug. 12, 1949, [1955] 3 U.S.T. 3114, T.I.A.S. No.3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, [1955] 3 U.S.T. 3217, T.I.A.S. No.3363, 75 U.N.T.S. 85; Geneva Convention

Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, [1955] 3 U.S.T. 3516, T.I.A.S. No.3365, 75 U.N.T.S. 287.
FN17. 213 U.N.T.S. 378-84 (1955).
FN18. 191 U.N.T.S. 365-68 (1954).
FN19. 260 U.N.T.S. 438-45 (1956).
FN20. 275 U.N.T.S. 335-42 (1957).
FN21. 181 U.N.T.S. 349-52 (1953).
FN22. U.S. Dep't of State, *The Legality of United States Participation in the Defense of Viet-Nam,* 112 Cong. Rec. 5506 (1966) (art. I (G)).
FN23. New York Times, Aug. 14, 1965, at I, col. 3.
FN24. Address by Farer and Petrowski, "The Nuremberg Trials and Objection to Military Service in Vietnam," before the American Society of International Law, Washington, D.C., April 25, 1969 (to be published in 1969 PROC. AM. Soc'y lNT'L L.).
FN25. *See* R. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 120-21 (1960). Similarly it is no bar to the trial of war criminals that equally guilty nationals of the victorious state might escape punishment. M. GREENSPAN, THE MODERN LAW OF LAND WARFARE 421 (1959).
FN26. This is stated in Article 2, common to all four conventions, *supra* notes 10 & 16.
FN27. FIELD MANUAL *supra* note 9, at para. 9.
FN28. In Bas v. Tingy, 4 U.S. (4 Dall.) 37, 39 (1800), the Supreme Court found that the United States was at war with France despite the absence of a declaration of war, referring to the facts of "bloodshed, depredation and confiscation" in conflicts between vessels of the two nations. The Court of Military Appeals held for various purposes that the United States was "at war" during the Korean conflict, United States v. Ayres, 4 U.S.M.C.A. 220, 15 C.M.R. 232 (1954), United States v. Bancroft, 3 U.S.M.C.A. 3, II C.M.R. 3 (1953), and held in 1968 that the United States was "at war" in Vietnam for the purpose of suspending the two-year statute of limitations on prosecuting military offenders who had gone absent without leave, United States v. Anderson, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968). For similar decisions interpreting the existence of a state of war during the Korean conflict for the purpose of construing insurance claims, see Carious v. New York Life Ins. Co., 124 F. Supp. 388 (S.D. Ill. 1954); Weissman v. Metropolitan Life Ins. Co., 112 F. Supp. 420 (S.D. Cal. 1953). In United States v. Bancroft, *supra,* 11 C.M.R. at 5, the court suggested the following factors as indicative of a state of war: (1) Movement to and the presence of large numbers of military personnel on battlefields; (2) number of casualties involved; (3) sacrifices required; (4) number of recruits who must be drafted; (5) national emergency legislation; (6) number and types of executive orders promulgated to deal in some way with the hostilities; (7) amount of money being expended for the express purpose of maintaining the armed forces in the theater of operations. Certainly these same factors would overwhelmingly indicate a state of war in Vietnam.
FN29. G.A. Res. 95(1) U.N. Doc. A/64/Add. 1 at 188 (1947).
FN30. For an historical account of earlier trials, *see* R. WOETZEL, *supra* note 25, at 172-89.
FN31. Table derived from data in 1 Trial Maj. War Crim. 279-366 (Int'l Mil. Trib. 1947).
FN32. The Tribunal did not find evidence sufficiently connecting Hess with the commission of war crimes, but did note that there was "evidence showing the participation of the Party Chancellery, under Hess, in the distribution of orders connected with the commission of War Crimes; that Hess may have had knowledge of, even if he did not participate in, the crimes that were being committed in the East,

and proposed laws discriminating against Jews and Poles; and that he signed decrees forcing certain groups of Poles to accept German citizenship." 1 Trial Maj. War Crim. 284 (Int'l Mil. Trib. 1947).
FN33. Text in 1 Trial Maj. War Crim. at 10-16 (Int'l Mil. Trib. 1947).
FN34. *See* R. WOETZEL, *supra* note 25, at 177.
FN35. U.N. CHARTER art. 2, para. 4.
FN36. *E.g.*, Trial of Willy Zuehlke, 14 L. Rep. Trials War Crim. 139, 144 (U.N. War Crimes Comm'n, Neth. Spec. Ct. Cassation 1948); Trial of Wilhelm List, 8 L. Rep. Trials War Crim. 34, 59 (U.N. War Crimes Comm'n, U.S. Mil. Trib. 1948); Trial of Josef Alstoetter, 6 L. Rep. Trials War Crim. 1, 52 (U.N. War Crimes Comm'n, U.S. Mil. Trib. 1947).
FN37. *See* M. McDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 531-34 (1961) [hereinafter cited as McDOUGAL & FELICIANO].
FN38. This may have special significance to the United States, since it bases its entire intervention in the Vietnamese war on the ground of resisting an *illegal* takeover of South Vietnam by Communist forces. In particular, when atrocities by the Communist side were cited in defense of the American massacre of over 100 Vietnamese civilians in the village of Songmy, a British member of Parliament replied, "I thought the Americans were in this war to show that they had a different standard of morality from the Communists," Lewis, *Atrocity Charge Stirring British,* N.Y. Times, Nov. 22, 1969, at 3, cols. 1, 4.
FN39. *See generally* L. FULLER, THE MORALITY OF LAW (1964).
FN40. *Cf.* Levie, *Penal Sanctions for Maltreatment of Prisoners of War,* 56 AM. J. INT'L L. 433 (1962).
FN41. *See* McDOUGAL & FELICIANO, *supra* note 37, at 54-55.
FN42. For text and commentary, *see* VON KNIERIEM, THE NUREMBERG TRIALS 428-39 (1959). Similarly, on June 6, 1941, Hitler issued his Commissars Order, providing that any Soviet political commissars who were captured were to be shot immediately. Von Knieriem writes, *id.* at 425, that the "Nuremberg Tribunals who judged the German generals have acknowledged to a large extent that the generals did everything within their powers to prevent the Commissars Order from being implemented."
FN43. For example, Sergeant Donald W. Duncan, former Special Forces "Green Beret" in Vietnam, and holder of two Bronze Stars, Legion of Merit, Vietnamese Silver Star, Army Air Medal, Combat Infantry Badge, Master Parachutist, and other decorations, testified before the Russell Tribunal in Copenhagen that during a mission in the An Lao valley in 1965 his team of eight men captured four Viet Cong prisoners. Radioing back to base, Duncan was informed to "get rid of them." Pretending not to understand this order, he effected helicopter transport for the prisoners, and when he got back to base was faced with an angry commander who made it plain that the prisoners should have been murdered. It would have been "standard practice" to kill the prisoners in such a situation, Duncan said, although the captain-for fear of radio monitoring and subsequent legal ramifications-would not say directly over the radio to "kill the prisoners." AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE RUSSELL INTERNATIONAL WAR CRIMES TRIBUNAL 473-74 (Duffett ed. 1968) [hereinafter cited as RUSSELL TRIBUNAL]. In his book, Duncan recounts an American instruction class for the Green Berets in "Counter-Measures to Hostile Interrogation" in which the techniques of hostile interrogation are presented in great detail but not any counter-measures, of which the instructor says there are none. A sergeant asks the instructor whether the only reason for teaching the class is for training in the *use* of the methods of interrogation (involving torture such as lowering of a prisoner's testicles into a jeweler's vise, mutilation, etc.). The instructor replies: "We can't tell you that, Sergeant

Harrison. The Mothers of America wouldn't approve. Furthermore, we will deny that any such thing is taught or intended." D. DUNCAN, THE NEW LEGIONS 123-25 (Pocket Books ed. 1968). In his testimony before the Russell Tribunal, Duncan states that this dialogue is a word for word quote. RUSSELL TRIBUNAL, *supra,* at 463.

FN44. D'Amato, Book Review, 75 HARV. L. REV. 458 (1961).

FN45. *See* McDOUGAL & FELICIANO, *supra* note 37, at 1-96, 520-731.

FN46. M. McDOUGAL, STUDIES IN WORLD PUBUC ORDER 887 n.109 (1960).

FN47. McDOUGAL & FELICIANO, *supra* note 37, at 52.

FN48. "For all types of controversies the one test that is invariably applied by decision-makers is that simple and ubiquitous, but indispensable, standard of what, considering all relevant policies and all variables in context, is *reasonable* as between the parties." M. McDOUGAL, *supra* note 46, at 778.

