

TRIBUTE TO PROFESSOR JORDAN PAUST

*Ved Nanda**

It is such an honor to pay tribute to a giant in the field of international law, Professor Jordan Paust, the Mike and Teresa Baker Law Center Professor of International Law at the University of Houston Law Center, who has recently retired after teaching there for 42 years. When the *Houston Journal of International Law* reached out, I readily accepted the invitation, with the only reservation that I may not be able to do justice to my friend's stature and accomplishments.

A widely admired scholar, a beloved teacher, and a powerful voice for justice and peace, Jordan delivered the Myres S. McDougal distinguished lecture in international law at the University of Denver College of Law last October. My students and colleagues had the opportunity to spend time with him and hear him speak eloquently on how essential it is for the U.S. to faithfully and enthusiastically abide by international law norms. Jordan has passionately and convincingly conveyed the message that it is in the U.S. interest to take international law seriously, to abide by it, and to set an example for the world community. This he has done from the platforms of prestigious international law fora, including the American Society of International Law, the American Bar Association, and International Law Association. And ever since he left Yale after working with the world-renowned international law teacher and the mentor to both of us, Professor Myres S. McDougal, Professor Paust has constantly spoken and written about it.

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It is no secret that Jordan's scholarship has few peers: not only has he published several highly acclaimed books, but his over 200 articles, book chapters and essays are published in prominent law journals in the United States – Yale, Harvard, Columbia, Stanford, Michigan, Pennsylvania, Virginia, Cornell, Texas, Duke, Houston, Denver, and the American Journal of International Law, among others. But his reach is not confined to the U.S. He has also published in Belgium, Canada, England, Germany, Greece, Israel, the Netherlands, Serbia, China, and Japan. Students and teachers there, as well, would attest to the rigorous analysis and insights for which his writing is known. I have taught and lectured in several countries around the world and am always pleased to find that Jordan is a permanent fixture in their law libraries. Professor Paust ranks among the top law school professors in the United States as measured by citations to his published work.

To my students at the University of Hawai'i Law School where I often teach in the summer session, I assigned Professor Paust's textbook, *International Law and Litigation in the United States*, which he wrote with our mutual dear friends, Professor Linda Malone and the late Professor Jon van Dyke. I am deeply impressed with the quality of their scholarship and the meticulous and thorough coverage of the critical legal issues in this book. I have also often used Jordan's law review pieces in my classes, and students have always appreciated them.

It is not only in his books, in journals and libraries that Professor Paust is a profound presence. As he shares his knowledge and wisdom in person with students and teachers in the U.S. and abroad, they all are the beneficiaries. He has spoken at conferences and colloquia in so many universities, and I have had the privilege of speaking along with him at many of these gatherings, where I get to see the enthusiastic response he always receives from the audience. And the topics he has covered have a wide range, as well – international human rights, international criminal law, U.S. Constitution and foreign affairs, terrorism, and the use of force, among others.

As a law teacher, Professor Paust has had an impact in several other places besides Houston. He has served as a faculty member at the U.S. Army Judge Advocate General's School, International Law Division, and he was a Visiting Edward Ball Eminent Scholar University Chair in International Law at Florida State University. And abroad he was a Fulbright Professor at the University of Salzburg, Austria.

I can only surmise that his work at the Judge Advocate General's School enhanced his passion for international human rights and international humanitarian law, for he has courageously taken a stand against violation of the laws of war by any country and has often chided the U.S. Administration for not consistently and faithfully complying with the dictates of international humanitarian law. The following are a few selected examples.

In 2003, in a *Yale Journal of International Law* piece, entitled *War and Enemy Status After 9/11: Attacks on the Laws of War*, Professor Paust challenged the Bush Administration for denying prisoner of war status to members of the armed forces of the Taliban, writing that while the Administration had shifted its position, and acknowledged that the laws of war applied to the United States' use of massive military force in Iraq, it had in fact denied the captured Taliban forces this status. He stated:

Such schizophrenic claims are not merely illogical and devoid of legal merit, but can also have dangerous consequences with respect to permissible forms of non-state actor violence, application of the laws of war in actual armed conflicts, and protections of members of the armed forces of the United States and other states.

Paust emphatically stressed that the U.S. could not be "at war" with al Qaeda or "terrorism," and concluded the essay with this statement: "Mean-spirited denials of international legal protections (to detainees) [in this conflict] are not merely unlawful, but also disservice a free people. Such denials have no

legitimate claim to any role in our nation's responses to terrorism." Res 80-68-9.

Professor Paust continued to question the Administration's treatment of detainees at Guantánamo. In 2007 he authored *Beyond the Law: The Bush Administration's Unlawful Responses in the "War" on Terror*, where he chastised the Administration for the measures it had taken to counter terrorism. Specifically, he recounted former Vice President Dick Cheney's role in approving the use of unlawful interrogation tactics including waterboarding during the eight-year Bush Administration, and his showing no regrets about being directly involved in the approval of such severe interrogation methods, as Cheney had said that "this was a presidential decision" and that the detainees received the kind of treatment "that we believe they deserve."

