HOW THE NUREMBERG TRIALS PAVED THE WAY FOR AND INFLUENCED THE POST-9/11 GUANTANAMO MILITARY COMMISSIONS

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I. INTRODUCTION

Before the Nazis committed atrocious crimes against humanity during World War II, there had never been a need for a protocol to prosecute individual war criminals on an international scale.[1] After the war, the four victorious Allied parties scrambled to develop a system with which to try the former Nazi leaders.[2] Together, these countries set up an international military tribunal, colloquially known as the Nuremberg Trials (Trials), dedicated to establishing "enforceable fundamental rules for individual conduct during and leading up to war and to begin to lay down a powerful benchmark for future international criminal tribunals."[3] Through this tribunal, "the world community punished German Nazis for committing atrocities against millions of innocent citizens, including those against German Jews on German soil."[4] During the trials, which took place from 1945-46, the four Allied countries tried twenty-two individual former Nazi leaders and six organizations[5] and charged each of them with committing crimes against peace, war crimes, and crimes against humanity.[6]

Fifty-six years later, after a vicious terrorist attack on the World Trade Center in New York City, the Pentagon in Washington, D.C., and Shanksville, Pennsylvania on September 11, 2001, the American government once again found itself in the position of having to determine how to bring to justice the international per-

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1. Berta Esperanza Hernandez-Truyol, *Nationalism: Globalized Citizenship: Sovereignty, Security and Soul*, 50 VILL. L. REV. 1009, 1017 (2005).

2. Ellis Washington, *The Nuremberg Trials: The Death of the Rule of Law (In International Law)*, 49 LOY. L. REV. 471, 474 (2003).

3. Patricia M. Wald, *Running the Trial of the Century: The Nuremberg Legacy*, 27 CARDOZO L. REV. 1559, 1559 (2006).

4. Hernandez-Truyol, *supra* note 1, at 1010-11.

5. Jonathan A. Bush, *Respondents: Lex Americana: Constitutional Due Process and the Nuremberg Defendants*, 45 ST. LOUIS L.J. 515, 521 (2001).

6. Washington, *supra* note 2, at 496.

petrators of crimes against humanity.[7] Although the post-9/11 situation was slightly different because it was only the United States that was in charge instead of the four powers that were involved in the Nuremberg Trials, finding a proper structure for a trial was nevertheless a difficult task for President Bush and his staff to complete. In response to the issue, President Bush "issued an executive order authorizing the use of military commissions in the War Against Terrorism" despite any concerns about—or distrust of—military tribunals held by the Supreme Court of the United States.[8]

Part II of this note will lay out the background and procedures of the Nuremberg Trials. First, it will describe the history behind the Trials and enumerate the charges with which the four Allied powers tried the Nazi defendants. Second, this part will detail the specific structure and procedures of the Trials, including the type of judges that made up the tribunal as well as evidentiary rules.

Part III of this note will explain the background and procedures of the post-9/11 Guantanamo Military Commissions. First, it will detail the history behind the creation of the Guantanamo Military Commissions. Similar to Part II, the latter half of Part III will address the structure and procedure of the Commissions.

Finally, Part IV of this note will explore how the similarities between the Nuremberg Trials and the Guantanamo Military Commissions highlight the influence Nuremberg had on Guantanamo. Further, it will explore how the differences exhibit that change to the procedure used at Nuremberg was needed in a post-9/11 America. This section will focus on why the expanded evidentiary rules were necessary in both cases and why the change from a civil judge to a military judge is significant.

II. NUREMBERG TRIALS

A. Background

After World War II, the Allied leaders' main concern "was determining the most effective way to bring charges against the re-

7. Eun Young Choi, *Veritas, Not Vengeance: An Examination of the Evidentiary Rules for Military Commissions in the War Against Terrorism*, 42 HARV. C.R.-C.L. L. REV. 139, 144 (2007).