FN49. McDouGAL & FELICIANO, *supra* note 37, at 521.

FN50. *Id.* at 72; *see id.* at 530.

FN51. It is not easy to see how military objectives could be evaluated as legitimate or nonlegitimate save in terms of their relation to some broader political purpose postulated as legitimate. To put the point comprehensively, it is most difficult rationally to appraise the necessity of a particular exercise of violence without relating it to a wider context of which it is a part-a context which includes a series of objectives, each of a higher or lower order of generality, with the more general affecting and determining the more specific. *Id.* at 526.

FN52. *See, e.g.,* THE REALITIES OF VIETNAM (Beal & D'Amato eds. 1968); E. GRUENING & H. BEASER, VIETNAM FOLLY (1968).

FN53. An example is President Truman's removal of General MacArthur during the Korean War when MacArthur wanted to bomb the airfields in mainland China that were the bases of Chinese aircraft fighting within Korea.

FN54. *See* 1 H. TRUMAN, MEMOIRS 419-20 (1955); Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki,* 59 AM. J. INT'L L. 759, 765 (1965) *(semble)* (position of the Japanese government).

FN55. This is what the district court of Tokyo did in the *Shimoda Case,* reported in Falk, *supra* note 54. Of course, there could be no specific legal prohibitions against the use of nuclear weapons when they had not yet been invented, but the court concluded that the atomic bombing of Hiroshima and Nagasaki violated the international laws of war by analogizing the effects of the bombing (radiation poisoning even after eighteen years) to prohibitions against the use of chemical-biological weapons, and by citing the Hague regulations restricting bombing of undefended cities to military objectives. *Cf.* D'Amato, *Legal Aspects of the French Nuclear Tests,* 61 AM. J. INT'L L. 66, 73-77 (1967).

FN56. *See generally* R. WOETZEL, *supra* note 25, at 96-189.

FN57. *Ct.* Justice Frankfurter's majority opinion in Communist Party of America v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

FN58. *Cf., e.g.,* CAL. CODE CIV. PRO. § 117g (West Supp. 1968) (small-claims court procedures, purpose of such courts would be frustrated by expense of rigid adherence to evidentiary rules).

FN59. For example, Stanley R. Resor, Secretary of the Army, dismissed the murder charges against several Green Beret soldiers who were in the process of being court martialled for the murder of a South Vietnamese agent on the ground that the Central Intelligence Agency refused to supply witnesses for the trial. Frankel, *Beret Case Raises Many Issues,* N. Y.Times, Oct. 1, 1969, at 3, col. 4.

FN60. 1 Trials Maj. War Crim. 15 (art. 19) (Int'l Mil. Trib. 1947).

FN61. *Id.* (art. 21).
FN62. *See* J. APPLEMAN, MLITARY TRIBUNALS AND INTERNATIONAL CRIMES 10103 (1954).
FN63. *E.g.*, 9 Trials Maj. War Crim. 674-84 (Int'l Mil. Trib. 1947) (correspondence of Neville Henderson and Lord Halifax), 12 Trial Maj. War Crim. 166 (Int'l Mil. Trib. 1947) (Gunther, *Inside Europe),* 9 Trials Maj. War Crim. 472 (Int'l Mil. Trib. 1947) Dahlerus, *Last Attempt),* 12 Trials Maj. War Crim. 305-44 (Int'l Mil. Trib. 1947) (Luther, *The Jews and their Lies),* 14 Trials Maj. War Crim. 368 (Int'l Mil. Trib. 1947) (Ford, *The International Jew),* 11 Trials Maj. War Crim. 436 (Int'l Mil. Trib. 1947) (works of Neville Henderson and Sumner Welles), 4 Trials Maj. War Crim. 519-27 (Int'l Mil. Trib. 1947) (Hitler, *Mein Kampf),* 2 Trials Maj. War Crim. 357 (Int'l Mil. Trib. 1947) (Ambassador Dodd's *Diary).*
FN64. *E.g.*, 14 Trials Maj. War Crim. 283-86 (Int'l Mil. Trib. 1947).
FN65. *See* Ferencz, *Nurenberg Trial Procedure and the Rights of the Accused,* 39 J. CRIM. L.C. & P.S. 144, 148-49 (1948); VON KNIERIEM, *supra* note 42, at 161-64.
FN66. *E.g.*, 7 Trials Maj. War Crim. 243, 250-52, 264-66 (Int'l Mil. Trib. 1947) (certification of documents), 8 Trials Maj. War Crim. 285 (Int'l Mil. Trib. 1947) (identification), 12 Trials Maj. War Crim. 165 (Int'l Mil. Trib. 1947) (unsolicited letter refused admission), 15 Trials Maj. War Crim. 87-88 (Int'l Mil. Trib. 1947) (uncertified affidavit), 5 Trials Maj. War Crim. 106 (Int'l Mil. Trib. 1947) (prejudiced witness), 5 Trials Maj. War Crim. 366 (Int'l Mil. Trib. 1947) (irrelevancy), 14 Trials Maj. War Crim. 556-58 (Int'l Mil. Trib. 1947) (impeachment of witness), 9 Trials Maj. War Crim. 610, 615-17 (Int'l Mil. Trib. 1947) (documents not genuine), 15 Trials Maj. War Crim. 531-33 (Int'l Mil. Trib. 1947) (inaccurate translation), II Trials Maj. War Crim. 375-78 (Int'l Mil. Trib. 1947) (unofficial document inadmissible). At one point Sir David Maxwell-Fyfe argued that Article 19 of the Charter, freeing the court from technical rules of evidence, "is an important matter in the view of the Prosecution and, therefore, we have to argue against its being whittled down." 14 Trials Maj. War Crim. 240 (Int'l Mil. Trib. 1947).
FN67. 2 L. Rep. Trials War Crim. 126, 131 (U.N. War Crimes Comm'n 1947) (Regulation 8(i)). Exactly the same wording is found in the "Mediterranean Regulations" binding United States Military Commissions (military courts having jurisdiction in the Mediterranean); text in 3 L. Rep. Trials War Crim. 110 (U.N. War Crimes Comm'n 1947). For citations to similar provisions in Australian and Canadian law, see 2 L. Rep. Trials War Crim. 126 (U.N. War Crimes Comm'n 1947).
FN68. I L. Rep. Trials War Crim. 85 (U.N. War Crimes Comm'n 1947); 2 L. Rep. Trials War Crim. 131-38 (U.N. War Crimes Comm'n 1947); M. GREENSPAN, *supra* note 25, at 510.
FN69. More attention to the purpose of evidentiary rules is resulting in parallel liberalization of the hearsay rule in American and British courts involving domestic cases. *See, e.g.*, Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961); G. WILLIAMS, THE PROOF OF GUILT 147 (1955). The proposed Rules of Evidence for the United States District Courts and Magistrates contains the draft rule that "A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer strong assurances of accuracy and the declarant is unavailable as a witness." Rule 8-04(a), 46 F.R.D. 161, 377 (1969).
FN70. INT'L MIL. TRIB. FOR THE FAR EAST, CHARTER art. 13.
FN71. 4 L. Rep. Trials War Crim. 78-81 (U.N. War Crimes Comm'n 1947).
FN72. *In re* Yamashita, 327 U.S. 1, 52-56 (1946) (dissenting opinion of Rutledge, J.*).*
FN73. *See id.* at 18-23.

