

# Review Symposium: War Crimes

## The Rule of Force in International Affairs

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*Nuremberg and Vietnam: An American Tragedy.* By Telford Taylor. Chicago: Quadrangle Books, 1970. Pp. 224. \$5.95 (clothbound), \$1.95 (paperback).

Two different issues arise when the American experience in Vietnam is considered in the context of the Nuremberg trials and related international conventions: the issue of "legality" and the issue of justice. The first is a technical question of law and history—by the standards of international law as formally accepted by the great powers, how is the American war in Indochina to be judged? The second question is more elusive. It is the question of proper standards. Are the principles of Nuremberg and related international law satisfactory and appropriate in the case of great power intervention as in Vietnam and Czechoslovakia, for example? The recent study of Nuremberg and Vietnam by Telford Taylor—the chief counsel for the prosecution at Nuremberg, a historian, professor of law, and retired Brigadier-General—is devoted to the first of these topics, but occasional remarks bear on the second as well. It is possible that Taylor's brief but informative study will set the framework for much of the subsequent debate over war crimes and broader questions of proper international conduct. Though conservative in assumptions and narrow in compass—overly so, in my opinion—Taylor's investigation leads to strong conclusions. He comes close to suggesting that the military and civilian leadership of the United States during the period from 1965 to the present are liable to prosecution as war criminals, under the standards of Nuremberg. No less controversial are the self-imposed limitations of his study. In many respects, Taylor's book offers a convenient point of departure for an investigation of the issues of legality and justice.

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### I. "War Crimes" and "Justice"

The issue of justice is not to be discounted. International law is in effect a body of moral principles accepted as valid by those who ratify treaties and other agreements. Furthermore, as Taylor emphasizes, treaties and manuals "are only partial embodiments of the laws of war." The preamble of the 1907 Hague Convention, for example, states that questions not covered should be resolved by "the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience."<sup>1</sup> It therefore makes sense to inquire into the *acceptability* as well as the political and social *content* of such principles as have been codified and generally adopted, and to consider them in the light of the dictates of public conscience and the laws of humanity, unclear as these may be. As to "usages established among civilized peoples," Justice Jackson, in an interim report to the President in 1945, wrote that "[w]e are put under a heavy responsibility to see that our behavior during this unsettled period will direct the world's thought toward a firmer enforcement of the laws of international conduct, so as to make war less attractive to those who have governments and the destinies of peoples in their power."<sup>2</sup> How have we met this responsibility in the postwar era? The question touches not only on the legality of American conduct in the light of Nuremberg and related principles, but also on the character of these principles themselves.

Taylor's discussion of the Nuremberg judgments reveals a fundamental moral flaw in the principles which emerged from those trials. Rejecting the argument that the bombing of North Vietnam constitutes a war crime, Taylor observes that "[w]hatever the laws of war in this field *ought* to be, certainly Nuremberg furnishes no basis for these accusations."<sup>3</sup> Yet this bombing has laid waste most of North Vietnam, including large cities with the exceptions of Hanoi and Haiphong.<sup>4</sup>

1. T. TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 29 (1970) [hereinafter cited to page number only].

2. P. 77.

3. P. 142.

4. Whether Taylor is aware of the extent of American bombing in North Vietnam is unclear. Other commentators are not. For example, Neil Sheehan wrote: "Although the North Vietnamese may not believe it, in the North a conscious effort was made to bomb only military, and what limited industrial targets were available, and to weigh probable civilian casualties against the military advantages to be gained . . ." Sheehan, *Should We Have War Crimes Trials?*, N.Y. Times, March 28, 1971, § 7, at 3, col. 4. The thirty-three books which Sheehan reviews in this piece contain much evidence to the contrary, and Sheehan does not explain why he discounts that evidence. From my own limited

The reason the law of war crimes does not reach American bombing is straightforward:

Since both sides [in World War II] had played the terrible game of urban destruction—the Allies far more successfully—there was no basis for criminal charges against Germans or Japanese, and in fact no such charges were brought.<sup>5</sup>

Aerial bombardment had been used so extensively and ruthlessly on the Allied side as well as the Axis side that neither at Nuremberg nor Tokyo was the issue made a part of the trials.<sup>6</sup>

Similarly, charges against German Admirals for violating the London Naval Treaty of 1930 were dismissed after testimony by Admiral Nimitz, which “established that in this regard the Germans had done nothing that the British and Americans had not also done.”<sup>7</sup> The Nuremberg Tribunal ruled that the German admirals should be subjected to no criminal penalties for their violation of international law, because the laws in question “had been abrogated by the practice of the belligerents on both sides under the stress of military necessity.”<sup>8</sup> Taylor concludes that “[t]o punish the foe—especially the vanquished foe—for conduct in which the enforcing nation has engaged, would be so grossly inequitable as to discredit the laws themselves.”<sup>9</sup>

From such comments we can derive the operational definition of “crime of war” as conceived at Nuremberg. “Criminal acts” were to be actually treated as crimes only if the defeated enemy, but not the victors, had engaged in them. No doubt it would be “grossly inequitable” to punish the vanquished foe for conduct in which the enforcing nation has engaged. It would, however, be just and equitable to punish both victor and vanquished for their criminal acts. This option, which Taylor does not mention, was not adopted by the postwar Tribunals either. The Tribunals instead chose “to discredit the laws themselves” by restricting their definition of criminal conduct in such a way as to exclude punishment of the victors.<sup>10</sup>

observations in the neighborhood of Hanoi, I join the North Vietnamese in “not believing it.” Nor do I think that Sheehan would “believe it” if he were to walk through the ruins of Phu Ly or Thanh Hoa, let alone the much more heavily bombed areas farther from Hanoi. Nevertheless, the bombing of North Vietnam, despite its enormous scale, has been well below that of South Vietnam and Laos in intensity and destructiveness.

5. Pp. 140-41.

6. P. 89.

7. P. 37.

8. P. 38.

9. P. 39.

10. Justice R.B. Pal, dissenting at Tokyo, argued that the dropping of the atom bomb was a criminal act exceeding any charged against those accused at the Tokyo trials.

The conclusion that Nuremberg is to be understood as the judgment of victors, rather than as the achievement of a new level of international morality, is reinforced by Taylor's discussion of aggressive war. The distinctive contribution of Nuremberg, he points out, was to establish the category of crimes against peace: "Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances," or "participation in a common plan or conspiracy" to this end.<sup>11</sup> "In terms of substantive international law," Taylor writes, "and in the mind of the general public, the salient feature of the Nuremberg trials was the decision that individuals could be held guilty for participation in the planning and waging of 'a war of aggression.'"<sup>12</sup> "Indisputably it was a cardinal part of the postwar policy of the United States Government to establish the criminality under international law of aggressive warfare . . . ."<sup>13</sup>

But, Taylor argues, a court could hardly decide the question of whether the United States has violated the anti-aggression provisions of the Nuremberg or United Nations Charters.<sup>14</sup> For one reason, "the evidentiary problems would be well-nigh insuperable." At Nuremberg and Tokyo, the allies had access to secret diplomatic and military document files, which would not be made available by the United States and South Vietnamese governments. "Total military victories such as those that ended the Second World War are comparatively rare in modern history, and it is difficult to envisage other circumstances

INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 621 (1953) (Dissentient Judgment of Justice R.B. Pal). The relevant passages are cited in N. CHOMSKY, *AMERICAN POWER AND THE NEW MANDARINS* 168-69 (1969). Pal did not, however, suggest prosecution for the decision to use the atom bombs. Taylor believes that the Nagasaki bombing, at least, can be considered a war crime. P. 143.

11. P. 79; INT'L L. COMM'N, REPORT, 5 U.N. GAOR, Supp. 12, at 11, U.N. Doc. A/1316 (1950), reprinted in *THE LAW OF NATIONS* 1021 (2d ed. H. Briggs 1952).

12. P. 84.

13. P. 76.

14. One might raise the question whether the Nuremberg and United Nations Charters are equivalent in status. I will not pursue the question here. But it does seem to me, as argued below, that there is a powerful case that the United States has grossly violated both in Indochina.

The recent release of documentary evidence on American planning before 1965 (*THE N.Y. TIMES*, *THE PENTAGON PAPERS* 79-509 (Gold, Segal & Abt eds. July 1971)) would appear to go some way towards overcoming the difficulty regarding "evidentiary problems" that Taylor cites and, in my opinion, greatly overestimates. One of the interesting features of these documents is how well they corroborate the interpretations of American policy in Indochina that appear, for example, in F. SCHURMANN, P.D. SCOTT & R. ZELNIE, *THE POLITICS OF ESCALATION IN VIETNAM* (1966). The documentary record so far released shows that the publicly available evidence was sufficient to determine the main lines of American policy. Space limits prevent discussion here. However, these documents would appear to provide direct evidence of a conspiracy to wage an expanding war of aggression and to violate the provisions of the United Nations Charter regarding pacific settlement of disputes.

that would unlock the secret files."<sup>15</sup> But if only access to the secret files can provide proof that aggressive war has been waged, then it follows that the "salient feature of the Nuremberg trials" will normally be relevant only to the case of an enemy that has suffered total military defeat.

Actually, Taylor vacillates somewhat on the matter of proof of aggression, in that he seems to trust the executive branch to make unilateral judgments regarding aggression by other states, despite the "insuperable" evidentiary problems. He writes that "until 1965 [he] supported American intervention in Vietnam as an aggression-checking undertaking in the spirit of the United Nations Charter . . . ."<sup>16</sup> It was in Taylor's opinion permissible for the American Executive to determine unilaterally that North Vietnam was engaged in aggressive war prior to 1965, and to join South Vietnam in collective self-defense against the armed attack from the North, under Article 51 of the United Nations Charter. So uniquely competent is the United States to exercise this judgment, he seems to believe, that it was unnecessary even to adhere to the provision in Article 51 that measures taken in the exercise of the right of self-defense be immediately reported to the Security Council,<sup>17</sup> or to the provision in Article 39 that "the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression" and shall determine what measures shall be taken.

In fact, I think that Taylor exaggerates the "evidentiary problems" of determining whether the United States is engaged in aggression in Southeast Asia, just as he underestimates the difficulty of establishing that it was engaged in collective self-defense against armed attack. His discussion of aggressive war seems to me inadequate in other respects as well, a matter to which I return below.

