

# Shawcross on Terror

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## Articles

Peter Berkowitz on Justice and the Enemy: From the Nuremberg Trials to Khalid Sheikh Muhammad by William Shawcross

Wednesday, February 1, 2012 9 min read By: [Peter Berkowitz](#)

William Shawcross. *Justice and the Enemy: From the Nuremberg Trials to Khalid Sheikh Muhammad*. Public Affairs. 235 pages. \$26.99.

During the fight against al-Qaeda, affiliated groups, and states supporting Islamist terrorism, progressive critics poured scorn on the Bush administration for allegedly shredding the Constitution and trampling on international law. Prominent among those progressives was then-Senator Barack Obama, who rode the train of their anger to the White House. His frequently harsh and uncompromising words suggested that the questions of law that the U.S. faced in combating jihadists who proclaimed holy war on America — and waged it in violation of the international laws of war by disdainful to wear uniforms, concealing their weapons, targeting civilians and civilian infrastructure, and seeking weapons of mass destruction to carry out their schemes of mayhem — were susceptible of simple and straightforward answers.

There is no contradiction, Senator Obama intoned and reaffirmed as president in his Inaugural Address, between our ideals and our security. No trade-offs, no compromises, no difficult calls had to be made. The law was clear and following it faithfully not only presented no puzzles about the relation between liberty and security but enhanced both. By affirming our dedication to the rule of law even while at war we would strengthen our values, and by scrupulously safeguarding the rights of detainees we would enhance our security by depriving the terrorists of another reason to hate us. Only ignorance or malevolence, it seemed to progressives, could explain Bush administration policies that in the critics' eyes shortsightedly and counterproductively put security ahead of liberty, since the struggle against Islamist terror gave rise to no hard questions of justice.

The distinguished British journalist William Shawcross is of a different view. "The judgment of evil is never simple" he states in the opening sentence of his important contribution to the debate over how the United States can honor justice in its struggle against Islamist terror. His book, however, is not a philosophical meditation on ultimate questions. Rather he provides a probing analysis grounded in history, law, and politics of how "the questions raised in the difficult international debates over the proper way to bring justice to the leadership of the Al Qaeda terrorist movement" illustrate "the ambiguity of dispensing justice in an imperfect world." Shawcross deftly surveys a decade's worth of national security and

law controversies, from the interrogation and trial of 9/11 mastermind Khalid Shaikh Mohammed to the proclamation by President Obama, following U.S. Navy SEALs' killing of Osama bin Laden, that "Justice has been done." He shows that fighting evil under law involves myriad challenges to our values and our security and generates a constant flow of difficult questions about how to reconcile them. And he is firm in his assessment that since September 11 the United States has imperfectly, but to an extent that should inspire admiration and gratitude from friends of freedom and democracy around the world, advanced the cause of justice in the battle against a ruthless enemy of civilization.

Shawcross brings rich and varied experience to his undertaking. He is the author of many books, including *Sideshow: Kissinger, Nixon, and the Destruction of Cambodia* and the bestselling *The Queen Mother*. In addition, he has been a politically engaged proponent of human rights, serving as chairman of Article 19, a London-based charity and pressure group that defends the rights of free expression; board member of the International Crisis Group, an ngo committed to preventing and resolving deadly conflict; and member, from 1995 to 2000, of the UN High Commissioner for Refugees' Informal Advisory Group. Not least, he is the proud son of Hartley Shawcross, Britain's lead prosecutor at the Nuremberg Tribunal, in which the victorious Allies tried many of the worst Nazis for war crimes.

Shawcross the son uses Nuremberg as a point of departure for understanding the dilemmas America confronts today because it "shows how difficult it always is to treat properly those who commit hideous and unprecedented crimes." Initially, the Allies were divided over how to handle captured Nazis. Stalin proposed the firing squad for 50,000. Churchill envisaged summary justice for a handful of top figures. Roosevelt eventually embraced the idea of a military tribunal for the leaders because it would demonstrate respect for due process while allowing the prosecution greater flexibility than civil courts would.

In May 1945, less than a month after President Roosevelt's death, President Harry S Truman chose Supreme Court Justice Robert Jackson to be the chief prosecutor at the tribunal. Jackson firmly rejected any sort of show trial: "You must put no man on trial before anything that is called a court under forms of judicial proceeding, if you are not willing to see him freed if not proven guilty."

The results of the Nuremberg Tribunal, which opened on November 20, 1945, with 24 Nazis on trial, and concluded with the announcement of verdicts on October 1, 1946, suggest that the prosecution was indeed obliged to establish guilt. Although the Allies had it within their power to do whatever they wished with the defeated Nazis, the trials they authorized to dispense justice acquitted three defendants, sentenced seven to long terms of imprisonment, and twelve to death by hanging (in addition, one defendant committed suicide and another was found unfit to stand trial).

In his opening remarks before the tribunal, Justice Jackson highlighted the precedent established by Nuremberg:

The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgments of the law is one of the most significant tributes that Power has ever paid to Reason.

