



1-1-2012

A War Crime against an Ally's Civilians: The No Gun Ri Massacre

Tae-Ung Baik

Follow this and additional works at: <http://scholarship.law.nd.edu/ndjlepp>

Recommended Citation

Tae-Ung Baik, *A War Crime against an Ally's Civilians: The No Gun Ri Massacre*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 455 (2001).

Available at: <http://scholarship.law.nd.edu/ndjlepp/vol15/iss2/3>

This Article is brought to you for free and open access by the Notre Dame Journal of Law, Ethics & Public Policy at NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of Law, Ethics & Public Policy by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

A WAR CRIME AGAINST AN ALLY'S CIVILIANS: THE NO GUN RI MASSACRE

TAE-UNG BAIK*

TABLE OF CONTENTS

INTRODUCTION	456
I. THE ANATOMY OF THE NO GUN RI CASE	461
A. <i>Summary of the Incident</i>	461
1. The Korean War (1950-1953)	461
2. Three Night and Four Day Massacre	463

* Research Intern, Human Rights Watch, Asia Division; Notre Dame Law School, LL.M., 2000, *cum laude*; Notre Dame Law Fellow, 1999-2001; Seoul National University, LL.B., 1990; Columnist, HANGYEORE DAILY NEWSPAPER, 1999; Editor, FIDES, Seoul National University College of Law, 1982-1984. Publications: *A Different View on the Kwangju Democracy Movement in 1980*, THE MONTHLY OF LABOR LIBERATION LITERATURE, Seoul, Korea, May 1990. Former *prisoner of conscience* adopted by Amnesty International in 1992; released in 1998, after six years of solitary confinement.

This article is a revised version of my LL.M. thesis. I dedicate this article to the people who helped me to come out of the prison. I would like to thank my academic adviser, Professor Juan E. Mendez, Director of the Center for Civil and Human Rights, for his time and invaluable advice in the course of writing this thesis. I am also greatly indebted to Associate Director Garth Meintjes, for his assistance and emotional support during my study in the Program. I would like to thank Dr. Ada Verloren Themaat and her husband for supplying me with various reading materials and suggesting the title of this work; Professor Dinah Shelton for her lessons and class discussions, which created the theoretical basis for this thesis; and Ms. Marilyn Imus for her continued kindness and assistance.

Professor Bruce Cumings at Chicago University and Ph. D. Candidate Jun Yoo provided me with invaluable comment on the No Gun Ri incident. Ms. Kyu-Sun Nam assisted my study by sending me Korean data. I am also indebted to Professor Sihyun Cho who gave me a chance to read his unpublished articles on No Gun Ri and International Crimes.

I extend my gratitude to all my LL.M. classmates, J.S.D. students, and J.D. students, including Helena, Xiaosheng, Margarita, Michelle, Ali, George, Meg, Makoto, and Marjorie. I also thank Emily Chang, who greatly helped me with my final revision of this article. Without their assistance and guidance, my study and this work would not have been completed. Special thanks go to my respected teachers in Korea who encouraged my study and challenging life here. I am also thankful to my friends in Korea, who supported me in various ways; without their help, I could not have finished my study in the LL.M. Program.

Last, but far from least, I would like to thank my mother, parents-in-law, all my family members, and my beloved wife for their support and encouragement in the completion of this writing.

	3. My Lai Massacre in Vietnam	465
	4. The Backgrounds of the Incident	467
	B. <i>Current Situation</i>	468
	1. The Denial of Redress	468
	2. Investigations	470
	C. <i>Legal Issues Raised</i>	471
II.	THE APPLICATION OF INTERNATIONAL HUMANITARIAN LAW	473
	A. <i>The Hague Conventions</i>	473
	B. <i>The Geneva Conventions</i>	478
	1. The Development of the Protection of Civilians	479
	2. The Problem of Article 4 of the Geneva Convention (IV)	480
	3. Protocol (I) and Protocol (II) to the Geneva Conventions (1977)	481
	4. Applying the Geneva Conventions of 1949 to the No Gun Ri Case	483
	C. <i>The Principles of Customary International Law</i>	486
III.	THE LAWS VIOLATED IN KOREA AND IN THE UNITED STATES	489
	A. <i>"The Criminal Act" in Korea—Murder (Article 250)</i>	489
	B. <i>"The Articles of War" in the United States—Murder (Article 92)</i>	491
IV.	THE REMEDIES THAT CAN BE SOUGHT	493
	A. <i>Legal Remedies in Korea</i>	493
	1. The Possibility of Criminal Procedure in Korea	493
	2. The Possibility of Civil Procedure Against U.S. Offenders in Korea	495
	3. Seeking Compensation Against the Korean Government	496
	B. <i>Legal Remedies in the United States</i>	497
	1. Criminal Procedure	497
	2. Civil Litigation Against the Offenders	498
	3. Filing Tort Claims Against the United States Government	499
	CONCLUSION	502

INTRODUCTION

The Massacre at No Gun Ri is another dark story of war, it occurred fifty years ago during the Korean War. The world has witnessed a great number of unbelievable atrocities; this incident

might seem to be just one of many. Killings and massacres are still being committed throughout the world. However, realizing that more than one hundred innocent civilians, including women and children, were intentionally killed by U.S. soldiers, we cannot turn our eyes away from this tragedy.

The United States joined the Korean War in support of South Korea's fight against Communist North Korea. They were supposed to fight against the North Korean People's Army but ended up committing an unacceptable war crime against an allied country's civilians. According to reports and evidence, this appears to be the second biggest war crime case in the history of the U.S. Army. The most notorious U.S. war crime case happened in 1968, known as the Massacre at My Lai, Vietnam.¹

War is defined as a legal condition in which two or more groups carry on a conflict by armed force.² "In the past 5,000 years, approximately 14,000 wars have been fought, resulting in five billion deaths."³ During World War I, ten million human beings were killed. World War II cost forty million lives, with many more deaths resulting from disease and epidemics.⁴ Seventy-three armed conflicts took place between 1945 and 1969, with the estimated proportion of civilian to combatant deaths ten to one in a conventional war and one hundred to one in a nuclear war.⁵ In the Korean War, fought from June 25, 1950 to July 27, 1953, about 37,000 U.S. soldiers were killed. An ironic aspect of war is that the primary victims are civilians rather than the soldiers; more than 3 million Koreans died while millions more became refugees, homeless and distraught. About 37,000 United States soldiers were killed in the war. Mass destruction, pain and suffering are the fate of the innocent people in war.

What is a "War Crime?" War crimes are the violations of the laws or customs of war.⁶ In other words, a war crime is conduct that violates international laws governing war. War, however, consists largely of acts that would be criminal if performed in time of peace—killing, wounding, destroying, or carrying off

1. Cf. JOSEPH GOLDSTEIN et al., *THE MY LAI MASSACRE AND ITS COVER-UP: BEYOND THE REACH OF LAW* 1-15 (1976).

2. Helen Fein, *Discriminating Genocide From War Crimes: Vietnam and Afghanistan Reexamined*, 22 DENVER J. INT'L L. & POL'Y (1993) (quoting QUINCY WRIGHT, *A STUDY OF WAR* 8 (1942)).

3. Audrey I. Benison, *War Crimes: A Human Rights Approach to a Humanitarian Law Problem at the International Criminal Court*, 88 GEO. L.J. 141, 174 (1999).

4. See *id.*

5. *Id.* at 175.

6. See *Report of the International Law Commission to the General Assembly*, 5 U.N. GAOR, 5th Sess., Supp. No. 12, at 11, U.N. Doc. A/1316, reprinted in 2 Y.B. INT'L L. COMM'N 374 ¶ 118 (1950) [hereinafter *Report of the I.L.C.*].

other peoples' property. Such conduct is not regarded as criminal if it takes place during the course of war. However, the "right of belligerents to adopt means of injuring the enemy is not unlimited."⁷ Even when at war, the law of war must be abided; this is called *jus in bello*.

The current rules on armed conflict have their roots in the practice of belligerents in the Middle Ages. Hugo Grotius, the "Father of International Law," "was the first to enunciate the doctrine that the 'justness' of the cause for which belligerents resorted to war did not negate the belligerents' duty to observe the rules of warfare."⁸ Currently, many treaties and agreements, such as the Hague Conventions,⁹ the Geneva Conventions,¹⁰ and Protocol I and Protocol II to the Geneva Conventions¹¹ constitute positive international humanitarian law. In addition, customary international law plays a significant role when the codified laws of war are not suited to govern particular cases.

The Charter of the Nuremberg Tribunals supplies the classic definition of three major crimes under the international law:

7. Hague Convention (IV) Respecting the Laws and Customs of War on Land, with annex of regulations, Oct. 18, 1907, art. 22, 36 Stat. 2277, 2301, T.S. No. 539, at 647 [hereinafter Hague Convention (IV)].

8. EDWARD K. KWAKWA, *THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION* 9 (1992).

9. Hague Convention (II) with Respect to the Laws and Customs of War on Land, with annex of regulations, Sept. 4, 1900, 1 Bevans 247, T.S. No. 403 [hereinafter Hague Convention (II)]; Hague Convention (IV), *supra* note 7.

10. Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, Aug. 22, 1864, 129 Consol. T.S. 361; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 6, 1906, 1 Bevans 516 (no longer in force); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929, 2 Bevans 965; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter Fourth Geneva Convention].

11. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex I, II (1977), *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex I, II (1977), *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

(a) *Crimes against peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) *War crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor 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 private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) *Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹²

The Rome Statute for an International Criminal Court categorizes international crimes in a slightly different way: (a) the crime of genocide, (b) crimes against humanity, (c) war crimes, and (d) the crime of aggression.¹³ The Rome Statute states that "Crimes against humanity [are crimes] committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."¹⁴ On the other hand, "War crimes [are] grave breaches of the Geneva Conventions of August 12, 1949," or "other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law."¹⁵ The Rome Statute, Article 8 (2)(b), specifies the acts of war crimes:

12. Charter of the International Military Tribunal, Aug. 8, 1998, art. 6 in INTERNATIONAL MILITARY TRIBUNAL: TRIAL OF THE MAJOR WAR CRIMINALS 11 (1947). It also states that leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan. *Id.*

13. See Rome Statute of the International Criminal Court, July 17, 1998, art. 5(1), U.N. Doc. A/CONF.183/9, (1998).

14. *Id.* at art. 7(1).

15. *Id.* at art. 8(2).

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; . . .

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated

The main difference between war crimes and crimes against humanity lies in their relationship to war. Crimes against humanity are crimes committed as part of a widespread or systematic attack directed against civilian population. They do not need to be related to war. On the other hand, a crime that has a close relationship to the war will be a war crime. A crime committed in time of war will not automatically be a war crime if it does not have a close relationship to the war. Crimes committed by soldiers and related in nature to the war will be considered war crimes.

Refugees that were massacred at No Gun Ri happened in the middle of war as an official activity of U.S. forces. If the incident had had no relationship to war, it would merely have been a case of crimes against humanity, but here, the massacre was committed by soldiers fighting in a war, and civilians were the soldier's targets. Moreover, the civilians' deaths cannot be accounted for without analyzing the broader wartime context. With this view, it is reasonable to regard the incident as a war crime. But defining the case as a war crime under international humanitarian law is not so simple. Several complicated questions are involved in analyzing the No Gun Ri incident.

The first problem is the time of entry into force of the Geneva Conventions and international humanitarian law. Most of the Geneva Conventions protecting civilians in general had not been adopted at the time of the Massacre. The No Gun Ri Massacre was committed in July 1950, and at that time, neither the Rome Statute,¹⁶ nor Protocols I and II to the Geneva Conventions had been adopted. Even the four Geneva Conventions of 1949 did not come into force until October 1950.

The second problem is the obscurity of the codified regulations. Most of the norms of international humanitarian laws were aimed at regulation of the treatment of the wounded or the captured. There is no specific regulation governing war crimes against an ally's civilians. It is almost impossible to find an appro-

16. Rome Statute is still waiting for entry into force.

priate clause that explicitly addresses the protection of allied countries' civilian population like the No Gun Ri refugees in the laws of war existing before 1950. To make matters worse, some of the international treaties officially exclude allied countries' civilians from protection. Article 4 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War manifestly states, "Nationals of a co-belligerent State[] shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are."¹⁷

Thus, whether or not the No Gun Ri massacre is a war crime under international humanitarian law is a very important analysis. It is necessary to explain legitimately why it is a war crime if we want to seek the appropriate remedies for the victims.¹⁸

This thesis' main purpose is supplying the victims of No Gun Ri with a legal basis for their claims. Healing the past is not a purely legal procedure. In a sense, it is a political and social process. However, legal issues are the primary concern of this thesis. The following questions will be discussed:

- (1) What is the nature of the incident?
- (2) Which laws were violated in Korea and in the United States?
- (3) Is international humanitarian law applicable to this case?
- (4) Does the incident constitute a war crime under customary international law?
- (5) What kinds of legal remedies are available for the victims?
- (6) In the conclusion, the importance of the concept of war crimes against allies' civilians will be reemphasized.