There is a still more serious issue at stake when we consider the acceptability of the principles of international law as codified in the Charter of Nuremberg and elsewhere. These principles were formu-

15. Pp. 118-19.

16. P. 206. Whether Taylor still accepts this assessment is not entirely clear.

17. The United States formally submitted the Vietnam question to the Security Council only in January 1966. 21 U.N. SCOR, Supp. Jan.-Mar. 1966, at 105, U.N. Doc. S/7105 (1966). Prior to that, the U.S. asked the Council to consider the (alleged) Tonkin Gulf incident in August 1964 (19 U.N. SCOR, Supp. July-Sept. 1964, at 135, U.N. Doc. S/5849 (1964)), and submitted reports in February 1965 (20 U.N. SCOR, Supp. Jan.-Mar. 1965, at 43, U.N. Doc. S/6174 (1965)) after the sharp escalation of American bombing in South and North Vietnam. See United States Dep't of State, *The Legality of U.S. Participation in the Defense of Viet-Nam*, 54 DEP'T OF STATE BULL. 474 (1966), reprinted in *THE VIETNAM WAR AND INTERNATIONAL LAW* 583, 590 (R. Falk ed. 1968) [hereinafter cited as *FALK-VIETNAM*]. Direct United States military engagement began in 1961-62.

lated by representatives of established governments, without the participation of representatives of mass-based popular movements that seek to overthrow recognized governments or that establish revolutionary governments. Richard Falk holds that "from the perspective of international order the capacity to govern is certainly an element in claiming political legitimacy,"<sup>18</sup> and Thomas J. Farer speaks of "the dangerous ambiguity of just when the insurgency has achieved sufficient status to require equal treatment."<sup>19</sup> This point is crucial in assessing Taylor's belief that the United States was engaged in an "aggression-checking" undertaking in Vietnam, say, in 1962. In that year American officials in Saigon estimated that half the population supported the NLF.<sup>20</sup> Furthermore, there was no evidence of North Vietnamese participation in any combat, and 10,000 American troops were in South Vietnam, many directly engaged in military actions.<sup>21</sup> Bernard Fall noted that "since 1961 Americans die in Viet-Nam, and in American uniforms. And they die fighting."<sup>22</sup> In March of 1962, United States officials admitted that American pilots were flying combat missions (bombing and strafing). By October, it was reported that thirty per cent of all air missions in South Vietnam had American Air Force pilots at their controls.<sup>23</sup> By late 1962 the United States was directly involved in large military actions in the Mekong Delta and the Camau Peninsula.<sup>24</sup> In a book published in 1963, Richard Tregaskis reported inter-

18. Falk, *International Law and the United States Role in Viet Nam: A Response to Professor Moore*, 76 YALE L.J. 1051, 1130 n.80 (1967), reprinted in FALK—VIETNAM, *supra* note 17, at 445, 480 n.80.

19. Farer, *Intervention in Civil Wars: A Modest Proposal*, 67 COLUM. L. REV. 266, 271 (1967), reprinted in FALK—VIETNAM, *supra* note 17, at 509, 514.

20. R. SCIGLIANO, SOUTH VIETNAM: NATION UNDER STRESS 145 (1963). Scigliano was a member of the Michigan State University Vietnam Advisory Group.

21. See, e.g., G. KAHIN & J. LEWIS, THE UNITED STATES IN VIETNAM 137 (1967).

22. B. FALL, STREET WITHOUT JOY 346 (1964).

23. N.Y. Times, March 10, 1962, at 8, col. 4; Oct. 17, 1962, at 4, col. 3. The thirty per cent figure excludes helicopter flights. By the beginning of 1964, the United States had 248 helicopters in Vietnam; by the end of the year, there were 327. See SHARP & WESTMORELAND, REPORT ON THE WAR IN VIETNAM (As of 30 JUNE 1968) 85 (1968). By comparison, the French never had more than ten operational helicopters in Indochina until April 1954. B. FALL, STREET WITHOUT JOY 242 (1964).

24. B. FALL, THE TWO VIETNAMS 332 (1964). No North Vietnamese were discovered in the Delta until 1968. American bombing of civilians in the Camau peninsula in the early 1960s has been confirmed by Col. Fletcher Prouty (ret.), who served at the time in liaison between the CIA and the Air Force. Review of the War, WNET-TV Channel 13, New York, Feb. 15, 1971. American airstrikes on villages in the early 1960s have been confirmed by reporters. Malcolm Browne (AP correspondent in Vietnam from 1961) described visits to hamlets that had been hit by napalm and heavy bombs in American air strikes: "there is no question that the results are revolting. Unfortunately, the Viet Cong builds bunkers so skillfully it is rarely touched by aerial bombs or napalm, except in cases of direct hits. But huts are flattened, and civilian loss of life is generally high. In some, the charred bodies of children and babies have made pathetic piles in the middle of the remains of market places." M. BROWNE, THE NEW FACE OF WAR 118 (1965). Obviously, this

views with American helicopter pilots who describe how the "wild men" of the 362nd Squadron used to shoot civilians for sport in "solid VC areas."<sup>25</sup> It has also been reported that in 1962, air commandos of the Special Operations Force, "[w]earing civilian clothes and flying planes with the markings of the South Vietnamese Air Force . . . attacked Vietcong concentrations in the jungles."<sup>26</sup>

There is, in short, a good case that the United States was involved in direct military attacks against indigenous popular forces in South Vietnam as early as 1962. It would be fair to call this "aggressive war" if, indeed, the capacity to govern is an element in claiming political legitimacy. Suppose that one were to hold, on the contrary, that governments recognized by the major powers are legally permitted to call in outside force to put down a domestic insurgency, while insurgents are not entitled to seek outside help. Suppose further that this rule applies even where the insurgents constitute the only effective government in large areas and the only mass-based political organization,<sup>27</sup> and where these insurgents are asking support from a state from which they have been arbitrarily separated by great power intervention and subversion.<sup>28</sup> If this hypothesized rule is an accurate in-

was known to the American command and civilian leadership. To cite only the most obvious evidence, the introduction to Browne's book is written by Henry Cabot Lodge, then between two terms as United States Ambassador to Vietnam. It should be noted that the Tokyo Tribunal judged Cabinet members to be responsible for war crimes in connection with the treatment of prisoners if, having knowledge of them, they did not resign. See *WAR CRIMES AND THE AMERICAN CONSCIENCE* 195 (E. Knoll & J. McFadden eds. 1970) for relevant excerpts from the Tribunal.

25. R. TREGASKIS, *VIETNAM DIARY* 108 (1963).

26. Robinson, *America's Air Guerrillas—Will They Stop Future Vietnams?*, *Boston Sunday Globe*, Jan. 31, 1971 (PARADE), at 6, col. 3. It was the SOF, according to this account, that conducted the raid against an abandoned prisoner of war camp near Son Tay in North Vietnam, in November 1970.

27. Even Douglas Pike, who is often hardly more than a propagandist for the American government, admits that the NLF constituted the only "mass-based political party in South Vietnam" and that in late 1964, it was impossible for the American-supported government to consider a coalition with the NLF, for fear that "the whale would swallow the minnow." D. PIKE, *VIET CONG* 110, 361-62 (1966). Elsewhere, Pike has estimated that in 1963, "perhaps half the population of South Vietnam at least tacitly supported the NLF." D. PIKE, *WAR, PEACE, AND THE VIET CONG* 6 (1969). See also p. 1461 *supra*. It is, of course, not very difficult for a great power to establish a government that will applaud its intervention. For example, the 14th Congress of the Czechoslovak Communist Party, the first "officially recognized" Congress since 1966, opened with "applause and cheers" for the Russian invasion of 1968. *Boston Globe*, May 26, 1971, at 2, col. 3 (Reuters).

28. I refer, in this instance, to the United States-supported refusal of the regime it had instituted in South Vietnam to adhere to the election provision of the Geneva agreements of 1954. Similarly, in Laos, when the Pathet Lao won an unexpected victory in the election of 1958 (after substantial American efforts to buy the election for the Right), the United States played a major rôle in the overthrow of the coalition government. See generally Ackland, *No Place for Neutralism: The Eisenhower Administration and Laos*, in *LAOS: WAR AND REVOLUTION* (N. Adams & A. McCoy eds. 1970) [hereinafter cited as *ADAMS & MCCOY*]; Mirsky & Stonefield, *The United States in Laos*, in *AMERICA'S ASIA* 253-323 (E. Friedman & M. Selden eds. 1970).

terpretation of the currently prevailing system of international law, then the only appropriate conclusion is that this system of law is to be disregarded as without moral force. Or, to be more precise, the conclusion must be that this system of law is simply a device for ratifying imperial practice.

These questions do not arise in any direct way in Taylor's discussion, in part because he scarcely touches on the pre-1965 period to which they are directly relevant. Similar problems, however, are implicit in his discussion of the legality of various modes of warfare. As already noted, Taylor argues that aerial warfare is not intrinsically unlawful, although the "silence of Nuremberg" on this matter raises questions "especially relevant to American bombing policies . . . in South Vietnam."<sup>29</sup> The routine destruction of villages by American firepower and ground sweeps and the forced evacuation of population are, he argues, of doubtful legality, and reprisal attacks against villages harboring Vietcong—official policy, as he notes—are a "flagrant violation" of the Geneva Convention.<sup>30</sup> What is more, Taylor believes the establishment of free-fire zones to be illegal.<sup>31</sup> But Taylor emphasizes the great problems in determining how legal principles should apply under the circumstances of Vietnam, where a superpower is using its technological resources to destroy guerrilla forces that conceal themselves among the population. The basic problem is this:

The enemy does not respect those laws, the terrain lends itself to clandestine operations in which women and children frequently participate, the hostile and the friendly do not label themselves as such, and individuals of the yellow race are hard for our soldiers to identify. As in the Philippines 65 years ago, our troops are thousands of miles from home in uncomfortable, dangerous and unfamiliar surroundings. No one not utterly blind to the realities can fail to acknowledge and make allowance for the difficulties and uncertainties they face in distinguishing inoffensive noncombatants from hostile partisans.<sup>32</sup>

The enemy "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" in two specific respects: the enemy does not wear "a fixed distinctive emblem recognizable at a distance" or "carry arms openly," as American soldiers do. The law,

29. P. 142.

30. P. 145.

31. P. 147.

32. P. 152.



as reaffirmed at Nuremberg, states that "a civilian who aids, abets, or participates in the fighting is liable to punishment as a war criminal . . . ." This may seem harsh, Taylor writes, but "it is certainly the law,"<sup>33</sup> just as the law does not apply to aerial bombardment of towns and villages in an effort to break the enemy's will or to deny him material or human resources.

These observations come very close to branding "people's war" illegal, while permitting the use of the technology of the industrial powers to suppress it. An essential feature of revolutionary people's war, Vietnamese style, is that it combines political and military action, thus blurring the distinction between combatants and noncombatants. The Vietnamese revolutionaries in general attempted to follow the Maoist injunction that "[a] bloodless transition is what we would like and we should strive for it."<sup>34</sup> Even Douglas Pike concedes that the NLF "maintained that its contest with the GVN and the United States should be fought out at the political level and that the use of massed military might was in itself illegitimate," until forced by the United States and the GVN "to use counterforce to survive."<sup>35</sup> When the NLF resorted to counterforce to survive, it exploited its natural advantage, the ability of the guerrillas to blend into the sympathetic local population, just as the United States exploited its natural advantage in the technology of surveillance and destruction.

These characteristics of people's war were outlined years ago by the leading Vietnamese communist ideologist Truong Chinh:

[There are] those who have a tendency only to rely on military action. . . . They tend to believe that everything can be settled by armed force; they do not apply political mobilization, are unwilling to give explanations and to convince people; . . . fighting spiritedly, they neglect political work; they do not . . . act in such a way that the army and the people can wholeheartedly help one another.<sup>36</sup>

Citing this passage, Bernard Fall noted that "once more, the enemy

33. Pp. 136-37. Whether it is "certainly the law" is open to question. There is a logical gap between Taylor's assertion that the laws of war require that combatants be identified and his further assertion that civilian combatants who are not so identified are war criminals.

34. Cited by Goodstadt, *Might and Right*, FAR EASTERN ECON. REV., April 10, 1971, at 22. Goodstadt observes that "physical force was always a second-best choice for Mao."

