

Introduction: Guantánamo, History, and Responsibility

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A year ago an article appearing in the *New Yorker* magazine described the courage of Alberto Mora, a Navy lawyer who warned his superiors at Guantánamo Bay about the abusive treatment of prisoners. The article was written by Jane Mayer, one of the participants in the Seton Hall University School of Law's Guantánamo Teach-In's panel of journalists. At the conclusion of her essay, Mayer quoted Mora expressing his dismay at Bush Administration lawyers who seemed to be unaware of history: "I wondered if they were even familiar with the Nuremberg trials—or with the laws of war, or with the Geneva Conventions."¹

It is difficult to know just *what* the lawyers and their clients in the White House and the Departments of Defense knew about these matters, but Nuremberg seems a reasonable enough place to begin thinking about the issues which Guantánamo raises.

The judgment of the International Military Tribunal ("IMT" or "Tribunal") at Nuremberg set the modern standard of international criminal responsibility in wartime, though it hardly wrote on a blank slate. The Nuremberg judgment—indeed, the Tribunal itself—was criticized for establishing categories of criminal behavior which had no prior international standing, including crimes against humanity.² But its reliance on crimes of war and crimes against the peace (aggressive war) were firmly grounded in norms of international law contained in treaties to which most states, including Germany, were historically bound. The judgment of the IMT refers repeatedly to principles and agreements located in pre-war treaties including the Hague Conventions of 1899 and 1907, the Kellogg-Briand Pact of

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¹ Jane Mayer, *Annals of the Pentagon*, THE NEW YORKER, Feb. 27, 2006, at 41.

² See WILLIAM BOSCH, JUDGMENT ON NUREMBERG: AMERICAN ATTITUDES TOWARD THE MAJOR GERMAN WAR CRIMES TRIALS (1970); see also Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38, 43–48 (1947).

1928, the Geneva Conventions on the treatment of Prisoners of War of 1929, and others.

Since Nuremberg, of course, the number of international treaties addressing crimes of war has grown by a considerable degree, as has the number of state parties bound to their standards. And general acceptance of the need for transnational rules of warfare has developed such that hesitations about the legitimacy of the Nuremberg project may now be considered academic. But there is value in briefly reviewing the Nuremberg principles, with specific regard to international treaty obligations and the treatment of prisoners, as we begin to read a compelling series of addresses and discussions of international law and the treatment of prisoners at Guantanamo. The value for Americans, I suggest, lies in an understanding that while all four occupying powers (United States, France, Great Britain, and the Soviet Union) were equal members in the Nuremberg project, it was largely due to American insistence that the IMT was established.³

The London Agreement of 1945 and the subsequent charter which created the structure and procedure of the Nuremberg trials are primarily legal documents, setting forth matters of jurisdictional reach, due process for defendants, and so on. But Nuremberg was more than a legal proceeding, and no one involved thought otherwise. A terrible war had just been concluded which claimed the lives of millions of combatants and millions more civilians. Reports of inconceivably barbaric treatment of Jews, other minorities, and prisoners by the Third Reich were beginning to surface. Memories of ambivalence or unwillingness of the victors of World War I—especially Americans—to prosecute war criminals at the Great War's end burdened the Allies' minds.⁴ A legal proceeding was called for, certainly, but more necessarily, a *statement* had to be made which transcended the boundaries of law.

This was to be accomplished in two ways. First, the statement had to have international, if not universal, appeal. It had to speak

³ See, e.g., BRADLEY F. SMITH, *THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD, 1944–1945* (1982).

⁴ See MICHAEL MARRUS, *THE NUREMBERG WAR CRIMES TRIAL 1945–46: A DOCUMENTARY HISTORY* 10 (1997). An international “Commission of Responsibilities” was created at the 1919 Paris Peace Conference to consider the question of dealing with war crimes. *Id.* After acrimonious debate, the Commission concluded against trials regarding the commencement of war but favored a tribunal for “violations of the laws and customs of war and the laws of humanity.” *Id.* The American delegation dissented, in part because “[t]he laws and principles of humanity are not certain, varying with time, place and circumstance, and according, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity” *Id.*

not just to the emotions of the victors but to the sentiment of justice of all mankind. And second, to escape the taint of “victors’ justice,”⁵ those who sat in judgment had to proclaim their willingness to be bound by the principles of the decision in the future.