I. THE ANATOMY OF THE NO GUN RI CASE

A. *Summary of the Incident*

1. The Korean War (1950-1953)

The Korean War broke out at 4:00 a.m. local time Sunday, June 25, 1950. The North Korean troops had launched their operation *Storm*. It was an all-out attack on the South without any declaration of war.¹⁹ Up to that point, the North and South had

17. Fourth Geneva Convention, *supra* note 10, at art. 4.

18. Similar analysis difficulties arose in the case of My Lai, Vietnam. *See, e.g.,* TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 126-53 (1970).

19. There is hot debate on the origin of the Korean War. North Korea claimed that the invasion was committed by the South Korean Army. On the other hand, the South Korean Government and the international community believe that North Korea attacked South Korea without notice. Even in the academic arena, the debate is still going on among the North Korean invasion

clashed some along the 38th parallel, but such an all-out surprise attack was never expected by the Southern camp.²⁰ Because of the superiority of North Korean military forces, Seoul fell within three days.

The United States immediately appealed to the United Nations (UN) Security Council to intervene, and the Security Council adopted a resolution determining that the action constituted a "breach of the peace."²¹ It called for the immediate cessation of hostilities and called upon the authorities in North Korea to withdraw forthwith their armed forces to the 38th parallel.²² On June 27, 1950, the Security Council recommended that the members of the United Nations furnish the Republic of Korea such assistance as may be necessary to repel the armed attack and to restore international peace and security in the area.²³ Accordingly, President Harry Truman ordered the use of U.S. planes and naval vessels against North Korean forces, and on June 30th, U.S. ground troops were dispatched, arriving in Pusan on July 1, 1950.

On July 7, 1950, the Security Council decided to place all forces and assistance from Member States under the unified command of the United States of America. This was the first establishment of a UN military force.²⁴ Already head of the U.S. military in Korea, General Douglas MacArthur was selected to command the UN forces; on July 14th, Korean President Syngman Rhee followed suit, giving MacArthur command over

theorists, South Korean invasion theorists, and the interaction between South and North theorists.

20. The invasion, in a narrow sense, marked the beginning of a civil war between peoples of a divided country. In a larger sense, the Cold War between the Great Power blocs had erupted into open hostilities.

21. S.C. Res. 82, U.N. SCOR, 5th Sess., 473d mtg., U.N. Doc. S/1501 (1950).

22. This resolution has an important meaning in terms of keeping freedom and peace because it was the first time that the UN Security Council got involved in such an issue to restore peace within a nation.

23. See S.C. Res. 83, U.N. SCOR, 5th Sess., 474th mtg., U.N. Doc. S/1511 (1950).

24. Sixteen countries agreed to dispatch troops into Korea, and five other countries offered medical aid. UN members sent 341,000 soldiers, including one land troop, two other armies, nine divisions, three brigades, eight infantry regiments, and their volunteers. In addition, two marine troops and three air force troops were mobilized.

the Korean army as well.²⁵ One man now commanded the U.S. army, the Korean Army, and the UN troops.²⁶

At first, U.S. troops were feeling quite confident about the war. They had believed that their mere presence would frighten away the North Korean troops.²⁷ However, in their first encounter with North Korean People's Army on July 5, 1950, Task Force Smith suffered a major defeat at Chukmaryong, North of Osan; U.S. forces lost 150 out of 540 soldiers, and 72 were held hostage by the North Korean army. Their only accomplishment was to stall the North Korean army's southward march for six hours. Taejeon was abandoned by the UN forces on July 20, 1950. American soldiers lost their cocky attitude as the North Koreans overran their first defensive positions. Early overconfidence was displaced by the grim realization that the North Korean force was superior. The North Korean army was larger and better equipped, and the soldiers were better fighters.²⁸

2. Three Night and Four Day Massacre

The No Gun Ri incident happened right at this moment. It started on July 26, 1950 and continued until the morning of July 29th.²⁹ According to the survivors, on July 23rd, the U.S. Army

25. On July 14, 1950 in Pusan, Korea, Syngman Rhee wrote to Gen. MacArthur. After acknowledging that General MacArthur had been placed in command of all UN military forces, President Syngman Rhee wrote, "I am happy to assign to you command authority over all . . . forces of the Republic of Korea during the period of the continuation of the present state of hostilities, such command to be exercised either by you personally or by such military commander(s) . . . to whom you may delegate . . ." Since that time, the command authority over the Korean Army has belonged to the United States. JAMES F. SCHNABEL, *POLICY AND DIRECTION: THE FIRST YEAR* 112 (1992) (citing Rad, State Dept. Msg. 41, U.S. Ambassador, Taegu, to Secretary of State, July 14, 1950, containing text of Letter, from President Rhee to General MacArthur), available at http://www.army.mil/cmh-pg/books/korea/30-2/30-2_1.htm (last visited Apr. 9, 2001).

26. Because of the status of the United States military command, the responsibilities of the U.S. Government, the Korean Government, and the United Nations can be raised together.

27. "As soon as those North Koreans see an American uniform over here,' soldiers boasted to one another, 'they'll run like hell.'" RUSSELL A. GUGELER, *ARMY HISTORICAL SERIES: COMBAT ACTIONS IN KOREA* 3 (1970).

28. *Id.*

29. The *Associated Press* brought this incident to the public's attention, reporting that "American soldiers machine-gunned hundreds of helpless civilians, under a railroad bridge in the South Korean countryside." Sang-Hun Choe et al., *Bridge at No Gun Ri*, ASSOCIATED PRESS WIRE REPORT, Sept. 30, 1999, available at <http://wire.ap.org/Appackages/nogunri/story.html> (fee for retrieval). Except where otherwise indicated, the bulk of the factual recitations describing the No Gun Ri incident were drawn from this report.

ordered the villagers of Joo Gok Ri to vacate the village because there might be combat. They evacuated and moved to Im Kye Ri, located 1.5 miles south. Two days later, on July 25th, the U.S. Army again ordered the villagers to move south toward Taegu or Pusan. About 500 people from the two villages walked toward No Gun Ri, being accompanied by U.S. troops. They stayed one night at Ha Gi Ri and arrived at No Gun Ri on the morning of July 26th. According to secret U.S. military intelligence reports written during this period, when the refugees entered the underpasses on July 26th, the North Korean frontline was four miles from No Gun Ri. "As the refugees neared No Gun Ri, leading ox carts, some with children on their backs, American soldiers ordered them off the southbound dirt road and onto a parallel railroad track."³⁰

The killing reportedly began "when American planes suddenly swooped in and strafed an area where the white-clad refugees were resting."³¹ The killing continued; "the American soldiers directed the refugees into the bridge underpasses—each 80 feet long, 23 feet wide, 30 feet high—and after dark opened fire on them from nearby machine-gun positions. Ex-GI, Herman Patterson said, 'It was just wholesale slaughter.'"³²

After speaking with superior officers by radio, Captain Melbourne C. Chandler had ordered machine-gunners to set up near the tunnel mouths and open fire.³³ The No Gun Ri survivors assert that no hostile fire originated from the refugees under the bridge.³⁴ According to the Korean claimants, the soldiers

30. *Id.* Declassified records confirm that the First Cavalry Division soldiers moved through that village area on this timeline. According to ex-sergeant George Preece's recollection, the way was being cleared for U.S. Army vehicles. *Id.*

31. *Id.* (both Koreans and ex-GIs reported this as the starting point). Declassified U.S. Air Force mission reports from mid-1950 show that pilots sometimes attacked 'people in white,' apparently because of suspicions North Korean soldiers were disguised among them. The report for one mission of four F-80 jets, for example, said the airborne controller 'said to fire on people in white clothes. Were about 50 in group.'

Id. In addition, CBS recently reported that they found an Air Force memo on strafing of refugees dated July 25, 1950, which said that Air Force planes had strafed columns of civilian refugees at the request of Army commanders. See *U.S. Studies Link Between Strafing Memo, No Gun Ri*, THE WASHINGTON POST, June 7, 2000, at A8.

32. Sang-Hun Choe et al., *supra* note 29.

33. See *id.*

34. See *id.* Ex-sergeant James T. Kerns and others suggested the Americans were answering fire from among the refugees. Eugene Hesselman of Mitchell, Kentucky, minimized the gunfire, reporting that "every now and then

shot and killed those near the tunnel entrances first.³⁵ Retired Colonel Robert M. Carroll was a twenty-five-year-old first lieutenant at the time of the massacre. He reports that battalion riflemen opened fire on the refugees from their foxholes. Carroll, not convinced this was the enemy, got the rifle companies to cease firing on the refugees.³⁶ Believing it was safer under a nearby double-arched concrete railroad bridge, Carroll then led a boy to join a group of traumatized, confused, and wounded Koreans gathered there.³⁷ He did not perceive a threat. "There weren't any North Koreans in there the first day, I'll tell you that. It was mainly women and kids and old men," recalled Carroll, who said he then left the area and knew nothing about what followed.³⁸ During three nights under fire, at least 126 villagers were killed and 45 were wounded according to the officially registered list of the victims' committee.³⁹ Reportedly, "some trapped refugees managed to slip away, but others were shot as they tried to escape or crawled out to find clean water to drink."⁴⁰ At the end of the incident, early on July 29, the 7th Cavalry pulled back. Three weeks later, the North Korean newspaper *Cho Sun In Min Bo* reported that "North Korean troops who moved in found 'about 400 bodies of old and young people and children.'"⁴¹

3. My Lai Massacre in Vietnam

At the My Lai Massacre, Captain Medina, who was prosecuted for ordering the massacre, testified that he instructed his troops to destroy My Lai 4 by "burning the hutches, . . . kill[ing] the livestock, . . . close[ing] the wells and . . . destroy[ing] the food crops."⁴² Lieutenant Calley testified that Captain Medina

you'd hear a shot, like a rifle shot.' But others recalled only heavy barrages of American firepower, not hostile fire. 'I don't remember shooting coming out,' said ex-rifleman Louis Allen of Bristol, Tenn." *Id.* The Koreans suggested the American soldiers may have been seeing their own force's gunfire ricocheting through from the tunnels' opposite ends. American soldiers confirmed this possibility. *See id.*

35. *See id.*

36. *See id.*

37. *See id.*

38. *Id.*

39. *See No Gun Ri Victims Request that the US Government Should Apologize and Compensate*, KYUNG-HYANG NEWSPAPER, Mar. 4, 2000, available at <http://www.ebo.co.kr/wwwboard/CrazyWWWBoard.cgi?db=ebo14&mode=read&num=70&page=1&ftype=6&fval=&backdepth=1>.

40. Sang-Hun Choe et al., *supra* note 29.

41. *Id.*

42. 32 C.M.R. 1182 (A.C.M.R. 1973).

informed the troops they were to kill every living thing.⁴³ The unit received no hostile fire from the village.⁴⁴ Following orders, the American soldiers fired at anything that moved.

Bunkers and huts were razed with grenades or raked with machine gunfire. Women, young and old, were raped. Some Vietnamese were shot as they stumbled out of their huts; most were executed in large assembled groups. Dennis Conti, a minesweeper operator who was a participant and an eyewitness to the massacre, recalled that women and children were pushed into bunkers, and grenades were thrown in after them. At one point when Conti was alone, he forced a twenty-year-old Vietnamese woman with a four year old child to perform oral sex upon him, while he held a gun at the child's head, threatening to kill the child. In the end, over 567 Vietnamese civilian men and children were dead.⁴⁵

Twelve officers and soldiers were charged with military-type offenses and thirteen were charged with crimes under Uniform Code of Military Justice (UCMJ).⁴⁶ The charges against seven of those officers and enlisted men charged were dismissed, three were acquitted, two were barred from reenlistment, and only one, First Lieutenant William Calley, was found guilty of premeditated murder and other crimes under the UCMJ.⁴⁷

43. United States v. Calley, 46 C.M.R. 1131 (A.C.M.R. 1973).

44. *Id.* at 1165.

45. Jeannine Davanzo, Note, *An Absence of Accountability for the My Lai Massacre*, 3 HOFSTRA L. & POL'Y SYMP. 287, at 294 (1999). American philosopher Michael Walzer declares, "[T]he American war in Vietnam was, first of all, an unjustified intervention, and it was, secondly, carried on in so brutal a manner that even had it initially been defensible, it would have to be condemned." See Helen Fein, *supra* note 2.

46. Davanzo, *supra* note 45, at 295.

47. *Id.* at 298-99.

Although Calley was sentenced to a dismissal and confinement at hard labor for life, the convening authority reduced this sentence to a dismissal and twenty years at hard labor. Subsequent to the convening authority's action, the Secretary of the Army further reduced the sentence to a dismissal and ten years at hard labor. William Calley, Jr., actually served a total of only three years under house arrest at Fort Benning, Georgia, and six months at the confinement facility at Fort Leavenworth, Kansas (from June 1974 to November 1974). Calley was released from confinement at Fort Leavenworth when his sentence was overturned by a federal district judge in Georgia. When the fifth Circuit Court of Appeals reinstated the conviction, Calley was not returned to confinement; instead, he was paroled by the Secretary of the Army in 1975. He works today in his father-in-law's jewelry store in Columbus, Georgia.

