NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY. By TELFORD TAYLOR. Chicago: Quadrangle Books, Inc., 1970. Pp. 224. $5.95.

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I have very little fault to find with Professor Taylor's exposition of the law, both our own constitutional law and the international law of war, applicable to the hostilities in Vietnam. It appears accurate, lucid, and reasonable—an extraordinarily good summary, for the lay as well as the legal reader, of some extraordinarily difficult legal problems. In particular, I am in complete agreement with his conclusion that the law of war, as difficult as it may be to apply and enforce, is very much better than no law at all. Its existence has averted a great deal of suffering in the wars which have afflicted our species during the last half century or so.[1]

I have, of course, a few caveats about some of Professor Taylor's suggestions. For example, while agreeing that it might well be preferable to try the American soldiers accused of war crimes in the Song My incident before special military commissions composed of civilian lawyers and judges, instead of before courts-martial, I have some doubt whether that could legally be done. Certainly, if I were counsel for one of the accused, I could make a strong argument that under the Uniform Code of Military Justice [2] he is entitled to trial by general court-martial, with all the protection that implies.

Likewise, I have greater doubt than Professor Taylor as to the validity of the so-called "Nuremberg defense," a concept which in essence would permit an individual lawfully to refuse to obey orders to participate in training for combat in Vietnam, to go to Vietnam, or even to report for induction, on the ground that compliance with such orders would put him in a position in which he would be compelled to commit violations of the law of war.[3] My trouble with the concept is that I do not believe its basic premise. With few exceptions, the only violations of the law of war for which people have been punished have been deliberate, voluntary acts which the perpetrators must have realized were war crimes and which they were under no real compulsion to commit. An American soldier of ordinary intelligence and ordinary moral courage certainly can refrain from committing war crimes without fear of *legal* punishment, and he probably can do so without fear of extralegal penalties. Indeed, it seems obvious that the great majority of American soldiers do so refrain.

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[1] T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 40 (1970).

[2] 10 U.S.C. §§ 801-940 (1964).

[3] T. TAYLOR, *supra* note 1, at 15.

But even on these matters Professor Taylor's position and mine are not very far apart. Overall this is a commendable book. I would feel much happier about the world if such a work could be published, or even read, in China or Russia or North Vietnam.

I agree also with Professor Taylor's conclusion in his chapter on *Aggressive War* that the "crimes against peace" principle of the Nuremberg Charter cannot usefully be applied to the fighting in Vietnam, any more than it can be applied to the Arab-Israeli conflict. One of the many unique things about Adolf Hitler was that he scarcely bothered to claim that the Third Reich was the victim of aggression. World War II was one of the very few wars in history in which it could be said with something like certainty which side started it. On the evidence available, I incline toward the opinion that North Vietnam bears the major part of the responsibility for the breach of the 1954 Geneva Accord [4] and the initiation of violence in South Vietnam; but the situation is sufficiently tangled so that I am left with that reasonable doubt which, under our system of criminal law, forbids a conviction.

The core of the book is devoted to breaches in Vietnam of the conventional law of war. There can be no doubt that American soldiers have sometimes—far too often—been guilty of violations of those provisions of the Geneva Conventions which are clearly applicable, particularly in the mistreatment and killing of noncombatants and prisoners of war who were not in a position to commit hostile acts.[5] The Song My massacre, whoever was responsible for it, is an example of such a clear violation, although as Professor Taylor recognizes,[6] it seems to have been an extraordinary and perhaps unique episode. And, as Professor Taylor says, even it "pales into . . . insignificance" [7] when compared to some of the atrocities committed by the enemy.

Indeed, it may be that the root of the problem is exposed by Professor Taylor when he points out that North Vietnam and the Vietcong simply refuse to be bound by the conventional law of war.[8] Professor Falk, like their other champions, argues in substance that military necessity justifies that refusal.[9] As a practical matter, this argument cannot be lightly brushed aside. It is clear that if they, or the Palestinian guerrillas, were to adhere to the Hague Regulations,[10] the Geneva Conventions,[11] and the rest of the conventional law of war, particularly the fundamental principle that combatants are to be dis-

[4] *Agreement on the Cessation of Hostilities in Vietnam,* in IV MAJOR PEACE TREATIES OF MODERN HISTORY: 1648-1967, at 2689 (F. Israel ed. 1967).

[5] *See, e.g.,* conventions cited note 13 *infra.*

[6] T. TAYLOR, *supra* note 1, at 139.

[7] *Id.* 171.

[8] *Id.* 135-36, 173.

[9] *Id.* 137, *citing* 2 AMERICAN SOCIETY OF INTERNATIONAL LAW, THE VIETNAM WAR AND INTERNATIONAL LAW 240 (R. Falk ed. 1969).

[10] Annex to Convention between the United States and other Powers Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2295 (1911).

[11] *See, e.g.,* conventions cited note 13 *infra.*

tinguishable from, and as far as possible separated from, noncombatants, they would have small chance of military success. The difficulty is that if military necessity justifies the tactics of the guerrillas, it may also justify at least some of the tactics employed against them. Professor Taylor seems to incline toward the opinion that there should be a strong presumption against involvement in hostilities against an enemy whose tactics and strategy make it exceedingly difficult to resist him without endangering people whose deepest desire is to take no part at all in the fighting.[12] But the logical end of this reasoning would be that an aggressive power, determined to subject other people to its rule by force, cannot be resisted, if only it is sufficiently unscrupulous—that is, if it is willing to create conditions in which resistance will inevitably bring suffering upon innocent people. It is in essence the problem of the airplane hijacking.