It was Justice Jackson, serving as Chief United States Prosecutor to the Tribunal, who promised to fulfill both aspirations. On leave from the Supreme Court of the United States by request of President Truman, his opening argument is memorable not only for its rhetorical brilliance but also for its strong moral tone. Upon reading it more than half of a century later, one senses his attempt to draw a line, not in the sand, but in the chronology of mankind itself. From the date of this trial, he seems to say, there will be allowed no further impunity for outrages upon humanity, even if sanctioned by state law. From the date of this trial, he proceeds, we will constantly be called upon as individuals and nations to place ourselves on one side of history or the other: there, in the past, with the men in the dock, on the side of lawlessness and tyranny; or here, on the side of civilized behavior, which will be recognized henceforth by the principles the Tribunal is being urged to impose. In fact, Justice Jackson refers to the word “civilized” or “civilization” in his opening statement no less than fourteen times. For example:

The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot stand their being repeated.

...

The real complaining party at your bar is Civilization . . . Civilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance⁶

In the same speech, Justice Jackson was no less emphatic about the prosecuting nations’ obligation to the future. In this remarkable passage, Justice Jackson distinguishes justice from vengeance, and in doing so recognizes that the former implies a duty:

⁵ Considerable legal and political ink has been spilled over this issue. See, e.g., Harold Rosenberg, *Nuremberg and the Corruption of Thought*, NEW YORK REVIEW OF BOOKS, Jan. 20, 1997, reprinted in HAROLD ROSENBERG, *THE CASE OF THE BAFFLED RADICAL* 122 (1985); SHELDON GLUECK, *THE NUREMBERG TRIAL AND AGGRESSIVE WAR* (1946).

⁶ ROBERT JACKSON, *THE NURNBERG CASE* 30–31, 94 (1947). Francis de Menthon, Chief Prosecutor for France, stated similar sentiments when he delivered his opening address two months later, referring to a crime against the spirit. MARRUS, *supra* note 4, at 91.

[I]t is hard to distinguish between the demands for a just and measured retribution and the unthinking cry for vengeance which arises from the anguish of war. It is our task, so far as humanely possible, to draw a line between the two. We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.⁷

The Tribunal's final judgment, as we know, resulted in findings of guilt and the imposition of severe sentences for most of the surviving major Nazi officials. But the judgment was not based on evidence of mere evil-doing; it was based on the conclusion that the defendants violated the letter and norms of international law. The IMT was most scornful of Germany's transparent desire to be free of international treaty obligations in general, and those which required the humane treatment of prisoners of war in particular. The judgment referred, for example, to a regulation of the German High Command, issued shortly after the invasion of the Soviet Union. It deemed Russian soldiers undeserving of protection under the 1929 Geneva Convention because the U.S.S.R. never ratified it (though Germany had), and because "Bolshevist" soldiers were not to be trusted. The regulation stated:

Bolshevism is the deadly enemy of Nazi Germany The fight against National-Socialism has become part of [the bolshevist soldier's] system. He conducts it by every means in his power: Sabotage, seditious propaganda, incendiarism, murder. The bolshevist soldier has therefore lost all claim to treatment as an honourable opponent, in accordance with the Geneva Convention.⁸

The pretext of the decree was that since the enemy soldier was untrustworthy (has any enemy been deemed otherwise?), he was unworthy of the very respect to which all captured soldiers are entitled by international law. The decree was criticized almost at once by Wilhelm Canaris, a German admiral, who was struck by its faulty logic and permission for cruelty (Canaris later divorced himself from the Nazi enterprise and was implicated in an unsuccessful attempt to overthrow Hitler). Canaris argued that whether or not Russia signed the Geneva accords, general principles of international law have long

⁷ JACKSON, *supra* note 6, at 33–34.