Why, on earth, did these unbelievable incidents happen? The official investigation report of the United States on the Massacre at My Lai points out six important reasons that caused the incident in Vietnam to happen: (1) lack of proper training, (2) dehumanizing attitude toward the Vietnamese, (3) nature of enemy, (4) organizational problems, (5) lack of leadership, and (6) the lack of a grand strategy by the United States.⁴⁸

4. The Background of the Incident

Similar problems contributed to the Massacre at No Gun Ri.

First, the U.S. soldiers were poorly equipped, ill trained, and had little understanding of Korea. These teenagers and young officers lacked combat experience and had abruptly entered the war just three days before.⁴⁹ A rumor was circulating among the U.S. ranks that North Korean soldiers masquerading as peasants might try to penetrate American lines with refugees. The soldiers were frightened and lacked the confidence to handle the situation correctly.

Second, there was an official order from American ground commanders to fire on refugees fearing that North Korean soldiers, dressed in civilian clothes, were infiltrating refugee columns, thus, posing a threat to U.S. forces. In the morning of July 26, 1950:

[T]he U.S. 8th Army, which was in charge of Korea, had radioed orders throughout the Korean front that began, "No—repeat no—refugees will be permitted to cross battle lines at any time," according to declassified documents located at the National Archives in Washington. Two days earlier, 1st Cavalry Division headquarters issued a more explicit order: "No refugees to cross the front line. Fire everyone trying to cross lines. Use discretion in case of women and children." In the neighboring 25th Infantry Division, the commander, Maj. Gen. William B. Kean, told his troops that since South Koreans were to have been evacuated from the battle zone, "all civilians seen in this area are to be considered as enemy and action taken

Major Jeffrey F. Addicott & Major William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153, n.35 (1993).

48. See Addicott & Hudson, *supra* note 47, at 162-74 (citing WILLIAM R. PEERS, *THE MY LAI INQUIRY* (1979)); see also GOLDSTEIN ET AL., *supra* note 1.

49. See Sang-Hun Choe et al., *supra* note 29. The factual information on No Gun Ri in the following three paragraphs is drawn from this report.

accordingly." His staff relayed this as "considered as unfriendly and shot."⁵⁰

Finally, after speaking with superior officers by radio, Captain Melbourne C. Chandler, ordered his soldiers to fire on the refugees at No Gun Ri.

Third, the case was not reported to the appropriate authorities nor was reparation offered. Consequently, subsequent similar incidents occurred during the Korean War.⁵¹

B. Current Situation

1. The Denial of Redress

The U.S. military and the Korean Government have denied redress several times.⁵² Cheong Eun Yong, the chairperson of

50. *Id.*

51. Many claims of similar incidents were raised after the No Gun Ri Massacre. For example, reportedly several months after No Gun Ri, the Waegwan Bridge was bombed, killing hundreds of refugees. Sang-hun Choe et al., *Vets Say Other Refugees Killed by GIs; On the Bridge Near Taegu During Early Korean War*, KOREA HERALD, Oct. 15, 1999, available at http://www.koreaherald.co.kr/SITE/html_dir/1999/10/15/199910150041.asp.

52. Since the writing of this article, both the U.S. and Korean Governments have completed their investigations and released official review reports.

The U.S. report concluded, "As a result of U.S. actions during the Korean War in the last week of July 1950, Korean civilians were killed and injured in the vicinity of No Gun Ri." United States Review Report, *Department of the Army Inspector General, No Gun Ri Review*, January 2001, available at <http://www.army.mil/nogunri/>. However, it adds:

[G]iven the fact that many of the U.S. soldiers lacked combat-experienced officers and Non-commissioned officers, some soldiers may have fired out of fear in response to a perceived enemy threat without considering the possibility that they might be firing on Korean civilians. Neither the documentary evidence nor the U.S. veterans' statements reviewed by the U.S. Review Team support a hypothesis of deliberate killing of Korean civilians.

Id. On the other hand, the Korean Review team declared, "In the desperate opening weeks of defensive combat in the Korean War, U.S. soldiers killed or injured an unconfirmed number of Korean refugees in the last week of July 1950 during a withdrawal under pressure in the vicinity of No Gun Ri." *Id.* The Korean report was published as a book. NO GUN RI INVESTIGATION TEAM, A REPORT OF THE INQUIRY ON THE NO GUN RI INCIDENT (2001).

After the release of the reports, former President Clinton expressed, "the United States' deepest sorrow, regret, and sympathy to the survivors and the victims' families for the events that transpired at No Gun Ri, and for their anguish during their long effort to gain acknowledgment of that tragedy."

Secretary of Defense William S. Cohen announced, "As a 'symbol of deep regret' over the tragedy, the United States promised to erect a memorial in the vicinity of No Gun Ri." He also promised that the United States would establish a scholarship fund, which the United States and the Republic of Korea have agreed to name the "United States-Republic of Korea Commemorative Scholar-

the Victims' Committee, and other victims filed a compensation claim with a U.S. claims office in Seoul in October 1960, but it was dismissed because of insufficient evidence and the statute of limitations.⁵³ In December 1960, July 1994, and October 1994, they also sent the U.S. Government complaints requesting both an apology and compensation; they received no answer.⁵⁴ Additional complaints were sent to President Clinton in July 1994 and October 1994; these also went unanswered.⁵⁵ When the victims sent complaints to President Kim Young Sam in July 1994 and October 1994, they received notice that their complaints had been transferred to the U.S. forces claims office.⁵⁶ However, the United States Army office was essentially non-responsive, stating that the U.S. does not assume responsibility in the case of damages caused by combatant activities against the enemy.⁵⁷ The answer reportedly was a *final decision* and *the last response* to the case.

In August 1997, thirty petitioners signed and filed a claim with the South Korean Government Compensation Committee.⁵⁸ Having researched various military positions, they pointed a finger at the 1st Cavalry. United States Armed Forces Claims Service responded, stating there was "no evidence . . . to show that the U.S. 1st Cavalry Division was in the area."⁵⁹ A lower-level South Korean compensation committee acknowledged people were killed beneath the railroad bridge but found no proof of U.S. involvement.⁶⁰ In April 1998, the national panel rejected the case, saying a five-year statute of limitations had expired long ago.⁶¹ Now, victims are seeking remedies directly in the U.S. judiciary and are reportedly planning to file a petition to the UN

ship." See United States Department of Defense, News Release: Secretary of Defense Statement on No Gun Ri, January 11, 2001, *available at* http://www.defenselink.mil/news/Jan2001/b01112001_bt017-01.html.

53. *No Gun Ri Chronology*, CHUNG CHONG DAILY NEWS, September 30, 1999.

54. *Id.*

55. *Id.*

56. *Id.*

57. The Korean claimants assert that the killings were not combat-related, because the enemy was miles away. See Sang-Hun Choe et al., *supra* note 29.

58. *See id.*

59. *Id.*

60. *See id.*

61. *See id.* "The A[ssociated] P[ress] subsequently reconstructed unit movements from map coordinates in declassified war records. They showed that four 1st Cavalry Division battalions were in the area at the time of the alleged incident." *Id.*

Human Rights Committee.⁶² The chairperson of the Victims Committee, Cheong, urges that the investigation and compensation should be made while the elderly victims are alive, and he suggests that the Korean Government can compensate the victims first and then claim indemnity from the United States.

2. Investigations

After the *Associate Press* published their investigation into No Gun Ri,⁶³ the Clinton Government announced its decision to conduct an official investigation of the case.⁶⁴ On September 30, 1999, the Secretary of Defense, William S. Cohen ordered the Army to undertake a new and thorough review of reports that American soldiers killed Korean civilians at the beginning of the Korean War.⁶⁵ Korean President Kim Dae Jung also ordered his Government to investigate the case thoroughly in co-operation with the U.S. Government, and to find remedies for the victims, such as compensation.⁶⁶ Even though the investigation is underway after the report, neither government mentions even a word regarding the remedies.⁶⁷ The only thing the governments repeatedly say is, "investigation first, then remedies."⁶⁸

Recently, there has been hot debate whether the testimony of Edward L. Dailey is credible or not.⁶⁹ As a part of the investigation, the links between the Air Force memo on strafing of refugees and the No Gun Ri incident are being researched.⁷⁰ In

62. See *Planning to file a petition in the UN Human Rights Committee, No Gun Ri Attorney Says*, DONG-A ILBO DAILY, June 15, 2000, available at <http://www.ebo.co.kr/wwwboard/CrazyWWWBoard.cgi?db=ebo14&mode=read&num=84&page=1&ftype=6&fval=&backdepth=1>.

63. See generally Sang-Hun Choe et al., *supra* note 29.

64. See Letter from the former President William J. Clinton to Army Secretary Louis Caldera (September 30, 1999), available at <http://www.washingtonpost.com/wp-srv/national/daily/aug99/clin30.hum> [hereinafter Caldera Letter].

65. Elizabeth Becker, *US to Revisit Accusations of a Massacre by GI's in '50*, N.Y. TIMES, October 1, 1999, at A3; see also Caldera Letter, *supra* note 64.

66. *Id.* Kim Dae Jung even suggested a joint investigation committee, but was not successful. After the diplomatic negotiation, a Bilateral Coordinating Group was established between the two countries. Chang-Sik Park, *Cloud on the Bridge*, HANGYEORE 21, Oct. 28, 1999, at 28.

67. See *supra* note 52.

68. Soon-goo Hwang, *After the No Gun Ri Case*, HANGYEORE 21, Jan. 20, 2000, at 28.

69. He recently reversed his testimony on the massacre, saying that he might not have been at the site, and that he might have heard the story from his colleague soldiers, who had seen the incident. See Felicity Barringer, *Ex-GI in A.P. Account Concedes He Didn't See Korea Massacre*, N.Y. TIMES, May 26, 2000. For more recent information, see *supra*, note 52.

70. CBS reported on June 6, 2000:

addition, there are elements of the No Gun Ri episode that are still unclear. As posed by the *Associated Press*, "What chain of officers gave open-fire orders? Did GIs see gunfire from the refugees or their own ricochets? How many soldiers refused to fire?"⁷¹ How high in the ranks did knowledge of the events extend?"⁷² Those questions should be answered by the investigations of the two governments and judicial agencies.⁷³

C. *Legal Issues Raised*

It is undeniable that more than one hundred Korean refugees were machine-gunned to death by U.S. soldiers. Clear evidence, including the testimony of the victims and ex-GI's, confirm that refugees were killed illegally at No Gun Ri. The full and precise facts will be disclosed after the official investigation.⁷⁴ Nevertheless, the following facts can safely be concluded from the reports and evidence already known:

- (1) There were mass killings at No Gun Ri by U.S. Soldiers on July 26, 27, and 28, 1950;
- (2) The soldiers fired on the refugees knowing that there were civilians in the refugee group who were not combatants;

Army investigators, searching for the truth of what really happened, have found an Air Force document that had been buried for decades at the National Archives, a memo by Air Force Colonel Turner Rogers, reads in part, 'The Army has requested that we strafe all civilian refugee parties . . . approaching our positions. . . . To date, we have complied.'

See Order to Fire on Civilians? (CBS television broadcast, June 6, 2000) at <http://www.wbz.com/now/story/0,1597,202826-364,00.shtml>. The so-called Rogers Memo clearly shows that air strafing on civilians was widely conducted by the U.S. Air Forces at the early stage of the Korean War. However, the U.S. review report does not admit this memo as concrete evidence of air strafing in No Gun Ri. *See supra* note 52.

71. "Not everyone fired, veterans said. 'Some of us did and some of us didn't,' said Veteran Delos Flint, of Clio, Mich., [a] soldier who had been briefly caught in the culvert with the refugees 'It was Civilians just trying to hide.'" Sang-Hun Choe et al., *supra* note 29.

72. *Id.*

73. *See supra* note 52. Problems identified at the beginning of the U.S. Government investigation linger to criticize the product-report: (i) The victims were not a party to the investigation, but were merely objects of the investigation; (ii) There was no neutral party to guarantee the impartiality of the committee; (iii) The power and the responsibility of the committee was not clearly enumerated; (iv) The relationship between the investigation and the legal remedy was not specified. *See* Sihyun Cho, *An Opinion on the Correct Response to the Civilian Massacres Committed by the United States Forces Such As No Gun Ri* (2000) (unpublished manuscript, on file with author).

