Yale Review of Law and Social Action

Volume 1
Issue 4 *Yale Review of Law and Social Action*

Article 10

1971

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Book Notes

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by Marcus G. Raskin

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Telford Taylor, brilliant lawyer, scholar, chief war crimes prosecutor, even musician, but especially citizen, has written an important book about the law of war crimes and its relevance to Vietnam. In *Nuremberg and Vietnam* Taylor discusses in crisp but fervent style the history of the distinction between just and unjust wars as well as the generally accepted meanings of war crimes prior to the Nuremberg and Tokyo trials. He appears to define war crimes as those acts which are contrary to international law, e.g. treaties, or are in violation of either the military or civilian law of the perpetrator's own nation. Taylor's scholarly honesty shows through in the book, and his civic love for his country manifests itself in his analysis and the book's dedication "To the Flag and The Liberty and Justice For Which It Stands."

Taylor says he favored the American war in Vietnam until 1965. However, by that time he had begun to re-evaluate his own position. In the last several years he has found it necessary to clarify the meanings of the Nuremberg judgments since many people were invoking their own interpretations and calling upon him, as a principal at Nuremberg, to legitimate their views. He rejects a wide application of the Nuremberg judgments stating that the courts are not "a suitable forum for the settlement of our Vietnam problem" since treaties—whether the U.N. Charter or the unratified London Charter agreements which set up the Nuremberg tribunals—would not necessarily take precedence over congressional actions authorizing the Vietnam war. On the other hand, as the nature of the war has become

more obvious, he has accepted the relevance of those judgments and international treaties such as the Geneva Convention of 1949 which deal with prisoners, the wounded and civilian population.

The issues analyzed in *Nuremberg and Vietnam* were raised in the Boston 5 draft conspiracy case where Taylor (with Calvin Bartlett and Carl Sapers) defended me. All questions raised by the defendants about war crimes and the war's constitutionality were dismissed out of hand by the judge although they hung heavy over the courtroom as they hang heavy over American society. The banner of the Nuremberg judgments has been carried by upholders of the United Nations, pacifists, individuals against bureaucratic and executive frolics, the New Left and draft resisters. Even imperial stalwarts who sanctioned the American enterprise in Vietnam, such as Thurman Arnold, have raised the Nuremberg banner. They believed that the United States could justify intervention by deciding on its own initiative when an aggression had taken place against other nations. How is it that the Nuremberg judgments are introduced by people who hold divergent points of view? Taylor points out that "Nuremberg is both what actually happened there and what people think happened, and the second is more important than the first." He suggests that what people are reaching for is a new objective expression, a consciousness of a fundamental morality. This common denominator attempts to define "some universal standards of human behavior that transcend the duty of obedience to national laws." His view is that the war crimes trials brought to international law an attempt to enforce personal responsibility for crimes against peace and the development of criminal liability for violation of the laws of war. Yet, in exploring the meaning of this view Taylor is aware that the law, in addition to articulating the moral strivings of a people, must also be enforceable. Consequently, the procedures and forums for enforcement become a primary problem.

The Nuremberg trials were judgments of victors over vanquished, although the elements of vengeance were mediated through law and justice. The trials were conducted over a five-year period in some 10,000 cases. They involved laws as old as western civilization. Whatever we might think of those cases, Taylor holds that there is one point beyond dispute. It was not only the people but the System which embraced war crimes trials as a means of holding individuals and governments to account:

". . . the United States Government stood legally, politically and morally committed to the principles enunciated in the charters and judgments of the tribunals. The President of the United States, on the recommendation of the Departments of State, War and Justice approved the war crimes program. Thirty or more American judges drawn from appellate benches of the states . . . conducted the later Nuremberg trials and wrote the opinions."

While the nation was committed to the idea that leadership could be held to account for war crimes and war matters, Taylor points out, the laws and rules were "very fuzzy around the edges." This lack of definition does not deprive nations of an indisputable core of international and domestic law which is quite applicable to the behavior of Americans at war with Vietnam. We know, for example, that under international law armed forces are bound to obey only *lawful* orders. As Lauterpacht, the great international legal scholar, has said, "They cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity."