⁸ The Avalon Project at Yale Law School, Nazi Conspiracy and Aggression Volume IV Doc. No. 1519-PS, http://www.yale.edu/lawweb/avalon/imt/document/nca_vol4/1519-ps.htm (last visited Mar. 5, 2007); see also *Judicial Decisions Involving Questions of International Law—International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 226 (1947) [hereinafter *Judgment and Sentences*].

required the humane treatment of prisoners of war, and there was no compelling reason for Germany to act otherwise.⁹ But Canaris's objection failed to carry the day. A week later, a reply to Canaris was written by Wilhelm Keitel, Chief of the German Armed Forces. Keitel answered Canaris's objection with a chilling syllogism:

The objections rise from the military concept of chivalrous warfare. This [war] is the destruction of an ideology. Therefore I approve and back the measures.¹⁰

The Tribunal had no tolerance for such thinking. Geneva was not about chivalry, and all wars are expressed in terms of ideology. Keitel was later sentenced to death by the IMT for commission of war crimes. In justifying its decision, not only against Keitel but other defendants as well, the IMT repeatedly condemned the Nazis' hollow defense of its abrogation of international law. The judgment states:

Everything [was] made subordinate to the overmastering dictates of war. Rules, regulations, assurances, and treaties all alike [were] of no moment; and so, freed from the restraining influence of international law, . . . War Crimes were committed when and wherever the Fuhrer and his close associates thought them to be advantageous.¹¹

This much is commonly understood. What is less well-known is that a subsequent series of trials was also held at Nuremberg in which less notorious Nazi officials and those who collaborated with them were prosecuted pursuant to Council Control Law No. 10. ("C.C. Law 10").¹² This law was created at the same time as the charter for the IMT, by the same four nations, and for the same purpose, but the trials it authorized were to be conducted by each nation in its own zone of German occupation. It thus fell to the French, British, Soviet, and American occupying forces to select who was to be prosecuted and judged by each nation. These "successor" trials, which occurred from 1946 to 1949, are of interest to us today because the trials in the American sector constituted a wholly American endeavor. The United States could have decided to prosecute no one, but instead selected an array of individuals whose culpability was more complex than, say, Göring or Speer. They were not architects of evil designs but persons without whose cooperation the designs could not have

⁹ *Judgment and Sentences*, *supra* note 8, at 229.

¹⁰ *Id.* at 229, 282.

¹¹ *Id.* at 224.

¹² TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 (1949).

been fulfilled.¹³ Eighty-six individuals were prosecuted by the Americans pursuant to C.C. Law 10, including judges, lawyers, military commanders, doctors, cabinet ministers, industrialists (from Krupp and I.G. Farben), and death squad commandos. Fifteen were sentenced to death and nineteen to life in prison.¹⁴ No one can say of the successor trials that the United States went along for the international ride.

Like the trials of the major war criminals by the IMT, the American trials held under authority of C.C. Law 10 paid close attention to German abrogation or dismissal of pre-war international treaties and violation of humane standards for the treatment of prisoners. For example, in *United States v. Krupp*,¹⁵ the court authorized by C.C. Law 10 referred to a decree of the Reich which swiftly dispatched the requirements of Hague Convention. The decree read:

The regulations of the Hague Convention on Land Warfare which concern the administration of a country occupied by a foreign belligerent power are not applicable, since the U.S.S.R. is to be considered dissolved, and therefore the Reich has the obligation of exercising all governmental and other sovereign functions in the interest of the country's inhabitants. Therefore, any measures are permitted which the German administration decrees necessary and suitable for the execution of this comprehensive plan.¹⁶

Note: the defeated nation is no longer a nation, "therefore, any measures are permitted."¹⁷ According to one of the American judges who sat in judgment on the *Krupp* case, "this policy, that the Hague Conventions were not applicable at all in Russia, was openly proclaimed and there was no attempt to keep it secret not to comply with the requirements of international law."¹⁸

¹³ Telford Taylor, Chief Prosecutor for the United States in these trials, states: "The responsibility for the selection of defendants in the Nuernberg Trials under Law No. 10 was mine alone No one has been indicted . . . unless, in my judgment, there appeared to be substantial evidence of criminal conduct under accepted principles of international penal law." *Id.* at 85.

