

NOTES

PROSECUTING NAZI WAR CRIMINALS IN THE UNITED STATES: THE TIME IN WHICH TO PUNISH THEM IS RUNNING OUT

If we believe, as we must believe, that no one anywhere shall be allowed to perpetrate another Holocaust, we cannot content ourselves with promises that we will take stern action the next time, whilst we turn our backs on the criminals who are demonstrably guilty.

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Director of the Justice Department's
Office of Special Investigations, 1980-83.¹

I. INTRODUCTION

The time in which to punish Nazi war criminals is running out. This urgency emerges out of the growth of worldwide neo-Nazi movements,² out of the recent deaths of Nazi war criminals, Rudolf Hess³ and Josef Mengele,⁴ and out of the public interest to punish these criminals for committing crimes against humanity.⁵ The need to punish Nazi war criminals can be compared to the need to punish terrorists. For example, in response to a rise in terrorism, the United States recently enacted legislation conferring jurisdiction upon its courts to prosecute terrorists committing acts of terrorism abroad that injure U.S. citizens.⁶ There is a similar need for the

1. A. RYAN, *QUIET NEIGHBORS* 337 (1984).

2. See N.Y. Times, Sept. 17, 1987, at 12, col. 1. During a radio interview, Jean-Marie LePen, leader of the French right wing political group, the National Front, and presidential candidate, described Nazi gas chambers as a "minor point" in the history of World War II. This statement caused an uproar amongst French socialists, communists, and other political groups who fear a neo-Nazi revival in France with the growth of support for LePen. See *id.*

3. See N.Y. Times, Aug. 18, 1987, at 1, col. 1. Rudolph Hess was tried and convicted by the International Military Tribunal at Nuremberg in 1946. He was sentenced to life imprisonment at Spandau in West Berlin. After four decades at the prison, Hess died on August 17, 1987 at age 93, where rumor circulated that he probably committed suicide. *Id.*

4. See G. POSNER & J. WARE, *MENGELE, THE COMPLETE STORY* (1986); see *infra* note 12.

5. A. RYAN, *KLAUS BARBIE AND THE UNITED STATES GOVERNMENT: A REPORT TO THE ATTORNEY GENERAL OF THE UNITED STATES* 169-70 (Aug. 1983). See also A. RYAN, *supra* note 1, at 324-44 (Ryan's discussion of a reawakened public interest in the Holocaust).

6. Omnibus Diplomatic Security and Anti-terrorism Act of 1986, Pub. L. No. 99-399, §1202, *codified as amended* at 18 U.S.C. §2331, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 853.

United States to assert jurisdiction over the prosecution of Nazi war criminals who, in essence, committed terrorist acts against subsequently nationalized U.S. citizens.

Traditionally, the U.S. government has based assertions of jurisdiction on nationality or territoriality principles.⁷ If the criminal was not a U.S. citizen at the time of the crime, the U.S. government generally has refused to exercise jurisdiction under the nationality principle.⁸ Moreover, if the crime was committed outside U.S. territory, the U.S. government generally has refused to exercise jurisdiction under the territoriality principle.⁹ Accordingly, the United States never has conferred jurisdiction upon its federal courts to prosecute Nazi war criminals.¹⁰ Instead, the United States has chosen to waive all claims of jurisdiction in favor of nations recognizing jurisdiction to prosecute and punish the alleged criminal.¹¹ Waiving jurisdiction, in effect, allows Nazi war criminals to go free, especially if no other nation chooses to prosecute.¹² The purpose of this Note is to demonstrate that the United States can and must assert jurisdiction over Nazi war criminals in order to punish them properly.

In Part II, this Note describes the five principles of jurisdiction: nationality, territoriality, the protective principle, passive personality and universality, and also explains why the United States traditionally has not recognized the last principle, which would confer jurisdiction over Nazi war criminals.

In Part III, this Note compares U.S. jurisdiction as it is today with that of Germany and Israel, the former claiming national and territorial jurisdiction and the latter claiming universal jurisdiction over Nazi war criminals. This Note also compares U.S. jurisdiction

7. See *infra* notes 41-73 and accompanying text.

8. See *infra* note 42.

9. See RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAWS OF THE UNITED STATES §402(1)(a) note 1 (Tent. Draft No. 6, 1985); see also RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAWS OF THE UNITED STATES §403. [hereinafter REVISED RESTATEMENT]. The United States follows the territoriality principle. *Id.* at §402(1).

10. The United States "[h]as been reluctant to . . . recognize the possibility that its courts may exercise jurisdiction over international crimes." M. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE ch. 7, §7.4 (1983).

11. See *infra* notes 157-177 and accompanying text. The United States gladly accepts extradition requests for alleged Nazi war criminals from countries willing to exert jurisdiction over the criminals. See *id.*

12. See *supra* note 4. For example, the war crimes committed by Nazi doctor Josef Mengele, known as the "Angel of Death," went unpunished. Not until 1984 did the international community actively pursue Mengele's apprehension. The manhunt came too late to serve justice. Mengele died sometime in 1985, before being caught and sentenced for the atrocities he committed at Auschwitz. *Id.*

with that of Canada, a country facing similar circumstances regarding the prosecution of Nazi war criminals.

In Part IV, this Note discusses the trend in the United States to exercise jurisdiction over terrorists, although the terrorists are foreign nationals and have not physically committed any crimes within U.S. territory. This Note analogizes Nazi war crimes to terrorism, especially as pertaining to the universality and passive personality principles. It explains why it is proper for the United States to exercise jurisdiction over Nazi war criminals through an extension of the universality doctrine.

Finally, in Part V, this Note calls for the United States to pass legislation or to amend its current immigration and criminal laws restricting the bases of jurisdiction in order to allow the U.S. courts to prosecute and sentence Nazi war criminals. This proposal is patterned after the recent extension of jurisdiction over terrorists, and would greatly assist the worldwide effort to punish Nazi war criminals.¹³

II. INTERNATIONAL PRINCIPLES OF CRIMINAL JURISDICTION

A. Overview

There are five principles of criminal jurisdiction in international law.¹⁴ These principles are territoriality, nationality, the protective principle, passive personality and universality.¹⁵ Each principle can be exercised in order to prosecute Nazi war criminals.¹⁶

13. An example of a worldwide effort to punish Nazi war criminals is the belated manhunt of Josef Mengele. The search was led by the United States Department of Justice (*Army Task Force to Hunt Mengele*, N.Y. Times, Feb. 21, 1985, at 5, col. 5), with the help of West Germany, Israel (*Three Nations Joining to Hunt Mengele*, N.Y. Times, May 11, 1985, at 1, col. 1), and Paraguay (*Paraguay is Said to Promise Manhunt for a Nazi Fugitive*, N.Y. Times, Nov. 24, 1984, at 7, col. 2).

14. *Jurisdiction with Respect to Crime, Draft Convention on Jurisdiction with Respect to Crime*, 29 A.J.I.L. 435, 445 (1935) [hereinafter *Draft Convention*]; see also REVISED RESTATEMENT, *supra* note 9, at §401. Criminal jurisdiction in international law includes jurisdiction to enforce, prescribe and adjudicate. *Id.*

15. *Draft Convention, supra* note 14, at 445.