FN74. *See, e.g.*, Note, *The Geneva Convention and the Treatment of Prisoners of War in Vietnam,* 80 HARV. L. REV. 851 {1967); Meyrowitz, *Le droit de la guerre dans le conflit Vietnamien,* 13 ANNUAIRE FRANCAIS DE DROIT INTERNATINAL 153 {1967).
FN75. N.Y. Times, Nov. 23, 1969, § 4, at 2, col. 4. Though the matter is clear from a legal point of view, the gravity of the massacre, in which over 100 and perhaps as many as 500 old men, women, and children were shot down in cold blood by American troops, should not be minimized. The lack of immediate reaction from the Saigon government suggests that such incidents may not be rare. An unnamed New York Times correspondent attributes the lack of urgency in investigating the incident to "a diminished capacity for moral outrage on the part of a population that has endured a quarter-century of fighting in which neither side has made much distinction between combatants and civilians." N.Y. Times, Nov. 21, 1969, at 18, col. 7. *See* R. Falk, *Songmy: War Crimes and Individual Responsibility,* 7 TRANSACTION 33 (1970).
FN76. RUSSELL TRIBUNAL, *supra* note 43.
FN77. *See* D'Amato, Book Review, 57 CALIF. L. REV. 1033 (1969).
FN78. *E.g.*, United States v. Mitchell, 369 F.2d 323 (2d Cir.), *cert. denied,* 386 U.S. 972 (1966); Testimony of Donald Duncan (see note 43 *supra),* in RUSSELL TRIBUNAL, *supra* note 43, at 457-513; D. DUNCAN, *supra* note 43, at 123-27; N.Y. Times, May 25, 1967, at 2, col. 4 (testimony of Moore and Duncan at Capt. Levy's trial).
FN79. *See, e.g.*, Petrowski, *Law and the Conduct of the Vietnam War,* in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 439,507-15 (Falk ed. 1969).
FN80. *See* McDOUGAL & FELICIANO, *supra* note 37, at 576 and cases therein cited. A prisoner of war may be executed for an offense committed during captivity, but only after a fair judicial trial. *Id. See also* M. GREENSPAN, *supra* note 25, at 131-42.
FN81. *See* Thiele Case, 3 L. Rep. Trials War Crim. 56-59 (U.N. War Crimes Comm'n, U.S. Mil. Comm'n, Germany 1945); M. GREENSPAN, *supra* note 25, at 103.
FN82. Arts. 4, 23, Annex to Convention IV Respecting the Laws and Customs of War on Land, in THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, at 100, 108, 116 (Scott ed. 1915); *see In re* Yamashita, 327 U.S. 1, 14 (1946).
FN83. Art. 13, Geneva Prisoners of War Convention, *supra* note 10.
FN84. *Id.* art. 17. *See also* Trial of Yoshio Makizawa, 15 L. Rep. Trials War Crim. 101 n.4 (U.N. War Crimes Comm'n, U.S. Mil. Comm'n, Shanghai 1946). Mere interrogation of POW's is not unlawful-Killinger Case, 3 L. Rep. Trial War Crim. 67, 68 (U.N. War Crimes Comm'n, Brit. Mil. Ct., Wuppertal, Germany 1945). The prohibition against physical or mental torture may sound quaint in this age of violence, but as Professor Chomsky has said: "I suppose this is the first time in history that a nation has so openly and publicly exhibited its own war crimes. Perhaps this shows how well our free institutions function. Or does it simply show how immune we have become to suffering? Probably the latter." N. CHOMSKY, AMERICAN POWER AND THE NEW MANDARINS 10 (1969).
FN85. Art. 3, Hague Convention of 1907, *supra* note 82; art. 4, Geneva Prisoners of War Convention, *supra* note 10.
FN86. Art. 27, Geneva Civilian Persons Convention, *supra* note 16. Article 33 of this convention prohibits reprisals against these civilian persons.
FN87. The Bauer Case held that guerrillas and irregular troops have the status of belligerents. 8 L. Rep. Trials War Crim. 15 (U.N. War Crimes Comm'n, Permanent Mil. Trib. Dijon 1945). But in the Hostages Case, 8 L. Rep. Trials War Crim. 34, 58 (U.N. War Crimes Comm'n, U.S. Mil. Trib. 1948),

the execution of captured partisans (Greece and Yugoslavia) by an occupying power in complete command of the territory was not held to be a war crime, the court stating that "[this] rule is based on the theory that the forces of two states are no longer in the field and that a contention between organised armed forces no longer exists." In any event, the Nuremberg trials uniformly held that summary execution of guerrillas was a war crime; guerrillas were in all cases entitled to a judicial determination of their status. McDOUGAL & FELICIANO, *supra* note 37, at 550 & n.77 (citing cases).

FN88. Geneva Civilian Persons Convention, *supra* note 16, arts. 3 & 5. *See also* McDOUGAL & FELICIANO, *supra* note 37, at 550.

FN89. Art. 3, Geneva Conventions of 1949, *supra* note 16.

FN90. Prisoners of War Convention, note 10 *supra*. The phrase "any important respect" in article 12 clearly includes murder or torture of POW's; *see id.* art. 130 ("grave breaches...involve wilful killing, torture, or inhuman treatment"). If the transferee Power murders the prisoners, obviously the last clause of article 12 providing for their return is futile; article 12 would thus have to be construed as requiring the transferring Power, at the very least, not to make any more such transfers. The Soviet Union and other associated powers have entered reservations that hold the transferring Power responsible for the deeds of the accepting Power. M. GREENSPAN, *supra* note 25, at 102.

FN91. Rauer Case, 4 L. Rep. Trials War Crim. 113, 115-17 (U.N. War Crimes Comm'n, Brit. Mil. Ct., Wuppertal, Germany 1946); Essen Lynching Case, 1 L. Rep. Trials War Crim. 88 (U.N. War Crimes Comm'n, Brit. Mil. Ct., Essen, Germany 1945); Jaluit Atoll Case, 1 L. Rep. Trials War Crim. 71 (U.N. War Crimes Comm'n, U.S. Mil. Comm'n, Marshall Islands 1945).

FN92. *E.g.*, Rauer Case, 4 L. Rep. Trials War Crim. 113 (U.N. War Crimes Comm'n, Brit. Mil. Ct., Wuppertal, Germany 1946); Schosser Trial, 3 L. Rep. Trials War Crim. 65 (U.N. War Crimes Comm'n, U.S. Mil. Comm'n, Dachau 1945). "Being concerned in the killing" is given a wide definition in the Schonfeld Trial, 11 L. Rep. Trials War Crim. 64,68-73 (U.N. War Crimes Comm'n, Brit. Mil. Ct., Essen 1946).

FN93. See Wright, *Legal Aspects of the Viet-Nam Situation*, 60 AM. J. INT'L L. 750 (1966); E. GRUENING & H. BEASER, VIETNAM FOLLY 352-69 (1968); V. HARTKE, THE AMERICAN CRISIS IN VIETNAM 24-28 (1968).

FN94. *In re* Yamashita, 327 U.S. 1, 15 (1946). The Court was careful to point out, in the face of considerable evidence that General Yamashita had extremely limited control of the chaotic situation in the Philippines and had highly circumscribed authority both de jure and de facto, that "the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates." *Id.* The degree of the General's control over the situation is spelled out in Yamashita Trial, 4 L. Rep. Trials War Crim. 1, 21-29 (U.N. War Crimes Comm'n, U.S. Mil. Comm'n, Manila 1946).

FN95. *In re* Yamashita, 327 U.S. 1, 15 (1946).

FN96. Justice Murphy, dissenting in *In re* Yamashita, 327 U.S. 1, 26, 39 (1946), would have been satisfied of Yamashita's guilt if there had been any evidence of "some element of knowledge or direct connection with the atrocities." *See also id.* at 41, 50 (Rutledge, J., dissenting).

FN97. David Kenneth Tuck was a former Specialist Fourth Class with the 25th Infantry Division in Vietnam from January 1966 to February 1967. RUSSELL TRIBUNAL, *supra* note 43, at 403. Carl Campbell was a former marine Private First Class in Delta Company, Ist Battalion, 7th Marine Regiment. *Id.* at 514. James Jones fought in the infantry in Vietnam from February 1965 to May 1966.

Id. at 516. For the credentials of Donald Duncan, former Special Forces "Green Beret" in Vietnam, see note 43 *supra.*

FN98. RUSSELL TRIBUNAL, *supra* note 43, at 404 (beheading by machete).

FN99. *Id.* at 419, 474-75. Tuck testified that the "only" prisoners captured in the jungle would be the "wounded." *Id.* at 423.

FN100. *Id.* at 405, 516.

FN101. *Id.* at 405 (Tuck).

FN102. *Id.* at 424 (Tuck).

FN103. *Id.* at 515 (Campbell).

FN104. *Id.* at 474 (Duncan, who *taught* some of these classes); see D. DUNCAN, *supra* note 43, at 126.

FN105. RUSSELL TRIBUNAL, *supra* note 43, at 406,411 (Tuck).

FN106. *Id.* at 406 (Tuck). A Gestapo order issued in 1944 instructed various regional Gestapo headquarters that certain prisoners of war were to be shot and "the reason for the shooting will be given as 'shot whilst trying to escape' or 'shot whilst resisting' so that nothing can be proved at a future date." The Stalag Luft III Case, 11 L. Rep. Trials War Crim. 31, 33 (U.N. War Crimes Comm'n, Brit. Mil. Ct., Hamburg 1947).

FN107. N.Y. Times, Oct. 1,1969, at 3, col. 1.

