

The Nuremberg Military Tribunals and the Origins of International Criminal Law¹

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*The NMTs pursued a variety of different goals, the most important of which were achieving retributive justice, educating the German people, creating a historical record, and contributing to the development of international criminal law. Some of those goals were achieved; others were not.*²

I. Introduction

On 7 March, 2011, President Barack Obama issued an executive order directing the resumption of the trials of declared Al Qaeda members and affiliates before U.S. military tribunals at Guantanamo Bay, Cuba.³ This order marked a significant shift for the administration, which had contemplated the possibility of ending the Guantanamo operation and seeking instead to prosecute the accused terrorists in U.S. federal courts.⁴ With this occasion, the mechanics of and justifications for military tribunals catapulted back into public debate. Undoubtedly, future discussion on the propriety of Guantanamo trials will involve reference to one of the most important events in the evolution of military tribunals and their application of international law: the U.S. Nuremberg Military Tribunals (NMTs).⁵

In his 2011 book *The Nuremberg Military Tribunals and the Origins of International Criminal Law (Tribunals)*, author Kevin Jon Heller embraces the challenge of detailing the individual NMTs, placing them in the proper historical context, and asserting an NMT legacy of spawning critical

advancements in international criminal law.⁶ As Heller notes in his introduction, the primary purpose behind *Tribunals* was to fill what he perceived to be an inexplicable void in the scholarly writing coverage of the NMT.⁷ Through painstaking detail, the author discusses the nuances of each of the thirteen cases and their handling of critical legal issues such as procedure, evidence, defenses, and sentencing. Clearly proud of his own work, the author goes so far as referencing a U.S. federal appeals case and its misinterpretation of an NMT principle—stating, a bit presumptuously, that “if this study had existed a few years ago, the court might have reached a very different conclusion.”⁸ Unfortunately, the book proves only a partial success. While succeeding at the pure information game, the book falls painfully short in terms of flow and readability, leaving all but the most committed readers likely to abandon the struggle. Ultimately, today’s Judge Advocates (JAs) may find select points to glean for professional development and satisfaction of historical curiosity, but this reviewer recommends that Heller’s book be placed on the reference shelf for occasional consultation—not in the JA’s critical kit-bag.

II. The Good: Details, Depth and a Dash of Applicability

Among the disappointments of *Tribunals* lie a few redemptive points. We should expect as much from Heller—an accomplished scholar, multi-published writer, and heralded blogger on the most current and controversial topics in international law.⁹ Accordingly, the reader will find a book meticulously researched and expansive in addressing the historical significance of the NMTs from all angles. The author arranges his 400-page work into five parts and sixteen chapters. Part I discusses the background to and formation of the Tribunals, as well as a factual synopsis of each of the twelve trials. Parts II, III, and IV are the meat of the book—offering sophisticated analysis of

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¹ KEVIN JON HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* (2011).

² *Id.* at 299.

³ Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 10, 2011).

⁴ Laura E. Jesse, *Hopping on Bus for “Hip” Hopeful*, SAN ANT. EXPR. NEWS, Nov. 18, 2007, at 1B.

⁵ The Nuremberg Military Tribunals (NMTs) must be immediately distinguished from their more famous and publicized predecessors, the International Military Tribunals (IMTs), which also occurred in Nuremberg—but directly pursuant to the joint arrangements by and with the participation of all the Allied Powers following Germany’s unconditional surrender in World War II. The NMTs, by contrast, and although sanctioned by existing agreements among the Allies, were a purely American-executed event as part of the United States’ post-war duties in its role as occupier and transitional governing body of specific sections of Germany. While the IMT focused on the top-tier war criminals from Hitler’s Nazi regime, the NMTs focused on many of the supporting role players such as the doctors, financiers, industrialists, and lower-level Government leaders. See WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS 9–13 (Norman E. Tutorow, ed., 1986).

⁶ HELLER, *supra* note 1, at 6–7.

⁷ *Id.* at 2.

⁸ *Id.* at 5 (referring to the court in *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2d Cir. 2009) and its apparently faulty reliance on the Nuremberg Trials for the proposition that aiding and abetting liability is conditioned on some kind of purposeful conduct).

⁹ See Dr. Kevin John Heller, MELBOURNE L. SCH., <http://www.law.unimelb.edu.au/melbourne-law-school/community/our-staff/staff-profile/username/Kevin%20Jon%20Heller> (last visited Mar. 26, 2012).

both the substantive and procedural legal elements at issue throughout the trials. Heller concludes in Part V with a good faith effort to draw the reader out of the weeds and into a broader perspective, recounting the historical events immediately following the NMTs and then offering commentary on their legacy.

