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Responsibility for Crimes of War

Because it is apparently intolerable for men to admit the key role of accident, of ignorance, and of unplanned processes in their affairs, the leader serves a vital function by personifying and reifying the processes. As an individual, he can be praised and blamed and given "responsibility" in a way that processes cannot. Incumbents of high public office therefore become objects of acclaim for the satisfied, scapegoats for the unsatisfied, and symbols of aspirations or of whatever is opposed. To them are constantly ascribed careful weighing of alternatives and soul-searching decisions. That the premises for the decisions are largely supplied and screened by others and the decision itself frequently predetermined by a succession of subordinates' decisions is not publicized. Decision-making at the highest levels is not so much literal policy-making as dramaturgy.¹

. . . a deeper analytical understanding of [the etiology of American policy in Vietnam] is not likely to be reached by a searcher committed and determined to see the conflict and our part in it as "a tragedy without villains," war crimes without criminals, lies without liars, a process of immaculate deception.²

Murray Edelman points to a central difficulty present in any analysis of decision-making within large, complex organizations: whether

Acknowledgment is made to Prof. John Barton and to Prof. Michael Walzer, whose seminars at Stanford aided considerably the formulation of the ideas presented here.

1. Murray Edelman, *The Symbolic Uses of Politics* (Urbana, 1964), p. 78.

2. Daniel Ellsberg, *Papers on the War* (New York, 1972), p. 129.

the organization be the American government, General Motors, or Stanford University, a search for discrete individuals who can be allocated "responsibility" for the institution's activities in other than a formal sense often proves frustrating.³ Almost inevitably the serious student will subordinate the search for such discrete individuals to a study of the institutional structures which seem to generate policies and behavior quite independent of conscious decisions.

Nor is the lawyer in a much better position. There seems to be an inverse relationship between the number of individuals involved in a transaction or event and the efficacy of traditional legal analysis as a mode of comprehending it. Once beyond a strictly two-person interaction—be it a murder, contract, or automobile accident, we enter the world of respondeat superior, agency, aiding and abetting, or conspiracy law. Even that law loses its power as anything more than a formal analysis when the individuals involved pass beyond a small number. And of no area is this more true than criminal law. We may accept wide-ranging imputations of responsibility for tort liability because of our belief that, when all is said and done, the individual or corporation deemed "responsible," even if not properly viewed as a causal agent, is not really paying a heavy cost because of an ability to spread the general costs among customers, etc. More to the point even than this economic analysis is the fact that civil liability usually does not carry with it any finding of moral inadequacy. "What distinguishes a criminal from a civil sanction," as Henry Hart argued, "and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition."⁴ Thus, paradoxically, a theory which justifies an automobile owner's being made responsible for a \$100,000 tort liability actually caused by the driver using his car proves inadequate to uphold that same owner's being fined \$500 for the drunken driving behind the accident. And this is so, even if the

3. The most important recent analysis of problems facing the decision analyst is Graham T. Allison's *Essence of Decision: Explaining the Cuban Missile Crisis* (Boston, 1971). A critique of Allison that focuses on the issue of responsibility is Stephen D. Krasner, "Are Bureaucracies Important? (Or Allison Wonderland)," *Foreign Policy* 7 (Summer 1972): 159-179.

4. Henry M. Hart, "The Aims of the Criminal Law," *Law and Contemporary Problems* 23, no. 3 (Summer 1958): 404.

former, in a given case, would destroy economically the individual or business made liable.

Great difficulties emerge when one considers the question of criminal responsibility for actions occurring within an organizational context. If we wish to engage in communal condemnation of such acts, against whom should the opprobrium be directed? It is no answer, of course, to say only the organization itself, for this simply begs the question, as I shall show below, of whether or not it is just to punish everyone connected with it. No sanction can be directed at an organization—whether the method chosen is a fine or dissolution—without also affecting at least some of the individuals with ties to the entity.⁵

Most domestic criminal law avoids these problems by focusing only on acts occurring within nonorganizational settings (unless a conspiracy be regarded as an organization). International public law, on the other hand, focuses especially on the acts of organizations, particularly those known as states. This difference is a product of experience rather than of logical necessity. There are domestic criminal laws which do apply to collectivities, and the war trials which are the subject of this essay are the most dramatic attempts to invoke the sanctions of international law against given individuals. We are, nevertheless, most comfortable analyzing conduct which occurs outside of formal institutional settings. Moreover, in evaluating individuals we tend to judge most confidently their adherence to well established norms of interpersonal relations, such as individual honesty. Thus a public official who accepts bribes is condemned because of the personal flaws his conduct is presumed to reveal. If, on the other hand, he participates in carrying out criminal policies of his government, there is much greater hesitancy to condemn him. The latter is viewed as a “political judgment,” about which the widest norms of toleration are encouraged, and not as a genuinely “personal act” indicating his moral character.

5. One of the clearest examples of this point is the punishment by the National Collegiate Athletic Association of the University of California at Berkeley for violations in its athletic programs. Although the coaches responsible for the misdeeds are no longer connected with the University, no team representing the University can participate in a post-season event. The greatest victims of this sanction are eighteen- and nineteen-year-old athletes who were in high school when the violations occurred.

The problem of "war crimes," of course, raises these problems in an especially vivid way. Following World War II there was obvious interest in punishing those who were responsible for the acts of the Nazi state,⁶ and the subsequent trials of alleged war criminals raised very sharply the problems involved in trying to assess the responsibility of a given individual relative to a very complex scheme of organizational behavior.⁷ What follows are a description and analysis of the notions of responsibility that were put forth at four of the war crimes trials and an examination of their implications regarding the actions of American officials concerning the Vietnam War. The advisability of the post-World War II trials or the merits of the particular counts brought forth at Nuernberg⁸ will not, however, be discussed.

I

Before beginning the central analysis, it is desirable to explain why the question of individual responsibility cannot be escaped by simple reference to corporate guilt. It has been pointed out that, prior to Nuernberg, the standard sanctions for violation of the laws of warfare had been either military reprisals or, more significantly for our purposes, reparations imposed by the victorious states upon the losers.⁹ Now such reparations might be defensible if they were viewed merely as tort damages; i.e., compensation paid a victim for injuries received

6. Trials were also held, of course, in regard to Japanese leaders. Except for reference to the *Yamashita* case, 327 U.S. 1 (1946), below, I am ignoring those trials. The principal reason is that they have been subjected to more persuasive criticism as to their fairness than I think is the case with the Nuernberg trials. See Richard Minear, *Victor's Justice: The Tokyo War Crimes Trial* (Princeton, 1971). In any case there is certainly nothing in those trials which would make responsibility more *limited* than the analysis presented here.

7. I will not be concerned in this paper with the quite separate problems of the defenses of obedience to superior orders or of the "act of state" doctrine. See Yoram Dinstein, *The Defense of "Obedience to Superior Orders,"* in *International Law* (Leyden, 1965).

8. I have adopted throughout this paper the spelling "Nuernberg" because it is used by the Government Printing Office in its edition of the *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, hereafter cited, with volume and date, as *T.W.C.*

9. William V. O'Brien, "The Nuremberg Principles," from James Finn, ed., *A Conflict of Loyalties*, reprinted in Richard A. Falk, ed., *The Vietnam War and International Law 3: The Widening Context* (Princeton, 1972), p. 201.

because of an event having some connection with the defendant. Yet there is no moral opprobrium attached to the defendant in such a situation; he, or indeed someone else with some requisite relationship to the compensation-giver, simply did not exercise "due care" in the given situation.