Thus, as a general rule the individual soldier may be held liable for war crimes even though he is carrying out an order of a superior officer. According to the United States Army's current field manual, a soldier can successfully interpose superior orders as a defense only where "he did not know and could not reasonably have been expected to know that the order was unlawful." It would seem that this defense can be offered where the individual's act is an extremely small incident in an organized pattern, program or strategy.

The army's current manual states: "obedience to lawful military orders is the duty of every member of the armed forces." Taylor suggests that whether the defense of superior orders is valid or not, any leader who expects obedience must accept legal responsibility for the acts of troops under his command. This is especially true in the case of military commanders.

The Canadians, in their War Crimes Regulations, have said that "where there is evidence that more than one war crime has been committed by members of a formation, unit, body, or group while under the command of a single commander, the court may receive that evidence as prima facie evidence of the responsibility of the commander for those crimes." According to this standard it would seem hard for a military commander to escape responsibility for the crimes inherent in incidents such as Son My, assassination programs, area bombing tactics for the purpose of terrorizing the population and generating refugees, mass deportations, use of various forms of poisoned materials, and failure to provide care to the wounded and defenseless. Each has been part of a military program and pattern in Vietnam. Each is a continuous programmed activity.

In American law the standard for responsibility does not appear to be any the less than that put forward by the Canadians. In the Yamashita case, the commander of Japanese forces in the Pacific was held responsible and was executed for not preventing and controlling troops under his command who committed war crimes even though he neither knew about them nor sanctioned them. At the time of Yamashita's crime Japanese forces were in full retreat and Yamashita's communication lines with his troops were cut by American troops. In its defense of the far-reaching and harsh judgment made on Yamashita, the U.S. Supreme Court argued that American officers were not exempt from the laws of war. They could be held to the same standard and penalized by American tribunals when they acted contrary to those rules. There is little difference between the actions alleged in the Yamashita case and the programs which have been trumpeted by American commanders in Vietnam. If the Yamashita standard was applied to the Vietnam war as Taylor suggests, the responsibility for Son My would be placed squarely on the American military commander though he might not even have known about the incident. It should be noted that General Westmoreland had continuous and virtually instantaneous communications with tactical units operating in the field as well as with Honolulu and Washington command centers. As a matter of policy General Westmoreland urged military commanders to have high body counts. In a guerrilla war the consequences of such a policy is that the entire civilian population of a contested area becomes the enemy. Given reliance on firepower and the fact that all Vietnamese were perceived as enemies or potential enemies, it is no wonder that Son My and other such incidents occur. Everyone in a designated war zone becomes fair game. As Sartre has pointed out, an invading force of a highly industrial power cannot stop itself from using genocidal techniques to beat down a hostile population.

While Taylor argues that criminal responsibility must attach itself both to commanders who knew of war crimes and to commanders who had military responsibility for them even if they did not know of the actual incidents, he does not see how civilians can be held responsible. It is at this point that international law becomes fuzzy. Despite the law's indistinct contours, top Nazi civilians were convicted for war crimes. Two theories of criminal responsibility were posited at Nuremberg: the theory of crimes against humanity (murder, genocide, inhumane acts against non-combatant populations) and the theory of crimes against peace (violations of international treaties and the pursuit of a policy of aggressive war). Three Nazi civilian leaders were convicted under these theories. The Tokyo tribunal convicted Koki Hirota, who served briefly as Prime Minister and for several years as Foreign Minister between 1933 and 1938, of war crimes for failing to stop the atrocities known as "the rape of Nanking." Under the Tokyo Tribunal's judgment it was held that political leaders who either authorize or have knowledge of illegal battlefield practices are responsible for the commission of war crimes. Thus there is precedent from the Nuremberg and Tokyo tribunals for the criminal conviction of civilians both on the basis of atrocities against non-combatants which, as part of the chain of command, they had a duty to prevent, and on the basis of the "aggressive war" policies the civilian leaders helped to develop.[1] In his dissent in the Yamashita case Justice Murphy feared that "The fate of some future President of the United States and his chiefs of staff and his military advisors may well have been sealed by this decision." Interpreting this phrase strictly it would appear to apply the command liability of Yamashita to officials in their military capacities who should have had knowledge of war crimes.

