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A RESPONSE TO TELFORD TAYLOR'S
NUREMBERG AND VIETNAM:
*AN AMERICAN TRAGEDY*¹

WALDEMAR A. SOLF*

UNDER THE headline "Military Made the Scapegoat for Vietnam," Charles G. Moskos, Jr., Chairman of the Department of Sociology, Northwestern University, examines (1) the attitudes and behavior of combat soldiers in Vietnam and (2) the reaction of elite groups in our society. Professor Moskos commented:

It is a cruel irony that so many of our national leaders and opinion shapers who were silent or supported the original intervention during the Kennedy administration now adopt moralistic postures in the wake of the horrors of that war. There appears to be emerging a curious American inversion of the old "stab in the back" theory. Where the German general staff succeeded in placing the blame for the loss of World War I on the ensuing civilian leadership of the Weimar Republic, the liberal Establishment in America now seems to have embarked on placing the onus of the Vietnam adventure on the military.

. . . [A] minor industry exists in the production of books and lectures castigating the military mind, the Pentagon, and GI butchers.

. . . It would not be too far afield to say that antimilitarism has become the anti-Semitism of the intellectual community.²

Professor Telford Taylor,³ who is best remembered as Justice Robert H. Jackson's successor as Chief of Counsel at Nuremberg after the War Crimes trial of the major war criminals, became an instant giant of the new industry by suggesting that if one were to apply to Dean Rusk, Robert McNamara, McGeorge Bundy, Walt Rostow and General William Westmoreland the same standards that were applied in the trial of General Tomoyuki Yamashita "there would be a very strong possibility that they

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¹ T. TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY*. Random House, 1970. Pp. 224.

² *WAR CRIMES AND THE AMERICAN CONSCIENCE* 175-181 (Knoll & McFadden eds. 1970).

³ Columbia University Law School. Professor Taylor teaches Constitutional Law.

would come to the same end as he did."⁴ This suggestion by the person described on the dust jacket as "U.S. Chief Counsel at Nuremberg" inevitably elevates Professor Taylor to the status of a first magnitude star among the scapegoat makers.

Regretably, Professor Taylor produced a work replete with demonstrable errors of law and contradictions. He thereby forfeits the opportunity to assume a place among the very few who are qualified by experience and academic standing to produce "trustworthy evidence" of what international law really is.⁵ There are, of course, too many who, without experience in the field, write at length about what it ought to be⁶ and some who affirm that it is what it is not.⁷

PROFESSOR TAYLOR'S CHARGES

Stated broadly, Taylor attributes to influential policy makers criminal culpability under three categories:

1. *Commander's Responsibility for Acts of Subordinates*

As the senior American commander in Vietnam, General Westmoreland is vicariously liable for failing to prevent atrocities committed by troops under his command. These include:

- a. Slaughter of villagers.
- b. Wanton destruction of property.
- c. Complicity in the torture of prisoners by the South Vietnamese.
- d. Murder of prisoners of war.

2. *Unnecessary Killing and Devastation resulting from Tactical Decisions*

The manner in which military operations were conducted occasioned loss of life and unnecessary suffering disproportionate to the military advantage gained. Under this charge, Taylor mentions the forced resettlement of rural families, the creation of "free-fire" zones, and devastation of large areas of the country in order to expose the insurgents.

⁴ Interview with Professor Taylor on the Dick Cavett show on Jan. 8, 1971, as reported in the N.Y. Times, Jan. 9, 1971, at 3, col. 1.

⁵ See Mr. Justice Gray's comments in *Pacquete Habana*, 175 U.S. 677, 700 (1900).

⁶ Speculation as to the interpretation of treaties, or the practice of nations is a legitimate enterprise which may influence the development of international law.

⁷ Altering the text of a multilateral treaty appears to be a brand new approach. Compare the text of the Annex to Hague Convention IV, *Regulations Respecting the Law and Customs of War on Land*, as published in 2 FALK, *THE VIETNAM WAR AND INTERNATIONAL LAW*, 500ff (1969), with the official text in 36 STAT. 2277; T.S. No. 539; II Malloy Treaties at 2269. One criticism levelled at law making treaties on the law of war is that they are hindsight oriented to the experience of the last war. But if the Falk text is correct, the 1907 Hague Regulations anticipated strategic bombing some eight or nine years before the first enterprising observation pilot thought it expedient to toss a grenade from the cockpit of his plane.

3. *The Strategic Charge*

The decision to use military rather than political means of aiding South Vietnam did not gain a military advantage and was therefore unnecessary. Unnecessary military violence is criminal.

These charges will be discussed in reverse order.

THE STRATEGIC CHARGE

In discussing President Johnson's strategic decision of 1965, when confronted with a deteriorating situation, to deploy large mobile forces to Vietnam, Taylor implies that military success supplies its own justification of military necessity. Conversely, he implies that military failure is proof that no military advantage was to be gained by the course of action followed and that the resulting ravages of war are therefore unnecessary. He quotes with approval Colonel Corson's view⁸ that:

"... American judgment as to the effective prosecution of the war was faulty from beginning to end"; that we became "over-involved militarily in the armed forces of the present, under-involved politically in the human forces of the future"; and that in the upshot our political and military leaders alike lost sight of the old law of war that "it is a mistake, illegal and immoral, to kill people without clear military advantage in a war."⁹

Stating the objective of U.S. policy in Vietnam to be "to stop Communism at the 17th parallel," Taylor suggests that the strategy selected in 1965 involving the use of mobility and massive fire power by large military forces foreseeably resulted in high civilian casualties and property destruction. In his view this course of action was not successful in achieving the stated objective, and, therefore, the casualties and devastation could not be justified by military necessity.¹⁰

Taylor's view of how the Vietnam conflict should have been conducted is one which cannot be assessed conclusively except by the judgment of history. The concept that unsuccessful military operations are their own proof of unnecessary violence injects a new dimension — *res ipsa loquitur* — to the basic principle of military necessity as justification for the violence of war.

Military necessity was stated at Nuremberg as permitting:

[A] belligerent, *subject to the laws of war*, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money. . . . It permits the destruction of life of armed enemies and other persons whose

⁸ R. CORSON, *THE CHANGING NATURE OF WAR* (1970).

⁹ TAYLOR, *supra* note 1, at 188.

¹⁰ *Id.* at 189-192.

destruction is incidentally unavoidable by the armed conflict of the war; . . . but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. . . . It does not admit the wanton devastation of a district or the willful infliction of suffering for the sake of suffering alone.¹¹ (Emphasis added.)

The Nuremberg courts considered it to be their duty to consider the defense of military necessity in the light of the facts and circumstances as they appeared to a decision maker at the time he made his decision; not on the basis of hindsight. Some of these circumstances, omitted from Taylor's perspective, are:

By 1964 the Vietcong were preparing for the third or final phase of insurgency — the formation of conventional armed forces to destroy the Saigon Government — while simultaneously stepping up guerrilla and political warfare. A Vietcong division was formed for the final phase. In December 1964 it attacked the village of Binh Gia, 40 miles east of Saigon, and virtually annihilated two South Vietnamese battalions. At the same time, the first commitment of regular North Vietnamese Army regiments had taken place near Dak To in the Central Highlands.

Capitalizing on the political disorders which affected the Saigon government, upon the infirmity of government administration throughout the country, and the deteriorating morale of the Vietnamese armed forces, the North Vietnamese and the Vietcong were moving in for the kill. Additional North Vietnamese forces were on the move through Laos.