35. D. PIKE, *Viet Cong* 91-92 (1966). Pike later observed that "armed combat was a GVN-imposed requirement; the NLF was obliged to use counterforce to survive." *Id.* at 101.

36. TRUONG CHINH, *LA RÉSISTANCE VAINCRA* (1947), cited in B. FALL, *STREET WITHOUT JOY* 372-73 (1964) (excerpt translated by Fall).

has been kind enough to give us the recipe of his victory."<sup>37</sup> The recipe is to gain political support among the population and to engage the population as a whole in the struggle against the central government backed—in this case imposed—by foreign military force. The participation of civilians in the revolutionary war reflects its political and social character, just as saturation bombing by B-52s based in sanctuaries in Guam and Thailand reveals the essential political and social character of American "counterinsurgency." The laws of war rule the former illegal, while the silence of Nuremberg falls over American practice. These laws, Taylor maintains, condemn as war criminals the civilians who take up arms against a foreign enemy or its local protégés; such civilians are "undeniably in violation" of the laws of war. But with regard to the American pilots who have destroyed towns and villages and devastated farmland and forest, driving millions from their homes and killing unknown numbers throughout Indochina, or to those who planned this policy, the laws of war have little to say. At most "the silence of Nuremberg . . . asks [questions] . . . relevant to American bombing policies . . . in South Vietnam,"<sup>38</sup> and presumably in Laos and Cambodia as well.

These laws, so understood, are the weapon of the strong, and are of no moral force or validity. It is a political decision to accept an interpretation of the law which holds that a government installed and maintained by a foreign power (as in South Vietnam or Hungary) has the right to call upon this foreign power to suppress an insurgency that has gained such extensive political support that insurgents are indistinguishable from the population, and which holds that civilian participants in the insurgency are war criminals. It is a political decision to accept as valid the law that combatants must identify themselves as such to the soldiers of the foreign army, while that same law raises no objection to the dispatch of soldiers "thousands of miles from home" to "unlovely circumstances" in which they cannot distinguish noncombatants from partisans.

Though Taylor is quite right to insist on the difficulties and uncertainties faced by these troops, there is no reason to withhold condemnation from the political leaders who sent them there, or to grant any validity to the legal system that permits this while condemning the enemy's recipe for victory: winning popular support and using this support in the only way a popular movement can to overthrow the local

37. B. FALL, *STREET WITHOUT JOY* 372-73 (1964).

38. P. 142.

representatives of a foreign superpower. No reason, that is, apart from the political judgment that a great power has the right to impose a regime of its choice, by force, in some foreign land. The system of law, so interpreted, is merely a ratification of imperialist practice.

Though Taylor is not entirely explicit, it seems that he accepts the political judgment that the United States has the right to impose the regime of its choice in South Vietnam. In his discussion of war aims, he refers to "our stated policy," namely, "to gain and hold the political allegiance of the South Vietnamese to a non-communist government, while giving them defensive assistance against any military means used by the North."<sup>39</sup> His only stated objection to this policy is that it was unlikely to work, under the circumstances of Vietnam. As to the "defensive assistance" against the North, surely he is aware that the main NLF fighting units were indigenous from the start, and remained so until the United States internationalized the war. He apparently believes that it was legitimate for the United States to introduce its military forces, as it did in the early 1960s, to gain and hold the political allegiance of the South Vietnamese to the non-communist government installed by the United States in 1954. Taylor refers to the "deeply idealistic strain in the American interventionist tradition,"<sup>40</sup> as when McKinley justified the war against Spain in 1898. This is a very superficial historical judgment. Virtually every imperial power has justified its actions on "idealistic" grounds. This was true of the British and French empires, the Japanese in East Asia,<sup>41</sup> and the Russians in Eastern Europe. That the leaders and populations of the imperial powers may even succumb to these delusions is hardly significant. It is remarkable that the standards by which we would judge other cases of imperial intervention seem so difficult to comprehend when applied to our own actions.<sup>42</sup>

39. P. 189.

40. P. 186.

41. On Japan's professedly defensive and idealistic motivations in the 1930s, see the references in Chapter II of N. CHOMSKY, *AMERICAN POWER AND THE NEW MANDARINS* 176-77, 179-84, 189-90, 193-202 (1969).

42. American innocence in this regard is if anything surpassed by our British allies. For example, the anonymous weekly columnist (presumably the editor) of the *Far Eastern Economic Review*, generally a sober journal, writes, "it must be evident to any openminded person that, whatever the effects of America's intervention in Vietnam, the action was taken with the most idealistic of motives and with the best of intentions . . . [To] claim that the United States is in Vietnam for imperialist reasons . . . is manifest nonsense." Column, *Traveller's Tales*, *FAR EASTERN ECON. REV.*, Feb. 20, 1971, at 13. Conceivably one might argue that despite ample evidence to the contrary, the United States is thus unique in world history, but to insist on the certainty of this most dubious judgment is merely a form of hysteria. The columnist also demonstrates the neutrality of the *Review*, as contrasted with "committed" scholars: thus the *Review*, he writes, does not hesitate to

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Taylor asks whether the American conduct of the war, with forced resettlement, complicity in the torture of prisoners, enthusiasm for body counts, devastation of large areas to expose the insurgents, free-fire zones, and the Son My massacre, was merely "a terrible, mad aberration."<sup>43</sup> He answers correctly that in part it was a consequence of the specific features of the Vietnam war cited above, which make the laws of war so difficult to apply. In fact, the policy of forced resettlement and devastation of large areas of the country was a rational, perhaps even a necessary response to the specific circumstances of the Vietnam war. Bernard Fall, bitterly anti-communist and a strong supporter of the American war before it reached its full fury, explained this fact very well in the early 1960s.

Why is it that we must use top-notch elite forces, the cream of the crop of American, British, French, or Australian commando and special warfare schools; armed with the very best that advanced technology can provide; to defeat Viet-Minh, Algerians, or Malay "CT's" [Chinese terrorists], almost none of whom can lay claim to similar expert training and only in the rarest of cases to equality in fire power?

The answer is very simple: It takes all the technical proficiency our system can provide to make up for the woeful lack of popular support and political savvy of most of the regimes that the West has thus far sought to prop up. The Americans who are now fighting in South Viet-Nam have come to appreciate this fact out of first-hand experience.<sup>44</sup>

Today, there is vastly more evidence to support Fall's conclusion. "The element of real popular support is vital," he wrote.<sup>45</sup> And it was exactly this "real popular support" that led Washington to adopt the policy of forced population removal that has reduced the peasantry from about eighty-five per cent to less than half of the population,

"criticize what it regards as mistakes in [American] strategy or policy," or to publish "bitter attacks on Vietcong atrocities . . . ." *Id.* True objectivity. The columnist also prides himself on his "sophistication" for "printing one of the few editorials which attempted to establish a sympathetic understanding for the troops who took part in the massacre at My Lai," *id.*, failing to note that the American peace movement, which he denounces, had almost universally taken the same position, but without glorying in its sophistication for this normal human response.

43. P. 152.

44. FALL, *supra* note 36, at 373. Note that this was written in the early 1960s, at a time when Taylor "supported American intervention in Vietnam as an aggression-checking undertaking in the spirit of the United Nations Charter." P. 206. Three years after this work appeared, Secretary of Defense McNamara testified before Congress that the Vietcong and the North Vietnamese were "operating . . . without, for all practical purposes, a single wheeled vehicle in all of South Vietnam." See the statement by Senator Proxmire, 177 CONG. REC. S4585 (daily ed. Apr. 5, 1971).

45. B. FALL, *supra* note 36, at 378.

while laying waste the countryside. If international law has nothing to say about this (except that civilians aiding the resistance are war criminals), then its moral bankruptcy is revealed.

## II. "War Crimes" In Vietnam

The major topic that Taylor considers, however, is the more narrow question of the legality of American actions in Vietnam when measured against the framework of Nuremberg and related conventions. In his analysis of the American intervention after 1965, Taylor concludes that there is definite evidence that war crimes have been committed and that culpability for these crimes extends to high levels of military command and civilian leadership. The evidence in this regard is extensive.

The primary example that Taylor considers is the My Lai massacre. Dr. Alje Vennema, director of a Canadian hospital near the site of the massacre, reports that he knew of it at once but did nothing because it was not at all out of the ordinary. His patients were constantly reporting such incidents to him. The province of Quang Ngai, in which My Lai is located, had been virtually destroyed. Half the population had been forced into refugee camps, and children were starving and wounded.<sup>46</sup> Colonel Oran Henderson, the highest-ranking officer now facing court-martial charges for the My Lai massacre, states that "every unit of brigade size has its Mylai hidden some place," though "every unit doesn't have a Ridenhour."<sup>47</sup>

This observation is borne out by direct testimony of veterans throughout the country. To cite just a few random examples, a highly decorated helicopter gunner testified in El Paso, Texas on May 5, 1971, that of the thirty-nine Vietnamese he had killed, one was an old man

46. Interview in the Ottawa Citizen, Jan. 12, 1970. An American working in Quang Ngai hospital estimated in 1967, a year before My Lai, that about seventy per cent of the civilian war casualties there were caused by American and allied bombardment—that is, in an area more or less under American control, where victims could reach the city hospital. For quotations and references, see N. CHOMSKY, AMERICAN POWER AND THE NEW MANDARINS 284, and N. CHOMSKY, AT WAR WITH ASIA 270-71 (1970).

47. N.Y. Times, May 25, 1971, at 13, col. 1 (city ed.) The reference is to Ronald L. Ridenhour, the Vietnam veteran who disclosed the incident to the Secretary of Defense a year after it occurred. The incident had been noted at once by the NLF, along with many other incidents that are still not acknowledged or discussed. Details were disclosed in Paris on June 15, 1968, but were neglected by the Western media. For a justifiably bitter account, see Wulff, *Le crime de Song My: Avec les félicitations du commandant en chef*, AFRICASIA, April 26-May 9, 1971, at 40, 41. Wulff is a West German physician who spent six years in Vietnam and who testified concerning the "new 'Ouradours and Lidices'" before the Russell Tribunal in 1967. His testimony is recorded in *A Doctor Reports from South Vietnam—testimony by Erich Wulff*, in AGAINST THE CRIME OF SILENCE 522-85 (J. Duffett ed. 1968).

riding a bicycle and ten were a group of unarmed civilians. In each case, he claims to have acted on direct order from his commanding officer. A former member of the Coast Guard testified that his orders were to pilot a small motorboat through Delta canals shooting randomly into every village to see if there were inhabitants. In hearings conducted by the Citizens' Commission of Inquiry on United States War Crimes, in Washington, D.C., Dec. 1-3, 1970, a Medic in the 101st Airborne Division testified that approximately twenty-seven civilians in a peaceful meeting were killed in an unprovoked attack by American tanks firing a barrage of tiny arrow-like nails. A Marine forward observer testified that he counted twenty dead civilians after an unprovoked artillery strike on two villages. Another Marine corporal testified that his unit was ordered to fire on starving civilians scavenging in a garbage dump after their food supplies had been destroyed in 1966—rice fields had been napalmed to destroy food in this free-fire zone. A former Army sergeant testified before an unofficial House committee headed by Rep. Ronald Dellums that he took part in the killing of about thirty unresisting Vietnamese civilians in the village of Truong Khanh, near My Lai, in April 1969. This testimony was confirmed to reporters by Vietnamese women in a refugee camp.<sup>48</sup> The Winter Soldier Investigation in Detroit produced voluminous testimony on atrocities,<sup>49</sup> as have other inquiries.