Such an analysis, however, hardly does justice to the notion of war crimes. Whatever else is the case, if one takes the notion of war crimes seriously, then the conduct in question is outrageous and richly deserving of condemnation. Moreover, those who commit war crimes are viewed as morally flawed.¹⁰

10. I should admit at this point that this essay begs a major question, i.e., whether it is necessarily immoral to commit war crimes. There are at least two ways of approaching this question. The traditional way is to reject the notion that any specific mode of conduct is *absolutely* forbidden, but instead to argue that "military necessity" would justify the breaking of any given rule in a given situation. See Marshall Cohen's critique of Telford Taylor's *Nuremberg and Vietnam: An American Tragedy* (Chicago, 1970), in *The Yale Law Journal* 80, no. 7 (June, 1971): 1492-1500, as well as the articles by Nagel, Brandt, and Hare in this journal: Thomas Nagel, "War and Massacre," *Philosophy & Public Affairs* 1, no. 2 (Winter 1971/72): 123-144; R. B. Brandt, "Utilitarianism and the Rules of War," *ibid.*: 145-165; and R. M. Hare, "Rules of War and Moral Reasoning," *ibid.*: 166-181. Thus it becomes impossible to commit a "war crime" if in fact it was "necessary" to commit an act otherwise labeled as such. This is obviously an unsatisfactory resolution of the problem for it seems to admit that an official is entitled to do whatever is necessary to win a battle or war. Even if this be tempered by the recognition that such latitude is allowed only if the cause for which the war is being fought is in fact just, then this simply pushes the argument back one step, so that the motives impelling the conflict must be evaluated. And, note well, we then analyze not the given conduct, such as torturing prisoners, but rather the wider justification of the war itself. See, for example, Michael Walzer, "World War II: Why Was This War Different?" *Philosophy & Public Affairs* 1, no. 1 (Fall 1971): 3-21. But in that situation, what makes the official a war criminal is the injustice of the war itself, even if we may be additionally appalled by the particular means with which that war is carried out.

A second way of approaching the question is to strike more basically at the notion that *criminal* conduct is necessarily *immoral*. That is, the notion of criminality may be positivistically derived from the prohibition of given conduct by a formal legal system. But it is a separate question whether or not such conduct is immoral. Thus many philosophers can easily admit that Martin Luther King or the Berrigan brothers are criminals, but go on to deny that they are also immoral because they broke the law. Yet if we can justify civil disobedience in the one case, must we not at least admit the possibility that a "war criminal" could present an analogous case? Is it necessarily a contradiction in terms that,

Collective criminal punishment is in principle open to the charge that it violates fundamental standards of fairness by being "overinclusive": the category of individuals actually stigmatized or otherwise treated as criminal would include some who could successfully defend

in a given context, we might wish to *honor* a war criminal if we viewed the cause for which he broke the law as just? This question obviously overlaps with that in the paragraph above.

There is a still more subversive way of making this point, and that is to attack the moral coherence of the present laws of warfare. The most provocative statement of this position is Richard Wasserstrom, "The Laws of War," *Monist* 56, no. 1 (January, 1972): 1-19. See also Richard Wasserstrom, "The Relevance of Nuremberg," *Philosophy & Public Affairs* 1, no. 1 (Fall 1971): 22-46. He argues basically that the present laws of war are morally senseless. For example, it is a war crime to bomb a military hospital, but not to bomb sleeping soldiers well back of the front lines. Why? It is a war crime to remove works of art from an occupied country to the museums of the victor, but not to saturate enemy citizens with bombs. Can this distinction be defended?

Wasserstrom's point must be read in the context of Hart's argument quoted above. Hart *assumes* the existence of a single community organized around a coherent moral code reflected in its criminal law. His notion of condemnation makes no sense otherwise. But the code under which crimes of war are defined may be incoherent. Thus I take it that Wasserstrom would not deny that bombers of military hospitals *should* be condemned; he would simply add that so should bombers of cities. A criminal law which punishes one and not the other, to adopt his own metaphor, is comparable to one which sanctions petty theft but is silent as to grand theft. Half a loaf may be worse than none if there is no principle by which one can defend selecting out only those activities punished by the present laws of war. It would be better to focus clearly on the *morality* of warfare and to speak unequivocally of moral condemnation than to pretend that the category of "war crimes" or "war criminals" is meaningful. The President who ordered the bombing of Hanoi over Christmas 1972 is surely more condemnable, even if perhaps not a "criminal," than some soldier in the field who in frustration murders a prisoner of war. To focus on the latter as a "criminal" while viewing the former as "merely" immoral is to reverse the priorities of sensible discussion. For an example of such a reversal, see Joseph W. Bishop, Jr., "The Question of War Crimes," *Commentary* 54, no. 6 (December 1972): 85-92. (Perhaps it is worth adding that I think that Nixon's conduct in ordering the bombing *is* criminal because no plausible claim of "military necessity" can be offered for it, but the main point is that its immorality would not in the least be lessened by a judgment that it was not criminal.)

This paper accepts for the moment Hart's assumptions, but I would be less than honest if I denied that the questions outlined above trouble me deeply. A complete theory of war criminality would certainly have to answer them rather than relegate them to a footnote.

themselves, if given the chance to do so.¹¹ This objection to collective responsibility is, obviously, independent of the fact that it may be more practical or efficient to label everyone connected with a group "responsible." Those who would say that the answer to the problem of war crimes is simply to extract fines from the state at fault would not, I suspect, also defend the proposition that, because "practical," it would therefore have been just to fine everyone arrested in the 1971 May Day demonstration in Washington \$25, even though the arrests were based in part on a conscious policy of "overinclusiveness" decided upon by police and Department of Justice officials, because, after all, many of those arrested *were* guilty, and the others could afford to pay \$25. The analogy is more apt than it might appear because reparations are collected through general tax revenues, and it would always be legitimate for a given individual to ask why it is just to fine *him* for something he did not do, i.e., commit a war crime.

Confirmation of sorts is provided for this distaste regarding collective punishment by the very judgment of the International Military Tribunal concerning its finding that certain German organizations were criminal in themselves. The imputation of collective criminality was immediately followed by qualifications drawn from the traditional criminal law: "Since the declaration with respect to the organizations and groups, will . . . fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal. . . . Membership alone is not enough to come within the scope of these declarations."¹² One can compare this language with decisions of the United States Supreme Court limiting liability under the Smith Act to "knowing membership" and participation in the Communist Party.¹³

11. See Joseph Tussman and Jacobus tenBroek, "The Equal Protection of the Laws," *California Law Review* 37, no. 3 (September 1949): 341-381, especially pp. 351-352 on "overinclusiveness."

12. *Trials of the Major War Criminals before the International Military Tribunal* 22 (1948), p. 500. Hereafter cited as *I.M.T.*

13. *Yates v. United States*, 354 U.S. 298 (1957); *Scales v. United States*, 367 U.S. 203 (1961).