FN108. *See* M. MCCARTHY, VIETNAM 14 (1967); *United States v. Griffen,* Washington Post, July 27, 1967, § A, at 27, col. 2; Touhy, *A Big "Dirty Little War,"* New York Times, Nov. 28, 1965, § 6, at 43, quoted in CLERGY AND LAYMEN CONCERNED ABOUT VIETNAM, IN THE NAME OF AMERICA 80, 81, 85 (1968) [hereinafter cited as NAME OF AMERICA]; Langguth, *Brutality is Rising on Both Sides in South Vietnam,* N.Y. Times, July 7, 1965, at 7, col. 1, quoted in NAME OF AMERICA, *supra* at 71 (American soldier tells friends of pushing prisoner out of helicopter).

Photographs of a Viet Cong prisoner of war being dropped to his death from a U.S. Army helicopter were published on page one of the Chicago Sun-Times, Nov. 29, 1969. The photographer, who took the pictures from a nearby escort helicopter, described the incident on the backs of the photographs. He wrote, "The Picture isnt too Pretty-but the whole Episode had Good Results as the other 2 'charlie's' told us Everything we wanted to know." *Id.* at 16, col. 3. In a letter accompanying the photos, the photographer explained that three prisoners were taken up into the helicopter for interrogation, and after the first one was dumped the other two told their captors what they wanted to know. The photographer also said, "Let's hear it for fear." *Id.* at 16, cols. 1-2.

FN109. RUSSELL TRIBUNAL, *supra* note 43, at 425-26. Martinsen received the Vietnam Service Medal, Vietnam Expeditionary Medal, Army Commendation Medal, Good Conduct Medal, and National Defense Medal.

FN110. *Id.* at 427.

FN111. *Id.*

FN112. *Id.*

FN113. *See, e.g.*, NAME OF AMERICA, *supra* note 108, at 80, 81, 85.

FN114. RUSSELL TRIBUNAL, *supra* note 43, at 456.

FN115. *Id.* at 439.

FN116. N.Y. Herald Tribune, April 25, 1965, quoted in NAME OF AMERICA, *supra* note 108, at 80-81 (cutting off of fingers, ears, fingernails or sexual organs of prisoners).

FN117. D. DUNCAN, *supra* note 43, at 131-32; RUSSELL TRIBUNAL 471-72, 476-77.
FN118. Shown on television in a film documentary prepared by the Canadian Broadcasting System. NAME OF AMERICA, *supra* note 108, at 86.
FN119. Tuohy, *supra* note 108.
FN120. NAME OF AMERICA, *supra* note 108, at 83.
FN121. K. KNOEBL, VICTOR CHARLIE 115 (1967) (the victim usually dies from this torture).
FN122. Sheehan, *Vietnam: The Unofficial Brutality,* N.Y. Times, Sept. 30, 1965, at 4, col. 4, quoted in NAME OF AMERICA, *supra* note 108, at 81.
FN123. B. FALL, LAST REFLECTIONS ON A WAR 232 (1967) (the cage is an iron frame covered with barbed wire; if the prisoner moves out of a crouch his body is "punctured all over")
FN124. K. KNOEBL, *supra* note 121, at 113.
FN125. Testimony of Senator Young (Ohio), 112 CONG. REC. 16395 (1966).
FN126. NAME OF AMERICA, *supra* note 108, at 66-67.
FN127. Kamm, *Songmy* 2: *The Toll of Frustration and Fury,* N.Y. Times, Nov. 23, 1969, § 4, at 2, col. 6.
FN128. *Id.* at cols. 6-7.
FN129. See text accompanying note 93, *supra*.
FN130. *Testimony of Senator Young, supra* note 125; Sheehan, *supra* note 122, quoted in NAME OF AMERICA, *supra* note 108, at 78-79; Bighart, *Green Berets Called Tolerant of Brutality in South Vietnam,* N.Y. Times, May 25, 1967, at 2, col. 4 (testimony at trial of Capt. Levy that American policy is to turn all prisoners over to South Vietnamese).
FN131. See notes 90-96 *supra* and accompanying text.
FN132. RUSSELL TRIBUNAL, *supra* note 43, at 473; *see* D. DUNCAN, *supra* note 43, at 125.
FN133. RUSSELL TRIBUNAL, *supra* note 43, at 404 (Tuck's testimony). Duncan testified that the Vietnamese interpreter does much of the actual torture, *id.* at 495, and that he is hired by the Special Forces ("Green Berets") directly (not through a Saigon agency), and is paid, clothed, and supported by the Americans. During his service, however, he is exempt from military duty in the army of the Republic of Vietnam. *Id.* at 494-95.
FN134. *Id.* at 516 (Jones' deposition, stating that Vietnamese torturers worked under supervision of American officers who gave the instructions).
FN135. *Id.* at 471-72 (Duncan's testimony) (money, supplies, communications all furnished by Americans).
FN136. *Id.* at 518 (deposition of John Hartwell Moore, former U.S. Army PFC, in Vietnam from December 1963 to May 1964). The field-telephone generator torture and the killing of prisoners by pushing them out of helicopters are undoubtedly American-inspired.
FN137. *E.g.,* M. BROWNE, THE NEW FACE OF WAR 116 (1968); NAME OF AMERICA, *supra* note 108, at 83, 85; RUSSELL TRIBUNAL, *supra* note 43, at 439; NEWSWEEK, Sept. 13, 1965, quoted in NAME OF AMERICA, *supra* note 108, at 85; D. DUNCAN, *supra* note 43, at 131-32.
FN138. N.Y. Times, May 25, 1967, at 2. col. 4 (testimony of Robbin Moore, author of *The Green Berets)* ("If he [the American soldier] tried to stop it [the torture] he would be relieved, and his career would suffer.") In 1965 the Department of State disclosed that it was conducting discussions with the Saigon government 'in an effort to curb what is reported to be the frequent use of torture by South

Vietnamese troops to extract information." Garrison, *U.S. Tries To Curb Vietnam Torture,* N.Y. Times, July 28, 1965, at 2, col. 4, quoted in NAME OF AMERICA,
supra note 108, at 67. It is worthy of note that mere knowledge of war crimes may be a factor in assessing guilt of a defendant even though he is on trial for completely different war crimes in a different area. The judgment against Admiral Doenitz at Nuremberg specifically mentioned the fact that Doenitz had knowledge that large numbers of citizens of occupied countries were confined in German concentration camps, even though this area was totally outside Doenitz' jurisdiction and actions. I Trial Maj. War Crim. 314 (Int'l Mil. Trib. 1947).
FN139. Farer & Petrowski, *supra* note 24; Chomsky, *Reflections on a Political Trial,* 11 N.Y. REV. OF BOOKS 23,30 (1968).
FN140. Senator Tower (Texas) recently stated that the United States should resume bombing of North Vietnam. N.Y. Times, Oct. 2, 1969, at 18, col.1.
FN141. American aerial bombardment in Laos, primarily along the Ho Chi Minh trail, seems to have increased in intensity after March 1968 when President Johnson ordered a substantial halt to the bombing of North Vietnam. N.Y. Times, April 1, 1968, at 1, col. 5.
FN142. Traditional, necessary methods of warfare of course do not contravene the laws of war.
FN143. According to M. GREENSPAN, *supra* note 25, at 486-87, accident that is not due to culpable negligence is a defense to a war-crimes charge.
FN144. Art. 19, Geneva Convention on Wounded and Sick, *supra* note 16.
FN145. Art. 18, Geneva Convention on Civilian Persons, *supra* note 16.
FN146. Art. 27, Annex to Hague Convention IV, *supra* note 82.
FN147. See text accompanying note 8 for full quotation.
FN148. Also, see art. 46 of Annex to Hague Convention IV, *supra* note 82: "family honor and rights, the lives of persons and private property, as well as religious convictions and practice must be respected."
FN149. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki,* 59 AM. J. INT'L L. 759 (1965).
FN150. *Id.* at 773.
FN151. RUSSELL TRIBUNAL, *supra* note 43, at 224.
FN152. H. COLES & A. WEINBERG, CIVIL AFFAIRS: SOLDIERS BECOME OVERNORS 830-31 (1964).
FN153. W. CHURCHILL, TRIUMPH AND TRAGEDY 469 (1953).
FN154. I Trial Maj. War Crim. 327-30 (Int'l Mil. Trib. 1947).
FN155. M. GREENSPAN, *supra* note 25, at 352.
FN156. Hague Rules of Air Warfare of 1923 art. 22, reprinted in M. GREENSPAN, *supra* note 25, at 654.
FN157. *Id.* art. 24, reprinted in M. GREENSPAN, *supra* note 25, at 655.
FN158. British Directive of October 29, 1942, in McDOUGAL & FELICIANO, *supra*
note 37, at 653.
FN159. *The Shimoda Case,* Falk, *supra* note 54, at 776, takes issue with the alleged legality of "blind" bombardment.
FN160. McDOUGAL & FELICIANO, *supra* note 37, at 657.
FN161. *Id.* The deliberate American shooting of over 100 Vietnamese civilians at Mylai 4 hamlet, Sonymy village, on March 16, 1968, has led to a general courtmartial and criminal investigations

