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Book Review

Telford Taylor: *Nuremberg and Vietnam: An American Tragedy*, Chicago, Quadrangle Books, 1970. Pp. 224. \$5.95

“Then conquer we must, when our cause it is just,—
And this be our motto,—‘In God is our trust!’ ”¹

Do these familiar lines from our national anthem declare that those who fight a just war cannot be sure of victory but are under a duty to seek it; or do they declare that those with a just cause are certain to win? The latter meaning is tantamount to saying that victory proves that the victor's cause was just, thus making the lines a paraphrase of Jenghiz Khan's famous message to the Russians on the Dnieper, “God is impartial; He will decide our quarrel.”² Whichever sense is given to the lines of the anthem, they assert that some causes for waging war are just and, by implication, that others are unjust. General Taylor would agree with the conclusion but his test of the justness of a cause of war would satisfy neither Jenghiz Khan nor Francis Scott Key.

Telford Taylor, who has spent much of his life as a government lawyer and is now a professor of law at Columbia University, served as a military intelligence officer in the European Theater in World War II and was promoted to brigadier general upon his appointment as deputy to Mr. Justice Jackson, United States Chief of Counsel for the prosecution at the first, or international, war crimes trial conducted at Nuremberg. General Taylor was Chief of Counsel at the subsequent Nuremberg trials conducted before “military tribunals” consisting of American civilian judges, including the so-called “High Command Case,” involving the charge of “crimes against the peace.” His latest book is a sad and thoughtful study of the implications for the current war in Indochina of the “Nuremberg principle,” that a soldier who fights in a war at the command of his government is subject to punishment as a criminal if it is later decided by a tribunal established by the victor that he waged a war of aggression.

As General Taylor explains, St. Augustine of Hippo (354-430) and St. Thomas Aquinas (1225-1274) developed the theory that a war is just only if conducted to rectify a wrong committed by the enemy (pp. 58-62). He asserts that the Swiss Emmerich de Vattel (1714-1767) was one of the last jurists, as distinguished from theologians, to treat the Augustinian-Thomist theory seriously and that the theory of just and unjust wars was virtually abandoned by the international community after the seventeenth

1. Francis Scott Key, *The Star-Spangled Banner*, Stanza 4 (1814).

2. Douglas, *Jenghiz Khan*, in 15 *ENCYCLOPAEDIA BRITANNICA* 316, 317 (11th ed. 1911).

century, largely because the Protestant Reformation made the Papacy an unacceptable authority for determining the justice of wars and there was no substitute (pp. 63-64). This is true but incomplete. General Taylor fails to tell his readers that Vattel and his contemporaries thought that the outlawing of war was utopian and impossible of achievement. Appalled by the devastation in the Thirty Years War (1618-1648), during which a third of the population of Germany was killed and hundreds of towns and villages were destroyed,³ seventeenth and eighteenth century jurists sought to restrict violence in war to that directed toward enemy soldiers and so to save the lives and homes of noncombatant civilians. The excessive violence and destruction has been attributed to the firm belief of each participant in a religious war that his cause is just and that he is an agent of divine vengeance. Since all belligerents affirm the justice of their cause and there is no judge on earth to decide between them, Vattel asserted emphatically that the first rule of the law of war must be

... that *regular war, as to its effects, is to be accounted just on both sides*. This is absolutely necessary . . . if people wish to introduce any order, any regularity, into so violent an operation as that of arms, or to set any bounds to the calamities of which it is productive. . . .

"Thus, the rights founded on the state of war, the lawfulness of its effects, the validity of the acquisition made by arms, do not, externally and between mankind, depend on the justice of the cause, but on the legality of the means in themselves,—that is, on everything requisite to constitute a *regular war*."⁴

Except for this omission of Vattel's first rule of the law of war, General Taylor's account of the development and content of the modern law of war is good (pp. 19-41). His application of its principles to the current operations in Indochina is masterly (pp. 122-207). The modern law of war is a sort of international common law, only part of which has been codified. The first major attempt at codification was United States War Department General Order No. 100 of April 24, 1863, which expressed Vattel's first rule as follows,

67. The law of nations allows every sovereign government to make war upon another sovereign state, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant.

