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## BOOK REVIEW: Telford Taylor: Courts of Terror

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## BOOK REVIEW

**Courts of Terror.** TELFORD TAYLOR. New York: Alfred A. Knopf, Inc., 1976. Pp. xi, 184. \$6.95. New York: Vintage Books (Random House), 1976. Pp. xi, 184. \$1.65 (pap.).

*Reviewed by Paul Sherman\**

In *Courts of Terror*, Professor Telford Taylor has produced a work of advocacy with a two-fold purpose: to create "an account of the prostitution of Soviet justice to serve State ends,"<sup>1</sup> and to publicize this failure of justice in order to "aid or comfort the victims of these abuses, and their friends and relatives."<sup>2</sup> He achieves the first goal, in large part, by describing his efforts and those of a number of attorneys and law professors to secure the release of twenty-three prisoners in the Soviet Union. In so doing, he describes the unusual procedures and occasionally extraordinary application of criminal provisions under which these prisoners were convicted. Whether publication of this work will achieve his second goal is a subjective judgment, but as he notes in Chapter 10, disclosure may serve to "systematize the spreading of information about these cases" and continue whatever momentum has been achieved.<sup>3</sup>

Professor Taylor's actual clients were the prisoners' relatives who had emigrated to Israel.<sup>4</sup> Most of the prisoners were Jewish, and all had sought to emigrate to Israel or to aid Soviet citizens who wanted to do so. They were charged with and convicted of a wide variety of crimes ranging in seriousness from attempted treason to malicious hooliganism.

In an unusual and seemingly naive approach to this type of problem, Professor Taylor and his associates initially decided to operate quietly through ordinary Soviet legal procedures, rather than launch an overtly political and public campaign. The basic procedure they chose was to attempt to convince the Office of the Procurator General (*Prokuratura*) to exercise its power to protest

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1. T. TAYLOR, *COURTS OF TERROR*, at x (1976) [hereinafter cited as *COURTS OF TERROR*].

2. *Id.* at xi.

3. *Id.* at 66.

4. Because of the impossibility of contacting many of the prisoners, the only persons who had standing and were available to those engaged in the project were relatives who had so emigrated. *Id.* at 20.

the convictions and have the cases reopened.<sup>5</sup> Ultimately, after several meetings with Soviet authorities and the submission of extensive legal and factual materials, their attempt to secure relief for the prisoners through normal Soviet legal channels failed.

The text, which describes these efforts, comprises less than half the volume; the balance consists of five appendices containing extracts from the legal and factual materials used by Professor Taylor and his associates. Here, relevant statutes, copies of petitions to the Soviet Government, legal memoranda, affidavits, and correspondence generated by the project are reproduced. These appendices provide voluminous documentation of the author's conclusion that serious injustice was inflicted in these cases.

Professor Taylor contends that these convictions were part of a State policy "to discourage Jewish emigration without appearing to prohibit it,"<sup>6</sup> and he sets forth numerous examples of the procedures utilized to accomplish that end. He argues that in some instances charges were fabricated,<sup>7</sup> and in others penal statutes were stretched beyond their intended scope to encompass the acts of certain defendants.<sup>8</sup> More fundamentally, he asserts that all these cases reflect a pervasive pattern of disregard for normal Soviet procedural safeguards. Finally, he maintains that, in many cases, unusually harsh sentences were imposed and that conditions of imprisonment were excessively severe or cruel.

As an advocate, the author generally succeeds in proving his accusations. His discussion of the procedures followed at trial shows a number of unusual departures from Soviet legal norms. These include limitations on the right of cross-examination,<sup>9</sup> re-

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5. See generally H. BERMAN, *JUSTICE IN THE U.S.S.R.* 238-47 (1963); R. DAVID & J. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 163-64 (1968); Boim, *Procuracy*, 2 *ENCYCLOPEDIA OF SOVIET LAW* 545, 548 (F. Feldbrugge ed. 1973).

6. *COURTS OF TERROR*, at x.