8. *Id.* at 139.

maining Nazi leaders for war crimes."[9] Together via the Charter for the Nuremberg Tribunal (Charter), the Allied victors—the United States, the United Kingdom, France, and Russia[10] (Four Powers)—established the first international military tribunal designed to try wartime leaders for crimes committed against international laws of war.[11] As an advantage of prevailing in the war, the Allies were able to use the Nuremberg Tribunal to "dictate policies aimed at Germans who were responsible for the war and for the barbarity of the acts perpetrated."[12] In this four-power trial, twenty-two individuals and six organizations were tried between 1945 and 1946.[13]

The Charter specified three categories of crimes for which the Nazi defendants were charged: 1) crimes against peace; 2) war crimes; and 3) crimes against humanity.[14] Crimes against peace constituted planning, preparation, and the initiation or waging of aggression.[15] War crimes encompassed violations of the laws or customs of war, such as murder, ill treatment or deportation to slave labor.[16] Crimes against humanity comprised murder, extermination, enslavement, and other inhumane acts committed against civilians before or during the war, as well as persecution on political, racial, or religious grounds.[17] The Allied prosecutors used these three categories to indict the Nazi defendants on four counts: 1) conspiracy to wage aggressive war; 2) waging an aggressive war; 3) commission of war crimes; and 4) perpetration of crimes against humanity.[18]

B. Procedure

The Soviet Union, France, Great Britain, and the United States faced the unique problem of having to choose between two distinct forms of legal procedure in determining how the Nurem-

9. Nuremberg, Germany was the place chosen by the Allies in which to hold the trials because in 1935 it was the city where Hitler's discrimination laws depriving Jews of their civil rights had been drafted. Washington, *supra* note 2, at 473.
10. Wald, *supra* note 3, at 1559.
11. *Id.*
12. Hernandez-Truyol, *supra* note 1, at 1017-18.
13. Bush, *supra* note 5, at 521.
14. Washington, *supra* note 2, at 496.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 497.

berg Trials would proceed. In an official Federal Communications Commission (F.C.C.) report from September 1945, Professor Trainin[19] commented:

> The legal procedure of the international tribunal is not a mechanical repetition of the principles of the ordinary national legal proceedings on an international scale – the essence of internationalism finds here its logical and consistent expression . . . . The court of the international tribunal will develop along its own line, corresponding to the interests and peculiarities of international justice.[20]

More simply, this meant that the Four Powers would create an international tribunal that was a mixture of all of their forms of judicial practice in an attempt to create one legal proceeding that would best prosecute and adjudicate the former Nazis for their crimes.

The Charter organized a tribunal comprised of one regular judge and one alternate judge from each of the Four Powers, hereinafter referred to as "the Commission."[21] The eight judges sat side-by-side and deliberated together, but the alternate judges did not vote at the time of deciding the convictions of those on trial.[22] Although the judges rotated as presiding judge during private sessions, the leaders decided that there would be one presiding judge at the public courtroom sessions in order to maintain an appearance of stability.[23] Once the panel was established, they found themselves with two problems: 1) how to deal with the language barriers between the different countries and 2) whether to follow common law or civil law.[24] Together, the four countries created the

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19. Aron Trainin was a professor of criminal law at Moscow State University and was trained in the Western European legal traditions. He spent years investigating international legal procedures with the goal of creating Soviet international criminal law. Towards the end of the war, Trainin published a book in which he argued that the Nazis should not be tried just for war crimes but also for launching a war of aggression; this concept would later shape the Nuremberg Charter. Francine Hirsch, *The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order*, 113 AM. HIST. REV. 701, 705 (2008).

20. F.C.C., Daily Report, Sept. 8, 1945, Donovan Nuremberg Trials Collection, Vol. XX Section 63.01, *available at* http://library2.lawschool.cornell.edu/donovan/pdf/Batch_9/Vol_XX_63_01_31.pdf.

21. Wald, *supra* note 3, at 1560.

22. *Id.*

23. *Id.* at 1570.