¹⁴ FRANK BUSHNER, *THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946-1955* 175-78 (1989). Some of the non-death sentences were reduced in 1951. *Id.*

¹⁵ 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10, *THE KRUPP CASE* (1951).

¹⁶ *Id.* at 1471.

¹⁷ *Id.*

¹⁸ *Id.* (Wilkins, J., dissenting). The dissent was from the acquittal of the defendants of the charge of spoliation in occupied territories, not from the finding of guilt of the more severe charges of crimes against the peace and the use of slave and concentration camp labor. *Id.*

The most interesting of the C.C. Law 10 cases, in light of the Teach-In on Guantánamo, is what is called the *Justice Case*, in which fourteen former German judges and prosecutors were charged with violations of the Hague Convention of 1907, the Geneva Prisoner of War Convention of 1929 and, as stated in the indictment, “the laws and customs of war, the general principles of criminal law derived from the criminal laws of all civilized nations, [and] the internal penal laws of the countries in which such crimes were committed.”¹⁹

The *Justice Case* could have proved to be a delicate endeavor: judges judging judges; laws trumping laws.²⁰ But the court did not have to engage in esoteric interpretations or legal quibbling. The Nazi decrees created or enforced by the defendants were patently unjust. Consider the “Night and Fog” (*Nacht und Nebel*) decree, examined in the *Justice Case*. (The decree has some relevance to the procedures discussed at the Teach-In. The detainees at Guantanamo were seized under dubious circumstances, sometimes betrayed or sold for bounty, flown across a continent and ocean, held incommunicado, without access to friends or relatives or witnesses, and “tried” in Cuba by their captors with secret evidence and no assistance of counsel.) The indictment in the *Justice Case* charged the defendants with participating in the execution of *Nacht und Nebel* project,

whereby civilians of occupied territories who had been accused of crimes of resistance against occupying forces were spirited away for secret trial by certain Special Courts of the Justice Ministry within the Reich, in the course of which the victims’ whereabouts, trial, and subsequent disposition were kept completely secret, thus serving the dual purpose of terrorizing the victims’ relatives and associates and barring recourse to any evidence, witnesses, or counsel for defense. The accused was not informed of the disposition of his case, and in almost every instance those who were acquitted or who had served their sentences were handed over by the Justice Ministry to the Gestapo for “protective custody” for the duration of the war.²¹

The American Tribunal found ten of the fourteen defendants guilty. The tribunal held that “[a]ll . . . who took part in enforcing or carrying it out knew that its enforcement violated international law of

¹⁹ 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10, THE JUSTICE CASE 22–23 (1951) [hereinafter THE JUSTICE CASE].

²⁰ See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) (debating whether or not Nazi law was “law”).

²¹ THE JUSTICE CASE, *supra* note 19, at 21.

war. They also knew, which was evident from the language of the decree, that it was a hard, cruel, and inhumane plan²²

This review of events which occurred in the 1940s in Europe has taken a long detour in time and space from Guantánamo Bay. But we could do worse than study this history, and ask if we have forgotten what Justice Jackson said we must never forget: that the record on which we judge the Nuremberg defendants today is the record on which history will judge us tomorrow. We could ask if we have poisoned the chalice which he swore we were bound by justice to raise to our own lips.

It was my pleasure to have participated in the organization of this Teach-In, the genealogy of which takes us back to an earlier war, which also aroused questions of law and human decency. So it is good that this program is being broadcast to hundreds of colleges, seminaries, and law schools, as our nation's future depends upon those who ask hard questions.

²² *Id.* at 1038.