

VIETNAM STUDIES

LAW AT WAR

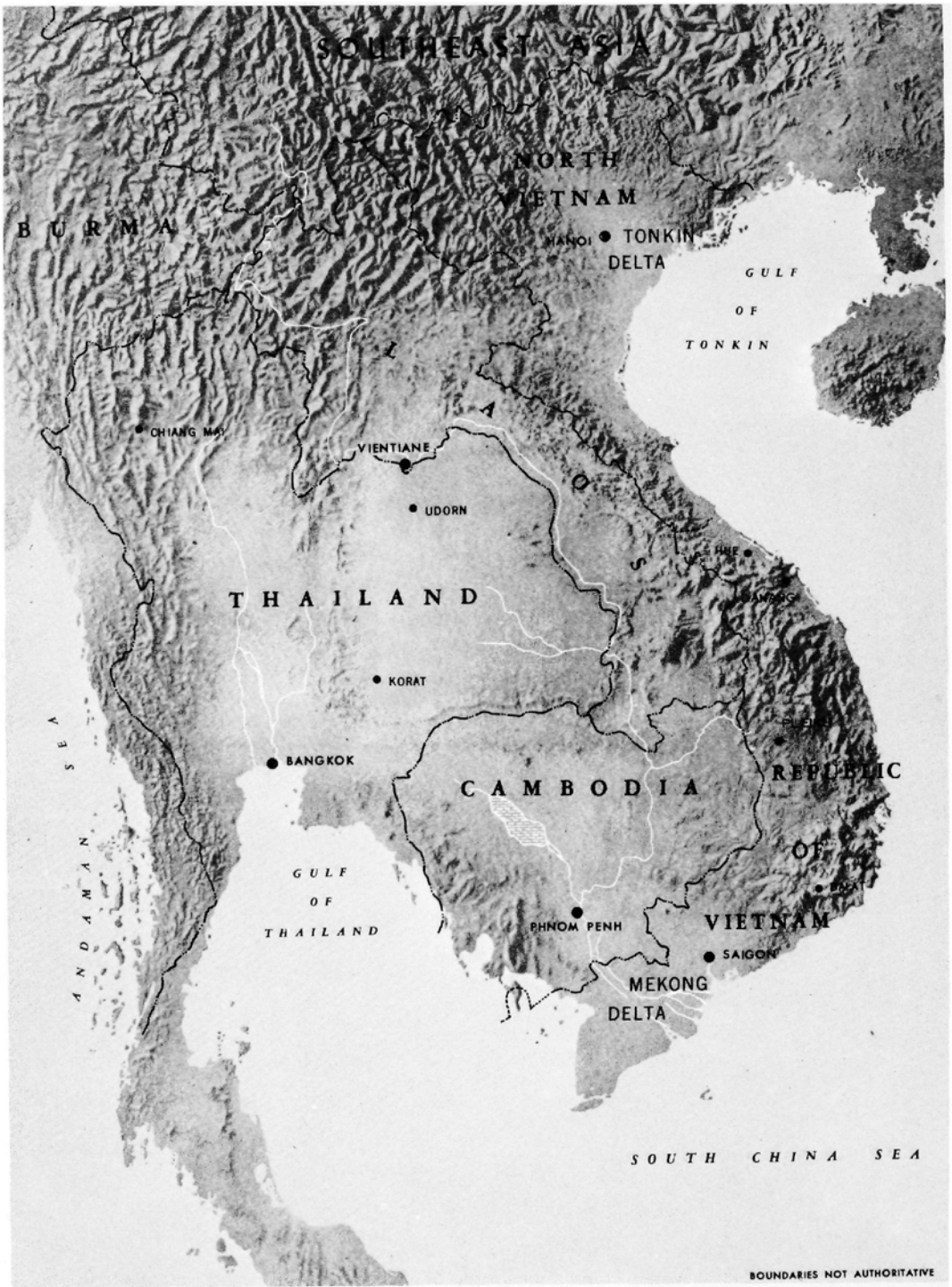
VIETNAM

1964 - 1973



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DEPARTMENT OF THE ARMY



VIETNAM STUDIES

LAW AT WAR: VIETNAM
1964-1973

by
Major General George S. Prugh

DEPARTMENT OF THE ARMY
WASHINGTON, D.C., 1975

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Foreword

The United States Army has met an unusually complex challenge in Southeast Asia. In conjunction with the other services, the Army has fought in support of a national policy of assisting an emerging nation to develop governmental processes of its own choosing, free of outside coercion. In addition to the usual problems of waging armed conflict, the assignment in Southeast Asia has required superimposing the immensely sophisticated tasks of a modern army upon an underdeveloped environment and adapting them to demands covering a wide spectrum. These involved helping to fulfill the basic needs of an agrarian population, dealing with the frustrations of antiguerrilla operations, and conducting conventional campaigns against well-trained and determined regular units.

Although this assignment has officially ended, the U.S. Army must prepare for other challenges that may lie ahead. While cognizant that history never repeats itself exactly and that no army ever profited from trying to meet a new challenge in terms of the old one, the Army nevertheless stands to benefit immensely from a study of its experience, its shortcomings no less than its achievements.

Aware that some years must elapse before the official histories will provide a detailed and objective analysis of the experience in Southeast Asia, we have sought a forum whereby some of the more salient aspects of that experience can be made available now. At the request of the Chief of Staff, a representative group of senior officers who served in important posts in Vietnam and who still carry a heavy burden of day-to-day responsibilities has prepared a series of monographs. These studies should be of great value in helping the Army develop future operational concepts while at the same time contributing to the historical record and providing the American public with an interim report on the performance of men and officers who have responded, as others have through our history, to exacting and trying demands.

The reader should be reminded that most of the writing was accomplished while the war in Vietnam was at its peak, and the monographs frequently refer to events of the past as if they were taking place in the present.

All monographs in the series are based primarily on official records, with additional material from published and unpublished sec-

ondary works, from debriefing reports and interviews with key participants, and from the personal experience of the author. To facilitate security clearance, annotation and detailed bibliography have been omitted from the published version; a fully documented account with bibliography is filed with the U.S. Army Center of Military History.

Major General George S. Prugh graduated from Hastings College of Law, University of California, in San Francisco in 1948 and received the degree of Juris Doctor. He is a member of the bar of the state of California. General Prugh is a graduate of the Command and General Staff College and the U.S. Army War College. He received the degree of Master of Arts from George Washington University in Washington, D.C., in 1963.

General Prugh is particularly well qualified to author this monograph on judge advocate activities at Headquarters, U.S. Military Assistance Command, Vietnam. In November 1964 he became the Staff Judge Advocate at the Military Assistance Command, and served in that capacity on an extended tour until July 1966. General Prugh's assignment in Vietnam coincided with the years which have been described by General Westmoreland, Commander, U.S. Military Assistance Command, Vietnam, as the year of crisis, 1964; the year of military commitment, 1965; and the year of development, 1966.

Following his tour in Vietnam General Prugh assumed the duties of legal adviser to the U.S. European Command in Saint-Germain-en-Laye, France, and later at Stuttgart, Germany. On 1 May 1969, he became the Judge Advocate, U.S. Army Europe and Seventh Army, at Heidelberg, Germany. He was reassigned to the Department of the Army, Washington, D.C., in June 1971, and assumed the position of The Judge Advocate General on 1 July 1971.

Washington, D.C.
10 September 1974

VERNE L. BOWERS
Major General, USA
The Adjutant General

Preface

The laws of a nation form the most instructive portion
of its history. . . .

EDWARD GIBBON

The American people have a special relationship with their law. While they themselves loudly criticize it as too slow, often archaic, and usually inadequate, they are at the same time devoted to its extraordinarily high legal principles—principles of fairness, openness, and justice frequently talked about by other peoples but rarely observed in actual daily practice to the extent that they are in America. The American people take their law with them, insofar as they are able, and they find it difficult to accept when other nations do not see justice in the same light they do. That war affects law is not apparent to many Americans, who are so used to peace at home, where their courts continuously function, that it is very hard for them to visualize how combat interferes with the legal process.

It will surprise no serious student of American affairs to learn that from the beginning of American participation in the Vietnam War there was a substantial presence of American law and legal institutions in the company of U.S. forces there. This presence of U.S. law had effects during American participation and after, some of them only dimly seen at this time because we are so close to the event. The purpose of this monograph is to describe the presence of law at a particular time and in a particular American command in Vietnam. I have selected the U.S. Military Assistance Command, Vietnam, as the headquarters, and the crucial years of 1964 through 1966 as the primary but not exclusive period of time to study, partly because as the senior legal officer, the Staff Judge Advocate at Military Assistance Command, Vietnam, then, I was most familiar with events, but in the main because it was in that headquarters and at that time that basic policy positions were formed. It was early apparent that law could have a special role in Vietnam because of the unusual circumstances of the war, which was a combination of internal and external war, of insurgency and nation-building, and of development of indigenous legal institutions and rapid disintegration of the remnants of the colonial French legal establishment. Further, the Vietnamese people were eager for knowledge of American institutions, including law.

To describe the events, the interplay, the considerations, and the immediate results of U.S. legal activities in the Military Assistance Command, Vietnam, has proved a large task. Any treatment of the conduct and discipline of the U.S. Army, Vietnam, a subordinate command, has been omitted as not a direct part of the law work of the Military Assistance Command.

Similarly omitted is a detailed discussion of the tragic action at My Lai (Son My), which beclouds the record of the many well-led—and legally conducted—military operations. Except for brief remarks in passing, My Lai is omitted for several reasons: it has been widely publicized, it occurred about two years later than the primary period this monograph deals with, and it was the legal responsibility of the service component, U.S. Army, Vietnam, as distinguished from the unified command headquarters, Military Assistance Command, Vietnam, which is the focus of this monograph.

Upon receiving the assignment to the Military Assistance Command, Vietnam, in the fall of 1964, I framed two guiding questions. First, what must be done to assure that the command's activities were performed in a manner conforming to applicable law, national and international? Second, in what manner could law and legal institutions be properly used to further the accomplishment of the command's mission?

These questions led directly to the requirement to find out how the law was actually working—and this meant an early identification of the law that was being applied and its source. For our command's activities this was difficult only in the area of international law. The so-called Pentilateral Agreement, referred to in some detail in the following text, served as a framework for dealing with legal issues arising between U.S. military personnel and the people and legal institutions of the Republic of Vietnam. This agreement was a bare-bones one, however, and much interpretation and practice would be needed before we could be sure the needs of the command and the desires of the host country could be simultaneously met.

Most difficult for us, however, was to determine applicable international law, for much depended upon the legal characterization of the conflict and the American role in it. The traditional tests of internal conflict in contrast to an international conflict were clearly too imprecise in this situation where the country of Vietnam had been divided, purportedly temporarily, by the Geneva Accords of 1954, and both portions of the country claimed sovereignty and had received some supporting recognition. There were aspects of a civil war within South Vietnam and equally valid aspects of invasion by regular troops from North Vietnam; Free World forces were present at

the invitation of the government, asserting the sovereignty of South Vietnam. Attacks on these Free World forces were made by "indigenous" Viet Cong and "foreign" North Vietnamese troops; the line between civilian terrorists and the military insurgents was so blurred as to be indistinguishable; and almost all of the traditional measures—uniform, organization, carrying of arms openly—failed to identify the combatants. Clearly we had a lot of loose ends to pick up before we could be certain of the legal positions we should advocate, and we had few precedents to guide us.

The second question brought us much more quickly and dramatically into the search for Vietnamese law. One fact became abundantly clear; we knew very little about Vietnamese law and how it actually worked. Nominally it was a derivative of the French civil law system, but in practice this law is not what impacted on the bulk of the population, at least outside of the three or four largest cities. The military services had developed a variation of the French system, but it was made unique by the various decrees that had been issued since the establishment of the Republic of Vietnam. Notwithstanding what the law was said to be, it was evident that what was actually being applied was frequently far different. To learn these facts, then, became a first priority and led to the formation of a division in the MACV Staff Judge Advocate's office of field advisers, military lawyers who would assist their Vietnamese counterparts in the field and would at the same time gather as much information as possible about the law system's actually working.

The emphasis of this monograph upon one law office perforce leaves unrecounted the story of the often dramatically impressive accomplishments of the substantially larger number of Army, Navy, and Air Force judge advocate personnel who performed legal services for subordinate commands within the Republic of South Vietnam.

The task of reconstructing the scenes in which the Military Assistance Command, Vietnam, judge advocates played a part was formidable. A debt of gratitude, therefore, is owing to my colleagues in the law who have contributed to the preparation of this monograph and to those many friends who have read all or parts of this manuscript and provided constructive suggestions. I wish to express my appreciation to Colonel Nathaniel C. Kenyon, Major Paul P. Dommer, and Captain Robert E. Deso, who, while members of my office, were project officers for this monograph. They assembled the materials and did most of the writing.

This study can touch on only a few of the highlights of the exciting period described, but it is my intention that it accurately reflect

the fact that at that time, in troubled Vietnam, military lawyers of America and Asia lifted the lid and looked, albeit briefly, at what law and its institutions can do for a country engaged in a modern armed conflict. This was activism in the law, and activism of high order. For having had an opportunity to participate in this activism at this time and with these people, I shall be eternally grateful.

Washington, D.C.
10 September 1974

GEORGE S. PRUGH
Major General, USA
The Judge Advocate General

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All illustration are from the Office of the Judge Advocate General.

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1964-1973

CHAPTER I

Organization for Legal Services

The U.S. Military Assistance Command, Vietnam

The development of a law firm is dependent on the needs of the firm's major clients. This is true in the Army as well as in civilian practice. The how and why of the organization for legal services in Vietnam, then, is more readily understood by first examining the major military client in Vietnam—the U.S. Military Assistance Command, Vietnam.

In August 1950 the United States sent a small military staff to Vietnam to assist the French in teaching Vietnam forces the use and maintenance of U.S. military equipment furnished under the Mutual Defense Assistance Act of 1949. Chiefly technicians, these advisers were not organized in regular military units but functioned as an extension of the U.S. diplomatic mission in Saigon to which they were assigned. By 1953 the United States had between two and three hundred military advisers in Vietnam, but no military lawyer had been assigned.

In 1959 the first Staff Judge Advocate, Colonel Paul J. Durbin of the Judge Advocate General's Corps, was assigned for the U.S. Army element of the Military Assistance Advisory Group, Vietnam. The U.S. Military Assistance Command, Vietnam (MACV), was created 8 February 1962. The Military Assistance Command was made directly responsible for the command, control, and logistical support of the steadily increasing number of U.S. military advisers, technicians, and staff personnel who were being assigned to Vietnam.

When the first U.S. Marine and Army infantry units were committed to combat in 1965, the U.S. Military Assistance Command, Vietnam, was serving as an allied headquarters in a major theater of operations in which multinational forces were engaged; an operational headquarters for U.S. Army, Air Force, Navy, and Marine units in combat in Vietnam, where major ground, sea, and air combat operations in Vietnam were planned, authorized, and executed under its command; and an extension of the U.S. diplomatic mission. The Commander, U.S. Military Assistance Command, Vietnam, served as the military member of the U.S. Mission Council for purposes of

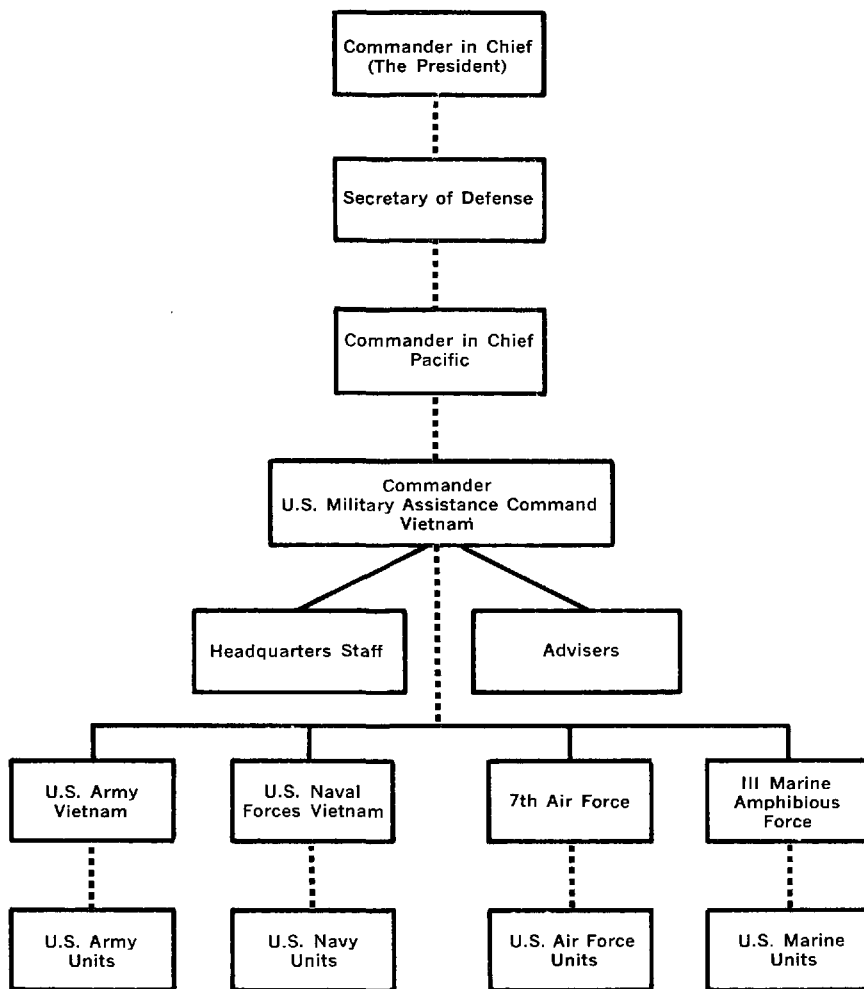
co-ordination with the chief of the mission on all matters relating to U.S. military activities in Vietnam. The relationship between the Military Assistance Command and the U.S. Embassy was always very close. The commander met with the U.S. Ambassador and the highest officials of the government of Vietnam almost daily, and several staff sections of the command, including the Staff Judge Advocate, were in constant contact with officers in the embassy. The U.S. Military Assistance Command also directed the U.S. advisory effort. All U.S. military advisers in Vietnam were assigned to the command and functioned independently of regular U.S. troop units.