A former helicopter gunner with 176 confirmed "kills" told reporter Joseph Lelyveld that his gunship was ordered to halt a flight of peasants. When the pilot reported that he had no way to do so, he received orders to "shoot them." Thirty or forty unarmed villagers were then killed by the gunship. Trainees said that their instructor had written President Nixon after the Calley verdict about his own involvement in an incident in which six gunships attacked a village after a helicopter crew member had been shot, the gunships killing 350 villagers.<sup>50</sup>

Refugees, reporters and other observers have presented voluminous substantiating evidence. What is particularly important is that these episodes appear to be quite routine:

I have personally accompanied a routine operation in which U.S. Cobra helicopters fired 20mm. cannons into the houses of a typical

48. N.Y. Times, April 29, 1971, at 10, col. 1 (city ed.); Boston Globe, May 10, 1971, at 2, col. 1.

49. 177 CONG. REC. E2826-E2900 (daily ed. Apr. 6, 1971).

50. N.Y. Times, April 26, 1971, at 26, col. 5-6 (city ed.).

village in territory controlled by the National Liberation Front. They also shot the villagers who ran out of the houses. This was termed "prepping the area" by the American lieutenant colonel who directed the operation. "We sort of shoot it up to see if anything moves," he explained, and he added by way of reassurance that this treatment was perfectly routine.<sup>51</sup>

An official map of the 25th Infantry Division delineates large areas subjected to artillery and air bombardment prior to the ground sweeps of Operation Junction City in 1967. Within these areas there were over twenty identifiable villages with a population of 5000, according to earlier census figures.

*N.Y. Times* correspondent R. W. Apple writes that he heard the "mere gook rule," according to which "anything that moves and has a yellow skin is an enemy, unless there is incontrovertible evidence to the contrary," repeated "100 times by majors and sergeants and privates." This, he writes, is "official policy, a part of everyday life." He goes on:

Not so evident to the average rifleman, but clear enough to those of us who have had an opportunity to travel about the country, is a deliberate policy of creating refugees wherever possible. An Army general . . . explained the idea to me as follows: "You've got to dry up the sea the guerrillas swim in—that's the peasants—and the best way to do that is blast the hell out of their villages so they'll come into our refugee camps. No villages, no guerrillas: simple."<sup>52</sup>

He adds further that Generals Westmoreland and Abrams, as well as Presidents Johnson and Nixon, surely knew this.<sup>53</sup>

It is this policy of "no villages, no guerrillas"—the policy of destroying the rural society—that is referred to as "forced-draft urbanization and modernization" by some of the more cynical academic technocrats who deal with Vietnam; "a euphemism to end all euphemisms,"<sup>54</sup> as

51. Statement of E. Opton, in *WAR CRIMES AND THE AMERICAN CONSCIENCE* 114 (E. Knoll & J. McFadden eds. 1970).

52. Apple, *Calley: The Real Guilt*, 81 *NEW STATESMAN* 449 (1971). The coercive character of earlier population removal was also well understood by the American command. Sharp and Westmoreland wrote that the first Strategic Hamlet Program in March 1962 "involved forced relocation of rural peasants, notwithstanding their strong attachment to their ancestral plots of land." SHARP & WESTMORELAND, *supra* note 23, at 79. This report consists largely of apologetics and is not, in my opinion, to be taken very seriously, unless independently confirmed, except with regard to the details of the American military engagement.

53. Apple, *supra* note 52.

54. P. 202.

Taylor appropriately comments. Apple's account indicates that this policy was not inadvertent, something that the U.S. command "stumbled upon" in an "absent-minded way,"<sup>55</sup> but rather was planned and understood in advance.

Neil Sheehan's widely discussed article on war crimes<sup>56</sup> makes the same point. Sheehan claims that "classified military documents specifically talk about bombing villages in communist-held areas 'to deprive the enemy of the population resource.'" He refers to a secret study in the summer of 1966 which proposed reconsideration of the policy of unrestricted bombing and shelling which was "urbanizing" the population.<sup>57</sup> This proposal was vetoed at the highest level of American authority in Saigon, he writes. It was decided instead to continue to employ "air and artillery to terrorize the peasantry and raze the countryside." One of the basic American tactics was "unrestricted air and artillery bombardments of peasant hamlets"—"devastation had become a fundamental element in [the American] strategy to win the war." The rural civilian population was the target of the American attack "because it was believed that their existence was important to the enemy." The idea was to defeat the Vietnamese communists "by obliterating their strategic base, the rural population."<sup>58</sup>

The United States authorities have a point when they argue that My Lai is not the typical incident of the Vietnam war. More typical, almost a story of the war in microcosm, is the village of Phuqui on the Batangan Peninsula, 130 miles southeast of Hue. In January 1969, 12,000 peasants in this region were forced from their homes in an American ground sweep, loaded on helicopters and shipped to interrogation centers and a waterless camp near Quang Ngai over which floated a banner saying "We thank you for liberating us from communist terror." According to official military statistics, there were 158 NVA and VC dead and 268 wounded in the six-month campaign of which this was a part. These refugees (who incidentally seem to have included the remnants of My Lai) had lived in caves and bunkers for

55. This occasionally-heard explanation is plainly absurd, even if we believe its original formulation by Samuel Huntington, *The Bases of Accommodation*, 46 FOREIGN AFFAIRS 642 (1968). The Huntington article appeared prior to the massive escalation of the American bombing in the countryside of Indochina. But if the effects of millions of tons of bombs and thousands of square miles of defoliation could not have been predicted beforehand, which is difficult enough to believe, it was surely known by mid-1968.

56. See note 4 *supra*.

57. Cf. note 55 *supra*.

58. Sheehan, *supra* note 4, at 12, col. 4.



months before the forced evacuation because of the heavy American bombing and artillery and naval shelling. A dike was "blasted by American jets to deprive the North Vietnamese of a food supply."<sup>59</sup>

As of April 1971, the dike had not been repaired: "As a result, the salt water of the South China Sea continues to submerge the fields where rice once grew." About 4000 refugees, including 1500 in Phuqui, have since returned. Phuqui is now surrounded by 10-foot rows of bamboo. It is under guard, and no one may enter or leave between 6:00 p.m. and 5:00 a.m. "The hills that overlook the flooded paddies, once scattered with huts, are 'ironed'—a word used by the peasants to mean filled with bomb fragments, mines and unexploded artillery shells. B-52 bomb craters nearly 20 feet deep pock the hills." One reason why the dike has not been rebuilt may be that—in the words of an American official—"two years ago the people on the peninsula were written off as communists. It would not be surprising if the attitudes still linger among the Vietnamese today." Most of the population go without basic food. "Province officials neither affirm nor deny police action to limit the peasants' rice . . . It has long been a practice to control the supply of South Vietnam's food, however, to insure that the Vietcong cannot eat excess peasant food." An American working in the province said, "You might say that Phuqui has been forgotten."

Forgotten it has been, along with hundreds of other villages like it.

The American war in Indochina is a record of war crimes and crimes against humanity, a record of mounting horror. For the reasons noted by Bernard Fall in the early stages of the war,<sup>60</sup> there may well have been no alternative.<sup>61</sup> The war has been directed against the rural population and the land that sustains them. Since 1961-62 American forces have been directly involved in bombing, strafing, forced population removal of millions of peasants, crop destruction and defoliation, destruction of agricultural lands and the irrigation system. The land is

59. N.Y. Times, April 6, 1971, at 16, col. 1 (city ed.). The quotations and most of the cited material comes from this report. The rest is taken from an earlier report by Henry Kamm in the N.Y. Times, Nov. 15, 1969, at 8, col. 5, and from a White Paper of the American Friends Service Committee, AFSC, WHITE PAPER (May 5, 1969), which gives the reports of Vietnamese-speaking field workers on the scene.

60. B. FALL, *supra* note 22, at xx.

61. It might be argued that domestic political considerations made it impossible for the President to saturate Vietnam with enough American troops to obviate the need for destructive firepower. Recall, however, that the French never sent conscripts to Vietnam and probably deployed no more than about 70,000 native French troops in all of Indochina. For references on French military strength, see Chomsky, *Mayday: the Case for Civil Disobedience*, NEW YORK REV., June 17, 1971, at 20 n.22. The American war in Vietnam is unusual, if not unique, in that the public was willing to tolerate, for a time, the deployment of an enormous conscript army to fight what was in essence a colonial war.

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pockmarked with millions of bomb craters. Lumber operations are impossible in forests where trees are riddled with shell fragments. Some six and one-half million acres have been defoliated with chemical poisons, often applied at tremendous concentrations. Included are perhaps one-half million acres of crop-growing land. South Vietnam, once a major rice-exporter, is now importing enormous quantities of food, according to Vietnamese sources.<sup>62</sup> About one acre in six has been sprayed by defoliants. In many areas, there are no signs of recovery. Crop destruction is done largely with an arsenical compound which may remain in the soil for years and is not cleared for use on crops in the United States. A contaminant in the herbicides, dioxin, is known to be a highly potent agent causing birth defects in mammals. Through 1969, one-half million acres of forest had been destroyed by giant tractors with Rome plow blades, widely used in other areas as well. These areas are scraped bare. Nothing may grow again. Arthur Westing, biologist, former Marine officer and director of the Herbicide Assessment Commission of the American Association for the Advancement of Science, writes that "we may well be altering drastically and detrimentally the ecology of vast acreages of South Vietnam."<sup>63</sup> "These vegetational wastelands will remain one of the legacies of our presence for decades to come"<sup>64</sup>—perhaps permanently.

The effects of these policies on the population can be easily imagined. Hunger and starvation from crop destruction and forced population removal have been noted since 1961.<sup>65</sup> Millions of people had been

62. See note 65 *infra*.

63. Westing, *Poisoning Plants for Peace*, 16 FRIENDS J. 193 (1970). Figures cited in text come from this article and that cited note 64 *infra*.

64. Westing, *Ecocide in Indochina*, NATURAL HISTORY, March 1971, at 56, 59.

65. Ngo Vinh Long, *Leaf Abscission*, in *ECOCIDE IN INDOCHINA* 54 (B. Weisberg ed. 1970). Long mentions that crop destruction was used at that time to force the population into strategic hamlets.

In *Thoi-Bao Ga* (a Vietnamese student journal published in Cambridge, Mass.) Long writes that according to the Saigon newspaper *Tin Sang*, Nov. 12, 1970, the chairman of the Committee on Agriculture of the GVN declared that American chemical defoliants had destroyed approximately sixty per cent of all crops in South Vietnam. The March 9, 1971 issue of the Saigon daily *Duoc Nha Nam* reports that South Vietnam imported one-half million metric tons of rice from the United States in 1970, enough, in Long's estimate, to feed five million persons. Nevertheless, journalists and others report widespread hunger, even starvation. *THOI-BAO GA*, March/Apr. 1971, at 6.

