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Nuremberg Sensibility: Telford Taylor's Memoir of the Nuremberg Trials

Kenneth Anderson

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Book Review

NUREMBERG SENSIBILITY: TELFORD TAYLOR'S MEMOIR OF THE NUREMBERG TRIALS

The Anatomy of the Nuremburg Trials.
By Telford Taylor.

New York: Alfred A. Knopf, 1992. Pp. 703. $35.00, cloth: $17.95, paper (New York: Little, Brown & Co., 1992).

Reviewed by
Kenneth Anderson [FNa1]

The leitmotiv of Goering's defense at the Nuremberg trials returned time and time again to this theme: "The victor will always be the judge, and the vanquished will always be the accused."

-Albert Camus, The Rebel

That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to reason.

-Justice Robert H. Jackson

Introduction

Justice Robert H. Jackson's opening statement at the Nuremberg trial has justly been characterized as one of the greatest orations in modern juristic literature. Yet behind its rhetorical power lies a fervent anxiety: a desire to silence the skeptical voices whispering that the Nuremberg trials were just the tarted-up revenge to which Camus alludes.

Nuremberg was indeed the profoundest tribute of power to reason, as Jackson claimed, but of what did the tribute consist? Jackson said it was to "stay the hand of vengeance," so to turn vengeance into something else in the instant before the hand falls. Vengeance, therefore, becomes justice by virtue of a pause: a pause in which the partial becomes impartial. The action that had seemed inevitable becomes **282* suddenly, for a moment, contingent. A pause, a moment, a space of time, a gap in the historical action: this was the tribute that constituted Nuremberg. It resolves the skeptical anxiety that the trial was

only about vengeance.

Telford Taylor's splendid memoir of the Nuremberg trial examines this pause. More precisely, The Anatomy of the Nuremberg Trials is an examination of the interior of that pause, its inner architecture. Taylor was a chief deputy prosecutor in the American team led by Jackson, and the chief American prosecutor in subsequent trials of war criminals also held at Nuremberg. Drawing on this experience, Taylor presents four major, interwoven themes: a discussion of the laws of war that is both accessible to the non-lawyer and interesting to the specialist; an account of the trial itself from the standpoint of a participant appreciative of its human drama and legal complexity; a private assessment of the legacy of Nuremberg; and, most important, a detailed portrait of how the war-crimes community lived and interacted in Nuremberg during the years 1945-1946.

This is not to say that other works on Nuremberg have concentrated exclusively on the trial or the defendants, or that they have not looked into the lives of the key players at the trial. However, insofar as the other accounts have examined the people who participated at Nuremberg, they have examined personality-that is, individuals-and have sought to assess their contributions to history. Taylor, by contrast, succeeds in re-creating the larger community that staged the trial: the people and their daily interactions. This task is easier for him, having been in Nuremberg throughout the trials, than for some other commentators. He portrays the Nuremberg community in the goings-on of minor players: clerks and translators and motor pool drivers doing their jobs, the second-tier lawyers, the staff counsel, and the Great and Good, who were, in their own estimation, Making History. In effect, Taylor recreates the sensibility of Nuremberg-by which I mean he recreates the tone, emotions, and emotional perceptions of the trial.

Working with admirable energy in his mid-eighties, Taylor has written a true memoir. It is neither an historian's magisterial summation of Nuremberg, a Theory of Everything, nor a Ph.D. dissertation by a breathless young scholar looking to make a splash. Both seek to exaggerate, often correctly but sometimes not, their subject matter. In contrast, The Anatomy is the work of a man looking back across the distance of a long life, with modesty, probity, and spare humor, his judgment seasoned but undimmed by the passing decades. He seeks neither to exaggerate nor to diminish, but to memorialize what happened, and what it was like and felt like. No matter how well-informed on law, history, and politics, and no matter how authoritative the scholarship, The Anatomy is still a memoir. Taylor understands instinctively*283 that to be readable, a memoir must be modest. The Anatomy displays modesty, sympathy, and engagement in abundance.