As General Taylor notes, the principal codifications of the law of war by multilateral treaty are the Regulations Respecting the Laws and Customs

3. C. WEDGIWOOD, *THE THIRTY YEARS WAR* 490-496 (1961).

4. E. VATTEL, *THE LAW OF NATIONS* 381-2 (Chitty transl. 1844), quoted in J. F. C. FULLER, *THE CONDUCT OF WAR* 1789-1961, 17 (1968).

of War on Land annexed to Hague Convention No. IV of October 18, 1907,⁵ and the four Geneva Conventions of August 12, 1949, governing the treatment of wounded, sick and shipwrecked members of enemy armed forces, prisoners of war, and civilians in occupied enemy territory or otherwise within the power of hostile forces or governments.⁶ The law of war rests on two main principles: (1) no more violence should be used against enemy armed forces than that which is strictly necessary to achieve a belligerent's military objective, and (2) no violence at all should be used against noncombatant civilians and members of the enemy forces who have been wounded or have surrendered as prisoners of war. The 1907 Hague Regulations, to effect these principles, prohibited attack or bombardment of undefended towns, villages, dwellings or buildings and, except in case of assault, required warning before bombardment of defended places.⁷ General Taylor suggests that some United States operations in World War II and in Indochina were in violation of these principles and regulations (pp. 122-153). With the exception of Vattel's first rule, he favors retention and enforcement of the law of war and the establishment of definite rules applying its basic principles to aerial warfare (pp. 39-41, 140-143). He does not explain how the "Nuremberg principle," that the victor may hang captured enemy soldiers after convicting them of waging a war of aggression, is to be reconciled with the principle of the law of war that no violence is to be used against prisoners of war. No doubt he would explain this as an exception to the latter principle, like the one which permits trial and punishment of prisoners of war for war crimes committed before capture.

General Taylor concedes that the Paris Peace Conference of 1919 decided that waging war, whether unjust or aggressive, was not punishable as a crime (pp. 66-67), but he does not mention the insistence of the United States upon this decision.⁸ In 1927 the Assembly of the League of Nations, to which the United States did not belong, adopted a resolution describing "a war of aggression" as "an international crime" and in 1928 the Kellogg-Briand Pact, later ratified by the United States and forty-three other nations, renounced war "as an instrument of national policy." (pp. 69-70). In 1944 the United Nations War Crimes Commission did not pass a resolution declaring that individuals could be punished for launching World War II because of opposition by the representatives of the United States, the United Kingdom and other countries (pp. 71-72). Nevertheless, according to General Taylor, Colonel Henry L. Stimson, Secretary of War, Attorney General Francis Biddle, Judge Samuel Rosenman of the White House

5. 36 Stat. 2295, T. S. 539.

6. T. I. A. S. No.'s 3362, 3363, 3364, 3365.

7. 36 Stat. 2295 arts. 25, 26; Fratcher, *The New Law of Land Warfare*, 22 Mo. L. REV. 143, 147 (1957).

8. HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 181 (1948). For the status of this Commission, see Fratcher, *Book Review*, 14 Mo. L. REV. 225 (1949).

Staff and Mr. Justice Jackson decided to support the view that waging aggressive war is a crime under international law for which individuals may be punished (p. 75). He attributes to their influence the fact that, both the London Agreement of August 8, 1945, under which the first or international war crimes trial at Nuremberg was conducted, and Control Council Law No. 10 of December 20, 1945, made "waging a war of aggression" a "crime against peace" for which individuals could be punished.⁹

General Taylor recognizes that there is an important difference between the Augustinian-Thomist theory that unjust wars are morally wrong and the Nuremberg doctrine that all wars of aggression are criminal and defends the shift in theory on the basis that it is easier to determine whether a war is aggressive than whether it is just (pp. 73-74). He suggests that a war is aggressive unless it meets the test of self-defense used in domestic criminal law (p. 98). Under this test, the American Revolution was a war of aggression. General Taylor does not mention that all governments which treat the use of force, other than in self-defense, as criminal provide judicial remedies for wrongs to person and property. The international community offers no satisfactory judicial remedy to a wronged nation. The 1940 German invasion of Denmark was both aggressive and unjust but not all wars of aggression are unjust. Suppose the Sudan were to dam the Nile between the fourth and fifth cataracts and divert its waters into the Red Sea at Port Sudan. Deprived of the waters of the Nile, Egypt would have to fight or die. If Egypt attacked the Sudan in order to raze the dam, this would be a just war on Augustinian-Thomist principles and Sudanese resistance would be unjust. On Nuremberg principles, as understood by General Taylor, Egypt would be conducting a war of aggression and some or all of the Egyptian soldiers captured by the Sudanese could properly be hanged for crimes against the peace. Ease of proof is not an adequate reason for punishing the victim of a wrong instead of its perpetrator.