Bryce Nelson, an *L.A. Times* reporter who was formerly a reporter for *Science*, writes that an unreleased report of the AAAS Herbicide Assessment Commission notes the death of ninety people within a four month period (September to December 1970) from exposure to spraying and drinking water contaminated with herbicides. *Village Voice*, January 28, 1971, at 15, col. 3. A former IVS worker with four years experience in South Vietnam reports "numerous encounters" with farmers in Cantho and Tayninh provinces whose crops were destroyed. He also reports seeing patients in Tayninh hospital "with limbs and faces burned mercilessly by phosphorous" and "child after child scarred or disfigured in some hideous way" in hospitals in the Mekong Delta. Letter to the Editor from Roger Montgomery, N.Y. Times, Jan. 22, 1971, at 38, cols. 5-6.

removed—often by force—into controlled areas, by the early 1960s. After 1965, air and artillery bombardment and ground sweeps accounted for the overwhelming majority of the refugees.

In South Vietnam, perhaps half the population has been killed, maimed or driven from their homes. In Laos, perhaps a quarter of the population of about three million are refugees. Another third live under some of the most intense bombardment in history. Refugees report that they lived in caves and tunnels, under bombing so intensive that not even a dog could cross a path without being attacked by an American jet. Whole villages were moved repeatedly into tunnels deeper and deeper in the forest as the scope of the bombing was extended. The fertile Plain of Jars in Northern Laos was finally cleared and turned into a free-fire zone. These refugees, incidentally, report that they rarely saw NVA troops and that Pathet Lao soldiers were rarely to be found in the villages. The areas in question are far from South Vietnam or the "Ho Chi Minh Trails." In Cambodia, the Kennedy subcommittee estimated that by September, 1970—after four months of regular bombardment—there were about a million refugees out of a population of about six million. The intensive bombardment also has been reported by captured correspondents. According to Richard Dudman's direct observations in captivity, "[t]he bombing and shooting was radicalizing the people of rural Cambodia and was turning the countryside into a massive, dedicated, and effective revolutionary base."<sup>66</sup> As elsewhere in Indochina, this is both a consequence and a cause of the American bombardment.

On April 21, 1971, Rep. Paul McCloskey, just returned from Indochina, testified before the Kennedy subcommittee that an Air Force lieutenant colonel at Udorn Air Force Base in Thailand said that "there just aren't any villages in Northern Laos anymore, or in southern North Viet Nam either, for that matter." Government reports, secret until unearthed with great effort by McCloskey, confirm the overwhelming evidence of refugee reports concerning the virtual destruction of large areas of rural Laos controlled by the Pathet Lao.<sup>67</sup>

Much the same is true in Vietnam. McCloskey quotes a top Civil Operations and Revolutionary Development Support (CORDS) official who informed him, in Vietnam a year ago, "that in a single province,

66. R. DUDMAN, 40 DAYS WITH THE ENEMY 69 (1971).

67. See N.Y. Times, April 22, 1971, at 8, col. 1 (city ed.); Boston Globe, April 16, 1971, at 2, col. 3; Boston Globe, April 23, 1971, at 5, col. 1. See also 117 CONG. REC. H794-800 (daily ed. Feb. 18, 1971) (formal testimony of Rep. McCloskey).

Quang Nam, American and allied forces had destroyed and razed 307 of the original 555 hamlets of the province." He adds, "I was flown over square mile after square mile where every village, home, and treeline had been burned to the ground; this was part of a rice denial and search and destroy program admittedly based on the need to deny the Vietcong the ability to obtain food, hospitalization, cover and concealment which the villages would otherwise afford."<sup>68</sup>

The *United States Army Field Manual* permits measures to "destroy, through chemical or bacterial agents harmless to man, crops intended solely for consumption by the armed forces (if that fact can be determined)."<sup>68a</sup> Yet the descriptions of crop destruction cited above, and those of the AAAS Herbicide Assessment Commission, suggest that nearly all of the food destroyed would have been consumed by civilians. It should be remembered that Goering was convicted at Nuremberg for crimes against humanity in part because of orders requiring diversion of food from occupied territories to German needs, and that the United States in Tokyo also supported prosecution of Japanese military officials for crop destruction in China.<sup>69</sup>

The province that McCloskey described, Quang Nam, is the subject of a book by the former Senior AID official in the province, William Nighswonger.<sup>70</sup> He explains that "the battle for Quang Nam was lost by the government to Viet-Cong forces recruited for the most part from within the province." A major reason for their success was "the progressive social and economic results" shown by their programs. As elsewhere in Indochina, it was the success of the communist-led forces in gaining popular support through successful programs<sup>71</sup> that led to

68. 117 CONG. REC. H796 (daily ed. Feb. 18, 1971). Similar reports on Quang Ngai and Quang Tin provinces were given in 1967, before the massive escalation of the air war in 1968. J. SCHELL, *THE MILITARY HALF* (1968).

68a. U.S. DEPT OF ARMY, *THE LAW OF LAND WARFARE* 18, para. 37 (1956) (Dept of Army Field Manual FM 27-10).

69. Statement by George Bunn, Professor of Law at the University of Wisconsin and formerly General Counsel, U.S. Arms Control and Disarmament Agency, *The Broad Implications of the Continued Use of Herbicides in Southeast Asia*, AAAS Annual Meeting, December 29, 1970 (mimeo).

70. W. NIGHSWONGER, *RURAL PACIFICATION IN VIETNAM* (1967).

71. For discussion, see Race, *How They Won*, 10 *ASIAN SURVEY* 628 (1970); R. SANSOM, *THE ECONOMICS OF INSURGENCY IN THE MEKONG DELTA OF VIETNAM* (1970). Race was an adviser to a District Chief in Long An Province, south of Saigon, while in the U.S. Army. Sansom is an Air Force Captain and a member of the staff of the National Security Council. Non-communist reporters who have visited NLF-controlled areas give substantiating evidence. See the report by Jacques Doyon cited in COMM. OF CONCERNED ASIAN SCHOLARS, *THE INDOCHINA STORY* 36 (1970). See also KATSUICHI HONDA, *THE NATIONAL LIBERATION FRONT* (1968) and *VIETNAM: A VOICE FROM THE VILLAGES* (1967) (collections of articles by Honda, privately translated and reprinted from the Japanese journal *Asahi Shimbun* in 1967). Regarding Pathet Lao programs as seen by refugees, see the verbatim interview in ADAMS & MCCOY, *supra* note 28, at 451-59 and N. CHOMSKY, *AT WAR WITH ASIA* 239

the American effort to destroy the rural society in which the revolution was rooted.

Robert Shaplen concludes that "the war's overall effects on the Vietnamese have been cataclysmically destructive, not only in physical terms but psychologically and socially."<sup>72</sup> Furthermore, these effects are overwhelmingly attributable to American firepower and tactics. Unless one assumes a high degree of idiocy on the part of the American command and the civilian leadership in Washington, it is necessary to suppose that something of the sort was anticipated when these tactics were designed. Furthermore, there is mounting evidence, some of it just cited, that the probable effects were understood in advance, and were even intended. Finally, it is important to bear in mind that these tactics, though sharply intensified in 1965 and again in 1968, can be traced back to the early 1960s. In fact the Diem regime, installed and kept in power by the United States, initiated a virtual war on peasant supporters of the Vietminh in the mid-1950s.<sup>73</sup>

In the face of such evidence, which has by now been recorded at great length in many easily accessible sources, it requires a real act of faith to doubt that the American command and the civilian authorities are responsible for war crimes and crimes against humanity in the sense of Nuremberg. In fact, it is difficult to understand the surprise or concern over My Lai, considering the relative triviality of this incident in the context of the overall American policies in Indochina.

Taylor observes, correctly and appropriately, that "[t]he war, in the massive, lethal dimensions it acquired after 1964, was the work of highly educated academics and administrators"—the Kennedy advisers, the Rusks, McNamaras, Bundys and Rostows, who stayed on with President Johnson and "who must bear major responsibility for the war and the course it took."<sup>74</sup> The same is true of the war in the years 1961-64, with its lethal effects—small, to be sure, compared with what was to come, but nonetheless hardly acceptable by civilized standards.

It remains to discuss two essential points: first, the argument that the American actions were permitted by "military necessity," and second, the claim that U.S. intervention was justified in collective

(1970). See also Selden, *People's War and the Transformation of Peasant Society: China and Vietnam*, in *AMERICA'S ASIA* (E. Friedman & M. Selden eds. 1970).

72. R. Shaplen, *The Challenge Ahead*, COLUM. JOURNALISM REV., Winter 1970-71, at 40.

73. For some discussion and further references, see E.S. HERMAN, *ATROCITIES IN VIETNAM*, ch. 2 (1970) [hereinafter cited as HERMAN]. All of this was well understood at the time. See, e.g., *VIETNAM: THE FIRST FIVE YEARS* (R.W. Lindholm ed. 1959).

74. P. 205.

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self-defense against armed attack, under Article 51 of the United Nations Charter. Taylor discusses both of these matters, but in what seems to me an unsatisfactory way.

### III. Military Necessity

In a sense, it is correct that the American policy of “no villages, no guerrillas” was based on military necessity. American planners were well aware of the enormous popular support for the communist-led resistance forces, the so-called ‘Vietcong’, and the lack of any significant popular base for the government.<sup>75</sup> Furthermore, there is no great secret as to why the Vietcong were so successful in gaining popular support.<sup>76</sup>

The Field Operations Coordinator of the U.S. Operations Mission, John Paul Vann, circulated a report<sup>77</sup> in 1965 on how the war should be fought. His premises were that a social revolution was in process in South Vietnam, “primarily identified with the National Liberation Front,” and that “a popular political base for the Government of South Vietnam does not now exist.” “The dissatisfaction of the agrarian population . . . today is largely expressed through alliance with the NLF,” he wrote. “The existing government is oriented toward the exploitation of the rural and lower class urban populations.” Since it is “naive,” he explained, to expect that “an unsophisticated, relatively illiterate, rural population [will] recognize and oppose the evils of Communism,” the United States must institute “effective political indoctrination of the population” under an American-maintained “autocratic government.” The document opposes mere reliance on gadgetry, air power, and artillery, and rejects the expressed view of a United States officer who stated, “if these people want to stay there and support the Communists, then they can expect to be bombed.” The report is based on the further assumption that the social revolution is “not incompatible” with United States aims, but that “the aspirations of the majority” can only be realized “through a non-Communist government.” According to Vann, the United States should be the judge of

75. See notes 20-21 *supra* and accompanying text.

76. See note 71 *supra*.

77. This report, untitled in my copy, was given personally by Vann in 1971 to the Australian social psychologist Alex Carey, who has studied in particular the Australian role in Vietnam. See Carey's carefully documented pamphlet, *Australian Atrocities in Vietnam 1-19* (undated pamphlet), which describes what he refers to as “our drift towards the standards of Hitler and the Gestapo.”

what would be "best" for the unsophisticated peasants of Vietnam. The United States, he argued, must impose "a benevolently inclined autocracy or dictatorship . . . while laying the foundation for a democratically oriented [government]." Vann's report expresses the benevolent face of imperialism. It is outspoken in its colonialist assumptions. From Taylor's few remarks on the subject, one might surmise that he would agree with Vann's proposals and leading assumptions.