¹¹ *United States v. List, XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS* U.S. GPO 1253-54 (1950-51). [Hereinafter cited as *TRIALS OF WAR CRIMINALS*.] One of the more interesting contradictions in Taylor's book is his apparent approval of the repudiated German doctrine of military necessity (*Kriegsraison*) which proclaimed that any action—whether or not prohibited by the law of war—may be taken if it is necessary for the purposes of war. (See *United States v. Von Leeb, XI TRIALS OF WAR CRIMINALS, supra* at 541 for the rejection of *Kriegsraison*.) He refers to the emphatic prohibitions of conventional and customary law of war against the killing of prisoners of war, and suggests that these absolute prohibitions may be disregarded under the "operation of military necessity." In a footnote he states that:

The Lieber rules of 1863 recognized this necessity by providing that a commander may be permitted to direct his troops to give no quarters, in great straits, when his own salvation makes it *impossible* to cumber himself with prisoners. The . . . recent Army manuals contain no comparable provision.

TAYLOR, *supra* note 1, at 35-36. Indeed they do not. Paragraph 85 of the 1956 *FIELD MANUAL, The Law of Land Warfare*, provides:

A commander may not put his prisoners to death because their presence retards his movements or diminishes his power of resistance. . . . It is likewise unlawful for a commander to kill his prisoners on grounds of self preservation, even in the case of airborne or commando operations

Military necessity cannot be used to justify acts forbidden by the law of war inasmuch as necessity was discounted in framing the prohibitory rule. A moment's reflection should show that it is never necessary to kill a disarmed prisoner. If the military mission is such that prisoners might "cumber" the unit, their weapons can be destroyed and the prisoner be bound where they can be later recovered by their friends.

The weakness of the government stemmed in part from the fact that since 1962 there had been over 6,000 assassinations and 30,000 kidnappings among the civilian population. 463 government officials had been assassinated and 1,113 had been kidnapped in 1964 alone.

By the late spring of 1965, the South Vietnamese Army was losing each week almost one infantry battalion to enemy action. Moreover, the enemy was gaining control of at least one district capital town each week.

Pacification programs and land reform could not continue in the face of the deteriorating security situation. The Government, unable to meet the crisis with its own resources, called for the support of U.S. ground forces.¹²

Bernard Fall's contemporary judgment of the 1965 decision to deploy ground forces to Vietnam is that:

[It resulted in] the First Battle of the Marne of the Vietnamese war, . . . no turning point as yet, but a halt to the runaway disaster.

In South Vietnam, after being stopped at Chu-Lai, Plei-Me and the Ia-Drang, the Communist regulars lost enough of their momentum for the time being not to be able to bring about the military and political collapse of the Saigon government late in 1965 — a situation which would have altogether closed out the American "option" of the conflict.¹³

Whatever may be the judgment of history as to whether President Johnson had any other alternative, hindsight is not one of the tools legitimately used by courts in assessing criminal liability for the use of unnecessary force. As early as 1851, in a case arising out of the war with Mexico, the Supreme Court had occasion to comment:

In deciding upon . . . necessity, the state of the facts as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable grounds for believing that the peril is immediate and menacing, or the necessity urgent, he is justified upon it; and the discovery afterwards that it was false or erroneous will not make him a trespasser. . . ."¹⁴

Even more cogent is the judgment of the tribunal of which Professor Taylor was Chief of Counsel in the case of General Lothar Rendulic. In order to provide his forces with time in which to evade advancing Russian forces, General Rendulic adopted a scorched earth policy which devastated the Norwegian province of Finmark. The inhabitants were

¹² Westmoreland, *Report on the War in Vietnam*, U.S. GPO 197-198 (1968).

¹³ B. FALL, *LAST REFLECTION ON A WAR* 172 (1967).

¹⁴ *Mitchell v. Harmony*, 54 U.S. (13 How.) 420 (1851).

evacuated and all villages, housing, communications and transport facilities were completely destroyed. In retrospect, it appears that the devastation was not necessary. Rendulic was charged with wanton destruction not justified by military necessity. On these facts the court commented:

We are not called upon to determine whether urgent military necessity for the devastation and destruction of Finmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time. The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty of his intentions It is our considered opinion that the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgment but he was guilty of no criminal act. We find the defendant not guilty on this portion of the charge.¹⁵

Taylor was not oblivious to these principles. He searched for evidence that, by the exercise of reasonable diligence, it would have been foreseeable in 1965 that the strategy of mobility and firepower was not suitable to the attainment of the stated objective. The evidence he cited are expressions of German diplomats protesting that the massacre of Klissura and reprisal shootings of villagers ordered by Nazi commanders only served to strengthen guerrillas hiding in the woods and mountains of Greece and Yugoslavia.¹⁶

The relevance of massacres and atrocities in occupied areas to the strategic decision to deploy large forces to Vietnam is hard to follow unless Taylor means to imply that what happened to Son My was a planned part of that strategy.

THE TACTICAL CHARGE

The law of war provides extensive protection to military personnel after they lay down their arms,¹⁷ to the sick and wounded members of

¹⁵ United States v. List, *supra* note 11, at 1296-97.

¹⁶ TAYLOR, *supra* note 1, at 192-95.

¹⁷ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, T.I.A.S. No. 3364.

armed forces,¹⁸ and to civilians in territory actually and effectively occupied by a hostile force.¹⁹

The law as it really is, however, extends only rudimentary protection to civilians who get caught in the cross fire of military operations on the battle field. These protections for noncombatant civilians in the area of hostilities are derived from the principle of military necessity and its converse, the rule of proportionality which provides that loss of life and damage to property must not be out of proportion to the military advantage gained. From these principles certain minimal rules may be said to be derived under the customary law of war.

a. Noncombatant civilians must not be made the object of attack directed at them alone.²⁰

b. Pillage and unnecessary destruction of property is forbidden.²¹

c. Civilians — like prisoners of war — in the hands of their enemy must be treated humanely and may not be murdered, tortured or mutilated or otherwise subjected to inhumane treatment.²²

Taylor correctly points up the state of the law in this regard:

It is sad but true that the weak and helpless are not exempt from the scourge of war. Indeed, they are likely to be the first to succumb to the starvation and other deprivations that are the consequence and, indeed, the purpose of an economic blockade. In this day and age they are at least as often the victims of aerial bombardment as are

¹⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, T.I.A.S. No. 3362; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, T.I.A.S. No. 3363.

¹⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 47ff, T.I.A.S. No. 3365; Annex to Hague Convention IV, Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 42-56, 36 Stat. 2277, T.S. No. 539.

²⁰ FIELD MANUAL 27-10. *Law of Land Warfare*, para. 3 (1956); although UN General Assembly resolutions are not law, it may be fair to state that Resolution 2444 (XXIII) Dec. 19, 1968, is a fair statement of the present law. There are, of course, several moves under way to improve the protection of civilians in armed conflict. These, however, are not the law today.

²¹ See Hague Convention, *supra* note 19, at art. 23g. The Hague Regulations are generally considered as declaratory of customary law.