The U.S. Military Assistance Command, Vietnam, was a subordinate, unified command under the operational control of the Commander in Chief, Pacific. (*Chart 1*) Its commander, an Army general, reported directly to the Commander, U.S. Forces, Pacific, a Navy admiral, who in turn reported directly to the Department of Defense. The MACV staff sections and advisory teams consisted of military personnel from each branch of the armed services who were assigned directly to the Military Assistance Command, Vietnam. By 1966 each service component of the command also had a major subordinate headquarters for command and control of the major troop units of that service—U.S. Army, Vietnam, U.S. Naval Forces, Vietnam, the III Marine Amphibious Force, and the 7th Air Force. Each of the service elements was self-sufficient in terms of logistical and administrative support, and all combat, combat support, and service units stationed in Vietnam were assigned to one of the service components.

The organization for legal services in Vietnam paralleled the command structure. The MACV Staff Judge Advocate, an Army colonel, was the legal adviser to the Commander, U.S. Military Assistance Command, Vietnam, and was the senior Army Judge Advocate in Vietnam. The staff of the MACV Staff Judge Advocate, composed of attorneys and clerical personnel from the Army, Navy, and Air Force, provided legal services to the MACV staff and advised the Vietnamese legal agencies.

This organizational structure existed until the last year of U.S. participation in the war. In November 1972, as part of a consolidation plan for U.S. Military Assistance Command, Vietnam, and U.S. Army, Vietnam, judge advocate resources of both were reorganized as U.S. Army, Vietnam—Military Assistance Command, Vietnam, Support Command. (*Chart 2*) No change in judge advocate missions or functions resulted, even then, however, and the senior staff judge advocate in Vietnam assumed two roles, legal adviser to the Commander, U.S. Military Assistance Command, Vietnam, and his staff

CHART 1—CHAIN OF COMMAND FOR MACV OPERATIONS



and senior staff judge advocate for units of U.S. Army, Vietnam. The Office of the Staff Judge Advocate, USARV-MACV Support Command, continued to provide legal services to all Army units during the sixty-day troop withdrawal period established in the Agreement on Ending the War and Restoring Peace in Vietnam.

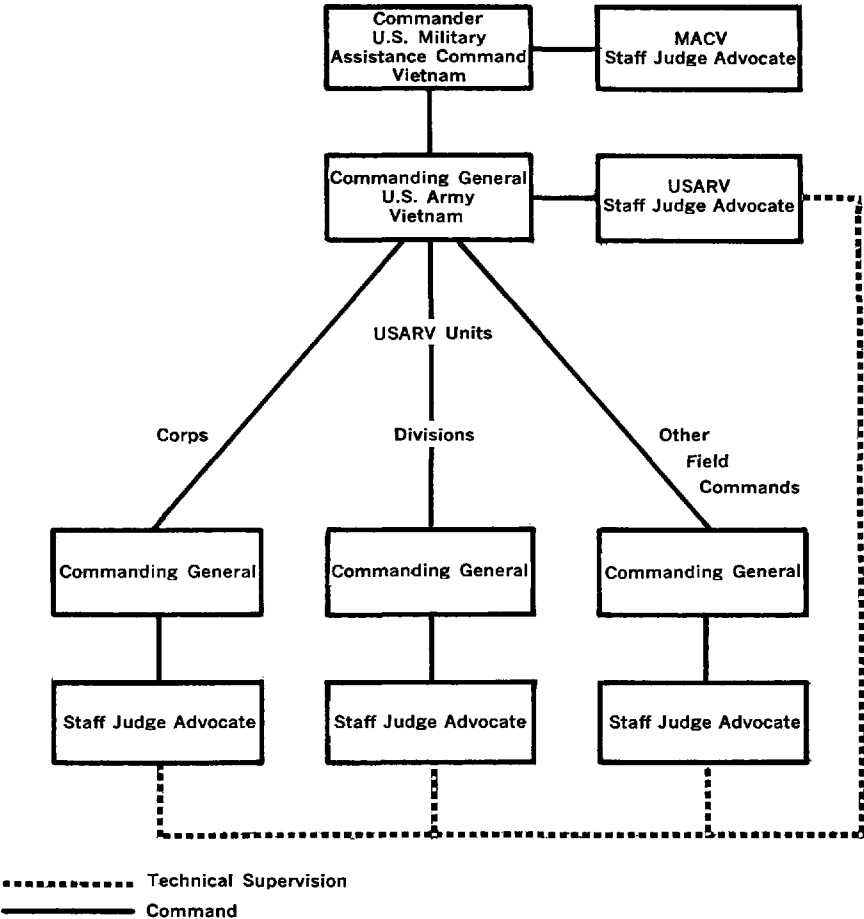
Each of the service elements of the Military Assistance Command, Vietnam—U.S. Army, Vietnam, 7th Air Force, U.S. Naval Forces, Vietnam, and III Marine Amphibious Force—had corresponding judge advocate support at each level of command. Each major U.S. Army, Vietnam, unit—corps, field force, division, support command, brigade—and major subordinate commands of the other several components had its own judge advocate office capable of providing all necessary legal support for the command.

Like the vast majority of military personnel assigned to Vietnam, judge advocates served a twelve months tour of duty. MACV judge advocates were assigned directly to that headquarters but all other Army judge advocates stationed in Vietnam were initially under the control of U.S. Army, Vietnam, headquarters, from which they could be reassigned thereafter. While conditions in Vietnam differed from those experienced by judge advocates in other parts of the world at that time, the legal services provided by the U.S. Army, Vietnam, judge advocates were basically the same as those supplied on any Army post anywhere in the world—trying courts-martial, advising commanders on military justice procedures and other legal problems, providing legal assistance to all personnel, administering the claims program, writing military affairs opinions, and reviewing staff actions and administrative boards for legal sufficiency.

The MACV Judge Advocates

The year 1965 was a watershed for legal organization in Vietnam, as it was for the entire U.S. military force. During the first few months there were only seven American military lawyers in Vietnam. All were stationed in Saigon. One lawyer each served the Army, Navy, and Air Force components of the U.S. Military Assistance Command, Vietnam; the other four were on General William C. Westmoreland's staff. In early 1965 few courts-martial were tried in Vietnam, and crime was not a serious problem. The U.S. Military Assistance Command was responsible to the Army for the administration of claims for all services. The Staff Judge Advocate advised the embassy on legal matters, and the MACV legal staff enjoyed a good rapport with the Vietnamese legal community. The legal problems concerning taxes, real estate leases, black market activities, foreign claims, and drugs, which were to be of mutual concern to the U.S. Military Assistance Command, the embassy, and the Vietnamese government in later years, had not arisen, or were not yet serious.

CHART 2—LEGAL ORGANIZATION OF U.S. ARMY UNITS, VIETNAM



Beginning in March 1965 with the rapid buildup of U.S. and allied troop strength, legal work increased considerably and new areas of responsibility were added to the duties of the MACV judge advocates. By mid-1965 the MACV Office of the Staff Judge Advocate had assumed the general form it was to retain for much of the war—the Staff Judge Advocate, a Criminal and Disciplinary Law Division, Claims Division, Administrative Division, Civil Law and Military Affairs Division, Advisory Division, and an International Law Division. (*Chart 3*)

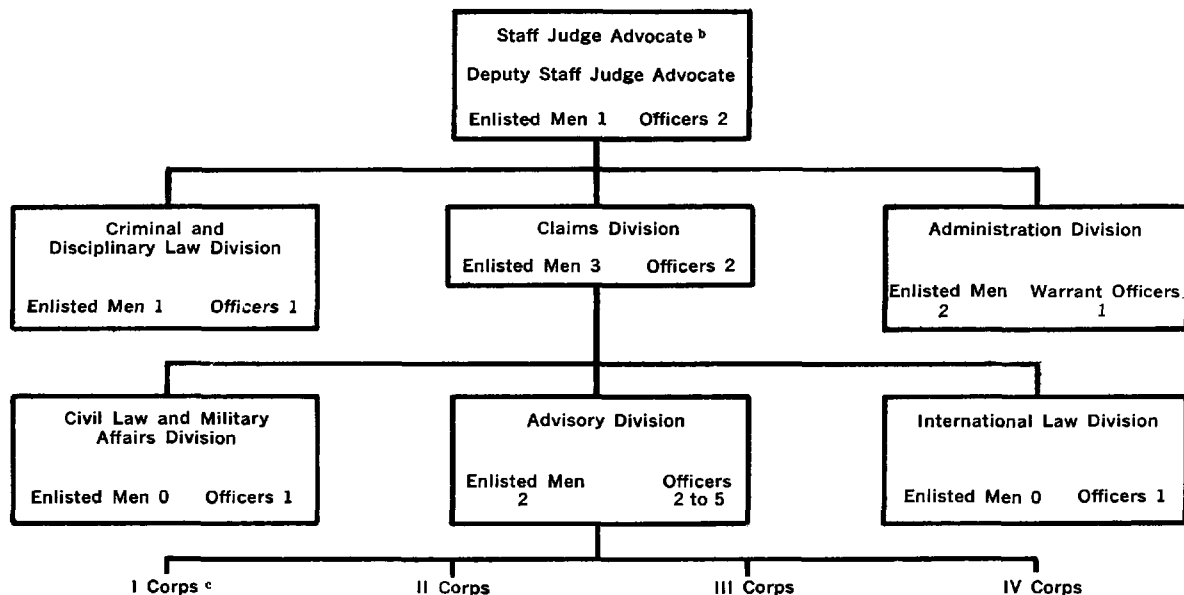
The Staff Judge Advocate

The Staff Judge Advocate was the principal legal adviser to the MACV commander and staff sections on all matters pertaining to law, including U.S. civil and military law, international law, and the laws of Vietnam and neighboring states. (*See Appendix A.*) He was responsible for command policy, supervision, and control of all military law activities for Headquarters, Military Assistance Command, and commands subordinate to it. He performed for the headquarters all statutory functions required of a staff judge advocate under the Uniform Code of Military Justice. He maintained an office of record for foreign agreements entered into by the command. Foreign agreements maintained by the Staff Judge Advocate's office included formal treaties between the U.S. and Vietnam on such matters as agricultural commodities, atomic energy claims, defense, economic and technical co-operation, informational media guarantees, maritime affairs, publications, surplus property, taxation, telecommunication, and trade, as well as informal working arrangements between U.S. field commanders and local Vietnamese authorities. A judge advocate mission peculiar to Vietnam was the Staff Judge Advocate's responsibility for developing and co-ordinating plans and providing advice concerning the role of law and lawyers in counterinsurgency, resources control, and the prosecution of the war. In his advisory capacity the Staff Judge Advocate was the senior military adviser to the Vietnam Directorate of Military Justice and to other military legal offices of the Vietnamese armed forces. The primary advisory objectives were the revision, development, and implementation of the Vietnamese code of military justice, the planning, co-ordination, training, and direction of the Vietnamese judge advocates, and the administration of military law and discipline. The Staff Judge Advocate also maintained liaison with and assisted Vietnamese civil legal agencies.

Criminal and Disciplinary Law Division

In the early days of the U.S. Military Assistance Command, Vietnam, this division performed the traditional military justice work of

CHART 3—ORGANIZATION OF THE OFFICE OF THE STAFF JUDGE ADVOCATE
U.S. MILITARY ASSISTANCE COMMAND, VIETNAM, 1965-1966 ^a



^a The size and organization of the office of the Staff Judge Advocate varied slightly after 1966. Claims were transferred to U.S. Army, Vietnam, and Criminal Law (Military Justice) was combined with International Law.

^b In addition to American personnel, there was one Vietnamese attorney adviser, a librarian-receptionist, an interpreter-translator, and one clerk-typist attached to the Staff Judge Advocate's office.

^c The Judge Advocate advisers in I, II and IV Corps were assigned to the MACV corps advisory headquarters in each of these military regions. The judge advocate adviser for III Corps was a member of the Saigon Staff Judge Advocate's office.

the command, observing the state of discipline and undertaking actions necessary to the functioning of military criminal law. Later the division was combined with the International Law Division. At that time the division's military justice responsibilities consisted of furnishing advice and guidance to judge advocates and to commanders and staffs of subordinate commands in the disposition of disciplinary and criminal matters; keeping the commander and the MACV staff, as well as senior MACV advisers and advisory groups, informed on the state of discipline in the command; and recommending appropriate corrective action as necessary.

Civil Law and Military Affairs Division

The Civil Law and Military Affairs Division advised and assisted the MACV staff and other agencies in such matters as currency control, black market operations, the withdrawal of military privileges from civilian contractor employees, the denial of access to military installations and facilities to U.S. civilians, and determinations of unacceptability for employment under U.S. government contracts. The division acted as liaison with the American Embassy, the U.S. Overseas Mission, the U.S. Agency for International Development, and the consul general on legal matters involving the Military Assistance Command. The division rendered advice on the legal status of, and military jurisdiction over, civilian personnel accompanying the armed forces. It appointed trial observers for U.S. civilians being tried in Vietnamese courts and monitored such cases. It reviewed MACV directives prepared by other staff sections. The division served as legal adviser to the Central Purchasing Agency, Vietnam, and to the Vietnam Regional Exchange, the agency which imported, distributed, stored, and sold all post exchange and base exchange items in Vietnam. In accordance with the terms of the Pentilateral Agreement—a mutual military aid pact signed by the United States with Vietnam, Laos, Cambodia, and France—the division acted to ensure exemption of U.S. agencies and U.S.-invited contractors from import taxes, customs duties, transportation taxes, inspections, and other forms of regulation by the Vietnamese government over imported goods and equipment which would adversely affect the U.S. mission in Vietnam. Finally, the division rendered advice and opinions on real estate matters such as the rent-free use by the United States of property owned by the government of Vietnam, compensation to owners for land appropriated for use as military bases or facilities, commercial leases of property to U.S. governmental agencies (there were over 1,300 such leases in Saigon alone by 1970), and real property disposal.

Advisory Division

Although MACV judge advocates had been associating with Vietnamese military and civilian attorneys for several years, the Advisory Division of the MACV Staff Judge Advocate's office was not organized until August 1965. The purpose of the Advisory Division was to continue the advisory work with the Vietnamese that had been carried on in an informal manner by previous judge advocates, and to augment the advisory work in Saigon by sending judge advocate advisers into other regions of South Vietnam. Broadly stated, the mission of the Advisory Division was to improve the effectiveness of the Vietnamese armed forces military law and procedures and to establish a popular military and civilian base for respect for law and order.

The Advisory Division was responsible for acquiring, compiling, analyzing, and reporting on data concerning the functioning of Vietnamese military law and legal institutions, including military courts, military field courts, tribunals, military prisons, jails, detention centers, rehabilitation centers, re-education centers, and the legal activities of the Vietnamese law enforcement agencies as they affected military law. As information was received and evaluated, recommendations were made to the Staff Judge Advocate for improvements believed possible in the Vietnamese military justice system. The division also acquired, translated, cataloged, published, and maintained files of Vietnamese decrees and other laws.