As already noted, Taylor accepts the legitimacy of the effort to "gain and hold the political allegiance of the South Vietnamese to a non-Communist government,"<sup>78</sup> while doubting the possibility of doing so. He regards faulty judgment and over-reliance on military means as the primary defects of American policy.<sup>79</sup> He accuses United States authorities of "under-maintenance": too much bombing and not enough concentration on the "civil half."<sup>80</sup> He raises no objection to the direct use of force in the early 1960s or to the support of large-scale terror in the late 1950s in the interest of maintaining the regime that the United States had installed.<sup>81</sup> Nowhere does he raise the fundamental question: Is it legitimate for the United States to use its power to impose a particular social and political order on some foreign land, supposing that it can do so within the limits of "proportionality" of force applied? His discussion of the intentions of American leaders is unsatisfactory in part because of his failure to raise this question. Thus Taylor argues that to accuse "our leaders" of being war criminals "assumes that the leaders wanted things to turn out as they have, whereas in fact it is plain that those responsible are exceedingly dissatisfied with the present consequences of their policies."<sup>82</sup> Taylor's point can be saved from incoherence only by the assumption that the intentions of American leaders—specifically, to win support for the government they had installed—are legitimate and benign, and that these leaders can be faulted only for having made errors of judgment along the way. Surely Taylor would not argue that the defendants at Nuremberg should have been acquitted merely because they, too, were "dissatisfied with the consequences of their policies."

Taylor believes that some of the American failures in Vietnam can be traced to the fact that "the armed services no longer possess leaders of stature and influence comparable to the heroes of the Second World

78. P. 189.

79. Pp. 188-89.

80. Pp. 196-202.

81. See note 71 *supra*.

82. P. 188.

War.”<sup>83</sup> This is an unfair criticism. The difference between World War II and Vietnam has to do with the character of the wars, not the character of the military commanders. The military in both wars was entrusted with implementation of the policies laid down by the civilian leadership. In the case of Vietnam, this was the policy of “gain[ing] and hold[ing] the political allegiance of the South Vietnamese to a non-Communist government.” To implement this policy effectively, the military command was compelled to abandon the benevolent imperialist pose and to destroy the rural society, the social base of the revolution. The civilian leadership was well aware of what was taking place and made no effort to change policy.

Ambassador Robert W. Komer, chief pacification adviser to the GVN in 1967-68, explains that “U.S. military intervention had averted final collapse of the coup-ridden GVN and had created a favorable military environment in which the largely political competition for control and support of the key rural population could begin again.”<sup>84</sup> The United States escalation overcame the difficulty that there was “little GVN administration . . . outside Saigon,” and made it possible ultimately to initiate the “comprehensive” and “massive” 1967-70 pacification program in an effort to cope with what was clearly “a revolutionary, largely political conflict.”<sup>85</sup> Despite the qualms of the benevolent imperialists such as Vann, it is difficult to see how this aim could have been achieved except through the means employed, namely, what Komer describes as “massive U.S. military intervention at horrendous cost.”<sup>86</sup>

In this sense, it can be argued that the horrendous cost of the American military intervention—including defoliation, forced population removal, bombing, harassment and interdiction, free-fire zones, anti-personnel weapons, the Phoenix program of assassination and terror,<sup>87</sup>

83. P. 201.

84. Komer, *Impact of Pacification on Insurgency in South Vietnam*, 25 J. INT'L AFF. 48, 50 (1971) [hereinafter cited as Komer]. He is referring to the outright American invasion and bombing escalation in the South in February 1965.

85. *Id.* Recall the remarks by Richard Falk, p. 1461 *supra*, on capacity to govern as an element in claiming political legitimacy.

86. Komer, *supra* note 84, at 49, 50, 55. These benevolent imperialists, it should be noted, did not dissociate themselves from United States policies despite their reservations even after the grim effects were obvious. See note 24 *supra*.

87. The Phoenix program is “aimed at neutralizing the clandestine Vietcong politico-administrative apparatus, which many regard as the key to their insurgent capabilities.” Komer, *supra* note 84, at 53. “Neutralization” is bureaucratese for “assassination or capture.” Estimates as to the numbers “neutralized” vary. Deputy United States Ambassador, William E. Colby, principal United States official in charge of pacification, testified before the Senate Foreign Relations Committee that close to 20,000 were “neutralized” in 1969, of whom 6,187 were killed. For comparison, the Saigon government claims that 4,619



the torture of prisoners to gain information—was a military necessity, and thus no crime if military necessity justifies departure from the language of international agreements. All of this is arguable given the essential premise that the United States was justified in intervening by force in this “revolutionary, largely political conflict” to guarantee the rule of the regime it had originally imposed in 1954 and its successors—the rule of the landholding and urban elite, the military officers, and the Northern Catholics who provided the social base for a regime that was clearly incapable of holding out on its own against a domestic insurgency.

The question whether this premise is valid arises in its sharpest form in the pre-1965 period with which Taylor does not concern himself. By 1965, as Vann noted,<sup>88</sup> these questions of principle were largely irrelevant. After the “large scale participation by U.S. ground forces,” he wrote, “it is almost inconceivable that the United States will withdraw from Vietnam short of a military victory or a negotiated settlement that assures the autonomy of South Vietnam.”<sup>89</sup> The same view was held by civilians close to the Administration, including some who were later to become outspoken doves. Thus Richard Goodwin wrote in 1966 that continued American combat was justified by “the bedrock vital interest of the United States” which must serve as the “single standard” for policy formation, namely, “to establish that American military power, once committed to defend another nation,<sup>90</sup> cannot be driven from the field.”<sup>91</sup>

Even today, it is well understood by the American command that military force must be used to destroy the political movement that the

civilians were killed by “the enemy” in 1969. The Phoenix program of course accounts for only a small fraction of the civilians killed by combined American-GVN forces. Len Ackland, a former IVS worker in South Vietnam and then a team leader and analyst for RAND, points out that the Phoenix program is designed to capture or murder civilians: “people who serve the political party, the National Liberation Front, as tax collectors, clerks, postmen, etc.” For references and further documentation, see N. CHOMSKY, *AR WAR WITH ASIA* 301-02 (1970); HERMAN, *supra* note 73, at 46-47.

88. See note 77 *supra*.

89. The latter phrase is a code-term, in American political terminology, for rule of South Vietnam by a non-communist government. The NLF political program of 1962, largely ignored—even suppressed—in the United States, called for the neutralization of South Vietnam, Laos, and Cambodia. One might argue that this was a deception, but it is unclear that the United States has unilateral authority to use military force in acting on its skepticism.

90. This is another formulation of the inexpressible statement that South Vietnam must be ruled by the American-imposed non-communist government. Goodwin was well aware, and explains in this book, that the insurgency even at that time was overwhelmingly domestic.

91. R. GOODWIN, *TRIUMPH OR TRAGEDY* 38 (1966). For many other expressions of related views, see the citations and references in N. CHOMSKY, *AMERICAN POWER AND THE NEW MANDARINS* (1969), particularly, Chapter 3, *The Logic of Withdrawal*, 221-94.

Saigon regime has never been able to defeat politically. A special intelligence survey ordered by General John H. Cushman, top American official in the Mekong Delta, warns that the enemy is expanding his political network and "reverting to a political-struggle phase."<sup>92</sup> William Colby adds that "we need to prevent the enemy from putting in this network, because that will permit the Communists to revive later on."<sup>93</sup> Once again, given the premise that the United States has the right to intervene to impose the regime of its choice, "military necessity" could justify the continued use of overwhelming military force against the Vietnamese, the Laotians, and the rural Cambodians as well.

It should be added that the premise that American military intervention in other nations' affairs is justified is solidly enshrined in American history. Taylor refers to the American conquest of the Philippines at the turn of the century. Whatever "idealistic" motives McKinley may have professed, the fact is that the United States overcame a domestic popular movement by force and terror, at tremendous cost to the native inhabitants. Seventy years later, the peasantry—three quarters of the population—still lives under material conditions not very different from those of the Spanish occupation.<sup>94</sup> In Thailand, a postwar effort at parliamentary democracy led by the liberal democrat Pridi Phanomyong was overthrown by a military coup that reinstated the Japanese collaborator who had declared war on the United States. Substantial and continuing American assistance has supported a terroristic regime that has willingly integrated itself into the American-Japanese Pacific system. Pridi, who had fought with the American O.S.S. against the Japanese during World War II, found his way to China. In Korea in 1945, the United States overthrew an already established popular regime, making use of Japanese troops and collaborators. By 1949 the American command had succeeded in destroy-

92. N.Y. Times, May 24, 1971, at 4, col. 3 (city ed.).

93. *Id.* See note 87 *supra* (identifying William Colby).

94. In October 1937 President Manuel Quezon pointed out that while "[t]he rich can live in extravagant luxury. . . , [t]he men and women who till the soil or work in the factories are hardly better off now than they were during the Spanish regime. . . . [T]hirty-five years of American regime has brought him only disappointments and sometimes, despair . . . ." G. TAYLOR, *THE PHILIPPINES AND THE UNITED STATES* 21 (1964). Taylor adds much information to confirm this judgment and concludes that by the late 1930s, "the mass of the people may have been worse off than before" the American occupation. *Id.* at 85. The Bell report of 1950 revealed that inequalities of income had become even more marked while the average standard of living had not reached pre-war levels. *Id.* at 137.

The director of the U.S. AID Mission in the Philippines, Wesley D. Haraldson, testified before a House sub-committee on April 25, 1967 that the condition of the average farmer "has not changed in the last fifty years . . . . In the past ten years the rich have become richer and the poor have become poorer." Haraldson cited in HERNANDO J. ARAYA, *THE UNTOLD PHILIPPINE STORY* 360 (1967).

ing the existing unions, the popular local councils, and all popular indigenous groups, and had instituted a right-wing dictatorship of the wealthy elite and military-police forces—employing ample terror in the process.

Vietnam is exceptional only because these familiar objectives have been so difficult to achieve. The goal in Vietnam remains: to concentrate and control the population, separating it from main force guerrilla units, and to create a dependent economy that adapts itself to the needs and capacities of the industrialized societies of the West (and Japan), under the rule of wealthy collaborators, with a mere pretense of democracy. As to the peasants, one can recall the words of a South Vietnamese writer speaking of the period of French domination: “the peasants [can] grit their teeth and nurse their hatred amidst the paddy fields.”<sup>95</sup> And the residents of the miserable urban slums can do the same.

This is in fact the model of national and social development that the benevolent imperialists such as Vann offer to underdeveloped societies, whether they are aware of it or not. It is to achieve such magnificent results as these that they are willing to subject the population of Indochina, allegedly for their own good, to the benefits of American technology, as has been done in Vietnam for the past decade.

#### IV. Aggression and Collective Self-Defense

The final matter to be considered is what Taylor describes as the “salient feature” of Nuremberg, namely the issue of crimes against peace. As Taylor observes, the justification for the American intervention in Vietnam can only be Article 51 of the United Nations Charter. Invocation of this Article assumes that the United States is engaged in collective self-defense against an armed attack from North Vietnam. There has been extensive discussion of this matter. It is curious that Taylor barely alludes to it and makes no effort to deal with arguments that have been repeatedly presented in legal and historical literature.<sup>96</sup> The fundamental problem in establishing the

95. Phi-Vân, *The Peasants (Dân Quê)*, Appendix to Ngô VINH LONG, *COLONIZED PEASANTS OF VIETNAM: 1900-1945*, to be published by the Harvard East Asian Research Center.