7. An example is the Pinkhasov case, discussed in *id.* at 56-58, involving alleged overcharges for carpentry services.

8. Examples include the widely publicized Leningrad trials where the defendants, accused of attempting to hijack an airplane, were convicted of violating the treason statute (Article 64, R.S.F.S.R., Criminal Code), *COURTS OF TERROR*, 6-10, 35-36, 148-53, and the Shkolnik case, in which the crime charged was espionage, *id.* at 12-13, 119-27.

9. The first of the two Leningrad trials involved one such instance. There, when a State witness appeared about to say something beneficial to the defendants, he was excused from the stand and no defense questions were allowed. *Id.* at 24, 99-100, 135. Another example occurred in the Feldman trial. *Id.* at 55 n.

fusals to hear expert witnesses,<sup>10</sup> and limitations on the rights of defense counsel.<sup>11</sup>

Insofar as the author's assertions about sentences and prison conditions are concerned, he builds a powerful case. For example, maximum sentences were frequently imposed for attempts, without distinguishing them from the completed acts.<sup>12</sup> Even more importantly, Professor Taylor shows that prison conditions were often highly unusual. Some of the Jewish defendants were confined in camps in which an overwhelming majority of the prisoners were persons convicted of collaborating with Nazi forces during World War II. Affidavits of former Jewish prisoners in these camps attest to many instances of victimization by anti-Semitic fellow prisoners.<sup>13</sup> There were also a number of official attempts to penalize or discourage religious practices.<sup>14</sup>

However, some of Professor Taylor's assertions appear to have less merit. There is little evidence of refusals by the courts to hear defense witnesses other than the exclusion of expert testimony and the refusal to allow "anti-Soviet" literature to be read in open court by the defendants.<sup>15</sup> His arguments relating to the inadequacy of Soviet defense counsel fail to recognize the tension inherent in the concept of socialist legality between an attorney's duty to society and his duty to a client. Soviet law has long recognized that an attorney plays a dual role in which his duty

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10. Professor Taylor states that the conclusions of experts who did not testify were relied upon by the court in determining that certain literature was anti-Soviet in nature, without according defendants the opportunity to obtain the opinions of other experts. More seriously, he asserts that these opinions, contained in the investigative files compiled on certain defendants, were not made part of the oral proceedings at trial. *See generally id.* at 36-38, 137-40, 159, 162.

11. Thus, in the case of Shkolnik, prison authorities apparently prevented a meeting with counsel. *See id.* at 38-39, 167-68.

12. In the first Leningrad trial, two of the defendants, convicted of attempted treason for seeking to steal an airplane in order to escape from the Soviet Union, were originally sentenced to death. Subsequently, after protests were raised in a number of countries against the severity of these sentences, the sentences were commuted on appeal to fifteen years imprisonment. *Id.* at 8-9. *See also id.* at 154-55.

13. *See id.* at 25, 163, 165-66, 169-72, 175.

14. *Id.* In at least one case, the prison authorities forcibly interfered with and prevented religious observance. *Id.* at 172.

15. The simple refusal, without more, to utilize expert witnesses does not appear to be a violation of Soviet legal norms. *But see* note 10, *supra*. Ordinarily, the decision as to whether expert witnesses are necessary rests with the prosecutor. The defendant only has the right to ask for the opinion of a different expert. This request may be granted or refused. *See* Kiralfy, *Expert Witnesses, Criminal Procedure*, 1 *ENCYCLOPEDIA OF SOVIET LAW* 263 (F. Feldbrugge ed. 1973); Fincke, *Defendant, id.* at 212, 213, 215-16. *See also* Articles 184, 185, R.S.F.S.R., Code of Criminal Procedure.

to represent his client is subordinated to his duty to advance the goals of socialism.<sup>16</sup>

Finally, while the author establishes that criminal statutes were construed too broadly in order to reach some of the defendants, a number of his supporting arguments appear to overstate the case. For example, one of Professor Taylor's major points arises from the application of the treason statute, Article 64, R.S.F.S.R. Criminal Code, to the defendants in the Leningrad trials who had attempted to leave the Soviet Union by hijacking a small airplane to Sweden. He argues that a major element of the treason charges, proof of intent, depended upon proof of possession and distribution of anti-Soviet literature. This is a separate crime punishable under Article 70, R.S.F.S.R. Criminal Code, and Professor Taylor contends that intent sufficient to convict under that Article was never proved. He concludes from this that the conviction under Article 64 was invalid because the requisite intent was never shown. However, Professor Taylor does not explain why facts insufficient to establish intent under Article 70 might not, nevertheless, be sufficient to establish the intent required by Article 64, a separate statute.<sup>17</sup>

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16. Barry & Berman, *The Soviet Legal Profession*, 82 HARV. L. REV. 1, 14-15 (1968); Malone, *The Soviet Bar*, 46 CORNELL L.Q. 258, 278-80 (1961).