One might appreciate Taylor's perspective but consider it inconsequential, merely a matter of human interest. One might believe that this is the stuff of magazine stories, not of deep analysis. But I think this is wrong. The Anatomy is timely and uniquely important because the sensibility of the war crimes tribunal is once again at issue-this time, in the matter of the international tribunal established by the Security Council to try war crimes in the former Yugoslavia. As of this writing, the Yugoslavia tribunal appears to be in deep logistical trouble, lacking defendants, a serious prosecutor, court-defensible

evidence, investigatory resources, cooperation, and political will. [FN1] I shall argue that these failures arise not just from incompetence or even from lack of political will-practicalities-but also because the promoters of Yugoslavia's tribunal have misunderstood the sensibility of Nuremberg while attempting to duplicate Nuremberg's legal forms.

I.

I first discovered The Anatomy in the form of bound galleys, given to me by Aryeh Neier, then Executive Director of the New York-based Human Rights Watch. He thrust them into my hands shortly before I was to depart for Iraqi Kurdistan, via Turkey, in the spring of 1992. I tried to muster some enthusiasm, but in truth, they weighed a lot, and I already had one large nonfiction tome to read during this several months-long mission to a place without mail, telephone, fax, and, frequently, electricity.

I was mission leader of a team of scientists going to Iraqi Kurdistan, under the sponsorship of Human Rights Watch and the Boston-based Physicians for Human Rights, to unearth mass graves of Kurds killed by Saddam Hussein in the infamous Anfal campaign of 1988. The scientists were anthropologists and archaeologists experienced in forensic work-determining causes and manners of death from physical evidence, such as skeletons and artifacts. They were a highly skilled group from around the world. They had previously excavated the skeletal remains of victims of the “dirty war” in Argentina, and later had worked in Chile, the Philippines, Guatemala, and El Salvador.

In the end, I took the galleys with me. It was at once appropriate and strange to read them by night in the village of Koreme, in the hills beneath the great mountains that marked the Turkish border. By day, we were slowly, painstakingly unearthing the remains of twenty-**284* six of Koreme's men and boys, who lay in two pits at the edge of the village. [FN2]

Koreme, like so many other Kurdish villages, had been systematically demolished by special Iraqi Army teams. Its houses had been bulldozed and its school and mosque dynamited; most of the village men had been executed and the remainder sent south, never to be seen again. The women, children, and old men had been dumped into camps without any real provision of food or water, where they died by the thousands from hunger and exposure. The physical destruction of Koreme, however, did not take place in the course of battle: it was razed after it had been emptied of its inhabitants-to wipe out the fact that anyone had lived there at all.

The village well was poured over with cement; even the rubble of the school, which the implosive charges of the demolition teams had laid out in neat, straight lines, was booby trapped with mines. The team archaeologist had to watch for trip wires as he mapped out the remains of Koreme. Still, nature had its own way of preserving the traces of life. In springtime, in the well-watered mountain valleys of Kurdistan, we found irregular glades of wildflowers, especially Queen Anne's lace, which grows in disturbed earth marking the places where the villages stood.

The systematic destruction of Koreme inevitably brought to mind the destruction of the village of Lidice in World War II, one of the "crimes against humanity" presented at Nuremberg. Indeed, I could find scarcely any difference between Albert Camus' epitaph for Lidice and the circumstances of organized ruin in Koreme:

> Until [Lidice], there were supposedly only two possible attitudes for a conqueror toward a village that was considered rebellious. Either calculated repression and the cold-blooded execution of hostages, or a savage and necessarily brief sack by enraged soldiers. Lidice was destroyed by both methods simultaneously.... Not only were all the houses burned to the ground, the hundred and seventy-four men of the village shot, the two hundred and three women deported, and the three hundred children transferred elsewhere to be educated in the religion of the Fuhrer, but special teams spent months at work leveling the terrain with dynamite, destroying the very stones, filling in the village pond, and finally diverting the course of the river. After that, Lidice was really nothing more than a mere possibility.... To make assurance doubly ***285** sure, the cemetery was emptied of its dead, who might have been a perpetual reminder that once something existed in this place. [FN3]

Our team in Kurdistan was investigating the same crime that preoccupied Nuremberg: genocide. [FN4] We plotted graphs to identify where shell casings had fallen from the firing squad, and took soil samples from a neighboring village to show that it had been bombarded, as the villagers said, with chemical weapons. In making this collection of physical evidence, we sought to establish incontrovertible proof, forensic evidence that would be admissible in a real court of law.