After further describing several tactics reportedly used against one of the detainees, al Qathani – including threats against his family, forced nudity and sexual humiliation, threats and attacks by dogs, beatings, and exposure to low temperatures for long times – Professor Paust said that such methods, along with waterboarding, "are each manifest forms of 'torture' that are absolutely prohibited under all circumstances and regardless of the status of the victim. If they were not torture, they would also be absolutely prohibited as cruel, inhuman or degrading treatment" In Professor Paust's words: "Cheney's direct involvement is evidence of complicity in international crime." He has written extensively that each of these tactics is illegal under the laws of war, human rights law, and the Convention Against Torture.

To give another example, Jordan's 2015 piece in *George Washington International Law Review*, *Human Rights on the Battlefield*, is a forceful assertion that neither treaties nor customary international law would support the contention that human rights law does not apply during armed conflict. He clearly demonstrated that customary human rights as rights based in the United Nations Charter have primacy in any social context, adding that some of those customary rights have

assumed the status of peremptory norms (*jus cogens*) and some treaty-based human rights are nonderogable.

Jordan's mastery of customary international law and his passionate advocacy of their application in the United States were evident at a human rights conference at my law school a few years back. In response to a couple of speakers who were skeptical of the application of customary international law in U.S. courts because of the uncertainty and imprecision associated with it, Professor Paust strongly countered them. By all accounts he won the argument.

On several other topics that fall under the umbrella of international law, Jordan's works have been highly influential. However, I will be giving only a selective and cursory look to his scholarship here.

In International Criminal law, Professor Paust has written authoritative books and law review articles. He often speaks and writes about the significance of the Nuremberg Tribunals' path-breaking contribution to human rights law and the laws of war, which lead to war crimes tribunals and eventually to the International Criminal Court. A couple of times I was with him as a co-panelist discussing the Genocide Convention and found his critical appraisal of the Convention timely and very helpful in clarifying the gaps that needed to be filled. He worked on a few projects with Professor Cherif Bassiouni, who was also a towering figure in the international criminal law community, having served as President of the International Association of Penal Law.

Professor Paust has been equally versatile in clarifying the existing norms on the use of force under international law. In addition to closely analyzing the UN Charter prohibitions on the use of force and the role of customary international law on this topic in his several books, he has written a number of incisive law review articles on the subject. For example, writing in *Cornell International Law Journal* he examined what acts of self-defense are permissible under Charter Article 51. As to the use of armed force against non-state actors who are directly engaged in ongoing

armed attacks against the U.S. military in Afghanistan, he considered the proportionate use of such force to be permissible.

In his 2009 remarks as a discussant on targeting of Taliban and al Qaeda targets in Pakistan, for the *European Journal of International Law*, he stated that the United States' use of drones in Pakistan is "not 'assassinations' within the meaning of the laws of war, which would otherwise be impermissible and war crimes, or unlawful 'arbitrary' killings within the meaning of human rights law. He also argued that targeting by the U.S. against non-state actors even in time of peace is permissible if those non-state actors

are engaged in an ongoing process of armed attack against the United States, U.S. military, or U.S. nationals abroad, and this would not mean that the U.S. is at 'war' or in an 'armed conflict' with the non-state actors that do not have the status under international law of an 'insurgent,' 'belligerent,' 'nation,' or 'state,' and we would not be at war with any other entity that was not attacked (e.g., the state in which the targetings occur) [T]hese are not acts of war against Pakistan.

He also noted that

targeting of those who, according to generally shared expectations within the international community, are not directly involved in the armed attack . . . would be illegal and the label 'assassination' can apply within the context of an international armed conflict such as that occurring in Afghanistan and, as expanded in given instances by the United States, in other countries.

And in an academic commentary for *Jurist* in September 2013, Professor Paust considered it lawful under the UN Charter

for the United States to use limited force in Syria, justifying it on several grounds, including (1) regional action for the maintenance of regional peace and security under Article 52 when the Security Council is paralyzed because of the veto provision, and (2) “as part of collective self-defense under Article 51 in response to armed attacks by the Assad regime against Turkey.”

He also argued that the nature of Article 2(4) is “clearly malleable.” His rationale for this position is that “a textually-sound and policy-serving approach to interpretation of Article 2(4) would not automatically rule out every use of force in every social context. An essential focus of the UN Charter includes the duty to promote universal respect for and observance of human rights, the dignity and worth of each human being, and self-determination of peoples.” Purists who argue that Article 2(4) has reached the status of *jus cogens* would disagree with this position, contending that this provision should be interpreted narrowly. However, under the dramatically changed circumstances since the adoption of the Charter, Professor Paust’s position has considerable merit.

Professor Paust is a leader in the profession. For example, he has served as the co-chair of the American Society of International Law’s International Criminal Law Interest Group and was on the American Society’s Executive Council and President’s Committee. He has served on several committees on international law, human rights, laws of war, terrorism, and the use of force, in several professional organizations, including the American Bar Association, the American Branch of the International Law Association, and the American Society of International Law. He always brings the highest level of enthusiasm and energy to this work, as with any task he undertakes.

After completing 42 years of distinguished teaching at the University of Houston Law Center and for four years before that at the Judge Advocate General’s School, Professor Paust decided to leave teaching while at the top of his career. Perhaps he will have some well-deserved time for rest and reflection. But knowing

him, and knowing his passions, he will always remain a champion for human rights, human dignity, justice, and peace. I, along with his many friends, salute him.