

Center for the Victims of Torture

Torture, Former Combatants, Political Prisoners, Terror Suspects, & Terrorists

<https://www.justsecurity.org/77835/nuremberg-prosecutor-says-guantanamo-military-commissions-dont-measure-up/>

Public Facing Advocacy Writing

by [Alka Pradhan](#) and [Scott Roehm](#)

August 24, 2021

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August 24, 2021

On September 6, 2006, detainees from the CIA secret prisons, known as black sites, were brought to Guantanamo Bay. That day, President Bush gave a [public speech](#) in which he admitted for the first time that the CIA had held men incommunicado for years. He justified the disappearances and torture of these men by saying that it has been necessary to move these individuals to an environment where they can be held secretly, questioned by experts, and when appropriate prosecuted for terrorist acts before military commissions at Guantanamo.

The Bush administrations disinformation campaign hid the fact that when the CIA's torture program began, there had been no plan to prosecute the victims. In fact, the Senate Select Committee on Intelligence found that the CIA expected black site detainees [to remain incommunicado](#) for the rest of their lives. The truth is that far from convening fair trials the United States government planned to secretly imprison these men, without any legal process, forever.

We now know that the experts at the black sites tortured detainees, some for years at a time. Ammar al Baluchi was treated [like a training prop](#) for newly-arrived interrogators at the black sites, who knocked his head against a wall repeatedly until he suffered a [traumatic brain injury](#). Detainees were [anally raped](#), [shackled to the ceilings by their wrists](#), and of course, [tortured with water](#). As we know, the torture not only [failed to produce any reliable information](#), it may have actually slowed the search for Osama Bin Laden. Consistent with [one of](#) the many horrifying findings in the Senate Intelligence Committees 2014 torture report, the CIA itself determined that it lacked legal basis for Mr. al Baluchis rendition and detention at the black sites in the first place.

It was only after the U.S. governments brazenly criminal scheme[1] at the black sites became [widely known](#) that the Bush administration brought the CIA detainees to Guantanamo Bay and announced the prospect of prosecuting them. Just a few months prior, in June 2006, the Supreme Court had struck down the first incarnation of Guantanamo military commissions (prosecuting Defense Department-held detainees) for lacking the most basic judicial guarantees which are recognized as indispensable by civilized peoples.

This sordid history makes it all the more stunning that [outgoing](#) Chief Prosecutor for the military commissions, Gen. Mark Martins, has [repeatedly invoked](#) a section of then-U.S. Supreme Court Justice Robert Jackson's opening statement for the prosecution at the Nuremberg trials following World War Two:

That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.

That comparison doesn't sit well, in particular, with Benjamin B. Ferencz, the last living Nuremberg prosecutor. In a [statement](#) soon to be filed in the 9/11 case at the military commissions, Ferencz writes:

From my understanding, it appears to me that there is very limited comparison between the fair trial procedures which were applied at Nuremberg trials [and] the current military commission being convened at Guantanamo Bay. For example, evidence tainted by torture was certainly not used in the prosecution at Nuremberg. Defense counsel were certainly not prevented from seeing their clients or accessing evidence against them.

The guiding principle of the Nuremberg Trials was that every defendant was entitled to absolutely fair trials. We worked hard to avoid falsification of evidence or torture of the defendants because as lawyers, we wanted nothing to taint these historic trials.

Ferencz acknowledges that some criticize Nuremberg as a case of victors justice, but explains why even by that standard the Guantanamo military commissions don't remotely measure up:

Allegations with respect to detainee abuses, and prolonged lack of access to legal counsel, as well as other deviations from internationally accepted fair trial and due process practices and standards have made the Guantanamo military commissions appear

suspect in the eyes of much of the world. For many, the very word Guantanamo has become synonymous with prisoner abuse and justice delayed, if not entirely denied. It would be a great tragedy if the goodwill generated by the United States at Nuremberg and by its subsequent leadership in international law were to be undermined by abuse of prisoners at Guantanamo (or elsewhere), or by practices and procedures which may fail to comport with internationally accepted standards. For proceedings to be perceived as just, they must not only be just, they must *appear* to be just.

The prospect that the Guantanamo military commissions would produce anything but *injustice* in reality or appearance is a ship that sailed long ago. No U.S. officials have faced meaningful consequences for the illegal detention and torture of detainees. The men who remain at Guantanamo are still abused through indefinite detention in harsh conditions. As they age in this environment, many have developed serious [medical problems](#), to the point that an independent doctor with deep experience at Guantanamo [said recently](#) she is very concerned that men will begin to die. Commission prosecutors detailed by the Department of Justice [have fought hard](#), and are [still angling](#), to use torture-acquired evidence. And, save for the declassified executive summary of the Senate Intelligence Committees torture report which comprises only eight percent of the full study secrecy around U.S. torture still reigns supreme.

Put more simply, unlike the efforts at Nuremberg, which marked the [birth](#) of international criminal law, the United States decided that power the power to hide criminal abuse of detainees and fair trial violations would subjugate reason and the rule of law at Guantanamo. It is for that reason that the 9/11 case has *not yet gone to trial*, and on that basis that detainee counsel are asking that the case be dismissed.

Chief Prosecutor Martins impending retirement (September 30) is yet another inflection point for the commissions. There is no prospect of justice for anyone through torture-tainted military commission trials. The Biden administration needs to replace Martins with someone who recognizes as much and pursues final resolution of the cases accordingly.

After two decades of indefinite detention without charge or trial, against a history of torture, and still shrouded in pervasive secrecy, the tragedy about which Ferencz worries has largely been written. Perhaps theres an epilogue in which the international goodwill and leadership he recalls the United States enjoying post-Nuremberg can begin to be restored; one where, in [President Bidens words](#), the United States earn[s] back its position in the world. If so, it starts with ending the military commissions.

Note: This article reflects the personal views of the authors and does not represent the opinion of the Department of Defense.)

[1] *United States v. Toscanino*, 500 F. 2d 267 (1974) at 270.

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