Making the waging of a war of aggression an international crime was not enough to permit the punishment of individual soldiers for waging such a war. Individuals engage in war at the command of their governments.

9. *Agreement for the Establishment of an International Military Tribunal*, 13 DEP'T. OF STATE BULL. 222 (1945); 19 TEMP. L.Q. 160, 162 (1945); Fratcher, *American Organization for Prosecution of German War Criminals*, 13 MO. L. REV. 45, 61, 65, 72 (1948). The London Agreement provided, "Crimes against peace, Namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances. . . ." *Id.* at 61. Control Council Law No. 10, which was drafted in the Legal Division of the Office of Military Government for Germany (U.S.) in compliance with a directive of the United States Joint Chiefs of Staff (JCS 1023/10, 8 July 1945), provided, "*Crimes Against Peace*. Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances. . . ." *Id.* at 72. The London Agreement was an executive agreement among the victor powers. Control Council Law No. 10 was a law imposed upon Germany by the four-power government of military occupation.

At the inception of World War II United States regulations provided, "Individuals of the armed forces will not be punished for [violations of the laws of war] in case they are committed under the orders or sanction of their government or commanders."¹⁰ British and French regulations contained provisions to the same effect.¹¹ Under German law, an act done in compliance with orders was punishable if the actor knew that the act constituted a civil or military crime or offense (pp. 47-48). In November, 1944, the United States regulations were changed to provide, "Individuals . . . who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment."¹² A similar change was made in the British regulations.¹³ General Taylor does not mention that the London Agreement and Control Council Law No. 10 went much further than either German law or the 1944 changes in British and American regulations toward eliminating the defense of superior orders by providing, "The fact that the defendant acted pursuant to order of his government or of a superior shall not free him from responsibility but may be considered in mitigation of punishment. . . ."¹⁴ This would seem to mean that superior orders are never a defense in bar, even if the accused did not and could not know that the orders were illegal. A soldier ordered to serve in a firing squad has no way of knowing whether the individual to be shot was properly convicted and sentenced by a duly constituted tribunal. The rule which General Taylor favors, now embodied in United States regulations, is that superior orders are a defense in bar if the accused did not know, and could not reasonably have been expected to know, that the act ordered was unlawful; if not a defense in bar, superior orders may be considered in mitigation of punishment (pp. 42-53). General Taylor exhibits a keen appreciation of the fact that the literal meaning of the text of orders is not necessarily the meaning conveyed to the soldiers to whom they are addressed (pp. 159-177). Perhaps he remembers that Jenghiz Khan's order to his troops who had captured Bukhara, "The hay is cut; give your horses fodder," was correctly interpreted by them to mean "loot, rape, kill and burn."¹⁵

Does the "Nuremberg principle," that individuals who wage a war of aggression at the command of their government are subject to punishment

10. FM 27-10, RULES OF LAND WARFARE ¶347, Oct. 1, 1940.

11. HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 276, 281 (1948).

12. FM 27-10, Changes No. 1, Nov. 15, 1944, ¶¶345.1, 347.

13. HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 282 (1948).

14. London Agreement, App., art. 8, 19 TEMP. L.Q. 163 (1945); Control Council Law No. 10, art II, §4 (b), 13 MO. L. REV. 73 (1948). The wording of the latter differs slightly from that quoted.