²² Although not free from doubt, it is probable that Common Article 3 of each of the 1949 Conventions, expressly applicable in armed conflicts not of an international character, expresses the minimum standard applicable to all victims of war who do not, or are no longer actively engaged in hostilities. Article 3 does not preclude the detaining power from punishing insurgents after a fair trial. But minimum standards of humane treatment are required. In the words of the ICRC commentary on Article 3:

[The Article] . . . merely demands respect for certain rules, which are already recognized as essential in all civilized countries. . . . What Government would . . . claim before the world, in case of civil disturbance which could justly be described as mere banditry, that, Article 3 not being applicable, it was entitled to leave wounded uncared for; to torture and mutilate prisoners, and to take hostages? (Pictet, Commentary, III Geneva Convention 36).

regular troops. The death of an infant in consequence of military operations, therefore, does not establish that a war crime has been committed.²³

A close look at the Geneva Civilians' Convention will show that the conventional law of war distinguishes between the law applicable in occupied territory on the one hand, and the minimum protection to the population generally (including the battle area) on the other.²⁴ It distinguishes, moreover, between "protected persons" and others. Professor Taylor recognizes that the term "protected persons" (who are entitled to more extensive protection than other victims of war) does not include nationals of a co-belligerent state "while the state of which they are nationals has normal diplomatic representation in the State in whose hands they are."²⁵

In considering Taylor's charges with respect to the tactics employed by U.S. forces a distinction must be drawn between the rules applicable to the conduct of hostilities — where the military objective is the defeat and destruction of the enemy and his war making potential — and the rules of belligerent occupation — where the military objective is the security of the area and the forces of the occupying belligerent.

How much, if any, part of South Vietnam could, in the 1965-1968 time frame, be considered to be occupied territory? Certainly the cities which had been spared devastation except from Viet Cong and North Vietnamese terror attack were not occupied by U.S. forces. Neither were rural areas firmly under Government control. The disputed areas were more likely to be classified as battle areas. Mere reconnaissance in force and hit and run forays into Viet Cong stronghold areas for the purpose of finding, fighting, fixing and destroying enemy forces, their secure bases, and their stockpiles of war supplies did not result in occupation.²⁶ Were the "free fire areas" and the forced resettlement of rural families — of which Taylor and other war critics complain, to be judged in the light of the rules applicable in occupied areas or in the light of those applicable in battle areas?

The fluid military situation that prevailed in 1965-1968 involved not only guerrilla warfare as described by Taylor, but also the employment of large division size units based in Cambodian and Laotian sanctuaries as well as in such Viet Cong strongholds as the Mekong Delta and War

²³ TAYLOR, *supra* note 1, at 134-35. See also Pictet, Commentary, IV Geneva Convention, ICRC 10 (1956).

²⁴ Compare Part II (Articles 13-26) with Articles 47-131, Geneva Civilians Convention, *supra* note 19.

²⁵ Geneva Civilians Convention, *supra* note 19, at Art. 4.

²⁶ Hague Regulation, *supra* note 7, Art. 43 provides: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only where such authority has been established and can be exercised."

Zones C and D. These areas were honeycombed with underground bunker complexes. These large units were capable of fighting in conventional formations, as well as in smaller guerrilla bands. The military problem presented in disputed areas and the law applicable thereto is described by Taylor:

. . . [I]n Vietnam the weaker inhabitants are not only victims, but often also participants. It is not necessary to be a male, or particularly strong, to make a booby-trap, plant a mine, or toss a hand grenade a few yards. American soldiers are often the losers in these lethal little games played by those who appear helpless and inoffensive. Furthermore, these actions are not occasional aberrations; on the contrary, they are basic features of Vietcong strategy. As the leading military figure of North Vietnam, General Vo Nguyen Giap, has put it:

The protracted popular war in Vietnam demanded . . . appropriate forms of combat: appropriate for the revolutionary nature of the war in relation to the balance of forces then showing a clear enemy superiority. . . . The form of combat adopted was guerrilla warfare . . . each inhabitant a soldier; each village a fortress. . . . The entire population participates in the armed struggle, fighting, according to the principles of guerrilla warfare, in small units. . . . This is the fundamental content of the war of people.

Now, guerrilla warfare is not intrinsically unlawful, but as waged by the Vietcong it is undeniably in violation of the traditional laws of war and the Geneva Conventions, based as they are on the distinction between combatants and noncombatants. Combatants need not wear uniforms (which the North Vietnamese generally do) but must observe the conventional four requirements: to be commanded by a person responsible for his subordinates; to wear a fixed distinctive emblem recognizable at a distance; to carry arms openly; and to conduct their operations in accordance with the laws and customs of war. The Vietcong commonly disregard at least the second and third provisions, and in response to the Red Cross inquiry, declared that they were *not* bound by the Geneva Conventions, on the grounds that they were not signatories and that the conventions contained provisions unsuited to their action and their organization . . . of armed forces.

Like a spy, a guerrilla may be a hero, but if he engages in combat without observing the requirements, he violates the laws of war and is subject to punishment, which may be the death penalty. Nor is there any special court for juveniles; the small boy who throws a grenade is as "guilty" as the able-bodied male of military age. This may seem a harsh rule, but it is certainly the law, and its continuing validity was reaffirmed in several of the Nuremberg trials.²⁷

Taylor's statement of the law is correct, and if the letter of Article 4

²⁷ TAYLOR, *supra* note 1, at 135-136.

of the Geneva Prisoner of War Convention were followed, few Viet Cong would be entitled to prisoner of war status. The U.S. directives to field forces on prisoners of war, however, extend the status of privileged combatants to all persons captured while engaged in combat or committing other belligerent acts. It is also extended to irregulars and guerrillas who have engaged in combat. It excludes only terrorists, saboteurs, and spies.²⁸ Concerning this directive the International Committee of The Red Cross delegate to Saigon had occasion to say:

The MACV instruction . . . is a brilliant expression of a liberal and realistic attitude. . . . This text could very well be a most important one in the history of the humanitarian law, for it is the first time . . . that a government goes far beyond the requirements of the Geneva Convention in an official instruction to its armed forces. The dreams of today are the realities of tomorrow, and the day those definitions or similar ones will become embodied in an international treaty . . . will be a great one for man concerned about the protection of men who cannot protect themselves. . . . May it then be remembered that this light first shone in the darkness of this tragic war of Vietnam.²⁹

The laws of war are based on the past experience of the major powers. The drafters of the Hague Convention on the Laws of War of 1907 looked back to the wars of the nineteenth century; the Geneva Conventions For the Protection of War Victims of 1929 were considered in the context of World War I; and the Geneva Conventions For the Protection of War Victims of 1949 dealt with issues which arose in World War II. In most instances they envisioned relatively stable fronts, orderly lines of communication, and secure rear areas. The participation of guerrilla bands was recognized but only as a side issue.

The divergence between what the drafters of the rules of war envisioned and the situation in Vietnam required innovative application of the basic principles to the situation confronting the Free World forces. These innovations resulted in U.S. policies, directives and procedures which Taylor calls "virtually impeccable."³⁰

Among the policies adopted to protect noncombatants was their evacuation from the battle area - the so called "forced resettlement of rural families". In this connection all that need be said is to cite the UN Secretary General's 1970 report to the General Assembly on *Respect for Human Rights in Armed Conflict*:

²⁸ Military Assistance Command, Vietnam Directive 381-46, Annex A, 62 AM. J. INT'L L., 766 (1968).

²⁹ Haight, *The Geneva Convention and the Shadow War*, U.S. Naval Institute Proceedings, 47 (1968).

³⁰ TAYLOR, *supra* note 1, at 162; See Report of the Department of the Army Review of the Preliminary Investigation into the My-Lai Incident, ch. 9 (Mar. 1970). [Hereinafter referred to as the Peers Report].