handled at the highest American levels. Statement of Stanley R. Resor, Secretary of the Army, N.Y. Times, Nov. 27, 1969, at 18, cols. 5-8. But as James Reston has pointed out, "The B-52's hit villages like this all the time in the 'free zone,' killing anybody in the area. Ditto the artillery guns. The only difference in the attack of Company C [in Songmy] was that they saw the human beings in the village and killed them with their M-16's anyway, and then told their story on TV." N.Y. Times, Nov. 26, 1969, at 44, cols. 5-6. Clearly there ought to be no legal distinction between a face-to-face massacre of unarmed, unresisting civilians and a deliberate aerial bombardment of such people.
FN162. H. SALISBURY, BEHIND THE LINES-HANOI 103 (1967).
FN163. *Id.* at 131.
FN164. *Id.* at 133.
FN165. Each of the commissions was subject to bombing attacks in the course of their visits. RUSSELL TRIBUNAL, *supra* note 43, at 149.
FN166. *Id.* at 312i.
FN167. *Id.* at 153.
FN168. *Id.* (Dr. Abraham Behar, Assistant at the Faculty of Medicine of Paris).
FN169. *Id.* at 162.
FN170. *Id.* at 175.
FN171. Lockwood, *Recollections of Four Weeks with the Enemy*, LIFE, April 7, 1967, at 44.
FN172. M. McCARTHY, HANOI 61 (1968).
FN173. RUSSELL TRIBUNAL, *supra* note 43, at 312g.
FN174. M. MCCARTHY, *supra* note 172, at 28.
FN175. H. SALISBURY, *supra* note 162, at 134.
FN176. RUSSELL TRIBUNAL, *supra* note 43, at 180-84, 150-51.
FN177. *Id.* at 181, 312h.
FN178. M. MCCARTHY, *supra* note 172, at 28.
FN179. *Id.* She adds: "I apologize for using North Vietnamese statistics, but the Americans have not supplied any."
FN180. RUSSELL TRIBUNAL, *supra* note 43, at 181.
FN181. *Id.* at 150.
FN182. *Id.* at 203-05.
FN183. *Id.*
FN184. *Id.* at 154.
FN185. *Id.*
FN186. H. SALISBURY, *supra* note 162, at 122.
FN187. *Id.*
FN188. RUSSELL TRIBUNAL, *supra* note 43, at 148.
FN189. H. SALISBURY, *supra* note 162, at 101.
FN190. *Id.* at 123. *Cf.* Quarterly Review Staff, *The Attack on the Irrigation Dams in North Korea,* 6 AIR UNIV. Q. 40 (1953).
FN191. RUSSELL TRIBUNAL, *supra* note 43, at 229.
FN192. *Id.*
FN193. *Id.*
FN194. *Id.* at 229-35.
FN195. N. CHOMSKY, *supra* note 84, at 15.

FN196. Comparative mission totals were:

	1967	1968
April	2,925	3,412
May	3,237	3,593
June	3,607	3,792
July (3 weeks)	3,819	2,723

N. Y. Post, July 23, 1968, quoted in Petrowski, *Law and the Conduct of the Vietnam War,* in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 439, 490 (R. Falk ed. 1969).
FN197. Petrowski, *supra* note 196, at 490.
FN198. *Id.* at 491 n.144.
FN199. *Id.*
FN200. N.Y. Times, Oct. 31, 1965, quoted in NAME OF AMERICA, s*upra* note 108, at 222.
FN201. B. FALL, *supra* note 123, at 228-30. Senator Hartke refers to a UNESCO study estimating that in the rural villages about 70 percent of the population are children. V. HARTKE, *supra* note 93, at 124.
FN202. Editorial, N.Y. Times, Nov. 22,1969, at 36, col. 2.
FN203. Orville Schell and Jonathan Schell, Letter to the N.Y. Times, Nov. 26, 1969, at 44, col. 5. Joseph P. Lyford, president of the Fund for Peace, has requested that the United States Senate investigate the reported massacre of South Vietnamese civilians in the town of Lang Vei on March 2, 1967. The incident was the result of an apparently intentional and deliberate attack by two Air Force F-4 Phantom jets using antipersonnel bombs and machine guns. *Lang Vei Massacre,* THE NEW DIMENSION, Jan. 1970, at 2.
FN204. B. FALL, *supra* note 123, at 228-29; M. BROWNE, *supra* note 137, at 165-66.
FN205. B. FALL. *supra* note 123, at 232; NAME OF AMERICA, *supra* note 108, at 412-13.
FN206. RUSSELL TRIBUNAL, *supra* note 43, at 559-60.
FN207. Stanley R. Resor, Secretary of the Army, stated to the Senate Armed Services Committee that "what apparently occurred at Mylai [the massacre of the villagers of Songmy] is wholly unrepresentative of the manner in which our forces conduct military operations in Vietnam." N.Y. Times, Nov. 27, 1969, at 18, col. 7. Harrison Salisbury observed: "1 could begin to see quite clearly that there was a vast gap between the reality of the air war, as seen from the ground in Hanoi, and the bland, vague American communiques with their reiterated assumptions that our bombs were falling precisely upon 'military objectives' and accomplishing our military purposes with some kind of surgical precision which for the first time in the history of war was crippling the enemy without hurting civilians or damaging civilian life." H. SALISBURY, *supra* note 162, at 69.
FN208. Sheehan, *Washington Concedes Bombs Hit Civilian Areas in North Vietnam,* N.Y. Times, Dec. 27, 1966, at 1, col. 4; H. SALISBURY, *supra* note 162, at 126.
FN209. R. HULL & J. NOVOGROD, LAW AND VIETNAM 166 (1968).
FN210. *Id.*
FN211. The Belsen Trial, 2 L. Rep. Trials War Crim. 1 (U.N. War Crimes Comm'n, Brit. Mil. Ct., Luneburg 1945).
FN212. *See, e.g.,* M. MCCARTHY, *supra* note 162, at 28.
FN213. RUSSELL TRIBUNAL, *supra* note 43, at 306.
FN214. *See* H. SALISBURY, *supra* note 207.

FN215. Joseph Harsch, distinguished correspondent for the *Christian Science Monitor*. quoted in N. CHOMSKY, *supra* note 84, at 14. Similarly an article in *Flying* describes a lucky young pilot who can napalm a village and then engage in strafing runs over the fleeing citizens. NAME OF AMERICA, *supra* note 108, at 205.

FN216. Prokosch, *Conventional Killers,* THE NEW REPUBLIC, Nov. 1, 1969. The "pineapple" bomb contains steel pellets in a hollow cylinder which are propelled by the explosion upon impact with the ground in a sun-burst pattern. RUSSELL TRIBUNAL, *supra* note 43, at 249-50. Sergeant Duncan reported in *Ramparts* that the Department of Defense placed contracts for the manufacture of 14.8 billion steel pellets for use in anti-personnel bombs. *Id.* at 167 n.2. The "mother bomb" is a casing which holds 640 "guava" bomblets; it explodes at an altitude of about one kilometer flinging the guava bomblets over an area of one by one-half kilometers. Upon impact, the gauva bomblet explodes, discharging 300 steel balls 5.56 mm in diameter. *Id.* at 250. *See also* the carefully documented evidence and eyewitness accounts of J.B. Neilands, Professor of Biochemistry at Berkeley, *id.* at 269-73. The damage to people can be intense and painful, according to Dr. Masahiro Hashimoto's testimony at the Russell hearings. The small steel balls can cause complicated fractures of thigh-bones and other large bones, they can trace complex paths through internal organs (often fatally), and they cannot be left in the body because their alloy make-up is incompatible with human tissues and body fluids. RUSSELL TRIBUNAL, *supra* note 43, at 262-63. Another type of bomb used extensively in North and South Vietnam, is the napalm or jellied gasoline bomb. *Id.* at 186. This material burns with an extremely high temperature-enough to weld body and bone tissue together—and also generates carbon monoxide which is fatal to humans in the vicinity of the bomb drop. *Id.*

FN217. Duncan reported that the steel balls cannot pierce cement and can only penetrate earthen or sand bag military revetments to a depth of two or three inches. Duncan, *And Blessed Be the Fruit,* RAMPARTS, May, 1967. *See also* M. MCCARTHY, *supra* note 172, at 102-03; NAME OF AMERICA, *supra* note 108, at 270-81; RUSSELL TRIBUNAL, *supra* note 43, at 135, 156, 162-66, 251-61. Dr. Jean Vigier, Director of Research at the French National Center for Scientific Research and former officer-in-charge of armaments inspection of the French Army, testified at the Russell hearings that the antipersonnel bombs will not harm fixed military or economic installations, but are effective against personnel in dense population centers. RUSSELL TRIBUNAL, *supra* note 43, at 253-54.

