

UNIVERSALITY AND THE RESPONSIBILITY TO ENFORCE INTERNATIONAL CRIMINAL LAW: NO U.S. SANCTUARY FOR ALLEGED NAZI WAR CRIMINALS

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Today it is generally recognized that customary international law of a peremptory nature places an obligation on each nation-state to search for and bring into custody and to initiate prosecution of or to extradite all persons within its territory or control who are reasonably accused of having committed, for example, war crimes, genocide, breaches of neutrality, and other crimes against peace.¹

With respect to war crimes in particular, there has been a long history of expectation that war crimes are offenses against humankind over which there is universal jurisdiction and a universal duty to prosecute.² For over two hundred years, the United States has generally shared such expectations and has imposed criminal sanctions against our own nationals and those of other countries, here and abroad, in military commissions and other fora, for violations of the laws of armed conflict.³ Additionally, there are numerous recognitions outside the United States of such a jurisdictional competence and responsibility. As an example, the 1919 Report presented to the Preliminary Peace Conference by the

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1. See, e.g., M.C. BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 110 (1987) (such duty is "a general principle of international law."); M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW—A DRAFT INTERNATIONAL CRIMINAL CODE 110 (1980); Paust, *Extradition and United States Prosecution of the Achille Lauro Hostage-Takers: Navigating the Hazards*, 20 VAND. J. TRANS. L. 235, 237-38 (1987), and references cited; Paust & Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 VAND. J. TRANS. L. 1, 20-29 (1978), and references cited.

2. See, e.g., Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 211-12, 223-24 (1983); *supra* note 1; see *infra* text accompanying notes 5-6, 10-11, and 14.

3. See, e.g., Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 112-18, 164-84 (1972), and references cited.

Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties affirmed:

Every belligerent has, according to international law the power and authority to try the individuals alleged to be guilty of . . . violations of the Laws and Customs of War, if such persons have been taken prisoner or have otherwise fallen into its power. Each belligerent has, or has power to set up, . . . an appropriate tribunal, military or civil, for the trial of such cases.⁴

Similarly, from the late 1960s to the early 1970s there were a series of United Nations General Assembly resolutions evidencing expectations about universal jurisdiction and the duty to engage in criminal sanction efforts.⁵ For example, in a 1973 resolution on principles of international cooperation in the detection, arrest, extradition, and punishment of persons guilty of war crimes and crimes against humanity, it was rightly affirmed:

1. War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment

3. States shall co-operate with each other on a bi-lateral and multi-lateral basis with a view to halting and preventing war crimes and crimes against humanity, and take the domestic and international measures necessary for that purpose.

4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them

7. States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity.⁶

In other resolutions it was also affirmed that a refusal "to cooperate in the arrest, extradition, trial and punishment" of such persons is contrary to the United Nations Charter "and to generally recognized norms of international law."⁷

4. Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement and Penalties (1919), *reprinted in* 14 AM. J. INT'L L. 95, 121 (1920).

5. *See, e.g.*, Paust & Blaustein, *supra* note 1, at 25-26 nn. 92-93.

6. G.A. Res. 3074, 28 U.N. GAOR Supp. (No. 30) at 78, U.N. Doc. A/9030 (1973).

7. *See, e.g.*, G.A. Res. 2840, 26 U.N. GAOR Supp. (No. 29) at 88, U.N. Doc. A/8429 (1971); *see also* G.A. Res. 3074, 28 U.N. GAOR Supp. (No. 30) at 78, U.N. Doc. A/9030 (1973); G.A. Res. 96, U.N. Doc. A/64, at 188 (1946).

The responsibility of nation-states to enforce such laws has also been recognized more particularly with respect to the 1949 Geneva Conventions, which would not be applicable directly to events prior to 1949, but which contain certain general recognitions considered to be part of customary law. Common article 1 of the Geneva Conventions addresses the duty of all signators "to respect and to ensure respect" for the Conventions "in all circumstances."⁸ Another common article (e.g., article 146 of the Geneva Civilian Convention) recognizes in pertinent part:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, . . . grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than . . . grave breaches⁹

As Geneva law affirms, there is no exception to the duty to search for those reasonably accused of having committed relevant violations and to initiate prosecution or to extradite. There is, as with customary law, no power in any single state to grant asylum or some other form of immunity with respect to crimes against the international community.¹⁰ There is, as with customary law, no power to avoid such responsibility because of some domestic law or political concern.¹¹ And, as the Geneva Conventions expressly note, there is no power in any state "to absolve itself" or any other state by agreement or otherwise.¹² As Pictet adds in his commentaries, such enforcement responsibilities under humanitarian law are "absolute."¹³ And as the 1956 U.S. Army Field Manual 27-10,

8. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 1, 6 U.S.T. 3516, 75 U.N.T.S. 287 (1955) [hereinafter Geneva Civilian Convention].