Nevertheless, I do not think, and Professor Taylor does not think, that a civilized power, or one which wishes to be civilized, must or should scrap the laws of war simply because its enemy does so. At a minimum, it can comply with the very basic provision of article III of each of the Geneva Conventions, which provides that in the case of armed conflict not of an international character occurring in the territory of one of the high contracting parties, "[p]ersons taking no active part in the hostilities, including members of the armed forces who have laid down their arms . . . shall in all circumstances be treated humanely . . ." [13] and which provides that such persons shall not be subjected to violence, murder, or the carrying out of executions without previous judgment pronounced by a regularly constituted court. More broadly, it can refrain from violence which serves no military purpose or which bears no reasonable proportion to the military end in view. This is, of course, the declared policy of the United States and its allies, who assert that the Geneva Conventions are fully applicable to the war in Vietnam.

As Professor Taylor points out, these policies are already adequately implemented by regulations, orders, directives and so forth.[14] The problem is adequate enforcement of those orders, particularly those requiring reporting, investigation, and prosecution of violations of the laws of war by American troops. Although there is little evidence that higher commanders had any direct, affirmative responsibility for what

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[12] T. TAYLOR, *supra* note 1, at 172, 173.

[13] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. III, [1955] 6 U.S.T. 3116, T.I.A.S. No. 3362, 75 U.N.T.S. 32 (No. 970); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. III, [1955] 3 U.S.T. 3220, T.I.A.S. No. 3363, 75 U.N.T.S. 86 (No. 971); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. III, [1955] 3 U.S.T. 3318, T.I.A.S. No. 3364, 75 U.N.T.S. 136 (No. 972); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. III, [1955] 3 U.S.T. 3518, T.I.A.S. No. 3365, 75 U.N.T.S. 288 (No. 973).

[14] T. TAYLOR, *supra* note 1, at 168-69.

happened at Song My, there is some evidence to suggest, at least, that as high as division headquarters there was little interest in investigating and prosecuting those who may have been responsible. Professor Tayor is clearly right in saying that the legal priciples of In re *Yamashita* [15] are as applicable to American as to Japanese commanders; it is their duty under both American and international law to take such steps as are reasonably within their power "to insure compliance with the law of war or to punish violators thereof." [16] I would hope, however, that no commander, American or foreign, will ever again be convicted on such evidence as that in the *Yamashita* case, or the similar case of In re *Hirota*.[17]

This principle in turn requires that those whose personal morality does not forbid such acts must be deterred by fear of punishment. If investigation develops evidence of such clear-cut violations of the law of war as seem to have occurred at Song My, there should be courts-martial not only of those directly responsible but also of those who condone such conduct or fail to take reasonable measures to prevent it. I emphasize again that I have not as yet seen convincing evidence of such condonation or acquiescence at higher levels of command. And such trials should not be propaganda trials; like other courts-martial for serious offenses, they should ensure the accused all the protection to which he is entitled under the Uniform Code and the Constitution.

Such a course is not politically easy. Although the Army may seem to be doing less than it should to prosecute violations of the law of war committed by its own forces, it is doing more than has ever been done by any other belligerent during hostilities. As Professor Taylor makes clear, in the past the trial and punishment of war criminals has almost invariably taken place after defeat and in the courts of a totally victorious enemy. It is to the credit of the United States that even prior to the breaking of the Song My story it had court-martialed and convicted some of its own soldiers for crimes committed against noncombatants and prisoners of war. We should continue this policy, and more vigorously than we have in the past. A very large section of the public will, as Professor Taylor points out, ask the very human question why we should punish our own people for acts which the enemy commits much oftener and more brutally, when that enemy not only does not discourage such conduct by his own forces, but boasts of it. The only possible answer, I think, is that we have been, and wish to remain, a relatively civilized nation—I emphasize the word rela-

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[15] [1946] Ann. Dig. Pub. Int'l Law Cases 255 (1945) (No. 111) (U.S. Military Comm'n, Manila), *petition for habeas corpus & prohibition denied sub nom.* Yamashita v. Styer, 75 Philippine R. 563 (1945), *cert. & leave to file petitions for writs of habeas corpus and prohibition denied*, 327 U.S. 1 (1946).

[16] DEP'T OF THE ARMY FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 501 (1956); *cf. id.* ¶ 507(b).

[17] [1948] Ann. Dig. Pub. Int'l Law Cases 356 (1948) (No. 118) (Int'l Military Tribunal for the Far East, Tokyo), *leave to file petition for writ of habeas corpus denied sub nom.* Hirota v. MacArthur, 338 U.S. 197 (1948) (per curiam).

tively—with a tradition of respect for law, and that if we emulate the enemy's brutality we lose not only the respect of other civilized nations, but our self-respect.

The broader question raised by Professor Taylor, too broad to discuss now, is whether it is possible to devise some minimum, fundamental law to mitigate the brutality of what Chairman Mao calls "wars of national liberation." To have any chance of observance, such laws must be acceptable even to belligerents like the Vietcong or the Arab guerrillas in Palestine. (North Vietnam, of course, is in a different position; I can see no military or political purpose of that government which is served by its refusal to comply with the Geneva Prisoner of War Convention.) It will not be easy to work out even such minimal rules. And yet even the Palestinian guerrillas have little to gain from firing rockets into school buses and killing children. At any rate, lawyers and soldiers ought to give more thought to the shape of the laws which might govern even the hit-and-run guerrilla wars which have become common in many parts of the world in the last quarter of a century.