74. These governmental investigations have recently been completed. *See generally supra* note 52.

- (3) The firing was supported by the superiors' orders and the declaration: "No refugees to cross the front line. Fire at everyone trying to cross lines. Use discretion in case of women and children."⁷⁵

The facts propose several legal questions:

- (1) What is the nature of the incident? Which law was specifically violated in the incident? Is it a simple murder case? Otherwise, does it constitute a crime against humanity or a war crime? A specific legal explanation is necessary in order to seek the legal remedy.
- (2) Who is responsible for the incident? Individual responsibility of the U.S. Army will not be denied under the international law. There is no doubt that the U.S. Government is officially responsible for this incident, too. Moreover, the Korean Government should be responsible, too, because Korean President Syngman Rhee transferred command authority over the Korean army to General MacArthur. In addition, considering General MacArthur's position as the Chief Commander of UN Forces, the United Nations may incite responsibility for the UN as well.⁷⁶
- (3) How can No Gun Ri be compensated? It is a basic principle of international human rights law to hold perpetrators of massive human rights violations accountable. The UN Charter and Universal Declaration of Human Rights guarantee "respect for and observance of human rights and fundamental freedoms."⁷⁷ The Universal Declaration also states, "Everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."⁷⁸ Since Nuremberg, it is an established norm that "any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment."⁷⁹ It is a duty of nations under customary international law to investigate and prosecute war crimes, genocide, torture, and crimes against humanity.

The experience of the transition from the military dictatorships to democratic regimes in the 1980s and 1990s has helped to theorize the principles of the accountability for past human

75. Sang-Hun Choe et al., *supra* note 29.

76. The responsibility of the United Nations is outside the scope of this thesis.

77. See Universal Declaration of Human Rights, Pmbl., G.A. Res. 217A (III), at 71, U.N. Doc. A/810 (1948); see also U.N. CHARTER, Pmbl. .

78. Universal Declaration of Human Rights, *supra* note 77, at art. 8.

79. Report of the I.L.C., *supra* note 6, at ¶ 98.

rights abuses.⁸⁰ In general, the victims, individuals, and society as a whole have: (1) a right to see justice done, (2) a right to know the truth, (3) an entitlement to compensation and non-monetary forms of restitution, and (4) a right to a new institution.⁸¹ In other words, the principles of international human rights law request completion of the following tasks: (1) investigation, prosecution, and punishment of the perpetrators; (2) disclosure to the victims, their families, and society of all that can be reliably established about those events; (3) an offerance of adequate reparations to the victims; and (4) separation of known perpetrators from law enforcement bodies and other positions of authority.⁸²

More than one hundred people were killed and many more were wounded by U.S. soldiers' firing at No Gun Ri. Survivors have suffered physical and emotional distress since the massacre happened. Consequently, they are entitled to all of the upper mentioned rights: to see justice done, to know the truth, to compensation, and to a new institution.⁸³

II. THE APPLICATION OF INTERNATIONAL HUMANITARIAN LAW

A. *The Hague Conventions*

The major conventions that constitute international humanitarian law are the Hague Conventions and the Geneva Conventions. The purpose of the Hague Conventions is to regulate "the conduct of hostilities"; the Geneva Conventions focus on the "victims of war." The two sets of Conventions are closely related, but the roots of each are quite different.

The Hague Convention (II), *Convention with Respect to the Laws and Customs of War on Land*, was adopted at the First Hague Peace Conference of 1899. The Convention and the Regulations were revised at the Second International Peace Conference in

80. See Juan E. Mendez, *Accountability for the Past Abuses*, 19 HUM. RTS. Q. 255 (1997). "[A]ccountability for past abuses must be considered not only in transitions to democracy, but in seeking solutions to armed conflicts as well." *Id.* at 257.

81. *Id.* at 261. Louis Joinet raises three rights instead of four as victims rights: (i) the right to know, (ii) the right to justice, and (iii) the right to reparation. See generally Louis Joinet, *The Administration of Justice and the Human Rights of Detainees*, 59 LAW & CONTEMP. PROBS. 249 (1996).

82. Even though this is the case for the internal human rights violations, these rights may be used in grave breaches of international humanitarian law as well.

83. The right to a new institution will include the specific codification of war crime against ally civilians to prohibit the recurrence of similar cases.

1907, resulting in *Convention (IV) Respecting the Laws and Customs of War on Land*.

The provisions of the Hague Conventions on land warfare, like most of the substantive provisions of the Conventions of 1899 and 1907, are considered as embodying rules of customary international law. The Nuremberg International Military Tribunal stated that by 1939 the rules "were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war."⁸⁴

The first question with regard to the application of the Hague Conventions is whether the Hague Conventions (II) and (IV) were effective at the time of the No Gun Ri incident in 1950. Korea signed the Hague Conventions (II) of 1899 in 1903; nevertheless, it never signed the Convention (IV) of 1907. The United States signed both of the Conventions in 1899. The answer is that Korea was under the protection of the Conventions, because Regulations of the Hague Conventions were considered customary international law. It is also customary international law that the laws of war that rise to the status of customary norms are binding on the States that are not formally parties to the Conventions.⁸⁵

TABLE 1: THE EFFECT OF THE HAGUE CONVENTIONS AT THE TIME OF THE NO GUN RI INCIDENT, JULY 1950

Effective Convention	Date of Signature by Korea	Date of Signature by U.S. (Ratification)	Effect at the time of No Gun Ri
Convention (II) of 1899	March 17, 1903	July 29, 1899 (April 9, 1902)	Effective (Customary International Law)
Convention (IV) of 1907	Not Signed	October 18, 1907 (November 27, 1909)	Effective (Customary International Law)

84. DIETRICH SCHINDLER & JIRÍ TOMAN, *THE LAWS OF ARMED CONFLICTS* 63 (1988). In 1946, the Nuremberg International Military Tribunal stated with regard to the Hague Convention on land warfare of 1907, "The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption . . . but by 1939 these rules . . . were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war." International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, *reprinted in* 41 AM. J. INT'L L. 172, 248-49 (1947). In 1948, the International Military Tribunal for the Far East similarly declared that the 1907 Hague Convention was "good evidence of the customary law of nations." *See id.*

85. *Id.* at 63.

The second question is whether the Hague Conventions protect civilians, as well as wounded soldiers and prisoners of war. It is very important to note that the Preamble of the Hague Convention explicitly dealt with the protection of populations. The Convention states in the Preamble, "[T]hese provisions, the wording of which has been inspired by the desire to diminish the evils of war so far as military necessities permit, are destined to serve as general rules of conduct for belligerents in their relations with each other and with *populations*."⁸⁶ Another similar notion in regard of the protection of the civilian is found later in the Preamble. "[P]opulations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience."⁸⁷ These statements can be understood as the legal basis for the application of the Hague Conventions to the case of No Gun Ri.

Clauses in the Hague Conventions can be used to criminalize the action of U.S. soldiers at No Gun Ri. According to Article 23 of the Hague Convention (II) and (IV), it is forbidden: (b) to kill or wound treacherously individuals belonging to the hostile nation or army; and (c) to kill or wound an enemy who, having laid down arms, or having no longer means of defense, has surrendered at discretion. Furthermore, Article 43 poses the obligations to the occupant, when "the authority of the legitimate power" passes to them, to take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. Article 46 of Convention (II) guarantees "family honour and rights, the lives of persons, and private property, as well as religious convictions and practice." The refugees of No Gun Ri carried no arms and were totally under the control of the U.S. soldiers when they arrived at the massacre site. Accordingly, U.S. soldiers should not have fired on the refugees, even if they might have suspected the presence of disguised North Korean soldiers among them.

However, the third question arises at this point. There is a problem in applying the clauses of the Hague Conventions to the No Gun Ri case directly. The concept of "hostile territory" is the question. The articles cited above are under the title of "On mili-

86. Hague Convention (II), *supra* note 9, at pmb1. (emphasis added).

87. *Id.* (emphasis added).

tary authority over hostile territory."⁸⁸ Is it correct to apply the section to the case of an "allied country's civilians"? Can it be considered that the No Gun Ri area in South Korea was "hostile territory,"⁸⁹ or the "territory of the hostile state"?⁹⁰ Can it be safely construed that the area was an "occupied territory"?⁹¹ Unfortunately, it seems to be impossible to consider No Gun Ri as a "hostile territory." Article 41 of *The Laws of War on Land: Manual published by the Institute of International Law (Oxford Manual)* states, "Territory is regarded as occupied when, as the consequence of invasion by hostile forces, the State to which it belongs has ceased, in fact, to exercise its ordinary authority therein, and the invading State is alone in a position to maintain order there."⁹² According to this definition, the territory of Korea at the time of the No Gun Ri incident can never be an occupied territory of the United States.

This problem even more clearly arises in the case of Geneva Convention (IV), *Convention Relative To The Protection Of Civilian Persons In Time Of War Of 1949*. Article 4 of the Convention explicitly refuses to protect the civilian population of the neutral or allied countries. It states, "Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are."⁹³

In any codification of law, there is always the risk that the document will not be adequate to cover all the potential issues that might arise. However, from the viewpoint of the civilians of allied countries, such as South Korean nationals during the Korean War and South Vietnamese civilians during the Vietnam War, the obscurity of or the defects in the codification cause a

88. Hague Convention (II), *supra* note 9, at § III. Section III of the Hague Convention (IV) carries the title of "Military Authority over the Territory of the Hostile State." Hague Convention (IV), *supra* note 7, at § III.

89. Hague Convention (II), *supra* note 9, at § III.

90. Hague Convention (IV), *supra* note 7, at § III.

91. Hague Convention (II), *supra* note 9, at art. 44; Hague Convention (IV), *supra* note 7, at art. 44.

92. *The Laws of War on Land*, Sept. 9, 1880, *reprinted in* SCHINDLER & TOMAN, *supra* note 84, at 42 (originally published by the Institute of International Law).

93. Fourth Geneva Convention, *supra* note 10, at art. 4. The problem of the Geneva Convention (IV) in protecting the civilians was solved in general by Protocol I. See Protocol II, *supra* note 11. The problem of The Geneva Conventions in the protection of the allied countries' civilians will be discussed later again.

very disappointing and painful situation for them. What is the alternative for the No Gun Ri victims? The solution is located in the Preamble of the Hague Conventions—the “Martens Clause.” Perhaps, it is the most important provision of the Hague Conventions.⁹⁴

The Preamble of the Hague Convention states:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.⁹⁵

In other words, in cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom; from the principles of military necessity, humanity, chivalry, proportionality and distinction; and from the dictates of public conscience.⁹⁶ “The Martens Clause grants combatants and non-combatants protection under generally accepted principles of international law, not only those peculiar to the law of war. More importantly, it gives custom an elevated status in the law of war.”⁹⁷ The Preamble of the Hague Convention supplies us with a solid legal basis in the application of international humanitarian law and customs of war to the case of No Gun Ri and the war crimes against allied countries’ civilians. The Massacre of No Gun Ri constitutes a war crime in light of the Preamble of the Hague Convention and under customary international law.

94. In *United States v. Krupp*, the court stated, “[The Martens Clause] is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity, and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the [Hague] Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.” KWAKWA, *supra* note 8, at 13 (citing *United States v. Krupp*, 9 Trials War Crim. 1341 (Nur. Mil. Trib. 1949)).

95. See Hague Convention (IV), *supra* note 6, at Pmb. . This Martens Clause has stood the test of time and is reproduced in almost identical terms in Article I of Protocol I of 1977.

96. See L. C. Green, *Essays on the Modern Law of War* 216 (1985).

97. KWAKWA, *supra* note 8, at 13.

B. Geneva Conventions

The so-called Geneva Conventions have a long history. The first Geneva Convention was adopted in 1864 after the Geneva Conference for the Amelioration of the Condition of the Wounded in War.⁹⁸ The Convention of 1864 was replaced by the Geneva Conventions of 1906, 1929, and 1949 on the same subject. "However, the Convention of 1864 ceased to have effect only in 1966 when the last state party to it (South Korea) which had not yet acceded to a later Convention, acceded to the Conventions of 1949."⁹⁹ Two protocols were additionally adopted in 1977, in order to cover internal armed conflicts and the conduct of hostilities.¹⁰⁰

TABLE 2: THE EFFECT OF GENEVA CONVENTIONS AT THE TIME OF THE NO GUN RI INCIDENT, JULY 1950

Effective Convention	Date of Effectuation in Korea (Ratification)	Date of Signature by U.S. (Ratification)	Effect at the time of No Gun Ri
Geneva Convention of 1864	January 8, 1903	March 1, 1882	Effective
Geneva Convention of 1906	Not signed	July 6, 1906 (February 9, 1907)	Effective
Geneva Convention of 1929	Not Signed	July 27, 1929 (February 4, 1932)	Effective
Geneva Convention (I), (II), (III), and (IV) of 1949	August 16, 1966 (July 11, 1966)	August 12, 1949 (August 2, 1953)	Not effective (Effectuated only after October 1950)
Protocol (I) and Protocol (II) to the Geneva Convention of 1977	January 15, 1982 (February 14, 1981)	Not signed	Not effective

Korea signed and ratified the Convention of 1864, *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field* on January 8, 1903, but is not a signatory to the Convention of 1929. It did not sign the four Conventions until 1966. On the other hand, United States was a signatory to the 1864,

98. See SCHINDLER & TOMAN, *supra* note 84, at 279.

99. *Id.*

100. The two Protocols Additional to the Geneva Conventions of 1949 embodied and developed the rules embodied in the Regulations of the Hague Conventions.

1906, and 1929 Conventions. In addition, it signed the 1949 Geneva Conventions on December 8, 1949, ratifying it on February 8, 1955.