17. This contention is raised in *Courts of Terror* at 35-36 and argued in depth at 135-41. See also COURTS OF TERROR 148-52. Professor Taylor argues correctly in one of the group's legal memoranda, *id.* at 136, that proof of treason under Article 64 requires proof of intent to harm the Soviet Union in addition to proof of the overt act of attempted flight. However, the author proceeds to assert that the prosecution relied heavily on "the hostility to the Soviet Union that supposedly was implicit in distributing literature in violation of §70" to establish this intent. *Id.* He then concludes that, since guilt was not properly established under Article 70, the requisite intent under that article was not established and could not have been utilized to establish intent under Article 64.

This conclusion does not necessarily follow. First, it is clear that the language of the two statutes differs significantly in defining requisite intent. Article 64 requires the act to be "to the detriment of the state independence, the territorial inviolability, or the military might of the U.S.S.R." *Id.* at 72. For Article 70, the act must be "for the purpose of subverting or weakening the Soviet regime or of committing particular, especially dangerous crimes against the state." *Id.* Second, as a subsequent memorandum points out, "[s]everal Soviet legal writings have argued that anti-Soviet motives convert an illegal exit into treason under 64(a)." *Id.* at 150. It may well be that the anti-Soviet motives required by Article 64 differ from the intent required under Article 70. Thus while "hostility to the Soviet Union supposedly implicit in distributing literature" may not necessarily establish the requisite intent under Article 70, it may be a sufficient basis for a finding of intent under Article 64. While Professor Taylor quite properly raised the question of intent in his submissions to the *Prokuratura*, the legal materials supporting this legal contention do not support the broad factual assertion in the text that "[i]t seems clear, accordingly, that Articles 64 [and another statute] were invoked by the Soviet authorities, despite their manifest inapplicability, in order to subject the defendants to the jeopardy of capital sentences." *Id.* at 36 (emphasis added).

Though *Courts of Terror* generally succeeds in exposing the injustices perpetrated in these cases and in illustrating the effect of political considerations on the administration of Soviet criminal law, the book suffers from a major and irremediable flaw that is a necessary result of the method chosen by Professor Taylor and his associates to obtain the release of these prisoners. The book is a description of a project which, from the beginning, had few prospects for success, and which actually appears to have been counterproductive. The attempt to influence the *Prokuratura* caused a delay of about two years in publicizing the plight of these prisoners, who are only now receiving the notice they would have obtained had the author publicized their plight immediately. While the dedication of Professor Taylor and his project members is admirable, this account of their activities leaves only a strong and dissatisfying sense of frustration.

In a broader context, *Courts of Terror* provides valuable insight into a more general phenomenon of interest to students of international affairs. This is the increasing frequency of bilateral dealings between private persons and foreign sovereigns in political and social matters, a type of interaction that is "quasi-public" in nature. The book is unusual in that it is both product and process, a description of an unsuccessful effort in this area as well as an illustration of still another form of quasi-public interaction.