Because I am a lawyer and not a scientist, my task as a member of the team was to advise the investigators of the legal rules of evidence and to interview village survivors. In this role, I watched with considerable respect as the team's anthropologists and archaeologists unearthed the four year-old mass graves, centimeter by centimeter, with the same technique and care that they would spend on a 2000 year-old village. I watched with equal respect and fascination as the anthropologists took the commingled bones and, laying them out in the morgue of the closest town hospital, painstakingly reassembled the twenty-six skeletons to give an astonishingly detailed account of the manner of death.

Over the course of these months in the field, I became aware of a parallel between what I was watching unfold around me at Koreme and what I was reading at night in Taylor's book. The work of the scientists was exacting and technical, and required great care and skill. They excavated with paintbrushes and toothbrushes; in the morgue, they used specialized reference works and complicated tests. The shell casings were collected and plotted; an expert in the United States would examine them through a microscope, one at a time, to identify the hammer mechanisms of the individual rifles. It was hard work, requiring patience and concentration, often under a hot sun. Often it was tedious, detail-oriented, and technical. Discussions were about the angles at which bullets had entered

skeletal structures and the patterns of bone fracture. It was not dramatic. It was not glamorous.

*286 II.

The practice of law, and especially the preparation of a criminal trial, is also rarely glamorous or dramatic. This is a homely truth, but it is also a truth about the Nuremberg trial.

I recognized this truth in the course of reading The Anatomy night after night in Kurdistan: tedium is a constant in Taylor's frank evocation of Nuremberg. I do not mean by "tedium" that the work was unimportant or lacked the technician's interest in legal process-the minutiae that we lawyers regard as craftmanship. On the contrary, Nuremberg was full of the basic, technical elements of "lawyering." Much of it was boring and dull, and certainly unglamorous.

At the Nuremberg Taylor describes, lawyers pored over thousands of pages of documents, searching for indicators of genocidal intent, evidence of conspiracy to make aggressive war, and proofs of war crimes. They wrote a lot, scribbled notes in margins, marked and revised and revised again, and passed back and forth endless internal memoranda. The sensibility of Nuremberg was expressed in a written medium that was neither the Charter (which established the Tribunal) nor the Judgment (which emanated from it) but in the memorandum that took up the space between the two. Staff counsel wrote memoranda, long and short, on every conceivable topic, from the lofty (what would it take to prove the crime of aggressive war?) to the mundane (who should have immediate access to translations of the trial documents?). The memorandum and the minute define this feature of Nuremberg's sensibility.

Thus, on one level, Nuremberg was about the technical drafting of indictments, responses, pleadings, memoranda, indices of documents, and all the rest that constitute ordinary litigation, at least in the Anglo-American tradition. It was a real trial, notwithstanding its many lapses of process. If all this written work did not achieve the sheer tonnage or slowness of modern U.S. corporate litigation, it certainly exceeded that which summary execution following a simple court-martial would have produced.

It seemed to me then, as I read The Anatomy in Iraqi Kurdistan, and it seems to me now that for all the mystique attached to the trial process, delivery of judgment, and execution of sentence, Nuremberg was surprisingly anticlimatic. In preparation for this Review Essay, I watched the famous film Judgment at Nuremberg: it encapsulates the pervasive myth that Nuremberg was dramatic and was intended to bring down upon the defendants the awful weight and majesty of The Law, for all the world to see.

Yet the community and trial that Taylor describes are certainly not dramatic. There is no awful weight here, obviously not in proportion *287 to the historical crimes the defendants had committed-how could there ever hope to be?-but, more significantly, there was no gravity beyond that of a trial for common crimes. Even the moments of

great drama-the revelation of genocidal crimes at the death camps, the pronouncement of sentences of death-carry with them the weight of common crime and common punishment. Taylor's comments on the pronouncement of judgment and sentence on the individual defendants are illustrative. The reading, he says, “of twenty-one consecutive decisions was tiring and for the staff somewhat dull” (p. 588). If that was dull, the preparations for those decisions by prosecution, defense, and bench were even more so, in precisely the sense of technical tedium that I described in my account of our work in Kurdistan. To understand the sensibility of Nuremberg, one has to explain its tedium.