Acting on behalf of the Staff Judge Advocate, the Advisory Division maintained liaison with elements of the Vietnamese civilian legal community such as the Ministry of Justice, the civilian courts, and the School of Law, as well as with the Vietnamese armed forces legal service, the Directorate of Military Justice. Work with the Directorate of Military Justice included advising and assisting Vietnamese judge advocates on technical legal matters on request; reviewing and advising on the Vietnamese judge advocate annual budget request and table of organization and equipment; advising on the operation of and obtaining supplies and equipment for the military courts and prisons; and assisting in improving military justice and other law instruction in the Vietnamese armed forces schools and training centers. As a matter of course, the Advisory Division also assisted the other divisions of the MACV Staff Judge Advocate's office and other MACV staff sections in matters pertaining to Vietnamese law. For example, the chief of the Advisory Division during 1972 and 1973 was a member of a Joint General Staff committee composed of representatives of the Military Assistance Command and the Republic of Vietnam armed forces to draft a mobilization law and also to prepare a demobilization study affecting the armed forces of the Republic of Vietnam. The judge advocate field advisers, who

COLONEL GEORGE S. PRUGH,
Staff Judge Advocate,
1964–1966.
(*Photograph taken after*
his promotion to major general.)



at various times were stationed in Hue, Da Nang, Pleiku, Nha Trang, and Can Tho, as well as in Saigon, worked with the Vietnamese judge advocates who administered the military courts and prisons in each of the four corps areas in South Vietnam. The judge advocate field advisers assisted their Vietnamese counterparts in all matters of U.S.-Vietnamese legal relations; established contact with local Vietnamese civilian judges, lawyers, and prosecutors; monitored Vietnamese legal activities in the corps areas and rendered reports on legal conditions in the corps areas to the MACV Judge Advocate in Saigon; and performed as command judge advocates for the MACV advisory units in the corps areas.

International Law Division

The International Law Division reviewed and assisted in drafting and interpreting international agreements between the Commander, U.S. Military Assistance Command, Vietnam, and the Vietnamese armed forces and between the Commander, Military Assistance Command, and Free World forces. This division rendered opinions on international law for the command, including the Law of the Sea, the Geneva Conventions of 1949, and the Laws of War. It maintained files of investigations of alleged war crimes and atrocities committed by or against U.S. military or civilian personnel in Vietnam. It assured that prisoners of war who had been captured by U.S. troops and turned over to the Vietnamese government for detention were being provided the legal rights accorded them by the Geneva Conventions. The International Affairs Division provided instruction to newly assigned MACV personnel in the Geneva Conventions and Code of Conduct.

One significant twist in the development of the role of judge advocates in Vietnam happened in mid-1965 and shaped the functioning of the MACV legal office in a manner not anticipated. It came about through a judge advocate staff study completed on 31 May and designed to explore the role of the civil law system in counterinsurgency operations in Vietnam. The following is quoted from its opening paragraph:

In the course of examining the legal system of Vietnam to determine where improvements could be made to make the system more effective in the prosecution of the war against the Viet Cong, it becomes apparent that a great gap exists between the work of the police and the work of the judiciary. In short, apprehension of Viet Cong becomes more efficient but the disposition of their cases is far from satisfactory. Some reflection on this specific problem leads to doubts concerning the utility of the civil code system generally as an effective tool against insurgency. At the same time it becomes apparent that the place of law in the counter-insurgency efforts is not well understood or studied, despite the fact that the establishment of a rule of law and order in the society is probably the most important goal that could be achieved.

A few days earlier the Staff Judge Advocate, Colonel George S. Prugh, had reported to a visitor from the Deputy Chief of Staff for Military Operations, Department of the Army:

The US military lawyers have been trying to inject some of the leadership needed to develop the bench and bar as indicated above. The task is too large for them to accomplish in the light of their regularly assigned tasks. They can still be of material help but it is clear that there should be a full-time civilian effort to generate the programs desired. It is estimated that three full-time practitioners, devoting their entire effort to an advisory program for the civilian bench and bar, could make a real breakthrough within two years and have their influence widely felt within five years. One of these could be located in the central part of Vietnam, spending considerable time at the courts and law school at Hue. The second would do the same for the south, also teaching at Saigon Faculte de Droit, and the third would be the chief and coordinator with the Minister of Justice and the Bench. From these three could come the plans for contractual assistance in the recodification program, the training of indigenous experts, and the handling of technical assistance from CONUS. If recruitment of civilian practitioners proves an obstacle possibly Army officers on excess leave would be available.

There cannot be a successful counterinsurgency program until there is established a respect for law and order. This can be done with establishment of an effective system of law, law enforcement, and public education in the place of the legal institutions and the citizen's role related to them. This is a long-term goal but it cannot be started after the military effort is completed. It must be simultaneous with the military operations against the VC and must be stressed in the areas where a sufficient degree of pacification has been attained to permit the legal institutions to function.

Such a program encompasses public education from the grade schools up.

It also means considerable improvement in the efficiency and relationship between the National Police and the court apparatus. It requires com-

pletely honest, uniform, consistent and impartial administration of the law.

And it needs the development of laws which are reflective of the popular notions, customs, traditions, and culture. . . .

There is a particular warning available to us in any civil code country where one or more of the following exist: (1) the law is an engrafted one, passed without local adaptation from a colonial power in relatively recent times; (2) there is no method for the general public to express itself in legal matters, such as through elections of officials or laws; (3) where the legal institutions do not function in the rural areas; or (4) where the bar is too small, intimidated, a "closed shop," or collectively voiceless in the affairs of the government.

These ideas pointed to a role for the military lawyer heretofore unthought of, a role that involved the use of law and legal institutions in a positive sense to defeat the insurgency. The first step was for the military judge advocates to learn about the existing law and legal institutions in Vietnam and how they functioned.

CHAPTER II

The Vietnamese Legal System

From the very beginning, judge advocates assigned to Vietnam had worked to become familiar with the laws of Vietnam, the legal system, and those who administered it. Clearly it was not enough for lawyers merely to play a passive role of problem prevention. The U.S. judge advocate mission in Vietnam was twofold: to defeat the enemy of the Republic of Vietnam and to assist the Vietnamese to develop their own institutions in the midst of the military crisis. The MACV judge advocates, working closely with their Vietnamese counterparts, sought ways in which law could be employed, including the way to use law as an effective weapon in the struggle against Communist insurgency. They also labored to help their fellow attorneys strengthen the Vietnamese legal system in a manner which would enable it to be truly responsive to the needs of the government and the people.

The accomplishment of these goals required not only a knowledge of the principles of law found in the United States and in international law, but also a thorough grounding in the legal processes of the Republic of Vietnam. This last was an especially formidable task. Vietnam was little known to most of the American Army, and certainly not to the U.S. legal community. There was a scarcity of readily available English source material suitable for studying the legal system. The fact that Vietnamese judicial organization was patterned upon the French system provided some comfort to those who were familiar with the civil law systems of Europe, but it soon became apparent that while the Vietnamese legal system might be French in structure it was uniquely Vietnamese in outlook and operation. Law is rooted in history, and those who wish to utilize the law as a tool for social development must first understand the society from which the law evolved and in which it must function. The requisite knowledge and insight for the task at hand would be gained by judge advocates only through day-to-day, step-by-step personal observation and involvement, in the midst of many distractions. In this continuing educational process the diligence of American attorneys was complemented by the patience, ability, and professional attitude of the Vietnamese attorneys and jurists with whom U.S. judge advocates worked on a daily basis. As mutual understanding

grew, mutual respect increased. Throughout the course of the war the co-operative efforts of American and Vietnamese attorneys have accrued to the benefit of both nations and to the credit of the legal profession.

The Vietnam Environment

The Republic of Vietnam is a long, narrow country on the eastern coast of the Southeast Asia mainland. Roughly the size of Florida, its terrain features are much more diverse. The Annamite Cordillera, a rugged jungled mountain chain, stretches for two-thirds of the length of the country and occupies most of the land. Bordering the mountains, along the coast of the South China Sea, is a narrow, fertile strip of lowland. South of Saigon and covering the southern one-third of the country is the Mekong Delta, a vast, semi-flooded alluvial plain which has long been a major rice producing region for Southeast Asia. The principal road and rail networks run north-south, hugging the coast. Route 1, the most important highway, is a two-lane paved road extending most of the length of the country. While there is heavy local traffic on the roads, most long-distance travel is by air. The mountainous regions west of the coast are largely undeveloped and insecure.

It has recently been estimated that South Vietnam has a population of eighteen million, which would be an increase of about three million in the last decade. The greatest number of people are concentrated in the Mekong Delta and along the narrow coastal plain. The majority of the people are ethnic Vietnamese, but there are several minority groups, the most significant being the Montagnards of the Central Highlands and the Chinese of the Cholon district of Saigon. Each of these groups maintains its own social customs and, to a certain extent, its own laws. While seldom doctrinaire in their beliefs, the Vietnamese profess many religions. Most are at least nominal Buddhists, but the Catholics, who comprise about 10 percent of the population, have been prominent in the political leadership of the country. Several minor sects have also been politically active, even to the extent of supporting private standing armies, such as those of the Hoa Hao and the Cao Dai.

Perhaps the most significant development in Vietnamese society (during the fifties and sixties) has been the growth of the refugee population. The first great wave of Tonkinese refugees fled from the northern part of Vietnam shortly after the Communists came to power. While many of these people were peasants and laborers, many others were educated teachers, professionals, and political figures. This leadership class was generally anticommunist. The Tonkinese from the north quickly became active in the political affairs of the

south, where their activities often aroused the resentment of native southern leaders who were Cochinese. This rivalry was a significant factor in the political turmoil of the early sixties in Saigon.

A second wave of refugees was created during the widespread heavy fighting of 1965-1971 in the south of the republic. Thousands of South Vietnamese were uprooted several times in the course of successive campaigns. The influx of refugees fleeing from the countryside placed an enormous burden on the city governments and social agencies which care for the refugees. As families became separated, possessions lost, and people crowded into the refugee camps, it was only natural that respect for law and order, already much diminished, should deteriorate further. The problems of administering to the refugees' needs mounted.

Administratively, South Vietnam is divided into provinces, roughly similar to U.S. counties. Each province is subdivided into districts. All but the most remote districts have at least one major town and many villages, which are made up of hamlets. The Vietnamese are an agrarian society whose loyalties have always been decidedly local. For those who have not been uprooted by the war, life centers around the family and the hamlet. Beyond the village any sense of personal responsibility toward society tends to dissipate rapidly. While a spirit of nationalism is growing, it is as yet but a thin veneer on the daily lives of many of the people. There are thousands of villages in Vietnam, and often the laws most relevant to the villagers in their dealings with each other are the laws of local custom, based on ancient tradition and strongly influenced by spiritism. These laws are interpreted and administered by the village leaders, who are the only legal authority for most of the population. Thus the ancient Vietnamese adage, "The laws of the emperor yield to the customs of the village," continues to be a valid reminder for anyone attempting to analyze the role of law in Vietnamese society today.

The Chinese Influence

A major influence on the Vietnamese attitude toward law is Confucianism, introduced by the Chinese during the eleven hundred years they dominated Vietnam before 938 A.D. Confucianism is an ethical concept which the Chinese applied to societal organization as well as to their personal lives. The patriarchal family was the model for a perfect society, and Confucianist doctrine prescribes for its support the duties and obligations owed by child to parent, wife to husband, younger to older, and of all to the father as the senior representative of the family group. As the father-figure of the empire, the emperor exercised absolute parental authority over his subjects

through a bureaucracy of mandarins—his personal representatives. In the person of the emperor resided all political, religious, and legal authority. His nearly omnipotent role was the logical result of Confucianist doctrine that taught not to follow certain abstract principles, in the Western sense, but to accept the authority of certain people. The notions of individual rights and abstract justice were absent. The emphasis was upon the duties and relationships between people to achieve social harmony and stability in the state.

A central precept of Confucianism is the achievement of social harmony through adaptation: the ideal solution of conflict is settlement by negotiation and adjustment; any position can be changed; no commitment is final. This philosophy has remained a dominant theme of society and a key to the Vietnamese view of life. A prudent man learns to adapt to changing circumstances and tries to ameliorate unpleasant situations. As political fortunes change, so do political loyalties; such reversals of allegiance are considered in terms of prudence rather than disloyalty. If you ask a Vietnamese a question and he thinks that the true answer might cause you to feel embarrassment or anger, he may respond in a manner he hopes will please you, even if the answer does not correspond to the facts as he knows them. Such responses are considered in terms of politeness, rather than untruthfulness. While honesty is an admired virtue, in the Vietnamese scale of values it would be considered foolish to sacrifice one's own well-being or family interests for the sake of being scrupulously fair to strangers. When the U.S. military lawyers looked at Vietnam in 1965 they recognized the need for a thorough understanding of Vietnamese values and mores. The same could be said of Vietnamese legal philosophy and jurisprudence.

The achievement of independence from the Chinese had not substantially changed Vietnamese law. Under the Chinese, Confucianism was almost synonymous with the law. It was the official state ethical code and the dominant intellectual tradition of the Vietnamese mandarins, the scholar-bureaucrats who administered the country. The Vietnamese dynasties that succeeded the Chinese retained the form and apparatus of the mandarin government, including the laws by which the Chinese had ruled Vietnam. The Vietnamese Hong Duc Code of the Le Dynasty, promulgated in the fifteenth century, was modeled on the Chinese T'ang Dynasty (618–807) Code. The Vietnamese Gia Long Code of 1815 was a bodily re-enactment in the Chinese language of the Manchu Dynasty Code of the seventeenth century. The scholars who adopted the Chinese codes for Vietnam may have felt they were performing a valuable service, but imposition of the foreign law served to alienate the people from the law and from those who administered it.

The French Influence

French rule imposed yet another alien layer of law on the Vietnamese but it did not totally replace Chinese law or ancient customary law. The French administered Vietnam as three separate regions: Tonkin, now North Vietnam, the capital at Hanoi, as a protectorate; Annam, central Vietnam, its capital Hue, as a protectorate; and Cochinchina, southern Vietnam, its capital Saigon, as a colony. One result is that each region today has its own legal code, and there is still no single comprehensive Vietnamese civil, criminal, procedural, or other code.

The French protectorate at Tonkin made few concessions to the appearance of native autonomy. The important executive powers were vested in a French Resident-Superior at Hanoi who governed in the name of the emperor. French resident officers in the larger towns directly controlled the local administration. They attempted to work through the mandarinat and to preserve the institution for administrative purposes, but on terms consistent with French needs. The traditional judicial system was retained and applied using the mandarinat as a front. By degrees Tonkin was subjected to modified French codes: a Code of Criminal Procedure in 1917, a Penal Code in 1921, and a Civil Code in 1931.

In Annam the emperor and his officials were left in charge of internal affairs, except for customs and public works, but they functioned under the close scrutiny of the French, whose rule was somewhat less direct than in Tonkin. All of the acts of the emperor, except on some minor matters of religion, eventually became subject to French approval. In Annam, the Gia Long Code was applied until promulgation of the Penal Code for central Vietnam in 1933, a Criminal Procedure Code in 1935, and a Civil Code in three parts between 1936 and 1939. All were basically French codes modified to suit local customs and the requirements of administration in Annam. The French drafters of the codes for both Annam and Tonkin went to great lengths to ascertain conscientiously what Tonkinese and Annamese customs really were and to exclude inappropriate provisions copied slavishly into the Gia Long Code from Chinese texts.

Cochinchina, which had been under French domination for some twenty years longer than Tonkin and Annam, became in 1862 a colony under French law, while Tonkin and Annam remained as protectorates, each under the nominal reign of its emperor. Cochinchina was administered directly by a French-staffed civil service under a governor and a colonial council. The colonial council was composed half of Frenchmen and half of Vietnamese, the latter elected on a limited suffrage and the former by the French civil servants working in the colony. As a colony, Cochinchina sent its own dele-

gate to the Chamber of Deputies in Paris. In 1879, attempts to govern through a controlled mandarinat were abandoned and French administrators were placed at the head of each province. The mandarins had been permitted to apply the Gia Long Code as far as they knew it in the absence of printed texts. The French administrators applied French law and a French translation of the Gia Long Code, and, when these did not cover the situation, the ancient Hong Duc Code. When French administrators were substituted for the mandarins, the Penal Code of France became the basis for civilian law until the Modified Criminal Code was published in 1912. Many statutes enacted in France were interpreted as applying automatically to Cochin China, as to all other full colonies. The Civil Code of France was followed by the French courts in Cochin China, local modifications having been published as early as the *Precis* of 1883.

The old Vietnamese laws remained in an uncertain state of coexistence with the laws of France even after the publication of the various codes by the French. The applicability of the codes was not territorial, but *ratione personae*. Each person carried his own law with him and the regional codes applied only to natives of the region. A stranger, for example an Annamese in Tonkin, was subject to his own law in civil disputes and to French law if charged with a crime. A Frenchman, or another foreigner, would be subject to French law in all matters. Furthermore, the applicability of the law was, to a degree, a matter of choice, as anyone could elect the protection of French law in place of the traditional Vietnamese law that still coexisted with the French codes. There were French courts and Vietnamese courts, but the former enjoyed an overriding jurisdiction. The Vietnamese courts were composed of the courts of the native provincial administrators, sitting as magistrates as they had done under the Chinese system of the Gia Long Code, except that in Cochin China the judges of the Vietnamese courts were Frenchmen until 1921, when a few Vietnamese magistrates were appointed to hear criminal cases according to French law in the vernacular of the accused. In civil cases, litigants had a choice between French and Vietnamese judges, even when they sought to be judged by traditional Vietnamese law in preference to the statutes of the colonial regime. However, if one party was not Vietnamese, jurisdiction lay exclusively with the French court. The only appellate courts were French, and the only procedure for appeal under the traditional Vietnamese system was by petition to the throne.