... [T]he circumstances of modern warfare may render difficult an adequate protection of civilians in all situations. . . . It would seem, therefore, that, while military personnel should exercise caution and respect, to the limit of the possible, the relevant norms relating to the protection of civilians under any circumstances, the most effective way of minimizing or eliminating the risk to civilians would be to make systematic efforts to the effect that civilians do not remain in areas where dangers . . . would be prevalent.

The importance of such efforts bear emphasizing, and the cause of the protection might be enhanced if the General Assembly would consider the usefulness of including as part of an appropriate resolution a call on all authorities involved in armed conflicts of all types to do their utmost to ensure that civilians are removed from, or kept out of, areas where conditions would be likely to place them in jeopardy or to expose them to the hazards of warfare.³¹

Taylor's objection to the forced evacuation of rural families is that it is violative of Article 49 of the Geneva Civilians Convention. That article is to be found in the section dealing with Occupied Territory and was primarily intended to forbid the Nazi practice of the mass evacuations and deportations from occupied territory to provide slave labor for the German war industry.³²

The technique to which Taylor objects is declaring an area from which civilians are evacuated as a "free fire zone" and then to attack the presumed enemy with artillery fire or air strike without prior clearance from the Vietnamese provincial authorities.³³

The Peers report describes this policy:

In 1966, certain . . . areas were declared as cleared areas to all Free World Military Assistance forces by GVN and became known as "free fire zones." Simply stated, a free fire zone was a specifically delineated geographic area, that had been previously approved for use of all means of fire power and maneuver. Such an area was cleared for firepower unless notification to the contrary was given. In 1967 MACV replaced its use with the term "specified strike zone (SSZ)." An SSZ was defined as "those areas approved by a province chief where a strike may be conducted without additional political clearance."³⁴

This fire control technique, used in areas where a maximum effort had been made to clear the civilian population from a planned battle area, is included within the Rules of Engagement which Taylor describes

³¹ UN Doc A/8052, at 15 (1970).

³² Pictet, *supra* note 23, at 277-280.

³³ TAYLOR, *supra* note 1, at 145-46.

³⁴ Peers Report, *supra* note 30, at 9-7.

as "virtually impeccable." Nevertheless, Taylor indicts the top leadership for conducting air strikes in such areas.

In contrast to his finding that "free fire zones" violate the law of war, Taylor gives the aerial bombardment of North Vietnam a legal clearance, "I can see no sufficient basis for war crimes charges based on the bombing of North Vietnam. Whatever the law of war *ought* to be, certainly Nuremberg furnishes no basis for the accusations."³⁵

Taylor thus indicts the use of fire power and mobility to strike known enemy areas from which an effort had been made to remove non-combatants, while approving the use of air bombardment in North Vietnam where there was no means to clear the civilian population from the target area. His reasoning is hard to follow. Strategic bombardment of populated places was not considered a war crime at Nuremberg. Neither was the tactical use of fire power in battle areas against military targets notwithstanding that civilian casualties resulted incidentally from both. The United Nations War Crimes Commission, after analyzing the World War II war crimes cases found that the laws of war which relate to actual conduct of hostilities were seldom made the basis of war crimes prosecution.³⁶

Unquestionably there have been cases when air power or artillery fire was deliberately misused. Such incidents inevitably occur in war. Whenever reasonable evidence of war crimes is presented to responsible commanders it results in investigation and, if substantiated, in trial by court-martial.³⁷

After analyzing Henry Salsbury's report on air bombardment of North Vietnam and the statements made at the Bertrand Russell War Crimes trials, Taylor found them insufficient to substantiate allegations of intentional air attack against civilians as such.³⁸ But on the same type of secondary evidence—the works of journalists—he is willing to assume widespread reprisal attacks against innocent civilians in South Vietnam. One may wonder how frequently journalists who came upon the evidence of war crimes, reported them through appropriate military channels so that an appropriate investigation might be made before the loss of witnesses. How often did they save them up for publication in the new industry of the scapegoat makers?

³⁵ TAYLOR, *supra* note 1, at 142.

³⁶ U.N. War Crimes Commission, XV LAW REPORTS OF TRIALS OF WAR CRIMINALS, London H.M. Stationery Office 109 (1947-1949). [Hereinafter cited at XV LAW REPORTS].

³⁷ TAYLOR, *supra* note 1, at 155.

³⁸ *Id.* at 142.

COMMANDER'S RESPONSIBILITY FOR ACTS OF HIS SUBORDINATES

The principle that a commander may be responsible for the acts of his subordinates is a traditional one. During the Black Hawk War of 1832, Abraham Lincoln, then a captain of militia, was convicted by a court-martial for failing to control his men who had opened the officers' supply of whiskey and partook thereof to the extent that some straggled on the march. He was sentenced to carry a wooden sword for two days.³⁹

In preventing war crimes, however, Captain Lincoln's military record was somewhat better. It is recorded that an old Indian with a safe conduct rambled into the camp and the men rushed to kill him. Lincoln jumped to the side of the Indian and by effective command action prevented the atrocity.⁴⁰

The principle of command responsibility is stated in the Army Field Manual:

In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.⁴¹

That principle was applied at "Nuremberg" which Professor Taylor defines as "both what actually happened there and what people think happened, and the second is more important than the first."⁴² In particular he refers to the case of General Tomoyuki Yamashita which most vividly projects in the popular mind an image of absolute command responsibility.⁴³

³⁹ SANDBURG, *ABRAHAM LINCOLN* 30 (one vol. 1954).

⁴⁰ *Id.*

⁴¹ FIELD MANUAL 27-10, *supra* note 20, at para. 501.

⁴² TAYLOR, *supra* note 1, at 13-14.

⁴³ Reel, *Commentary on Taylor's charges*, N.Y. Times, Jan. 19, 1971, at 36, col. 3 (Letters to the editor). A. Frank Reel, who had been one of General Yamashita's defense counsel, indicates that Yamashita was punished not for anything he had done, but because of the position he had held.

Professor Taylor asks the broad question:

... [A]re the people of the United States able to face the proposition that Jackson put forth in their name, and examine their own conduct under the same principle that they applied to the Germans and Japanese at the Nuremberg and other war crimes trials?⁴⁴

Later, referring specifically to the Yamashita case he suggests:

... [T]he Son My courts-martial are shaping the question for us, and they cannot be fairly determined without full inquiry into higher responsibilities. Little as the leaders of the Army seem to realize it, this is the only road to the Army's salvation, for its moral health will not be recovered until its leaders are willing to scrutinize their own behavior by the same standards that their revered predecessors applied to Tomoyuki Yamashita 25 years ago.⁴⁵

Appearing on the Dick Cavett television show of January 8, 1971, he stated more explicitly:

If you were to apply to [people like General Westmoreland] . . . the same standards that were applied in the trial of General Yamashita there would be a strong possibility that they would come to the same end as he did.⁴⁶

The scope of the ensuing discussion deals with two distinct "Nuremberg" standards:

a. The substantive standard: What level of omission is necessary to hold a commander vicariously liable for the offenses committed by his subordinates not ordered by him?

b. The procedural standard: By what standard should criminal charges against a commander be adjudicated?

The Substantive Standard

The context in which Professor Taylor's implications are made requires a brief recital of the Yamashita case.

General Yamashita commanded the Fourteenth Army Group of the Japanese Army in the Philippine Islands during the last year of the Japanese occupation from October 9, 1944 until September 3, 1945 when he surrendered to American forces and became a prisoner of war. On September 25 he was charged with a violation of the law of war specifying that he "unlawfully disregarded and failed to discharge his duty to control the operations of the members of his command per-

⁴⁴ TAYLOR, *supra* note 1, at 13.