FN218. Farer & Petrowski, *supra* note 24.

FN219. Germ warfare, and radiological weapons, are often discussed in the same context as chemical warfare. Since the present essay is shaped by the availability of evidence pertaining to the Vietnam war, these other kinds of weaponry are not discussed here. Nor is any position taken as to the legality per se of the use of antipersonnel bombs, though it may be noted that, apart from questionable analogies to the use of "dum-dum" bullets proscribed in early conventions, antipersonnel bombs have been used in many wars against enemy soldiers without ever forming the basis for post-war criminal proceedings. *See generally* E. MCCARTHY, THE ULTIMATE FOLLY (1969). *See also* Meyrowitz, *Les Armes Psychochimiques et le Droit International,* 1964 ANNUAIRE FRANCAIS 81.

FN220. Protocol Prohibiting the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, of June 17, 1925, in 3 M. HUDSON, INTERNATIONAL LEGISLATION 1670 (1931); 90 L.N.T.S. 65.

FN221. Some 80 states have ratified including the major powers except for Japan and the United States. N.Y. Times, Nov. 26, 1969, at 16, col. 5.

FN222. According to President Nixon, "The United States has long supported the principles and objectives of this protocol." N.Y. Times, Nov. 26, 1969, at 16, col. 2.
FN223. See D' Amato, *supra* note 13.
FN224. See notes 13, 15 *supra*. The Nuremberg Tribunal stated the principle of the applicability, despite its terms, to Germany of the 1907 Hague Convention in noting that "by 1939 these rules laid down in the convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war. ..." 1 Trial Maj. War Crim. 254 (Int'l Mil. Trib. 1947). *See also* United States v. Ohlendorf, 4 Trial Maj. War Crim. 459-60 (Int'l Mil. Trib. 1950); United States v. Greifelt, 5 Trial Maj. War Crim. 153 (Int'l Mil. Trib. 1950); United States v. Von List, 11 Trial Maj. War Crim. 1240 (Int'l Mil. Trib. 1950).
FN225. See McDOUGAL & FELICIANO, *supra* note 37, at 633-34 for a documented account. *See also* O'Brien, *Biological Chemical Warfare and the International Law of War*, 51 GEO. L.J. 1 (1962).
FN226. See the discussion of the total war concept in Falk, *supra* note 54, at 783, 788-93.
FN227. 8 DEP'T STATE BULL. 507 (1943). The argument that abstention from gas warfare in World War II was due solely to fear of retaliation by the other side, and not because of an international legal prohibition, can never be proved. But even if it were true, the fear of reciprocal noncompliance plays an important part in many if not most of the rules of international law. *See* D'Amato, *International Law—Content and Function: A Review*, 11 J. CONFLICT RESOLUTION 504 (1967).
FN228. President Nixon stated that the United States "reaffirms its oft-repeated renunciation of the first use of lethal chemical weapons." N.Y. Times, Nov. 26, 1969, at 16, col. 1. Continuing worldwide approval of the objectives of the Geneva Protocol is demonstrated by the passage of a United Nations General Assembly resolution on December 5, 1966, joined by ninety states including the United States, that invited "all states to strictly conform to the principles and objectives" of the Protocol and "condemned any act contrary to these objectives." G.A. Res. 2162, 21 U.N. GAOR A/Res/2162 (XXI) (1966). It is clear that one of the main reasons for the durability of the Geneva Protocol is the clear line between use and non-use of gas. This factor in itself constitutes a partial refutation of those who would contextualize and relativize the laws of war out of existence. For a critique of the contextual approach see Falk, *supra* note 54 at 788-93. Professor Schelling has articulated the relevant physical-psychological factors: "Gas only on military personnel; gas used only by defending forces; gas only when carried by projectile; no gas without warning—a variety of limits is conceivable. ...But there is a simplicity to 'no gas' that makes it uniquely a focus for agreement when each side can only conjecture at what alternative rules the other side would propose " T. SCHELLING, ARMS AND INFLUENCE 131 (1966). Has the distinction been shattered by the use of "tear gas" and "riot-control gas" in Vietnam?
FN229. *See* T. SCHELLING, *supra* note 228.
FN230. In an authoritative text on international law it is stated that "some gases are not so deadly or so cruel as others, but the dangers of recognizing any categories of permitted gases and thus sanctioning the manufacture of the necessary equipment for using them are obvious and great, so that, it is submitted, the society of States has adopted the right policy in endeavoring to extirpate this mode of warfare *in toto."* 2 OPPENHEIM, INTERNATIONAL LAW; A TREATISE 343 n.2 (H. Lauterpacht ed., 8th ed. 1955). In fact, tear gas was used in World War I, and the Geneva Protocol may have been framed with the question of tear gas in mind. See Meselson, *Behind the Nixon Policy for Chemical and Biological Warfare*, 26 BULL. ATOMIC SCI. 23, 31 (1970).

FN231. See note 220 *supra*.
FN232. President Nixon has acknowledged the existence of “our chemical warfare program" while reiterating the American renunciation of the first use of "lethal" chemical weapons. N.Y. Times, Nov. 26, 1969, at 16, col. 1. The sole question becomes whether the United States has used “lethal" chemical weaponry. This question should not be confused with the rationalization sometimes given that eye-irritating and nausea-inducing gases are more "humane" than bombs, shooting, and hand-grenades, and therefore are legal. *See, e.g.*, TIME, April 2, 1965, at 20, quoted in NAME OF AMERICA, *supra* note 108, at 119. For *any* type of weapon, including atomic bombs, can be rationalized as being more “humane" than ordinary bombs and shooting because they end the war quicker and thus save lives. Such a rationale, obviously, would wipe out all the laws of warfare, since both sides would naturally think that doing the most brutal and hitherto illegal acts would bring the enemy to its knees faster and hence be humane.
FN233. S. HERSH, CHEMICAL AND BIOLOGICAL WARFARE 156-57 (1969).
FN234. *Id.* at 142-54; Frankel, *U.S. Reveals Use of Nonlethal Gas Against Vietcong,* N.Y. Times, March 23, 1965, at 1, col. 8; V. HARTKE, *supra* note 93, at 127-28. *See generally* E. McCARTHY, THE ULTIMATE FOLLY (1969).
FN235. Hilding, Letter to the N.Y. Times, written on March 26, 1965 (cited in RUSSELL TRIBUNAL, *supra* note 43, at 344-45).
FN236. *Id.* A New York Times editorial stated that these gases "can be fatal to the very young, the very old and those ill with heart and lung ailments." N.Y. Times, March 24, 1965, at 42, col. 1 quoted in RUSSELL TRIBUNAL, *supra* note 43, at 344. Doctors Sidel and Goldwyn wrote in 277 NEW ENGLAND I. MED. (1967) that "Chemical and biological weapons are notoriously uneven in their dispersal and therefore in the amount absorbed by each recipient; to ensure that every person receives an incapacitating dose, some will have to receive an overdose. Furthermore, the young, the elderly and the infirm will be the particularly susceptible victims."
FN237. S. HERSH, *supra* note 233, at 52.
FN238. *Id.* at 157 (letter of Dr. Alje Vennema of Burlington, Ontario).
FN239. A. PRENTISS, CHEMICALS IN WAR (1937).
FN240. CBW: CHEMICAL AND BIOLOGICAL WARFARE 91 (Rose ed. 1969) [hereinafter cited as CBW]. The gas is injected into the tunnels by a high-velocity wind machine nicknamed "Mighty Mite." *Id.*
FN241. N.Y. Times, Jan. 13, 1966, at 3, col. 1; V. HARTKE, *supra* note 93, at 128; RUSSELL TRIBUNAL, *supra* note 43, at 344.
FN242. RUSSELL TRIBUNAL, *supra* note 43, at 532-33 (Dr. Erich Wulff).
FN243. CBW, *supra* note 240, at 93-96.
FN244. RUSSELL TRIBUNAL, *supra* note 43, at 341. *See also id.* at 330 (testimony of Dr. Dehar); *cf.* Mennonite Central Comm. Newsletter, Nov. 10, 1967 (death of boy from overdose of gas).
FN245. S. HERSH, *supra* note 233, at 142-51.
FN246. Smith, *U.S. Command in Saigon Rejects Pentagon View that Use of Tear Gas Reduces Civilian Casualties,* N.Y. Times, Sept. 29, 1969, at 11, col. I.
FN247. *Id.* at col. 4.
FN248. N.Y. Times, Feb. 22, 1966, at I, col. 5; Hersh, *supra* note 233, at 152-53.
FN249. N. Y. Times, Nov. 26, 1969, at 16, col. 7; V. HARTKE, *supra* note 93, at 126-27.