If the reader is looking for pure facts or confirmation of particular legal principle flowing out of the NMTs, then *Tribunals* is a gem. Written in textbook-like owner's manual style, the middle portions of the book diligently grind through the legalese of the trials. Clearly the product of yeoman's work, nearly every sentence in the factual sections contains a footnoted reference to the trial transcripts, evidentiary documents, or written opinions—the culling and digesting of which is truly impressive.¹⁰ Perhaps the greatest success of the book is the collective law-school seminar of chapters six, seven, thirteen, and fourteen, which covers the NMT's implementation of legal doctrine in the areas of evidence, procedure, allowable defenses, and sentencing criteria. Here, Heller dons his professorial cap and relentlessly plies the reader with specific historical reporting, competing opinions from legal scholars over the last sixty years, and plenty of his own analysis on the legitimacy and wisdom of the judges' decision-making.¹¹ In this manner, *Tribunals* squarely accomplishes its stated objective of filling the educational gap surrounding the NMTs. Even the hungriest of scholars could likely feast here for second, third, and fourth readings.

In addition, *Tribunals* achieves a minor success in its smattering of applicable lessons for modern-day JAs. Among them is the author's brief account of the role the Theater Judge Advocate General (JAG) played in the organization of both the International Military Tribunals (IMT) and subsequent NMTs. Here, we discover that the theater commander, General Eisenhower, looked to the theater JAG, Brigadier General Betts, to lead the entire U.S. Government effort in implementing the directives of the Joint Chiefs and the Truman administration.¹² This assignment, with all it implied in the areas of leadership, creativity, problem-solving, and executive decision-making, echoes the expectations modern commanders have for their JAs. Consider, for example, the JAG Corps' assumption of responsibility for non-expressly legal missions such as financial oversight and the Rule of Law in deployed

¹⁰ See, HELLER, *supra* note 1, at 372 (noting that the documentary product of the trials included written capture of 1300 witnesses, more than 30,000 documents admitted into evidence, and judicial opinions in excess of 3800 pages).

¹¹ *Id.* at 157 (offering educated commentary on the fairness of the trials with respect to evidentiary rulings, alluding in part to the tribunal's controversial decision to depart from the IMT practice of prohibiting the defendants themselves to conduct cross-examination). See also *id.* at 143.

¹² *Id.* at 12.

environments.¹³ New JAs may draw inspiration from Heller's book when assigned operational duties that have little to do with their three-year technical education. Further, JAs may also benefit from Heller's thorough treatment of the inner workings of the NMT's prosecution team headed by Brigadier General Telford Taylor. Chapter three outlines how Taylor handled the leadership challenge of assembling a thirty-five-man, all-civilian, all-volunteer team of attorneys and then directing their efforts to achieve success at trial.¹⁴ Given the joint, interagency, and multi-organizational environments that dominate the modern-day operational landscape, Taylor's experience may prove tremendously informative.¹⁵

III. The Bad: Absent Context and Under-Delivered Promises

Unfortunately, any praise of *Tribunals* requires almost immediate qualification. Heller begins with the enticing pronouncement that an explicit goal of his book is to “place the trials in their historical context . . . the (early) history of the Cold War.”¹⁶ Despite brief allusions to McCarthyism and the Korean War in the introductory paragraphs,¹⁷ the audience is dragged through the entirety of the book without meaningful follow-up. Not until the penultimate chapter, 300 pages later, does the author attempt to make good on his bold promise. That attempt, when it comes, is a perfunctory mention of various world events without in-depth discussion or analysis of their connection with Nuremberg.¹⁸ This missing context represents a missed opportunity for the author to temper the book's dry, lecturing style with much needed perspective and entertaining relief.

Further, the title of the book promises to show the reader “The Origins of International Law”—a promise the

¹³ Vasilios Tasikas, *Developing the Rule of Law in Afghanistan: The Need for a New Strategic Paradigm*, ARMY LAW., July 2007, at 45, 53 (discussing the Pentagon's embrace of stability operations as a strategy and the implications for judge advocates as the spearheading the requisite rule of law activities).

¹⁴ HELLER, *supra* note 1, at 43–49 (discussing the development of the overall trial strategy—and making reference to the motley crew recruited on Taylor's behalf that is detailed on page 17).

¹⁵ See, e.g., TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 269–92 (1993). Although Heller's book offers a summarized account of operations inside the Subsequent Proceedings Division (SPD), readers will likely find Taylor's first-hand account most illuminating.

¹⁶ HELLER, *supra* note 1, at 5.

¹⁷ *Id.* at 5–7.

¹⁸ *Id.* at 341, 349. In these few, isolated paragraphs, Heller merely mentions the increasing “fear of the Soviet Union” and the political pressure—in light of the burgeoning North Korea conflict—to kowtow to Germany as a means of enticing their involvement in the European Defense Community. *Id.* No further discussion of significance on these issues is offered.