⁴⁵ *Id.* at 182.

⁴⁶ N.Y. Times, Jan. 9, 1971, at 3, Col. 1.

mitting them to commit brutal atrocities and other high crimes. . . ."⁴⁷

The trial, which began on October 8, 1945 resulted in his conviction on December 7, 1945.

The proof adduced against General Yamashita showed that during his tenure in command a large number of Filipinos and Americans, including prisoners of war, guerrillas, and innocent civilians were brutally mistreated.

There was some testimony that certain offenses reflected official policy, and some occurred in the immediate vicinity of General Yamashita's headquarters. There was also some testimony indicating direct knowledge on the part of General Yamashita. The credibility and competence of much of this inculpatory evidence is discussed in the section dealing with the procedural standard. Suffice it to say that under the rules established for the commission it was received in evidence—over vigorous defense objection—and obviously considered by the members of the commission.⁴⁸ Moreover, even if the direct evidence of knowledge and complicity were excluded, the Government contended in the Supreme Court that the large number of atrocities shown offered circumstantial evidence of knowledge and a consistent policy of lawlessness.⁴⁹

The theory of the defense was that because of the confusion attending the defeat of his forces, General Yamashita had no knowledge of any atrocity and that he did not have the capability to exercise the required command control.

The defense adduced no evidence of any command action to prevent atrocities; there was no evidence of any personal intervention on the part of the commander to require adherence to the law of war, nor was there any showing that the processes of Japanese military justice were invoked to punish any perpetrators of war crimes. Yamashita did testify that had he known of the atrocities he would not have condoned them.

It is in the context of the defense of ignorance of fact that Taylor contends that "in sharp contrast [to the circumstances] that confronted General Yamashita in 1944 and 1945, with his forces reeling back in disarray before the oncoming American military power house," American military commanders "were splendidly equipped with helicopters and other aircraft which endowed them with every opportunity to keep the course of fighting and its consequences under close and constant observation."⁵⁰

⁴⁷ *In re Yamashita*, 327 U.S. 1, 5, 13-14 (1946). Bills of Particular alleged 123 gross atrocities committed by members of the forces under his command. *Id.* at 14.

⁴⁸ See note 77 *infra*, and LAW REPORTS, *supra* note 36, Vol. IV, at 18-23.

⁴⁹ Brief of Respondent 55-56.

⁵⁰ TAYLOR, *supra* note 1, at 181.

The relevance of this rhetoric is obscure. As far as can be determined, it has never been contended that American commanders were unaware that war crimes had been committed by Americans in Vietnam, nor does Taylor cite any such claim. He describes as "virtually impeccable"⁵¹ the command directives issued by General Westmoreland in an effort to prevent war crimes,⁵² to insure that known or suspected war crimes are promptly reported, investigated and processed to action.⁵³ He is aware that substantiated allegations of violations of the law of war have usually resulted in trials by court-martial.⁵⁴ He fails to record the manifestations of General Westmoreland's command emphasis, follow-up and personal concern in the prevention of war crimes as recorded in the Peers report.⁵⁵ If he considers that General Westmoreland knew of Son My before the belated letter of Mr. Ron Ridenhour, on March 1969,⁵⁶ he fails to make that allegation and offers no proof. He fails, moreover, to cite the detailed procedures on handling prisoners of war and civilian detainees which are available in the public domain, and which go far beyond the letter of the Geneva Prisoner of War Conventions in according prisoners of war protection to guerrillas who do not meet the Convention

⁵¹ *Id.* at 168. "Impeccable" directives are usually issued in response to a problem which he caused concern to the commander.

⁵² MACV Directive 27-5, Nov. 2, 1967, quoted in 62 AM. J. OF INT'L. L. 765 (1968); Peers Report, *supra* note 30, at 9-12.

⁵³ *Id.* MACV Directive 27-4; Peers Report, *supra* note 30, at 9-10 to 9-12.

⁵⁴ TAYLOR, *supra* note 1, at 55. See note 97, *infra* for an analysis of relevant court-martial statistics.

⁵⁵ At page 9-14, 9-15, the Peers Report, *supra* note 30, states:

MACV published several other documents pertaining to U.S. policy with regard to ROE (Rules of Engagement), treatment of Vietnamese nationals, and the reporting of war crimes. Letters, memoranda, and messages emphasizing COMUSMACV's concern for these subjects, and reaffirmations of MACV policy were published on many occasions. In addition, the COMUSMACV command policy file emphasized these subjects. At his Commander's Conferences, COMUSMACV repeatedly discussed the necessity for proper treatment of Vietnamese nationals and proper control of firepower.

On 3 December 1967, General Westmoreland closed his Commander's Conference by directing each commander to reduce firing accidents, report all accidents/incidents direct to MACV, and insure that all troops understand the "Nine Rules" that govern their conduct in RVN. Documentation of COMUSMACV policy and interest in these areas was and is plentiful.

The necessity for subordinate commanders to implement the MACV directives as well as the stated and implied policies was also emphasized. The chain of command within the MACV unified command afforded the means for the necessary delegation of authority to implement MACV policies. Within the chain of command, subordinate units usually published directives elaborating upon the regulations of the higher headquarters and insuring that at their lower level of command the specifically directed responsibilities assigned to them were further implemented. Another factor used by subordinate headquarters in determining applicability or the requirements to implement the directives of a higher headquarters was the mission assigned to the subordinate unit.

⁵⁶ Peers Report, *supra* note 30, at 1-7.

standard.⁵⁷ Nor does he acknowledge that the International Committee of the Red Cross had ready access to American prisoner of war collecting points and Vietnamese internment camps.

By his Yamashita analogy, Professor Taylor must be alluding to "what people think" is the Nuremberg standard, that a commander is per se criminally liable for the misconduct of his troops, but neither the *Yamashita* case⁵⁸ nor Nuremberg went that far.

The United States Supreme Court, which determined only the jurisdiction of the tribunal and whether the charge alleged an offense, stated the standard as follows:

[The provisions of the Hague Conventions and the 1929 Geneva Convention] plainly impose on the petitioner . . . an affirmative duty to *take such measures as were within his power and appropriate in the circumstances* to protect prisoners of war and the civilian population.⁵⁹ (Emphasis added).

What actually happened at Nuremberg is more explicit. Professor Taylor, then the prosecutor in the High Command case, urged that under the Hague regulations a military commander is per se responsible for crimes committed within the area of his command. The tribunal rejected Professor Taylor's argument:

Modern war . . . entails a large measure of decentralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of administrative measures. He has a right to assume that details entrusted to responsible subordinates will be legally executed There must be personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. *In the latter case, it must be a personal neglect amounting to wanton, immoral disregard of the action of his subordinates amounting to acquiescence.*⁶⁰ (Emphasis added).

The degree of negligence defined as criminal by the Nuremberg Tribunal is in striking contrast to that which Professor Taylor describes. Referring to Colonel Corson's statement "that the atrocities, alleged or otherwise, are a result of bad judgment, not criminal behaviour," Taylor

⁵⁷ Annex A of MACV Directive 381-46 of Dec. 27, 1967, *Criteria for Classification and Disposition of Detainees*; MACV Directive 20-5 of Mar. 15, 1968, *Prisoners of War—Determination of Eligibility*; published in 62 AM. J. OF INT'L. L. 765-775 (1968).