24. Wald, *supra* note 3, at 1570, 1573. In dealing with the first dilemma, to ensure that everyone in the room understood both the questions of the judges and the answers of those on trial, the tribunal agreed to translate everything back

"London Agreement,"[25] which officially constructed the Nuremberg tribunal, known as the International Military Tribunal (IMT).[26] The judges agreed to abandon civil law in favor of factual pleadings that were within the boundaries of the indictment and a limited number of relevant documents and chose to follow both Continental practice and common law, namely allowing both sworn testimony and/or unsworn statements.[27] In deciding between the two different systems, the judges also had to determine what burden of proof to require. In the end, they compromised with a burden of proof beyond a reasonable doubt falling on the prosecutor but without a jury or the option of appeal.[28]

As the structure of the Trials was new and unprecedented, the Commission had the power, to an extent, to make decisions regarding the proceedings as they went along. In an official document regarding procedure and rules of evidence, Lieutenant Colonel (Lt. Col.) Adwin W. Green[29] wrote, "The Commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceeding, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it."[30]

Part of this broad power was granted to the President of the Commission with regard to what evidence would be admissible in court. Lt. Col. Green goes on in his report to say, "Such evidence

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and forth between German, French, English, and Russian. Wald, s*upra* note 3, at 1570.

25. On August 8, 1945, the four Allied powers signed the London Agreement, establishing the International Military Tribunal as the means by which to try the major figures whose offenses were not constrained to one specific geographical location. This Agreement determined the Tribunal's composition, defined offenses, delegated investigatory and prosecutorial powers, established the Tribunal's procedures and limits of powers, and established punishments. It also defined the four offenses the Tribunal had the jurisdiction with which to try the Nazi defendants. Jeffrey C. Tuomala, *Nuremberg and the Crime of Abortion*, 42 U. TOL. L. REV. 283, 291 (2011).

26. Bush, s*upra* note 5, at 523.

27. Wald, *supra* note 3, at 1573.

28. *Id.*

29. Adwin W. Green was a Lieutenant Colonel in the Judge Advocate General's Corps of the United States Army. He worked at the European Theater of Operations United States Army (ETOUSA). Adwin W. Green, Military Commissions and Provost Courts with Particular Regard to Procedure Including Rules of Evidence, Sept. 25, 1943, Donovan Nuremberg Trials Collection Vol. CVII, Section 62.05, *available at* http://library2.lawschool.cornell.edu/donovan/pdf/Batch_15/Vol_CVII_62_05_01.pdf.

30. *Id*. at 1.

shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man."[31] As this was a vague and broad requirement, the Commission had a great deal of flexibility in determining what they would allow prosecutors to use against the Nazi defendants. In a shift from typical Anglo-Saxon requirements, the Nuremberg Tribunal accepted as evidence German films and photos without document authentication that would have normally been needed in a standard trial proceeding.[32] Similarly, the tribunal allowed official reports from Allied countries, which documented the scope and nature of war crimes committed in occupied countries to be admitted into evidence by notice alone.[33]

III. GUANTANAMO MILITARY COMMISSIONS

A. Background

Much like the Allied victors after World War II, after the horrific attacks of 9/11 the United States government found itself in the position of having to bring to justice the people who were responsible.[34] Backed by the global community, the United States "labeled the events of September 11 as an act of war."[35] In doing so, the United States government had to figure out how best to try the individuals who were responsible for the attacks, most of whom where members of Al Qaeda.[36] After many suggestions of criminal trials, courts-martial, and mixed civilian and military commissions similar to the Nuremberg Trials, the White House decided on military commissions.[37]

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31. *Id.*
32. Wald, *supra* note 3, at 1580.
33. *Id.*
34. Jack Goldsmith, *The Shadow of Nuremberg*, N.Y. TIMES, Jan. 22, 2012, at BR8.
35. Hernandez-Tryuol, *supra* note 1, at 1035.
36. Melissa J. Egan, *Current Development 2006-2007: Refusing To Settle For An Unsettled Law: The Controversy Surrounding The Military Commissions Act And The Ethical Implications Of Compliance*, 20 GEO. J. LEGAL ETHICS 547, 548 (2007). Al Qaeda is a terrorist network that is neither a state, nation, belligerent, or insurgent group, and which lacks even a semblance of a government and does not control significant portions of territory as its own. Jordan J. Paust, *Responding Lawfully to Al Qaeda*, 56 CATH. U. L. REV. 759, 760-61 (2007).
37. Choi, *supra* note 7, at 144.