To say that every German or every American is “guilty” for every act committed by persons acting under the authority of their respective States rests on a host of begged questions.¹⁴ And even if one accepts, for the sake of argument, the notion of collective guilt, we can still distinguish among degrees of responsibility. It would be unjust for everyone to have to pay the *same* fine for war crimes unless we assume equal guilt or assume that guilt varied directly by income, so that the progressive income tax would be an adequate collection device. The only viable defense of collective reparations then is to adopt the torts analogy, though at the price of removing the sting of moral outrage that underlies criminal adjudication. Indeed even the torts analogy rests on a begged question—the relationship between “fault” and liability. If we emphasize the necessity for a linkage, then even the torts analogy could scarcely support collective reparation without proof of fault.¹⁵

We are thus impaled on the horns of a dilemma: to adopt collective responsibility is either to commit an injustice or to undermine the community condemnation on which the criminal law rests and which especially should be the basis for the punishment of war crimes. If one wants to preserve the force of the notion of war *criminality*, he must find discrete criminals or else argue that in fact everyone *is* guilty and deserving of punishment.

14. The most recent philosophical analysis is Joel Feinberg, “Collective Responsibility,” in *Doing and Deserving* (Princeton, 1970), pp. 222-251. A classic polemical attack on the notion is Dwight McDonald, “The Responsibility of Peoples,” in *Memoirs of a Revolutionist* (Cleveland, 1957), pp. 33-106.

15. For a survey of the problem of criminal liability of business corporations, see “Comment: Increasing Community Control over Corporate Crime—A Problem in the Law of Sanctions,” *Yale Law Journal* 71, no. 2 (December, 1961): 280-306.

As to the complexities even of collective tort liability, I offer the following, reprinted in its entirety from *The Wall Street Journal*, 17 January 1973, p. 1: “MORE BUCKS FOR THE BANG: Someone left an explosive on the baseball field in Estherville, Iowa, after a public fireworks display in 1969. William Rosenau, then 14 years old, happened by and lit it. It exploded, blowing off three of William’s fingers. A court found the town of 8,108 negligent and awarded William a judgment of \$94,676. To raise the money, Estherville is increasing property taxes.”

II

I shall be considering the judgments of four trials held at Nuernberg following World War II. Those four are the Trial of the Major War Criminals, held before the International Military Tribunal (IMT), which consisted of judges appointed by the four major Allied powers, in addition to three trials held under the aegis of Allied Control Council Law No. 10, by which the individual powers were given authority to prosecute "lesser" alleged war criminals. These three trials, held before American tribunals, are usually called "The Ministries Case,"¹⁶ "The High Command Case,"¹⁷ and "The Hostage Case."¹⁸ All four of the cases featured multiple defendants; all four included defendants who were acquitted as well as more numerous ones who were found guilty. In this section the focus will be on general doctrine which can be derived from the judgments. In the following section the judgment of a specific individual, Ernst von Weizsaecker, will be examined so that the application of the doctrines can be better understood.

The trial before the IMT is, of course, the most famous of the war trials, largely because of the inherent drama provided by the celebrity of the defendants. Here were Goering, Rosenberg, von Ribbentrop, Speer, and eighteen others, most of whom were "household words" to the communities involved in fighting the war. Precisely because of the rank of the defendants, however, the judgment is relatively unilluminating from the point of view of this paper, for there was, in fact, little difficulty in proving the criminal behavior of most of them, save only for the three who were acquitted—Schacht, von Papen, and Fritzsche.¹⁹

16. T.W.C. 14 (n.d.), p. 308.

17. T.W.C. 11 (1950), p. 462.

18. T.W.C. 11 (1950), p. 1230. I restricted my attention to these four judgments because they raised the broadest issues insofar as application of sanctions to individual members of governmental organizations is concerned. Also relevant is the fact that some of the other Nuernberg trials seem to have dealt with conduct which does not genuinely seem to be present in Vietnam, such as criminal medical "experimentation" on the inmates of concentration camps. "The Medical Case," T.W.C. 2, p. 171.

An excellent distillation of doctrine drawn from all of the reported war crimes trials can be found in Morris Greenspan, *The Modern Law of Land Warfare* (Berkeley, 1959), chap. 12.

19. A useful table is provided in Anthony A. D'Amato, Harvey L. Gould, and

The IMT judgment is most helpful in considering the problem of responsibility not for traditionally recognized war crimes but rather for the more controversial category of "crimes against peace" and conspiracy to commit such crimes. These were two of the four counts upon which most of the defendants were tried; significantly, these were the only two counts for which Schacht and von Papen were prosecuted. The other two counts were the aforementioned "war crimes" and a new crime of "crimes against humanity." The last has also been the subject of much controversy, but, as indicated earlier, the justification of the various charges will not be examined here except where relevant to the principal argument.

Upon count one, conspiracy to wage crimes against peace through planning and waging aggressive war, only eight of the twenty-two were convicted: Goering, Hess, von Ribbentrop, Keitel, Rosenberg, Raeder, Jodl, and von Neurath. A similar charge was leveled at the various officials involved in the Ministries and High Command Cases, but it was ordered dropped by the tribunals.²⁰ The reason for this chariness to convict was the restriction of liability under this charge to those members of the German regime who were within "Hitler's inner circle of advisors" or otherwise "closely connected with the formulation of the policies which led to war."²¹ As Morris Greenspan argues, to the general requirement of *mens rea*,²² was added a requirement of actual close participation in the conspiracy.²³ This explains, then, the dismissal of conspiracy charges against all lesser figures, for by definition they could scarcely have stood within the "inner

Larry D. Woods, "War Crimes and Vietnam: The 'Nuremberg Defense' and the Military Service Resister," *California Law Review* 57, no. 5 (November 1969): 1055-1110, reprinted in Falk, ed., *op. cit.*, p. 414. All such later references are also taken from this table unless otherwise noted.

20. T.W.C. 11, pp. 482-483; 14, pp. 435-436.

21. I.M.T. 22, p. 547 (acquittal of Julius Streicher on charge of crimes against peace). See also the acquittal of Fritzsche, at pp. 583-584, where it is pointed out that, although head of the Home Press Division of the Reich Ministry of Popular Enlightenment and Propaganda at the time war was initiated, he did not "achieve sufficient stature to attend the planning conferences which led to aggressive war."

22. T.W.C. 11, pp. 488-489.

23. Greenspan, *op. cit.*, pp. 449-450 and citations therein.

circle” or else they would have been classified as “major” war criminals and tried before the IMT.²⁴

The requirement of *mens rea* as to the aggressive character of German warfare also meant that the number of defendants convicted under the controversial charge of crimes against peace was minimal. At the IMT, to the eight named above who were convicted of conspiracy to commit such crimes, only three more were added—Frick, Doenitz, and Seyss-Inquart. Of the fourteen officials of the German government tried in the Ministries Case on such a count, only four were ultimately convicted.²⁵ Similarly the German generals tried in the High Command Case were ordered acquitted on the charge of participating in crimes against peace. The rationale for doing so should be quoted in full:

If a defendant did not know that the planning and preparation for invasions and wars in which he was involved were concrete plans and preparations for aggressive wars and for wars otherwise in violation of international laws and treaties, then he cannot be guilty of an offense. If, however, after the policy to initiate and wage aggressive wars was formulated, a defendant came into possession of knowledge that the invasions and wars to be waged were aggressive and unlawful, then he will be criminally responsible if he, *being on the policy level, could have influenced such policy and failed to do so*.²⁶

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*.²⁷

24. A full discussion of the conspiracy count is contained in Harold Leventhal, et al., “The Nuernberg Verdict,” *Harvard Law Review* 60, no. 6 (July 1947): 863-881.

