The Legacy of Nuremberg: Sustaining Human Rights

Daniel Smith

On July 17, 1998, the cause of human rights was given great impetus when the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute of the International Criminal Court, thus creating for the first time an independent and permanent court with jurisdiction over the most serious crimes of concern to the international community: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. Also on this date, a beautifully sunny day in Ithaca, Henry Korn, B.A. '68, and his wife, Ellen Schaum Korn, B.S. '68, contributed a significant new addition to the law library: nearly 150 bound volumes of Nuremberg trial transcripts and documents from the personal archives of General William J. Donovan (1883–1959).

This coincidence is an apt one, because the International Military Tribunal at Nuremberg and the Nuremberg Military Tribunals (also known as the Subsequent Proceedings or Subsequent Trials) were the direct historical antecedent for the formation of the International Criminal Court. The Nuremberg tribunals were established at the conclusion of World War II to mete out justice to the principal perpetrators of the Holocaust, with the International Military Tribunal addressing four counts: (1) the common plan or conspiracy, (2) crimes against peace, (3) war crimes (including genocide), and (4) crimes against humanity.

Donovan played an important part in the International Military Tribunal proceedings in his role as special assistant to the U.S. chief of counsel, Supreme Court justice Robert H. Jackson. Both men grew up in upstate New York, Jackson in Frewsburg and Donovan in Buffalo. Jackson attended the Albany Law School for a year and would become the last member of the Supreme Court to gain admission to the bar by reading law in a law office instead of through graduation from law school. Donovan graduated from the Columbia Law School and, despite an undistinguished academic record, became a prominent attorney in New York City. In World War I he earned the Congressional Medal of Honor and many other decorations. Most importantly, however, he was the founding director of the Office of Strategic Services—the precursor of the Central Intelligence Agency—and thus offered valuable intelligence to Jackson as the Allies gathered evidence to construct their case against the German war criminals.

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Jackson and Donovan were acutely aware of the historical moment of the Nuremberg process and were thoroughly committed to ensuring a just and expeditious trial for the defendants. Jackson eloquently articulated some of the guiding principles of the prosecution in a report to President Truman that was released publicly on June 7, 1945:

The American case is being prepared on the assumption that an inescapable responsibility rests upon this country to conduct an inquiry, preferably in association with others, but alone if necessary, into the culpability of those whom there is probable cause to accuse of atrocities and other crimes. We have many such men in our possession. What shall we do with them? We could, of course, set them at large without a hearing. But it has cost unmeasured thousands of American lives to beat and bind these men. To free them without a trial would mock the dead and make cynics of the living. On the other hand, we could execute or otherwise punish them without a...
hearing. But undiscriminating executions or punish-
ments without definite findings of guilt, fairly arrived
at, would violate pledges repeatedly given, and would
not set easily on the American conscience or be re-
membered by our children with pride. The only other
course is to determine the innocence or guilt of the
accused after a hearing as dispassionate as the times
and horrors we deal with will permit, and upon a
record that will leave our reasons and motives clear. 3

Jackson continues, cautioning:

We must not forget that when the Nazi plans were
boldly proclaimed they were so extravagant that the
world refused to take them seriously. Unless we write
the record of this movement with clarity and preci-
sion, we cannot blame the future if in days of peace
it finds incredible the accusatory generalities uttered
during the war. We must establish incredible events
by credible evidence. 2

The relationship between Jackson and Donovan was not
an easy one. Although Donovan could not be said to have
been in disagreement with any of the foregoing, he did have
a different conception about how to develop the prosecution’s
case. Jackson’s approach was to rely predominantly on docu-
mentary evidence, while Donovan thought it politic to pur-
sue a greater use of testimonial evidence as well. Jackson,
however, did not yield on the question of negotiating with
the defendants or their counsel for testimony. Partly in re-
response to Donovan’s efforts in that direction, which included
the possibility of using Hermann Göring as a witness against
other defendants, Jackson addressed a memorandum to
Donovan and other senior staff lawyers that detailed in no
uncertain terms the ground rules for dealing with the prison-
ers of war.