9. *Id.*, art. 146 at 3616, 75 U.N.T.S. at 386.

10. See, e.g., *supra* note 6 and accompanying text; Paust, *supra* note 3, at 120-23; Paust, *supra* note 2, at 221-32; Paust, *Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights*, 18 CASE W. RES. J. INT'L L. 283, 284-85 (1986) [hereinafter *Aggression Against Authority*].

11. See, e.g., Principles of the Nuremberg Charter and Judgment Formulated by the International Law Commission, 5 U.N. GAOR Supp. (No. 12) at 11-14, U.N. Doc. A/1316 (1950) (principles I-IV); 9 Op. Att'y Gen. 356 (1859); Paust, *supra* note 3, at 118-23; *supra* note 10.

12. See, e.g., Geneva Civilian Convention *supra* note 8, art. 148; see also *id.*, art. 1.

13. See, e.g., J. PICTET, IV COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 602 (1958); see also *id.* at 15-17, 587, 590-94.

The Law of Land Warfare, recognized more generally, the sanctions or "principles" documented in the Geneva Conventions "are declaratory of the obligations of belligerents under customary international law to take measures for the punishment of war crimes committed by *all* persons . . ." ¹⁴ that is, regardless of the nationality of victims, or the place of occurrence.

It is of interest more generally that universal jurisdiction, that competence of states recognized under international law which is necessarily interrelated with enforcement duties, provides jurisdiction to enforce sanctions against crimes that have an independent basis in international law. Universal jurisdiction is thus technically a jurisdictional competence to enforce, and enforcement is actually made on behalf of the international community. ¹⁵

From the dawn of our constitutional history, universal enforcement has been recognized over "crimes against mankind," crimes "against the whole world" and the "enemies of the whole human family," or those persons who become "*hostes humani generis*" by the commission of international crimes. ¹⁶ As the Sixth Circuit noted in 1985, in *Demjanjuk*, ¹⁷ "[t]he law of the United States includes international law" and "[i]nternational law recognizes 'universal jurisdiction' over certain offenses." ¹⁸ The Sixth Circuit quoted section 404 of the Draft Restatement, ¹⁹ that "[a] state may exercise jurisdiction to define and punish certain offenses recognized by the community of nations," and then correctly affirmed that "any nation which has custody of the perpetrators may punish them"—including, in that case, the state of Israel, a state and a forum which did not even exist at the time of the alleged violations of international law. ²⁰ Israel's competence, like that of the United States and any nation-state, can implicate an extraterritorial jurisdiction under the universality principle with respect to crimes that were already crimes under international law in a forum that is even newly created. As the court in *Demjanjuk* noted in passing, the proceedings at Nuremberg "were based on universal jurisdiction." ²¹ And as the Nuremberg Tribunal itself recognized, the signatory powers that created the Tribunal

14. U.S. DEP'T OF ARMY FM 27-10, THE LAW OF LAND WARFARE 181, ¶ 506(b) (1956) (emphasis added).

15. See, e.g., Paust, *supra* note 2, at 211-12.

16. See *id.* and references cited.

17. *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

18. 776 F.2d at 582; see also *infra* note 28; *United States v. Yunis*, 681 F. Supp. 896, 900-01 (D.D.C. 1988).

19. 776 F.2d at 582, quoting RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (Tent. Draft No. 6, 1985).

20. 776 F.2d at 582-83.

21. *Id.* at 582.