25. See T.W.C. 14, p. 865 for the list. Von Weizsaecker was originally convicted, but the tribunal reversed its decision. See *ibid.*, p. 950.

26. T.W.C. 11, pp. 488-489 (emphasis added).

27. *Ibid.*, p. 489 (emphasis added).

The defendants in question were not on the policy level and were therefore summarily acquitted.²⁸

Two things should be noted. First, as mentioned above, responsibility for crimes against peace is restricted to a relatively few senior officials. For better or worse, the notion that adoption of a theory of crimes against peace or of aggressive warfare threatens to make every citizen a war criminal is incorrect. This leads to the second point, that the resolution of the key questions under counts one and two involves complex empirical judgments about the structures of power within the society in question. As we will see below in Section III, formal organization charts are entirely subordinate to empirical information regarding the *actual* distribution of influence within the German government. It is undoubtedly true that the circle of responsibility would be widened as the circle of "inner advisors" or otherwise influential associates broadened, but severe limits would still be imposed in terms of the absolute numbers of officials who could ever be held responsible for aggressive wars. The drama of just *who* would emerge in the docket would remain, but in all cases the list of candidates would be relatively small.

If the tribunals were hesitant to find guilt under the innovative and controversial charges of aggression and conspiracy to commit same, they were much less reluctant in regard to the much more traditional counts of war crimes and crimes against humanity.²⁹ Thus, of the

28. *Ibid.*, p. 491.

29. Technically speaking the notion of crimes against humanity is also innovative, but still much less so than conspiring to wage or actually waging an aggressive war. The terrible reason for the establishment of crimes against humanity is that the German slaughter of the Jews (and Poles, and . . .) is not cognizable within the traditional understanding of war crimes because technically these victims were not formal belligerents of the German state, and the laws of war protect only belligerents. It was not and is not a "war crime" to treat a citizen of one's own country or of one's ally iniquitously. Should one wish to protest the legality of German treatment of the Jews or South Vietnamese treatment of their own citizens, one must adopt a "crimes against humanity" analysis. Still, it is surely less controversial to do so, to decide that the wanton waste of the lives of one's nationals constitutes a crime, than to decide what constitutes "aggression." It should also be noted that the IMT limited the scope of the crime against humanity by insisting that, for conviction to ensue, such acts must be linked to the war itself; thus, German activities prior to the onset of World War II were not found cognizable (*I.M.T.* 22,

eighteen Germans accused of war crimes before the IMT, only two, Rudolph Hess, who was in a British prison throughout the war, and Fritzsche, a propagandist, were acquitted. These two were also the only two of a slightly different eighteen to escape conviction as criminals against humanity. Similarly, twelve of the fourteen officers tried under the High Command Case and eight of the ten tried in the Hostage Case were found guilty of the more traditional crimes, although, as noted above, the charges regarding crimes against peace were dismissed. In the Ministries Case, eighteen of the nineteen officials tried on counts of war crimes or crimes against humanity were convicted.

What were "war crimes"? Article 6(b) establishing the IMT defined them as

violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.³⁰

Article 6(c) in turn defined "crimes against humanity":

namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.³¹

As pointed out above, the IMT is relatively unilluminating as to the actual standards by which guilt is to be determined. The only real

p. 498). For a discussion of this point and the possibly limited scope of "war crimes" in relation to Vietnam generally and to My Lai in particular, see Jordan Paust, "Legal Aspects of the My Lai Incident—A Response to Professor Rubin," *Oregon Law Review* 50, no. 2 (Winter 1971): 138-152, reprinted in Falk, ed., *op. cit.*, pp. 366ff., analyzing Article 4 of the 1949 Geneva Civilian Convention, 6 U.S.T. 3520 (1955).

30. *I.M.T.* 22, p. 471.

31. *Ibid.*, p. 496.

clue comes from its acquittal of the propagandist Fritzsche. Although speeches he delivered indicated anti-Semitism, they "did not urge persecution or extermination of Jews." Moreover, and significantly, he was apparently without knowledge of the exterminations being carried out. Indeed, there was even evidence that he had tried to suppress publication of the notorious *Der Sturmer*, the newspaper of Julius Streicher, who *was* convicted and sentenced to death for crimes against humanity for urging the destruction of the Jews. Thus, although Fritzsche's "aim was . . . to arouse popular sentiment in support of Hitler and the German war effort," this support of the regime was analytically distinguishable from an intention "to incite the German people to commit atrocities on conquered peoples," and so he was acquitted.³²

The war trials therefore stand for two linked principles: (1) Officials of governments *will* be judged on their behavior and will not be allowed to claim either obedience to superior orders or the act-of-state doctrine in justification. But (2), mere participation in even the Nazi regime is not enough to label one a "war criminal." Direct evidence of participation in the criminal acts themselves is necessary. To be found guilty of war crimes and crimes against humanity, "there must be a breach of some moral obligation fixed by international law, a personal act voluntarily done with knowledge of its inherent criminality under international law."³³ There is no strict liability for war crimes; *mens rea* in addition to an *actus reus* is necessary.³⁴ The

32. *Ibid.*, pp. 584-585.

33. T.W.C. 11, p. 510.

34. Readers familiar with the *Yamashita* case, 327 U.S. 1 (1946), will remember that the Japanese general in that case was in fact subjected to what can fairly be described as strict liability for the acts of his subordinates. Indeed Taylor emphasizes that case in his argument that probable cause exists to believe various high military officers to be guilty of war crimes (*Nuremberg and Vietnam: An American Tragedy* [Chicago, 1970], p. 182).

I do not rely on the *Yamashita* case in my own argument for two reasons. First, I simply do not think the result in that case can be defended. General Yamashita was convicted for failing to take measures to prevent commission of war crimes even though no direct proof was offered that he ordered or even consented to the crimes or that he had the actual power to prevent their commission. Second, insofar as I do wish to establish liability of superior officers for the acts of their subordinates, such principles can in fact be derived from the High Command and Hostage Cases, as will be seen below. Pragmatically speaking, then, there is no need to embrace *Yamashita* because a more tenable

necessity to find both of these elements, indeed, raises the principal problem of this essay, for the acts themselves were most often performed by those who were in fact never tried by any major tribunal—the ordinary soldier. To find a governmental official guilty demanded the linkage of his activity to that of the final actors themselves, a most complex task.

The complexities are illustrated most clearly in the Ministries Case, dealing with civilian officials. Thus von Erdsmanndorff was acquitted in spite of the finding that he “had knowledge of the crimes against humanity committed against the Jews. . . . But a careful examination of the evidence reveals little or nothing more. It is far from enough to justify a conviction. The deputy chief of the Political Division [of the Foreign Ministry], particularly under the von Ribbentrop regime, had little or no influence. He was . . . little more than a chief clerk.”³⁵ Similarly, Karl von Ritter, between 1940 and 1944 the liaison officer between the Foreign Ministry and the German High Command, escaped conviction on certain war crimes charges because “knowledge that a crime has been or is about to be committed is not sufficient to warrant a conviction except in those instances where an affirmative duty exists to prevent or object to a course of action.”³⁶ It is clear that “duty” here means legal obligation and not fidelity to moral imperatives. The tribunals therefore establish no requirement of supererogatory heroism; criminal responsibility ensued only if one were directly and knowingly linked with the commission of criminal acts.