⁵⁸ The Commission believed that "the crimes were so extensive and widespread, that they must have either been wilfully permitted, or secretly ordered by the accused." See note 77 *infra*.

⁵⁹ *In re Yamashita*, 327 U.S. 1, 10 (1945).

⁶⁰ *United States v. Von Leeb*, XI TRIALS OF WAR CRIMINALS, *supra* note 11, at 534-44.

reverts to his role as prosecutor: "Colonel Corson overlooks, I fear, that negligent homicide is generally a crime of bad judgment rather than evil intent."⁶¹

I fear that Professor Taylor has overlooked the fact that negligent homicide is usually a misdemeanor of relatively recent origin found in motor vehicle codes. It is predicated on simple negligence in the operation of motor vehicles and was probably intended to provide a reasonable compromise verdict in involuntary manslaughter cases.⁶² It has no relation to the international law of war, at least not with respect to grave breaches as defined in Article 130 of the Geneva Prisoners of War Convention or Article 147 of the Geneva Civilians Convention. These denounce the commission, or order to commit, against protected persons the following:

Willful killing, torture or inhuman treatment . . . *willfully* causing great suffering or serious injury to body or health, *willfully* depriving a protected person of the rights of fair and regular trial prescribed in the . . . Convention; and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. (Emphasis added).

There remains for consideration another relevant matter: a commander's authority over military justice.

The military commission which condemned General Yamashita delivered a brief explanation for its findings. In part, it stated:

Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility It is for the purpose of maintaining discipline and control, among other reasons, that military commanders are given broad powers of administering military justice⁶³

The commission consisted of five general officers who were unquestionably familiar with the authority commanders exercised during World War II in respect to the administration of military justice. It was the matter of command control over courts-martial which lead to the enactment of the Uniform Code of Military Justice, which forbids specifically

⁶¹ TAYLOR, *supra* note 1, at 178, *cf.*, his view on bombing in North Vietnam at 140; *cf. also* United States v. List, *supra* note 11.

⁶² PERKINS, CRIMINAL LAW 75-76 (2d ed. 1969). In military law negligent homicide is not limited to motor vehicle cases. The standard, however, is simple negligence. Manual for Courts-Martial, U.S., para. 213f (12) (rev. ed. 1969).

⁶³ Record of the trial before the Military Commission, convened by C. G. U.S. Army Force, Western Pacific, at 4061.

many of the practices prevalent when Professor Taylor was in uniform.⁶⁴ As a Unified Commander, General Westmoreland was not authorized to convene courts-martial. Except for the authority to refer reports of investigation to a subordinate for appropriate action, he could not influence the judicial discretion of any subordinate commander, much less that of a court-martial.⁶⁵ Even the appearance of command influence brings down the condemnation of the United States Court of Military Appeals,⁶⁶ and affords fuel for other segments of the new industry.⁶⁷

Additional aspects of modern military justice will be considered in the discussion pertaining to procedural matters.

The Procedural Standard

Professor Taylor's suggestion that the behaviour of the Army's leaders be scrutinized by the standards applied to General Tomoyuki Yamashita,⁶⁸ may imply that this scrutiny be conducted by the procedural standards under which General Yamashita was tried and condemned.

When he suggests that a special military commission — rather than an ordinary court-martial — is better suited to try the Son My cases,⁶⁹ he betrays a nostalgic preference for the Post World War II procedures. After all, an ordinary court-martial, like a jury, is hedged in with procedural limitations, exclusionary rules of evidence, and due process standards. These procedural safeguards were deliberately curtailed in the regulations established for war crimes military commissions during and after World War II.⁷⁰ In 1949, however, the procedural standards applied to General Yamashita were repudiated by the Geneva Conventions. It is noteworthy that less than four years after the Yamashita trial had begun, the principal Allies were willing to agree that the manner in which that

⁶⁴ See 10 U.S.C. §837, Art. 37 (1959), which prohibits any commander from censuring, reprimanding, or admonishing any member, military judge, or counsel with respect to findings, sentences, or any other function of the judicial proceeding. He is also forbidden from attempting to coerce or improperly influence the judicial functions of the court, or the judicial acts of any convening, approving or reviewing authority. The authority to conduct instruction in military justice is severely restricted to procedural and substantive law, thus excluding policy guidance. Moreover, performance in courts-martial may not form a basis for fitness reports.

⁶⁵ Manual for Courts-Martial, *supra* note 62, at para 5, 13.

⁶⁶ See *United States v. Johnson*, 14 U.S.C. M.A. 548 (1969).

⁶⁷ See SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* (1970).

⁶⁸ TAYLOR, *supra* note 1, at 182.

⁶⁹ *Id.* at 163.

⁷⁰ See *Ex parte Quirin* 317 U.S. 1 (1942); Mason, *Inter Arma Silent Leges*, 69 HARVARD LAW REVIEW, 806, 813-31 (1956); and Dissent by Mr. Justice Rutledge, *In re Yamashita*, 327 U.S. 1, 61-72; D'Amato, *War Crimes and Vietnam* 57 CALIF. L. REV. 1055, 1069-73 (1969).

case — and other World War II war crimes trials — had been conducted, would in the future constitute a grave breach of the law of war.⁷¹

When General Yamashita surrendered on September 3, 1945, he became a *prisoner of war* and was treated as such until charges were preferred against him on September 25.⁷² Article 63 of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War provided: "A sentence will only be pronounced on a prisoner of war by the same tribunal and in accordance with the same procedures as in the case of persons belonging to the armed forces of the Detaining Power." Under the Articles of War in effect during World War II, prisoners of war were expressly made subject to court-martial jurisdiction by the provision of Article of War 12.⁷³ Moreover, many of the procedural safeguards which had been incorporated into court-martial procedures in 1911, 1916, and 1921 had been made specifically applicable by the Articles of War to military commissions which exercised jurisdiction under the law of war.⁷⁴ Article of War 25 allowed the reading of depositions in evidence under prescribed conditions "before any military court or commission *in any case not capital.*" (Emphasis added). Depositions were allowed in capital cases only at the instance of the accused.

Nevertheless, the order establishing the military commission which tried Yamashita authorized the receipt of all evidence that would "have probative value in the minds of reasonable men" including reports of investigators, affidavits, depositions, statements, diaries, letters, and other documents deemed relevant to the charge.⁷⁵ Much of this evidence was not admissible either in a court-martial or a military commission under the Articles of War and the Manual for Courts-Martial.

At the trial, numerous affidavits, depositions, letters and newspaper articles, motion picture films with sound track added, were received over objection by the defense.⁷⁶ Most of these items tended to show the commission of widespread atrocities by Japanese forces in the Philippines. As there was some corroboration by witnesses, and the defense did not deny that troops under Yamashita's command had committed widespread atrocities, it is sometimes suggested that the otherwise incompetent evi-

⁷¹ "Grave Breaches . . . shall be those involving any of the following acts . . . : willfully depriving a prisoner of war of the right of fair and regular trial prescribed in these Conventions." Art. 130, 1949 Geneva Prisoner of War Convention.

⁷² U.N. War Crimes Commission, IV LAW REPORTS OF TRIALS OF WAR CRIMINALS, 3 (1947-1949) [Hereinafter cited as IV LAW REPORTS].

⁷³ 41 Stat. 787 (1920).

⁷⁴ *Id.* at 792-94, Articles of War 24, 25, 38. Traditionally military commissions had operated without statutory authorization as common law war courts not subject to the procedural rules applicable to courts-martial.

⁷⁵ IV LAW REPORTS, *supra* note 72, at 57.