author initially reinforces when describing the NMTs' groundbreaking practice of issuing written judgments that specifically addressed substantive issues such as evidence and procedure.¹⁹ Nevertheless, Heller fails to elaborate on the substantial impact the tribunals may have had on international law. For this impact to have occurred, one would expect a broad acceptance of the NMTs judgments by the world community—something *Tribunals* fails to show. In fact, the author himself seems confused on this topic, and his confusion confuses the reader. The assertion-whiplash first occurs in chapter five's discussion of jurisdiction. Following pages of argument for the true international quality of the NMTs (and therefore their basis for recognition),²⁰ the author concedes in the chapter's concluding remarks that modern courts remain reluctant to rely on the NMTs' judgments because of their questionable legitimacy.²¹ Heller undermines the NMTs' credibility throughout the book²²—but then in chapter sixteen claims that modern courts pay great respect to the NMTs' judgments in numerous ways.²³ This schizophrenic feel continues through the book's final pages where, after being told that modern courts "have exhibited considerable uncertainty about [the NMTs'] authority,"²⁴ the reader is emphatically assured that the NMTs generated an "inestimable contribution to the form and substance of international criminal law."²⁵ Heller ends his work by stating that "[t]he NMTs might not have given birth to international criminal law, but they clearly nurtured it into adolescence."²⁶ Unfortunately, on this topic, the average reader of *Tribunals* may find himself wondering which way is up.

¹⁹ *Id.* at 3.

²⁰ *Id.* at 107–37. In perhaps his most thorough and skillful argument of the book, the author presents his case that—based on the underlying authorities of the London Charter and Control Council Law 10—the NMTs were actually "inter-allied special tribunals" that applied international law. *Id.* at 137.

²¹ *Id.*

²² *See, e.g., id.* at 229–30 (noting that much of the NMT jurisprudence was "very progressive" and later ratified by other judicial bodies, while significant other aspects were "problematic" in that the judges simply misapplied a solid legal principle). *Id.*

²³ *Id.* at 368–97 (spelling out all the ways that international courts such as the Yugoslavian Criminal Tribunal and the International Criminal Court have relied on specific excerpts of the NMT judgments).

²⁴ *Id.* at 375.

²⁵ *Id.* at 400.

²⁶ *Id.*

IV. The Ugly: Brilliance Without Balance—Only the Strongest Survive

Among the book's chief deficiencies is its failure to provide the reader with the full context of the NMTs' central characters, places, and events. For example, Heller spends his first three chapters walking his audience through the history of the NMTs, discussing in detail the various laws, ordinances, and orders undergirding the proceedings—but fails to give any biographical data of the myriad names that seem to appear from nowhere along the way.²⁷ Some minimal comprehension of the basic facts can arise amidst the choppy presentation style in these sections, but one may be left wondering who these people were and what they were like, and what they had to do with one another and U.S. foreign affairs. In contrast, works like Joe Perisco's *Nuremberg: Infamy on Trial*—although more focused on the IMT—present the human-interest side of the history that holds the reader's interest and leads to remembering and comprehension. Without this critical element, Heller's book generates a lot of deep breaths and head-scratching.

Finally, the author presents his material in a highly technical, textbook-like manner that was almost fatally difficult to follow. This is particularly true regarding the legal framework for the creation of and execution of the trials.²⁸ Despite telling the NMT narrative at the beginning of the book in terms of the various international agreements and orders that the prosecution team relied upon, the author waited until chapter five—over 100 pages in—to actually explain how these documents related to one another and were critical to the proceedings. Despite making frequent references to these foundational documents between, Heller at no point provides a simple flow-chart—or even flow-paragraph—laying them out in logical order for the reader's reference. Instead, all but the most well versed legal historians are left scurrying after the author with a pad and pencil, attempting to diagram and cross-reference in order to decipher the many interesting points the author does actually make. While rewarding at times, the overall process was exhausting.

²⁷ *See, e.g., id.* at 10, 12, 17, and 40–42. Within these pages and many others throughout the first portion of the book, the reader is introduced to characters like Justice Jackson, Telford Taylor, Mickey Marcus (who apparently played a critical role in assisting Taylor with staffing his prosecution team), and various NMT judges—almost always without backstories and almost always re-introduced later without any reminder to the reader of their exact role or specific significance. *Cf. TAYLOR, supra* note 16, at 289 (providing in-depth detail about Mickey Marcus and his personal relationship with other Nuremberg personalities).

²⁸ *See, e.g., HELLER, supra* note 1, at 107 (highlighting the author's lack of road-mapping despite the technical, numerical quality of the U.S. executive branch orders, the military ordinances, the articles of international agreements, and other implementing laws he discusses off-handedly).

V. Conclusion

Ultimately, Kevin Jon Heller writes an important book in *Tribunals*, dutifully offering a detailed, scholarly accounting and analysis of an event largely avoided by other academics. This work can be a useful asset for practitioners and students of international criminal law. Nevertheless, digesting and making sense of *Tribunals* is far from easy. Lacking much personality, the book presents its dense

material in an even denser manner, challenging the most disciplined attention spans and encouraging the reader to simply look elsewhere. While bright spots of analysis, key historical reporting, and lessons for modern application appear throughout, they are overshadowed by the book's unwieldiness. An encyclopedic reference of an important event, *Tribunals* should be consulted in a pinch—but otherwise avoided in lieu of more engaging material.