Both knowledge and actual responsibility are, of course, difficult to establish for members of complex organizations. Indeed, there is some reason to think that the convictions under the enunciated standards were the result of a fluke—that is, “the German proclivity for systematic records and the unexpectedly swift final victory, which placed files of documents in Allied hands.”³⁷ Without such records,

approach exists. It is true, however, that anyone who does defend the justice of *Yamashita* must accept a concomitantly broad imputation of criminality vis-à-vis our own leadership in the Vietnam episode.

35. T.W.C. 14, pp. 577-578.

36. *Ibid.*, p. 625.

37. Leventhal, et al., “The Nuernberg Verdict,” p. 904. Taylor stresses this point also in *Nuremberg and Vietnam*, p. 118.

convictions might have been impossible. Thus, for example, the IMT was unsympathetic to Ernst Kaltenbrunner's protestation that he lacked responsibility for the extermination of Jews, because there existed "very large numbers of orders on which his name was stamped or typed, and in a few instances, written. It is inconceivable that in matters of such importance his signature could have appeared so many times without his authority."³⁸ And such records were even more essential to the evaluation of lesser officials.³⁹

On occasion the office held by an official could itself be probative as to whether or not certain knowledge was in fact possessed.⁴⁰ Given that all the documentation in the world, unless personally initialed, cannot actually "prove" that an official in question actually read the documents, it was stipulated that "an army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit."⁴¹ Moreover, there is an affirmative duty to become cognizant of the actions of one's subordinates: "If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defense."⁴² The only exception to this rule concerns "events, emergent in nature and presenting matters for original decision," where command responsibility will not be found unless the officer "approved of the action taken when it came to his knowledge."⁴³

The problem of allocating responsibility becomes even more complex when we consider the distinction between line and staff officials, whether in a civilian or military context. Line officials are those who have the authority within a given structure to command others to behave in certain ways. Staff officials, on the other hand, usually have no direct authority over anyone. Their function is simply to advise, secure information, draft documents, etc. The question then arises, can staff officers be "responsible" for acts they neither directly (i.e.,

38. *I.M.T.* 22, p. 538.

39. See, for example, the remarkable documents reprinted at *T.W.C.* 11, pp. 634ff., listing, among other things, that 73 Russian soldiers, together with 1,658 Jews, had been shot in conformance to orders.

40. See, e.g., *T.W.C.* 14, pp. 697, 843.

41. *T.W.C.* 11, p. 1260.

42. *Ibid.*, p. 1271.

43. *Ibid.*, p. 1260.

physically) committed nor “ordered” others to commit? The answer is affirmative. The basic rationale is eloquently spelled out by the Tribunal in the Ministries Case:

If the commanders of the death camps who blindly followed orders to murder the unfortunate inmates, if those who implemented or carried out the orders for the deportation of Jews to the East are properly tried, convicted, and punished; and of that we have no question whatsoever; then those who in the comparative quiet and peace of ministerial departments, aided the campaign by drafting the necessary decrees, regulations, and directives for its execution are likewise guilty.⁴⁴

The foregoing discussion has necessarily been abstract, representing a distillation of some basic precepts from the records of four trials (out of a much larger potential sample), themselves of multiple defendants. As always it is helpful to see how they worked concretely by examining their application in a specific case. Although it would be most helpful to examine both civilian and military defendants, with line and staff duties, that would make this discussion unwieldy. Instead I shall confine my close attention to one official, and I turn now to that task.

III

Ernst von Weizsaecker was, from April 1938 through the spring of 1943, State Secretary of the German Foreign Ministry, making him second only to von Ribbentrop (who was convicted and sentenced to death by the IMT) within the formal structure having responsibility for the conduct of foreign affairs.⁴⁵ Before 1938 he had served in various capacities within the Foreign Office, which he entered in 1920. After 1943 he was German Ambassador to the Vatican. More space is devoted to him than to any other single official in the judgment in the Ministries Case, and review of his case is extremely illuminating as to the operative standards of responsibility used by that tribunal.

44. T.W.C. 14, pp. 645-646 (conviction of Stuckart).

45. All information about von Weizsaecker is taken from the Judgment, at T.W.C. 14, pp. 340-385, 463-509, 690-694, 800-801, 857, 951-959.

Von Weizsaecker was tried under seven counts—crimes against peace; participation in a common plan or conspiracy to wage aggressive war; two counts of war crimes and crimes against humanity; plunder and spoliation; slave labor; and membership in criminal organizations. As noted above, all charges were dismissed as to the count dealing with the common plan or conspiracy. Of the remainder, he was convicted only under count five, war crimes and crimes against humanity, and was acquitted on the rest. He had initially been convicted also of crimes against peace, but this was reversed upon petitioning the tribunal for review.

The importance of documentary evidence was mentioned above; although usually this provided the specific means of connecting given individuals to particular events, at least in von Weizsaecker's case it also established the evidence by which he could be acquitted, for his defense essentially turned on his lack of affirmative participation in the creation and execution of the aggressive German policies. Documentary evidence existed that could demonstrate "not only that he was not engaged in planning or preparing an aggressive war, but that he was averse to it and that he expressed no thought that in the long run it would be successful, but on the contrary that it would involve disaster to Germany."⁴⁶ Thus even the second-ranking officer of the Foreign Ministry could escape liability for the general policies and acts of his Government if evidence existed as to his internal opposition (within the bureaucracy, though not publicly expressed) to them.

Such internal opposition is not enough to mandate exculpation if the individual in question otherwise "aided or abetted or took a consenting part"⁴⁷ in the activities under examination, but it is clear from the treatment of von Weizsaecker that stricter standards as to the meaning of such aid or consent were used if evidence of opposition were available than if there were none.⁴⁸ Perhaps the most interest-

46. *Ibid.*, p. 346.

47. *Ibid.*, p. 349.

48. See especially the memorandum reversing the initial finding of guilt under count one, *ibid.*, pp. 954-955. Originally the tribunal had held that, in relation to the invasion of Czechoslovakia, alone of the number of individual instances of aggressive war analyzed, he "was not a mere bystander," but instead an affirmative actor (*ibid.*, p. 354).

ing specific example of the intricate approach taken by the Tribunal is in regard to von Weizsaecker's responsibility for the invasion of Poland:

Von Weizsaecker had no part in the plan for Polish aggression; he was not in the confidence of either Hitler or von Ribbentrop. While his position was one of prominence and he was one of the principal cogs in the machinery which dealt with foreign policy, nevertheless as a rule, he was an implementor and not an originator. He could oppose and object, but he could not override. Therefore, we seek to ascertain what he did and whether he did all that lay in his power to frustrate a policy which outwardly he appeared to support. *If in fact he so acted, we are not interested in his formal, official declarations, instructions, or interviews with foreign diplomats.*⁴⁹

Thus although the tribunal, considering von Weizsaecker's culpability for the invasion of the Low Countries, agreed that in fact his statements to the Belgian ambassador were "deceptive" in regard to German intentions and admitted that "were we to judge him only by these things alone we would be compelled to the conclusion that he was consciously, even though unwillingly, participating in the plans,"⁵⁰ he is still acquitted. The panel notes that "in determining matters of this kind we may not substitute the calm, undisturbed judgment derived from after knowledge, wholly divorced from the strain and emotions of the event, for that of the man who was in the midst of things, distracted by the impact of the conflagration and torn by conflicting emotions and his traditional feelings of nationality."⁵¹ It is enough that von Weizsaecker opposed these policies, an opposition which eventuated in his playing "a real part in the continuous underground opposition to and plots against Hitler."⁵² It is fair to say that a *de minimis* test of aiding and abetting was adopted, whereby less than "substantial"⁵³ participation in the execution of German invasions was treated as no participation at all.