The extraordinary fact of the American government is that since the end of the second world war there has been a fusion of military and civilian roles. Since 1945

the role of the civilianized military and the militarized civilian have been shaped by and have shaped American national security affairs. Under the National Security Act of 1947 military and civilian distinctions were blurred by law and in the bureaucracy they were blurred in practice. Distinctions between war and peace were viewed as belonging to an unsophisticated time. War, continuous military engagement and the display of power in other lands, became ends in themselves without reference to purpose or legitimacy. The talents and resources of the society were forged into the sword of continuing war. Vietnam was the active fulfillment of the imperial mission. The "brightest and the best" (such as McNamara, the brothers Bundy and Rostow, and Rusk) ran the engine of war for the Mission. It was they who ordered the bombings (the "turning of the screw" as it was called), the population removal, the reliance on overwhelming firepower, and the policy of not taking prisoners. The militarized civilian gave the go-ahead for reprisals, aggressive military actions and signed on to programs which by their nature resulted in war crimes. To draw a distinction in responsibility for war crimes between the civilianized military and the militarized civilian in the national security state is like attempting to draw lines in water; both are culpable under present standards. Yet, it is likely that the Attorney General would not prosecute former national security officials, nor would the Supreme Court be likely to rule on this matter if brought forth as a defense by an officer accused of war crimes in a military case.

Taylor is right about the inapplicability of war crime sanctions to civilians; there is an anomaly in the law. Military commanders can be held responsible under the Uniform Code of Military Justice, but civilian policy makers can escape judgment because no indictment will be brought. Acting for the state, they are placed above the law.

Some judges and scholars have argued, and Taylor tends to agree, that Congress, the people's voice, supported and advocated the course taken in Vietnam. According to this reasoning, in terms of American constitutional law the Vietnam adventure cannot be viewed as an unconstitutional executive frolic. This argument has been made as a possible defense for the civilian policy-makers. But even if the Congress assented to the Vietnam war, there is nothing in the Constitution to suggest that Congress has unlimited power to vote funds and commit lives to military adventures for the purpose of ideological or bureaucratic vindication.

In *Fleming v. Page,* Chief Justice Taney spoke for the Supreme Court when he said that Congress's power to declare war was, in fact, limited. By this he meant that it cannot "be presumed to be waged for the purpose of conquest or the acquisition of territory. . .[but] the genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purpose of aggression or aggrandizement, but to enable the general government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens." While there is much which suggests that the extent of our military actions in Vietnam was for the purpose of vindicating a clique in the American government who, through their decisions, actions and programs, involved the United States more and more deeply, it can hardly be said that either the rights of American citizens or the general government of the United States was under attack by North Vietnam or the National Liberation Front.

I introduce this to point up two issues. First, the fact that Congress voted appropriations for the Vietnam war does not mean, nor is there any indication in the legislative history to suggest, that such appropriations were to be construed as support for the war. Indeed, the Chairman of the House Appropriations Committee, and various other Congressmen made it clear that voting support for American troops should not be construed as support of the war. Congressmen emphasized that they voted funds in fear that American troops would be stranded without means of defending themselves. Second, even if Congress were judged as having forfeited its right to object to the war because it was hoodwinked into supporting the Gulf of Tonkin resolution, there is nothing to suggest that Congress has the power to declare war for frivolous reasons—whether for land or in vindication of particular arrangements made by the CIA, military advisory teams or the national security bureaucracy. Thus, a defense based upon alleged congressional approval would be invalid.