“have done together what any one of them might have done singly.”²² In the face of defense arguments concerning the maxim *nullum crimen sine lege, nulla poena sine lege* (or, one might say today, the nonsense claim of *ex post facto*), the Tribunal had also echoed a common response—“the crimes defined by . . . the [Nuremberg] Charter were already recognized as war crimes under international law.”²³

In the United States, we know also that customary international law, including universal jurisdictional competence and enforcement responsibility, is part of the supreme law of the land.²⁴ Such law is one which, under our Constitution, the Executive must faithfully execute²⁵ and which the federal judiciary has the recognized competence directly to identify, clarify and apply.²⁶ More generally, it was recognized by the United States Supreme Court in 1795 that the “law of nations” is part of “our law,” that private violations of neutrality are “highly criminal by the law of nations,” and that “*all* . . . trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in *any* nation.”²⁷ And, as Chief Justice Marshall noted in 1808, “the law of nations is the law of all tribunals in the society of nations.”²⁸ Somewhat similarly, the Court recognized in 1942 (in connection with war crimes prosecutions): “From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes . . . the status, rights and duties of . . . nations as well as . . . individuals.”²⁹ Importantly also, an 1865 opinion of the Attorney General aptly noted that Congress has a concurrent power “to define, not to make, the laws of nations”; that the laws of nations “exist

22. Judgment of the International Military Tribunal (Nuremberg 1946), *reprinted in* 41 AM. J. INT'L L. 172 (1947).

23. *Id.*

24. *See, e.g.,* Paust, *supra* note 2, at 199-201, 211-12, and references cited; *supra* note 18 and accompanying text.

25. *See, e.g.,* Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377 (1987), and references cited.

26. *See, e.g.,* U.S. CONST., art. III, § 2, cl. 1 (“Laws of the United States, and Treaties”); *supra* note 24; *supra* note 18 and accompanying text. Constitutionally, such authority derives most directly from art. III, § 1 (“The Judicial Power”) and § 2, cl. 1 (“all Cases . . . arising under . . . the Laws of the United States”), since customary international law is part of the “Law” of the United States. As the first Chief Justice recognized: “laws of the United States [include] . . . [t]he laws of nations.” *Henfield’s Case*, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793) (No. 6,360) (Jay, C.J.); *see also* *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Hilton v. Guyot*, 159 U.S. 113, 163 (1895); RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111(1)-(3), comment e and reporter’s note 4 (3d ed. 1987); Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT'L L. 393, 394 n.1, 418-43 (1988), and references cited.

27. *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 156 (Paterson, J.), 159-61 (Iredell, J.) (1795).

28. *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 276-77 (1808) (Marshall, C.J., opinion).

29. *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942).

and are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress"; and that Congress "cannot abrogate them or authorize their infraction."³⁰ In an interrelated sense, an earlier opinion declared that the law of nations "must be paramount to local law in every question where local laws are in conflict" and that what the President must do "must of course depend upon the law of our own country, as *controlled* and *modified* by the law of nations."³¹

In view of even these few salient points and precedential recognitions concerning universal jurisdiction and enforcement responsibility, as well as the incorporation of customary international law as the supreme law of the land, one can recognize that the present Administration's policy of *denaturalizing* and *deporting* alleged Nazi war criminals, or in a few cases, extraditing them is on balance misguided and a national disgrace. Not only is such an abnegative policy generally violative of international law, but it is also generally subversive of global efforts, however halting and incomplete, to seek out and bring to trial all persons reasonably accused of having committed war crimes. The more recent effort to declare a present head of state *persona non grata*³² is equally misguided and shockingly inadequate. Mere deportation and exclusion of aliens is hardly responsive to this nation's and the President's peremptory duty to seek out and to initiate prosecution of all persons reasonably accused of war crimes or, alternatively—as the only viable alternative—to extradite them for the purpose of prosecution elsewhere.

Even certain changes in our immigration laws did not and could not obviate such a customary responsibility—a responsibility of a peremptory nature that Congress cannot abrogate, a violation that Congress cannot authorize. Moreover, the Supreme Court has often recognized that statutory schemes, if at all possible, are to be interpreted consistently with international law.³³ And a statutory law requiring a U.S. attorney "to institute proceedings" to *denaturalize* certain alleged war criminals³⁴ does not on its face demand that U.S. attorneys violate the duty under

30. See 11 Op. Att'y Gen. 297, 299-300 (1865). For a general discussion on the primacy of customary international law, see Paust, *supra* note 26, at 418-43, and references cited.