Taylor goes on to describe the reactions of the individual defendants to their sentences. Although the “[t]ension in the court was,” he says, “very high” and the spaces between each pronouncement “seemed intolerable” (p. 598), the mood was not discernibly different from that of any serious capital trial. This seems strange and somehow unjust. Goering, for example, not surprised to be sentenced to death by hanging, “bowed slightly to the Tribunal, turned, and disappeared into the elevator”; Jodl, who reportedly expected acquittal, heard Chief Justice Lawrence sentence him to death, “stiffened visibly, turned, and fixed his eyes on me [Taylor] for a second or two before going out” (pp. 598-99). These descriptions remind us of what is reported in the newspapers everyday for heinous, but nonetheless quite ordinary, crimes.

III.

Although the crimes tried at Nuremburg were historic-historically inhuman-the trial was conducted on a distinctly mundane, human scale. The defendants themselves account for this pervasive and almost mediocre commonness: they simply did not rise to the level of evil corresponding to the historic nature of their crimes. Lacking the appearance of evil, they were unable to play their parts to demonstrate the majesty of law. They were grey, washed-out functionaries whose ultimate crime lay in saying yes to every other crime-not at all the stuff of Milton's Satan.

Perhaps this must necessarily be so; perhaps it is simply romanticism to claim that there could be truly great evil, evil that is embodied in the Son of the Morning, evil that is also majestic. Even if such evil were possible, however, the men in the dock at Nuremberg did not reflect it, and the gravity of Nuremberg was inevitably compromised by their mediocrity. What Hannah Arendt ***288** wrote of the banality of evil applies as much to the defendants at Nuremberg as to their compatriot Eichmann. [FN5]

This limitation of Nuremberg, this reason for its commonness, is fundamentally an aesthetic problem: it did not soar as theatre or as a spectacle of edification. There is another reason for this commonness, however, which is rooted in a deep contradiction of the Nuremberg trials. On one level, the crimes to be tried at Nuremberg were historic: one desperately wants to say that they were different in kind, and not just degree, from other serious crimes, even from murder, rape, and enslavement. For many, it was not merely a question of numbers, of mass. Raphael Lemkin was motivated to coin the word “genocide” in part because “he found the concept of ‘murder,’ or even ‘mass murder,’ inadequate to deal with the phenomenon he had in mind.” [FN6]

Seen in this light, the trial halted the defendants' march to the gallows to confirm what the victors beheld: not crimes, but crimes of history. At the same time, however, the process of law created an air of normalcy. The defendants were executed as common criminals, by hanging, as though to emphasize their private status. The mechanisms of an ordinary criminal trial, with its legal memoranda, forms and pleadings, were applied by the Allies to proclaim the defendants' crimes as common.

Taylor's account suggests that this inherent contradiction between the historic and the common was resolved in favor of commonness. It was a debate between the rhetoric of Nuremberg, which often (if inconsistently) emphasized the trial's historic quality, and the technical rhetoric of law, which emphasized commonness. In the end, the law treated the defendants as gangsters-mobsters and mafiosi-and their crimes as gangsterism on a mammoth scale. Gangsterism is the limit of mere criminality.

Camus, otherwise so insightful into what he called Nazism's "irrational terror," accepts the gangster imagery. The Nazis were "psychopathic dandies" who seized hold of the levers of the modern nation-state:

> Deprived of the morality of Goethe, Germany chose, and submitted to, the ethics of the gang.... Gangster morality is an inexhaustible round of triumph and revenge, defeat and resentment. [FN7]

*289 Other writers on Nuremberg, too, have perpetuated the gangster image. In his influential account Justice at Nuremberg, Robert Conot refers to the defendants in the dock as an "array of Mafia chieftains." [FN8]

This characterization is, however, deeply and dangerously wrong. Mein Kampf and the writings of Alfred Rosenberg are more disturbing than the visions of Al Capone. [FN9] Although its perpetrators were banal, the evil of Nazism had depth: the fraternal twins of bloodsoaked, Teutonic millenarianism and the promise of modernity, as Horkheimer and Adorno observed. [FN10] Nazism's evil coherence was not petty gangsterism.
Still, the temptation to reduce this evil to something manageable, petty in principle if not degree-to something for a court of judges, rather than the armies of Europe and America to handle-is wholly understandable. To make this evil petty, criminal, or crazy is to deny that it might have triumphed. [FN11]

It is to say that the Nazis and their ilk are not really like us-which is, of course, untrue. This reduction of history to the courtroom took place in order to make the evil of Nazism manageable, to package it into something firmly under our control and then thrust it away from us. Nuremberg is about spiritual control.