In a culmination of this decision, President Bush signed into law the Military Commissions Act of 2006 (Act).[38] This bill established military commissions that were to try non-citizens who were believed to be either 1) members of Al-Qaeda or 2) have engaged or participated in terrorist activities harmful to the United States.[39] In dealing with the aftermath of the attacks, these commissions became a necessity because the standard civilian criminal system was not well enough equipped to properly deal with the trials of unlawful enemies.[40] For example, the commissions provided for the prosecution of violations of the laws of war, required a lower level of proof and were better able to control highly sensitive information.[41] As such, the Act was passed in order to authorize a more efficient and effective means of trying unlawful alien combatants.[42]

B. Procedure

Under the Act, military commissions tried unlawful enemy combatants, including those who were suspected of being terrorists, for violations of the law of war.[43] As such, a major provision of the Act was that the accused were forbidden to be excluded from the proceedings, unless the exclusion was for the purpose of ensuring the safety of individuals or to prevent the accused from being disruptive to the proceedings.[44]

In the process of creating these military commissions, the Act set out two preliminary points regarding offenses: 1) that the Act itself codifies offenses traditionally able to be tried by military commissions but does not establish new crimes that did not exist before the enactment of the Act; and 2) that the statute is retroactive, meaning that the Act, as a declaration of existing law, allows for trial of crimes that occurred before the enactment of the Act.[45]

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38. Egan, *supra* note 36, at 547.
39. *Id.* at 548-49.
40. *Id.* at 552.
41. *Id.* at 552-53.
42. *Id.*
43. Egan, *supra* note 36, at 549-50.
44. *Id.* at 555. Under § 949d(e) of the Military Commissions Act, if an accused has been warned by the military judge to cease disrupting the proceedings but persists in doing so anyway, the accused may be excluded from that portion of the proceedings upon the military judge's determination. 10 U.S.C. § 949d(d) (2014).
45. Major Patrick D. Pflaum, *A Matter Of Discipline And Security: Prosecuting Serious Criminal Offenses Committed In U.S. Detention Facilities Abroad*, 194 MIL. L. REV. 66, 89-90 (2007).

In establishing these points, the Act codified common offenses, such as accessory after the fact, attempts, and solicitation, as well as twenty-eight other offenses as proper to be tried by the commissions, and stated that the commissions could try offenses of perjury, contempt, and obstruction of justice.[46]

Procedurally, the Act enabled the Secretary of Defense or an officer appointed by the Secretary to convene a commission and any Armed Forces officer was eligible to serve as a military commissioner.[47] It required a two-thirds vote of the members present[48] at the time of the vote for conviction, except for offenses eligible for capital punishment, which needed no less than twelve commissioners to be present at the time of the vote[49] to agree on a conviction as well as the death sentence.[50]

For rules of evidence, the Act superficially followed the rules of evidence in a trial by general court-martial in which the Secretary of Defense laid out the procedural rules that he believed to be practicable and consistent with military activities.[51] However, the Act also stipulated a list of provisions, which deviated from traditional military commission rules.[52] These provisions allowed for the Secretary of Defense to prescribe that evidence might be admitted if the military judge determines that it has probative value to a reasonable person.[53] The provisions also allow for the Secretary of Defense to allow hearsay evidence if the person seeking to admit the evidence informs the other party of his or her intention to do so sufficiently enough in advance.[54] This enables the other party with a fair opportunity to look over the evidence, including the circumstances under which it was obtained, and to acquire proof that it is unreliable or lacks probative value, therefore causing it to be excluded.[55] However, the disclosure of methods by

46. *Id.* at 90.

47. Choi, *supra* note 7, at 153.

48. The Military Commissions Act required that five jurors be present in order to begin the proceedings. 10 U.S.C. § 948m(a)(1) (2014).

49. 10 U.S.C. § 949m(c) (2014).

50. Choi, *supra* note 7, at 154.

51. *Id.*

52. *Id.* at 155.