This memorandum is among the Donovan Papers now
at the Cornell Law Library. A penciled check next to his name
on the list of recipients indicates that it is Donovan’s own
copy. Under the heading “Matters which I think may cause
criticism and confusion in reference to high-ranking prison-
ers of war require that the following instructions will be ob-
served,” point two, which has been underlined, reads: “No
social entertaining of any prisoner of war shall be undertaken
or permitted by any member of this staff.” In the right-hand
margin next to it is a cartoon figure with a smiling face. Al-
though it would be impossible to prove that this editorial
comment was in fact the handiwork of Donovan, it is entirely
plausible, especially given the known tensions between
Donovan and Jackson. (Donovan, in fact, would leave
Jackson’s staff in November 1945.)

While this fleeting attempt at levity is trivial in the con-
text of the proceedings, it does point up their very real, hu-
man dimension. Nuremberg was about absolute conflict, about
reasserting humanity in the face of inhumanity. A sense of
this urgency is revealed in a terse response to an assistant’s
typed note, also among the Donovan Papers: “General
Donovan: These are the copies of the excerpts of the Tho-
mas diary, as far as it went. J.E.S.” Donovan replies: “Get some
more.” The person referred to is Georg R. Thomas, a Ger-
man general of the infantry who was arrested by the Gestapo
in 1944 before being captured by the Allies. In an extended

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handwritten statement, entitled “Über die Schuldfrage,” or
“Concerning the Question of Guilt,” Thomas begins:

The terrible indictment which the Allied Court has
made against the war criminals of the period of the
Nazi regime, against its political and military orga-
nizations, and indirectly thereby against the whole
German people, must cause each thinking person
to ask this question: How was it possible that a na-
tion which gave to the world a Kant, Goethe,
Lessing, Bach and Beethoven, trusted and obeyed
such a regime for twelve years?

History will pass a terrible judgment over the
past twelve years of the German people because
even after the present feelings of hatred, vengeance
and egotism will have made room for greater objec-
tivity, and when the German people will no longer
heap upon itself self-accusations and denunciations,
in order to prove its political change of heart, the
one thought will remain as a sad recognition: How
could a whole nation follow the mad teachings of
this man?

It is therefore absolutely essential that men
who have proven themselves opponents of this re-
gime, and who are able out of their personal expe-
rience to contribute to an elucidation of the
question of the failure of the German people, say
everything openly which might serve to disentangle
this German question.
The Donovan Papers contain both Thomas's original statement in German and a typed translation in English that was prepared by the Allies. The German text is written in pencil and colored pencil on several different types of now very fragile paper (including a doctor's form for patients' medical history, or Krankheitsgeschichte) and fills all available space, with numerous emendations and afterthoughts. It is the record of a vanquished warrior—whether his remorse was genuine or not remains an open question.

There are many other remarkable documents among the Donovan Papers, including memoranda discussing how the military tribunal should be structured, working notes associated with the interrogation of Göring, drafts of trial briefs against various defendants, Nazi organizational charts, and evidentiary analyses prepared by the Office of Strategic Services and other agencies. The documents assume various formats, ranging from mimeographs, photostats, and carbon copies to photographs, maps, typescripts, and original manuscripts. While most of the documents are copies that can be found elsewhere, there are a significant number that are unique to Cornell's holdings and that represent an important, though small, part of the history of the Nuremberg process.

The official version of the International Military Tribunal was published in Nuremberg as a forty-two-volume set by the secretariat of the tribunal. Extensive though this record is, it does not contain all the background material that animated the proceedings nor the vast archives that documented the machinations of the Nazi war apparatus. Jackson's staff screened over one hundred thousand captured documents, and around four thousand were translated and used as evidence.

Relatively few witnesses were called, but Jackson's prosecutorial strategy was ultimately vindicated when the court rendered its judgment on October 1, 1946:

Much of the evidence presented to the Tribunal on behalf of the Prosecution was documentary evidence, captured by the Allied Armies in German army headquarters, Government buildings, and elsewhere. Some of the documents were found in salt mines, buried in the ground, hidden behind false walls and in other places. The case, therefore, against the defendants rests in large measure on documents of their own making, the authenticity of which has not been challenged except in one or two cases.3

And in his final report to President Truman on October 7, 1946, in which he reviews the outcome of the International Military Tribunal and resigns his commission as chief of counsel to the United States, Jackson states:

We have documented from German sources the Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people. No history of this era can be entitled to authority which fails to take into account the record of Nürnberg.4

In an effort to make such an accounting of the record, and to celebrate the fiftieth anniversary of both the Convention on the Prevention and Punishment of the Crime of

Daniel Smith (right) and the Korn family (Greg and his parents, Henry and Ellen) looking at the bound volumes of the personal papers of General William J. Donovan, now available in the Cornell Law Library, thanks to Henry and Ellen Korn.
Genocide (December 9, 1948) and the United Nations Universal Declaration of Human Rights (December 10, 1948), I have organized an exhibition in the Dawson Rare Book Room by the same name as this article: "The Legacy of Nuremberg: Sustaining Human Rights" (see sidebar). The exhibition traces the evolution of international law and human rights over a span of four hundred years.