96. See, e.g., CONSULTATIVE COUNCIL OF THE LAWYERS COMM. ON AMERICAN POLICY TOWARDS VIETNAM (R. Falk, Chairman; J. Fried, Rapporteur), *VIETNAM AND INTERNATIONAL LAW, AN ANALYSIS OF THE LEGALITY OF THE U.S. MILITARY INVOLVEMENT* (1967). See also several papers in FALK—VIETNAM, *supra* note 17. The most recent study, which appeared after Taylor's book, is W. STANDARD, *AGGRESSION: OUR ASIAN DISASTER* (1971).

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United States case is that American military intervention preceded and has always been far more extensive than North Vietnamese involvement. (There is, in addition, a question as to the relative rights of North Vietnamese and Americans to be fighting in South Vietnam, after the unification provisions of the Geneva agreements were subverted.) To cite one crucial moment, consider early 1965, the point at which Taylor begins to have doubts about the legitimacy of the American involvement. Chester Cooper, who had been directly involved in Southeast Asian affairs since 1954 and was in charge of Asian affairs for the White House under the Johnson Administration, wrote:

Communist strength had increased substantially during the first few months of 1965. By the end of April it was believed that 100,000 Viet Cong irregulars and between 38,000 and 46,000 main-force enemy troops, including *a full battalion of regular North Vietnamese troops*, were in South Vietnam. Meanwhile American combat forces were moving into South Vietnam at a rapid rate; in late April more than 35,000 American troops had been deployed and by early May the number had increased to 45,000.<sup>97</sup>

The single North Vietnamese battalion of 400-500 men was tentatively identified in late April.<sup>98</sup>

In February 1965, the Johnson administration attempted to justify

97. C. COOPER, *THE LOST CRUSADE: AMERICA IN VIETNAM* 276-77 (1970) (emphasis added).

98. For details see T. DRAPER, *ABUSE OF POWER* 73-82 (1967). There has been no attempt to respond to Draper's devastating critique of Administration claims regarding the North Vietnamese troop involvement in the South. The astonishing internal contradictions suffice in themselves to make the Government case unbelievable. See also the references in note 96 *supra*. Recall that this North Vietnamese battalion was allegedly detected in the South two and a half months after the regular bombing of North Vietnam had been initiated, eight and a half months after the first bombing of strategic targets in North Vietnam in a "reprisal" for an incident which probably never occurred. The Government claims regarding North Vietnamese aggression in Laos and Cambodia are no more compelling. For an analysis of what information exists, see N. CHOMSKY, *AT WAR WITH ASIA* 117-82, 187-252 (1970) and D.G. PORTER, *After Geneva: Subverting Laotian Neutrality*, in ADAMS & MCCOY, *supra* note 28, at 179. See also J.C. POMONTI & S. THION, *DES COURTISANS AUX PARTISANS* 131f (1971); Pearson & Smilowitz, *Biting the Fishhook*, *BULL. OF CONCERNED ASIAN SCHOLARS*, Fall 1970, vol. 2, no. 4, at 80.

THE PENTAGON PAPERS, *supra* note 14, provides new information relevant to North Vietnamese troop commitment. The first report that North Vietnamese troops had entered "into the order of battle" appears in a CIA memorandum of April 21, 1965, referring to a regiment of the 325th Division, which had been reported as possibly in the area since February. This regiment allegedly was operating in northwestern Kontum Province in II Corps. Evidently, the evidence was not very compelling. As late as July 2, 1965, Assistant Secretary of Defense John McNaughton expressed his concern "about the increasing probability that there are regular PAVN forces either in the II Corps area or in Laos directly across the border from II Corps." The documents also reveal that in late April a United States force level of 82,000 along with 7,250 "third country" troops was approved, and that General Westmoreland's request of June 7 for 44 battalions (a total force level of almost 194,000) was approved on July 30.

the new escalation with a White Paper, which, Cooper notes, "proved to be a dismal disappointment." The problem was that "the actual findings [regarding North Vietnamese involvement] seemed pretty frail." No regular troops could be identified. As for infiltrators, even if allegedly "known" and "probable" infiltrators were combined, the average southward movement beginning in 1959, when the insurrection was already solidly in progress, was "little more than 9000 per year," which did not "loom very large" as compared with the one-half million-man Saigon army and the 23,000 regular American troops deployed. "The information on enemy weapons," he observed, "was even less earth-shaking." The three 75mm. recoilless rifles of Chinese communist origin, forty-six Soviet-made rifles, forty submachine guns and one automatic pistol of Czech origin that had been captured (and that might have been bought on the open market) did not seem too impressive as compared with over \$860 million in military assistance given by the U.S. to the Saigon government since 1961.<sup>99</sup> In fact, the weapons of communist origin constituted less than two and one-half per cent of the captured weapons, as I. F. Stone noted at the time.<sup>100</sup>

As to the infiltrators, the figures seem even less impressive when we recall that so far as is known, these were overwhelmingly South Vietnamese returning to their homes. It is difficult to see why this should be impermissible, after the subversion of the Geneva agreements and the American and Saigon violations of the Geneva Accords,<sup>101</sup> the Diemist repression, and the renewal of guerrilla war in the South in 1957. Furthermore, Cooper makes no mention of the "infiltration" of trained South Vietnamese into South Vietnam by the United States after training at American military bases; nor, for that matter, of the saboteur groups and guerrilla teams of South Vietnamese infiltrated to

99. C. COOPER, *supra* note 97, at 264-65.

100. Stone, *A Reply to the White Paper*, I.F. Stone's Weekly, March 8, 1965, at 1, col. 1.

101. "It appears from the International Control Commission's reports that through February 28, 1961, about 154 violations had been registered against the South and only one violation against the North." R. SCIGLIANO, *supra* note 20, at 154. Scigliano argues that the North has the advantage of being "more acute, or devious" and that the "inability of ICC teams to perform their duties . . . is much greater in North than in South Vietnam." R. SCIGLIANO, *supra* note 20, at 155. Perhaps. However, one ICC Report states: "As has been revealed in the preceding paragraphs, the degree of co-operation given to the Commission by the two parties has not been the same. While the Commission has experienced difficulties in North Vietnam, the major part of its difficulties has arisen in South Vietnam." INT'L CONTROL COMM'N, SIXTH INTERIM REPORT OF THE INT'L COMM'N FOR SUPERVISION AND CONTROL IN VIETNAM, CMND. No. 31, at 26-31 (1957), reprinted in VIET NAM: HISTORY, DOCUMENTS AND OPINIONS 170-72 (M.E. Gettleman ed. 1965). On the matter of the obligations of North and South Vietnam with regard to the Geneva agreements, see Partan, *Legal Aspects of the Vietnam Conflict*, in FALK—VIETNAM, *supra* note 17, at 201, 209-16.

the North since 1956, according to Bernard Fall.<sup>102</sup> Nor, finally, does Cooper mention that the American troops had been directly involved in military operations since 1961-62.

All in all, the case that the U.S. was merely exercising the inherent right of collective self-defense against an armed attack from North Vietnam is frail indeed. Yet one who defends the legitimacy of the American involvement must go beyond even this and claim that the United States had the right to determine unilaterally that there had been "aggression from the North" and to escalate its already substantial military involvement in South Vietnam, by-passing the stipulations in the United Nations Charter concerning the role of the Security Council in determining the existence of a threat to peace. Unless all of this is accepted, one must conclude that the American military actions are illegal, and themselves constitute aggression—that there was aggression not from the north, but from the east.

Unfortunately, Taylor has virtually nothing to say about these frequently-debated questions. His treatment of the matter of aggression is, in general, unsatisfying. In discussing the allegation that North Vietnam is guilty of aggression in South Vietnam, Taylor points to "strong evidence." "Indisputably, the ground fighting has all taken place in South Vietnam," not in North Vietnam. But, he argues, the case is not clear, since the Geneva Agreements merely established two "zones" and explicitly declared the military demarcation line to be "provisional" and not "a political or territorial boundary."<sup>103</sup> Furthermore, South Vietnam, with United States support, declined to proceed with the scheduled elections. Of course, if it is unclear whether North Vietnam is guilty of aggression, it is correspondingly unclear whether American military action is justified by Article 51, which in fact speaks not of "aggression," but of "armed attack," a narrower category.<sup>104</sup>

Furthermore, the "strong evidence" that Taylor cites and questions cuts other ways as well. Thus, for example, ground fighting has taken place in South Vietnam, not the United States. By Taylor's standards, there is thus "strong evidence" that the United States is guilty of aggression in South Vietnam, particularly since American authorities

102. Fall, *Vietnam: The Agonizing Reappraisal*, 48 *CURRENT HISTORY*, Feb. 1965, at 95. For further references see N. CHOMSKY, *AMERICAN POWER AND THE NEW MANDARINS* 242-43, 281-82. For further confirmation, see J. ZASLOFF, *POLITICAL MOTIVATION OF THE VIET CONG: THE VIETMINH REGROUPEES*, RAND Memorandum RM-4703/2—ISA/ARPA, at 124 (May 1968).

103. Pp. 101-02.

104. See note 96 *supra*.

have admitted that the GVN had little administrative authority outside of Saigon by 1965.<sup>105</sup> Taylor never considers this question in his discussion of aggressive war.<sup>106</sup> Rather, he states the case for possible American aggression as follows:

[T]he case . . . is based on the conclusions that both South Vietnam and the United States violated the Geneva Declaration of 1954 by hostile acts against the North, unlawful rearmament, and refusal to carry out the 1956 national elections provided for in the Declaration, and that the United States likewise violated the United Nations Charter by bombing North Vietnam.<sup>107</sup>

But these charges constitute only part of the case. A much more serious charge is that the United States has engaged in aggressive warfare in South Vietnam in violation of the provisions of the United Nations Charter concerning the use of force. These charges are based on military actions taken against an insurgency which the United States recognized to be popular and successful—far more popular than the government it had installed and maintained, which had lost the war by 1965 despite the absence of any regular North Vietnamese troops. Taylor does not mention these matters, I presume, because of his tacit assumption that the United States had the right to intervene with its ground, helicopter and air forces in what some American authorities have recognized to be a “revolutionary, largely political conflict.”<sup>108</sup>

It might be argued that the stipulations of the United Nations Charter regarding the threat or use of force (specifically, Article 2(4)) have been so eroded as to be effectively inoperative. The issue is discussed by Thomas M. Franck in a recent study.<sup>109</sup> He discusses “the changed realities of the postwar quarter-century” that have so shattered the precepts of Article 2(4) that “only the words remain.”<sup>110</sup> Franck is surely right in arguing that “both super-Powers have succeeded in establishing norms of conduct within their regional organizations which have effectively undermined Article 2(4),”<sup>111</sup> beginning with the insis-

105. See pp. 1477-79 *supra*.

106. Taylor's only reference to the issue is the following, in a different context: “When we sent hundreds of thousands of troops to South Vietnam, bombed North Vietnam, and moved into Cambodia, were our national leaders as guilty of launching a war of aggression as were Hitler and his generals . . . ?” P. 13. The question is not taken up again.

107. Pp. 96-97.

108. See p. 1479 *supra*.

109. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970).

110. *Id.* at 809.

