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Robert E. Conot, Justice at Nuremberg

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BOOK REVIEW

Justice At Nuremberg, by Robert E. Conot. Harper & Row New York, 1983. Pp. 593.

There is a scene captured for all time in Leni Riefenstahl's "The Triumph of the Will"¹ where, immediately following a particularly fervid outburst made during a speech at the 1936 Nuremberg rally, Hitler pauses to catch his breath and listen to the cheering crowd. During this pause, Hitler slams his fist into his hand, characteristically brushes back his sweaty forelock, and then smiles gleefully. Why was this ideologue, who had undoubtedly just finished making some point he considered to be important, smiling in the midst of his serious speech? It is an interesting question, and one this reader has pondered, because it seemed such an odd time to smile.

It is my belief that Hitler's was a smile of satisfaction because he knew that the crowd believed in what he was saying and that they would do his bidding. And, of course, ultimately they did his bidding. History has shown Hitler to have been correct in thinking they would.

What it was he commanded, and what it was they did, is the tale told by Robert Conot in *Justice at Nuremberg*.² This book is the finest comprehensive rendering of the first, and most closely followed, of the war crimes trials following the Second World War. Conot has covered all the important facets of this trial and asked all the right questions. Whether the questions raised by that trial can ever be answered is itself an open question.

Almost everyone has heard of the Nuremberg trials. People in positions of authority are acutely aware of this fact. William Westmoreland, American commander during the height of the Vietnam War, wonders in his memoirs whether top American military and civilian leaders of the Southeast Asian war effort could be held culpable under Nuremberg sort of principles in light of incidents such as My Lai.³ He answers, not surprisingly, in the negative. Although "Westy's" memoirs reminded this reader - again, probably not sur-

1. Leni Riefenstahl was able to propagate the Nazi ethos through her films, including this one. She transformed propaganda into art of a sort. She may have been the only real Nazi artist. Since the war's end, she has been unable to raise money for any substantial film projects.

2. R. CONOT, *JUSTICE AT NUREMBERG*, (1983) (hereinafter cited as CONOT).

3. W. WESTMORELAND, *A SOLDIER REPORTS*, 499, (1980).

prisingly - of the type of narrow military analyses and justifications written by some of the German generals and admirals such as Guderian,⁴ Manstein,⁵ and Doenitz,⁶ it is still significant that Westmoreland raised the question. The clear implication is that even among those who engage in what passes for ethical musing at the Pentagon, there is still at least a public relations sensitivity to concerns raised at the Nuremberg trials. There have been, as we are all too painfully aware, few military men historically who have felt obliged even to wonder aloud about such matters.

During the American involvement in Southeast Asia, such matters were the concern of the signatories of a document entitled "A Declaration of Conscience."⁷ The Declaration is presumably still on file today with some agency of the United Nations. It was signed by tens of thousands who enunciated their opposition for moral reasons to American military involvement in the Southeast Asian conflict. Invoked in that document was what was referred to as the "Nuremberg Principle."⁸ This term refers to the ethical primacy of individual conscience over orders from superiors and the state.

The articulation of that principle recognizes in reverse fashion the heart of one of the two defenses proffered by the original, and subsequent, Nuremberg defendants. Conot discusses and analyzes these defenses in detail. The first defense was basically a factual one, claiming that everything in the bureaucracy of the Third Reich was

4. H. GUDERIAN, PANZER LEADER, (1952). Guderian's importance in the development of the armored warfare *blitzkrieg* techniques pioneered by the German militarists early in the war cannot be overstated. Later in the war, he served as Army Chief of Staff, in which capacity it would have been difficult, if not impossible, for him to have been unaware of various atrocities perpetrated against Russian civilians and soldiers.

5. E. MANSTEIN, LOST VICTORIES, (1958). Von Manstein was responsible for the restoration of a condition of fragile stasis on the Eastern Front following the Stalingrad debacle. His name was touted about from time to time as a possible Commander-In-Chief for the Eastern Front. Like other high ranking German generals who served on the Eastern Front, he would have had to have been nearly deaf and blind to have been unaware of the atrocities visited upon the Russian people.