While all of the codes published by the French for Annam and Cochin China were still in effect in the Republic of Vietnam, they were no more successful in bringing the law to the people than were the Chinese codes which preceded them. The conglomeration of customary, Chinese, and French laws and the cumbersome dual sys-

tem of administration did little to enhance the image of the law or the central government in the eyes of the average farmer in his hamlet. Significant advances were made under the French, but even to those Vietnamese who were exposed to the law and who understood its workings, it must have seemed that the "rule of law" meant simply the rules of the governing political power, imposed on a population whose only participation in the legal process was passive obedience.

A MACV Staff Study of 31 May 1965 summarized the effect of French law upon the Vietnamese as follows:

Under the French an effort was made to establish a judiciary apart from administration, and this brought French officials deeply into the Vietnamese judicial system, according to the 1962 Michigan State University study of RVN. "Thus the social structure was penetrated and fractured at the district and village levels. The canton chiefs and village elders were stripped of their police and judicial powers, which were given to the French policemen and judges." This led to further separation of the people from the law. The Michigan State University study noted "the introduction of a new legal code had upset the social structure of Vietnam. The Vietnamese were bewildered by both the form and the content of the new French law, which was rigid where Vietnamese law was known for its flexibility. The majestic slowness of the French judicial procedures were in marked contrast to the quickness of traditional justice." One of the main Vietnamese grievances against the French was the substitution of French laws for the Vietnamese code. "French law was completely out of harmony with traditional law and custom."

The French heritage remains heavy in the entire legal system, military and civilian. The older, more renowned lawyers and judges are often found to be French educated, French and non-English speaking. Professional works are often published in French. The French trappings as well as institutions are adapted by the Vietnamese, and these are superimposed over the Vietnamese society without much change. The Code Napoleon influence is naturally strong, and the civil code system, as distinguished from the common law, is employed. Trial by jury is not employed, the technique of cross-examination is severely limited, and the authority of an examining magistrate is much enlarged as compared with US or common law practice. One former French governor wrote: "We have destroyed the past and not built anything to replace it . . . It was with a handful of Frenchmen, under a killing climate, that we attempted to apply our laws to two million people belonging to a Chinese civilization which had stood against two thousand years of revolution."

Following its putative independence from France under the Elysee Agreements of 1949, the Vietnamese legal system remained much the same as it had been under the French, except that on 16 September 1954 the courts and legal system were completely taken over by the Vietnamese. With the appointment of Ngo Dinh Diem as premier in 1954 and the departure of Emperor Bao Dai in 1955 there began the promulgation of a long list of emergency decrees designed to control the population and resources and to protect the state under insurgent conditions. Seven different constitutions were promulgated,

suspended, and replaced as a result of a series of coups and counter-coups. In 1964 alone seven different governments came and went.

The Vietnamese Constitutions

The first constitution was promulgated on 26 October 1956, a year after the Republic of Vietnam was proclaimed, with Diem as president. It provided for separation of executive and legislative powers, but in practice the legislative power was insignificant. There was no separate autonomous judicial branch; the court system was under the supervision of the executive branch through what was then called the Department of Justice. The relationship between the executive and legislative branches was not clearly defined, and the executive, under President Diem, quickly became predominant. Under the constitution the president was vested with broad emergency powers to rule by decree between the short sessions of the legislature, and, in time of war, internal disturbance, or financial or economic crisis to exercise extraordinary power to institute any appropriate measures. While the constitution did provide for some checks on executive power, they were largely ineffectual.

President Diem's regime came to a violent end on 1 November 1963, victim of a successful coup. The 1956 constitution was replaced by a hastily drawn provisional charter on 4 November 1963. All executive and legislative power was placed in the hands of a Revolutionary Military Council headed by Major General Duong Van Minh. Since all power was centralized and exercised by the generals, the provisional charter had little legal significance.

A second provisional charter replaced the first provisional charter on 2 July 1964. This was soon followed by a third provisional charter on 16 August 1964. Both the second and third charters stressed the supremacy of military leadership and executive power. Major General Nguyen Khanh, who had unseated General Minh in January 1964, became chairman of the Revolutionary Military Council, which was the supreme organization of the nation.

The charter of 16 August 1964 was withdrawn because of severe criticism that it provided for a military dictatorship. It was replaced by the fifth constitution, the provisional constitution of 20 October 1964, which provided for a transfer of authority to a civilian government. The civilian government proved ineffective and relinquished its authority in June 1965 to a group of military leaders headed by Air Vice Marshal Nguyen Cao Ky.

This group established the National Leadership Council, a ten-man military directorate, with Major General Nguyen Van Thieu as chairman, a position comparable under the circumstances to that of chief of state. On 19 June 1965 the committee named Air Vice

Marshal Ky as prime minister and proclaimed the sixth constitution, another provisional charter.

In September 1966, a constituent assembly was elected by nationwide ballot to draft another constitution providing for the return to civilian government. The drafting committees consulted many constitutions, particularly the French, American, Japanese, and Korean, and were aided in their work by advice from the United States. The seventh constitution since the constitution of 1956 was proclaimed on 1 April 1967. It provided for a president, a bicameral legislature, and an independent judiciary. Checks and balances between the three branches were set out.

Decree Law

With South Vietnam in a state of almost constant warfare and political upheaval since 1954, the government came to rely increasingly on the use of emergency executive decrees as a means of controlling the people and resources and preserving order in the state. In Vietnamese terminology, a decree was an edict by the executive power, namely the president of the Republic or the prime minister, countersigned by one or more ministers. As a general rule, any decree had to be based on a previous law, that is on an act of the National Assembly. The president or the prime minister had the power to introduce a proposal of decree law. The legal office at the office of the president of the republic was in charge of contacting the minister involved for necessary discussion, exchange of ideas, and draft of the decree law concerned. The draft was then sent to the Council of Ministers for deliberation, and, if approved, it was promulgated by the president and published in the Republic of Vietnam official gazette. The decrees usually did not formally replace existing law, but added to it. If there was conflict between an existing law and a new decree, the new decree controlled.

Decrees were often vague in language and far-reaching in scope. For example, the 1962 law for the protection of morality prohibited abortion, sorcery, animal fights, smoking by persons under age eighteen, prostitution, which was defined as "voluptuous activities," dancing, and beauty contests. Article 4 stated, "Dancing at any place is forbidden. All various styles of dance which are harmful to the good customs and nice traditions, and all beauty contests are banned."

There were hundreds of decrees, affecting every aspect of Vietnamese life. Representative decrees designed to control the resources of the country were those regulating the stocking of goods, the distribution of food, the provision of security measures for rice truck convoys, and the possession and use of pharmaceuticals, medical supplies, batteries, sulfur, steel pipes, cotton seed, soybean oil, and

currency. Among the decrees regulating the life of the people were decrees placing strict controls on the press, requiring government permission for all meetings, including family gatherings, enlarging police powers to search, seize, and arrest, and controlling the use of roads and other transportation facilities. Decrees aimed most directly at suppressing insurgency were those which defined crimes against the state security, forbade membership in the Viet Cong, defined and punished "subversive acts," defined and prescribed the death penalty for "hooliganism" and other offenses, declared a state of emergency, declared a state of siege, declared martial law, and declared war. (*See Appendix B.*)

A survey of the decrees does, however, reflect the efforts of the various governments of South Vietnam to meet the insurgency and invasion threats and at the same time to preserve a reasonable measure of freedom, disrupting the normal patterns of life of the citizens as little as necessary, and giving considerable obeisance to formalism and legal reasoning, which Vietnamese officials, jurists, lawyers, and politicians believed their legal institutions required. That the efforts frequently failed was due to a variety of reasons, one of which was the basic inability of the law enforcement machinery to take on the tasks necessary to support wartime decrees in a war-disrupted country. Another reason was the lack of tradition to support obedience to or respect for the law. A third was that often the decree sought to build upon a foreign, primarily French, law without full knowledge of that law, its modernization, or its wartime application. There was also an apparent belief that severe-sounding laws would not have to be applied as threatened. It is noteworthy that throughout most of the war the decrees, and the courts in enforcing them, declined to take the position that a state of war existed or that wartime penalties should be imposed.

From a legal standpoint, among the most controversial decrees were those that provided for the detention of individuals who were considered dangerous to national security. This category of civilian security suspects consisted of civilians arrested by the police or security guards, or persons detained as a result of military operations who were not readily classifiable as innocent civilians or prisoners of war. Civilian security suspects were initially investigated by the police. If it appeared that they were innocent, they could be released by the police chief, the district chief, or the province chief. If there was sufficient evidence for trial they were turned over to the military courts, which, as in most civil law countries, had jurisdiction over all national security offenses.

If there was insufficient evidence for trial but an individual was nevertheless deemed dangerous to security, he was held for "processing" by the province security committee. This committee consisted

of the province chief, the deputy chief for security, the prosecutor (the only legally trained member of the committee), a National Police representative, a Military Security Service representative, the sector S-2 (a Vietnamese military intelligence officer), and one person representing the Regional Forces and Popular Forces. These committees had the authority to release a suspect, to order him to live in a certain area, to banish him from a certain area, or to incarcerate him in a re-education center for a period of up to two years, such periods being renewable indefinitely. If the committee decided to incarcerate an individual, the recommendation was sent to the Central Security Committee in Saigon, which forwarded it to the Minister of the Interior for signature. The Minister of the Interior, who often was an attorney or judge, was responsible for the internal security of the state.

Proceedings of a security committee were not judicial in nature, although the committee could allow a suspect to be present and be represented by counsel.

Periods of confinement varied: some were for as little as three months, others were extended beyond the original two years. The duration of confinement was influenced by the inadequate facilities for the numbers involved, and ultimately the normal period of confinement for political prisoners, those considered enemies of the state, often including Viet Cong, was between six months and a year. The result was an anomalous situation in which a member of the Viet Cong, taken in combat and dealt with as a prisoner of war, could go to a prisoner of war camp, where he would be treated according to the Geneva Conventions of 1949, but where he would also be likely to remain until the war came to an end; on the other hand, a member of the Viet Cong picked up by the police in a city or village search would likely be sent to a re-education center, where he would be treated as a pretrial criminal, without Geneva Convention benefits, but where he probably would be confined for as little as six months and then set free without a trial.

The courts played no part in sending individuals to the re-education centers, nor could a prisoner seek release through the courts. The common law concept of habeas corpus was alien to Vietnamese jurisprudence, as it is generally in the civil law system. This is not to say that no effort was made to prevent unjust confinement or to release those who might be confined without sufficient cause. The re-education centers were operated by the Ministry of the Interior, but the Ministry of Justice had constitutional responsibility for supervising detentions which were under its control. There was co-operation between the two ministries, and Ministry of Justice prosecutors were able to inspect the prisoners, review confinement records, and report to the Minister of Justice, who could recommend

that prisoners be released. A prisoner or his relatives who felt that a detention was unjust could complain to the prosecutor, who would conduct an investigation.

Under the terms of the 1967 constitution, many of the emergency decrees promulgated earlier were of questionable validity. Yet with few exceptions they remained in effect, and additional decrees were promulgated, further concentrating power in the executive. On 10 May 1972 President Thieu declared martial law. The constitution authorized the president to declare "a state of emergency, curfew or alert" which the legislature must ratify, amend, or reject within twelve days, but there was no specific provision for a declaration of martial law. Some legislators, therefore, thought the decree of 10 May unconstitutional, but it was not rejected. On 28 June the National Assembly passed a bill delegating to President Thieu the sole power to decide by decree any necessary measures in the fields of security, defense, economy, and finance "for a six-month period." Later decrees directed measures to be taken and penalties to be given for violations of "security and public order during wartime or a state of martial law." These decrees were largely variations upon themes of earlier decrees setting forth security measures.

The decrees were emergency political measures taken by a government at war—a war that raged the length and breadth of the country, where the enemy mingled with the citizenry, where political and social institutions were as much targets as were military forces. In order to cope with this situation, measures were enacted regulating virtually every aspect of political, economic, and social activity. Some decrees were detailed; others were sweeping. Generally, decrees gave the government sufficient authority for effective action in the area of national security. In terms of legal craftsmanship, the law and procedures prescribed were often lacking in definiteness, coherence, and uniformity. The profusion of decrees alone would make any comprehensive analysis of their impact on the legal system extremely difficult. Many of the measures enacted envisioned legal concepts unfamiliar to American attorneys, while some decrees contained Western terms which had no precise correlation in Vietnamese jurisprudence. Some of the decrees were secret, and others were not publicized. Since many previously enacted decrees and statutes remained in effect, at least nominally, there were inevitable conflicts between provisions of the different decrees, codes, and the latest constitution.

Drafting executive orders, which are in the nature of legislation, is always a difficult task. On the one hand, the exigencies of the situation must be met, but on the other hand, the measures taken must be within the limits of constitutional authority and should be reconciled with previous policies and laws of the government. This

exacting work requires time, favorable working conditions, and an adequate pool of experienced attorneys, none of which was readily available in Vietnam during the war.

The Ministry of Justice

Prior to the enactment of the 1967 constitution, the Ministry of Justice was the paramount legal institution in the government, with authority over all courts, judges, and prosecutors. There were statutory guarantees designed to promote independent decisions by judges in litigated matters, but the authority of the ministry included the power to supervise the administration of the court system, to appoint, transfer, and discipline members of the judiciary, and to exercise financial control over the judicial system. Under the 1967 constitution the judiciary became separate and independent from the executive branch of the government; the judiciary was granted an autonomous budget, and the Supreme Court exercised authority over all courts and judges.

Other important responsibilities of the Ministry of Justice were retained within the framework of the 1967 constitution. Acting through its "prosecuting judges" (public prosecutors) the ministry prosecuted penal actions, and it could participate in civil actions if it determined such a course was warranted to protect the public interest. It advised the government on legal matters, drafted legislation, administered the prisons, controlled the judicial police, and was responsible for law reform.

The responsibility of the Ministry of Justice as legal adviser to the government was particularly significant since the various ministries did not have legal advisers or legal staffs of their own. Advice was requested on such matters as the civil rights of citizens, the exploitation of natural resources, administrative contracts, and government reorganization. The ministry might also be called on indirectly to advise province chiefs and provincial administrators, who did not have their own legal advisers. These officials normally sought advice from the Ministry of the Interior, which could in turn request assistance from the Ministry of Justice.

Starting in the mid-1960s the Ministry of Justice conducted a vigorous campaign to modernize the laws and increase the use and efficiency of the legal process. In 1965 a Law Study Committee was named by the Minister of Justice for the purpose of unifying the various legal codes that were in effect in the country. The committee, which was financially sponsored by such organizations as the Asia Foundation and the U.S. Agency for International Development, was chaired by the Minister of Justice and included prominent Vietnamese attorneys and judges. The committee worked for three years

to review and redraft the criminal code, the civil code, and the codes of criminal, civil, and commercial procedure. The unified codes were forwarded to the legislature in mid-1969 for debate and vote. To ensure continuation of the work of the committee, it was institutionalized as a Law Center attached to the Ministry of Justice, with the Minister of Justice and the chiefs of the public law section, the civil law section, and the criminal law section of the ministry as members of the Law Center planning board. The Law Center continued the revision of the code of commerce, which was begun by the Law Study Committee, and began work on the administrative code, the code on the authentication of legal documents, and the code on the expropriation of properties for public use. Other projects slated were the revision of the military code, the labor code, and the housing code.

The systematic study and revision of the laws by Vietnamese scholars will be a major step toward gaining the respect of the people for the law, thus forging a bond between the people and the government. The official and unofficial, formal and informal, personal and private support of the American military lawyers in Vietnam has contributed substantially to this process.

A number of steps were taken by South Vietnam to promote the effective administration of the law by ensuring an adequate number of qualified personnel to perform legal functions. After 1967 the Supreme Court was responsible for the regulation and supervision of all judges. This responsibility was fulfilled through the activities of the judicial administration committee. The Supreme Court also established its own law and research center in 1969. Within its jurisdiction, the Ministry of Justice drafted regulations governing the careers of prosecutors and establishing the independent status of notaries, who were previously government officers under the control of the ministry. The ministry also took steps to increase the number of process servers in each province and to bring the judicial police directly under the control of the ministry.