53. *Id.*

54. Choi, *supra* note 7, at 162.

55. *Id.* This provision would not have run into issues of lack of representation for defendants as "military defense counsel for a military commission under this chapter shall be detailed as soon as practicable after the swearing of charges against the accused." Per the Act, every defendant was represented. 10 U.S.C. § 948k(a)(3) (2014).

which the evidence was acquired are subject to the Act's rules on classified information, and therefore, there may be certain instances in which the opposing party cannot ascertain methods of discovery.[56] The Act's regulations on classified information state that such information shall be privileged if disclosing the information would be detrimental to national security and protected through a series of actions, including deletion and substitution of redacted, summarized or admitted relevant facts.[57]

IV. THE SIMILARITIES BETWEEN THE TWO TRIBUNALS HIGHLIGHT THE INFLUENCE THE NUREMBERG TRIALS HAD ON THE GUANTANAMO MILITARY COMMISSIONS WHILE THE DIFFERENCES SHOWCASE CHANGE WAS NEEDED

The 9/11 attacks on the World Trade Center were similar to the atrocities committed by the Nazis in World War II in that they "both involved attacks on civilians and both were based largely on race,"[58] as well as that "the ideology of Al Qaeda and its Islamist associates shares attributes with Nazism; it too is totalitarian, and it too has anti-Semitism at its core."[59] As such, the Allied victors of World War II and the American government after 9/11 had essentially the same job in bringing to justice the Nazis and Al Qaeda, respectively. Therefore, because the Nazi atrocities and the 9/11 attacks were both war crimes issues on an international scale, it is understandable that both the Allies and the Bush Administration settled on using military tribunals to carry out their goals of trying these war criminals.

The Nuremberg leaders faced the unique issue of how to balance different kinds of legal systems and how to agree on a proper way to treat the Nazi defendants.[60] Some of the Allies wanted to deny the Nazis a trial altogether, while others who believed in allowing the Nazis due process agreed to make ad hoc compromises.[61] To avoid major problems "the form of trial – international military tribunal – was chosen in part to avoid what Roosevelt's sen-

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56. Choi, *supra* note 7, at 162.

57. *Id.* at 156.

58. Gary J. Chester, *A Natural Law Approach Towards the Conduct of the 9-11 Terror Trial*, 14 TOURO INT'L L. REV. 180, 183 (2010).

59. Jonathan Yardley, *Lessons from Nuremberg on Trying 9/11 Suspects*, DENVER POST, Feb. 5, 2012, at 11E.

60. Goldsmith, *supra* note 34, at 1.

61. *Id.*

ior cabinet officials described as the 'technical contentions and legalistic arguments' available in civilian courts."[62]

No doubt the post-9/11 American government faced the same problem that the Four Powers did when creating the military tribunal that became the Nuremberg Trials: whether to deny the perpetrators of 9/11 a trial altogether or to allow the Al Qaeda defendants their due process.[63] Therefore, because of the similarities between the Nuremberg and post-9/11 circumstances, it made sense for the Bush Administration to use a military tribunal as the means by which to try the Al Qaeda defendants after 9/11. As such, the Bush Administration looked to one major prior military tribunal for reference: the Nuremberg Trials.[64]

However, because those in charge of Nuremberg – the United States, Great Britain, France, and the former-U.S.S.R. – had to contend with three competing expectations for the purpose of the Trials, as well as vastly different notions of justice,[65] the format of the Nuremberg Trials was not completely suitable for direct application by the Bush administration in the trying of the Al Qaeda defendants. As a result, President Bush's government had to decide exactly what parts of the Nuremberg Trials they wanted to use as an influence for their own military tribunals and which parts they could not use at all. In fact, British journalist William Shawcross says, "Nuremberg provides legitimacy for a process today that is at once military in venue but nonetheless legitimate and law-governed."[66] In simpler terms, the Nuremberg Trials provided a backdrop upon which Bush's Administration could build a new kind of a military tribunal that more easily fit the situation of a post-9/11 United States.

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62. *Id.*

63. *Id.*

64. Although there were other military tribunals, such as the International Military Tribunal for the Far East, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal in Rwanda, the Nuremberg Trials were the first major international military tribunal. *See* M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 58-59 (1997).

65. The U.S.S.R.'s idea of justice versus that of the United States, Great Britain, and France. Yardley, *supra* note 59.

66. Wells C. Bennett, *Book Review: Justice and the Enemy: Nuremberg, 9/11, and the Trial of Khalid Sheik Mohammed by William Shawcross*, LAWFARE (Jan. 7, 2012, 11:29 AM), http://www.lawfareblog.com/2012/01/justice-and-the-enemy-nuremberg-911-and-the-trial-of-khalid-sheik-mohammed/.