6. K. DOENITZ, MEMOIRS: TEN YEARS AND TWENTY DAYS, (1958). Doenitz was one of the original Nuremberg defendants. His command of the German submarines was so deadly that there were some months when it was not entirely clear that Britain would be able to import enough of anything to survive, let alone wage effective war.

7. "A Declaration of Conscience" was a petition enunciating the specifics of the reasons for opposing the Vietnam War on moral grounds. It was circulated in newspapers and magazines, and the document with the signatures placed on file with the United Nations.

8. The term "Nuremberg Principle" evolved out of these trials and is today used to justify disobedience to illegal orders.

so tightly compartmentalized that no one knew anything outside of his own sphere, e.g., no one knew much of anything about the various horrors. A person who does not know that evil is occurring, certainly cannot be held responsible for it.

What the "Nuremberg Principle" refers to more specifically is the second defense, one grounded more in law than in fact: "I was only following orders." The notion embodied in this defense is that an order from a superior, could, should, and did supersede any and all ethical and moral proscriptions and requirements. So one drops the Zyklon B into the "shower room," and as long as one has been instructed to do that, the fact that people are thereby gassed is someone else's concern. Any explicit or implicit moral concerns have been considered and resolved at a higher level, and one's otherwise unconscionable conduct is excused. It purports to be, in essence, rather an elegant means of excusing one's own misdeeds by passing responsibility up the chain of command.

It was not a defense that succeeded, either in the original, or later, Nuremberg proceedings. And therein lies much of the substance of the tale told by Conot. *Justice at Nuremberg* is a comprehensive analysis and dissection of the original of these trials.⁹ The book is organized around large sections entitled "Crime and Punishment," "Interrogation and Indictment," "Prosecution," "Defense," and "Judgment." The chapters follow this organizational scheme so that the overall rendering roughly follows the chronology of the trial.

The trial was prosecuted by a joint team comprised of American, British, Russian, and French lawyers. Justice Robert Jackson headed the American team, and Conot discusses the political wranglings that swirled around the Justice.¹⁰ The same powers, using four judges and four alternates, tried the case. German lawyers, paid by the tribunal, conducted the defense. Of the twenty-one defendants charged, three were acquitted, seven were given terms of years to life imprisonment, and eleven were sentenced to death by hanging.

The ramifications of this proceeding were staggering. There was virtually no legal precedent for such an undertaking. Various questions were asked when the tribunal was constituted; and these questions are still asked today. Was there a legal right to try these peo-

9. There have been other works. See, e.g., EUGENE DAVIDSON, *THE TRIAL OF THE GERMANS*, (1966). But none have, in this reader's opinion, so comprehensively discussed "all" important aspects, i.e., the factual, legal, moral, philosophical, psychological, and political.

10. CONOT, *supra* note 2, at 442-43.

ple? Was there a legal necessity? How did the conducting of this trial accord with American prohibitions on *ex post facto* justice? Should numbers of the defendants have been disposed of summarily in one fashion or another as they were apprehended by the various conquering powers rather than be provided a forum to put forth their rationalizations, evasions, and prevarications?

This also raises the dual question whether anyone's hands were clean enough to try these people, and whether it mattered. How, to choose a single example, does one try a country and its leaders for plotting and launching a war of aggression when either you plotted it with them, or passed them on the way to the war? The first situation was the case with Germany and the Soviet Union in Poland,¹¹ the latter with Germany and Great Britain in Norway.¹² On the issue of genocide, one might inquire of the Soviets where large numbers of their peoples have gone—the Volga German colony during World War II being one group. One could also inquire, for that matter, of our own ancestors where all the Native Americans went. On strictly legal grounds, how does one answer the retort of Klaus Barbie¹³ that the Germans had every lawful right to repress the *maquis* since the French had indeed signed an armistice, promising to lay down their arms in exchange for the Germans' ending the war?