16. A war criminal is someone who has committed war crimes and/or crimes against humanity as defined by international law:

(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian popula-

The territoriality principle recognizes that states are competent to punish crimes committed within their territory.¹⁷ Underlying territorial jurisdiction is the notion that every state retains physical power as a necessary and sufficient condition for the exercise of jurisdiction over a defendant or his property.¹⁸ For example, a state has physical power over a defendant by virtue of his actions committed within that state or by virtue of his property located within that state, thereby justifying an exercise of territorial jurisdiction.¹⁹ This principle is the most fundamental and is regarded to be of primary worldwide importance.²⁰

By virtue of the second, the nationality principle, a state can prosecute its national,²¹ the alleged Nazi war criminal, regardless of where the crime was committed.²² For example, Germany could assert jurisdiction over any of its nationals accused of Nazi war crimes, because the majority of Nazi war criminals were German nationals.²³ Underlying the nationality principle is the assumption

tion, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 279; Charter of the International Military Tribunal, art. 6, 59 Stat. 1544, 1547, E.A.S. No. 472, at 4, 82 U.N.T.S. 284.

17. *Draft Convention*, *supra* note 14, at 480.

A State has jurisdiction with respect to any crime committed in whole or in part within its territory

This jurisdiction extends to

(a) Any participation outside its territory in a crime committed . . . in whole or in part within its territory; and

(b) Any attempt outside its territory to commit a crime in whole . . . or in part within its territory. *Id.*

18. W. RICHMAN & W. REYNOLDS, *UNDERSTANDING CONFLICT OF LAWS* 93 (1984). Physical power is no longer a prerequisite for the exercise of jurisdiction in the United States. *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

19. *See, e.g., International Shoe*, 326 U.S. at 310.

20. The territoriality principle finds expression in many national codes. For a complete listing, *see Draft Convention*, *supra* note 14, at 481-82.

21. *Draft Convention*, *supra* note 14, at 473. According to the *Draft Convention*, "[a] 'national' of a State is a natural person upon whom that State has conferred its nationality . . . in conformity with international law."

22. *Id.* at 519. A State has jurisdiction with respect to any crime committed outside its territory:

(a) By a natural person who was a national of that State when the crime was committed or who is a national of that State when prosecuted or punished; or

(b) By a corporation or other juristic person which had the national character of that State when the crime was committed. *Id.*

23. *Infra* note 77 and accompanying text.

that a state has almost unlimited legal control over its nationals, which is why this principle is so widely accepted.²⁴

Under the third, the protective principle, a state has jurisdiction with respect to a crime committed against the security, integrity or independence of its government, although committed extra-territorially.²⁵ For example, the United States recently asserted jurisdiction over a foreign national on the ground that drug trafficking constituted a threat to U.S. security.²⁶ The protective principle is recognized in the United States²⁷ and also in international law.²⁸ This principle, however, is often subject to abuse by states which stretch the concept of what constitutes a threat to their security in order to establish jurisdiction²⁹ and, therefore, it is ranked as a basis for secondary, or auxiliary jurisdiction.³⁰

The fourth, the passive personality principle, permits states whose nationals are victims of crimes, to assume jurisdiction regardless of where the crime occurred.³¹ Although it has been used to exercise jurisdiction over extraterritorial crimes,³² the passive personality principle has been more strongly contested than any other type of auxiliary competence.³³ Accordingly, it has been rejected by the United States and other countries as the sole basis for establishing jurisdiction.³⁴

24. The nationality principle finds expression in many national codes. For a complete listing, see *Draft Convention, supra* note 14, at 523-25.

25. See *Draft Convention, supra* note 14, at 543.

A State has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed. *Id.*

26. See *United States v. Newball*, 524 F. Supp. 715 (E.D.N.Y. 1981).

27. See REVISED RESTATEMENT, *supra* note 9, at §402(3).

28. *Contra* The Geneva Convention on the High Seas, opened for signature April 29, 1985, art. 11, para. 1, 13 U.S.T. 2312, 2316 T.I.A.S. No. 5200, 450 U.N.T.S. 82, 88.

29. Moeller, *U.S. Treatment of Alleged Nazi War Criminals: International Law, Immigration Law and the Need for International Cooperation*, 25 VA. J. INT'L L., 793, 852 (1985).

30. *Draft Convention, supra* note 14, at 445. Secondary, or auxiliary competence is defined as any type of jurisdiction other than national or territorial, which constitutes primary competence. See *id.*

31. *Id.*

32. See, e.g., *S.S. Lotus (France v. Turk.)*, 1927 P.C.I.J., (ser. A) No. 9 (Judgment of Sept. 7).

33. See *Draft Convention, supra* note 14, at 579 (especially by the United States and Great Britain).

34. *Id.*; See B MEHRISH, *WAR CRIMES AND GENOCIDE: THE TRIALS OF PAKASTANI WAR CRIMINALS* 16-19 (1972). It should be noted that the universality principle served as the basis of jurisdiction over Nazi war criminals at the Nuremberg Trials. The Nuremberg Tri-

The final principle of jurisdiction in international law, and perhaps the most important one with respect to the prosecution of war criminals, is the universality principle,³⁵ which determines jurisdiction by reference to the custody of the criminal.³⁶ Therein the sole basis of such jurisdiction is the presence of the criminal within the state assuming jurisdiction, regardless of the perpetrator's or victim's nationality.³⁷ Under this principle, the punishment of Nazi war crimes could be undertaken by any one state on behalf of all other states. Under the universality principle, however, jurisdiction may be invoked only after the state with custody has surrendered the alien for prosecution to other states and that offer has gone unaccepted.³⁸ The universality principle is widely,³⁹ but by no means universally, accepted as a basis of auxiliary competence.⁴⁰

B. Principles Recognized by the United States

The United States actively recognizes the jurisdictional principles of territoriality,⁴¹ nationality,⁴² and the protective principle.⁴³ Traditionally, the United States recognized only the territorial principle of jurisdiction as set forth by the Supreme Court in 1909.

In *American Banana Co. v. United Fruit Co.*,⁴⁴ Justice Holmes stated the general rule that the character of an act as unlawful must be determined by the law of the country where it is committed.⁴⁵ Accordingly, the perpetrator must be tried by the state in which he committed the crime to avoid interference with

bunal, composed of members of the Allied Powers, had a right under the Charter of the International Military Tribunal to prosecute Nazi war criminals. The Nuremberg Tribunal was, therefore, justified in assuming that Nazi war crimes were crimes under international law, and as an international court, the Tribunal had the legal right to apply international law to try and sentence the accused.

35. *Draft Convention*, *supra* note 14, at 573.

36. *Id.*

37. *Id.*

38. *See Draft Convention*, *supra* note 14, at 582.

39. The universality principle finds expression in many national codes. For a complete listing, *see Draft Convention*, *supra* note 14, at 574-76.

40. *Id.* at 445. *See also, Draft Convention*, *supra* note 30 (for an explanation of "auxiliary competence").

41. The United States recognizes the territoriality principle of jurisdiction. *See REVISED RESTATEMENT*, *supra* note 9, at §402(1)(a).

42. *See REVISED RESTATEMENT*, *supra* note 9, at §402(2).