The Geneva Conventions of 1949 entered into force in October 1950, three months after the No Gun Ri Massacre.¹⁰¹

The three previous Geneva Conventions have no specific provisions with regard to the protection of civilians. The *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 1864* was effective at the time of No Gun Ri. The focus of the Convention was the "wounded or sick combatants." Article 6 of the Convention states, "Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for." However, there is no provision that regulates the killings of civilians. The *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 1906* was more detailed and more precise in its terminology than the Convention of 1864. New provisions were included concerning the burial of the dead and the transmission of information. The *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 1929* inserted new provisions to the Convention of 1906 concerning the protection of medical aircraft and the use of the distinctive emblem in time of peace. It was based on the experience of World War I. It is impossible to find any special provisions on the protection of civilians in the early versions of the Geneva Conventions.

1. The Development of the Protection of Civilians

The concept of the protection of civilians during the wars was codified very recently. The *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, signed at Geneva on August 12, 1949, was the first Convention that contained the enumerated clauses to protect the civilians in time of war. Since the traditional laws of war were focused on the methods or means of war, or combatant victims of war, the war crimes against civilians were generally dealt with under the common law or customs of war. Only the Hague Regulations of 1899 and 1907 contain "some provisions concerning the protection of populations against the consequences of war and their protection in occupied territories."¹⁰²

After World War I, the International Red Cross Conferences of 1929 took the first steps towards constructing supplementary rules protecting civilians during war. The 1929 Diplomatic Con-

101. See TABLE 2, *supra* Part II(B).

102. SCHINDLER & TOMAN, *supra* note 84, at 495.

ference, which revised the *Convention on the Wounded and Sick* and drew up the *Convention on Prisoners of War*, recommended that studies should be undertaken, working toward concluding a convention on the protection of civilians in both enemy and enemy-occupied territory. In Tokyo in 1934, the International Red Cross Conference approved a Draft Convention prepared by the International Committee of the Red Cross.¹⁰³ On June 21, 1938, the British Prime Minister, Neville Chamberlain, stated in the House of Commons that three principles of international law were applicable to warfare from the air. He declared, "Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighborhood are not bombed through negligence."¹⁰⁴ When the Assembly of the League of Nations met in the following autumn, it adopted without dissent the resolution, *Protection of Civilian Populations against Bombing from the Air In Case of War*.

After World War II, the four Geneva Conventions were adopted. *Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 1949* was the first one that contained provisions for civilians. It "may be regarded as a manifesto of human rights for civilians during armed conflict."¹⁰⁵

The purpose of the Fourth [Geneva] Convention was to prevent a repetition of the situation resulting from the Nazi occupation of Europe during the Second World War, when nationals of the occupied territories were subjected by their countries' enemy to every form of indignity and cruelty known to man. The Convention's provisions are intended to ensure that civilian nationals of a party to a conflict . . . preserve their dignity as human beings and, to the extent possible in view of the war situation, retain and enjoy those rights which are normally considered as belonging to human beings, regardless of race, nationality, sex, political belief, or any other special characteristic.¹⁰⁶

2. The Problem of Article 4 of the Geneva Convention (IV)

However, there is a serious defect in the Fourth Geneva Convention in regard of the protection of the allied country's civilians. It clearly states in Article 4, "Nationals of a neutral State

103. See *id.*

104. See also *Protection of Civilian Populations Against Bombing from the Air In Case of War*, art. I(3), reprinted in SCHINDLER & TOMAN, *supra* note 84, at 162.

105. GREEN, *supra* note 96, at 94.

106. *Id.* at 95.

who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are."¹⁰⁷ Under this provision, the "nationals of a neutral State" and "nationals of a co-belligerent State" are not protected. The Civilians Convention only protects non-nationals in the hands of an occupying power. Despite all the talks about the importance of human rights, and despite the knowledge of what happened, for example, to German dissidents and "undesirables" during the Second World War, nationals only enjoy the limited protection afforded them by other international agreements on the preservation of human rights to which their home State may be a party.¹⁰⁸

During the Korean War, South Korea was a co-belligerent State to the United States, and it had normal diplomatic representation in the United States. Consequently, Korean civilians were not protected under the Geneva Convention (IV). Only the latter part of the Article that says, "[t]he provisions of Part II are, however, wider in application, as defined in Article 13" will be effective for the allied countries' civilians. Article 13 of the Geneva Convention (IV) states, "The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war." However, the provisions in the section (Art. 13-26) contain no compulsory regulations except for the protection of children (Art. 24) and correspondence between family members (Art. 25). The Geneva Convention (VI) did not succeed in protecting all civilian populations.¹⁰⁹

3. Protocol (I) and Protocol (II) to the Geneva Conventions (1977)

The defect of the coverage of the civilians of neutral and allied countries was generally resolved in the *Protocol Additional To The Geneva Conventions Of 12 August 1949, and Relating To The Protection Of Victims Of International Armed Conflicts (Protocol I)*, which was signed in 1977.¹¹⁰ It contains an article that extends the definition of civilians and civilian population. If one is not

107. Fourth Geneva Convention, *supra* note 10, at art. 4.

108. See GREEN, *supra* note 96, at 98.

109. See CHARES A. SHANOR & TIMOTHY P. TERRELL, *MILITARY LAW IN A NUTSHELL* 204-05 (1980).

110. See Protocol I, *supra* note 11. Protocol II to the Geneva Conventions was especially intended to include the non-international armed conflicts.

manifestly a combatant, he or she will be considered a civilian.¹¹¹ Article 51 of the Protocol declares that the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.¹¹² It also says, "The civilian population as such, as well as individual civilians, shall not be the object of attack."¹¹³ Especially, Part IV of Protocol I is devoted to Civilian Population. Article 48 states as a basic rule, "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."¹¹⁴ This is the embodiment of the idea of the Hague Conventions.

Article 72 of the Protocol (I) has very important meaning. It states:

The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.¹¹⁵

This provision manifestly acknowledges the relationship between international humanitarian law and international human rights law. It shows that the gap between the two groups of international laws is merging to one body gradually.¹¹⁶

Protocol I guarantees in Art. 75(1) that "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely."¹¹⁷ It also states, "The fol-

111. See *id.* at art. 50(1).

112. See *id.* at art. 51(1).

113. *Id.* at art. 51(2).

114. *Id.* at art. 48.

115. *Id.* at art. 72.

116. See THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 167 (1988).

117. Protocol I, *supra* note 11, at art. 75(1). The full text of art. 75(1) is as follows:

In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour,

lowing acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: (a) Violence to the life, health, or physical or mental well-being of persons, in particular: (i) Murder; (ii) Torture of all kinds, whether physical or mental."¹¹⁸

Under these provisions, the No Gun Ri massacre is clearly a war crime. The soldiers who fired on the refugees and the superiors who permitted the machine-gunning of them should be punished accordingly. However, Protocol (I) came into force in 1978. Moreover, the United States refused to sign the Protocols because of the extension of the coverage to include internal conflicts.¹¹⁹ In this regard, Protocol I cannot be used as the legal instrument governing the No Gun Ri case. However, it can be used as evidence of a rule of customary international law.

4. Applying the Geneva Conventions of 1949 to the No Gun Ri Case

In 1949, the Geneva Convention (I), (II), (III), and (IV) were adopted at the same time: (1) *Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of August 12, 1949 (Geneva Convention I)*; (2) *Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea of August 12, 1949 (Geneva Convention II)*; (3) *Geneva Convention Relative to the Treatment of Prisoners of War of*

sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

118. *Id.* at art. 75(2).

119. See MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMISSION ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 440 (1982). The U.S. Government argued that Protocol I is "fundamentally and irreconcilably flawed" and "contained provisions which would 'undermine humanitarian law and endanger civilians in war.'" KWAKWA, *supra* note 8, at 26 (citing Letter of Transmittal from former President Reagan, Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts, S. Treaty Doc. No. 2, 100th Cong., 1st Sess. 111, 1987, *reprinted in* 81 AM. J. INT'L L. 910 (1987)). The attitude of the United States is, recently, changing. For example, an instruction issued by the chairman of the U.S. Joint Chiefs of Staff states that the "Armed Forces of the United States will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized." Chairman, Joint Chiefs of Staff, Instruction 5810.01, Implementation of the Department of Defense Law of War Program (1996), *quoted in* Major Corn, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War*, ARMY LAW., June 1998, at 17.

August 12, 1949 (*Geneva Convention III*); (4) *Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (Geneva Convention IV)*.¹²⁰ The Conventions achieved great improvement in the protection of victims of war. However, there are barriers to the application of those Conventions to the No Gun Ri case.

First, the Geneva Conventions of 1949 were not enacted at the time of the No Gun Ri incident. Even though the texts of the Conventions were adopted on August 12, 1949, the date of entry in force was on October 12, 1950, three months after the No Gun Ri Incident. This is an inherent barrier to the application of the Convention to the case.

Second, the United States did not ratify the Geneva Conventions at the time of No Gun Ri. It signed the Conventions on August 12, 1949, but ratified them on August 2, 1955.¹²¹ This means that the United States only has the obligation to "refrain from acts which would defeat the object and purpose" of the Conventions in light of the *Vienna Convention on the Law of Treaties*.¹²² The Vienna Convention is generally considered "a codification of the existing customary international law."¹²³ The United States also recognizes the Vienna Convention as "the authoritative guide to current treaty law and practice,"¹²⁴ even though it has not ratified it until now. However, the opinion of scholars are not uniform on the issue of whether Article 18 of the Vienna Convention is a rule of customary international law, even if the PCIL, in 1926, had decided that the abuses of the rights before the ratification of a treaty would be in violation of the

120. See First Geneva Convention, *supra* note 10; Second Geneva Convention, *supra* note 10; Third Geneva Convention, *supra* note 10; Fourth Geneva Convention, *supra* note 10.

121. The fact that Korea was not a signatory to the Convention is not a problem, because the "general participation clause" was expelled from the international humanitarian law after the Hague Convention and Common Article 2 explicitly codified the principle.

122. "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed." Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, U.N. Doc. A/CONF. 39/27.

123. BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 114 (3d ed. 1999).

124. *Id.* at 114.

obligation of the treaty.¹²⁵ In this regard, it is difficult to declare that the Geneva Conventions were legally binding on the United States at the time of the No Gun Ri incident.

Third, as stated above, Geneva Conventions do not contain any specific provision regarding war crimes against allied countries' civilians. To make matters worse, the Fourth Geneva Convention manifestly excluded the nationals of a neutral State and nationals of a co-belligerent State from its protection of civilian population.¹²⁶ The so-called Common Article 3 of the Conventions states, "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely."¹²⁷ However, there is the precondition, "in the case of armed conflict not of international character," which cannot be the expression of the relationship between the United States and Korea. The nature of the Korean War might arguably be described as a civil war at the starting point of the war.¹²⁸ Nevertheless, the character of the Korean War was completely changed into an international war after the U.S. and the UN armies intervened.¹²⁹ Consequently, it cannot be construed that Common Article 3 regulates the case of war crimes against allied countries' civilians. It can only be used as a basis to infer the intention of the framers. The clause guarantees the "minimum" protection in the case of armed conflict not of an international character. Since the term, "not of an international" character was added on

125. See SEOK-YONG LEE, *INTERNATIONAL LAW: THEORY AND PRACTICE* 179 (1995). On the other hand, in 1926, PCIJ decided that the abuses of the rights before the ratification of a treaty would be in violation of the obligation of the treaty.

126. Fourth Geneva Convention, *supra* note 10, at art. 4.

127. *See id.*

128. Regulation of civil war has been left to the discretion of the sovereign entity in which the conflict occurs because of the concept of national sovereignty. SHANOR & TERRELL, *supra* note 109, at 185. Some scholars assert that the Korean War was a civil war. However, they do not negate the international character of the war, either. In the Vietnam War, the Viet Cong was fighting a "national liberation war." However, the war was also defined as an international war.

129. The conflict in Afghanistan, for example, was "an international conflict because there was a foreign occupation there—it makes no difference that the foreign forces were invited by the Afghan 'government.'" The *mujahidin* was engaged in an international conflict not because it was fighting a "war of national liberation," but because there was a foreign (Soviet) occupation there." KWAKWA, *supra* note 8, at 47 (quoting W. Michael Reisman, *The Resistance in Afghanistan is Engaged in a War of National Liberation*, 81 AM. J. INT'L L. 906, 908 (1987)).

the presumption that international conflicts would have 'more' protections than non-international conflicts, not less, there is no reason not to apply the minimum standard to the case of international armed conflicts.

In short, the Geneva Conventions are not sufficient instruments to regulate the acts of the U.S. soldiers at No Gun Ri, because of: (1) the date of entry into force, (2) the absence of ratification of the United States, and (3) the obscurity of the provisions. Yet, they can be used as evidence of the expanding protection of civilians under international humanitarian law. Although the codification of the protection of allied countries' civilians was not satisfactory in the Geneva Conventions of 1949, the Conventions indirectly show that the killing of civilian populations is not allowed under the laws or customs of war. These Conventions provide strong evidence supporting the fact that the No Gun Ri incident was in violation of the laws or customs of war.