IV.

Nuremberg was fundamentally an expression of a peculiarly American legal sensibility, reflecting the fact that the impetus for the trial began with the Americans, who then

convinced the skeptical British. The French and Soviets were brought in only later, in order to complete "the Allies." Indeed, the idea for a trial came mainly from a group of New York lawyers. As Taylor says:

> The initial pressure for postwar trials came from the peoples of the German-occupied nations, but the assemblage of all these concepts in a single trial package was the work of a handful of American lawyers, all but [one] ... from New York City. Some of them ... were what today we would call "moderate" Republicans; several ... were Democrats. Elitist and generally accustomed to personal prosperity, all had strong feelings of noblesse oblige (p. 41).

290 Taylor himself knew a number of prosecution staff members from his earlier years in government. He shared a lot in common with them, and they shared a lot in common with each other. Once in Nuremberg, stuck with one another for months at a time, they became a remarkably homogenous group, the distilled essence of the antiquated ideal of the lawyer-statesman. It was as if Sullivan & Cromwell or Milbank, Tweed, Hadley & McCloy decided to conduct a trial. The aura of the prevailing New York corporate law firm culture drifted across the Atlantic to land in Nuremberg.

Taylor shows that American legalist sensibilities, which, in a time of best-sellers like The Firm and television shows like L.A. Law, seem so contemporary, are, in fact, deeply rooted. Deepest of all is the belief that the courtroom is the right place for dealing with war crimes. The American lawyers viewed the war effort and the war itself as properly bringing the rule of law to bear on an ever-widening range of human conduct, subjecting mere politics to it. The war, in their minds, transcended the merely political: it was for them a statement of law, but one that still needed, in the end, the imprimatur of a judicial act. The Nuremberg trial was needed to convert the contingent fact of Allied might into the eternal fact of Allied right.

These sentiments reflect that peculiarly American view that the world can be reimagined and reinvented through the rule of law in the courtroom. The architects of Nuremberg thought a judicial trial would limit the otherwise rampant scope of political action; it would sink Russian proposals to ship millions of men from Germany as slave labor to rebuild the Soviet Union (pp. 45-46). In another sense, however, the very idea of a trial was an expansive imaginative exercise: how the world might have been, how it should have been. Yet, as everyone knew, after the war and its devastation, and especially after the Holocaust, there was no going back. Nothing could ever make up the loss.

Nonetheless, Nuremberg was a trial in which the future was at issue. Germany was destroyed and occupied and its dethroned leaders were in the dock. The trial would make a difference, and not only to these defendants; it would be part of a larger process to recast Germany in a different mold. The future required a certain kind of Nuremberg spectacle-a spectacle, curiously and almost contradictorily, of deflation, in which the Nazi leaders were seen as perpetrators of merely common crimes, criminals brought to heel. This is how the trial's American framers saw it, and they were not wrong.

V.

It may seem strange that I have taken for my materials such airy stuff as the affect and tone of the trial and the reductive tendency of **291* the law, rather than legal doctrine and hard political reality. But fragility does not signify unimportance, and The Anatomy offers one of the few opportunities to hold these things delicately in our hands and to discern their faint and tentative patterns.

What we learn, I think, is that the recourse to a trial and judicial procedures did not heighten the affective impact of the Allied victory. In fact, Nuremberg deliberately dampened it. The trial reduced the awe and awfulness of the Allies' complete dominion over Germany as it reduced the former masters of Germany to criminals. It peculiarly de-dramatized history by placing it in the same forum where one might seek replevin of a cow.

This observation has consequences for the Yugoslavia tribunal. Before turning to compare the sensibility of Nuremberg with its Yugoslavia counterpart, it is instructive to note how much of Nuremberg's spirit is absent from the charter of the new tribunal. [FN12] As we have seen, the great conceit of Nuremberg was that it reduced the landscape of war to the dimensions of a courtroom. Indeed, as Taylor makes clear, Jackson aimed to establish a judicial precedent on the criminality of aggressive war. Jackson "made crimes against peace-the criminalization of initiating aggressive war-the foremost feature of the Nuremberg trial...." (p. 635). He saw the fundamental crime as a crime against peace, the crowning, pathbreaking charge that the Americans and British divided between them. For Jackson, war crimes were minor matters to be left to the French and Soviet prosecutors.