43. The United States asserted the protective principle of jurisdiction in the case of *U.S. v. Newball*, 524 F. Supp. 715 (E.D.N.Y. 1981) (implying that drug trafficking is a threat to U.S. security).

44. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

45. *Id.* at 347.

the authority of another sovereign.⁴⁶ This rule remained the foremost principle of jurisdiction in the United States for over thirty years.⁴⁷

Over the last several decades, however, U.S. courts progressively have moved away from the narrow Holmesian principle of territorial jurisdiction.⁴⁸ This trend suggests a more aggressive approach toward establishing jurisdiction and is evident in the cases decided since *American Banana*,⁴⁹ which rendered *American Banana* virtually obsolete.⁵⁰ For example, in *United States v. Aluminum Co. of America (ALCOA)*,⁵¹ Judge Learned Hand stated that any state may hold a person liable for extraterritorial conduct having effects within its borders.⁵²

Similar to the movement away from purely territorial notions of jurisdiction, the movement away from quasi-in-rem proceedings, as a method of establishing jurisdiction over a defendant, has been replaced by a more practical emphasis on fairness.⁵³ No longer will a court assert jurisdiction over a person solely because he happens to own property within that state. Instead, a court will look to the defendant's contacts with the state before approving an exercise of jurisdiction.⁵⁴

Originally, in *Pennoyer v. Neff*,⁵⁵ Justice Field stated that the Oregon court lacked personal jurisdiction over the defendant, because he was neither domiciled in Oregon nor served with process there.⁵⁶ The Supreme Court, however, held that the Oregon court could attach land owned by the defendant and located in Oregon, in order to enforce a personal judgment against him on an unrelated claim.⁵⁷ The Supreme Court's use of quasi-in-rem jurisdiction, however, was later found to be unfair in light of due process

46. *Id.* at 355.

47. *United States v. Aluminum Co. of America (ALCOA)*, 148 F.2d 416 (2d Cir. 1945). The current trend is toward expanding principles of jurisdiction.

48. L.F.E. Goldie, *A Taxonomy of Claims to Exercise Jurisdiction - Nationality, Territoriality, Protection of the State and its Processes, and Universality 1* (unpublished manuscript available at Syracuse University College of Law).

49. *Id.* at 19.

50. *Id.* at 13.

51. *ALCOA*, 148 F.2d at 416.

52. *Id.* at 443.

53. *See Pennoyer v. Neff*, 95 U.S. 714 (1877).

54. *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

55. *Pennoyer v. Neff*, 95 U.S. at 714.

56. *Id.*

57. *Id.* at 723. The Supreme Court found that the exercise of quasi-in-rem jurisdiction in no way infringed upon the sovereignty of the state in which Neff was domiciled. *Id.*

as set forth in *International Shoe Co. v. Washington*.

In *International Shoe*,⁵⁸ the Supreme Court held:

[d]ue process requires . . . that in order to subject a defendant to a judgment in personam, if he not be present within the territory of the forum, he [must] have certain minimum contacts within it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'.⁵⁹

Not only did *International Shoe* expand the scope of jurisdiction, it changed the traditional concept of jurisdiction, as found in *Pennoyner*, from a narrow emphasis on territoriality to a more practical emphasis on fairness.⁶⁰

The trend of U.S. courts toward a more aggressive approach of extraterritorial jurisdiction, however, mainly has been exercised to prosecute antitrust cases concerning foreign commerce,⁶¹ conspiracy cases,⁶² and cases where fraud has been perpetrated abroad.⁶³ U.S. courts also take an aggressive role against actions concerning international terrorism committed against U.S. citizens.⁶⁴ All the above-mentioned crimes have occurred outside U.S. borders, but they have had a severe "effect" within,⁶⁵ which is why the United States has recognized jurisdiction to prosecute the perpetrators.⁶⁶

As for other methods, the United States traditionally has not recognized the principle of passive personality as the sole basis of

58. *International Shoe*, 326 U.S. at 310.

59. *Id.* at 316. The Supreme Court could have upheld jurisdiction, because the defendant was doing business in Washington. Instead, the Supreme Court destroyed the need to ground jurisdiction on territorial power absent the requisite minimum contacts. *Id.*

60. W. RICHMAN & W. REYNOLDS, *supra* note 18, at 85.

61. See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Strassheim v. Daily*, 221 U.S. 280 (1911); see *Holophane Co. Inc. v. United States*, 352 U.S. 903 (1956); see *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

62. See generally *Goldie*, *supra* note 48.

63. See *id.*

64. See *infra* notes 151-164 and accompanying text.

65. The "effect" within U.S. borders has been on U.S. citizens (for example, on family and friends of the U.S. victims injured abroad) and on U.S. policy (for example, the pressure of lobbyists in Congress calling for the United States to take action against extraterritorial crimes committed against U.S. citizens).

66. An example of the use of the "effects doctrine" is the *Cutting Case*, reprinted in *1887 Papers Relating To The Foreign Relations Of The United States* 751 (1888). In *Cutting*, a Mexican court convicted an American journalist of libeling a Mexican citizen in a newspaper article printed in Texas. The Mexican court asserted jurisdiction under a Mexican long-arm statute which provided that "[p]enal offenses committed in a foreign country by . . . a foreigner against Mexicans, may be punished in the Republic." *Id.* at 856. *Cutting* was convicted by the Mexican court, because of the effect his libelous statement had on the plaintiff within Mexico. However, *Cutting* was later released under an order of the Mexican appellate court after the victim withdrew his complaint. *Id.*

jurisdiction,⁶⁷ and generally considers the principle to be an anathema to U.S. federal law.⁶⁸ The American repudiation of the passive personality principle is based upon the Restatement (Second) of Foreign Relations Law which provides that, "A State does not have the jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals."⁶⁹ Accordingly, the United States generally has refused to assert jurisdiction over extraterritorial crimes where the victim happened to be a U.S. national.⁷⁰ Similarly, the U.S. government continues to protest assertions of jurisdiction by foreign courts over acts of U.S. nationals committed abroad.⁷¹

The United States has been equally reluctant to assert jurisdiction under the universality principle.⁷² Instead of prosecuting and sentencing criminals residing in the United States who have committed extraterritorial crimes, the United States has regularly chosen to denaturalize, deport or extradite them to the country in which they committed the crime.⁷³

C. *Conferring Jurisdiction Over Nazi War Criminals in the United States*

Compliance with territoriality or nationality principles is not feasible in the case of Nazi war criminals, because Nazi war crimes were not committed within U.S. territory or by U.S. nationals. Nor is there an argument for the use of the protective principle, because Nazi war crimes were not committed against the security, territorial integrity or political independence of the United States. Furthermore, the passive personality principle is inapplicable, because the victims were not U.S. citizens at the time of the crimes. The most persuasive argument in favor of U.S. jurisdiction is under the universality principle, whereby the United States would have jurisdiction solely based on the presence of the alien within

67. See, e.g., *United States v. Columba-Colella*, 604 F.2d 356 (5th Cir. 1979).

68. See Blakesley, *A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crimes*, 1984 UTAH L. REV. 685, 715.

69. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §30(2) comment e (1965).

70. See Blakesley, *supra* note 68, at 715.

71. See *id.* See also Cutting Case, *reprinted in 1887 Papers Relating To The Foreign Relations of the United States* 751, 856 (1888).