⁷⁶ *Id.* at 23, 34, 57-58.

dence was harmless if it was an error. Some of the least trustworthy evidence, however, bore directly on the issue of lack of knowledge and some highly damaging second hand hearsay and rumor tended to show that Yamashita actually ordered a policy of atrocities.⁷⁷

Because the commission made no explicit finding that the atrocities had been ordered by the accused, it was contended that, even if it had been an error to receive such hearsay, there had been no sufficient showing of prejudice because the tribunal had apparently given the evidence little weight.⁷⁸

Yet there are indications in the judgment of the Commission that the hearsay evidence had its impact. In part, the Commission stated:

The Prosecution presented evidence to show that the crimes were so extensive and widespread, that they must have either been *willfully permitted*, or *secretly ordered by the accused*.⁷⁹ (Emphasis added).

It is recognized that only the Anglo-American judicial system applies the exclusionary rules to evidence in criminal cases. There is little to fear from the consideration by Civil Law judges of any relevant evidence. Civil Law judges have a tradition of independence and extensive training and experience in the evaluation of evidence "which might have probative value to reasonable men." But the Commission that tried Yamashita was not composed of professional Civil Law judges. They were five general officers of the Army who were not lawyers. To the extent that they were familiar with military law, they had been exposed to the exclusionary rules which screened out rumor, incompetent hearsay, and other unreliable evidence. As members of the Commission, they were freed from the restraint of the exclusionary rules. To suggest that the rumors directly implicating Yamashita in the ordering of atrocities was harmless error is highly speculative. By today's standards such speculation would be intolerable. The burden is on the prosecution to show beyond a reasonable doubt that incompetent evidence did not contribute to the verdict obtained.⁸⁰ The present standard is in sharp contrast to the explanation offered by the UN War Crimes Commission that, "No trial has come to [their] notice in which an allegation based upon [the de-

⁷⁷ *Id.* at 19-20. Narciso Lopus, a collaborator was permitted to testify that his employer, the Philippine General Ricarte, had told the witness that General Yamashita had issued a general order to wipe out the whole Philippines if possible. The witness also stated that Yamashita subsequently rejected Ricarte's plea that he should withdraw the order. Filemon Castillejos, who operated a restaurant for the Japanese, testified that two Japanese officers and two soldiers had told him that a telegram ordering the killing of all Americans in the Philippines had been received from General Yamashita.

⁷⁸ *Id.* at 62.

⁷⁹ *Id.* at 34.

⁸⁰ *Chapman v. California*, 386 U.S. 10 (1967).

nial to a prisoner of war of Geneva Convention protection] led undisputably to a conviction."⁸¹

On appeal from the denial by the Philippine Supreme Court of Yamashita's petition for a writ of habeas corpus, the Supreme Court of the United States rejected the applicability of both the Articles of War and the Geneva Convention of 1929, holding that they were intended to apply only to offenses which were committed by prisoners of war *subsequent* to their capture.⁸²

The rationale of the *Yamashita* case became a precedent for Nuremberg⁸³ and other war crimes tribunals. Pleas by the accused and requests by the International Committee of the Red Cross for compliance with the provisions of the 1929 Geneva Convention were rejected in most reported cases.⁸⁴ Generally this rejection rested on the assertion that under customary law those who violated the laws of war could not avail themselves of the protection which they afford and that the 1929 Convention, which made no mention of precapture offenses, was not intended to modify customary rules.⁸⁵ This is equivalent to the view that those who are charged with violations of the municipal criminal law may not avail themselves of the procedural safeguards which that law provides for the protection of defendants.

Article 85 of the 1949 Prisoner of War Convention works a deliberate repudiation of this practice. It provides, "[p]risoners of war, prosecuted under the laws of the Detaining Powers for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."

Among these benefits is Article 102, which provides:

A prisoner of war can be validly sentenced only if the sentence had been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present chapter have been observed.

The proceedings of the Diplomatic Conference make it clear that a repudiation of the *Yamashita* rule was intended.⁸⁶ The delegates were unanimous in the view that prisoners of war tried for war crimes should have the benefits of the Convention until their guilt has been proven.

⁸¹ XV LAW REPORTS, *supra* note 36, at 100.

⁸² *In re Yamashita*, 327 U.S. 1 (1946).

⁸³ The Nuremberg Charter explicitly exempted the tribunal from "technical rules of evidence." I Trial Major War Criminals 15. For an illuminating discussion of the type of evidence received at Nuremberg see D'Amato, *supra* note 70.

⁸⁴ Pictet, Commentary III, *supra* note 22, at 413.

⁸⁵ *Id.* 414.

⁸⁶ 2A Final Record 389-90, 559; Pictet, Commentary III, *supra* note 22, at 413 n. 1.

The Soviet Bloc, however, objected to the entitlement of prisoners of war to these benefits after conviction and interposed reservations to that effect.⁸⁷ The North Vietnamese reservation to Article 85, on the other hand, excludes persons "prosecuted and convicted" of war crimes. Apparently, North Vietnam construes this as depriving one accused of war crimes of the benefits from the time of the accusation.⁸⁸ Thus, North Vietnam still claims to follow the rule of the Yamashita case.

The Convention not only precludes a Detaining Power from trying prisoners of war by special ad hoc national tribunals, but it also precludes, for all practical purposes, their trial by International Military Tribunals. The Grave Breaches Articles provide only for trials in national courts. As it is improbable that the military law of the Detaining Power will authorize foreign judges to sit in judgment of its own military personnel in any event, the creation of international tribunals of mixed composition will be next to impossible. Thus the International Military Tribunals of Nuremberg and Tokyo may represent an almost unique position in history.⁸⁹

Insistence that these trials be held by the regular national courts or military tribunals provides a certain standard of justice and procedure and insures familiarity of the court with its well established tradition and procedures. This minimizes the danger that the courts will deprive the accused of rights because of ignorance.

Notwithstanding that international law now would forbid the trial of prisoners of war before an ad hoc special military commission, Taylor would have the Son My defendants — who are protected only by the

⁸⁷ Pictet, Commentary III, *supra* note 22, at 422-24. In response to a request for clarification of its reservation, the Soviet Union advised the Swiss Government that the reservation applies only after "the sentence becomes legally enforceable." After the sentence has been served, the benefits of the convention would be resumed.

⁸⁸ Pinto, Roger, Hanoi, *et. al.*, Convention de Geneva, *Le Monde* (Paris) 27 December 1969. *But see* Paul de la Pradelle, *Le Nord — Vietnam et les Conventions Humanitaire de Geneve*, *Revue Generale de Droit International Public*, (Paris: April-June 1971).

⁸⁹ As a precedent for International Military Tribunals Taylor cites the 1474 tyranny trial of the Burgundian Governor of Breisach, Peter Hagenbach, by the tribunal of judges from Alsace, Switzerland, and other member states of the Holy Roman Empire. Apparently so preoccupied with the World War II pattern of trial of the defeated by the victors, Taylor assumed that: ". . . after Charles' defeat and death Hagenbach was charged with conduct that trampled underfoot the laws of God and man. . . ." TAYLOR, *supra* note 1, at 81.

Superficial examination of his cited authorities [GEORGE SCHWARZENBERG, II, *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 462-3 (1968)] or the *ENCYCLOPEDIA BRITANNICA* would have revealed that Charles was alive, well, and still powerful in May 1474 at the time of the Breisach trial. (4 *ENCYCLOPEDIA BRITANNICA* 407 (1947 ed.), v. 5 at 288, v. 21 at 684). As a matter of historical conjecture, Swiss participation in that trial was probably one of the causes of the Swiss-Burgundian war which began in 1476 and led to Charles' ultimate defeat and death at Nancy on January 6, 1477.

