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WHEN LAWYERS ARE WAR CRIMINALS

By Scott Horton

To the memory of Helmuth James von Moltke

> "In France, innumerable summary executions occur, even as I sit here writing. Each day certainly more than a thousand people are killed, and thousands of German men experience murder as a matter of routine. And yet all of that is child's play compared to what's going on in Poland and Russia. Can I learn about this and just sit at the table in my heated apartment and drink tea? Don't I establish my complicity simply by doing nothing? What will I say in the future, when someone asks me: and what did you do during this time?"
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> — Helmuth von Moltke, in a letter to his wife, October 19, 1941

Talking about the Nuremberg Tribunals inevitably seems to involve "bad Germans," so I want to talk about a man who deserves to be remembered in the course of this meeting. He was more than merely a "good German;" indeed, he was man whose powerful moral example serves as a model for all of us today, a man who represents the ethical pinnacle of our profession. And the strange thing is that he was a staff lawyer at the German defense ministry during the Second World War. His name was Helmuth von Moltke. His tenacious advocacy of the Geneva and Hague Conventions in the face of withering criticism and suspicion from the Nazi hierarchy saved the lives of thousands of civilians and prisoners, particularly on the Eastern Front and in the Balkans. It also led inextricably to his execution at the hands of the Nazis in 1945.

Disgusted by an atmosphere in which law was constantly subverted to political expedience, Moltke envisioned harsh prosecutions of politicians and lawyers who engaged in such antics as an essential purgative. In a draft dated June 14, 1943, Moltke envisioned a special international criminal tribunal to be convened at the conclusion of the Second World War for the purpose of bringing to justice those who violated the laws of war. Lest there be any doubt, it was principally the men he worked with every day in the Wehrmacht whose punishment he foresaw. In view of

mounting evidence of a crime of genocide, and out of concern that international customary law failed yet to provide a medium for its punishment, he advocated an expansive posture for prosecution. “Any person who violates the essential principles of divine or natural law, of international law, or of international customary law in such a fashion that makes clear that he contemptuously disregards the binding nature of such law shall be punished,” he wrote in a plan for a post-war tribunal in 1943.

This conference has turned on a great deal of discussion of Robert Jackson and his visionary role in the Nuremberg process, but it is truly remarkably that so much of Jackson's vision was committed to paper two years earlier, and its author was not only a German, but the scion of his nation's most prominent military family.

I come to the example of Moltke for another reason, namely that he very properly puts the emphasis not on the simple soldiers who invariably operate the weaponry of war, but on those who make the policies that drive their conduct. And in that process, his stern gaze falls first on the lawyers. In a proper society, the lawyers are the guardians of law, and in times of war, their role becomes solemn. Moltke challenges us to test the conduct of the lawyers. Do they show fidelity to the law? Do they recognize that the law of armed conflict, with its protections for disarmed combatants, for civilians and for detainees, reflects a particularly powerful type of law – as Jackson said “the basic building blocks of civilization”? Do they appreciate that in this area of law, above all others, the usual lawyerly tricks of dicing and splicing, of sophist subversion, cannot be tolerated?

These are questions Moltke asked. They are questions that the U.S.-led prosecution team in Nuremberg asked. They are questions that Americans should be asking today about the conduct of government lawyers who have seriously wounded, if not destroyed, the Geneva system.

For this issue, one Nuremberg case forms the key precedent: United States v. Altstoetter, also called the Reich Justice Ministry case. That case stands for some simple propositions. One of them is that lawyers who dispense bad advice about law of armed conflict, and whose advice predictably leads to the death or mistreatment of prisoners, are war criminals, chargeable with potentially capital offenses. Another is that cute lawyerly evasions and gimmicks, so commonly indulged in other areas of the law, will not be tolerated on fundamental questions of law of armed conflict relating to the protection of civilians and detainees. In other words, lawyers are not permitted to get it wrong.