72. See *infra* notes 150-156 and accompanying text.

73. See *infra* notes 157-177 and accompanying text.

its territory at the time it decided to prosecute.⁷⁴

III. COMPARISON OF JURISDICTION: GERMANY, ISRAEL AND CANADA WITH THE UNITED STATES

The United States has yet to recognize the principle of universality which would confer jurisdiction over Nazi war criminals.⁷⁵ Germany, Israel and Canada, on the other hand, have recognized jurisdiction over Nazi war criminals and have taken relatively active roles in prosecuting them.

A. Germany⁷⁶

Germany has territorial and national jurisdiction over Nazi war criminals, because many of the war crimes were committed on German soil and by German nationals. Therefore, Germany is perceived as having primary responsibility⁷⁷ to prosecute and punish Nazi war criminals. With the flood of emigration from Germany following World War II,⁷⁸ however, Germany would have to request the extradition of Nazi war criminals from the countries where the criminals have relocated. For the most part, the Federal Republic of Germany has failed to make many requests for the extradition of Nazi war criminals.⁷⁹

Germany is reluctant to seek the extradition of Nazi war criminals because many of the alleged criminals were non-German citizens at the time they committed their crimes.⁸⁰ Furthermore, Germany claims that these non-Germans committed crimes outside the territory of Nazi Germany during World War II, although acting under the authority of the Nazi government.⁸¹ The Federal Republic, therefore, claims that it lacks the required jurisdiction to prosecute many Nazi war criminals.⁸² Despite its reluctance, the Federal Republic of Germany has attempted to prosecute Nazi war criminals who committed war crimes on German

74. *Draft Convention*, *supra* note 14, at 573.

75. *See supra* notes 41-73 and accompanying text.

76. The terms "Federal Republic of Germany," "West Germany" and "Germany" are used interchangeably herein.

77. *See supra* note 30. Nations possessing national and territorial jurisdiction over the alleged criminals are viewed as having primary responsibility to prosecute.

78. *See infra* notes 150-153 and accompanying text.

79. *See Moeller*, *supra* note 29, at 810. Only one individual has ever been extradited from the United States to West Germany. *See infra* note 86 and accompanying text.

80. *See A. RYAN*, *supra* note 1, at 8-14, 192-93, and 353-61.

81. *See Moeller*, *supra* note 29, at 811.

82. *See id.*

soil.⁸³

One attempt by Germany to punish Nazi war criminals occurred in 1973, when the Federal Republic requested the extradition of Hermine Braunsteiner Ryan from the United States pursuant to a 1930 treaty of extradition.⁸⁴ Ryan, a naturalized American citizen at the time of the request,⁸⁵ was being charged by Germany with murder committed while a guard at Maidanek, a concentration camp near the city of Lublin in Poland.⁸⁶ Ryan, a native Austrian, was not a German citizen when she committed her crimes.⁸⁷ Nonetheless, the Federal Republic asserted criminal jurisdiction over her and convicted her of committing war crimes during the Nazi regime.⁸⁸

Following Ryan, forty-eight cases were pending in German courts against Nazi war criminals during the mid-1970s.⁸⁹ It was reported that German prosecutors were no longer interested in this work.⁹⁰ They felt that the Nazi crimes committed during World War II were a thing of the past.⁹¹ Accordingly, approximately 3,000 Nazi war criminals who had not yet been brought to trial would escape prosecution in Germany when the statute of limitations on Nazi crimes expired in 1979.⁹²

Germany's waning commitment to prosecute Nazi war criminals is exemplified by Klaus Barbie. In 1945, the year after

83. See, e.g., Convention on Extradition, *infra* note 136 and accompanying text. Soil or territory, in extradition treaties, are defined as the territory, including the waters and air-space *belonging to or under the control of* one of the contracting parties (emphasis added).

84. Treaty of Extradition, July 12, 1930, United States-Germany, 47 U.S.T. 1862, T.I.A.S. No. 836.

85. New York Times reporter Joseph Lelyveld pursued a trail of information he received to find the truth about Ryan, a naturalized American citizen residing in New York. See Lelyveld, *Former Nazi Camp Guard is Now a Housewife in Queens*, N.Y. Times, July 14, 1964, at 10, col. 3.

86. See *In re* extradition of Hermine Ryan, 360 F. Supp. 270 (E.D.N.Y. 1973), *aff'd* 478 F.2d 1397 (2d Cir. 1973).

87. See generally J. GEHL, *AUSTRIA, GERMANY AND THE ANSCHLUSS 1931-1938* (1963). Although Ryan, a native-born Austrian, was considered a German during the Anschluss, it was not until 1939, the year after the end of the Anschluss, that Ryan joined the Nazi party. See A. RYAN, *supra* note 1, at 47.

88. See Sulzberger, *Proposals to Speed War Crimes Studied*, N.Y. Times, Nov. 15, 1981, at 27, col. 1.

89. A. RYAN, *supra* note 1, at 332.

90. See *id.*

91. N.Y. Times, Aug. 29, 1975, at 1, col. 2. Craig Whitney reported that, "increasingly, West Germany has turned away from the past as something long ago paid for and long since overcome." *Id.*

92. See A. RYAN, *supra* note 1, at 332. Not until 1979 did worldwide protest persuade West Germany to indefinitely extend its statute of limitations on Nazi crimes. *Id.* at 333.

the Allied armies forced the Nazi troops out of France, Barbie, an SS first lieutenant, fled to La Paz, Bolivia to escape prosecution for the crimes he committed in Lyon.⁹³ France filed a formal extradition request with the Bolivian government, charging Barbie with war crimes.⁹⁴ In 1974, the Supreme Court of Bolivia rejected France's request, because Bolivia had no formal extradition treaty with France.⁹⁵ Barbie, by then a Bolivian citizen, could not be extradited to France.⁹⁶

In 1982, the West German government was pressured to request Barbie's extradition from Bolivia.⁹⁷ Bolivia rejected the request for the same reason it had almost a decade earlier with France: the absence of an extradition treaty between Bolivia and West Germany.⁹⁸ On January 25, 1983, however, Barbie was arrested by the Bolivian government, expelled from that country, and sent directly to West Germany.⁹⁹ The Germans protested taking in Barbie under such short notice.¹⁰⁰ Although the West Germans filed the extradition request, they never expected to get Barbie, nor did they want him.¹⁰¹

Germany refused to cooperate with any attempts to expel Barbie from Bolivia.¹⁰² Germany, the country with primary responsibility to punish Barbie, failed to assert national jurisdiction. Accordingly, Barbie's crimes remained unpunished until recently, when France was finally able to obtain him.¹⁰³

93. See *id.* at 275.

94. *Id.*

95. See *id.* at 277.

96. *Id.*

97. *Id.* West Germany was chosen by the international community to request Barbie's extradition, because Germany had primary competence - national jurisdiction - to prosecute. See *id.*

98. See *id.*

99. See *id.* at 278. Bolivia finally agreed to extradite Barbie to Germany.

100. See *id.*

101. See *id.*

102. See N.Y. York Times, Mar. 3, 1983, at A26, col. 1.

103. Bolivia took the chance of violating legal norms and made a new attempt at extradition with France. The gamble worked and the French government brought Barbie to stand trial in Lyon. Barbie was charged with ". . . eight counts of crimes against humanity; the liquidation of the Union Generals of Jews in France; the deportation of 650 French men, women and children on the last convoy to Auschwitz; the arrest and torture and execution of scores of Lyon's Jews; the deportation of fifty-two orphaned children from Isieux." See A. RYAN, *supra* note 1, at 279. If France had not fervently pursued the extradition, Barbie's war crimes probably would have gone unpunished.

