

The Nuremberg Precedent: When Lawyers Are War Criminals

by Nancy and Ed Spannaus

With the current intensification of popular sentiment favoring the impeachment of President George Bush and Vice President Dick Cheney, it is crucial to focus on their most serious crimes and offenses against the U.S. Constitution. Certainly at the top of any such bill of impeachment, should be the waging of aggressive war, and conspiring to commit war crimes, offenses for which top German military and civilian officials were tried and convicted at Nuremberg in 1946, with the United States taking the leading role in establishing such crimes as offenses against humanity and international law which require the the perpetrators be brought to justice.

As we and others have repeatedly stated, those policy-makers and lawyers who formulated the policies which authorized the torture and abuse of prisoners, are more culpable than the lower-level personnel who implemented such policies. We set forth the Nuremberg precedents for this in an interview with international law specialist Scott Horton, in our Jan. 28, 2005 issue.

Mr. Horton elaborated this further in a speech delivered to a conference on the Nuremberg War Crimes Trials, sponsored by the American Society for International Law and held at Bowling Green, Ohio, on Oct. 7. Mr. Horton's complete remarks can be found in an Oct. 8 posting on <http://balkin.blogspot.com>.

Horton dedicated his remarks to the memory of Helmut James von Moltke, a staff lawyer in the German Defense Ministry during the Second World War, who not only opposed the Nazi war-crimes policies, but envisioned prosecution and punishment of the politicians and lawyers who subverted the law to justify war crimes.

Horton focussed on the case *United States vs. Josef Altstoetter, Wilhelm von Ammann, et al.*, in which, *inter alia*, two Justice Ministry lawyers were tried and convicted on charges which included the drafting of the December 1941 "Night and Fog Decree" (*Nacht-und Nebelerlass*), authorizing special procedures in German-occupied territories in which political suspects could be detained, tried in secret court proceedings, and in many cases, executed. Even though these special procedures violated the Hague and (pre-war) Geneva Conventions, the Justice Ministry lawyers contended

that these Conventions did not apply because their adversaries did not adhere to them.

This argument is precisely the same as that used by Justice Department lawyers such as John Yoo, Alberto Gonzales, and William Haynes in pushing through the Bush Administration's torture policy. Should they claim that they are acting "under orders," that simply underscores the fact that the very top layers of the Bush Administration—especially Vice-President Cheney and Secretary of Defense Donald Rumsfeld—are culpable for defining policies that defy the Nuremberg principles.

Following are excerpts from Mr. Horton's remarks, picking up from his reporting of the convictions of two Justice Ministry lawyers for crimes against humanity and war crimes.

Scott Horton: The Nazi Paradigm

Here are excerpts from Scott Horton's address to the above-mentioned conference on the Nuremberg War Crimes Trials Oct. 7.

Between the Fall of 2001 and early 2004, U.S. Government lawyers engaged many of the same issues and took decisions very close to those taken by von Ammann and his colleagues in the German Justice Department. In particular, the *Nacht-und Nebelerlass* has a close cousin in the United States extraordinary rendition project on a policy plane, though we should quickly note two essential distinctions: the total throughput in human terms has been dozens, not thousands of persons, and it has not involved death sentences, though not a few persons (to be exact: 98) have died in incarceration under circumstances suggesting that torture was involved, if they were not indeed tortured to death. These lawyers adopted a mantra, namely, to quote Alberto Gonzales, that the Geneva Conventions were "quaint" and "obsolete," and did not apply to a "new kind of warfare."

In so doing, they thoughtlessly moved in the same paths traversed by lawyers in Berlin 60 years earlier. Indeed, at

the General Staff trial, the world public learned for the first time of the valiant struggle of Moltke when one of his memoranda was put into evidence. It pleaded in forceful terms for respect of the Geneva Convention rights of enemy soldiers, civilians, and irregular combatants on the East Front, mustering a series of arguments that bear remarkable similarity to a memorandum sent by Colin Powell to President Bush 60 years later. And in the margins, in the unmistakable pencil scrawl of Field Marshall Keitel, were found the thoughts that these rules were “quaint” and “obsolete,” they reflected the “outmoded notions of chivalric warfare.” This was cited as an aggravating factor justifying a sentence of death against Keitel.