A. Similar Lower Standards of Evidence Did Not Indicate Pre-Determined Guilt But Rather Allowed the Tribunals to Define the Extent of Each Defendant's Individual Guilt

Arguably, the biggest similarity between the two tribunals was that the Bush Administration decided to maintain the Nuremberg Trials' practice of admitting evidence that would typically be inadmissible in a civilian court of law. The Nuremberg Trials permitted German photographs and films without document authentication, as well as official reports from Allied countries, which documented the scope and nature of war crimes committed in occupied countries to be admitted into evidence by notice alone.[67] Similarly, the Act accepted hearsay, unsworn statements, and other generally inadmissible evidence to be used in the trials.[68]

It is likely that this similarity of admitting typically inadmissible evidence into trial in both the Nuremberg Trials and under the Guantanamo Military Commissions can be attributed to the nature of the two tribunals and the types of criminals that they were set up to try, i.e, that both tribunals were the embodiment of Victor's justice.[69] The Allies in 1945 and President Bush's government in 2001 each needed to figure out a way to prosecute their respective international war criminals. As a result of this necessity, the governments needed to change the rules in order to successfully carry out their goals of bringing to justice those who had committed some of the worst war crimes and crimes against humanity.[70]

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67. Wald, *supra* note 3, at 1580-81.

68. Paust, *supra* note 36, at 798.

69. Victor's justice is generally understood to be a post-conflict judicial process where the victors carry out revenge on the defeated through the legal proceedings. Jesse Melman, *The Possibility of Transfer(?): A Comprehensive Approach to the International Criminal Tribunal for Rwanda's Rule 11bis to Permit Transfer to Rwandan Domestic Courts*, 79 FORDHAM L. REV. 1271, 1285 (2011).

70. More abstractly, similarity can be found in the structures of the enemies for whom each of the tribunals was set up to try. It is a well-known fact that the Nazi government of 1930s and 1940s Germany was totalitarian and anti-Semitic. Similarly, while "the scale and the nature of the threats are different" than that which the Nazis posed, "the ideology of Al Qaeda and its Islamist associates shares attributes with Nazism; it too is totalitarian, and it too has anti-Semitism at its core." Ideologically, the Nazis and the Al Qaeda are frighteningly similar, each having a dictator that is "despotic, ruthless, anti-Semitic, anti-Christian, and totalitarian." Yardley, *supra* note 59.

Similarity can also be found in the rationalizations of the parties in charge of each of the trials. For justification of the Nuremberg Trials, the four Allied countries as a group determined that what they were doing to the Nazi defendants was just "because [they] concluded that the crimes had previously

As such, both tribunals were created as a way to try and charge those who committed war crimes and crimes against humanity.

Because of the change in rules and laxer standards, particularly at Nuremberg, many contemporary historians criticize the Nuremberg Trials as "an exercise in 'victor's justice'."[71] More specifically, critics have said that the procedural shortcomings in the trial and in the application of substantive norms are the "consequence of a conviction-oriented framework imposed by the four great powers that established the court."[72] Second, critics claim that the International Military Tribunal, through the Nuremberg Trials, breached "fundamental principles of justice because it only judged one side."[73] Some might claim that both the Allies' decision and the post-9/11 American government's decision to suddenly and arbitrarily lower the standard of evidence indicate that the leaders of each of the tribunals had already determined the fates of those on trial and wanted to make sure that they achieved the "right" result.[74] However, in the case of Nuremberg, it is unrealistic to assess trials that took place in 1945 and 1956 by the human rights standards of today, which have significantly progressed.[75] Moreover, it could be said that this is not the case because the guilt of most of the high-ranking Nazi official defendants was already determined by the circumstances of the situation.[76]

In the Nuremberg Trials, there was little doubt that many of the officers who served under Hitler had done his bidding and committed the war crimes for which they were put on trial.[77] It became common knowledge at the end of World War II what Hitler and those in the Nazi party had done and why the Allies were

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existed in some form." Likewise, post-9/11, the United States government "has created a new crime by redefining the concept of war." Hernandez-Truyol, *supra* note 1, at 1056.