The restoration of justice under law was a theme to which Hartley Shawcross returned in his closing remarks before the tribunal:

States may be great and powerful. Ultimately the rights of men, made as all men are made in the image of God, are fundamental . . . and so, after this ordeal to which mankind has been submitted, mankind itself — struggling now to re-establish in all the countries of the world the common simple things — liberty, love, understanding — comes to this Court and cries, “These are our laws — let them prevail.”

What William Shawcross characterizes as the “remarkable achievement” of Nuremberg extended well beyond the trials themselves. The tribunal contributed to the rehabilitation of Germany; set the stage for outlawing crimes against humanity; solidified the long-standing commitment in customary international law, soon to be enshrined in the 1949 Fourth Geneva, to the protection of civilians in wartime; and helped establish procedures for the prosecution and punishment of violations of the international laws of war.

Shawcross is equally keen to note that in its time Nuremberg was “both experimental and contested.” And in our time its precedent must be thoughtfully applied. “At Nuremberg,” he observes, “our civilization designed a vehicle to anathematize men imbued with evil.” Yet “evil is eternal and re-invents itself in every age.” Thus, while the precedent of Nuremberg endures, the vehicles for justly combating evil’s new faces must be repeatedly refurbished and in some cases new vehicles must be designed and constructed.

In asserting that they are both embodiments of evil, Shawcross is under no illusions about the difference in scale between the jihadists and the Nazis, and about the difference in the nature of the threat they pose. In striking contrast, however, to many of his colleagues among the transnational community of human rights advocates and activists, he is also under no illusions about the attributes that link the jihadist vision to that of the Nazis:

it too is totalitarian, and it too has anti-Semitism at its core. In the case of Al Qaeda that intransigent hatred is extended to all “infidels.” Just as Hitler planned a “thousand year Reich,” so the Islamists call for a global caliphate in which they and their laws prevail absolutely, and endlessly.

It is in significant measure because of his clear-eyed view of the gravity of the security threat the jihadists pose that Shawcross is able to illuminate the legal challenge they present.

Understanding the security threat posed by transnational Islamic terrorists begins with understanding the faith that inspires them. Shawcross calls it Islamism, which he defines as “a collection of ideologies united by the belief that Islam is both a religion and a political system.” Since religion and politics are intertwined in all forms of Islam it is necessary to add that Islamism is in particular characterized by commitment to violent religious war against the West. The Muslim Brotherhood, founded in Egypt in 1928 by Hassan al-Banna and informed by the writings of its preeminent theorist, Egyptian Sayyid Qutb (1906–1966), has been the most influential promulgator of Islamism in the Sunni world. It is dedicated to a return to the teachings of the Prophet Muhammad, the rejection of Western politics and morality, and the creation by whatever means necessary of Islamic regimes based on strict interpretations of Sharia, or Islamic religious law. Undoubtedly, the oppression and the underdevelopment that are the bitter fruits of the authoritarian government endemic to Arab societies, indeed much of the larger Muslim world, have fueled the growth of the Islamist alternative. Shawcross reminds that the Deobandi movement of northern India and Pakistan, which enjoyed a close relationship with the Taliban, also teaches violent jihad and the need to restore an original and purified Islam. And for all the enmity between Sunni and Shia Muslims and Arabs and Persians, the Shiite Islamic Revolution in Iran and the Islamic Republic it established have been driven by a similar determination to destroy the infidel and spread the reign of Islam. It was against the background of this toxic brew of piety and bloodlust that in 1993 Khalid Shaikh Mohammed collaborated in the attempt to blow up the World Trade Center, in 1996 Osama bin Laden declared war on the United States, and in the late 1990s, under the protection of the Taliban in Afghanistan, the two plotted 9/11.

Shawcross has no doubt that America’s prompt use of military force against al-Qaeda and the Taliban in Afghanistan was appropriate. He also recognizes that America was ill-prepared to deal with the legal challenges of waging war against transnational terrorists. But the root of the problem, he argues, was not the supposedly dastardly character of the Bush administration, but rather the condition at the time of American law and the international laws of war, which “were not designed to cope with what was being called a ‘new kind of war,’ involving primarily stateless actors who cared nothing for any rules of war.”

Indeed, the Geneva Conventions, the United Nations and other international institutions, and American law, with its sharp distinction between the laws of war and criminal law, presupposed that war involved conflict between states waged by soldiers in uniform, or civil war. Neither the international laws of war nor American domestic law had been compelled to give much attention to the handling of transnational terrorists, hybrid fighters not fitting easily under either body of law. Unlike traditional soldiers, Islamist terrorists do not wear uniforms, do not carry their arms openly, do not owe allegiance to a state, and, as the centerpiece of their strategy, attack civilians and civilian objects. And unlike traditional criminals, Islamist terrorists seek to destroy states.