The Bush Administration apparently assumed that the court system would toe the political line they had drawn. It was clearly taken by surprise when the Supreme Court, in *Hamdan*, knocked the legal props out from under the Administration’s detainee policy, validating the positions taken by the senior legal officers of the nation’s uniformed military services and the State Department, which had opposed the Administration on these grounds. The *Hamdan* decision presents a straightforward interpretation of the Geneva Conventions, finding that Common Article 3 was applicable to detainees in the War on Terror who did not qualify for prisoner of war protections. This position is also identical to the view embraced by the organized bar in the United States in 2003, in a series of reports that warned the Administration that its legal reasoning was both radical and isolated. But the most striking aspect of the Court’s opinion was its forceful and repeated references to the War Crimes Act of 1996. There is little doubt that the Court was concerned that the Administration’s policies were not just inconsistent with Geneva, but in fact potentially criminal under American law.

The Administration’s response was to propose the Military Commissions Act of 2006, the thrust of which was to attempt to amend the War Crimes Act into oblivion and to make the amendment retroactive. . . .

I want to ask today: What has this legislation done to the legacy of Nuremberg? Has it granted impunity to persons who committed war crimes? Is that impunity effective, and might it have unintended consequences?

At Nuremberg, Justice [Robert] Jackson promised that this process would not be “victor’s justice.” He said, “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 lips as well.” Powerful words. A moral compact. Did the Bush Administration seek to repudiate Jackson’s commitment? This can be answered quite clearly: Yes. But did they succeed? That is less clear. . . .

The Military Commissions Act seeks to accomplish its objective of granting impunity through three tools. First, it redefines “war crimes” into a series of specifically chargeable offenses, of which two, “torture” and “cruel treatment” are

most important for these purposes. Second, it makes the re-statement of these crimes retroactive to Sept. 11, 2001. Consequently, a series of criminal offenses under the War Crimes Act will disappear retroactively when the Act goes into force. Third, it strips courts of jurisdiction over *habeas corpus* petitions and forbids litigants to cite the Geneva Conventions and related international and foreign law in those courts, in an effort to blind the courts to the law which the Constitution obligates them to enforce.

The initial draft makes clear that the White House sought impunity for crimes arising as a result of the use of three techniques that the Bush Administration (and, from the remarkable wording of one of Bush’s press conferences, Bush himself) authorized, and which constitute grave breaches under Common Article 3: waterboarding, long-time standing (or as it was called by its NKVD inventors, in Russian: *stoika*) and hypothermia or cold cell. The use of these techniques is a criminal act. The purported authorization of these techniques is a criminal act. The larger effort to employ them constitutes a joint criminal enterprise.

The Act does not alter the fact that these practices are outlawed by Common Article 3. However, by creating a series of specifically chargeable crimes that weave and bob through the historical offenses, the drafters apparently seek to make it more difficult to prosecute these offenses in U.S. courts.

At the core, we have this question: Are waterboarding, hypothermia, and long-time standing “cruel treatment” as the crime is identified in the Act? And on this point, the legislation’s sponsors Senators [John] Warner, [John] McCain, and [Lindsey] Graham, say “yes,” while the White House says “no.” A fair reading would say that the Act creates ambiguity where none previously existed. However, a close comparison of the White House’s original proposal with the compromise version that resulted clearly undermines the White House’s claims, for the changes seem clearly keyed to forbidding the questioned tactics.

So where do we go from here? Unfortunately, its track record up to this point suggests that the Administration will exploit any ambiguity to work its will. Consequently, the burden will shortly fall on Administration lawyers, who will be challenged to pick their path: Will it be that of Moltke and Jackson, or will they adhere to the twisted course of [David] Addington, Yoo, and Gonzales? That’s a stark choice, and one that entails absolute moral clarity.

If the consequence of the Act is to immunize those who authorized these techniques from prosecution, is that lawful? The U.S. position, articulated most recently in connection with Yugoslavia’s efforts to immunize its military leaders, was that any such act would only provide evidence of a broader conspiracy to commit war crimes. Consequently, the grant of immunity is ineffective in the contemplation of the international community; moreover, those involved in purporting to grant immunity may thereby be roped into a charged joint criminal enterprise.