B. Israel

Unlike Germany, Israel recognizes international criminal jurisdiction under the passive personality¹⁰⁴ and universality¹⁰⁵ principles. Israel, however, actively exercises the latter in order to prosecute Nazi war criminals.¹⁰⁶

In 1950, the Israeli Knesset enacted the Nazi and Nazi Collaborators (Punishment) Law.¹⁰⁷ Under the Nazi Punishment Law, an Israeli court can impose the death penalty¹⁰⁸ upon any person it convicts of committing crimes against the Jewish people,¹⁰⁹ for war crimes¹¹⁰ and for crimes against humanity.¹¹¹

An example of the use of the Nazi Punishment Law was Adolph Eichmann's criminal trial in Israel.¹¹² The Israeli Mossad fervently hunted down Eichmann, kidnapped him in Argentina and brought him to Israel to stand trial on fifteen counts of criminal acts under the Nazi Punishment Law.¹¹³ Thirteen months after

104. In 1972, Israel amended its criminal laws to provide:

2B. (a) The courts of Israel shall be competent to try in Israel under Israeli law a person who has committed abroad an act which would be an offense if it had been committed in Israel and which harmed or was intended to harm the life, person, health, freedom or property of a national or resident of Israel.

Penal Law Amendment (Amend. No. 4) Law, 5732 - 1972, Laws of the State of Israel no. 26 (1971-1972).

105. See Goldie, *supra* note 48, at 17-18.

106. See *id.* at 18.

107. See Moeller, *supra* note 29, at 855 n.392 (citing Law of Aug. 1, 5710-1950 [1950] 4 Laws of the State of Israel No. 64, at 154).

108. See Moeller, *supra* note 29, at 855 n.393 (citing Law of August 1, 5710-1950 [1950] 4 Laws of the State of Israel No. 64, at 154, § 1(a)(1)-(3)). The Nazi Punishment Law states: A person who has committed one of the following offences-

- 1) did, during the period of the Nazi regime, in a hostile country, an act constituting a crime against the Jewish people;
- 2) did, during the period of the Nazi regime, in a hostile country, an act constituting a crime against humanity;
- 3) did, during the period of the second World War, in a hostile country, an act constituting a war crime;

is liable to the death penalty. *Id.* at §1(a)(1)-(3).

109. The definition of "crimes against the Jewish people" is similar to the definition of "genocide" defined in the Genocide Convention. See Convention on the Prevention and Punishment of the Crime of Genocide, art II(a)-(e), *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*].

110. The definition of "war crimes" is the same as that in the Charter of the International Military Tribunal, *supra* note 16.

111. The definition of "crimes against humanity" is the same as that in the Charter of the International Military Tribunal, *supra* note 16.

112. Moeller, *supra* note 29, at 855 n.396 (citing Attorney General of the Government of Israel v. Adolph Eichmann, 36 I.L.R. 18 (Dist. Ct. Jerusalem 1961), *aff'd*, 36 I.L.R. 277 (Sup. Ct. Isr. 1962)).

113. Moeller, *supra* note 29, at 855 n.397 and accompanying text (citing 36 I.L.R. at

the trial began, Eichmann was convicted and sentenced to death.¹¹⁴

The District Court of Jerusalem relied upon the universonality, passive personality, and protective principles to affirm Israel's exercise of extraterritorial jurisdiction in the Eichmann case.¹¹⁵ Although the Supreme Court of Israel agreed with the District Court's rationale,¹¹⁶ the former based the claim of jurisdiction solely upon the universonality principle.¹¹⁷

The Eichmann trial raised important legal issues;¹¹⁸ for example, Eichmann's abduction from Argentina to stand trial in Israel, the jurisdiction of Israeli courts, and the retroactivity of Israeli law.¹¹⁹ The District Court of Jerusalem resolved each of these issues based upon international and Israeli law and in light of public policy.¹²⁰

The District Court refused to find the Mossad's abduction of Eichmann illegal.¹²¹ Instead, the Court relied on a general rule of international law which prohibits a criminal to use the method by which the forum has obtained him as a defense to his being tried in that state.¹²² The District Court went on to validate jurisdiction over Eichmann, once he was present in Israel.

Counsel for Eichmann objected to the jurisdiction of the Israeli court and its application of Israeli law on grounds of international law. Eichmann contended that his prosecution, after being kidnapped from Argentina and brought to stand trial in Israel, violated international law and exceeded the jurisdiction of the Israeli court.¹²³ The District Court, however, rejected Eichmann's contention and held that jurisdiction to try the case was based on the Nazi Punishment Law,¹²⁴ "a statutory law the provisions of which

235-53 (District Court Judgment)).

114. H. ARENDT, *EICHMANN IN JERUSALEM* 240 (1963).

115. Moeller, *supra* note 29, at 856 n.402 and accompanying text.

116. *Id.* at n.403 and accompanying text. Jurisdiction over Eichmann's crimes could not be based upon the protective principle of jurisdiction, because Israel was not a nation at the time of Eichmann's crimes. Jurisdiction could not be based upon the passive personality, because none of the victims were Israeli nationals at the time of the crimes. *Id.* at n.405 and accompanying text.

117. *Id.* at n.404 and accompanying text.

118. See P.PAPADATOS, *THE EICHMANN TRIAL* (1964).

119. *Id.* at 48-101.

120. See Oliver, *Judicial Decisions*, 56 A.J.I.L. 805 (1962).

121. *Id.* at 835.

122. *Id.*

123. Oliver, *supra* note 120, at 805.

124. Nazi Punishment Law, Law of Aug. 1, 5710-1050 [1950] 4 Laws of the State of Israel No. 64 *cited in* Oliver, *supra* note 120, at 807.

are unequivocal."¹²⁵ The District Court found no violation of international law in giving effect to the law of the Knesset.¹²⁶

The District Court also rejected Eichmann's argument concerning the retroactivity of Israeli law. The Nazi Punishment Law, which was enacted in 1950 to punish those who had committed Nazi war crimes, covered a specified period which had ended five years prior to the enactment of the law.¹²⁷ The District Court compared the retroactive application of the Nazi Punishment Law to the laws used to prosecute Nazi war criminals at Nuremberg: a compilation of universal principles of justice.¹²⁸ Similarly, the District Court upheld the Nazi Punishment Law on grounds of universal jurisdiction, because "no principle of international law could have denied the new State [Israel] the natural power to put on trial all those killers of [her] people who fell into [her] hands."¹²⁹

The Federal Republic of Germany protested against Eichmann's trial,¹³⁰ based upon what it saw as the danger inherent in claims of universal jurisdiction.¹³¹ Most other countries found no problem with Israel's punishing "one of history's greatest persecutors of the laws."¹³²

Another example of Israel's use of the Nazi Punishment Laws, as applied through the universality principle, is the trial of Ivan Demjanjuk.¹³³ In 1983, Israel requested that the United States extradite Demjanjuk¹³⁴ to Israel to stand trial for the atrocities he committed while a guard at Treblinka.¹³⁵ According to the U.S.-

125. Oliver, *supra* note 120, at 807.

126. *Id.*

127. *Id.* at 832.