FN250. Protocol cited *supra* note 220. On a hot day these sprays can revolatize into gases. *See* Christian Science Monitor, Nov. 25, 1967, at 16, col. 4 quoted in NAME OF AMERICA, *supra* note 108, at 294-95. There is a report that gas masks have been used against the spray. NAME OF AMERICA, *supra* note 108, at 120.
FN251. *See, e.g.*, Meyrowitz, *The Law of War in the Vietnamese Conflict,* in 2 THE VIETNAM WAR AND INTERNATIONAL LAW, *supra* note 3, at 516, 558; Hersh, *supra* note 233, at 125-26.
FN252. There would appear, however, to be at least an inconsistency in the American position that it is intervening in South Vietnam to save the villagers from unwanted Viet Cong domination and the policy of destroying the food supply of both Viet Cong and villagers.
FN253. These include 2,4D and 2,4,5-T. *See* S. HERSH, *supra* note 233, at 131.
FN254. The basic formulae vary with the region, climate, and target plant, but nearly all include arsenic and cyanide compounds. CBW, *supra* note 240, at 67; RUSSELL TRIBUNAL, *supra* note 43, at 367; NAME OF AMERICA, *supra* note 108, at 288. The amount of 2,4D used in Vietnam has almost exhausted the domestic supply; the military is demanding four times the total annual production, which in 1965 alone was 77 million pounds. CBW, *supra* note 240, at 66.
FN255. CBW, *supra* note 240, at 89-90; RUSSELL TRIBUNAL, *supra* note 43, at 372.
FN256. RUSSELL TRIBUNAL, *supra* note 43, at 368.
FN257. CBW, *supra* note 240, at 90. "Miss Thuy-Ba, M.D., chief of the medical staff of a provincial NLF hospital, described to us a lethal case she observed. A five-year-old boy was brought to the hospital after he had eaten contaminated fruit. He had severe abdominal pain, vomiting, then diarrhea with blood in his stools, followed by collapse and death." *Id.*
FN258. Jellied gasoline. The type developed for use in Vietnam also contains polystyrene, which makes the napalm adhere to the flesh as it burns. S. HERSH, *supra* note 233, at 54; NAME OF AMERICA, *supra* note 108, at 269-71.
FN259. Napalm with 30 percent white phosphorus added. The phosphorus increases combustibility and in addition penetrates deeply into the skin, causing liver and kidney poisoning which in most cases is fatal. CBW, *supra* note 240, at 88.
FN260. S. HERSH, *supra* note 233, at 53-55; RUSSELL TRIBUNAL, *supra* note 43, at 374-75.
FN261. Protocol cited *supra* note 220. *Contra,* Brownlie, *Legal Aspects of CBW,* in CBW, *supra* note 240, at 141, 150. The intense heat generated by burning napalm—2000°F. to 3600°F. (RUSSELL TRIBUNAL, *supra* note 43, at 375)—arguably may bring the substance within the alleged legal ban against weapons causing "unnecessary harm" *See* Brownlie, *supra,* at 150; Petrowski, *supra* note 196, at 503. However, the standards, if any, as to what constitutes "unnecessary" suffering are vague and subjective.
FN262. RUSSELL TRIBUNAL, *supra* note 43, at 376-77 (testimony of Gilbert Dreyfus, Professor of Biochemistry at the University of Paris Medical School).
FN263. Carbon monoxide is toxic at the one per cent atmospheric saturation level. *Id.* at 377. It gives rise to hallucinations, motor disturbances, and paralysis which prevent walking and all desire to escape. *Id.* By thus preventing the victim from escaping from the fire, it greatly increases the lethality of napalm. CBW, *supra* note 240, at 88.
FN264. McDOUGAL & FELICIANO, *supra* note 37, at 679. The emphasis on deterrence as well as punishment can justify an act of somewhat greater gravity in specific reprisal for a prior illegal act by the

other side. *See also Naulilaa Incident,* in BRIGGS, THE LAW OF NATIONS 951-53 (2d ed. 1952).
FN265. McDOUGAL & FELICIANO, *supra* note 37, at 679-82.
FN266. *See* Levie, *Maltreatment of Prisoners of War in Vietnam,* in 2 THE VIETNAM WAR AND INTERNATIONAL LAW, *supra* note 3, at 361, 392-96.
FN267. McDOUGAL & FELICIANO, *supra* note 37, at 679-86.
FN268. *See* 15 L. Rep. Trials War Crim. 177-82 (U.N. War Crimes Comm'n, 1947); United States v. List, 11 Trials Maj. War Crim. 1250 (Int'l Mil. Trib. 1948) ; United States v. von Leeb, 11 Trials Maj. War Crim. 528 (Int'l Mil. Trib. 1948).
FN269. Brand, *Digest of Laws and Cases,* in 15 L. Rep. Trials War Crim. I, 177 (U.N. War Crimes Comm'n 1947).
FN270. *E.g.,* R. WOETZEL, *supra* note 25, at 120.
FN271. 1 Trials Maj. War Crim. 313 (Int'l Mil. Trib. 1947).
FN272. The late Bernard Fall wrote: "From all the accounts I received from Intelligence in Viet-Nam, there is no evidence of torture of American prisoners by the Viet Cong, and released United States prisoners have confirmed this." B. FALL, *supra* note 123, at 233. Levie, *supra* note 266, has made much of the fact that captured American pilots have been paraded through the crowd-lined streets of Hanoi, in violation of the Geneva Convention on Prisoners of war. *Id.* at 380. But this does not amount to physical torture or murder, and indeed in contrast to the inevitable lynchings of downed Allied pilots in Axis-held countries during World War II, *e.g.* 1 Trials Maj. War Crim. 292 (Int'l Mil. Trib. 1947), Essen Lynching Case, 1 L. Rep. Trials War Crim. 88 (U.N. War Crimes Comm'n, Brit. Mil. Ct., Essen 1945), North Vietnamese restraint seems remarkable. *See* Fallaci, *Two American POW's,* Look, July 15, 1969 at 30, 32 ("The people of the village...could have killed me if they wanted to. In a way, I deserved it. I had destroyed their village. ..."), *See also* RUSSELL TRIBUNAL, *supra* note 43, at 558; H. SALISBURY, *supra* note 162, at 139.
FN273. Art. 13, Geneva Prisoners of War Convention, *supra* note 10.
FN274. Dostler Case, 1 L. Rep. Trials War Crim. 22, 31 (U.N. War Crimes Comm'n, U.S. Mil. Comm'n, Rome 1945).
FN275. "Military necessity" is not used here in Professor McDougal's sense of one of the two fundamental complementary policies underlying the laws of warfare, see text accompanying note 49 *supra,* but rather in the narrower, more traditional meaning of a defense plea by an individual accused of violating a particular rule of warfare.
FN276. 8 L. Rep. Trials War Crim. 34, 66 (U.N. War Crimes Comm'n, U.S. Mil. Trib., Nuremberg 1948). *See also* Milch Trial, 7 L. Rep. Trials War Crim. 27, 44 (U.N. War Crimes Comm'n, U.S. Mil. Trib., Nuremberg 1947) (Musmanno, *J.,* concurring).
FN277. Hostages Case, 8 L. Rep. Trials War Crim. 34,69 (U.N. War Crimes Comm'n, U.S. Mil. Trib., Nuremberg 1948) *(quoting* art. 23(g) of the Annex to Hague Convention IV of 1907, cited *supra* note 82).
FN278. *E.g.,* art. 6(b) of the Nuremberg Charter, quoted in text *supra* note 7 (on the devastation of enemy property); art. 23(g) of Hague Convention IV, Annex, 1907, cited *supra* note 82 (on the destruction or seizure of enemy property) .
FN279. *Cf.* J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 252 n.25 (1959).