There was no disputing the charge that von Weizsaecker was in

49. *Ibid.*, p. 356 (emphasis added).

50. *Ibid.*, p. 378.

51. *Id.*

52. *Id.*

53. *Ibid.*, p. 380.

fact aware of the aggressive nature of the German actions.⁵⁴ What was lacking was affirmative participation. It was, however, also suggested that, knowing of their aggressive character, he had an affirmative obligation to go beyond internal opposition to actual attempts at sabotage. Thus it was asked why he did not inform the Russian ambassador of Hitler's plans against his country in 1941. The tribunal dismisses this argument. After first pointing to the danger to which he would have had to expose himself, the panel said it was enough that he had opposed the invasion within the Foreign Ministry. But it then goes on to make a separate argument, for it notes that such betrayal of his country would not in fact have changed Hitler's policy, but would have led only to greater German losses because of Soviet preparations.

The prosecution insists, however, that there is criminality in his assertion that he did not desire the defeat of his own country. The answer is: Who does? One may quarrel with, and oppose to the point of violence and assassination, a tyrant whose programs mean the ruin of one's country. But the time has not yet arrived when any man would view with satisfaction the ruin of his own people and the loss of its young manhood. To apply any other standard of conduct is to set up a test that has never yet been suggested as proper, and which, assuredly, we are not prepared to accept as either wise or good.⁵⁵

Undoubtedly some of the relative generosity shown von Weizsaecker is to be explained by a more general reservation as to the legitimacy of the alleged crime of participation in aggressive war. Although the tribunal followed the IMT in upholding the validity of that charge under international law, it was reluctant to convict without overwhelming evidence of both knowledge and participation, and it was concomitantly willing to accept counterevidence of the type used so successfully by von Weizsaecker. What is especially remarkable is its willingness to minimize the importance of formal diplomatic activity. The tribunal was, however, much less generous to the defendant in regard to more traditional crimes of war.

54. See, e.g., *ibid.*, p. 382.

55. *Ibid.*, p. 383.

In its initial discussion of the responsibility of von Weizsaecker for the extermination of the Jews, the tribunal repeats the central theme that responsibility attaches only where the accused individual occupies a position within the governmental structure of actual authority to affect or implement policy. Because the Foreign Office had no jurisdiction, for example, over the activities of the Einsatzgruppen operations in the Eastern European countries, there was no responsibility, even though there was knowledge of them.⁵⁶ It is perhaps true that no "decent man could continue to hold office under a regime which carried out planned and wholesale barbarities of this kind," but indecency is not a crime.⁵⁷

In other aspects relating to treatment of the Jews, however, the Foreign Office had not only knowledge but also authority, and here the decision as to criminality would be different. Here, too, von Weizsaecker attempted to argue that minimal participation should be negated by the fact that he opposed what was being done. Indeed, he argued that he remained in office until 1 May 1943 for two central reasons: he could continue to plan some meaningful role in the underground opposition to Hitler by retaining access to important information and distributing such information, and he "might be in a position to initiate or aid in attempts to negotiate peace." The tribunal specifically stated that it believed his claims, but went on to note also that, whatever force they might have in mitigating punishment, they cannot be a defense to charges of crimes of war or crimes against humanity. "One cannot give consent to or implement the commission of murder because by so doing he hopes eventually to be able to rid society of the chief murderer. The first is a crime of imminent actuality while the second is but a future hope."⁵⁸ Thus the State Secretary was under an affirmative obligation to object, upon inquiry by the SS as to the Foreign Office's opinions in regard to the treatment of Jews. Failure to object was grounds for being found guilty, as von Weizsaecker here was. This was the sole instance where he was in fact convicted, and for this he received a sentence of seven years.⁵⁹

56. *Ibid.*, p. 472.

57. *Id.*

58. *Ibid.*, pp. 497-498.

59. *Ibid.*, pp. 498, 866. It should be noted that Judge Powers filed a sharp dissent to the judgment of his two colleagues that guilt attached even in this instance (*ibid.*, pp. 910-913).

IV

It is time now to turn from Nuernberg to Vietnam. What inferences can we draw from the preceding material? What would be necessary were we to decide to try individual high officials of the American government, past or present, for war crimes which have undoubtedly taken place as part of the Vietnam War?⁶⁰

At least two distinct questions are raised by suggestions for holding war crimes trials. The first is deceptively simple: taking the Nuernberg principles sketched above as given, what kinds of evidence would be needed in order to convict officials of war crimes?⁶¹ The second question is more obviously complex: given the extreme unlikelihood that trials for war crimes will in fact be held under official auspices, either domestically or internationally, what alternatives are open to the lay citizenry who remain convinced not only that crimes have occurred, but also that there may be criminals to whom can be allocated responsibility? The first question can be answered from within the accepted legal tradition. The second, however, involves what would frankly be an exercise of extralegal judgment, an attempt to make at least quasi-legal findings (i.e., that given individuals are "war criminals") without legal authority to do so. The second question

It is also true that, regarding the deportation of Hungarian Jews, von Weizsaecker's linkage was found "so slight and insignificant" that he was acquitted, so even here some kind of *de minimis* test remained (*ibid.*, pp. 499, 507, 508, 526).

60. For evidence as to the commission of both conventional war crimes as well as the crime of aggressive war, see the essays collected in Falk, *op. cit.*, as well as, e.g., Richard A. Falk, Gabriel Kolko, and Robert Jay Lifton, eds., *Crimes of War* (New York, 1971). See also the review by Neil Sheehan, "Should We Have War Crimes Trials?" *The New York Times Book Review*, 28 March 1971, p. 1, reviewing 33 books alleging the commission of war crimes. There has also been testimony by ex-servicemen themselves as to war crimes in Vietnam. See, e.g., material introduced into the *Congressional Record* by Senator Hatfield on 6-7 April 1971, pp. E2825-2900, 2903-2936.

61. Again it should be emphasized that one may not want to take the Nuernberg principles as given, especially insofar as the trials simply ignored the issue of civilian bombing by refusing to charge any defendant for such action (presumably because any defendant would have been able to charge *tu quoque* in regard to the Allied bombing). See Taylor, *Nuremberg and Vietnam*, pp. 140-145. See also Taylor, "Defining War Crimes," *The New York Times*, 11 January 1973, p. 39, referring specifically to the bombing of Hanoi.

is not logically entailed by the principal topic of this essay—theories of responsibility. It is, however, linked to any affirmative response to the question of whether viable standards of responsibility exist, for we are then faced with the dilemma of a positive legal system which refuses to apply “the law.” What response is then open to the citizen who sees a conflict not between law and morality, but rather between law and a particular legal structure which refuses enforcement?

