

JAN 11 1973

NYTimes

*The Siege of Hanoi: II*

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## Defining War Crimes

By Telford Taylor

The North Vietnamese Government has consistently charged that American military operations in Vietnam are "war crimes," and this accusation plays a very important part in the way they describe the war, both to themselves and to others. In 1965 and 1966, when American bombing in North Vietnam began, their Government repeatedly threatened to try captured American airmen as war criminals, under the Nuremberg precedents, but in recent years this intention, if ever seriously entertained, appears to have been abandoned.

However sincerely the North Vietnamese today hold the belief that the American bombing is "criminal," I think it is clear that the practical value of this concept for them is primarily for internal morale and external propaganda purposes, and there is little likelihood that the American prisoners will ever find themselves on trial before a North Vietnamese court.

While the North Vietnamese war-crimes literature covers American military operations in both North and South Vietnam, in recent months, the emphasis has been almost exclusively on our aerial bombardments in the North.

The Vietnamese case does not rest exclusively on the antipersonnel bombs, but rather embraces the entire program of aerial bombardment, with emphasis on the civilian casualties. To assess this charge carries the judge into highly controversial areas in which the "law" is far from clear, and requires that Hanoi and Haiphong be considered not in isolation, but in conjunction with other cities that have suffered the same or worse fates—Coventry, Hamburg, Berlin, Dresden, Tokyo, Hiroshima and other memorials to the art of war.

The results of our bombing undeniably are horrible, but Hanoi is not the only city that has undergone such horror. Immoral and senseless this bombing may well be, but where is the law under which to call it criminal?

When I put this question to the North Vietnamese lawyers, they gave two answers. The first was that our bombing is part of an aggressive war launched by the United States against their country. Even assuming the truth of the premise, this is not a satisfactory analysis, for if aggression alone is the test of criminality, every military operation carried out by the aggressor would be a war crime — a view put forward and rejected, I believe rightly, at Nuremberg. It would also follow that the North Vietnamese, who on their assumption are not aggressors, would be legally justified in bombing Saigon into bloody ruins.

Their second and more substantial response is that the laws of war cannot remain frozen at the Nuremberg level, but must respond to the march of events, and that by now the futility and inhumanity of "strategic" bombing has been so clearly demonstrated that it must be outlawed, much as poison gas was after the First World War. To this I can only say amen, but objectivity obliges the response that efforts to formulate such a law have failed for over half a century, and that the demand for it has come chiefly from countries that do not have strategic air power at their disposal. I am, I fear, too much of a legal traditionalist to accept this argument in its full sweep.

But surely the bombing of Hanoi does raise serious legal questions under the principle of "proportionality" — the rule that there must be a reasonable relation between the military objective and the damage and suffering which its attainment will entail. A single enemy soldier is a legitimate target whether he is in the front line or on home leave, but to level a city block to kill him at home is beyond the bounds of proportionality.

It is under this principle that our bombing operations at Hanoi appear most vulnerable to the charge of criminality. The military objectives, even as described by the Pentagon, seem so

trivial, and so remote from our shores, that the death and destruction we inflict appear as wanton. This impression is underlined by the, to me, inexplicable use of B-52's, with their carpet-bombing technique, to strike at small targets in urban areas.

Confronted with the appalling consequences, a legal approach to these events is bound to provoke impatience. Whether or not Bach Mai and Khan Thien are "crimes" is of small moment to the victims. Why are we doing what we are doing? Both at home and abroad millions are asking that question, and it is the grave responsibility of the American Chief Executive to answer it.

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