71. William A. Schabas, *Victor's Justice: Selecting "Situations" at the International Criminal Court*, 43 J. MARSHALL L. REV. 535, 535 (2010).

72. *Id.* at 535.

73. Schabas, *supra* note 71, at 536.

74. Michael T. McCaul & Ronald J. Sievert, *Congress's Consistent Intent to Utilize Military Commissions in the War Against Al-Qaeda and Its Adoption of Commission Rules that Fully Comply with Due Process*, 42 ST. MARY'S L.J. 595, 615 (2011).

75. Schabas, *supra* note 71, at 535.

76. Three of the twenty-two defendants tried at Nuremberg were acquitted. Jordan Engelhardt, *The Preeminent State: National Dominance in the Effort to Try Saddam Hussein*, 41 CORNELL INT'L L.J. 775, 782 (2008).

77. Tuomala, *supra* note 25, at 286.

fighting the Axis Powers.[78] Therefore, the main task of the Allies was to determine the extent to which those who had served under Hitler had actively participated in the crimes against humanity.[79] As high-ranking officials within the Nazi party, most of these men on trial at Nuremberg were already guilty by carrying out Hitler's commands. As such, making the evidentiary standards laxer enabled the Allies to better determine which defendants played a real part in the crimes against humanity. Once the roles could be determined and those acquitted who did not participate in such acts, the lower standards aided the Allied judges to better know the extent of each of the remaining Nazi defendants' guilt and better determine his ultimate punishment for his crime.

By the same token, by the time the Guantanamo Military Commissions were established and all the quirks worked out, the Bush Administration had determined that Al Qaeda as a group – although not every member – was responsible for the attacks on 9/11, although the Administration improperly classified almost all of the members as enemy combatants.[80] Like that of the International Military Tribunal at Nuremberg, the task of the Guantanamo Military Commissions was a matter of figuring out the extent of the terrorists' guilt and involvement in the attacks without a proper process of proving that the defendants were actually guilty of the crimes against humanity for which they were imprisoned and on trial.[81] As a result, the Act allowed a lower standard of evidence to better help them determine who actively participated in the 9/11 attacks on the World Trade Center and, subsequently, draw the lines on the levels of guilt to better determine what kinds of punishment to enact for each individual Al Qaeda defendant.

B. Military Personnel Heading the Guantanamo Military Commissions Instead of Civilian Judges Highlights the Difference in Circumstances between Post-9/11 America and Post-World War II Nuremberg

Despite the similarities between the Nuremberg Trials and Guantanamo Military Commissions, there are some obvious differ-

78. *Id.*

79. The judges of the Nuremberg Trials acquitted the three defendants that they did likely both to legitimize the Trials, as well as to distinguish between those acts that were simply reprehensible and those acts that were punishable under criminal law. Engelhardt, *supra* note 76, at 782-83.

80. Paust, *supra* note 36, at 768-69.

81. Egan, *supra* note 36, at 550.

ences,[82] the most notable of which is that, while Nuremberg was a military tribunal, it was a military tribunal with "judges [who] were not military men but civilian jurists of the first order."[83] In contrast, the judges in the Guantanamo Military Commissions were military judges who were "assigned to the Office of the Judge Advocate General, which must certify they are qualified for duty as a judge."[84] Furthermore, the judges at Guantanamo had to be certified before they could be appointed, which "requires that the judge has attained the rank of Lieutenant Colonel,[85] served as lead counsel in five or more major trials, and successfully completed a military judge course."[86]

Procedurally, and possibly as a result of it being headed by attorneys instead of military officials, Nuremberg offered fewer protections to its Nazi defendants than the Act offers to its Al Qaeda defendants.[87] In fact, Shawcross has noted that "time-traveling Nazi defendants would likely prefer to be tried by military commission these days, the latter forum affording significantly more in the way of procedural protections than the Nuremberg tribunal ever did."[88] Relatedly, "the concept of crimes of war has expanded"[89] under the Act since the limited definition of war crimes present at Nuremberg and now lists eighteen offenses for which defendants may be charged, including many of the crimes listed in the Charter for the Nuremberg Tribunal.[90]