United States v. Altstoetter: Lawyers As War Criminals Concerned about the level of resistance faced by German troops in the occupied territories, Hitler instructed Field Marshall Keitel to issue a special decree authorizing extraordinary measures pursuant to which political suspects would simply “disappear” to special detention facilities and might face summary court proceedings. The death penalty appears as the punishment most frequently contemplated. The decree, issued on the same day the Japanese attacked Pearl Harbor (December 7, 1941) and as the German drive on

Moscow stalled and the Soviet counteroffensive had begun, is known as the "Night and Fog Decree" (*Nacht und Nebelerlass*), a reference to the covert action it authorized. Contemporaneous documents make clear that it was motivated by the high level of casualties German soldiers were sustaining behind the front in occupied territory. Pacification of this territory was given a high priority.

A team of Justice Department lawyers worked with Keitel and his team at OKW on the drafting of the decree and further steps for its implementation. This included a series of highly particularized rules setting out how such detainees were to be treated by police, justice officials and others. The rules specified how such individuals would be permitted to make wills, issue final letters of farewell, what would be done with children born to detainees and how their death could be recorded in the registry. Other lawyers prepared parallel orders creating special secret courts and detention facilities for those interned under the *Nacht und Nebelerlass*. These courts were crafted under domestic German law and thus constituted a projection of German law into the occupied territories.

These arrangements flouted the protections of the Hague Convention, specifically the right of "family honor, lives of persons" and the right "to be judged under their own laws." To the extent applied against uniformed service personnel, they also violated the Geneva Convention on Prisoners of War of 1929. However, the Justice Department lawyers advanced the view that the Hague and Geneva Conventions were inapplicable because their adversaries did not subscribe to these documents. This decree was applied brutally, and with particular force in France. A total of at least 7,000 persons were detained; a large number of them perished.

The Justice Department lawyers justified these acts as steps available to an occupying power in order to protect its troops against terrorist acts or insurgency. Further, the occupied territories could be divided, roughly, into three categories: (i) areas directly incorporated into the German State (for instance, Austria, Alsace-Lorraine, the Eupen-Malmedy region of Belgium, Danzig and portions of Poland); (ii) areas under German occupation and direct administration (such as Bohemia and Moravia); and (iii) areas under puppet regimes (such as Hungary and Slovakia). As for the first, they asserted the right to treat persons found within those territories under German law. As to the second, they claimed the right as occupier to promulgate new rules and orders, and to derive them from Germany. As to the third, they relied on the acquiescence of regimes like Vichy France and Hungary. Their positions on these points were at least colorable from a legal perspective.

The Justice Department lawyers were indicted and charged with crimes against humanity and war crimes arising out of the issuance and implementation of the *Nacht und Nebelerlass*. The United States charged that as lawyers, "not farmers or factory workers," they must have recognized that their technical justifications for avoiding the application of the Hague and Geneva Conventions were unavailing, because these conventions were "recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war." That is to say, they were customary

international law. Further, the United States charged, this decree "would probably cause the death of human beings," grounding a charge of homicidal intent.

After trial, the two principal Justice Department lawyers, one a deputy chief of the criminal division, were convicted and sentenced to ten years' imprisonment, less time served. This judgment clearly established the concept of liability of the authors of bureaucratic policies that breach basic rules of the Hague and Geneva Conventions for the consequences that predictably flow therefrom. Moreover, it establishes a particularly perilous standard of liability for government attorneys who adopt a dismissive attitude towards international humanitarian law.

THE PRESENT CRISIS

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 plain, 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 sixty 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 sixty years later. And in the margins, in the unmistakable pencil scrawl of Field Marshall Keitel, were found the words "quaint" and "obsolete." This was cited as an aggravating factor justifying a sentence of the 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. The Hamdan decision presents a straight-forward 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. When it became clear that the Administration could not muster a majority for this legislation in the Senate, the Administration entered into a compromise with Senators McCain, Warner and Graham, who had specifically flagged and objected to this effort.

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 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. But before getting to that point, I want to deconstruct some myths that the Administration has generated to obscure their entire process.

THE CAMOUFLAGE

In announcing the Military Commissions Act, President Bush insisted that he needed the legislation to lay to rest the concerns of 400-500 professional interrogators. These loyal citizens were, he said, concerned that the Supreme Court in Hamdan had called into question the legality of what he called "the Program," a set of "alternative interrogation procedures" which were developed and implemented by his Administration. This was perhaps the most fact-free speech Bush has ever delivered. But it contained three fundamental misrepresentations.