31. 9 Op. Att'y Gen. 356, 362-63 (1859).

32. See, e.g., N.Y. Times, Feb. 23, 1988, at A12, col. 1.

33. See e.g., *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-18 (1804); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801); 1 Op. Att'y Gen. 26, 27 (1792); see also *id.* at 53 (stating that the municipal law is strengthened by the law of nations); *Rutgers v. Waddington*, Mayor's Court of the City of New York (1784), cited in 2 AMERICAN LEGAL RECORDS, SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674-1784, at 302 (R. Morris ed. 1935) (construing the 1783 N.Y. Trespass Act consistently with the Treaty of Peace), discussed in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 413-14 (J. Goebel ed. 1964); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 457-58 (1969).

34. See 8 U.S.C. § 1451(a) (1982).

customary international law, which is supreme law of the land, to initiate prosecution or extradite. Similarly, a statute attempting merely to deny executive discretion to "waive" deportation as such or to grant "discretionary relief" under prior and more ordinary immigration law schemes³⁵ does not on its face demand a violation of the duty under customary international law to initiate prosecution or extradite. Congress has attempted no such result. Nor did Congress attempt to eliminate the jurisdictional grants to military commissions or to the federal district courts contained in other legislation.³⁶ Any contrary interpretation of immigration statutes would be subversive of international law and cannot rightly be permitted. Indeed, the stated purpose of such changes in immigration law was to deny a safe haven, "sanctuary," or "harbor" for alleged Nazis, not to provide an immunity from prosecution or extradition.³⁷

Finally, it is worth noting that contrary to myth, the United States has the competence under federal law to prosecute any war crime either in a federal district court, or in an *ad hoc* military commission, the latter at least in time of war until peace is formalized.³⁸ Thus, former Nazi war criminals can be prosecuted in the United States if the executive branch has the political will to prosecute. As demonstrated in the article *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, sections 818 and 821 of title 10 of the United States Code (which are part of an extraterritorial statutory scheme), incorporate the laws of war by reference for purposes of criminal prosecution and sanctions, and thus supplement the result more generally that the customary laws of war are part of the laws of the United States.³⁹ This general point has already been addressed and affirmed by the United States Supreme Court, for example, in *Ex parte Quirin* in 1942.⁴⁰ Moreover, such an "extraterritorial" criminal law enacted by Congress is applicable by its terms to "any person who by the law of war is subject to trial by a military tribunal," which, of course, includes civilians.⁴¹ Furthermore, under 18 U.S.C. section 3231, the federal district courts recognizably have jurisdiction over "all offenses against the laws of the United States,"

35. See 8 U.S.C. §§ 1251(a)(19) and (f)(1)(A) & (B) (1982).

36. See e.g., 10 U.S.C. §§ 818, 821 (1982); 18 U.S.C. § 3231 (1982).

37. See H.R. Rep. No. 1452, 95th Cong., 2d sess., reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4700; *Linnas v. I.N.S.*, 790 F.2d 1024, 1030 (2d Cir. 1986).

38. See e.g., *Aggression Against Authority*, supra note 10, at 301-02; Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6 (1971), reprinted in IV THE VIETNAM WAR AND INTERNATIONAL LAW 447 (R. Falk ed. 1976) [hereinafter *After My Lai*].

39. 10 U.S.C. §§ 818, 821 (1982); see *After My Lai*, supra note 38, at 10-12 *passim*.

40. See 317 U.S. at 27-31.

41. See 10 U.S.C. § 818 (1982); see also *After My Lai*, supra note 38, at 12-17.

which would include necessarily the offenses incorporated by reference in 10 U.S.C. sections 818 and 821, as well as offenses against laws that are a part of our law in other ways.⁴² Importantly also, under Article III of the Constitution, judicial power extends to offenses against the laws of nations, which are recognizably “laws” of the United States and/or “treaties” made by the United States.

Whether or not there is a conspiratorial refusal to prosecute or a failure resting on legal ignorance, I am not sure. But such a refusal or failure must be opposed. Quite clearly our violation of international law must stop. It is *our* time. This is *our* responsibility.

42. See *After My Lai*, *supra* note 38, at 17-27, and references cited.