It must be remembered that perpetual military engagement abroad itself helps to generate the situation of crisis and apparent danger to American "interests." Such crises can be manipulated by secret and unaccountable policy-making institutions for political purposes. For example, during the Johnson and Kennedy Administrations there was the 303 Committee, a high spy tribunal in the national security apparatus chaired by McGeorge Bundy. Its major task was both planning and reviewing military and CIA provocation activities around the world. If reference were made in this group to anti-force treaties or international law, it was for the purpose of circumventing them. From the committee members' public statements it appears that any concern they had for the law was in finding ways to make it serve or justify provocative and aggressive actions. The Tuesday lunch group which chose bombing targets in North Vietnam did not begin its meetings by reviewing the Kellogg-Briand Pact or the U.N. Charter. It would seem that the people and Congress have a right to disavow their unknowing complicity in such matters. Taylor argues that the classification laws all but eliminate the possibility of finding out what happened in Vietnam. If this were the case the leaders of government could mask their criminal or unlawful behavior. Consequently the only way justice could be done is by a revolution that lays open the files or as the result of a war in which the United States is overrun. Neither of these alternatives is tolerable.

Perhaps, as Dag Hammarsjold thought, it is necessary for smaller nations to discipline the leadership of the large nations since no nation is great enough to discipline its own. The legality of U.S. intervention in Vietnam could be brought to the International Court of Justice. Since both the complainant (a small state such as Sweden, for example) and the United States are parties

to the optional clause, the International Court would likely have jurisdiction. The United States would not be able to invoke the Connally reservation since interpretation of the anti-force articles and treaties such as the U.N. Charter and Kellogg Pact are not domestic questions. The small state could then argue that the International Court had jurisdiction since a weak state in a world run by highly-armed countries has a vital interest in the great powers observing the U.N. Charter sections and treaty obligations. Had such a case been brought by Cambodia in early 1970, that nation might not have been laid waste. It should be noted that if such a case were brought and successfully argued against the United States, it would mean that officials who operated in the framework of aggressive war would be in specific violation of the anti-force treaties and could be held responsible. Yet, self-disciplining and the forming of an internal accountability system is to be preferred.

The United States has prided itself on the ideology of accountability of its officials. This has been expressed, in the past, through the electoral process. But as that process becomes more peripheral to bureaucratic and institutional forces which are not subject to the elective process, redress through the courts becomes crucial. There is no reason why under present law the Supreme Court could not appoint a master, as in the situation of difficult anti-trust cases, to sift evidence and to ascertain whether there was a pattern of provocation which breached international law. Once remedial actions could be brought in the courts, citizens would not be without recourse against untrammeled and lawless policy-makers.

One would have thought that the Tokyo and Nuremberg judgments would have resulted in a code of behavior for civilians in the national security bureaucracy which could be enforced either by citizens or the Attorney General. It is crucial that Congress now initiate a code of conduct for national security officials using as the key the Tokyo and Nuremberg judgments. Such a code would define the difference between the use of military force for aggressive purposes, and its use in defense of the people of the United States. It should be remembered that in the World War II precedents a number of the accused in the Far East were sentenced to life imprisonment for crimes against peace.

In the latter part of the twentieth century, it is likely that many people in the name of a national community will insist that questions of war and peace should be decided by the people as a community, and not by the rulers. It will be insisted that the community have power to punish those who arrogate this authority unjustly to themselves. To achieve this goal will demand creative thought, teaching, and political struggles. In this and the other suggested reforms, it is to be hoped that Telford Taylor will play a large role.

1. There is a history in America on the matter of personal responsibility which goes back before the Nuremberg cases. In 1927 Senator Borah sponsored a resolution in the U.S. Senate as a way to protect the people against the follies of government which would then protect lawful governing. The resolution stated that as war *had* been a lawful institution among states, he wanted the Senate to resolve

"that it is the view of the Senate of the United States that war between nations should be outlawed as an *institution or means for the settlement of international controversies by making it a public crime under the law of nations,* and that every nation should be encouraged by solemn agreement or treaty to bind itself to indict and punish its own international war-breeders or instigators and war profiteers under powers similar to those conferred upon our Congress under Article I, Section 8 of our Federal Constitution, which clothes the Congress with the power to define and punish offenses against the law of nations. . . ."

The United States pressed Borah's argument in the allied case against Japanese leaders who were successfully tried for war crimes after the Second World War.