First, he suggested that the interrogators faced the prospect of prosecution under the War Crimes Act. In fact, as a matter of long-established policy, U.S. service personnel are prosecuted under the Uniform Code of Military Justice and not the War Crimes Act. The CIA personnel and private contractors involved in this process likewise faced no prosecution risk under the WCA because of a memorandum of agreement between the Department of Justice, Department of Defense and CIA done by Michael Chertoff when he headed the Criminal Division. Chertoff undertook that as long as a set of scheduled techniques were used, which are described on an appended memorandum he prepared with Alice Fischer, no prosecutions would be undertaken for death, dismemberment or assaults. Consequently, only one group feared prosecution under the War Crimes Act, and that is the policy makers: John

Yoo, Jay Bybee, Alberto Gonzales, David Addington, Jim Haynes, and a host of others. This measure was pushed at their initiative, and for their benefit. This is the first dark secret of this measure.

Second, Bush revealed that there was a new "Program," of "extraordinary procedures" that he, personally, had been advised of and had approved. The Program, he complained, had been stopped as a result of the decision in Hamdan. This is part of a general political strategy of spotlighting judges and accusing them of politics when they are bravely enforcing the law. But the facts here are different: the Program was always against the law, and the U.S. Army's own interrogation manuals stated just that. As the current issue of Time reports, and I have corroborated from my own sources, the use of these techniques was suspended when even the President's own lawyers, and I am talking about political appointees in the DOJ as well as the interim general counsel of the CIA, concluded that it was unlawful. They were propelled to this conclusion not by Hamdan, but a half year earlier, by the passage of the McCain Amendment, which banned cruel, inhuman and degrading treatment as well as torture. Placing the blame on the Court was the second lie.

Third – and this is the darkest lie of all because it impugns the integrity of American service personnel – Bush stated that the reach for highly coercive new techniques came at the instance of the interrogators themselves. But in fact, we now know from an array of leaked documents that these techniques were rammed down their throats, often over courageous opposition, both within the CIA and the uniformed services. When the career professionals refused, DOJ lawyers were enlisted, led by figures like Alberto Gonzales and John Yoo, to override their objections by issuing formal opinions backing orders from the White House to use abusive techniques. Consequently, when we allocate moral and legal culpability for the deaths, torment and scarred lives that this process has produced, it is the torture memo writers who surely deserve the biggest blame. It was their professional duty to say "no," but instead when asked whether they would give a green light to war crimes, they responded by doing their master's unthinking bidding.

IMPUNITY

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 restatement of these crimes retroactive to September 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 working of one of Bush's press conferences, Bush himself) authorized and which constitute grave breaches under Common Article 3: water-boarding, 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 plain intent of the drafters is to make it more difficult to prosecute these offenses in U.S. courts.

At the core, we have this question: are water-boarding, hypothermia and long-time standing "cruel treatment" as the crime is identified in the Act? And on this point, the legislation's sponsors – Senators Warner, McCain and 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 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.

Clearly there will be no prosecutions in the U.S., certainly not under Attorney General Alberto Gonzales, who would figure near the top of anyone's list of criminal conspirators and whose name has already appeared in a criminal indictment relating to Abu Ghraib. But what about universal jurisdiction processes? Spain, France, Belgium, Germany, Switzerland and Italy all have universal jurisdiction statutes. Germany has already entertained a complaint against Rumsfeld, Tenet and others over detainee abuse questions. That complaint was dismissed without prejudice by the German Federal Prosecutor. In his opinion, the Federal Prosecutor stated that the first

predicate of the statute had not been met since there was no showing that a prosecution for the crimes shown in the home nation of the defendants would not occur. Considering the political and military position of the United States, the invocation of a universal jurisdiction statute against sitting officers of the government has to be viewed as more than an uphill task. But I think passage of the Act has just made it a whole lot easier.

CONCLUSION

The legacy of Nuremberg and the solemn undertaking that Justice Jackson gave for the United States at the opening session, are under assault by the Bush Administration, which has embraced a radical world view that rests on a cult of power and a disdain for law. And fundamentally, this Administration has a notorious allergy against accountability in any form. But this conference is evidence that the spirit of Nuremberg has not been extinguished in the United States. And indeed, the flickering candle that was lit at Nuremberg has developed into principles which form the heart of the international legal order. We bear witness to those principles with this conference.

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