First, Professor Taylor's project was an effort to influence the governmental decisions of a foreign nation by working within that nation's political system. The activities described bear a striking resemblance to efforts at international lobbying ordinarily associated with multinational corporations. In effect, Professor Taylor and his associates, citizens of the United States, represented clients, citizens of Israel, before an agency of the Soviet Government in an effort to change what the author maintains was a political decision. Except for the specific goals involved, it is difficult to distinguish these actions from those of representatives of a corporation seeking to change a foreign State's import or tax policies.<sup>18</sup>

Second, *Courts of Terror* is an illustration of another form of public-private interaction in international affairs in that it is itself an appeal to world opinion. Again, the goal is alteration of a

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18. See generally R. BARNET & R. MÜLLER, *GLOBAL REACH* (1974); Note, *Multinational "Payoffs" Abroad: International Repercussions and Domestic Liabilities*, 2 *BROOKLYN J. INT'L L.* 108 (1975).

foreign country's political decision by private parties. Here, however, the approach is indirect and more closely resembles the activities of organizations such as the International Chamber of Commerce or Amnesty International.<sup>19</sup>

While the efforts described in *Courts of Terror* are examples of relatively innocuous forms of quasi-public international interaction, such conduct is not the only means by which private parties may try to influence State policy. The means available are manifold and their legality runs the gamut from the forbidden to the encouraged under municipal law.

Most nations would concede some degree of legality to the conduct of Professor Taylor and his associates. However, some types of quasi-public activity fall within a gray area of legality: bribery may be a common practice in some states, condoned either tacitly or expressly;<sup>20</sup> personal pressures or private special relationships may be utilized;<sup>21</sup> private boycotts, such as those against South African businesses, may be organized;<sup>22</sup> and political contributions designed to influence public policy may be more important than previously thought.<sup>23</sup> Finally, still other forms of conduct, such as hijacking or political violence, are clearly illegal under the municipal law of most nations.<sup>24</sup> Yet, all these means—whether legal, illegal or doubtful under municipal law—have been used by private parties and sometimes applauded by nations whose political goals coincide with those of the private actors.<sup>25</sup>

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19. See AMNESTY INTERNATIONAL, ANNUAL REPORT 1974/75 (1975); AMNESTY INTERNATIONAL, REPORT ON TORTURE (1973). See also N.Y. Times, May 29, 1973, at 52, col. 4.

20. See Note, *Multinational "Payoffs" Abroad: International Repercussions and Domestic Liabilities*, *supra* note 18, at 111-13.

21. Indeed, Professor Taylor notes that his personal acquaintance with the Soviet Procurator General, Roman Rudenko, assisted him in his attempt to gain direct access to that official and thus request permission to submit the materials prepared by him and his associates to the *Prokuratura*. COURTS OF TERROR 18. See also *id.* at 28.

22. An analogous effort can be perceived in attempts by certain stockholders of General Motors Corporation to terminate that company's economic involvement in South Africa. N.Y. Times, May 22, 1971, at 39, col. 1.

23. N.Y. Times, May 16, 1975, at 47, col. 2.

24. As Professor Taylor notes, the Soviet Union promulgated an anti-hijacking statute in January 1973. COURTS OF TERROR 45 n. See also 49 U.S.C. § 1472 (Supp. V, 1975).

25. See, e.g., N.Y. Times, May 6, 1970, at 18, col. 4 (Molotov cocktails and rocks thrown at United States cultural center in West Berlin protesting United States intervention in Cambodia); N.Y. Times, Apr. 16, 1970, at 1, col. 7 (violent protests directed against United States property in Jordan).

Hijacking of airplanes by terrorist groups may be a somewhat special type of quasi-public international activity. To some extent, actions by persons contesting governmental sovereignty have been the subject of marginal regulation by international law. See, e.g.,

Despite the varying forms and degrees of legality of these courses of conduct, the types of participants remain constant. In all cases, the initiating party is private and the party sought to be affected is governmental. Such an interrelationship may not be unusual in domestic politics, or in commercial intercourse where the activities of nations are not governmental in a traditional sense. However, international transactions attempting to influence traditional governmental policies of foreign nations have little in the way of historic precedent. Consequently, there is no developed body of law governing these political contacts.<sup>26</sup>

Despite some recent ad hoc attempts to control certain forms of quasi-public international activity, there has been no coherent effort at a unified approach to its regulation. Indeed, even limited attempts at control have met with little success.<sup>27</sup> These results, in large part, are due to a failure of States to perceive the long-term necessity for neutral regulation without regard to specific goals or motives of the private parties. Instead, short-term political considerations have prevented the development of any law governing these relationships.