128. *Id.* "Many of the national courts now functioning in the liberated countries have been established recently, but no one has argued that they are not competent to try the cases that arose before their establishment. . . . No defendant can complain that he is being tried by a Court which did not exist when he committed the act." *Id.* (quoting Goodhart in *The Legality of the Nuremberg Trial*, JURID. REV. 8, (April 1946)).

129. Oliver, *supra* note 120, at 834.

130. Goldie, *supra* note 48, at 18.

131. *Id.*

132. Goldie, *supra* note 48, at 18.

133. See A. RYAN, *supra* note 1, at 94-141.

134. *Id.* at 102. In 1958, Demjanjuk and his wife became American citizens. *Id.*

135. *United States v. Demjanjuk*, 518 F. Supp. 1362 (1981), *aff'd*, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, 459 U.S. 1036 (1982).

Israeli extradition treaty,¹³⁶ the United States agreed¹³⁷ and Israel began a criminal trial for Demjanjuk's prosecution.¹³⁸

The examples of Eichmann and Demjanjuk are the most prominent cases in which Israel has taken an active role in prosecuting individuals who have harmed and tortured her nationals. Recognition of universal jurisdiction ensures Israel's rights to punish heinous crimes committed against her citizens.¹³⁹ The effects of Nazi war crimes, however, are not unique to Israel. These abhorrent crimes afflicted mankind as a whole and, as violations of the law of nations,¹⁴⁰ every nation has a legal obligation to punish the perpetrators.¹⁴¹

C. Canada

Canada is yet another country that has acknowledged its obligation to prosecute Nazi war criminals. In September of 1987, Canada enacted a statute which confers jurisdiction upon its courts to prosecute every person who commits an act or omission outside of Canada that constitutes a war crime or a crime against humanity.¹⁴² The statute covers acts or omissions committed at a time in which "Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the act or omission on the basis of the person's presence in Canada, [or] subsequent to the time of the act or omission the person is present in Canada."¹⁴³ Thus, the statute bases jurisdiction upon the universality principle.

Like the universality principle, if someone has committed a

136. Israel requested Demjanjuk's extradition pursuant to the Convention on Extradition between the Government of the United States and the Government of the State of Israel, 14 U.S.T. 1707, T.I.A.S. 5476 (entered into force Dec. 5, 1963).

137. *United States v. Demjanjuk*, 518 F. Supp. 1362 (1981), *aff'd*, 680 F.2d 32 (6th Cir. 1982).

138. N.Y. Times, Apr. 19, 1988, at 1, col. 1. An Israeli court convicted Demjanjuk of committing war crimes. An appeal of this judgment is currently pending.

139. The victims were not Israeli citizens at the time of the war crimes, because Israel did not become a state until 1948. The State of Israel's "right to punish" Nazi war criminals, however, is derived from:

[A] universal source (pertaining to the whole of mankind) which vests the right to prosecute and punish crimes of this order in every State within the family of nations; and a specific or national source which gives the victim nation the right to try any who assault their existence.

Oliver, *supra* note 120, at 828.

140. *Id.* at 808.

141. *See id.* at 811.

142. An Act to amend the Criminal Code, the Immigration Act, 1976 and the Citizenship Act, 35-36 Eliz., ch.37, §1.91 (1987).

143. *Id.*

criminal act and that person is present in Canada, then such presence triggers jurisdiction in Canada so to allow prosecution of the offender.¹⁴⁴ Moreover, the Canadian statute does not create retroactively any new crimes. Unless the offense was one under international or Canadian law when committed, it is not considered criminal at the time of prosecution.¹⁴⁵ Such requirements comply with those under international and Canadian laws.

The purpose of the Canadian statute is to prevent Canada from becoming "a haven for those persons who have committed acts. . . which are rightly condemned throughout the civilized world."¹⁴⁶ One parliamentarian commented that "[i]t is difficult to characterize Canada as a just society or civilized place without a strong policy to bring to justice those who have committed crimes which can be characterized as war crimes or crimes against humanity.¹⁴⁷ In passing this legislation, the Canadians sent a strong message about its civilization. The message conveyed suggests that this type of conduct will not go unpunished.¹⁴⁸

Under international law, every nation has jurisdiction to prosecute war criminals in its custody regardless of the victim's nationality or of the place where the crime was committed.¹⁴⁹ Accordingly, the United States is obligated to recognize universal jurisdiction and to prosecute Nazi war criminals, especially where, for some reason, the crime would otherwise go unpunished.

D. The United States

After World War II, the United States became the home to refugees, many of whom were imprisoned, tortured or otherwise abused by Nazi war criminals. Through U.S. immigration law, those refugees became citizens and nationals of the United States.¹⁵⁰

144. *An Act to amend the Criminal Code, the Immigration Act, 1976 and the Citizenship Act*, H.C. 33d Parl., 2d Sess. 1:35 (1987).

145. *Id.* at 1:14. Prior to enacting the law, the House of Commons worried that the statute would not be in conformity with international law or Canadian law. *Id.*

146. 129 PARL. DEB., H.C. (2d Sess.) 159 (1987).

147. *Id.*

148. *Id.* Mr. Nelson Riis commented, "Clearly after 42 years of inaction we owe it not only to the memories of those who have died but also to their families who have suffered in surviving. *Id.*

149. Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CALIF. L. REV. 177, 218 (1945). The author states the jurisdictional principle of universality is applicable to the punishment of war crimes. *Id.*

150. See *The Immigration and Nationality Act of June 27, 1952*, Pub. L. No. 82-414, 66

Nazi war criminals also fled Europe for the United States after World War II in order to escape prosecution and to facilitate changing their identities to survive unnoticed.¹⁵¹ Many Nazi war criminals found it easy to enter the United States,¹⁵² because of the flood of immigration into the country, especially with the enactment of the Displaced Persons Act.¹⁵³

With the large number of Nazi war criminals in the United States since World War II, the United States, like Canada, could establish jurisdiction over these criminals under the universality principle.¹⁵⁴ The United States, however, has avoided exercising jurisdiction over Nazi war criminals¹⁵⁵ by using alternative means to trying and sentencing the criminals in the United States.¹⁵⁶

1. *Denaturalization, Deportation and Extradition as Alternatives to Prosecution of Nazi War Criminals*

Almost all legal actions brought against Nazi war criminals in the United States are denaturalization proceedings.¹⁵⁷ Denaturalization deprives the individual of citizenship and subjects him to deportation.¹⁵⁸ Congress in 1978 amended the Immigration and Nationality Act¹⁵⁹ to include Nazi war criminals as a class of excludable and deportable aliens.¹⁶⁰

Stat. 163 (codified at 8 U.S.C. §§1101-1525 (1983)).

151. A. RYAN, *supra* note 1, at 276.

152. Allan Ryan, Jr., investigator for the Justice Department's Office of Special Investigation commented: "How did Nazi war criminals come to the United States? We invited them in." *Id.* at 28.

153. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, *amended* at Pub. L. No. 81-555, 64 Stat 219 (expired 1952). A total of 400,000 people entered the United States under the Displaced Persons Act before its expiration. A. RYAN, *supra* note 1, at 25. Approximately 10,000 alleged Nazi war criminals entered the United States under this Act. *Id.*

154. *See supra* notes 142-149.

155. *See, e.g.,* Blayney, *Herbert Pell: War Crimes and the Jews*, 65 *AMER. JEWISH HIST. Q.* 335-352 (1976).

156. *See infra* notes 157-177 and accompanying text.

157. *See* The Immigration and Nationality Act of June 27, 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified at 8 U.S.C. § 1451(a)).

158. *Id.*

159. The Immigration and Nationality Act of Oct. 30, 1978, Pub. L. No. 95-549, 92 Stat. 2065 (codified at 8 U.S.C. §1182(a)(33) (1978)).

160. *Id.* The 1978 amendment subjects to deportation:

Any alien who during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with-

(A) the Nazi government in Germany,

(B) any government in any area occupied by the military forces of the Nazi government of Germany,

Under the amendment, a U.S. district attorney must prove by clear and convincing evidence¹⁶¹ that the alien fits into one of the enumerated classes before an immigration judge can find him deportable.¹⁶² The alien, however, can appeal an adverse decision to the Board of Immigration Appeals¹⁶³ as well as to the federal courts for further review.¹⁶⁴

Once the court finally determines that the alien is deportable, the alien may choose the country to which he is sent.¹⁶⁵ If the alien makes no choice, he may be deported to the country of his birth, to the country from which he came or to any country that will take him.¹⁶⁶ Deportation is complicated, because few countries want to take in Nazi war criminals.¹⁶⁷ As such, the United States gladly grants requests for extradition in order to get rid of Nazi war criminals.¹⁶⁸

Extradition is a bilateral process. The United States requires a formal request for the return of a criminal by a nation with whom the United States has a valid treaty.¹⁶⁹ For example, the United States granted the extradition of Ivan Demjanjuk upon Israel's request pursuant to the Convention on Extradition Between the Government of the United States and the Government of the State of Israel.¹⁷⁰

(C) any government established with the assistance or cooperation of the Nazi government of Germany, or

(D) any government which was an ally of the Nazi government of Germany, ordered, incited assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

Immigration and Nationality Act of Oct. 30, 1978, Pub. L. No. 95-549, 92 Stat. 2065 (codified at 8 U.S.C. §1182(a)(33) (1978).

161. See *Chaunt v. United States*, 364 U.S. 350 (1960).

162. See 8 U.S.C. §1252(b) (1983).

163. See INS Appeals, 8 C.F.R. §242.21 (1984).

164. See 8 U.S.C. §1105a (1961). For an in depth discussion of the controlling law on Nazi war criminals subject to denaturalization and deportation by the United States, see Note, *Nazi War Criminals in the United States: It's Never Too Late For Justice*, 19 VAND. J. TRANS. L. 856 (1986).

165. The Immigration and Nationality Act of June 27, 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified at 8 U.S.C. §1253(a)).

166. The Immigration and Nationality Act of June 27, 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified at 8 U.S.C. §1253(a)).

167. Note, *Nazi War Criminals in the United States*, *supra* note 164, at 884 (1986).

168. See *supra* notes 134-138 and accompanying text.

169. See 18 U.S.C. §§3181-3195 (1982). For further discussion of the extradition of Nazi war criminals, see Note, *Nazi War Criminals in the United States*, *supra* note 164, at 885-892.

170. The Convention on Extradition Between the Government of the United States and the Government of the State of Israel, Dec. 10, 1962, 14 U.S.T. 1707, T.I.A.S. 5476 (entered into force Dec. 5, 1963).

Although denaturalization and deportation represent the extent of prosecution of Nazi war criminals under current U.S. immigration¹⁷¹ and criminal¹⁷² laws, these two processes serve only to remove the criminals from the United States, but do not ensure proper punishment. Extradition is the other, yet less frequently available, alternative.¹⁷³ All three processes are tedious,¹⁷⁴ often unreliable¹⁷⁵ and exemplify the fact that immigration law should not be used as a substitute for the criminal justice system.¹⁷⁶ Accordingly, the United States must extend the trend of asserting jurisdiction over other crimes committed abroad¹⁷⁷ to Nazi war crimes.

IV. THE GROWTH OF EXTRATERRITORIAL JURISDICTION OVER TERRORISTS EXTENDED TO CONFER U.S. JURISDICTION OVER NAZI WAR CRIMINALS

A. Growth of Jurisdiction Over Terrorists

The escalation of international terrorism during the past few years has led the United States to actively pursue extraterritorial jurisdiction in order to protect its citizens from acts of terrorism committed abroad.¹⁷⁸ The Omnibus Diplomatic Security and Anti-terrorism Act of 1986 ("Anti-terrorism Act") expands U.S. jurisdiction over foreign nationals committing acts of international terrorism against U.S. citizens.¹⁷⁹ The Anti-terrorism Act bases jurisdic-

171. See Note, *Nazi War Criminals in the United States*, *supra* note 164, at 884.

172. Murdering civilians in Nazi concentration camps during World War II is not a prosecutable offense under present U.S. criminal law. See *United States v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, 459 U.S. 1036 (1982).

173. See *supra* notes 168-170 and accompanying text.

174. For a detailed look at the tedious processes of denaturalization, deportation and extradition, see Note, *Nazi War Criminals in the United States*, *supra* note 164, at 872-892.

175. The denaturalization, deportation and extradition processes are unreliable, because they do not ensure that the Nazi war criminal will be prosecuted for his crimes. They simply serve to rid the United States of the problem.

176. Note, *Nazi War Criminals in the United States*, *supra* note 164, at 885.

177. See *infra* notes 178-199 and accompanying text.

178. See N.Y. Times, Jan.19, 1986, at 1, col. 4 (discusses rise in terrorism in 1985 and recent proposals to prevent terrorist attacks).

179. Omnibus Diplomatic Security and Anti-terrorism Act 1986, Pub. L. No. 99-399, §1202, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 853, 895-97 (codified at 18 U.S.C. §2331) [Anti-terrorism Act]. *Id.* Section 1202 of the Act provides, in part:

(a) HOMICIDE. - *Whoever* kills a national of the United States, while such national is outside the United States, shall - . . . be fined under this title or imprisoned for any term of years for life. . . *Id.* at §2331(a).

tion on the universality and passive personality principles, a significant departure from the traditional concepts of territoriality and nationality.¹⁸⁰

A prerequisite of exercising universal jurisdiction is that the crime committed is so heinous and of such universal magnitude that any nation obtaining personal jurisdiction over the accused may prosecute.¹⁸¹ Congress recognized that the Anti-terrorism Act should be based upon the universality principle, because universality would justify expansion of extraterritorial jurisdiction by implying that international terrorism should be treated as a crime of universal magnitude.¹⁸² The Anti-terrorism Act, however, is not based upon the universality principle, because terrorism has "not yet achieved sufficient intensity of interest to warrant recognition as a true basis for universal jurisdiction."¹⁸³

Unlike terrorism, the crimes of piracy,¹⁸⁴ slave trading,¹⁸⁵ hijacking or attacks on civil aircraft,¹⁸⁶ genocide,¹⁸⁷ and war crimes¹⁸⁸

(emphasis added).