The Court System

A direct result of the separate administration of Annam and Cochin China under the French is that historically South Vietnam has had two court systems, one centered in Hue, the other in Saigon. The ultimate court of appeal for both was the *Cour de Cassation* in Saigon, but each of the two systems administered a different code of laws and each had its own bar and law school. The courts in Vietnam adhered to the French model in that there were dual systems of judicial and administrative courts, each having its own hierarchy and each culminating in an appeals court. The judicial courts heard

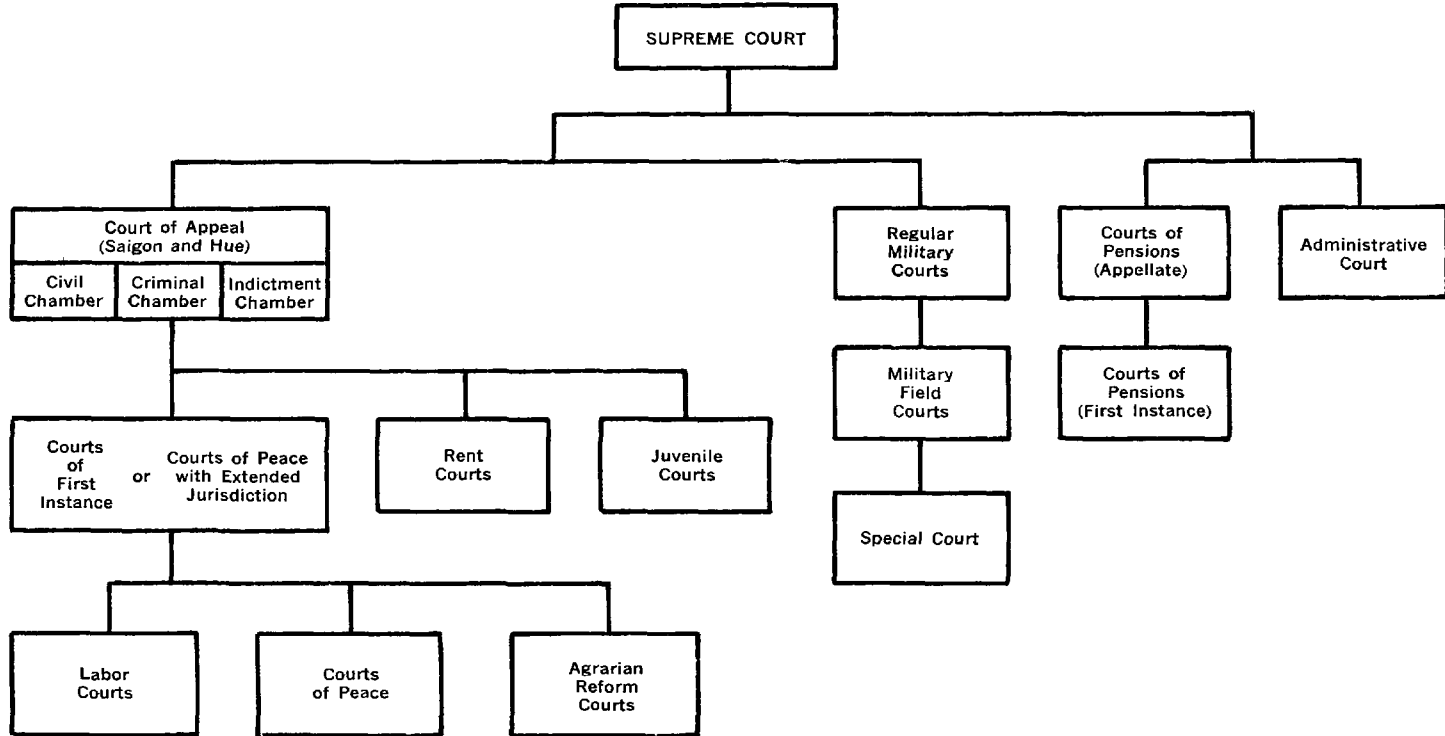
the traditional criminal and civil matters, while the administrative courts had jurisdiction over disputes between citizens and the state involving certain specialized areas of government action.

The highest judicial court was the *Cour de Cassation*; the highest administrative court, the Council of State. There were also a number of specialized courts having cognizance of cases in such areas as employer-employee disputes; a juvenile court; agrarian courts; and a court to hear landlord-tenant disputes. Before the changes effected by the constitution of 1967, the judicial system of South Vietnam was wholly a part of the executive branch of the government, with the Minister of Justice as executive head of the legal system having responsibility for organizing and supervising the courts, for administering the laws, and for defining the regulations governing the legal profession and the practice of law. While the 1967 constitution instituted major changes with respect to the prerogatives of the newly created Supreme Court, the judicial system remained French in tone and the functions of the lower courts were virtually unchanged. (Chart 4)

Vietnamese trials are unlike those in the United States, which are characterized by procedural technicalities designed to protect the rights of the accused and direct confrontation and cross-examination of all pertinent witnesses before the court, and which permit aggressive participation by counsel at all stages of the proceedings. Vietnamese trials, like those of other civil law systems, are inquisitorial in nature. The function of the court is not to act as referee in a contest between opposing counsels, but to make a judicious inquiry as to the facts and then to apply the law so as to achieve substantial justice.

Criminal cases are processed in two stages. The first stage of each case is the investigation, which may be a routine matter performed by police or other authorities, or may be an exhaustive compilation and analysis of evidence performed by an examining magistrate from the prosecutor's office over a period of several months. Once the investigation is complete, the case is forwarded to the prosecutor, who determines whether the case should be sent to trial. The second stage of the case, the trial, provides a forum for a disinterested review of the government's evidence and an opportunity for the court to examine the accused and call such witnesses as it, in its discretion, feels are relevant to the issues at hand. In simple and *flagrante delicto* cases there is little deliberation; in serious, complex cases the most important piece of evidence is often a voluminous dossier compiled by the prosecutor's office. Witness testimony before the court, if there is any, is apt to be abbreviated, with the president of the court asking all the questions. The president is in complete

CHART 4—JUDICIAL SYSTEM OF THE REPUBLIC OF VIETNAM



charge of the court; the participation of counsel is limited primarily to argument.

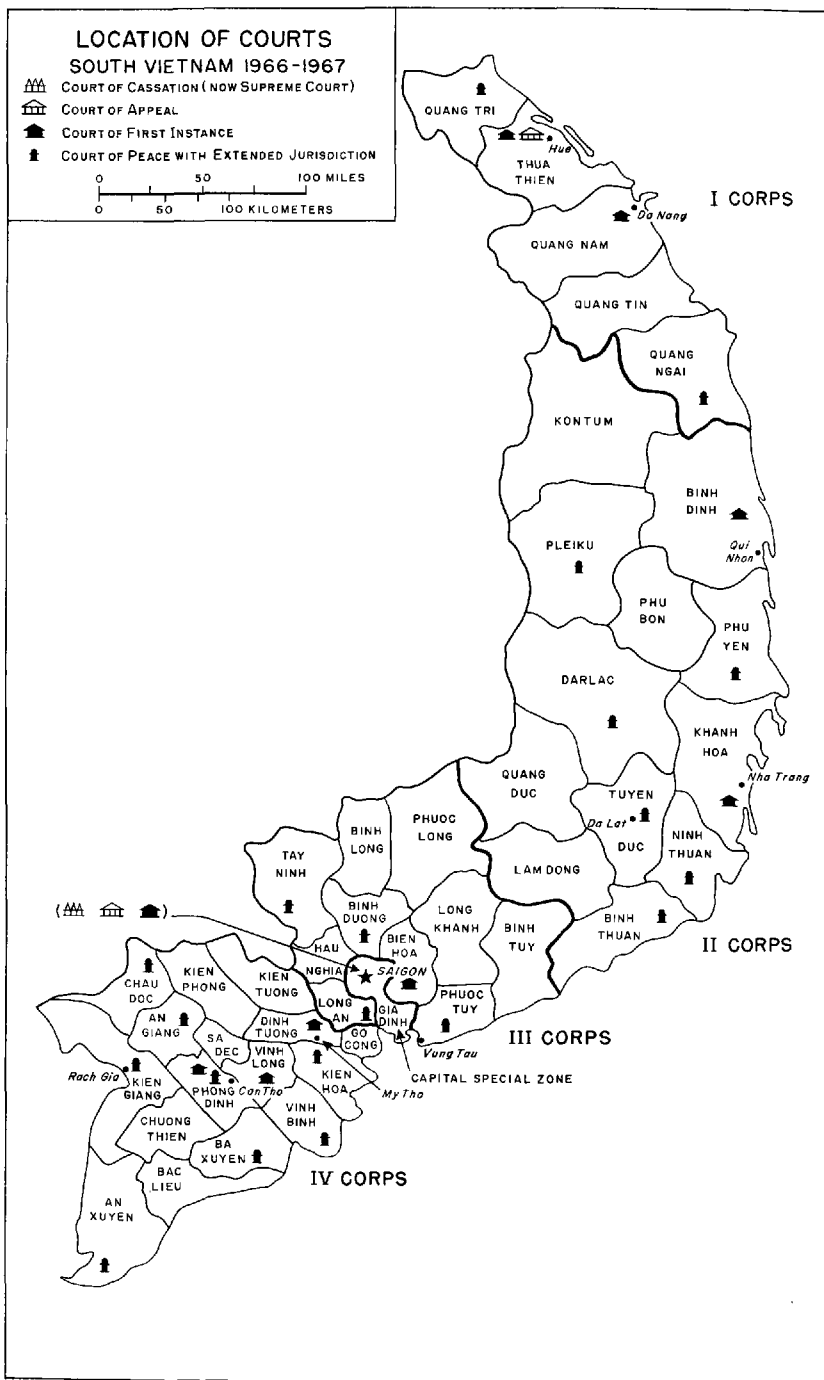
In the military courts, trials seldom last more than a day, and it is not unusual for a field court to try more than a hundred desertion cases in a trial session of two or three days. In the eyes of the accused it is the prosecutor who is the dominant figure in the proceedings. Defense counsel does not usually participate actively in the pretrial stage of a case; it is the prosecutor's office which gathers the evidence and compiles the dossier upon which the case is tried, and it is the prosecutor who decides whether to send a case to trial. If a criminal case goes to trial there is a very high probability of conviction. At trial the prosecutor speaks from a raised platform, equal in height to the court's bench, while the accused and his counsel are at floor level. If the accused is convicted, the recommendation of the prosecutor carries great weight with the court in determining an appropriate sentence.

In comparison with American practice, the role of defense counsel seems severely curtailed; yet defense counsel in Vietnamese courts performs an important function by assisting the court to apply properly the correct law to a case and by ensuring that any factors favorable to the accused are developed before the court. The impetus in a criminal proceeding is nevertheless clearly furnished by the government, with the prosecutor as the key figure in the administration of justice. Thus a heavy responsibility rests on the prosecutors to be scrupulously fair in safeguarding the rights of the accused as well as those of the state in order to maintain the credibility of the system. This need for objectivity on the part of the prosecutors is recognized by the Vietnamese, who accord them the title of "prosecuting judges" and classify them as judges rather than as practicing attorneys. (The prosecuting judges are members of the Ministry of Justice. The magisterial judges, who determine guilt or innocence and assess punishment, are members of the judiciary and are regulated and supervised by the Supreme Court.)

There were five steps in the hierarchy of the judicial courts: (1) *Cour de Cassation*; (2) Courts of Appeal; (3) Courts of First Instance; (4) Courts of Peace With Extended Jurisdiction; and (5) Courts of Peace (or Justice of the Peace). (*Map 1*)

The *Cour de Cassation* sat in Saigon as the highest judicial court of appeal. It heard civil, commercial, and criminal appeals, and had jurisdiction to hear cases in which it was alleged that a lower court had abused its powers, was in conflict with the judgment of other courts in similar cases, or had made certain technical errors.

There were two Courts of Appeal, one in Saigon, the other in Hue. Each was divided into two chambers, civil and criminal. Appeals in civil cases were heard by a panel of three judges who heard mis-



MAP 1

demeanor cases; two citizen assessors were added to the panel in felony cases.

The Courts of First Instance, of which there were nine in May 1967, usually consisted of a presiding judge, a prosecutor, an examining magistrate, and a clerk. If the court was busy, as in Saigon, additional judges and other personnel could be added. These courts had jurisdiction to hear all civil, commercial, and criminal cases. They could also rehear cases from Courts of Peace With Extended Jurisdiction and from Courts of Peace.

The Courts of Peace With Extended Jurisdiction, of which there were twenty throughout the provinces in 1968, had jurisdiction over civil and commercial cases and all criminal cases except the most serious felonies. They also exercised control over the Courts of Peace. These courts consisted of a presiding judge and clerk. There was no examining magistrate or prosecutor. In some criminal cases two assistant judges might be added, but there was never a prosecutor present.

The Courts of Peace consisted of a single magistrate (justice of the peace) and clerk. Frequently a district chief acted as magistrate. They tried minor civil cases and petty criminal offenses, conciliated disputes brought before them by citizens, and conducted investigations into serious criminal offenses. In 1966 approximately ninety of these courts had been established at district level and at some of the more isolated province capitals. Because of wartime conditions and budgetary restrictions, operations of the Courts of Peace were not emphasized. Endeavors were made only to provide each province with a Court of First Instance.

The Council of State was the highest court of administrative appeal. It heard appeals from the decisions of the Administrative Court and the Appellate Court of Pensions. When asked to do so it could render legal advice to the government and assist in drafting laws and decrees. The Administrative Court heard cases brought by citizens against the government and disputes between government agencies. The Appellate Court of Pensions and the two Courts of Pensions took cognizance of complaints regarding allowances to disabled veterans.

The specialized tribunals were the labor courts, which heard disputes between employers and employees; the juvenile courts for trial of delinquents under the age of eighteen, except in case of political offenses and "hooliganism," which were reserved for trial by the military field courts; the agrarian courts to handle litigation arising from agrarian reform laws; and the rent courts to hear landlord-tenant disputes. Decisions of the agrarian courts were final. Appeals from decisions of the others were heard within the judicial court system.

Chapter V of the 1967 constitution provided for a Supreme Court vested with "independent judicial power" and empowered to establish and administer regulations for the judiciary. It stated that the separate responsibilities of judges and prosecutors were to be clearly delineated and governed by separate regulations, with judges under the control of the Ministry of Justice. The Supreme Court was given extensive powers of review "to interpret the Constitution, to decide on the constitutionality and legality of decrees and administrative decisions," and to decide on the dissolution of political parties whose activities "oppose the republican form of government." Supreme Court justices could be removed from office only for "moral or physical incapacity, conviction, or violation of discipline."

The first step in implementing the changes prescribed in the 1967 Constitution was taken on 17 October 1968, when the National Assembly elected nine justices of the first Vietnamese Supreme Court. Although the constitution provided for the appointment of six additional justices, none was nominated. Shortly after the Supreme Court took office the two existing "supreme courts," the *Cour de Cassation* and the Council of State, were suspended, and their functions were assumed by the new Supreme Court. The authority of the Supreme Court was extended beyond that of the *Cour de Cassation* in that the Supreme Court could hear and decide exceptional pleas made at any stage of a pending case raising the constitutionality of law, decree, or administrative ruling. Supreme Court decisions were binding, and a ruling had the effect of stopping implementation of unconstitutional or illegal legislative enactments, administrative regulations, or administrative decisions from the date of publication of its decision.

The Military Courts

The military courts played a prominent role in the Vietnamese legal system. Under wartime mobilization, a substantial percentage of the population acquired military status, and all military offenders were tried by military courts, regardless of the nature of the offense or the circumstances under which it was committed. Military status encompassed not only active members of the regular armed forces but also members of auxiliary and quasi-military organizations, and even some civilians who worked closely with the military. If a crime was committed by a military member with a civilian accomplice, the civilian accomplice could be tried by the military court. Finally, all civilian security offenders were tried by military courts, in accordance with executive decrees defining security offenses and specifying the forum for trial.

The chief of all legal services for the entire Vietnamese armed forces was the Director of Military Justice, an Army colonel who

reported directly to the Minister of Defense rather than to the Army chief of staff. (Nguyen Mong Bich, who served as director of the Directorate of Military Justice from 1964 to 1966, was elected one of the first nine justices of the Supreme Court.) The director gave advice to the Minister of Defense on all legal matters; studied and implemented the organization, operation, and administration of the military courts; recommended changes to the Vietnamese Code of Military Justice, which is modeled on the French Code de Justice Militaire; studied all problems of national and international law concerning the Vietnamese armed forces; and rendered legal assistance. These functions were carried out by the personnel of the Directorate of Military Justice, the Vietnamese equivalent of the Judge Advocate General's Corps.

There were approximately fifty military justice corps officers, ranging in rank from first lieutenant to colonel. Most were law school graduates, but not all had completed the probationary period required for full admission to the bar. These officers could function as prosecutors, examining magistrates, or judges. They were assisted by bailiffs, clerks, and the judicial police. The directorate was charged with the investigation, preparation, prosecution, and trial of cases falling within military jurisdiction for all of the Vietnamese armed forces. The directorate also operated confinement facilities in each corps area for the detention of individuals awaiting trial by the military courts, which were located at Da Nang, Nha Trang, Saigon, and Can Tho.