Uniform Code of Military Justice and the Constitution — tried before such a tribunal.

[T]here is much to be said for trying the Son My cases before a special military commission, to which able judges and lawyers, outside the military chain of command might be appointed. As has been seen, the defense of superior orders does not eliminate criminal responsibility, but rather shifts it upward, and that is the direction an ordinary court-martial will be least likely to look.⁹⁰

One may wonder, if American constitutional due process is a consideration, why Taylor gives no thought to an ordinary jury trial.⁹¹ Is it because a jury, like a court-martial will be instructed to consider only the issue before it . . . the guilt or innocence of the accused, . . . not to range up or down, to determine who else may share in the defendant's guilt, if he is guilty. These may be functions for a grand jury, but not of a trial jury. Both a jury and a court-martial may go to war with a rule of law if the rule offends its sense of justice,⁹² but it will not convert a criminal trial into a political fishing expedition.

Taylor's preference for military commissions with procedural rules specially tailored to accomplish extraordinary functions is revealed in his discussion of the case of Lt. James Duffy who was convicted of the premeditated murder of a helpless prisoner. When the court was informed that the mandatory sentence was life imprisonment, the court revoked its findings and convicted Duffy of involuntary manslaughter.⁹³ Indignantly Taylor exclaims:

What is one to make of all this? "Involuntary Manslaughter" denotes an unintentional negligent killing, and is a singularly inappropriate label for the conduct on which Duffy's conviction was based.

. . . *If ever a case cried out for an explanatory opinion, it is this one, but opinions are not part of court-martial practice.*⁹⁴ (Emphasis added).

Is it part of the jury practice in New York for the jury to render an explanatory opinion?

⁹⁰ TAYLOR, *supra* note 1, at 163. Nuremberg established that a superior order is not a defense to an order which is plainly and obviously illegal. An order to kill helpless prisoners in one's custody is as plainly and obviously an illegal order as can be imagined.

⁹¹ One of the virtues (or evils) of a military commission is that its composition and procedures are not prescribed by statute. The President is therefore free to establish it in any form or shape he desires. It may be set up under rules which curtail procedural rights as in the Quirin and Yamashita cases, or it may be composed as an exact replica of a Federal District Court with grand juries and petit juries, as are the U.S. Civil Administration Courts, Ryukyu Islands. See *Rose v. McNamara*, 375 F. 2d 924 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 856 (1967).

⁹² H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 495 (1966).

⁹³ TAYLOR, *supra* note 1, at 151, 161.

⁹⁴ TAYLOR, *supra* note 1, at 162.

Without benefit of explanatory opinion, Taylor then attributes the findings to what an anonymous officer calls the "mere gook rule." (A tendency toward leniency to Americans who kill Vietnamese civilians, because the Vietnamese were regarded as somehow second class human beings or "mere gooks.")

If animosity toward Viet Cong and Viet Cong sympathizers contributes to jury verdicts, Taylor has cited ample reasons for such animosity.⁹⁵ It is difficult to attribute such attitudes to leadership, however. I can recall no war in recent memory when there has been so little hate propaganda against the enemy from national or military leadership. In fact, the veneration of the Viet Cong by the peace movement at home, may contribute to some degree to the soldier's frustration and animosity toward suspected Viet Cong.⁹⁶

Taylor cites only one verdict in support of the existence of a "mere gook rule" and here he generalizes from inadequate empirical data.

I have analyzed the results over a three-year period of court-martial trials for murder, rape, and manslaughter in which the victim was Vietnamese and I find that the acquittal rate is somewhat less than that found in various studies of American jury cases.⁹⁷ If courts-martial behave pretty much like American juries, it seems that the drafters of the Uniform Code of Military Justice have achieved at least one of their objectives. I find no corroboration for the existence of a "mere gook rule" in the performance of American courts-martial.

On at least one occasion, Taylor, a teacher of Constitutional Law, betrays his impatience with the Fifth Amendment. Referring to charges against 14 officers for failing to take appropriate action on Son My reports, Taylor states, "[t]he matter was then transferred to the jurisdiction

⁹⁵ See *supra* note 27.

⁹⁶ Moskos, *supra* text, at 1.

⁹⁷ The number of persons tried by court-martial convicted and acquitted for murder, manslaughter and rape — June 1965 through June 1968 (Vietnamese victims).

Offense	Tried	Convicted	Acquitted	Lesser Offenses	Percent Acquitted
Murder	31	16	7	8	23
Rape	17	13	4	0	23.5
Manslaughter	11	7	2	2	18

COMPARATIVE ACQUITTAL RATE

	Court-Martial Vietnamese Victim	Kalven & Zeisel Sample Jury	1945 Census
Murder	23%	19%	32%
Rape	23.5%	40%	38%
Manslaughter	18%	45%	51%

H. KALVEN & H. ZEISEL, *supra* note 92, at 42.

of Lieutenant General Mathew [sic] O. Seaman, . . . who shortly announced dismissal for lack of evidence against seven of the officers."⁹⁸ In a footnote to the passage, Taylor observes "One of the officers cleared by General Seaman had invoked the privilege against self-incrimination while testifying before the Hebert Committee."⁹⁹ Not even when Taylor was in uniform was it possible in a court-martial, to prove guilt on the basis of a claim of the privilege against self-incrimination. Now, it can't even be done that way in California.¹⁰⁰

If Taylor had in mind applying the procedural standards of the *Yamashita* case to America's military leaders, his rhetorical question might truly get an affirmative answer. Fortunately, for American Justice and the integrity of the Constitutional standard of due process, those procedural standards are things of the past. Let them remain buried with the thumb screw, the rack, and the third degree.

CONCLUSION

Professor Taylor states that one of the purposes of his book is to examine this question: "What are the Nuremberg legal principles, and what is their meaning as applied to American involvement in Vietnam?"¹⁰¹

He then affirms that in his discussion he will avoid assumptions and preconceptions as to how these questions should be answered, "since . . . they need to be considered quite as carefully and urgently by those who execute or support our Vietnam policies as by those in opposition."

In a sense, he may have accomplished his purpose, for by a melange of inaccuracies, half truths, and rhetorical implications, he offers something for all viewpoints. Every man, no matter what his views, can find them corroborated at least by implication, somewhere in the 207 pages of text. Taylor's style is facile and graceful. His style tends, on a first reading, to conceal the multiple contradictions and inaccuracies. But the book falls far short of fulfilling the promise of its stated purpose. His factual passages are often based on the preconceptions and assumptions of the careless secondary sources upon which he relies much too heavily. His statements of law are selected to support the legal results which ought to follow upon his view of the fact. Regretably, he failed to head the principles he enunciated in his opening statement to the court that tried the High Command case, "[T]he issues here are far too grave to warrant any trick of advocacy: the evidence is quite compelling enough to provide its own eloquence."¹⁰²

⁹⁸ TAYLOR, *supra* note 1, at 167.

⁹⁹ TAYLOR, *supra* note 1, at 167.

¹⁰⁰ *Griffin v. California*, 380 U.S. 609 (1965).

¹⁰¹ TAYLOR, *supra* note 1, at 12-13.

¹⁰² *United States v. Von Leeb, X TRIALS OF WAR CRIMINALS*, *supra* note 11, at 63.