As to the first question it is clear from the discussion above how dependent the Nuernberg trials were on captured documents. The judgments were careful to document the connections between given officials and the acts for which they were accused of responsibility; there was a minimum of reliance on purely formal analysis of responsibility within governmental organizations. Such documents were available for two separate reasons. The first was, of course, the fortuitous capture of the papers of the regime by the victorious Allies. But the second reason is perhaps of greater relevance insofar as application of the Nuernberg precedents to American officials is concerned, and that is simply that the most essential fact about the Nazi regime was that it consciously articulated and executed such policies as the Holocaust or the brutal murders of prisoners of war and hostages. Having consciously adopted the policies, the regime took great care to measure their enforcement through the preparation of copious reports, memoranda, etc. Individuals in turn proved their fidelity to the regime by documenting their own acquiescence in its orders.⁶²

Not even the most bitter critic of American policy would suggest that it has been the result of clearly articulated, clearly ordered, and clearly executed desires to flaunt international law and morality in the same way as was true of Germany. Thus, even if American documents were capable of being subpoenaed or captured, it is doubtful that evidence similar to that introduced at Nuernberg would be found. The most maddening characteristic of officials of the American government, to their critics, is their *denial* of the carnage that has taken place in Vietnam, rather than their exaltation of the slaughter in the name of the American *volk*.

62. See Hannah Arendt, *Eichmann in Jerusalem* (New York, revised edition, 1965), chap. 8: “Duties of a Law-Abiding Citizen.”

It is also important to distinguish clearly problems attendant on trying civilian officials from those present regarding military officers. Thus, concerning the latter, it is quite possible, as Taylor and others have suggested,⁶³ that the very failure to investigate charges of war crimes that have been leveled is itself criminal under the standards articulated in the High Command Case. Without accepting the scope of *Yamashita*, one can still argue that military commanders are obliged to organize the armed forces so as to maximize the likelihood of exercising meaningful discipline over the troops and preventing the commission of criminal acts. Insofar as evidence does exist that the American command in Vietnam breached his duty, there would seem to be few purely legal problems involved in trying officers for at least some of the crimes committed there.⁶⁴

The judgments are much murkier, however, regarding the responsibilities of civilian officials to assure that they will be provided with accurate information, on pain of liability should they not seek such data. Without such evidence as was available at Nuernberg, it is tempting to adopt formalist theories of government to assume without more that the occupant of a given office is automatically a "war criminal" because an organization chart puts him in formal control of given subordinates. But this begs the question of the knowledge by superiors of criminal action, the ease with which accurate information might have been available, or the relationship between formal authority and actual power.

What constitutes acquiescence in criminal activity? For example, the Department of Defense rightly notes that Americans in Vietnam received formal instruction in the rights granted by the Geneva Convention.⁶⁵ In spite of all the doubts one might have about the actual

63. Taylor, *Nuremberg and Vietnam*, pp. 123-182; see also "Playboy Interview: Anthony Herbert," *Playboy* (July 1972): 59ff., concerning the experiences of an Army colonel who attempted to inform superiors about the commission of war crimes.

64. Seymour Hersch, *Coverup* (New York, 1972), documents the suppression by American officials of information concerning the crimes committed at My Lai. His principal source of information is the still-secret Peers Report, based on investigations conducted by the Army itself.

65. Hersch, *op. cit.*, pp. 40-41.

fidelity to that Convention or to orders to obey it, how does one establish the culpability of high governmental officials for breaches of the Convention by subordinates if those officials have in fact issued such orders? Is it enough simply to say that they were perfunctory, hypocritical, self-deluded, etc.?

The tribunals were particularly stringent about finding guilt for participation in the crime of aggressive war. Insofar as some critics of the Vietnam War emphasize its aggressive character (i.e., on the part of the American government), those critics would face what seems to be an insurmountable problem of proving actual knowledge of the aggressive character of American participation, in addition to the difficulty of selecting out those officials who actively brought about the war. Indeed, for a conspiracy charge to be sustained,⁶⁶ one would, among other things, have to identify the "inner circles" of the Kennedy and Johnson Administrations. Whatever one might think of the "decency" of ex-Vice President Humphrey, for example, in serving the Johnson Administration's foreign policy, it would seem impossible, on the basis of currently available information, to suggest seriously that he is a "war criminal," for he does not seem to have been in any strong sense a member of the "inner circle." He is culpable only if we adopt what Nuernberg specifically rejected—the obligation to resign from an administration engaging in criminal activity.⁶⁷

66. See Noam Chomsky, "The Rule of Force in International Affairs," *Yale Law Journal* 80, no. 7 (June 1971) (review of Taylor): 1459 n. 14.

67. Though see Richard A. Falk, "Son My: War Crimes and Individual Responsibility," in Falk, ed., *The Vietnam War and International Law* 3, pp. 338-339, where he quotes a passage from the Tokyo judgment which *does* suggest an affirmative duty to resign: "If [a Cabinet member] has knowledge of ill-treatment, but elects to remain in the Cabinet thereby continuing to participate in its collective responsibility for protection of prisoners, he willingly assumes responsibility for any ill-treatment in the future." Falk goes on to argue that it is therefore now part of the law of war that "A leader must take affirmative acts to prevent war crimes or dissociate himself from the government. If he fails to do one or the other, then by the very act of remaining in a government of a state guilty of war crimes, he becomes a war criminal" (*ibid.*, p. 339). I do not think that an analysis of the Nuernberg judgments supports this statement. (One way of rationalizing the quoted statement with the analysis in the text is to argue that by its terms the Tokyo rule operates *only* where there is a Cabinet which does operate on a theoretical basis of collective responsibility. Where that is not the case, as it certainly is not in this country, then there would be no duty to resign.)

In summary, then, although it might be disputed whether or not the lack of copious documentary evidence raises a “well-nigh insuperable” obstacle to the holding of American war crimes trials,⁶⁸ it can scarcely be disputed that severe problems are raised if we wish to adhere to the standards set at Nuernberg. It is arguable, though, that the problems are of differential severity in regard to the specific kinds of war crimes under discussion. Thus convictions for waging aggressive war *do* depend on specific information relating to both knowledge and actual power in a way that does not seem to be the case for more traditional war crimes. Critics of the war who focus more on the means with which it has been fought rather than its allegedly aggressive character would seem to have a slightly easier task in terms of proving culpability. As noted above, one’s office within an organization, even if not determinative as to actual responsibility, nevertheless may properly raise a presumption of some degree of responsibility. Is it unfair, then, to expect certain officials to come forward with evidence that they did *not* actively join in the commission of criminal policies? That is, if one (a) proves that a criminal pattern of activity developed in the conduct of the war, and (b) shows that the institutional roles filled by the men in question have at least formal responsibility for the policies in question, then a *prima facie* case is established, and it is reasonable to expect the individuals to demonstrate that the case fails.

Moreover, it is worth mentioning that information, even if less reliable than the captured German documents, *is* available about the policy-making apparatus in charge of the war. There are not only the Pentagon Papers, but also such studies as David Halberstam’s *The Best and the Brightest*; it is possible, as well, that more officials of the relevant administrations will feel it wise or necessary to publish accounts of how *they*, at least, were never so foolish as Walt Rostow, and thus illuminate further, even if self-servingly, the parameters of power.