The Regular Military Courts were activated by Ordinance Number 8 of 14 May 1951 which promulgated the Code of Military Justice. The presiding judge in each court was a civilian, chosen from the local Court of Appeals. The alternate presiding judge was a field grade officer from the Directorate of Military Justice. The other members of the court were detailed from local military units. The prosecutor and his staff were Directorate of Military Justice personnel, but there was no military defense counsel. An accused could hire civilian counsel, or, if he did not have the means, civilian counsel would be appointed for him from the local bar. The jurisdiction of these courts was extensive. They had jurisdiction over all military personnel of the regular armed forces, all paramilitary personnel in a military status, and even some civilians who were granted the status of military personnel because of their connection with the armed forces, for violations of military law and ordinary criminal law. These courts could adjudge any penalty including the death penalty. Appeals from these courts were made to the Supreme Court.

The military field courts were established by Decree Law 11/62 of 21 May 1962 to hear expeditiously *flagrante delicto* cases in which the evidence was considered so clear or the offense was so simple that

extensive pretrial investigation was not warranted. Under the Vietnamese concept, *flagrante delicto* included not only cases of individuals actually caught in the act of committing an offense, but also cases in which individuals were caught having in their possession "any object, weapon, material or document which could lead to the belief that he is the author of the crime or an accomplice thereof."

Decree Law 4/66 assigned the field courts additional jurisdiction during the state of war over cases of bribery, influence peddling, embezzlement of funds, and illegal speculations, regardless of whether the accused was a civilian or a serviceman, and regardless of whether the accused was apprehended in *flagrante delicto*. Decree Law 15/66 assigned the military field courts jurisdiction over cases of desertion, encouraging desertion, and protecting and harboring deserters. Under Decree Law 11/62 the court included one presiding judge and four military jurors. There was no provision for objection and appeal and the judgment was executed immediately after being pronounced, provided the death penalty was not included. In 1970, however, the Supreme Court, employing the American idea of judicial review, decided that much of the jurisdiction, court composition, and procedure of the military field courts was unconstitutional. Under Decree Law 06/70, 23 June 1970, military field courts were vested with jurisdiction over deserters and accomplices, servicemen and assimilated servicemen apprehended in *flagrante delicto*, and their civilian accomplices and accessories in the case of all felonies and misdemeanors prescribed by the Code of Military Justice, the Code of Criminal Law, and other rules and regulations. The military field court was revised under the June decree to include one presiding judge and four associate judges. If the presiding judge was a civilian judge, he had to be a chief judge or an associate judge of the Court of Appeals; if military, he had to be of the rank of major or higher. The associate judges of the military field courts had to be professional military judges appointed by the Supreme Court. Decree Law 06/70 also provided for an appeal to the Supreme Court in all cases except desertion.

The Law and the People

In theory, the Vietnamese court structure appears to extend nationwide in a highly sophisticated and comprehensive manner. In reality, however, the activities of most of the courts and virtually all of the civilian bar were limited to the principal cities. In the countryside, Courts of Peace were the only legal instrumentalities. These courts were not staffed by judges or qualified attorneys. The Justices of the Peace who presided over these courts, were provincial administrators, often military officers, lacking legal training and experience. Since there were few lawyers or judges at the local level, the average

Vietnamese could not see the administration of the law as being substantially different from any other exercise of governmental authority.

Traditionally, the Vietnamese have not relied on the law to settle their disputes or affirm their rights because they were not familiar with the law, and the legal apparatus was not easily available to them. A major factor in the remoteness of the law from the people had been the shortage of practicing attorneys in Vietnam. In 1967 there were only 193 fully qualified attorneys in all of South Vietnam. Of this small number, 150 practiced in Saigon, and thirty of the forty-four provinces had no lawyers at all. In addition to the practicing attorneys there were approximately 100 judges, a category which included prosecutors as well as magistrates. Only two schools produced lawyers in Vietnam, one at Hue and the other at Saigon. The Law School at Saigon had about 4,000 students, but only a fraction were studying law as U.S. students would know it. The others studied economics, public administration, political science, and international affairs. In 1964, for example, only twelve probationers were admitted to the bar for the entire country.

In considering these figures it is well to remember that the demand for legal services in Vietnamese society has been vastly different from that of Western, or, more particularly, American society. The Vietnamese economy is not an industrial or commercial one. There are relatively few automobiles, insurance companies, and real estate transactions to generate legal business. Average income is low, but it takes relatively little to live on. In addition to these and many other factors that tended to keep the lawyer population low, lawyers in a civil law system are not expected to provide the same services in the same manner as do lawyers in a common law system such as that in the United States. Finally, there is much to be said for local, nonjudicial, and prompt settlement of petty disputes and minor offenses, and this method has worked quite well in many instances in Vietnam. In any case, the law as symbolized by the operation of the legislature and the courts with the active participation of the citizenry, represented by qualified counsel, has not played a significant role in the forming or functioning of Vietnamese society.

The role of law in society is relevant to the conduct of war in two respects. First, the law can play a vital part in the effort to control the people and resources of a country and to curtail subversive activities. If there are well-written laws, effective co-operation between the police and the courts, and an efficient method for processing cases at the local level, people soon become familiar with the requirements of wartime measures; they realize that the laws are being enforced and that those who violate them will be punished. This awareness promotes increased voluntary compliance by the great majority of

the population, and it acts as a positive deterrent to those inclined to break the law. Second, and no less important, the law can help the war effort by effectively and justly operating within the courts at the local level, thus providing order as well as a highly visible symbol of the government's capability and its concern for the needs of the people. The need for personal security and a means for settling disputes are basic to organized society; by administering to those needs through the law, a government can engender loyalty and foster a spirit of participation and co-operation among the people that can pay high dividends in a counterinsurgency effort.

In the Vietnam War, because of the existence of insurgency and counterinsurgency and because worldwide scrutiny was applied to the struggling government of South Vietnam, law assumed even more importance than might have been expected. Insurgency characteristically capitalizes on existing law to shield insurgents, exploit weaknesses in the governmental and legal structure, and in general uses the nation's law to aggravate any division between the populace and the counterinsurgency forces. On the other hand, the government's forces look to the law for new powers and authority in order to control the insurgents, and in doing so can very easily further alienate the populace from its own government. Failure by the government to grasp the intricacies of the equation can easily lead it to increasingly oppressive rule and deeper complications in its effort to extricate itself from the insurgency. One of the most subtle but significant questions the government has to answer is how to combine all forces, military and civilian, in the solution of insurgency. Sharp or traditional lines of demarcation as to what is civilian and what is military are not apparent in such a situation. The commander who does not see and provide in his counterinsurgency plans for the role of such civilian agencies as the police, the prosecutors, the courts, the jails, and the law generally has likely foredoomed his military efforts.

Communist forces have generally well understood the political military interrelationships, and the war in Vietnam was not in this regard an exception. The Free World forces, possibly in part because of the number and sovereignty of their components, seemed slower to grasp the significance of the role law plays in insurgency, slower to create the necessary civilian-military team, and slower to ensure that law supported them in their relations and operations involving the people of Vietnam instead of eroding or working against their goals.

The goldfish bowl aspects of the Vietnam War—the constant presence, reporting, and commentary of a worldwide press relatively free to roam about South Vietnam within the protection of the Free World forces—contributed heavily to the influence that world opinion of law or its absence would have on the war effort of the Republic of Vietnam. To fight for its life while at the same time

building a rule of law, to create a bench and bar and establish a civil service where none has existed is a tough task for any government. To do it under the constant and critical eye of a press that compares what it sees with what it expects of its own experienced and sophisticated governments further complicated the matter in Vietnam. Not only was it important to have a just administration of law; that administration had to appear just to the public media or the government would pay a price before world opinion. The enemies of the Republic of Vietnam, however, the Viet Cong and the North Vietnamese, were not tested in the same manner and consequently were in a position to gain considerable propaganda and political advantage. Recognizing these circumstances, and the opportunities as well as the dangers they presented, the MACV Staff Judge Advocate took steps early to bring the political-military aspects of law into focus.

CHAPTER III

The Judge Advocate Advisory Role

A unique aspect of MACV judge advocate activities was the advisory function. The use of the word advisory, which was the customary U.S. label for other MACV activities, is misleading in that it suggests that the American military lawyers were advising their Vietnamese counterparts in the application of Vietnamese law. A more accurate title would be liaison function, since the judge advocates and the Vietnamese lawyers exchanged information and co-ordinated their activities in the field of military law. It is true that the American military lawyers did, on occasion, offer advice to their Vietnamese counterparts, as in the case of applying the Geneva Conventions and in the control of desertion, but most of the Americans' so-called advisory efforts were directed toward collecting information on the workings of military law and military legal institutions; assisting their Vietnamese counterparts in securing necessary funds, people, and material to accomplish their tasks; obtaining references and answering inquiries concerning American law; and ensuring that American and Vietnamese respective military law programs worked in harmony with one another.

The judge advocate mission of providing effective legal counsel for the U.S. command required close co-ordination with all the legal agencies of the government of Vietnam. Beyond functional co-operation, however, the MACV Staff Judge Advocate was also charged with assisting the Republic of Vietnam armed forces legal branch, the Directorate of Military Justice, to develop in a manner that would effectively contribute to the prosecution of the war. While advisory activities in the strict sense were limited to the Directorate of Military Justice, members of the MACV Judge Advocate's office also established communication with members of the government and civilian legal community and assisted them in developing legal institutions whenever possible. This association was only natural in a country where the bar was small and concentrated mainly in Saigon, where military and civilian legal problems were often intertwined, and where there was no U.S. civilian legal community to work with the local bar. Cases in which mutual professional respect and friend-

ship among attorneys exerted a positive influence enabling clients to resolve their differences were countless. In Vietnam the cordial relationship between U.S. military attorneys and Vietnamese lawyers benefited both governments.

Beginnings and Development to 1965

While the Advisory Branch of the MACV Judge Advocate's office was not formally established until 1965, judge advocates had been cultivating friendships with Vietnamese attorneys for some five years. The positive results of such voluntary activity on the part of judge advocates are illustrated in an excerpt from a trip report prepared by Colonel Lawrence Fuller, Chief, International Affairs Division, Office of The Judge Advocate General, Department of the Army, who toured the Pacific commands in late 1962. Speaking of the efforts of Colonel George F. Westerman as Staff Judge Advocate to the U.S. Military Assistance Advisory Group, Indochina, the report states:

Colonel Westerman is doing an exceptional job as SJA in Vietnam. In addition to a well-run office two things should be mentioned. First, he has excellent relations with the embassy where he serves as their lawyer, also. Many of the embassy people knew him in Paris, came to rely on him there, and continue that reliance here. Second, he devotes his evening hours to several worthwhile kinds of instruction. Twice a week he teaches American Jurisprudence to law school students continuing Colonel [Paul] Durbin's classes. Twice a week he teaches a class in American Political Ideals to undergraduate classes in the university, reaching a group [the university undergraduate] that worldwide is the natural target for communist propaganda. Finally, twice a week he teaches English to a class of judges and officials of the Ministry of Justice and has a morning session for the Minister of Justice alone. As a result any question involving the United States coming before the Ministry of Justice or the Saigon courts comes before one of Colonel Westerman's students. This latter activity has already paid off as the Ministry of Justice has now indicated that Vietnam will have no objection to the convening of U.S. courts-martial in Vietnam and will use its processes to make local witnesses available. This has been a problem to us throughout Indo-China since 1954 and is the first breakthrough we have had. For eight years the Department of State insisted that because of local objections we could not convene courts in Vietnam, Laos, Cambodia, and Thailand. Colonel Westerman by his round-the-clock efforts is making countless friends for himself and for the United States.

The efforts of Colonels Durbin and Westerman were continued and expanded by subsequent judge advocates. By 1965 a multifaceted advisory program was accounting for a significant portion of the time of the MACV judge advocate's office. Special emphasis was placed on aiding the Vietnamese to develop legal programs that would increase the efficiency of the armed forces, deter subversive activities of the Viet Cong, and promote loyalty to the Saigon government.

One important advisory effort was the collection, translation, and interpretation of Vietnamese decrees and regulations relating to the resources control program, military discipline, and other subjects having a bearing on the conduct of the war. The MACV Judge Advocate's office was the first agency in the U.S. command to undertake this task in a comprehensive way. As the documents were translated by the Vietnamese attorney working in the Judge Advocate's office, copies were forwarded to appropriate U.S. government agencies and MACV staff sections so that all U.S. personnel could keep abreast of changes in the Vietnamese system and work more effectively with their Vietnamese counterparts. For example, in January 1965 distribution of Minister of Defense Decree 546 to all U.S. advisers was completed. This law was significant to the resources control program because it granted broad authority to the Vietnamese military police to conduct investigations and make arrests, particularly in cases concerning offenses against state security, which included the unlawful acts of the Viet Cong and their accomplices, sympathizers, and collaborators. Previously there had been large jurisdictional gaps where matters of state security were concerned. This broadened jurisdiction was especially important in areas away from the principal cities, where law enforcement officers were thinly spread and it was important to take decisive action quickly in order to prevent offenses or to apprehend offenders. The distribution of this decree complemented a comprehensive study on the resources control, arrest, and search and seizure laws of the Republic of Vietnam, which had been prepared by the MACV Staff Judge Advocate's office and was also distributed to U.S. advisers in January 1965. By March this study had been translated into Vietnamese and distributed to U.S. advisers for use in conjunction with their Vietnamese counterparts. In May the translation into English of all Vietnamese resource control laws, orders, and directives was completed. A special edition of seventy mimeographed sets was furnished to the Naval Advisory Group for distribution to all U.S. vessels on patrol in Vietnamese territorial waters.

In order to broaden the base of known Vietnamese law, opinions prepared by the Vietnamese civilian attorney in the MACV Staff Judge Advocate's office were serialized, stenciled, and distributed to all U.S. service lawyers in Vietnam. The first three published opinions were titled "A Study of the Attorney Profession," "Procedures for Transaction in Real Estate," and "Acquirement of Real Estate in Vietnam by Foreigners." The MACV Staff Judge Advocate's office prepared an English-Vietnamese Law Dictionary, copies of which were furnished to all U.S. and Vietnamese military and civilian lawyers and judges in Vietnam. The office had recommended that the MACV Adjutant General establish a uniform indexing

system and format for translated versions of Vietnamese decrees, directives, and other documents, but pending action by the Adjutant General the Staff Judge Advocate's office continued to collect, translate, mimeograph, index, and distribute Vietnamese government documents. By July 1965 eighty-five documents had been so prepared, all relating to some aspect of Vietnamese law. Summaries and reports on Republic of Vietnam armed forces military justice and the republic's civil legal system were also prepared by the MACV Staff Judge Advocate's office to assist the field advisory effort.

In addition to collecting and utilizing Vietnamese laws, the Staff Judge Advocate's office also furnished appropriate law books, texts, and other legal materials to the Vietnamese. In order to assist the Minister of Justice of Vietnam in preparing an election law, the Staff Judge Advocate sent him in April 1965 a copy of the Precinct Chairman's Manual: Korean Election Law of 1948, which was prepared when Korea was under U.S. military government, and a report by the U.S. Presidential Commission on Registration and Voting Participation. During the same month the Minister of Justice and Minister of the Interior were also sent copies of Law and Population Control in Counterinsurgency, prepared by The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. In May forty Judge Advocate General's School texts on international law were distributed to various Vietnamese agencies and individuals, including the ministries of foreign affairs, interior, and justice, the law school in Saigon, and the Vietnamese judge advocate officers. In June similar distribution was made of texts on civil law and the law of land warfare. The Staff Judge Advocate's office also participated in Law Books-USA, a program funded by voluntary contributions from U.S. lawyers to provide foreign lawyers with sets of eight American paperback lawbooks. In June thirty-five sets of such lawbooks were obtained for distribution to Vietnamese lawyers, judges, military law officers, and others who would benefit by them.

Judge advocates devoted considerable time in 1965 to working with Vietnamese agencies and the U.S. command to assist the Vietnamese in strengthening their governmental institutions. At that time these institutions were under tremendous pressure from several sources. Although many Vietnamese leaders were well educated and highly sophisticated, the government as a whole did not have the physical means or administrative experience to cope with the mushrooming demands placed on the bureaucracy by the war. There were far too few trained civil servants, and these were not available at all in large areas of the country. The Communists and other dissident factions were relentless in their efforts to thwart government programs, both military and civilian, and the rapid turnover of governments in Saigon further aggravated the situation. The Vietnamese govern-

ment was under the difficulty of improving its programs and undertaking new ones to hold the country together, while at the same time it was struggling for its very existence against a determined and ruthless enemy. The U.S. command worked vigorously to strengthen and assist the Vietnam government as rapidly as possible, mindful to respect Vietnamese sovereignty and keenly aware that American solutions would not always work with Vietnamese problems. Most of the Vietnamese attorneys with whom MACV judge advocates worked were competent, dedicated men who were concerned over the plight of their country and who worked to improve their government. They needed reinforcement and encouragement, rather than direction.