FN280. Even this possible exception would be denied under traditional precedents; see text accompanying note 81 *supra*.
FN281. This may be difficult to prove. It was testified at the Russell hearings that prisoners do not hinder American infantry from moving on since the infantry travels by helicopter anyway. RUSSELL TRIBUNAL, *supra* note 43, at 424.
FN282. McDOUGAL & FELICIANO, *supra* note 37, at 691.
FN283. *See, e.g.*, Belsen Trial, 2 L. Rep. Trials War Crim. 1 (U.N. War Crimes Comm'n, Brit. Mil. Ct., Luneburg 1945) (staff members of concentration camps).
FN284. J. APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES 267 (1954). In addition to the American military commissions, the following countries had their own military commissions trying war criminals: Australia, France, the Netherlands, Poland, Norway, Canada, China, Greece. Separate from, and in addition to these, were the Nuremberg and Tokyo Tribunals.
FN285. Art. 8, in 1 Trials Maj. War Crim. 12 (Int'l Mil. Trib. 1947).
FN286. 1 Trials Maj. War Crim. 224 (Int'l Mil. Trib. 1947).
FN287. J. DINSTEIN, THE DEFENSE OF "OBEDIENCE TO SUPERIOR ORDERS" IN INTERNATIONAL LAW 156-64 (1965).
FN288. See Note, 9 HARV. INT'L L.I. 169 (1968); FIELD MANUAL, *supra* note 9, at 182-83 (superior orders not a defense).
FN289. Hostages Case, 8 L. Rep. Trials War Crim. 34, 74 (U.N. War Crimes Comm'n, U.S. Mil. Trib., Nuremberg 1948). An extremely well documented summary of the rejection, in the national trials of war criminals after World War II, of the plea of superior orders as a reason for an a priori discharge of the defendants from criminal responsibility is given in J. DINSTEIN, *supra* note 287, at 194-95.
FN290. Hostages Case, 8 L. Rep. Trials War Crim. 34, 50 (U.N. War Crimes Comm'n, U.S. Mil. Trib., Nuremberg 1948).
FN291. McDOUGAL & FELIClANO, *supra* note 37, at 691-92 (citing cases).
FN292. *Id.* at 693.
FN293. The Krupp Trial, 10 L. Rep. Trials War Crim. 69, 149 (U.N. War Crimes Comm'n, U.S. Mil. Trib., Nuremberg 1948). In this trial, all defendants except one were convicted.
FN294. The Flick Trial, 9 L. Rep. Trial War Crim. 1, 18-21 (U.N. War Crimes Comm'n, U.S. Mil. Trib., Nuremberg 1947).
FN295. N.Y. Times, Nov. 22,1969, at 1, col. 2.
FN296. *See* Shils & Ianowitz, *Cohesion and Disintegration in the Wehrmacht in World War II*, 12 PUB. OPIN. Q. 280, 281 (1948); *cf.* D'Amato, *Psychological Constructs in Foreign Policy Prediction,* 11 J. CONFLICT RESOLUTION 294 (1967).
FN297. Transcript in N.Y. Times, Nov. 25, 1969, at 16, cols. 6,8. Meadlo admitted killing "ten or fifteen" men, women, and children during the massacre. *Id.* at col. 3.
FN298. LIFE, Dec. 5, 1969, at 36.
FN299. *Id.* at 43.
FN300. Former U.S. Infantry Specialist Fourth Class David Tuck testified at the Russell tribunal that American soldiers who disobey orders in Vietnam are sent "further out with the artillery outfit that had just been hard hit" in hopes that they will get killed. RUSSELL TRIBUNAL, *supra* note 43, at 421.
FN301. Ex-Sergeant Charles West told a *Life* reporter that Captain Medina related to his company that "the order was to destroy My Lai and everything in it." But then later West said, "Captain Medina didn't give an order to go in and kill women or children." LIFE, Dec. 5, 1969, at 39. Although these

statements logically could both be true, their juxtaposition indicates the kind of confusion that may normally exist in the mind of each soldier. Moreover, each member of a squadron may have a different impression of what the order was. Ex-Private Meadlo said that "I felt I was ordered to do it." Quoted in text accompanying note 297 *supra*.

FN302. A range of possible cases may include: A civilian invoking the Nuremberg principles as an affirmative defense to justify his refusal of induction into the armed forces. *Cf.* United States v. Holmes, 387 F.2d 781 (7th Cir. 1967), *cert. denied,* 391 U.S. 936 (1968); Mitchell v. United States, 369 F.2d 323 (2d Cir. 1966), *cert. denied,* 386 U.S. 972 (1967). A civilian invoking Nuremberg as a defense against prosecution for counseling draft-evasion. *Cf.* United States v. Spock, 416 F.2d 165 (1st Cir. 1969). As a defense to prosecution for destroying draft records. *Cf.* United States v. Berrigan, 283 F. Supp. 336 (D. Md. 1968). As a defense in a court-martial prosecution for refusing to obey an order to report to Vietnam. *Cf.* United States v. Johnson, 18 U.S.C.M.A. 246, 38 C.M.R. 44 (1967). A civil action for injunction by a soldier seeking to avoid training other soldiers for actions that will involve war crimes. *Cf.* Noyd v. McNamara, 378 F.2d 538 (10th Cir.), *cert. denied,* 389 U.S. 1022 (1967). A soldier refusing combat orders based on a Nuremberg defense. *Cf.* Luftig v. McNamara, 373 F.2d 665 (D.C. Cir.), *cert. denied sub nom.* Mora v. McNamara, 389 U.S. 934 (1967).

FN303. See text accompanying notes 12-28 *supra.*

FN304. UNIFORM CODE OF MILITARY JUSTICE art. 92, 10 U.S.C. § 892 (1964).

FN305. FIELD MANUAL, *supra* note 9, at 182-83; text accompanying notes 282-89 *supra.*

FN306. See note 44 *supra.*

FN307. 5 U.S. (I Cranch) 137 (1803).

FN308. 28 U.S.C § 1331(a) (1964). A correct phrasing of the "matter in controversy" should suffice for purposes of this statute. *See* Velvel, *The War in Viet Nam: Unconstitutional, Justiciable, and Jurisdictionally Attackable,* 16 KAN. L. REV. 449, 495-96 (1968). *See also* Giles v. Harris, 189 U.S. 475 (1903) (deprivation of federal rights by state officers); Note, *Draft Reclassification for Political Demonstrations-Jurisdictional Amount in Suits Against Federal Officers,* 53 CORNELL L. REV. 916 (1968).

FN309. Velvel, *supra* note 308, at 497-98.

FN310. He should argue that the interest in securing the proper resolution of these federal issues should outweigh the policy of ordinarily not interfering with the military. See Wolff v. Selective Service Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967); Hammond v. Lenfest, 398 F.2d 705 (2d Cir.), *rev'd per curiam on rehearing,* 398 F.2d 718 (1968).

FN311. *See* United States v. Dolton, 192 F.2d 805 (2d Cir. 1951).

FN312. 330 U.S. 75 (1947). The Court wrote: "We can only speculate as to the kinds of political activity the *appellants desire* to engage in " (emphasis added).

FN313. *E.g.,* none of the fourteen defendants involved in the Presidio mutiny trial in San Francisco received the assignment he had expected. Private Roy Pulley was assured by his recruiter that he would be trained in fixed-wing aircraft maintenance, but wound up being trained as a helicopter machine-gunner. Dames, *The Presidio "Mutiny",* 161 NEW REPUBLIC, July 5, 1969, at 21, 22. Perhaps this sort of fraud in the inducement is militarily advantageous from the military's point of view in that embittered, calloused, disillusioned soldiers make better killers on the battlefield. If so, the practice should not come as a surprise.

FN314. *See* Flast v. Cohen, 391 U.S. 83 (1968); Schwartz & McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam,* 46 TEX. L. REV. 1033 (1968).

FN315. Luftig v. McNamara, 373 F.2d 664 (D.C. Cir. 1967), *aff'g* 252 F. Supp. 819 (D.D.C. 1966).
FN316. 389 U.S. 934 (1967).
FN317. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). *See Ex parte* Quirin, 317 U.S. I, 25 (1942); Little v. Barreme (The Flying Fish), 6 U.S. (2 Cranch) 170 (1804).
FN318. *See, e.g.,* Afroyim v. Rusk, 387 U.S. 253 (1967); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Greene v. McElroy, 360 U.S. 474 (1959); Reid v. Covert, 354 U.S. 1 (1957); Korematsu v. United States, 323 U.S. 214 (1944); United States *ex rel.* French v. Weeks, 259 U.S. 326 (1922).
FN319. If the claimant is a defendant in a criminal case *(e.g.,* refusing to obey induction or combat orders), he would clearly be deprived of due process if a court excluded the basic issues relevant to his defense on the doctrine of "political questions." *See* United States v. Sisson, 297 F. Supp. 902 (D. Mass. 1969) (Wyzanski, J.).
FN320. 369 U.S. 186, 217 (1962); *see* Scharpf, *Judicial Review and the Political Question: A Functional Analysis,* 75 YALE L.J. 517, 567-73 (1966).