15. Douglas, *Jenghiz Khan*, in 15 ENCYCLOPAEDIA BRITANNICA 316 (11th ed. 1911).

as criminals, extend to junior officers and enlisted men? Does it extend to civilians who work in munitions plants or operate railways used for military transport? Does it extend to civilians who merely pay taxes and buy war bonds, knowing that the money will be used to finance the war? If it does, it amounts to a virtual return to the principles of Jenghiz Khan and Tamerlane, which permitted a conqueror to butcher enemy prisoners of war and civilians at will. Vattel realized this two centuries ago.¹⁶ This question has worried General Taylor for many years. In his closing statement for the prosecution in the "High Command Case" he said,

It will benefit no one, least of all the prosecution, to urge a definition of the crime against peace which would sweep within its purview thousands of more or less ordinary men and women.

The prosecution would be the last to suggest a rule which would incriminate the ordinary soldier whose participation in these gigantic ventures was infinitesimal, or anyone who lacked the intelligence or opportunity to realize the aggressive character of the wars of conquest launched by the Third Reich.¹⁷

Even if the "Nuremberg principle" is restricted to senior general officers, it tends to prolong wars. Although faced with inevitable defeat, a general will continue to fight as long as he can if surrender will entail his suffering the shameful death of a criminal. Like General Custer at the Battle of the Little Big Horn, he will prefer to die like a soldier.¹⁸

In the book under review, General Taylor appears to approve the conviction of crimes against the peace by the first or international Nuremberg Tribunal in the case of high military and government officials who participated in Hitler's planning of wars of aggression but to question that tribunal's holding that Admiral Doenitz waged aggressive war merely by commanding a flotilla of submarines (pp. 85-86). Now that twenty-two years have elapsed since he sought their conviction of that offense, General Taylor appears to be thankful that the tribunal acquitted all of the defendants in the "High Command Case" on the charge of crimes against the peace (pp. 15-17, 86). The judgment of the tribunal in that case included the following passages:

We hold that Control Council Law No. 10 likewise is but an expression of international law existing at the time of its creation. We cannot therefore construe it as extending the international common law as it existed at the time of the Charter to add thereto any new element of criminality, for so to do would give it an *ex post facto* effect which we do not construe it to have intended. . . .

16. E. Vattel, *THE LAW OF NATIONS* 381 (Chitty transl. 1844).

17. *United States of America v. Field Marshal Wilhelm von Leeb, et. al.*, 10 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1, 328 (1948).

18. J. F. C. FULLER, *THE CONDUCT OF WAR 1789-1961*, 279, 281, 293, 299 (1968).

If and as long as a member of the armed forces does not participate in the preparation, planning, initiating or waging of aggressive war on a policy level, his war activities do not fall under the definition of crimes against peace. It is not a person's rank or status, but his power to shape or influence the policy of his state, which is the relevant issue for determining his criminality under the charge of crimes against peace.

International law condemns those who, due to their actual power to shape and influence the policy of their nation, prepare for, or lead their country into or in an aggressive war. But we do not find that, at the present stage of development, international law declares as criminals those below that level who, in the execution of this war policy, act as the instruments of the policy makers. Anybody who is on the policy level and participates in the war policy is liable to punishment. But those under them cannot be punished for the crimes of others. . . .

The acts of commanders and staff officers below the policy level, in planning campaigns, preparing means for carrying them out, moving against a country on orders and fighting a war after it has been instituted, do not constitute the planning, preparation initiation, and waging of war or the initiation of invasion that international law denounces as criminal.¹⁹

General Taylor's latest book is well-written, well-printed and well worth reading and pondering by Americans. Bearing in mind the author's need to defend what he did at Nuremberg without resort to the defense of superior orders, it is also a fair book. We may well join him in being thankful that the tribunal which decided the "High Command Case" restricted the "Nuremberg principle" to top policy makers. As so restricted, it might warrant the punishment of Jefferson Davis for "waging a war of aggression" but not that of Major Mosby or Private Jones of Company J.

WILLIAM F. FRATCHER*

19. 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 487-91 (1948). The tribunal consisted of John C. Young, former chief justice of the Supreme Court of Colorado, Winfield B. Hale, judge of the Tennessee Court of Appeals, and Justin W. Harding, former district judge in Alaska. Even as restricted by the judgment of the tribunal, the "Nuremberg principle" is difficult to reconcile with the principle of military subordination to the civil power. S. Huntington, *THE SOLDIER AND THE STATE* 353 (1964). Professor Huntington suggests that General Taylor understands this, citing T. TAYLOR, *SWORD AND SWASTIKA* 368-70 (1952).

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