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Shawcross is frank about Bush administration errors. For example, it should have cooperated better with Congress to craft new laws to govern the detention, interrogation, and prosecution of enemy combatants and should have consulted more with allies. The president should not have initially made a “group status determination” that all detainees captured on the battlefield in Afghanistan were unlawful enemy fighters; instead the Bush administration should have provided from the beginning the “competent tribunals” called for by the Geneva Conventions to determine the status of those captured on the battlefield. And although President Bush did promise that at Guantánamo Bay detainees would be treated “humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva,” the Bush administration should not have initially refused to apply the Geneva conventions to Guantánamo Bay detainees. At the same time, Shawcross is also at pains to point out what so many progressive critics of the Bush administration quite determinedly fail to grasp: The president had strategic reasons and legal ground for the choices he made even if in hindsight it can be seen that in several high profile matters the better arguments were on the other side of the question.

The author does not shy away from the acrimonious disputes about interrogation, which boiled over into the demand that CIA interrogators and Bush administration lawyers be prosecuted as war criminals. Despite the opprobrium heaped far and wide on the Bush administration for what it called “enhanced interrogation” — sleep deprivation, slapping, slamming against walls (that were designed to be flexible to avoid physical harm), and waterboarding (used on three prisoners including Khalid Shaikh Mohammed) — and what its critics insisted were open and shut cases of torture, Shawcross believes that the practices give rise to vexing issues. Indeed, he considers compelling arguments suggesting that provided that such interrogation techniques as the Bush administration authorized are not motivated by malice or used for sadistic pleasure, physicians are present to ensure safety, and it is reasonable to suppose that potentially life-saving information is at stake, enhanced interrogation may in some circumstances be the lesser of two evils.

The debate over military tribunals also has weighty considerations on both sides. Shawcross expresses sympathy for the pushback against the Bush administration determination to use not only federal courts but also military tribunals to try detainees. Those, like candidate Obama, who invoked the spirit of Nuremberg to argue that federal criminal courts were a more appropriate venue for trying al-Qaeda fighters and cheered on the Supreme Court for requiring greater due process and more defendants’ rights than the Bush administration wanted were correct, Shawcross allows, “up to a point.” But, Shawcross hastens to add, progressives tended to ignore the considerable due process protections provided by the Bush military tribunals, which included the opportunity to appeal all the way to the Supreme Court. And Shawcross notes that the Supreme Court’s 2006 *Boumediene* decision

“represented an unprecedented extension of constitutional rights to foreign born enemy combatants,” certainly far beyond the due process and rights accorded Nuremberg defendants. Consequently, he worries, in the spirit of Nuremberg, that as a result of *Boumediene*, decisions about handling prisoners in the struggle against Islamist terror, as Justice Scalia wrote in *Boumediene* in dissent, “will ultimately lie with the branch [the judiciary] that knows least about the national security concerns that the subject entails.”

Despite the president’s rhetoric, his administration has demonstrated dramatic continuities with the Bush administration. Three years after Obama’s executive order closing it, Guantánamo Bay remains open.

Shawcross shows that the Obama administration’s conduct of operations against Islamist terrorism has been paradoxical. On the one hand, the president and Attorney General Eric Holder promised a dramatic break with the Bush administration. In January 2009, on his second full day in office, Obama signed an executive order directing the closing of the detention facility at Guantánamo Bay within a year. To great fanfare Holder announced his intention of trying Khalid Shaikh Mohammed in federal criminal court. And in its initial responses to the November 2009 massacre perpetrated by U.S. Army Major Nidal Malik Hasan at Fort Hood in Texas, underwear bomber Umar Farouk Abdulmutallab’s December 2009 attempt to blow up the airliner on which he was traveling as it approached Detroit, and Faisal Shahzad’s attempt in May 2010 to detonate a car bomb in Times Square, the Obama administration displayed a preference for a law enforcement approach and avoided recognizing the attacks’ obvious Islamist dimension.

On the other hand, the Obama administration has demonstrated dramatic continuities with the Bush administration. Three years after the president’s executive order, Guantánamo Bay remains open. Attorney General Holder was forced to reverse his decision to try Khalid Shaikh Mohammed in federal criminal court in New York City; Mohammad will instead be tried by military tribunal at Guantánamo Bay. In authorizing the killing of bin Laden, President Obama presided over the final stages of a mission conceived by his Oval Office predecessor. And in giving the order for the raid on bin Laden’s safe house in Pakistan and increasing the use of drones to conduct targeted killing missions, including authorization of the successful September 2011 attack killing American citizen and influential al-Qaeda operative Anwar al-Awlaki in Yemen, President Obama has shown his readiness to set aside the law enforcement paradigm for dealing with the Islamists and to use lethal force against, and incur civilian casualties in the pursuit of, terrorists waging war against the United States.

Step by step, Shawcross’s book brings into focus not only the legal but the moral, political, and strategic ambiguities that America has faced since 9/11 in its battle against Islamic terrorism. But concerning one profoundly important point, his book brings into focus the unambiguity of the matter:

America's commitment and sacrifices have, since the beginning of the twentieth century, been essential to the world's ability to resist nihilism. That is still true today. Only America has the power and the optimism to defend the world against what really are the forces of darkness.

By clarifying the dilemmas that America faces in justly defeating its jihadist enemies and by putting into perspective both America's achievement and errors in the struggle against Islamist terrorism, Shawcross shows himself a true friend of freedom and democracy.

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