Obviously, policy considerations will always influence the activities of independent nations to a substantial degree in approaching any form of international regulation. This is true of both the decision to create such regulations and the decision to submit to them. In this area of public-private interaction, such policy questions are readily apparent. For example, Professor Taylor's activities were undertaken for reasons that most in the

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2 L. OPPENHEIM, INTERNATIONAL LAW § 298 (8th ed. H. Lauterpacht 1955). Thus, insofar as hijackings or other forms of violence are committed against a Sovereign by those private persons who contest its exercise of sovereignty, such actions are not a major departure in quality from similar actions in the past. However, insofar as these activities are attempts to influence nations other than the one whose sovereignty is challenged, the relationship to the newer form of quasi-public activity is clearer. Compare N.Y. Times, July 4, 1976, at 1, col. 7 (hijacking of airplane by terrorists to force Israel to release pro-Palestinian prisoners) with N.Y. Times, Oct. 30, 1972, at 1, col. 1 (hijacking of airplane to force Federal Republic of Germany to release Arab commandos held for slaying of Israeli athletes at 1972 Munich Olympics).

26. Classically, international law has been regarded as governing only relations among nations or international organizations. Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, [1949] I.C.J. 174; L. SOHN & T. BUERGEN-THAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 108 (1973).

27. E.g., Convention for the Suppression of Unlawful Seizure of Aircraft, done Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, has not been ratified by a number of States. Of those nations which have ratified it, a large number have done so with reservations. For the response of the United States to this lack of success, see 49 U.S.C. § 1514 (Supp. IV, 1974), authorizing the President to suspend air service to States acting in a manner inconsistent with the Convention.

West would consider beneficent. However, it is unlikely that the Soviet Union would so characterize them. Similarly, the reaction of United States officials to foreign private attempts to conduct "war crimes trials" during the conflict in Vietnam illustrates that any characterization of even this type of quasi-public international activity may be largely a political matter of "whose ox is gored."<sup>28</sup>

Quasi-public international activity has been dealt with on a case-by-case basis by States. As a result of this piecemeal approach, nations have given insufficient consideration to two major reasons underlying the adoption and enforcement of all rules of law in international relations. These are, first, the strong political interest of each nation in conducting its internal or diplomatic affairs without outside interference and, second, the need for some standard against which the propriety of such outside conduct may be measured.

The conduct of private individuals and corporations or associations can intimately affect the economic, social or political interests of all States. Therefore, the absence of law in this area poses great problems to all nations. This growing field of human activity, the future limits of which seem boundless, currently lacks any conceptual underpinnings or a clear definition of rights and duties.

When this lack of a conceptual framework and its possible impact upon nations is recognized, the need for some unified and neutral approach toward these activities becomes apparent. Without such an approach, it is unlikely that any meaningful regulation acceptable to all nations can be achieved since transitory political interests will continue to obscure the broader and deeper problem that extends to the heart of the concept of national sovereignty.

Of course, immediate policy considerations will continue to influence the activities of independent nations regardless of the development of rules of law in the quasi-public area. Nevertheless, while laws may be broken, particularly in the international field, political considerations often lead to the observance of defined legal norms. This is so because, as a matter of policy, the benefits perceived as flowing from generalized observance of these norms will ordinarily outweigh the transitory political benefits that may accrue from a breach.<sup>29</sup>

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28. See generally N.Y. Times, Feb. 19, 1967, § 6 (Magazine), at 24.

29. L. HENKIN, *HOW NATIONS BEHAVE* 31-44 (1968).

It is the combination of the potential impact of quasi-public international activities and the value of a set of consistent unified rules that makes obvious the need for international regulation in this area. *Courts of Terror* illustrates the growth of this area of activity and raises questions about the types of regulation that may be necessary. As an attempt to vindicate human rights, it underlines the difficulties inherent in any attempt to subject quasi-public international contacts to rules of law. As such, it also provides a valuable counterpoint to the publicity accorded to other less desirable forms of this activity in recent years. Perhaps this and other studies in the field will prompt a wider recognition of the need for legal regulation in this area, as well as an examination of the means by which such a rule of law might be developed and implemented. While *Courts of Terror* raises these and other questions, it provides no answers. One can only hope that some may be forthcoming in the future.