68. Taylor, *op. cit.*, p. 118. It is this specific assertion that Chomsky, *op. cit.*, disputes. Like Richard Falk, “Nuremberg: Past, Present, and Future,” *Yale Law Journal* 80, no. 7 (June 1971) (review of Taylor): 1501-1528, Chomsky believes that the Pentagon Papers provide a sufficient evidentiary base from which to determine guilt or innocence of war crimes.

But, of course, official trials are not going to be held, and discussion about procedures that might be used at such trials is academic. If law is indeed only that which courts are prepared to enforce, then the status of the law of war is weak. Yet, as noted above, it is possible to argue that law has an existence independent of the willingness of the state to enforce it, and that it is fruitful to discuss what alternatives to official trials might exist for establishing who, if anyone, bears blame for illegalities attached to the Vietnam War. Two general alternatives suggest themselves. One is the establishment by inevitably self-appointed groups or individuals of a citizens' tribunal which would consider the guilt of named officials and publish its assessments.⁶⁹ A second alternative would be the preparation by individual scholars of articles, to be published perhaps in law reviews, as to the guilt or innocence of named individuals under the applicable precedents. One article might be on Lyndon Johnson, another on McGeorge Bundy, a third on Henry Kissinger, etc.

The problems with both alternatives, of course, are obvious. They raise spectres of at best a "left-wing McCarthyism" and at worst a peculiarly academic version of lynch law. It is one thing to have such extralegal tribunals or individuals consider the question of whether or not the United States, as a reified entity, committed crimes. The affirmative answer which would be forthcoming could be used to support the idea that this country has an obligation, in spite of the problems noted in section one above, to provide reparations to the North and South Vietnamese victimized by its criminal activities. But

69. See, e.g., Falk, *op. cit.*, pp. 344-345 n. 66, who suggests "a national board of legal experts" to review violations of the laws of war in Vietnam. On the other hand, Falk in this article specifically rejects the preparation by such a board of criminal indictments against named individuals, on the grounds that this would be "scapegoating" and an attempt to relinquish a more widely shared responsibility for the war. However, see Falk's review of Taylor, *op. cit.* n. 67, p. 1503, where he speaks of "putative 'war criminals' being rewarded with such jobs as the presidency of the World Bank, the presidency of the Ford Foundation, the editorship of Foreign Affairs, and high-salaried professorships at leading American institutions of learning." Given that a minimally aware reader can identify Robert McNamara, McGeorge Bundy, William Bundy, and Walt W. Rostow, it appears that Falk may now be more receptive to reviewing the actions of named public officials.

it is entirely different to discuss the responsibility of named individuals—or so the argument would run.

It should immediately be noted that the objection to extralegal proceedings cannot necessarily take the form that they would deny “due process” to the affected individuals, for it is easy to conceive of a citizens’ tribunal which would follow impeccably every evidentiary rule and other requirement perceived as necessary to “due process.” The objection to such proceedings must take a more fundamental form—that it is always illegitimate for private citizens to try to enforce the law in the face of refusals by the State to do so. If one’s sole objection to Senator McCarthy is that he refused to depend on the authoritative legal institutions of the society to repress those accused of communist sympathies, instead of pointing to the ruthless disregard of due process in the procedures by which he determined the culpability of his victims, then there is in truth no answer to the charge of “left-wing McCarthyism.” I would argue, however, that to focus only on the unwillingness to trust the existing formal institutions of the society to enforce the law is to beg the question of *why* those institutions are necessarily the only ones that can legitimately, in anything more than a formal sense, maintain legal norms by using them as a source of judgment concerning the conduct of members of the society.

And, it must be stressed, recourse to extralegal determination of “guilt” is entirely separate, analytically, from recourse to similar determinations of “punishment.” One can oppose, that is, the actions of a lynch mob, without necessarily denying the accuracy of their perception that the individual in question is “in fact” guilty of the crime for which he is accused, even though the formal system, for given reasons, is incapable of declaring him guilty.⁷⁰

The most appalling aspect of America’s participation in the Vietnam War, aside from the slaughter itself, has been the refusal to

70. For those bothered by this last sentence, I ask them to consider their own reactions to the acquittals of southern whites in the early 1960’s for the murder of civil rights workers and leaders like Medgar Evers, or more recent acquittals of policemen for charges linked to the suppression of black militants. Even if one would not wish to “punish” the acquitted assassin of Evers, is it *necessarily* wrong to regard him as factually guilty and therefore deserving of moral condemnation and stigmatization?

take seriously the allegations of war criminality which have been put forth. The obvious reason for this reluctance is that to take the Nuernberg principles seriously is to admit the reality of criminal responsibility on the part of high officials. At the same time even some critics who would accept the notion that criminal activities have occurred would still attribute these activities (outcomes) to the mechanisms of impersonal institutions. As argued at the beginning of this essay, there are good reasons for doing so.

Yet Daniel Ellsberg is surely right to argue that governmental officials should be called to account for their deeds, if that is at all possible. To accept without restriction the view of government as articulated by Murray Edelman is to descend further into a completely Kafkaesque world of institutions without actors, a mad kind of world where individual activities (though not "decisions") culminate in a world that no one desires and for which no one is responsible. To reject without question Edelman's view, on the other hand, is to fall just as surely into the opposite trap of believing that great events in fact can be traced to great individuals, whether members of a conspiracy or "dictators." Unfortunately, it seems likely that those who are sympathetic to extralegal tribunals are too ready to assign individual responsibility to all officials of the American government. But it is just as likely that those who automatically condemn extralegal judgment are all too generous to American policy-makers in rejecting either the criminal nature of at least aspects of the war or the responsibility of discrete human beings for the consequences of their actions.

Given the intractable dilemma, however, it is still necessary to choose a lesser evil, and I submit that at this time the lesser evil is to engage in analysis of the behavior of named individuals, with a concomitant willingness to announce that there is, or is not, "probable cause" to believe that they are war criminals. Such discussion would at the very least contribute to the sorely needed analysis of the notion of individual responsibility for the outcomes of complex organizations. If one ultimately decides that Edelman (and Tolstoy and Kafka) are correct, then at least that decision will not be made by default. If it *can* be determined to what extent responsibility is allocable, then the principles developed will have wide application, for

increasingly all significant social activity takes place through the aegis of complex organizations.

As to the individuals in question, there is the blunt fact that they are members of the dominant social and political elites of this country. McGeorge Bundy, Richard Nixon, and Henry Kissinger can handily defend themselves against the charges of being war criminals in ways that an ordinary citizen could not. Though any injustice done to an individual is a cause for concern, there is greater reason to be concerned by the social consequences of not making such inquiries. Moreover, to move beyond a mere utilitarian justification, there remains, though now out of fashion, a view of the world which emphasizes our rootedness in a moral order which in itself generates demands that wrongdoers be identified and punished, even if only through stigmatization, in order to restore a moral harmony which is dislocated when injustice of the nature present in Vietnam occurs.⁷¹

71. See Yosai Rogat, *The Eichmann Trial and the Rule of Law* (Santa Barbara, 1961), p. 22; Arendt, *op. cit.*, pp. 278-279.