As today's Security Council establishes the Yugoslavia tribunal, Nuremberg remains relevant principally for matters of war crimes, crimes against humanity, and genocide-the "minor" matters at Nuremberg. Jackson's aspiration for Nuremberg has faltered precisely on account of the existence of the Security Council. To be sure, Nuremberg did establish a rule of law concerning aggressive war; it is codified in the United Nations Charter. In that sense, at least, war is no longer merely the foreign policy option of an independent sovereign. The rule of law has replaced political decision. However, this rule of law is not justiciable; it is not, as at Nuremberg, a matter of judicial determination. Instead, the determination of aggressive war and threats to peace and security is committed to the hands of the Security Council itself. Great power politics is now dressed up in the rhetoric of the rule of law and sanctified by the U.N. Charter.

The Yugoslavia tribunal's charter, therefore, is noteworthy for what it does not reproduce from the vastly more sweeping Nuremberg **292* charter. The division between jus ad bellum [FN13] and jus in bello [FN14] is fully restored in the Yugoslavia tribunal charter, with the Security Council having sole discretion as to the former, and the tribunal adjudicating only the latter. Even within the area of war crimes, the Yugoslavia tribunal has no power to impose the death sentence. The most controversial features of the

American prosecution at Nuremberg, the conspiracy charges, have been eviscerated, and guilt by association has been ruled out absolutely. Finally, no trials may be held in absentia. To my mind, these are all sensible constraints, but they do reflect a narrower conception than Nuremberg.

Of course, the Yugoslavia tribunal's authority is limited by a more practical matter: it has no one to try. Still, my own experience-private conversations with senior military officers and judge advocates of the NATO armies over the past two years-suggests that this tribunal has more than just practical difficulties: there is a deep malaise. Senior European military officers and diplomats have told me that they see no point in scheduling a trial if no one is willing to commit to a military victory. Paradoxically, this sentiment comes from officers who deeply oppose military involvement in the former Yugoslavia. They have brother officers who disingenuously hope that the Americans will "exhaust themselves," as one put it, "in fantasizing about a trial and its paperwork," so that they will not seriously consider an invasion.

What is striking about these attitudes is that they assume precisely what the Americans have not. Many of these officers argue that there is no justice but "victor's justice." As another officer explained, Nuremberg was a "lovely hood ornament on the ungainly vehicle that liberated Western Europe, but it was not a substitute for D-day." A military victory is not simply a practical prerequisite to a trial, they seem to say, but a moral necessity.

This assertion captures my own point about the sensibility of Nuremberg: to reduce the world to a courtroom, to legal memoranda and pleadings and paperwork, is possible only once an army sits atop its vanquished enemy. Otherwise, the enormity of the crimes left unaddressed out in the hills of Bosnia so dwarf those raised before the tribunal that it mocks justice. A trial, Nuremberg taught, puts the symbolic seal of justice on what armies have rectified with force. These officers imply that to hold a trial without having "fixed things" in the field is, symbolically, as much or more an act of ratification as condemnation.

293 In other words, to hold a war crimes trial in the former Yugoslavia today would be like holding Nuremberg after acquiescing in the German annexation of Poland, the Ukraine, and the rest of the eastern lands.

VI.

These officers lay a serious moral charge against this new tribunal. I am not sure that there is an answer to it, except to say that the issue of war crimes is legally and morally separate from the resort to force. Jus in bello and jus ad bellum are legally and logically independent. Because the two do not overlap, one can argue that a conviction of individuals for war crimes by an international tribunal at the present time would condemn but not ratify the suffering in Bosnia.

Unfortunately, one can reply, they do overlap, because what NATO would have to "fix"

in the former Yugoslavia is not only conquest and illegal resort to force but also war crimes, ethnic cleansing, and crimes of conduct. Seen in that light, a tribunal is not above the question of military intervention; the one presumes the other. Whereas too many world leaders, including some in the U.S. government, welcome the proposal for a trial because they see it as essentially a symbolic alternative to military action, they cynically understand very well how the two are linked, but linked as a reason for military inaction.