111. *Id.* at 832.

tence by the United States "that a state's sovereignty is subject to the overriding right of a region to demand conformity to regional standards."<sup>112</sup> An example is the United States condemnation of "not intervention by foreign troops but of a 'foreign' ideology,"<sup>113</sup> as in the Guatemalan affair of 1954. This was the direct precursor of the Brezhnev doctrine. Franck is also correct in observing that "national self-interest, particularly the national self-interest of the super-Powers, has usually won out over treaty obligations."<sup>114</sup> It might be added that the United States has developed a concept of "regional organization" that incorporates large parts of Southeast Asia in a "regional organization" where it assumes the right to operate freely, and that the violations of Article 2(4) can arguably be traced back to the immediate postwar activities of the great powers in securing their spheres of influence. The British and then American interventions in Greece, beginning in 1944, would be particularly significant examples.

Despite his observations on the behavior of the great powers, Franck's discussion seems to me to be flawed by an implicit bias in favor of these powers. In discussing the "changing nature of warfare" he cites two categories: "wars of agitation, infiltration, and subversion carried on by proxy through national liberation movements,"<sup>115</sup> and nuclear wars. With respect to direct violations of Article 2(4), it is of course the first category that is of primary concern, notwithstanding the great powers' attempts to disguise their interventions on grounds of a presumed relation to great power conflict. But Franck's discussion of this category begs the basic question. As he points out later in the same article, "One man's war of national liberation is another's aggression or subversion, and vice versa."<sup>116</sup> His bias is revealed in that he continually takes the position of the second man: the new kinds of warfare which, he argues, have led to the erosion of Article 2(4) are characterized as wars of infiltration and subversion carried on by proxy. If, taking the contrary view, these should be characterized as imperial interventions to repress movements of national liberation, then it follows that the erosion of Article 2(4) has not been caused by the "changing realities of the postwar quarter-century,"<sup>117</sup> but primarily by the postwar forms of the traditional behavior of great powers. By begging the ques-

112. *Id.* at 834.

113. *Id.*

114. *Id.* at 836.

115. *Id.* at 812.

116. *Id.* at 820.

117. *Id.* at 809.



tion in the particular way he does, Franck takes his stand, without argument or even explicit assertion, on the side of the great powers. This bias is only partially mitigated by his later references to a third factor in the erosion of Article 2(4), namely, "the increased authoritarianism of regional systems dominated by a super-Power."<sup>118</sup>

A similar bias appears when Franck refers to the "significant support"<sup>119</sup> given to indigenous communist insurgents by China in Laos and South Vietnam, for example. He cites no evidence. The available evidence indicates that Chinese aid has always been small as compared to that given by the United States and its allies to the right-wing forces. Franck's reference to propaganda as a form of intervention hardly applies in this case. China's position has generally been that wars of national liberation must be indigenous and cannot rely on China for substantive material support. Incidentally, so far as is known, the only Chinese troops fighting in the Indochina war are the Chinese Nationalist troops employed by the United States, particularly in clandestine operations in Laos.

The same questions are begged when Franck asserts that "the small-scale and diffuse but significant and frequent new wars of insurgency have, by their nature, made clearcut distinctions between aggression and self-defense . . . exceedingly difficult."<sup>120</sup> Thus he points out that it strains credulity "to be told that Poland had attacked Germany or South Korea the North,"<sup>121</sup> but in the case of wars of national liberation, "it is often difficult even to establish convincingly"<sup>122</sup> who is the aggressor. He might have used a different analogy. It would strain credulity to be told that Hungary attacked the Soviet Union in 1956, or that the Philippines attacked the United States at the turn of the century, or that the American colonies attacked England in 1776. If one takes the view that wars of national liberation and great power interventions constitute a continuation of the classic pattern, to be sure with certain modifications, then these are more appropriate analogies, and there is nothing strikingly new about the postwar period.

As to the outside support for wars of national liberation, recall the vast support given by the French to the American colonies in the revolutionary war.

118. *Id.* at 835.

119. *Id.* at 813.

120. *Id.* at 820.

121. *Id.*

122. *Id.*

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There is no question but that the American Revolutionary War, when considered as a 'normal' insurgency, entirely fits the bill of the many revolutionary wars which afflict the middle of the twentieth century. Shorn of almost two centuries of 4th-of-July oratory, it was a military operation fought by a very small armed minority—at almost no time did Washington's forces exceed 8,000 men in a country which had at least 300,000 able-bodied males—and backed by a force of 31,897 French ground troops and 12,660 sailors and Marines manning sixty-one major vessels.<sup>123</sup>

Even compensating for the effect of 4th-of-July oratory, we would have no difficulty in evaluating the bias of a contemporary British writer who referred to the American revolution, in Franck's terms, as a war of agitation, infiltration and subversion carried on by proxy through a national liberation movement. Taking Fall's point of view, which I believe to be much closer to accuracy than the position implicit in Franck's discussion, we must conclude that there is no strikingly new factor in the postwar era that led to the erosion of Article 2(4). Rather, one must agree with U Thant, I believe, when he says, in words that Franck quotes: "In the final analysis there can be no solid foundation for peace in the world so long as the super-Powers insist on taking unilateral military action whenever they claim to see a threat to their security"<sup>124</sup>—or, we may add, a threat to the perceived self-interest of dominant social groups.

While it is beyond question that what remains of Article 2(4) is "only the words," there seems no reason to suppose that this is any change from earlier norms or that it is a consequence of changes in world affairs that could not have been foreseen by the framers of the United Nations Charter. There is, furthermore, no reason to accept the conclusion that the precepts of Article 2(4) should not be considered applicable. Of course, these precepts suffer from the absence of an enforcing authority, which is a general defect of international law.

The question of the right of intervention and the threat or use of force by the great powers to impose social and political arrangements in developing countries should be at the forefront of any investigation of Vietnam, whether in the light of Nuremberg or in a broader historical context. By failing even to raise such questions, Taylor reduces his discussion to marginal significance, it seems to me. For future policy

123. B. FALL, *LAST REFLECTIONS ON A WAR* 276 (1967).

124. Franck, *supra* note 109, at 835.

decisions, these are surely the major issues. In a dozen places in the world the United States is providing military support to regimes that are attempting to suppress internal insurgency, in ways that might lead to direct military intervention.<sup>125</sup> It can be plausibly argued that in Greece it is the American military support for the Colonels that prevents a popular insurgency. In much of Latin America, the same is true.

Almost all Latin American regimes can now suppress rural insurrections of willful foes. Because of a number of factors, none is as weak as Fulgencio Batista's government of the 1950s. U.S. AID's Public Safety Division has trained police as a first line of defense against terrorism in at least 14 republics; armies are better equipped as \$1.75 billion in U.S. military aid has poured into the Americas; upward of 20,000 latino officers and enlisted men have trained at Ft. Gulick in the Canal Zone, and now available are new antiguerrilla weapons developed in Vietnam, which run the gamut from specially designed helicopters to body smellers.<sup>126</sup>

These remarks recall the observation of General Maxwell Taylor in 1963 that in Vietnam "we have a going laboratory where we see subversive insurgency . . . being applied in all its forms." The Pentagon, recognizing "the importance of the area as a laboratory," had already sent "teams out there looking at the equipment requirements of this kind of guerrilla warfare."<sup>127</sup> There is considerable evidence, in fact, that the United States has exploited Vietnam as a laboratory for counterinsurgency, testing weapons and tactics for the wars it anticipates in much the same way that other powers used Spain in 1936-39.<sup>128</sup>

Among the Latin American regimes that are using the technology designed in the Vietnam laboratory for countering insurgency, there are several that owe their existence to interference from the United States. In Guatemala, a promising reform-minded regime was overthrown by United States subversion in 1954. For the past several years there has been a virtual bloodbath, as some 4000 peasants were killed indiscriminately, in the course of an anti-communist extermination campaign,

125. For recent discussion of this possibility, see Goldstein, *The American Political System and the Next Vietnam*, 25 J. INT'L AFF. 91 (1971).

126. George W. Grayson, Jr., Washington Post, Jan. 10, 1971, § B (editorials), at 3, col. 4. Grayson is Associate Professor of Government at William and Mary College, a specialist in Latin American politics and the theory of revolution.

127. *Hearings on Dep't of Defense Appropriations Before a Subcomm. of the House Comm. on Appropriations*, 88th Cong., 1st Sess. (1963), cited in M. Klare, *The Pentagon's Counterinsurgency Research Infra-structure*, NACLA NEWSLETTER, vol. IV, No. 9, January 1971.

128. Exactly the same point was made by Malcolm Browne as early as 1964. M. BROWNE, *supra* note 24, at xi.

with weapons supplied by the American military aid program.<sup>129</sup> Donald Robinson reports that he observed a Special Operations Force team training Guatemalan Air Force men to use newly designed Bell helicopters to pursue guerrillas.<sup>130</sup> It is even possible that there was still more direct United States military involvement. Vice President Marroquin Rojas claimed several years ago that American planes based in Panama were conducting raids in Guatemala and returning to their Panamanian bases, using napalm in areas suspected of harboring guerrillas.<sup>131</sup> Missionaries working in Guatemala report that they have seen the results of napalm raids.

The extent of American involvement in counterrevolutionary warfare in the postwar period cannot be realistically estimated. There is enough information available to indicate that it is very great. While the United States is surely not alone in undertaking forceful intervention in the internal affairs of other nations, no other power in the postwar period has employed even a fraction of the military force used by the United States in its efforts to destroy indigenous forces to which it has been opposed in other lands.

It is this general policy of counterrevolutionary intervention, raised almost to the level of a national ideology during the Kennedy administration and inherent in Henry Kissinger's doctrine of "limited wars,"<sup>132</sup> which must be reconsidered if we are to be serious about an inquiry into national policy or into the general issues of legality and justice raised and sometimes skirted at Nuremberg, approached but rarely faced directly in treaties and international agreements, and forced upon the consciousness of any civilized person by the tragedy of Vietnam.

129. Gall, *Guerrilla Movements in Latin America*, N.Y. Times, March 28, 1971, § 7 (Book Review), at 35, col. 3. The leader of the campaign, he points out, is now the elected President of Guatemala; his regime is the most brutal in the country's history, with large numbers killed in early 1971, including members of the legal noncommunist opposition.

130. *Id.* See also note 26 *supra*. These operations, incidentally, are world-wide. According to the same report, Col. Fletcher Prouty states that Air Force-CIA units that preceded the formation of SOF flew Tibetan tribesmen to Colorado for combat training and then returned them to Tibet; a resistance force up to 42,000 was organized, he claims. Robinson also reports that they form part of the American counter-insurgency operations in Thailand and that they have conducted missions in Saudi Arabia and even North Korea.

131. Marcel Neidergang, *Violence et Terreur*, Le Monde, Jan. 19, 1968, at 1, col. 2.

132. See particularly H. KISSINGER, *NUCLEAR WEAPONS AND AMERICAN FOREIGN POLICY* 132-233 (1957); H. KISSINGER, *THE NECESSITY FOR CHOICE* 57-98 (1961). Kissinger discusses "limited war strategy" within the framework of great power conflict. If we ask ourselves where these "limited wars" will be fought, however, a different interpretation suggests itself. In fact, each of the superpowers regularly interprets its efforts to maintain its hegemony within its own empire as a defense of some principle (freedom, socialism) from the encroachments of its rival. In this respect, the cold war has served the leadership of the superpowers as an admirable propaganda device for mobilizing their respective populations behind expensive and dangerous efforts to maintain imperial dominions.