C. *The Principles of Customary International Law*

According to Article 38(1)(b) of the Statute of the International Court of Justice, one of the primary sources of international law is "international custom, as evidence of a general practice accepted as law."¹³⁰ In addition, the "general principles of law recognized by civilized nations" are another source of international law.¹³¹

The law of war is defined as a "branch of international law prescribing the principles and usages which, in time of war, govern the status and relations of enemies, persons under military government or martial law, and persons resident in the theatre of war."¹³² Large part of laws of war have been embodied in treaties or conventions. However, there are still many unwritten laws of war—namely, customs and basic principles of the law of war.¹³³ Restatement Section 102 states that customary law, as well as law made by international agreement, have equal authority as international law.¹³⁴ Additionally, the force of customary interna-

130. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179.

131. *Id.* at art. 38(1)(c).

132. DANIEL WALKER, *MILITARY LAW* 520 (1954).

133. In order for the practices to be customary law, two basic elements are necessary: "practice of states" and "*opinio juris*." LINDA MALONE, *INTERNATIONAL LAW: THE PROFESSOR SERIES* 30–31 (2nd. 1998).

134. CARTER & TRIMBLE, *supra* note 123, at 145 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102 cmt. (j)).

tional law has been recognized in the *United States Army Field Manual*, which states:

The unwritten or customary law of war is binding upon all nations The customary law of war is part of the law of the United States, and, insofar as it is not inconsistent with any treaty to which this country is a party or with a controlling executive or legislative act, is binding upon the United States, citizens of the United States, and other persons serving this country.¹³⁵

The Supreme Court of the United States has recognized customary international law as "the Law of the Land" for over two centuries. In *Paquette Habana*,¹³⁶ the Supreme Court noted that the seizure of the Spanish fishing vessels was an official act by the U.S. Navy during wartime, yet nevertheless, held that the action violated principles of customary international law and ordered the ships returned.

In the application of customary international law to the case of No Gun Ri, the basic principles of the law of war will be the main issues for discussion. The basic principles of the law of war can be listed as follows:

- (1) the principle of military necessity,¹³⁷
- (2) the principle of humanity,¹³⁸
- (3) the principle of chivalry,¹³⁹
- (4) the principle of proportionality,¹⁴⁰ and
- (5) the principle of distinction.¹⁴¹

For example, the U.S. soldiers might argue in the present case that it was justifiable to fire on the refugees, because they suspected there were North Korean soldiers among them. In other words, they may insist that it was necessary in the military sense to act in that way in order to fight against the North Korean Army.¹⁴² However, the principle of military necessity

135. U.S. DEP'T OF THE ARMY, THE LAW OF LAND WARFARE: UNITED STATES ARMY FIELD MANUAL 7 (1956).

136. 175 U.S. 667 (1900).

137. See WALKER, *supra* note 132, at 520.

138. See *id.*; see also KWAKWA, *supra* note 8, at 34-38.

139. See WALKER, *supra* note 132, at 520; see also KWAKWA, *supra* note 8, at 34-38.

140. See WALKER, *supra* note 132, at 520.

141. See *id.*

142. In the My Lai case, on the defense that Lt. Calley believed the villagers were part of "the enemy," the U.S. Supreme Court decided as follows: [T]he uncontradicted evidence is that they were under the control of armed soldiers and were offering no resistance He also admitted he knew that the normal practice was to interrogate villagers, release those who could satisfactorily account for themselves, and evacuate

does not allow such a treacherous attack to be justified. In addition, the principle of humanity restricts the acts of hostility.

Actually, the *United States Army Field Manual* admits that the law of war places limits on the exercise of a belligerent's power in the interests of protecting both combatants and noncombatants from unnecessary suffering. It says:

[The law of war] requires that belligerents refrain from employing any kind of degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry. The prohibitory effect of the law of war is not minimized by 'military necessity' which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity.¹⁴³

Article 14 and Article 16 of the Lieber Instructions,¹⁴⁴ an authoritative restatement of the principle of military necessity also states:

Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war. . . . Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions.¹⁴⁵

Moreover, according to the principle of humanity, combatants should avoid inflicting unnecessary harm and suffering.

the suspect among them for further examination. Instead of proceeding in the usual way, Calley executed all, without regard to age, condition, or possibility of suspicion. On the evidence, the court-martial could reasonably find Calley guilty of the offenses before us.

United States v. Calley, 48 C.M.R. 19, 25 (1973).

143. U.S. DEP'T OF THE ARMY, *THE LAW OF LAND WARFARE: UNITED STATES ARMY FIELD MANUAL* (1956), reprinted in RICHARD HAMMER, *THE COURT-MARTIAL OF LT. CALLEY* 14 (1971) [hereinafter HAMMER'S ARMY FIELD MANUAL].

144. SCHINDLER & TOMAN, *supra* note 83, at 6.

145. Instructions for the Government of Armies of the United States in the Field, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863, reprinted in SCHINDLER & TOMAN, *supra* note 84, at 3.

Humanity consists of at least three elements: the avoidance of unnecessary damage, the avoidance of certain means that cause superfluous suffering, and the principle of discrimination or noncombatant immunity.¹⁴⁶ The Hague Convention (II) of 1899 and the Hague Convention (IV) of 1907 are the explicit references to the principle of humanity.¹⁴⁷

The principles of proportionality and distinction also disclaim the justification of the attack on civilians. The principle of proportionality means that the losses resulting from a military act should not be excessive in relation to the anticipated military advantage. The principle of distinction requires that "the armed forces of the belligerent parties have an obligation to draw a firm line of demarcation between civilians and civilian objects, on the one hand, and combatants and military objectives, on the other."¹⁴⁸ In this regard, the No Gun Ri Massacre overtly violates the basic principles of the law of war and customary international law.

If a nation specifically refuses to abide by a regulation expressed in a treaty signed by others or embodied in conduct observed by all other nations, it is difficult to argue that such a nation is in any way bound by that rule. However, the doctrine of *jus cogens* (peremptory norms) holds that certain fundamental, behavioral norms are absolutely binding upon all nations. "Grave breaches" of the law of armed conflict, including willfully killing; torturing; or inhumanely treating the wounded, prisoners of war, and civilians are crimes against *jus cogens*.¹⁴⁹ In this regard, killing more than one hundred civilians, including women and children, is evidently in violation of the law of war, and in addition, it is a violation of a norm of *jus cogens*.

III. THE LAWS VIOLATED IN KOREA AND IN THE UNITED STATES¹⁵⁰

A. *The Criminal Act in Korea—Murder (Article 250)*

The Korean Government has the "obligation to confirm and protect the inviolable fundamental Human Rights of the nation-

146. See KWAKWA, *supra* note 8, at 34–42.

147. RICHARD SHELLY HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* 48 (1983).

148. KWAKWA, *supra* note 8, at 39.

149. See SHANOR & TERRELL, *supra* note 109, at 213.

150. The author has translated the statutes analyzed in this article from Korean to English; the citations provided are to the statutes in their original language, Korean.

als" under the Korean Constitution.¹⁵¹ Since the No Gun Ri incident clearly violated the human rights of the Korean victims, the Korean Government has an obligation to examine the case in light of Korean Law. Korean Criminal Act Article 2 declares that a foreigner's crimes committed in Korea will be governed by the Act.¹⁵²

Article 250 of Korean Criminal Act states that one who kills another shall be punished by death, life-long, or more than five-year imprisonment.¹⁵³ Article 257 and Article 258(1) declare the punishment for inflicting bodily harm.¹⁵⁴ In addition, negligence homicide shall be punished by the penalty of a five-year or less detention.¹⁵⁵ War crimes are not explicitly provided for in the Korean Criminal Act. The distinction between murder and manslaughter is not enumerated either.

One of the issues in the application of the regulations will be whether the killing at No Gun Ri constitutes an intentional and premeditated murder, or negligent homicide. According to the evidence raised, the indiscriminate firing on the refugees by the U.S. soldiers was an intentional and premeditated killing. They killed the civilians knowing that they were not soldiers in the North Korean People's Army. The killing was not accidental. There was an order from the superiors, and they started to fire on the refugees who were hiding under the bridge tunnel. This means that they had intentions to kill. Thus, the incident constitutes murder.

In Korea, international humanitarian law and customary international law can also be applied as legitimate law, because the Korean Constitution assures the legal authority of international law. Article 6 of the Korean Constitution says, "The treaties that are signed and promulgated under the Constitution, and generally accepted international law have the same legal authority as the internal laws have."¹⁵⁶ In this vein, crimes in violation of international law can be punished under international law.

151. KOREAN CONST. art. 10.

152. Korean Criminal Procedure Act, art. 250(1) (1997), *available at* http://www.moj.go.kr/justice/search/law/1_120.html.

153. *Id.*, at art. 250(1).

154. *Id.*, at art. 257. One who inflicts a bodily harm on another shall be punished with the penalty of up to seven years imprisonment, up to ten years suspension of the civil rights, or a monetary fine of up to one thousand won. *Id.*, at art. 258(1). One who inflicts bodily harm on another and causes another's life to be in danger shall be punished by more than a year imprisonment, but less than ten years imprisonment. *Id.*

155. *See id.* at art. 268.

156. KOREAN CONST. art. 6.

B. *The Articles of War in the United States—Murder (Article 92)*

At the time of the No Gun Ri incident, the military law that governed the U.S. soldiers was the "Articles of War." The so-called "common law crimes" in the military are codified in the regulations. "The Articles of War (A.W.) was substantially revised in 1948; it was enacted in 1920 and amended in minor particulars in 1937, 1942 and 1947."¹⁵⁷ On May 5, 1950, the President signed H.R. 4080, an Act "[t]o unify, consolidate, revise, and codify the Articles of War, The Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice."¹⁵⁸ This Code—the UCMJ—went into general effect on May 31, 1951.¹⁵⁹ For the first time in American history, all members of the Armed Forces were subject to one set of disciplinary laws. The UCMJ is still the basic military law in United States.¹⁶⁰ However, since the

157. COLONEL FREDERIC BERNAYS WIENER, *THE UNIFORM CODE OF MILITARY JUSTICE: EXPLANATION, COMPARATIVE TEXT, AND COMMENTARY* 25 (1950).

158. *Id.* at 29.

159. WALKER, *supra* note 132, at 110.

160. See generally MICHAEL J. DAVIDSON, *A GUIDE TO MILITARY CRIMINAL LAW* 1–10 (1999). In the current UCMJ, homicide is:

[T]he killing of another person or human being, is punished under a hierarchical system of punitive articles: Article 118 (murder), 119 (manslaughter), and 134 (negligent homicide). At the top of the hierarchy is premeditated murder, which imposes the heaviest elements of proof on the prosecution and concomitantly authorizes the most severe punishment: death. Descending the levels of homicide, the burden on the prosecution gradually decreases, but so too does the amount of potential punishment.

Id. at 95. "Article 118 describes four types of murder: premeditated, unpremeditated, acts inherently dangerous to others, and felony murder. . . . [P]remeditated murders and felony murders [are punishable by mandatory life imprisonment or death penalty]." *Id.* at 95. Manslaughter is classified as voluntary or involuntary under Article 119 (a) or (b) of the UCMJ.

Voluntary manslaughter involves a killing while 'in the heat of passion caused by adequate provocation,' by an accused who intended to either kill or seriously injure the victim. . . . Involuntary manslaughter occurs when the accused unintentionally kills another, . . . while acting in a grossly careless manner indicating an utter disregard for the foreseeable consequences of the actions of the accused. Under the UCMJ, negligent homicide is similar to involuntary manslaughter, except that this offense requires a lower degree of negligence. . . . The prosecution must show that the accused violated a legal duty to use due care that caused the death, such as the duty a parent has to provide medical care for a child or the duty of an armed service member in a combat zone to determine if he is shooting at an enemy or friendly soldier. The prosecution need not show that the accused intended to kill or harm the victim.

Id. at 97.

No Gun Ri Massacre happened in July 1950, the provisions that criminalize the acts at No Gun Ri should be found in the A.W.

Article 92 of the A.W. states:

Art. 92. Murder—Rape: Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated, he shall be punished as a court-martial may direct. Any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct: *Provided*, That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.¹⁶¹

Murder is classified in two ways in the A.W., pre-meditated murder and murder that is not premeditated. There is also a clause regarding manslaughter. Article 93 of A.W. states:

Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm, shall be punished as a court-martial may direct.

In the No Gun Ri case, Captain Chandler reportedly said, "The hell with all those people. Let's get rid of all of them."¹⁶² This notion means that he decided to fire on them even though he knew they were civilians. Consequently, he and the U.S. machine-gunners were subjected to murder charges under this clause, Article 92. Considering the fact that there were soldiers who refused to fire on the refugees at No Gun Ri, it is hard to believe that the killings were not intentional. The No Gun Ri Massacre was murder under Article 92 of the A.W.¹⁶³

161. JUDGE ADVOCATE GENERAL OF THE [U.S.] ARMY, MANUAL FOR COURTS-MARTIAL, U.S. ARMY, 1949 (Article 29 of the Articles of War).