While this profound lack of correspondence between the Nuremberg and Yugoslavia tribunals arises from the obvious difference between surrendered Germany and unsurrendered Serbia, it also expresses the difference between the sensibilities of the Nuremberg and the Yugoslavia tribunals. As Taylor describes it, the Nuremberg trial could afford to be an exercise in emotional deflation precisely because the Allies had paid the price in blood to occupy Germany. In effect, Nuremberg was always just the coda to that military affair.

The Yugoslavia tribunal is not, in contrast, the coda at this point, but the main and only act. Those who promote the trial see it as a way of pumping up emotion and affect over Yugoslavia; they see it as a way to bring the awful weight and majesty of The Law down upon-well, whom? The Yugoslavia tribunal invokes the law as a rhetorical device to make the U.N. appear to do more than it has, but everyone knows that those who would conduct the trial have not paid the price.

Thus, in the end, those who want to imitate Nuremberg in Yugoslavia have deeply mistaken what the Nuremberg trial was all about. At its core Nuremberg was about foregoing what was in one's hand; this Yugoslavia tribunal wants to grasp what the world has not been willing to put there. This is why public discussion of the tribunal has ***294*** an emotionally desperate quality. This desperate quality corresponds precisely but inversely to the tedium and plodding pace of Nuremberg. After the war, after the battles, after the ethnic cleansing had ended, Nuremberg could afford to be tedious and plodding. The Yugoslavia tribunal seeks to make history; but the true lesson of Nuremberg is that the power of law to reduce history to its terms can only be accomplished where history-victory and surrender-has been made elsewhere.

END TEXT

Notes:

[FNa1]. Lecturer on Law, Harvard Law School; Adjunct Associate Professor of Law, Fordham Law School; and Director, Arms Project, Human Rights Watch, New York. J.D., Harvard Law School, 1986; B.A., University of California, Los Angeles, 1983. The views expressed here are strictly those of the author and are not attributable to Human Rights Watch.

[FN1]. See, e.g., Sadruddin Aga Khan, War Crimes Without Punishment, N.Y. TIMES, Feb. 8, 1994, at A23.

[FN2]. An account of the forensic investigation and the history of the atrocities committed in Koreme is found in KENNETH ANDERSON, MIDDLE EAST WATCH & PHYSICIANS FOR HUMAN RIGHTS, THE ANFAL CAMPAIGN IN IRAQI KURDISTAN: THE DESTRUCTION OF KOREME (1993).

[FN3]. ALBERT CAMUS, THE REBEL 155-56 (Anthony Bower trans., 1954).

[FN4]. The word "genocide," coined by Raphael Lemkin, did not appear until after the trial; at Nuremberg, the elements of the crime of genocide (not codified in international law until the Genocide Convention) were largely prosecuted as crimes against humanity. See Raphael Lemkin, Genocide Is a Crime Under International Law, 41 AM.J. INT'L. L. 147 (1947); Matthew Lippman, The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 3 B.U. INT'L. L.J. 2-3 (1985).

[FN5]. HANNAH ARENDT, EICHMANN IN JERUSALEM (1960).

[FN6]. LAWRENCE J. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION 89 (1991).

[FN7]. CAMUS, supra note 3, at 150.

[FN8]. ROBERT CONOT, JUDGMENT AT NUREMBERG 146 (1983).

[FN9]. Cf. ALFRED ROSENBERG: SELECTED WRITINGS (Robert Pois ed., 1970).

[FN10]. See generally MAX HORKHEIMER & THEODOR W. ADORNO, DIALECTIC OF ENLIGHTENMENT (1972); ZYGMUNT BAUMAN, MODERNITY AND THE HOLOCAUST (1989).

[FN11]. For a different perspective on the same point, see Kenneth Anderson & Richard Anderson, Limitations of the Liberal-Legal Model of International Human Rights: Six Lessons from El Salvador, 64 TELOS 91, 97-98 (1985).

[FN12]. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, 48th Sess., U.N.Doc. S/25704 (1993), reprinted in 32 I.L.M. 1163 (1993).

[FN13]. Jus ad bellum refers to the law governing the resort to force. See MICHAEL WALZER, JUST AND UNJUST WARS 21 (1977).

[FN14]. Jus in bello refers to the law governing the conduct of war. See id.

END NOTES