In the MACV Staff Judge Advocate's office, priority was given to advising the Vietnamese military establishments, which traditionally placed little emphasis on legal proceedings as a means of discipline. In January 1965 the Staff Judge Advocate, Colonel Prugh, encouraged a study designed to promote a higher degree of discipline and respect for military justice in the Vietnamese Army. Materials relating to military justice training were furnished to the Director of Military Justice, and a program was initiated to develop reliable data on disciplinary conditions in Vietnamese Army units in the field. In March the Staff Judge Advocate of the Vietnamese high command presented to the MACV Staff Judge Advocate a plan for the organization of judge advocate offices at the Vietnamese corps headquarters for the purpose of promoting military justice in the field and bringing offenders to speedy trial. The plan was later co-ordinated with the Director of Military Justice. Proposed tables of organization and equipment for the newly established office of the Staff Judge Advocate of the high command and for the proposed corps judge advocate offices were discussed and translated into English. Also in March a study was made of the Vietnamese armed forces claims procedures, and, after co-ordination with the MACV comptroller, arrangements were made to have a representative of the Claims Branch participate in financial management team surveys and other activities of the Military Community Action Program, which was aimed at providing more timely and realistic payment of claims by the Vietnamese armed forces to Vietnamese civilians.

To resolve problems common to Vietnamese and U.S. and other Free World Military Assistance Forces in the areas of law, order, and discipline, a proposal was submitted by MACV to the Director of Military Justice for the establishment of a Military Community Affairs Council. Liaison was maintained by the MACV Staff Judge Advocate with the judge advocate of the Korean forces, who was furnished information and copies of appropriate MACV directives covering legal and disciplinary matters, and other data describing the Vietnamese civilian and military legal system.

A chronic problem throughout the war was the desertion rate in the Vietnamese armed forces. As early as May 1965 the MACV Staff Judge Advocate wrote to the J-1 of the Vietnamese high command detailing some proposed solutions. In conjunction with the letter, the Staff Judge Advocate also sent a plan for control of desertion in the Vietnamese armed forces to the MACV assistant chief of staff, J-1. It was not unusual for studies or proposals initiated by the staff Judge Advocate's office to be submitted to U.S. command staff sections as well as to appropriate Vietnamese agencies so that parallel action could be taken. In May 1965 also a staff study "to examine the role of the Civil Law in the Counterinsurgency in Vietnam and to make pertinent recommendations" was prepared and sent to the Commander, U.S. Military Assistance Command, Vietnam, and subsequently to the U.S. Ambassador and the director of the U.S. Overseas Mission. (*See Appendix C.*) The staff study pointed to the need for improving the effectiveness of the Vietnamese civilian legal institutions and recommended that the director of the U.S. Overseas Mission study those aspects relative to the civilian advisory effort. A staff study calling for the establishment of a civilian advisory effort in law was prepared and also submitted to the commander, who approved and transmitted it to the director of the U.S. Overseas Mission. Among various other papers submitted to the commander and to the MACV chief of staff were current judge advocate law programs dealing with Vietnamese resources control laws; apprehension, trial, and punishment; improvement in effectiveness of current search and seizure laws; information and education in the law; and building a popular base of respect for the rule of law in Vietnamese society.

The Gendarmerie

Assisting the Vietnamese to create, strengthen, reorganize, or replace governmental institutions and agencies was a challenging task. The judge advocate advisers had not only to understand the theory of the Vietnamese system, but they had to be thoroughly familiar with the actual operation of the laws under the Vietnamese government and the interaction of law agencies with other government agencies. A high degree of co-ordination was required of all Vietnamese agencies and U.S. staff sections involved. Given the basic unfamiliarity of most Americans with the Vietnamese legal system, the instability of Vietnam's government, the tremendous pressure for effective action generated by the war, and the American penchant for innovation, it was inevitable that some of the changes made in Vietnamese institutions would be unsuccessful. An interesting example of an advisory breakdown in the legal area was the demise of the Gendarmerie.

The Vietnamese Gendarmerie, patterned on the French force of

the same name, was a national organization of "judicial police" that filled a gap between the military and civilian law enforcement agencies. It was a rural police force spread throughout the countryside, and composed of men who were intimately familiar with the areas to which they were assigned. Known as "The Red Hats," because of their distinctive red headgear, these men were a familiar and respected symbol of authority. The Gendarmerie played a very important investigative role, especially away from the major cities. As judicial police they conducted investigations for the courts and had the authority to take sworn statements that were admissible in court. In the Vietnamese legal system they played a vital role in bringing the rule of law to the people of the countryside. Unfortunately, during the process of reorganizing the various Vietnamese law enforcement agencies, a decision was made that the Gendarmerie was not worth keeping; funds for Gendarme operations were cut from the approved budget, and the organization went out of existence in January 1965. A huge backlog of cases piled up in the Vietnamese courts because there was no one to investigate or process them. Given the conditions existing in Vietnam at the time, it is not difficult to see how the mistake of abolishing the Gendarmerie was made. Very few Americans understood the place of the Gendarmerie, since there is no equivalent force anywhere in the U.S. legal system. U.S. military advisers were not concerned with what were considered civilian police matters, and the civilian public safety advisers of the U.S. Overseas Mission, who were working with the Vietnamese National Police, naturally viewed police functions in terms of their own organizational experience. Since the Gendarmerie did not fall into any familiar category of American law enforcement organization, it was abolished.

The worst aspect of the reorganization was that when the Gendarmerie was disbanded about half the men were transferred to the civilian National Police and the other half to the Vietnamese military police, but no systematic effort was made to transfer Gendarmes and their cases together, so that investigations could be completed. Since both the National Police and the military police were being developed along American lines, there was no law enforcement agency designed to carry on effectively the judicial police work of the Gendarmerie. As a result, thousands of cases were never completed. As the full significance of what had happened came to light, Colonel Nguyen Mong Bich, the Vietnamese Director of Military Justice, took steps to fill the void by establishing among the military police a section initially called the Military Judicial Police. This section was later named the Criminal Investigators, following the American pattern and adding the concept of the judicial policeman with special authority as a sworn investigator for the court. The demise of the

Gendarmerie, however, severely disrupted Vietnamese military judicial operations for a considerable period of time.

Law Society of Free Vietnam

One of the more enjoyable advisory activities was the organization of the Law Society of Free Vietnam in May 1965. The society initiated a cultural program designed to enable American military lawyers to exchange views and to discuss differences in law systems and doctrines with members of the Vietnamese legal profession. It was intended that the program would not only establish better relations between American military lawyers and members of the Vietnamese legal profession, but that it would also foster the use of law as a weapon in counterinsurgency. The program, entitled *The Role of Law in Contemporary Society*, consisted of a series of thirteen seminars, meeting every other week. The meetings included panel discussions, mixed team debates, individual presentations, critiques, and selected motion pictures, followed by a social hour. The beginning of the seminar series was scheduled to coincide with Law Day, celebrated on the first day of May. The Law Society sent to the armed forces radio service a list of spot announcements for broadcast from 26 April through 2 May; transmitted materials for news articles; requested area chaplains to note Law Day in their sermons; and suggested issuance of appropriate statements by major subordinate commanders.

The first meeting of the Law Society was held on 5 May 1965 at the Vietnamese-American Association in Saigon. Lieutenant Richard E. Reider, a U.S. Navy legal officer, spoke on *The Citizen's Role in Law*. Among the prominent persons to attend the first seminar were U. Alexis Johnson, Deputy American Ambassador; Barry Zorthian, Director, U.S. Information Service in Saigon; Ly Binh Hue, Public Prosecutor of Saigon; Huynh Duc Buu, Assistant Public Prosecutor; Vu Tiem Tuan, Judge, Saigon Court of Appeals; and Colonel Nguyen Mong Bich, Director of Military Justice, later a Justice of the Supreme Court. For the second program, *Lawyers in Contemporary Society*, the speaker was Vuong Van Bac, Treasurer of the Bar of Saigon, Secretary General of the Association of Vietnamese Lawyers, and a member of the faculty of the National Institute of Administration and of the University of Dalat (later a negotiator at the Paris peace talks, ambassador to London, and subsequently Foreign Minister). At the third seminar Colonel Nguyen Mong Bich spoke on *The Function of the Courts*. To illustrate the fourth program, "Trial by Jury," a mock trial written by Colonel John M. Rankin, U.S. Air Force, Assistant Staff Judge Advocate, MACV, was presented to the audience, which included many distinguished Vietnamese jurists. On 14 July 1965, Mrs. Nguyen Phuong Thiep, a prominent attorney in Saigon, presented a paper on *The Juvenile Program*; on 28 July



VIETNAM JUSTICES HOLD PANEL DISCUSSION AT MEETING OF LAW SOCIETY IN SAIGON. *U. Alexis Johnson is in the foreground, Colonel Prugh standing, right.*

Lieutenant Colonel Malcolm L. McCain, Staff Judge Advocate, First Logistics Command, U.S. Army, Vietnam, discussed Judicial Review Procedures.

The seminars continued to draw large and interested audiences from the Vietnamese and American communities. After each seminar Vietnamese members of the audience were eager to express their views. Speeches and presentations were generally printed in both English and Vietnamese and distributed to the audience; some were reprinted in Saigon newspapers. These meetings fostered a democratic exchange of ideas, increased the legal knowledge of the participants, and provided a cordial atmosphere for professional contacts. Most important, the seminars presented a sampling of American legal ideas and attitudes to an influential segment of Vietnamese society in a manner the Vietnamese could accept without resentment. These Vietnamese lawyers and judges, who were able scholars in their own right, were introduced to new alternatives for dealing with legal problems and stimulated to analyze and improve their own legal institutions. The Americans, in turn, learned from the Vietnamese.

While judge advocate staff members spent most of their time in Saigon, they made periodic trips to other parts of the country to study what effect programs initiated in Saigon were having in the field. In late 1964 and again in early 1965 the MACV Staff Judge Advocate,

accompanied by his counterpart, the Director of Military Justice, made visits to the Vietnamese commanding generals of the four corps to discuss discipline procedures, desertion rates, and the handling of Viet Cong prisoners. In May 1965 they visited the U.S. Marine legal officer at Da Nang to co-ordinate legal activities involving newly arrived U.S. marines with Vietnamese authorities in the Da Nang area. At the request of the MACV Staff Judge Advocate the Director of Military Justice made a special visit to the Vietnamese commanding general of I Corps to ensure that several recently captured terrorists would be dealt with in a military trial. There had been a press story to the effect that the terrorists were to be executed without even an attempt at trial, but this did not occur and Vietnamese legal processes were fully observed. Convincing the Vietnamese commander to adhere to legal procedures in dealing with Viet Cong agents was of more than theoretical interest to the U.S. command since the Viet Cong had publicly avowed a policy of reprisal against U.S. prisoners of war, and did in fact later execute at least three prisoners allegedly in reprisal for executions by the Vietnamese of other Viet Cong terrorists.

The Advisory Division

It was the opinion of the MACV Staff Judge Advocate that legal advisory activities could contribute significantly to the allied mission in South Vietnam, and that a legal advisory program deserved official recognition and support. A request to use American legal resources to establish an advisory branch was submitted by the MACV Staff Judge Advocate to the Commander, U.S. Military Assistance Command, Vietnam, in January 1965. The request was approved and the Advisory Branch, initially consisting of a chief and two field representatives, came into existence in July 1965. While the number of people and methods of operation of the Advisory Branch varied somewhat in subsequent years, the original plan called for an advisory chief to be stationed at the Staff Judge Advocate's office in Saigon, and one field adviser to be located in each of the four corps areas. The Advisory Division continued to function until the Agreement on Ending the War and Restoring Peace in Vietnam became effective on 27 January 1973. At that time the incumbent chief of the Advisory Division became the legal adviser to the U.S. Delegation to the Four Party Joint Military Commission in Saigon during the sixty days of that body's operations.

The chief of the division worked directly with the Directorate of Military Justice and other Vietnamese governmental agencies on such matters as budgeting, tables of organization and equipment, law reform, desertion control, administration of the military courts and prisons, and other programs to assist the Vietnamese to improve

the functioning of their legal system. The advisory chief received and analyzed reports and information from the judge advocate field advisers, assisted them in their work in the corps areas in any way possible, and co-ordinated the whole judge advocate advisory program.

The field advisers were the eyes and ears of the MACV Staff Judge Advocate in the respective corps areas, monitoring the status of law and order away from Saigon—morale and military discipline in the field units, the effectiveness of resources control measures, the desertion control program, and the functioning of the military courts and prisons. Working in conjunction with other U.S. advisers, they assisted their Vietnamese counterparts to improve legal facilities and legal programs. When possible, they established contacts in the local legal community, and made recommendations to the Staff Judge Advocate in Saigon for improving existing programs or establishing new ones. Finally, they acted as liaison between the U.S. command and Vietnamese legal officials in their own corps areas, providing limited legal services to the U.S. advisory headquarters to which they were assigned.

The status of the field advisers varied from corps to corps and from time to time throughout the war. I Corps, the northermost and most distant corps area from Saigon, had a resident judge advocate adviser from August 1965 until March 1973. Originally stationed in Hue, where the university, the civilian and military courts, and the prison were located, the judge advocate adviser moved to Da Nang after *Tet* of 1968, when the military courts and prison also moved to Da Nang. II Corps, comprised of the Central Highlands provinces, and by far the largest corps area in terms of geography, had a resident judge advocate adviser from 1965 until 1973. The III Corps judge advocate adviser was stationed at the MACV Staff Judge Advocate's office in Saigon, where he assisted the advisory chief and taught courses at the Saigon University Law School, performing corps advisory functions as well. The IV Corps judge advocate adviser was located in Can Tho in the Mekong Delta. Originally all field advisers were assigned to the MACV Staff Judge Advocate's office, with duty stations in their respective corps areas. Later, the judge advocate advisers for I, II, and IV Corps were assigned to the Regional Assistance Command headquarters in those corps areas. This assignment made the countrywide judge advocate advisory program less cohesive, but lines of communication were maintained. The extent to which judge advocate field advisers were actually able to devote their efforts to advisory work varied considerably from time to time and place to place, depending to a great extent on the relationship between the judge advocate adviser and the U.S. commander for whom he worked, and on the legal needs of the local U.S. command at the time.

Over the years there was a marked contrast between the advisory work in Saigon and the activities of the field advisers in the outlying areas. In Saigon, advisory efforts were focused on such areas as the organization, staffing, and budgeting of Vietnamese legal institutions, particularly the Directorate of Military Justice; the collection, translation, and indexing of Vietnamese legal materials; educational programs for the Vietnamese legal community; monitoring the military courts and prisons; and trying to obtain materials to upgrade Vietnamese legal facilities and the military prison in Saigon. The judge advocate advisory work in Saigon included collecting and disseminating Vietnamese legal materials, answering specific questions pertaining to Vietnamese and American law, preparing staff studies, and participating as members of various MACV and joint MACV-Vietnamese committees. One example of the last category was the MACV judge advocate adviser's participation as a member of a joint committee which developed a national mobilization study for the Vietnamese armed forces in the fall of 1972.

Educational Program

One of the most vigorously pursued and successful long-range advisory efforts was the educational program, which was developed during the tours of Colonels Durbin and Westerman. From the early sixties until March 1973 members of the MACV Staff Judge Advocate's office continued to teach courses in government and law at Saigon University and to tutor in English Vietnamese lawyers who were then, or later became, Supreme Court justices, Minister of Justice, Minister of Interior, or key Directorate of Military Justice personnel.

The Staff Judge Advocate was successful in obtaining authorization for members of the Directorate of Military Justice and other government officials to receive assignments and grants for study in the United States. For example, in 1965, the Prosecutor and Assistant Prosecutor of the Saigon Court visited the United States as part of the Foreign Leader and Specialist Program of the Department of State. Such visits were highly successful and were continued over the years to allow a representative cross section of the Vietnamese legal community to observe American legal institutions. Annual orientation tours were also programed for key personnel of the Directorate of Military Justice to visit U.S. military and civilian courts, schools, and prisons.

A program was also initiated whereby selected officers of the Directorate of Military Justice were sent to The Judge Advocate General's School in Charlottesville, Virginia, as members of one of the school's eight-week basic courses or nine-month advanced courses in military law. An average of two language-qualified officers a year

were sent to Charlottesville; the highest point was reached in January 1970 when four officers qualified for attendance. Also in 1970, an officer of the Directorate of Military Justice was accepted by Tulane University to attend a one-year program in comparative jurisprudence leading to an LL.M. degree. This assignment was the culmination of efforts by the Judge Advocate Advisory Division to send a deserving member of the Directorate of Military Justice to America for advanced legal studies.