162. Sang-Hun Choe et al., *supra* note 29.

163. In the My Lai case, Lt. Calley argued that "proof of malice was as indispensable to conviction for murder in violation of Article 118 of the UCMJ, as it was at common law or under the predecessor Articles of War." The Court-Martial concluded, "We find no impediment to the findings that appellant acted with murderous *mens rea*, including premeditation. The aggregate of all his contentions against the existence of murderous *mens rea* is no more absolving than a bare claim that he did not suspect he did any wrong act until after the operation, and indeed is not convinced of it yet. This is no excuse in law." Id. at 528 (United States v. Calley, 46 C.M.R. 1131, 1184 (A.C.M.R. 1973))

In short, the Massacre at No Gun Ri is murder and a war crime for the following reasons. First, the indiscriminate killing of the refugees is murder under Article 250 of Criminal Act in Korea. Second, the Massacre is in violation of Article 92 (murder) of the "Articles of War" in the United States. Third, the acts constitute grave breaches of the laws of war in the field of international law. The No Gun Ri Massacre was in violation of the Hague Convention Preamble that explicitly protects civilians in time of war. The incident is also against the spirit of the Geneva Conventions. Most of all, the No Gun Ri Massacre is a grave breach of customary international law. Hence, not only should the soldiers at the site be charged under the laws of war, but so, too, should the superiors who ordered or allowed soldiers to fire on the civilian refugees and everyone in the chain of command who assisted in the subsequent cover-up. The No Gun Ri Massacre was murder and, under international humanitarian law, a "war crime."

IV. THE LEGAL REMEDIES THAT CAN BE SOUGHT

A. *Legal Remedies in Korea*

1. The Possibility of Criminal Procedure in Korea

There are barriers to seeking the prosecution of the offenders in Korea. First, Article 249 of the Korean Criminal Procedure Act states that the statute of limitations for prosecution of a crime that shall be punished by the death penalty is fifteen years. The starting point of the period of limitation is the moment the crime was completed.¹⁶⁴ Accordingly, the statute of limitations has already passed in relation to the No Gun Ri incident.

Furthermore, *the Agreement Relating to Jurisdiction over Criminal Offences Committed by the United States Forces in Korea between the Republic of Korea and the United States of America* (Taejon Agreement) which entered into force July 12, 1950, carries a special provision for the criminal offenses of U.S. soldiers. It says, "The Ministry of Foreign Affairs understands that in view of the prevailing conditions of warfare, the United States forces cannot be

GOLDSTEIN ET AL., *supra* note 1, at 506-07 (1976) (quoting 46 C.M.R. 1131, 1184 (1973)).

"The court also stated that it has been a settled rule of American law for one hundred years, that even in war, the summary killing of an enemy, who has submitted to, and is under, effective physical control, is murder." *Id.* at 528 (quoting 48 C.M.R. 19 (1973)).

164. Korean Criminal Procedure Act art. 252.

submitted to any but United States forces.”¹⁶⁵ The effect of the provision was reconfirmed by the *Agreement Under Article IV of the Mutual Defense Treaty between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea and Related Documents* (SOFA);¹⁶⁶ consequently, Korea does not have jurisdiction over the case of the No Gun Ri Massacre under the treaties.

However, when the United States does not prosecute the offenders even when there is clear evidence to prosecute them, the Korean Government may take jurisdiction in light of customary international law. The No Gun Ri Massacre is not merely a general crime, but a war crime under international humanitarian law. Accordingly, it is possible to prosecute the offenders in Korea regardless of the obstacles in Korean domestic law. Customary international law makes it possible for war crimes, crimes against humanity, torture, and genocide to be prosecuted in any related country in case the offenders are not punished in their own country. The *Pinochet* case in London was the world-famous evidence of the presence and effectiveness of the principle of universal jurisdiction.¹⁶⁷ Article XXII(3)(c) of SOFA states, “If a State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as possible.” After receiving this notice, Korea will have jurisdiction over the case.

Under customary international law, the statute of limitations does not apply to war crimes either. The *Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity*¹⁶⁸ is the embodiment of customary international law. In this regard, if the United States does not prosecute the offenders even after investigation, Korea may prosecute them with the evidence of the crimes under international law regardless of the statute of limitations.

165. Agreement Relating to the Jurisdiction over Criminal Offenses committed by the United States forces in Korea, July 12, 1950, S. Korea-U.S., 5(2) U.S.T. 1408 [hereinafter Taejon Agreement].

166. Agreement Under Article IV of the Mutual Defense Treaty between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea and Related Documents, July 9, 1966, U.S.-Korea, art. XXII(12), 17 U.S.T. 1677, [hereinafter SOFA].

167. See Human Rights Watch, *The Pinochet Precedent—How Victims Can Pursue Human Rights Criminals Abroad*, at <http://www.hrw.org/campaigns/chile98/precedent.hum> (last visited Apr. 8, 2001).

168. U.N. Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391 (XXIII), U.N. GAOR (1968).

It should be noted that the offenders must be present at the Korean Court to be punished under the Korean Criminal Procedure Act. Prosecutors may hold the prosecution suspended until the offenders are arrested. Article 4(2)(b) of the Extradition Treaty between the United States and Korea states:

Each party cannot reject the extradition in case of an offense for which both Contracting States have the obligation to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution pursuant to a multilateral international agreement, including but not limited to such agreements relating to genocide, terrorism, or kidnapping.¹⁶⁹

Consequently, the United States has the obligation to extradite the offenders to Korea. If the offenders happen to visit Korea after the suspended prosecution, they may be arrested by the prosecutors.

2. The Possibility of Civil Procedure Against U.S. Offenders in Korea

SOFA does not carry any specific provision on this issue. It means that the victims of No Gun Ri can file the claims against the individual perpetrators either in the United States or in Korea. Korean Civil Act Article 750 states, "[O]ne who damages another by voluntary or involuntary tort shall have the responsibility to compensate."¹⁷⁰ Under this provision, the No Gun Ri victims can file the claims against offenders in Korean Civil Court.

The statute of limitations of the tort claim is three years after the knowledge of the damages or the offenders and ten years after the tort acts.¹⁷¹ However, it does not matter, because the statutory limitation shall not apply to war crimes.¹⁷² Accordingly, when the victims find defendants in Korea, they may file lawsuits.

169. Extradition Treaty Between the Government of the Republic of Korea and the Government of the United States of America, June 9, 1998, art. 4(2)(b), *available at* http://www.mofat.go.kr/inter_treaty_real.nsf/261660cf456f573c9256871002d350b/7D64556CD052FFB949256625000D2606?OpenDocument.

170. Korean Civil Act art. 750 (1997), *available at* http://www.moj.go.kr/judge/search/law/1_039.html.

171. *Id.* at art. 766.

172. U.N. Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *supra* note 168. Article 1 states, "No statutory limitation shall apply to the following crimes, irrespective of the date of their commission: (a) War crimes as they are defined in the Charter of the International Military Tribunal, Nurnberg [sic], of 8 August 1945 and confirmed by resolutions 3(1) of 13 February 1946 and 95 (I) of 11 December 1946

The doctrine of sovereign immunity prevents claimants against the U.S. Government from filing in Korean Civil Court. A foreign country cannot stand in front of another country's court.

3. Seeking Compensation Against the Korean Government

Article 29 of the Korean Constitution states, "A national may file a legitimate claim against the State or the public body as the law regulates, when he or she is damaged by torts of an official on duty."¹⁷³ In the same sense, the Korean State Compensation Act Article 2(1) regulates, "If an official on duty voluntarily or involuntarily violates the law and inflicts harm on a person, the State or Local Government shall compensate according to this law."¹⁷⁴ In addition, filing a lawsuit against the government according to civil procedure is another alternative.

The victims of the No Gun Ri Massacre may raise three arguments:

- (1) The Korean Government did not help them to seek proper remedies for their human rights violations and they sometimes discouraged the activities of the victims. The omission and the wrongful intervention is in violation of the Korean Constitution and international human rights law;
- (2) The right to seek remedies against U.S. forces was excluded in the negotiation of SOFA of 1966, and consequently, victims could not seek compensation in the Korean Civil Court. Therefore, the Korean Government is responsible for it.
- (3) In July 1950, the Korean Government transferred military command authority to General MacArthur, whose soldiers committed the Massacre. In spite of this transfer, the Korean Government still had the obligation to protect the Korean people during the Korean War, and should have controlled the U.S. Army. In this regard, the Korean Government is not immune from the responsibility of the massacre.

Those are possible arguments for the victims when they seek redress against the Korean Government. It should also be noted that it would be much easier to deal with the claims in a political

of the General Assembly of the United Nations, particularly the 'grave breaches' enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims"

173. KOREAN CONST. art. 29.

174. Korean State Compensation Act art. 2(1) (1997), available at http://www.moj.go.kr/justice/search/law/1_024.html.

and social sense considering the nature of the incident. The responsibility of the government will not be restricted to the court. In this regard, the activities of the victims and non-governmental organizations (NGOs) are very important.

B. *Legal Remedies in the United States*

1. Criminal Procedure

The United States has the obligation to prosecute the offenders of war crimes under international law. The primary jurisdiction belongs to the United States under the Taejon Agreement between the United States and Korea¹⁷⁵ and Article XXII(12) of SOFA. International humanitarian law also assures the primacy of the jurisdiction of the United States. Which court in the United States has the jurisdiction over this case? The *Manual for Courts-Martial, 1949* ¶ 10 states:

The general rule to be followed in the Army is that court-martial jurisdiction over officers, cadets, soldiers, and others in the military service of the United States ceases on discharge or other separation from such service and that jurisdiction as to an offense committed during a period of service thus terminated is not revived by reentry into the military service.¹⁷⁶

Hence, the No Gun Ri case shall be dealt with, not in a court-martial, but in a civilian court. It can serve as an alternative to establishing a new tribunal for the incident.

There is no statute of limitations in the case of murder in the United States. Article 39 of A.W. of 1948 states:

Except for desertion or absence without leave committed in time of war or for mutiny or *murder*, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before arraignment of such person.¹⁷⁷

The My Lai incident in Vietnam drew great attention from the world, but it is noteworthy that Lt. Calley was not convicted under a charge of *war crimes*. He was sentenced to life imprison-

175. Taejon Agreement, *supra* note 165.

176. MANUAL FOR COURTS-MARTIAL U.S. ARMY 1949, *supra* note 161, at 9 ¶ 10.

177. *Id.* at art. 39 (emphasis added). The statute of limitations in the UCMJ is three years according to Article 43. There is no statute of limitations in the case of murder. *Id.* at art. 43. For a comparison of the Articles of War to the UCMJ, see *id.* at 25-27.

ment on the charge of murder under the UCMJ.¹⁷⁸ The term, "war crime," was technically avoided.¹⁷⁹ This is quite odd, but still the case. The *United States Army Field Manual* Article 507, states:

The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice, and, if so, will be prosecuted under the Code.¹⁸⁰

The direct application of international humanitarian law to the U.S. forces is avoided under this clause. Nevertheless, it is very important to mention that the My Lai Massacre was the only event in which the United States actually acknowledged war crimes committed by U.S. soldiers in Vietnam. If it is ever properly investigated, the No Gun Ri incident will be the second biggest war crime case in U.S. Army history.

The charges against the offenders in the No Gun Ri case cannot be restricted to murder under A.W. Article 92. War crimes should be called war crimes. There is no justification for avoidance of the application of international humanitarian law to an overt war crime. "Justice Jackson acknowledged that if certain acts are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would be unwilling to have invoked against us."¹⁸¹

2. Civil Litigation Against the Offenders

The jurisdiction of courts-martial is entirely penal or disciplinary. They have no power to adjudge the payment of damages or to collect private debts. Consequently, if the No Gun Ri victims want to file claims against the offenders, they have to choose the

178. "[A] number of American personnel were tried under the Code for offenses [sic] which, if they had been committed by non-Americans, would have been described as war crimes or crimes against humanitarian law." See L. C. Green, Symposium, *International Criminal Law: Command Responsibility in International Humanitarian Law*, 5 TRANSNAT'L L. & CONTEMP. PROBS., 319, 352 (1995).

179. According to the Army Field Manual, "The term 'war crime' is the technical expression for a violation of the laws of war by any person or persons, military or civilian. Every violation of the law of war is a war crime." HAMMER'S ARMY FIELD MANUAL, *supra* note 143, at art. 499.

180. *Id.* at art. 505(b).

181. Frank Lawrence, Note, *The Nuremberg Principles: A Defense for Political Protesters*, 40 HASTINGS L.J. 397, 411 (1989) (citation omitted).

civil procedure in the United States. Personal compensation for the tort acts can be sought in the civil court. However, because of the nature of the crimes, pursuing personal reparations from the offenders is not easy and probably will not be enough. That is why they should first take into consideration the possibility of filing claims against the government in general.

3. Filing Tort Claims Against the United States Government

Since the Massacre was committed by U.S. officers, the government is not immune from state responsibility. In other words, the No Gun Ri victims can file tort claims against the U.S. Government. Two questions should be answered for the filing of the claims: (a) the jurisdiction of the tort claims, and (b) the doctrine of sovereign immunity.