What *Justice at Nuremberg* succeeds in doing is to demonstrate how what was conceived initially to be largely a moral statement, which would set a precedent in international law for future conduct, broke down at times into a spectacle of legal and political wrangling over various factual or technical legal matters. The problems involved in launching such an undertaking as this trial were immense, and at times it appeared that the entire venture might never get off the ground. To ask the threshold question, whose substantive and procedural law should be used? There was not, and, despite this trial, is not to this day any international criminal code as such.

11. Germany and the Soviet invaded, conquered, and partitioned Poland in 1939. This was not the first time Poland had suffered because of its geography, and undoubtedly will not be the last.

12. German and English warships crossed each other's paths in 1940 on their way into Norwegian waters.

13. Klaus Barbie ran the Gestapo office in Lyons, France. He tortured to death the French resistance leader, Jean Moulin. After the war, he worked for the Americans as a counter-intelligence operative. He has been apprehended and is being tried at Lyons, by the French. See *Klaus Barbie and the United States Government: A Report to the Attorney General of the United States*, submitted by Allen A. Ryan, Jr., Special Assistant to the Assistant Attorney General, Criminal Division, United States Department of Justice, (August 2, 1983).

Should the defendants have been charged with murder under German domestic law? Under this approach would a legal defense be that the orders came from the chief of state and head of government, so as an *a priori* matter, they could not be illegal? On the procedural side of the ledger, there was the question whether the trial should have been conducted as an American adversarial proceeding or a European inquisitorial one. Merely invoking international law provided no ready solution. The Geneva Convention and other such similar instruments provide no sanctions for transgressors. International custom arguably is on the side of the defendants in particular cases.¹⁴

So the question arises, as it did at the outset of the trial, whether these trials should have been held at all. The answer to that question is, I believe, the success of this book. After recognizing and discounting for the hypocrisy, mendacity, blood-thirst and other motives of the victors—and these were all most assuredly present—Conot leaves us with the scenes recorded in the film “The Nazi Plan,” shown during the trial. The following statement is typical of the film. One scene in particular . . .

I mean the clearing out of the Jews, the extermination of the Jewish race. Most of you must know what it means when one hundred corpses are lying side by side, or five hundred or one thousand. To have stuck it out and at the same time to have remained decent fellows that is what has made us hard. This is a page of glory in our history! . . .¹⁵

The speaker was Himmler, and the statement demands judgment, which is what the victors intended to provide at Nuremberg. According to Conot, the film had a great impact on everyone in the courtroom, including the defendants.

What was primarily on trial at Nuremberg, when all was said and done, were the results of the Nazi ideology. Fifty million civilians and soliders died as a result of the various invasions, occupations, im-

14. See, e.g., I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 428, (1973) (particularly the discussion of the Corfu Channel case). This reader, for one, concludes that since the application of force is not always prohibited by international law, that the German occupation of the Rhineland may not have been clearly prohibited. If the French were justified in ignoring the armistice imposed on them by the Germans, perhaps the Germans were justified in ignoring the Versailles treaty which was imposed on “them” by the Allies after the First World War.

15. CONOT, *supra* note 2, at 198. “A Nazi Plan” was excerpted from, among other footage, Riefenstahl’s “The Triumph of the Will.” See *supra* note 1.

prisonments, gassings, burnings, beatings, starvings, whippings, freezings, lung-collapsings, infections, and on and on and on. This was done, of course, all in the name of a creed which deliberately dehumanized, and brutalized whole peoples pursuant to the half-baked "master-race" scheme.

Also publicized at the trial were some of the morally ambiguous situations, or situations demonstrating that the Germans were not always wholly in the wrong. These are troubling matters, even - or perhaps especially - for supporters of the trial.