Educational programs were not limited to sending Vietnamese attorneys to the States. Efforts were also made to increase the awareness of the Vietnamese to the importance of law within their own military system. As part of the continuing efforts to make American legal publications available to the Vietnamese, the Directorate of Military Justice was placed on the subscription list for *The Army Lawyer*, the *Military Law Review*, and the *Judge Advocate Legal Service* periodicals. The *U.S. Supreme Court Reporter* was made available to the Vietnamese Supreme Court. In early 1970 the Ministry of Defense authorized the Directorate of Military Justice to start publication of a semiannual *Military Law Review*. This publication had been recommended by the Advisory Division to fill the need for dissemination of information on changes and progress in the Vietnamese legal system. The MACV judge advocate staff regularly contributed articles on American military law to this publication.

A major step forward was taken in mid-1969 with the initiation of a law curriculum for cadets at the Vietnamese Military Academy at Dalat and the assignment of one member of the Vietnamese Military Justice Corps to the academy as professor of law. Previously there had been only occasional legal lectures and no regular legal instruction at the academy, which is the Vietnamese equivalent of West Point. In November 1971 the Directorate of Military Justice opened its own school for training military lawyers, administrative personnel, and court clerks. The school was located in Saigon and was staffed by two Directorate of Military Justice officers—Major Tran Lai Mien, who had attended the advanced course of The Judge Advocate General's School at Charlottesville, and Major Tran Hua Dinh, who had recently returned from comparative law studies at Tulane University.

Judge advocate advisers also remained active in legal society and educational programs in Saigon, particularly the educational seminars sponsored by the Vietnamese-American Association. A Saigon chapter of the Federal Bar Association was formed, and held periodic meetings to which all U.S. attorneys in the country were invited. The observance of May 1st as Law Day grew from its simple beginning in 1965 to an annual tradition where all U.S. and Vietnamese attorneys who could make the trip came to Saigon for appropriate legal pro-

grams and festivities. The 1972 Law Day reception, held at the U.S. Embassy, was hosted by Ambassador Ellsworth Bunker and General Creighton W. Abrams, and was attended by U.S. and Vietnamese attorneys from all parts of Vietnam.

The Field Advisers

The work of the judge advocate field advisers was quite different from the legal advisory activities carried on in Saigon. The field adviser was the only person in his corps area doing legal advisory work with the Vietnamese. Field advisers did not have a staff to assist them, and available library facilities were apt to be minimal. The U.S. and Vietnamese officers with whom the field advisers dealt were usually considerably older and ranked above the judge advocate advisers. Keeping informed of developments in the corps area which were of interest to the Staff Judge Advocate, as well as establishing contacts in U.S. and Vietnamese military units and civilian agencies, usually required considerable traveling by the field MACV adviser. The language difference was a problem; however, many Vietnamese judge advocates spoke French or some English, and interpreters were usually available.

Living and working conditions and daily activities of the field advisers varied widely. Some advisers were able to work with their Vietnamese counterparts on a daily basis and devoted most of their time to advisory activities; others, of necessity, functioned primarily as command judge advocates for the U.S. advisory headquarters to which they were assigned. The success of a field adviser's tour of duty depended on many factors—his own drive, personality, and ingenuity; the personality of his counterpart and the adviser's ability to establish rapport with him; the support given the adviser by the local U.S. command; and the legal needs of the area at that particular time. The work of the field advisers was innovative in a very real sense in that each adviser was required to discover and act on problem areas in which he could most effectively render assistance. Seldom was there a book solution for the problems he encountered.

Advisory activities involved such diverse legal areas as Vietnamese military justice procedures, questions arising from the Pentilateral Agreement, operation of the re-education centers, provincial jails and military prisons, the Vietnamese claims program, the National Police, the military police, desertion control, resources control, security programs, and various aspects of the pacification program. Often the most pressing advisory problems were more practical than legal in nature, such as arranging transportation for Vietnamese legal officers, providing storage for records of trial, or obtaining material and equipment to improve the military courts and prison facilities.

It was not unusual for incidents with potential legal implications

to occur in Vietnam, involving business enterprises, government agencies, and individuals from several different nations. Questions of any complexity, or with potentially serious legal consequences, were referred to the MACV Staff Judge Advocate in Saigon, but the field adviser was sometimes the initial legal point of contact and the investigator of fact for such incidents.

A feeling for the wide range of activities which fell within the work of the judge advocate field advisers can be gained from an account of some of the experiences of Captain John T. Sherwood, who was the first judge advocate adviser for II Corps from August 1965 until May 1966. Shortly after Captain Sherwood assumed his duties, a U.S. B-57 bomber crashed in the commercial section of downtown Nha Trang, causing several casualties and extensive damage to houses and shops in the area. While the legal authority of the U.S. command to pay claims for such "combat" damage was in doubt, the MACV Staff Judge Advocate nevertheless moved swiftly to assess the damage and to assist those who had suffered physical and financial injury to submit requests for compensation. As part of this effort, the judge advocate field adviser spent two days working with a committee of Vietnamese citizens to inspect damage in order to determine an equitable amount for settlement in accordance with applicable Vietnamese standards. The adviser also conferred with the Nha Trang Provost Marshal concerning the conduct of some National Police, who allegedly were ineffective in preventing looting after the crash. The judge advocate adviser took part in negotiations between the French-owned electric company that serviced Nha Trang (the Eastern Construction Company) and a representative of the U.S. 5th Special Forces Group concerning liability for property damage caused by a Filipino national employed by the company who drove a Civilian Irregular Defense Group vehicle into an electric company transformer. (The U.S. Special Forces trained and financed the Civilian Irregular Defense Group.)

Captain Sherwood's activities were not confined to Nha Trang. Indeed, in August and September of 1965 he traveled extensively: to Qui Nhon to visit the province jail and observe the status of the Vietnamese military police and military justice instructions in units of the Regional Forces and Popular Forces; to Dalat to visit the Military Academy, the Command and General Staff School, and the U.S. Overseas Mission province representative; and to Ban Me Thuot to meet the sector adviser, the U.S. 23d Division staff, and the U.S. Overseas Mission representative. At Ban Me Thuot Captain Sherwood attended an oath of allegiance ceremony whereby 300 dissident Montagnards returned to the government side. On 17 September he flew to Saigon to confer with the Director of Military Justice and the Vietnamese Judge Advocate staff. He spent 23 to 25 September

inspecting Regional Forces and Popular Forces training at Tuy Hoa and observing the pacification program in Phu Yen Province. At the end of September Captain Sherwood visited Vietnamese II Corps headquarters at Pleiku, where he met the corps legal staff and arranged for the shipment of records between the corps headquarters in Pleiku and the Military Court in Nha Trang. While at Pleiku, Captain Sherwood also conferred with U.S. commanders on military justice problems, redrafted a provost marshal directive concerning the confiscation of military payment certificates from Vietnamese employees of U.S. installations, discussed the desertion problem of the Regional Forces and Popular Forces with U.S. advisers, and visited a Vietnamese refugee camp.

Although such a great amount of travel was not required of Captain Sherwood every month, he was constantly provided with new and interesting experiences. He reviewed a treatise on Vietnamese law written in English by a Vietnamese judge advocate officer. He represented two U.S. soldiers charged with rape, attempted rape, robbery, and assault at a pretrial investigation. He visited the Khanh Hoa Military Prison, the Duc My National Training Center for Vietnamese army recruits, and the Song Mao National Regional Force Training Center. He conferred in Bangkok with the staff judge advocate of the Joint U.S. Military Advisory Group, Thailand, on the legal status of U.S. military personnel visiting in Thailand, and on the feasibility of an advisory effort for military lawyers in Thailand. He made three parachute jumps with the first Montagnards ever to be airborne-trained. He participated in a political warfare exercise in which leaflets were dropped from the air over territory controlled by the North Vietnamese. He made a visit to the Khanh Hoa Province jail. He made a detailed study of the methods used by U.S. units in II Corps for handling captured enemy personnel. (To gather facts for this study, he made a visit to the 1st Air Cavalry Division (Airmobile) at An Khe, to the 3d Brigade, 25th Infantry Division, at Ban Me Thuot and Pleiku, and to the 1st Brigade, 101st Airborne Division, at Phan Rang and Tuy Hoa. He made an effort to determine to what extent cards on treatment of prisoners of war were being disseminated by the Vietnamese Army and to what extent the contents of the cards were understood by the Vietnamese troops, many of whom were illiterate.)

As can be seen from the great diversity of the activities detailed above, it is difficult to characterize the work of the judge advocate field advisers. Each adviser determined his own program through analysis of the legal needs and the opportunities existing at his duty station at the time of his tour. Early advisers, like Captain Sherwood, spent a great deal of time ascertaining conditions in their respective corps areas and building an identity for themselves while working for

acceptance of the legal advisory program. As the number of U.S. advisers and troops throughout Vietnam increased and the legal advisory program became established, later judge advocate advisers were able to devote their efforts to other matters. But each field adviser had to gain anew the confidence of his Vietnamese counterpart and of the U.S. forces with whom he dealt, and each had to rely on his own tact, resourcefulness, and legal ability in order to accomplish his mission successfully.

The Prison Advisory Program

One facet of the advisory program for which neither civilian nor military legal training had prepared the judge advocate advisers of the Military Assistance Command was working with the Vietnamese military prison system. In the American Army, military confinement facilities were administered by the Military Police Corps. In the Vietnamese system, as in the Chinese and some other systems, the military prisons were administered by the Military Justice Corps. Since MACV judge advocates were advisers to the Directorate of Military Justice, they also became advisers to the military prisons. One such prison was located in each of the four corps areas, in conjunction with the military court serving that area. The term military prison did not include the prison on Con Son Island, which was considered a civilian prison, even though it contained political prisoners who could have been tried by military courts.

The Vietnamese military prisons were pretrial detention centers only. The great majority of prisoners were charged with desertion. The average deserter spent about three months in confinement awaiting his trial; one charged with more complicated and serious offenses might spend a year or more in pretrial confinement. Time spent in pretrial confinement was credited toward service of sentence, and deserters and petty criminals sentenced to confinement upon conviction were usually remanded to an army labor battalion to serve the remainder of their terms. Those convicted of more serious crimes were sent to civilian prisons to serve their sentences. Each of the military prisons was under the supervision of the chief prosecutor of the military court for the corps area. The Directorate of Military Justice officials who operated the prisons were not attorneys; neither, for the most part, were they trained prison specialists. Prison conditions tended to be inferior in comparison to standards one would expect in American military prisons, but life in Vietnamese military prisons was not appreciably more spartan than that of many civilians or of soldiers in the field.

Judge advocate advisory efforts for the military prisons fell into two general categories: obtaining sorely needed building materials

and supplies, and attempting to provide a certain degree of administrative guidance and technical expertise.

The material needs that existed for the prison system are illustrated by the advisory experience with the Da Nang military prison in 1972. Prior to 1970 the prison had been located in Hue. During *Tet* of 1968 the prison, along with many other U.S. and Vietnamese facilities in and around the city, came under siege by the Communists. The prison was not overrun, but after the *Tet* offensive a decision was made to move it to Da Nang, which was considered more secure. The move to Da Nang would also bring about a considerable increase in administrative efficiency, since both the military court and the military field court had been moved to Da Nang. Several sites near Da Nang were considered, and rejected as being insufficiently secure from enemy attack. Finally, an abandoned engineer compound in east Da Nang was selected as an acceptable site.

The move was begun in 1970, and the facility was officially opened on 1 July 1971. The new prison consisted of eight stucco buildings surrounded by barbed wire. There was no front gate for the outer compound; there were no defensive fortifications, no sleeping facilities for cadre or prisoners, no messing facilities, no potable water, and no electricity. Slowly, prison officials and the judge advocate adviser began making improvements, most of which were wiped out by a typhoon in October 1971. As U.S. units in I Corps began to move out of the line and return to the United States, however, surplus and scrap supplies and materials became available through advisory channels.

From January until June 1972 approximately seventy-five truckloads of building materials, steel cargo (CONEX) containers, furniture, and items of military clothing and equipment were obtained for the prison. The great bulk of the material acquired was considered not reusable by the American forces, but Vietnamese ingenuity found practical uses for even the most unlikely pieces. For example, a front gate was fashioned by welding together discarded pieces of pipe and a huge aluminum sliding warehouse door. The materials acquired were used to construct fourteen defensive bunkers, sleeping platforms for 1,200 prisoners, a stage, a guardhouse, and a handicraft office, and to furnish the mess hall, a visiting hall, a conference hall, a dispensary and doctor's office, a canteen, a cadre lounge and cadre barracks, and the prison administrative offices. Acquisition of a water trailer and water tank enabled potable water to be transported and stored for use in the kitchen. Guards were furnished with helmets, flak jackets, web gear, and rain gear.

Encouraged by the success of the self-help projects, prison officials were able to secure from a construction company a donation of 400

CHAPEL OF THE
MILITARY PRISON AT DANANG.

*Judge advocates helped
to procure building materials.*



bags of cement, which were used to construct a chapel and a pagoda for use by the prisoners and cadre. Ingenuity on the part of the prison commandant and marketing assistance from the judge advocate adviser enabled the prison to increase the assets of the prison general purpose fund by 65 percent in a three-month period through the sale of woven straw lobsters. Other handicraft projects were tried on an experimental basis, and a vegetable garden was started. The persistent efforts of the prison commandant and the judge advocate adviser to work through Vietnamese logistical channels were rewarded when a doctor was assigned to work at the prison on a regular basis, and when a generator was sent to the prison, which previously had been without electric power. An allocation of funds from Saigon made possible the start of construction of two administration buildings, several latrines, and a kitchen in August 1972, by which time the Da Nang prison was well on its way to becoming a model institution in the Vietnamese military penal system.

While the day-to-day work with the prisons was carried on by the field advisers, the MACV Staff Judge Advocate in Saigon was also active in obtaining materials for the prisons and in devising ways to improve the administration of the prison system. Over the years, large quantities of construction materials were obtained, enabling the Vietnamese to complete such major projects as an evidence building at the Saigon Military Prison and an annex to the Saigon Military Prison, both completed in 1970, and an evidence building at the Nhah Trang Military Prison in 1971. Smaller projects, such as the construction of sleeping platforms, were carried on continuously as material became available. Some major projects, such as the construction of the fourth and newest military prison at Can Tho in the spring of 1970 and an additional cell block at the Saigon Military

Prison in 1971, were funded through government channels.

Although the Directorate of Military Justice was responsible for the operation of the military prisons, few of its officials had any formal training or previous experience in penal administration. Because of the high wartime desertion rates, the military prisons were often overcrowded, and prison populations were subject to fluctuations of as much as 50 percent over a short period, depending on the time of the year, tactical conditions in the field, and periodic amnesty programs instituted by the Vietnamese government to relieve overcrowding in the prisons and to return troops to the field. It was not unusual for as few as fifty guards and administrative cadre (a total of all shifts, including officers) to control over 1,200 prisoners. Prisoners were essentially self-regulating within the compounds. Escape attempts were surprisingly few, and discipline was generally excellent. The average allocation for prisoner support in 1972 was 10¢ (U.S.) per prisoner per day. Given these conditions, problems of prison administration were inevitable.

Officers from the MACV Staff Judge Advocate's office in Saigon periodically visited the military prison in each corps area, monitoring progress and co-ordinating advisory programs with the field advisers. Recognizing the need for more professional help in the prison advisory program, Colonel Robert K. Weaver, the MACV Staff Judge Advocate, in 1970 was able to augment the Advisory Division staff by having a U.S. Military Police Corps officer assigned as a special adviser to the pretrial confinement facilities under the Vietnamese Directorate of Military Justice. Following an inspection of four prisons in November 1970 the American military police adviser prepared an administrative checklist for the entire functioning of the confinement facilities, covering custody, control, and confinement practices pertaining to health, comfort, and sanitation. The checklist was translated into Vietnamese and delivered to the Directorate of Military Justice for use in a three-month sampling which would indicate areas of needed improvement and facilitate the development of standard operating procedures.

Colonel Weaver arranged visits to Vietnamese military prisons by U.S. staff members with expertise in the operation of confinement facilities, such as the MACV J-1, the MACV Command Surgeon, and the chief of the Provost Marshal Prisoner of War Division. After these visits the observations and recommendations of the members were compiled, analyzed, and forwarded to the Director of Military Justice and the Minister of National Defense. In 1971 a group of twelve Vietnamese prison officials and noncommissioned officers was conducted on a detailed tour of both the old and new U.S. Army confinement facilities at Long Binh post. In June 1972 plans were made for formal school training and subsequent on-the-job training

at the Military Police School at Fort Gordon, Georgia, for several Directorate of Military Justice prison officials in fiscal year 1974.

When the Paris Agreement on Ending the War and Restoring Peace in Vietnam entered into force the judge advocate advisory role came to an end. Legal advisory activities in Vietnam had ranged from conferring with government ministers in Saigon to inspecting troop training in Tuy Hoa and obtaining lumber for a prison in Da Nang. Advisory "subjects" are not found in any law school curriculum, and coping with the diversity of advisory activities challenged the legal talents of the U.S. military attorneys who participated in this fascinating work. Each undertaking was important in assisting the Vietnamese to improve and strengthen their legal system.