Unlike the Allied countries at Nuremberg, the American government after 9/11 likely felt that military personnel were better

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82. Perhaps the biggest procedural difference between the two tribunals is that the Guantanamo Military Commissions allowed for a system of appeals of the defendants' convictions, whereas the convictions of the Nazi defendants of the Nuremberg Trials were final. In his official outline of the procedures of the Nuremberg Trials, Lieutenant Colonel Green states, "There is no legal provision for appeal from the decision of a military commission." Green, *supra* note 29, at 18. However, under the Military Commissions Act of 2006, defendants' appeals can initially be reviewed by an automatic Court of Military Commission Review, along with a system of limited review by the United States Court of Appeals for the District of Columbia Circuit, and then a possible review by writ of certiorari to the Supreme Court. Paust, *supra* note 36, at 797.

83. Wald, *supra* note 3, at 1560.

84. McCaul & Sievert, *supra* note 74, at 640.

85. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 7-1(c) (Oct. 3, 2011).

86. McCaul & Sievert, *supra* note 74, at 640.

87. Yardley, *supra* note 59.

88. *Id.*

89. Hernandez-Truyol, *supra* note 1, at 1052.

90. *Id.*

suited to try Al Qaeda for their crimes against humanity rather than civilian lawyers and judges.[91] One reason could be that there was only one government and justice system with which to attend, as opposed to the four competing governments and two different justice systems of the Allied Powers. It is more likely that the American government considered that punishing those responsible for the attack on the World Trade Center was a matter of national importance and safety.[92] As such, the Bush Administration believed the trials should be under jurisdiction of the military rather than the civilian justice system likely because it is the military that typically deals with terrorists and would therefore need less time being briefed on the workings of Al Qaeda and procedures of military trials than every day attorneys and judges would need.[93]

Interestingly, although some might say that military commissions with military personnel serving as judges should offer less procedural protection to defendants than a civilian court, the Act actually provided better protection than Nuremberg likely because the sense of proper process has changed since Nuremberg.[94] The leaders of the Nuremberg Trials were attempting to balance so many different languages, ideologies, and justice systems at once, that the rules and procedures of the Nuremberg Trials became a combination of the four different systems. This combination was to ensure that the Nazi defendants were tried properly in a way that suited all of the Allies and without any mishaps or missteps due to language barriers or discrepancies between the countries. With the American government working alone, the Bush Administration was able to use the United States' own rules and procedures and tweak them in a way that best fit the situation of trying Al Qaeda; in doing so, the procedural protection for defendants became freer, stronger, and more effective than the protections at Nuremberg.[95]

V. CONCLUSION

In 1945, the victorious Allied powers found themselves in the unique position of having to create the first international military tribunal to bring to justice the former Nazi leaders for the abominable war crimes and crimes against humanity that they commit-

91. McCaul & Sievert, *supra* note 74, at 638-39.
92. *Id.* at 643.
93. *Id.* at 644.
94. Bennett, *supra* note 66, at 2.
95. *Id.*

ted under the command of Adolf Hitler. In 2001, the American government found itself facing a similar dilemma of having to prosecute the Al Qaeda terrorists who were at the heart of the World Trade Center attack on September 11th. While the Bush Administration had the Nuremberg Trials to look to as precedent for the creation of a military tribunal to try international defendants for war crimes, the Bush Administration nevertheless had to make changes to the structure of the trial to better fit the situation at hand. As a result, many critics claim that the Nuremberg Trials in particular were a consequence of Victor's justice, a way for the Allies to convict the Nazi defendants without having to face justice for the crimes they themselves committed during the war.

In comparing the two military tribunals, it is clear that neither model is perfect, and both are flawed in their own ways. However, both tribunals worked effectively in their own situations: the make-up and procedures of the Nuremberg Trials were necessary to compensate for the different languages and legal systems, while the make-up and procedures of the military tribunals set up by the Act were appropriate in post-9/11 America. Nevertheless, both tribunals are good models of military commissions on which to draw in future scenarios but, ultimately, depending on the circumstances of the situation, it will be up to future governments to decide for themselves whether to follow these tribunals or come up with a new model of their own.