An incident recounted by Conot is particularly interesting.¹⁶ In the spring of 1942 a German U-boat captain by the name of Werner Hartenstein ordered the sinking of the British auxiliary warship the "Laconia". It was sunk. He then radioed the German admiralty to report. Admiral Doenitz, the German submarine commander, and from 1943 on, German naval commander, and the Vichy French, responded. Rowboats were lined up, linked by rope and towed toward Africa behind the U-boats. Some survivors were put aboard the U-boats. Hartenstein, the German admiralty, and the Vichy French were endeavoring to save the civilians following the military act of sinking the auxiliary warship.

This odd procession never reached the African coast because en route they were attacked by the Americans from the air. Sharks, drawn by the blood took over from there. Hartenstein, not surprisingly, cast off, submerged, and ran for cover. That was the last time a U-boat attempted to rescue any of its victims. Admiral Doenitz justified somewhat ambiguous orders given following the Laconia sinking regarding future U-boat conduct by pointing to military necessity and also by deposing Admiral Nimitz, the U.S. Pacific Naval Commander. Doenitz received a ten year prison sentence.

In addition to factual situations, which tended to prove that the Germans were not always in the wrong, there was also, as Conot appropriately points out, the continued German assertion of *tu quoque*, although this was formally forbidden. They were saying, "If I am guilty, you are too!" One thinks, for example, of the terror bombings of various German cities. When Private Kurt Vonnegut of Indianapolis, Indiana, emerged from Slachthaus-Funf in Dresden, Germany, he beheld a scene of horror.¹⁷ Allied bombers had set the fairy tale city

16. CONOT at 324.

17. VONNEGUT, *SLAUGHTER-HOUSE FIVE* (1971). This story is Vonnegut's fictionalized accounting of his wartime experiences.

aflame and burned thousands of refugees to death. There were no significant military targets in Dresden and the allies knew it. Morality aside, as the military puts it, the advocates of terror bombing have been proven wrong again and again and again. The British did not surrender because the Luftwaffe nightly bombed their cities, nor did the Germans because the allies did likewise, nor did the Spanish Republic after Guernica, nor did the Vietnamese a few years back when American B-52's destroyed villages and villagers. In this particular instance, Hermann Goering was acquitted of charges involving the bombings of Warsaw, Rotterdam, and Coventry.

Goering cheated the hangman on the way to the gallows, as had Hitler before the war ended.¹⁸ The British had picked up Himmler, but he bit into a cyanide capsule he had in his teeth, and despite fevered efforts to save him, he died and could not be brought to trial. Martin Bormann slid away during the battle of Berlin, possibly availing himself of Odessa, as also probably did Eichmann, Mengele, and many others. There were some big fish at Nuremberg - Goering, Speer, Keitel, Jodl - but many slipped away. This was convenient to many there who blamed a lot on Hitler and Himmler and others.

Of the big fish who were there, the cases of Keitel and Speer were especially interesting, and the important parts of those cases are recounted in *Justice at Nuremberg*.¹⁹ Keitel and Speer claimed, in effect, that they were people in power who were in a morally ambiguous position. They attempted to justify themselves by pointing to the evil they deflected. They asked the judges to consider what would have happened had they not been in power. One thinks of General Jaruselski declaring martial law in Poland to obviate what the Russians saw as a need to invade and restore order following the spread of Solidarity.

This was the heart of General Keitel's, and not only Keitel's, defense at Nuremberg. Yes, yes, yes, he replied, I was present during the formulation of the "lynch law" for captured Allied airmen. But I asked that regular procedures be established for such lynchings. Yes, said Armaments Minister Speer, I used slave labor. But I asked that they be better fed and then cast the whole issue in economic terms the better to improve the condition of people working and living in caves without adequate sanitary facilities and being fed a few hundred calories a day. They tried. They all tried. Things could have

18. Hitler and Goering both poisoned themselves.

19. CONOT, *supra* note 2, at 355-58 and 433-44.

been so much worse. I have often wondered whether more damage has been done historically by those who followed the laws of their societies, or by those who did not. Neither this book nor the Nuremberg proceedings have answered that question, but the question has been raised in both instances in a most intriguing fashion.

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