First, the regulations for the jurisdiction over the claims against the United States Forces are found in SOFA. Article XXIII(5) of SOFA states:

Claims (other than contractual claims and those to which paragraph 6 or 7 of this Article apply) arising out of acts or omissions of members or employees of the United States armed forces, including those employees who are nationals of or ordinarily resident in the Republic of Korea, done in the performance of official duty, or out of any other act, omission or occurrence for which the United States armed forces are legally responsible, and causing damage in the Republic of Korea to third Parties, other than the Government of the Republic of Korea, shall be dealt with by the Republic of Korea in accordance with the following provisions¹⁸²

After the adoption of SOFA on February 9, 1967, Korean Compensation Committee has jurisdiction. The United States Code of Federal Regulations supports this rule:

(a) The governments of some foreign countries have by treaty or agreement waived or assumed, or may hereafter waive or assume, certain claims against the United States. In such instances claims will not be settled under laws or regulations of the United States.¹⁸³

However, Article XXIII(13) of SOFA provides, "The provisions of this Article shall not apply to any claims which arose before the entry into force of this Agreement. Such claims shall be processed and settled by the authorities of the United

182. SOFA, *supra* note 166, at art. XXIII(5).

183. 32 C.F.R. §536.40 (2000).

States."¹⁸⁴ Consequently, the claims of the No Gun Ri victims against the U.S. Armed forces shall be under the jurisdiction of the authorities of the United States.

Second, the doctrine of sovereign immunity question is more complicated. It is based on the common law idea that the King can do no wrong. All sovereign government entities enjoy the privilege of immunity from any liability for the acts of their agents and employees. However, the United States has waived immunity for tortious acts under the Federal Tort Claims Act of 1946 (FTCA), Military Claims Act (MCA), and Foreign Claims Act (FCA). The No Gun Ri victims will have to resort to one of those systems.

The Federal Tort Claims Act of 1946 provides a broad waiver of this immunity for claims against the United States. However, FTCA has several exceptions to liability, including "28 U.S.C.A. §2680(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war, and (k) Any claim arising in a foreign country." The "combatant activities" exception here means the "Governmental activities which by their very nature should be free from the hindrance of a possible damage suit."¹⁸⁵ The FTCA also does not apply to any claim arising in a foreign country. The purpose of the foreign act exception to the FTCA "was to avoid the risk of United States exposure to unreasonable liability under foreign law and facts over which [it] has no control."¹⁸⁶

The Military Claims Act (MCA)¹⁸⁷ supplies an alternative to the FTCA. The MCA is designed to provide relief for any persons, whether civilian or military, injured or killed as a result of non-combatant activities of the armed forces not covered by the FTCA. Recovery is permitted whether or not there is any indication of negligence or fault on the part of the military, or where the claim arises in a foreign country.¹⁸⁸ The Act authorizes the Secretary of each service to settle claims up to \$100,000.¹⁸⁹

184. SOFA, *supra* note 166, at art. 23(13).

185. Johnson v. United States, 170 F.2d 767, 769 (9th Cir. 1948).

186. Price v. United States, 707 F. Supp. 1465, 1471 (S.D. Tex. 1989). On Nov. 29, 1995, the Court of Appeals confirmed this assertion, but reversed this case on different grounds. See Price v. United States, 69 F.3d 46 (5th Cir. 1996).

187. 10 U.S.C.A. §2733 (1998).

188. See SHANOR & TERRELL, *supra* note 109, at 326, 327.

189. See 10 U.S.C.A. § 2733(d) (1998).

The Foreign Claims Act¹⁹⁰ enables the foreign country's victims to file claims against the U.S. Government. The FCA authorizes the Secretaries of the various services to appoint officers to handle claims of damage to or loss of real or personal property of any foreign country or any inhabitant of the country. The Secretary may settle and pay claims up to \$100,000. The FCA also has the precondition of "noncombatant activities." The claim must have arisen from the act or omission of a military or civilian government employee not acting incident to combat activities.

If a claim is filed initially under FTCA and the claimant fails to demonstrate negligence on the part of a government employee, a claim under the MCA or FCA is possible. The reverse is also true.

Each tort claims Act has a two-year statute of limitations.¹⁹¹ Nevertheless, the No Gun Ri victims can file a claim because it is customary international law not to apply the statute of limitations in civil procedure, as well as criminal procedure, in the case of war crimes.

The main barrier for the No Gun Ri victims to overcome is the question of "non-combatant activities." Many cases deny the applicability of the Acts to the claims arising out of combatant activities. In 1992, the United States engaged in hostile military activities toward Iran in order to protect shipping in the Persian Gulf during the Iran-Iraq war, and a U.S. warship shot down an unidentified civilian aircraft. In *Koohi v. United States*, the court concluded that:

[C]laims for damages caused by the shooting down of a civilian aircraft by United States warship were within Federal Tort Claim Act (FTCA) exemption for claim arising out of combatant activities during time of war; tracking, identification and destruction of unidentified aircraft that appeared to pose threat to warship' safety constituted 'combatant activities'¹⁹²

In the No Gun Ri incident, do the firings on the refugees constitute combatant activities? Arguments against the defense of the combatant activity exception can be made:

First, secret U.S. military intelligence reports from the time of the incident place the North Korean frontline four miles from

190. 10 U.S.C.A. § 2734 (1998) (section entitled "Property loss; personal injury or death: incident to noncombat activities of the armed forces; foreign countries").

191. See 10 U.S.C.A. § 2734(b)(1) (1998).

192. 28 U.S.C.A. § 2680, n.75 (citing *Koohi v. United States*, 976 F.2d 1328 (Cal. 1992)).

No Gun Ri on July 26th, when the refugees entered the area. It means that the massacre did not happen in a combatant area. Second, there is no evidence that the GIs saw gunfire from the refugees. Some soldiers say that the Americans were answering fire from among the refugees.¹⁹³ Nevertheless, other soldiers recall only heavy barrages of American firepower, not hostile fire.¹⁹⁴ The Korean victims say the Americans may have been seeing their own comrades' fire, ricocheting through from the tunnels' opposite ends.¹⁹⁵

, it was recognizable that there were civilians, including old men, women, and children, when the U.S. soldiers started to fire. The information that some soldiers refused to shoot proves this fact. In this regard, it can be inferred that the No Gun Ri incident did not occur in the context of combatant activities. The incident stemmed from a mistaken idea and was clearly the wrong response to the situation. Therefore, the victims of the No Gun Ri Massacre may file claims against the U.S. Government under the Foreign Claims Act.

CONCLUSION

In comparison with ordinary war crimes, the No Gun Ri Massacre, as a "war crime against an ally's civilians," carries special characteristics.¹⁹⁶ The distinctiveness comes from the awkward nature of the occurrence. Who could imagine that the soldiers who came to help could commit war crimes against the allied country's people? This abnormal aspect of the incident accounts for all the complicated problems that arise.

First, it was hard to break the curtain of secrecy shrouding the case. The story of the Massacre remained untold until the *Associated Press* released the news on September 30, 1999 after thorough investigations. It took almost fifty years for the victims to bring the incident to the public. The My Lai Massacre needed the brave disclosure of Ron Ridenhour, who sent a four-page detailed, informational letter to "twenty-three members of Congress, the Secretaries of State and Defense, the Secretary of the Army, and the Chairman of the Joint Chiefs of Staff."¹⁹⁷ Cheong Eun Yong and the reporters of the *Associated Press* played a similar

193. Sang-Hun Choe et al., *supra* note 29.

194. "I don't remember shooting coming out," said ex-rifleman Louis Allen of Bristol, Tennessee. *Id.* (emphasis added).

195. *Id.*

196. The My Lai Massacre (against the South Vietnamese) has already shown how difficult it is to deal with those cases.

197. See Addicott & Hudson, *supra* note 47, at 159 (citation omitted).

role for Korea. The government of the victims was reluctant to pursue the case, because it did not want to be engaged in a diplomatic problem with its allies because of old happenings. For the same reason, the government did not help the victims access the truth and gather information.

Second, it is also hard for the victims to file claims with the authorities. Under the military dictatorship, the No Gun Ri victims had to endure threats and insults from Korean officials. For example, after filing the petitions in the 1960s, a survivor, Yang Hae-Chan, was threateningly warned by the Korean police to keep quiet about the massacre. Many of the victims were abused by the suspicion of ideology when they properly filed their cases, in vain. It was the dominant atmosphere under the military dictatorship in Korea to assume that claims against the United States might help the North Korean Government.¹⁹⁸

Third, it is hard to find an appropriate remedy for the victims' emotional injuries. They were the residents of a country that welcomed U.S. soldiers into their own land. Accordingly, the emotional harm inflicted on the survivors is beyond description. They may want to see the offenders prosecuted; but after fifty years have passed, it may be almost impossible to prosecute the perpetrators.

Finally, and most importantly, the legal instruments that criminalize the acts of the offenders as war crimes are not clear enough. Partly because of the nature of the incident, and partly because of the delayed codification of the laws of war, it is impossible to find any direct international regulation that governs the case. In addition, it is extremely hard to borrow any legal argument in the field of international law, since not many scholars focus on such specific events.

This thesis is mainly devoted to the legal aspects of the incident. The conclusions of the research can be summarized as follows:

- (1) The No Gun Ri Massacre constitutes a war crime under international humanitarian law. The Preamble of the Hague Convention II and the Hague Convention IV supply the basic rules and principles of the protection of civilians.

198. Recently, the Unified Democratic Front of North Korea released an announcement claiming that (1) South Korean Government should apologize for the wrong propaganda that attributed the incident to North Korean People's Army and (2) the victims should be compensated appropriately. Chung Il-Yong, *The Civilian Massacre Cases During the Korean War Claimed by North Korea*, YONHAP NEWS AGENCY, Oct. 1, 1999, available at http://www.tgedu.net/student/go-kuk/nonsul/26/z02_011.html.

- (2) The Geneva Conventions of 1949 are not sufficient to regulate the acts of the U.S. soldiers at No Gun Ri, because of (a) the date of entry into force, (b) the absence of ratification of the United States, and (c) the obscurity of the provisions. Nevertheless, although the codification of the protection of the allied country's civilians in time of war was not satisfactory in the Conventions, the Conventions can be used as evidence supporting the fact that the No Gun Ri incident was in violation of the laws and customs of war.
- (3) Most of all, the No Gun Ri Massacre is a grave breach of customary international law. Hence, not only the soldiers at the site, but also the superiors who ordered or allowed to fire on the civilian refugees, are to be charged under the laws of war. The No Gun Ri Massacre was murder, and under international humanitarian law, a war crime.
- (4) The firing by the U.S. soldiers on the refugees on July 26, 27, and 28, 1950 at No Gun Ri is in violation of the Korean Criminal Act. The acts are murder. The superiors who ordered the crime shall be punished accordingly.
- (5) The acts of the soldiers are in violation of the "Articles of War," Article 92, which was effective at the time of the incident. According to Article 92, the firing constitutes the crime of premeditated murder.
- (6) Several legal remedies are available both in the United States and in Korea, including criminal procedure against the offenders, civil procedures for filing tort claims against the offenders, and directly seeking compensation from each Government through civil procedure, the Korean State Compensation Act or the Foreign Claims Act.

Fifty years have passed since the No Gun Ri Massacre was committed. This is a long time for the victims to endure the sufferings of the past. However, it might be too short a time to see the entire human rights problems solved. Although punishment for war crimes and crimes against humanity is not very common, we already have two great experiences: The Yugoslavia War Crimes Tribunal (ICTY) and the Rwanda Tribunal (ICTR). Based on these experiences, the proposed International Criminal Court is waiting for the day of its entry into force. "A permanent international criminal court, which would adjudicate war crimes committed anywhere in the world, would replace the law of force by the force of law."¹⁹⁹ Thus, international humanitarian law has been nourished by international human rights law,

199. Susan Tiefenbrun, Editor's Message, *Peace with Justice*, 3 HOFSTRA L. & POL'Y SYMP. 1, 7 (1999).

and the gap between the two groups of laws is being narrowed. The human rights situation in the world is improving. So is the protection of civilians in time of war, even though it is still far from perfect.

The concept of war crimes against ally civilians is new and ironic. However, cases have arisen in both the Korean and Vietnam Wars. Korean soldiers who fought in Vietnam against North Vietnamese forces also reportedly committed several massacres against South Vietnamese in 1960s. Those incidents will surely recur in the future as long as the military intervention in foreign countries continues. Therefore, the protection of ally civilians should be strongly emphasized, and the regulations of international humanitarian law over war crimes should be improved to better protect ally civilians.

As the famous historian, E.H. Carr has written, "history is the dialogue between past and present."²⁰⁰ A critical review of the No Gun Ri Massacre is not only an effort to correct the past tragedy, but also an attempt to build a bridge to the future. Solving the decades long dark problems will pave a road to the better relationship between the two countries. Moreover, imposing lights on the dark yesterday will be a guarantee to a better society tomorrow.

200. See E. H. CARR, *WHAT IS HISTORY* (1962).