People have had not only an intellectual but also a visceral reaction to the materials in the exhibition.

It begins with William Fulbecke's compendium The Pandectes of the Law of Nations (1602) and concludes with the Rome Statute of the International Criminal Court (1998), downloaded from the United Nations Web site. Along the way are representative works in various languages and editions—by such seminal legal commentators as Grotius, Pufendorf, Wolff, Bynkershoek, and Vattel—that reflect the development and transmission of legal thought across temporal and physical borders. Observers will also find the locus classicus of the term international law, coined by Jeremy Bentham in 1780, as well as the origin of the word genocide, a neologism created by Raphael Lemkin in 1944 to "denote an old practice in its modern development" and first employed judicially in the indictment at Nuremberg the following year.

Within this historical context the exhibition features materials selected from the Donovan Papers, some of which have been described above. Complementing the Nuremberg documents are several memoranda by Otto Charles Doering Jr. (copied from microfilm in the Special Collections of the Kroch Library) that were written in the sixties to assist a biographer of Donovan. Doering was a longtime law partner of Donovan and served as his right-hand man and executive officer in the Office of Strategic Services. Doering, one of Donovan's few confidants, received his LL.B. in 1928 from the Cornell Law School.

It can be said without exaggeration that people have had not only an intellectual but also a visceral reaction to the materials in the exhibition. The weight of history is palpable when one sees and contemplates Grotius arguing the distinction between just and unjust wars side by side with Jackson seeking to redress one of the worst calamities of the modern era. The exhibition thus far has attracted members of the Law School Advisory Council and many law students interested in human rights and international law. Across campus, Jewish student groups have also evinced interest, and I am beginning to field research queries from scholars at Cornell and elsewhere. A reception for the Korns acknowledging the receipt of the Nuremberg transcripts and documents (and the newly instituted Henry Korn Lecture Series) drew both university officials and members of the press to the Dawson Rare Book Room.

Primary historical materials are essential for the researches of scholars and students alike, and although curiosity is the only prerequisite to gain access at the law library, special collections require special attention. Rare, fragile, and unique materials must be given the care they deserve. When one considers how many generations of committed individuals and institutions have sustained the works that make up our historical collections—for centuries, in many instances—it is readily apparent that we are only transitory custodians of what will be the intellectual heritage of the future.

Various initiatives are under way at Cornell to preserve and promote access to this body of knowledge, and in these endeavors the electronic world has much to offer. Look to a future issue of the Forum for word of progress, or visit the legal history and rare books section of the law library's Web site.

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2. Id. at 10.
3. 1 Trial of the Major War Criminals before the International Military Tribunal 173 (1947).
4. Jackson, supra note 2, at xvi.
5. URL: www.un.org/icc. The Cornell International Law Journal is sponsoring a symposium devoted to the International Criminal Court on March 5 and 6. Entitled "The International Criminal Court: Consensus and Debate on the International Adjudication of Genocide, Crimes against Humanity, War Crimes, and Aggression," the symposium will feature, among others, Philippe Kirsch, chair of the ICC conference's primary deliberative body, the Committee of the Whole, and David Scheffer, the head of the U.S. delegation at Rome.
6. URL: www.lawschool.cornell.edu/library.
A GUIDE TO THE EXHIBITION “THE LEGACY OF NUREMBERG”

The list below is in chronological order. An annotated version of this guide, as well as guides for the exhibitions “Some American Firsts” and “Rejuvenating Blackstone,” can be found at the law library’s Web site: www.lawsc.hornell.edu/library.


William Joseph Donovan [1883–1959]. Nuremberg Trial Transcripts and Documents. [Donovan Papers, Rare Books, Cornell Law Library].

Otto [Charles] Doering Jr. [1904–79]. Memoranda to Corey Ford. [Doering Papers (1946–ca. 1965), #4445, Department of Manuscripts and University Archives, Cornell University Library].