180. The territorial principle is inapplicable, because the Anti-terrorism Act applies to crimes committed outside the United States. The nationality principle is inapplicable, because the Anti-terrorism Act applies to all persons who commit terrorist acts, not just U.S. nationals. See Pub. L. No. 99-399, §1202 (1986) U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 853 (codified at 18 U.S.C. §2331).

181. See *Draft Convention*, *supra* note 14.

182. See H.R. CONF. REP. No. 783, 99th Cong., 2d Sess. 86 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 1926, 1959.

183. Blakesley, *supra* note 68, at 719.

184. *Id.* at 717-718. Piracy is a crime punishable by any nation that obtains or captures the pirate. See The Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, art. 19 (entered into force Sept. 30, 1962).

185. *Id.* at arts. 13, 22.

186. See, e.g., Montreal Convention (convention for the suppression of unlawful acts against the safety of civil aviation), Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570, 974 U.N.T.S. 177 (entered into force in U.S., Jan. 26, 1973). See also Hague Convention (convention for suppression of unlawful seizure of aircraft) Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 (entered into force in U.S., Oct. 14, 1971).

187. Genocide has been recognized as a universal crime, punishable by any state signatory to The Convention on the Prevention and Punishment of the Crime of Genocide [hereinafter Genocide Convention], Dec. 9, 1948, 78 U.N.T.S. 277. The United States ratified the Genocide Convention in October 1988. See Genocide Convention Implementation Act of 1987 (The Proxmire Act), Pub. L. No. 100-606, 1988 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 4156-4166 (codified at 18 U.S.C. §§ 1091-1093 (1988)) [hereinafter Proxmire Act]. The Act makes genocide a "basic offense" punishable by (1) a fine of not more than \$1,000,000 and imprisonment for life, and (2) a fine of not more than \$1,000,000 or imprisonment for not more than twenty years, or both, depending upon the offense. Proxmire Act, 18 U.S.C. § 1091(a)-(b). Subsection 1091(d) sets forth that the circumstances required for the U.S. courts to exercise jurisdiction over the conduct proscribed by a basic offense. Such circumstances are where the offense is committed within the United States, or where the alleged offender is a national of the United States. Proxmire Act, 18 U.S.C. § 1091(d)(1)-(2). Thus,

have been acknowledged as of such universal interest and intensity that "international conventions have been aimed at their elimination."¹⁸⁹ There is a trend to recognize terrorism as a crime of universal magnitude, but the international community has not yet found the crime serious enough to justify the exercise of universal jurisdiction.¹⁹⁰ As such, the Anti-terrorism Act alternatively bases jurisdiction on the passive personality principle.¹⁹¹

The Anti-terrorism Act proscribes terrorism committed abroad by foreign nationals against U.S. citizens.¹⁹² Although U.S. courts traditionally rejected the use of passive personality jurisdiction,¹⁹³ more recent decisions have acknowledged this principle as a valid basis for exercising jurisdiction.¹⁹⁴ These cases support the proposition that, even without explicit congressional authority, courts can apply the passive personality principle to exercise extraterritorial jurisdiction.¹⁹⁵ The growth of U.S. jurisdiction over extraterritorial crimes under the passive personality principle led to the Anti-terrorism Act's enactment.¹⁹⁶

The Anti-terrorism Act precedent is narrowly tailored to proscribe terrorism¹⁹⁷ and has not been applied to other criminal acts

the Nazi war criminals who, as displaced persons, became nationalized U.S. citizens after World War II are subject to criminal liability under U.S. law.

188. See generally, *In re Yamashita*, 327 U.S. 1 (1945)(War crimes are punishable in the United States).

189. Blakesley, *supra* note 68, at 717-18.

190. Donnelly, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 CORNELL L. REV. 599, 602 (1987) (for a discussion of the impact of terrorism on the international community).

191. Omnibus Diplomatic Security and Anti-terrorism Act, Pub. L. No. 99-399, § 1202, codified as amended at 18 U.S.C. § 2331, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 853, 896-897 (codified at 18 U.S.C. §2331).

192. *Id.*

193. See *supra* notes 41-73 and accompanying text.

194. See *United States v. Layton*, 509 F. Supp. 212 (N.D. Cal. 1981), *appeal dismissed*, 645 F.2d 681 (9th Cir. 1981), *cert. denied*, 452 U.S. 973 (1981).

195. For cases that assert that United States can exercise jurisdiction under any of the principles of jurisdiction, including the passive personality, see *United States v. Smith*, 680 F.2d 255, 257 (1st Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983); see *United States v. Rodriguez*, 182 F. Supp. 479 (S.D. Cal. 1960), *aff'd in part sub nom. Rocha v. United States*, 288 F.2d 545 (9th Cir. 1961), *cert. denied*, 366 U.S. 948 (1961); but see *United States v. Columba-Colella*, 604 F.2d 356 (5th Cir. 1979).

196. For a detailed look at the growth of extraterritorial jurisdiction based on the passive personality, see Donnelly, *supra* note 190, at 616-619.

197. To date, there exists no consensus among nations as to the definition of "international terrorism." See Convention to Prevent and Punish the Acts of Terrorism Taking the Form Of Crimes Against Persons and Related Extortion That Are Of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S No. 8413 (entered into force in the United States October 20, 1976).

committed abroad.¹⁹⁸ This statute, however, is proof that “. . . [t]he expansion of extraterritorial jurisdiction is justifiable within the framework of existing United States and international law.”¹⁹⁹ There is no reason why this precedent cannot be applied to base U.S. jurisdiction over Nazi war criminals.

*B. Expanded Jurisdictional Principles Vis-a-Vis Terrorists
Extended to Nazi War Criminals*

The United States has come a long way toward expanding jurisdiction since the days of *American Banana*,²⁰⁰ especially with the enactment of the Anti-terrorism Act.²⁰¹ No longer are the principles of territoriality and nationality the limits of jurisdictional reach by the U.S. courts.²⁰² Courts will actively assert any of the five principles of jurisdiction in order to bring terrorists to justice.²⁰³ This growth of extraterritorial jurisdiction must similarly be extended to confer jurisdiction over Nazi war criminals.

The United States does not assert jurisdiction over Nazi war criminals because the crimes did not occur within U.S. territory, yet ironically it will prosecute terrorists who commit extraterritorial crimes.²⁰⁴ The different characteristics of terrorists and Nazi war criminals should not account for the different treatment by the United States.

Many terrorists are foreign nationals who have committed acts of terrorism abroad against U.S. citizens. All Nazi war criminals, on the other hand, were foreign nationals who committed war crimes abroad against non-U.S. citizens. The basic difference is, therefore, the victim. With terrorists, the victim was, at the time of the crime, a U.S. citizen. The U.S. government is quick to assert jurisdiction over acts of violence against its citizens, because the

198. The Act's legislative history demonstrates that Congress intended the certification of the Attorney General for the prosecution of a terrorist to ensure that the Act is not applied to normal street crimes. H.R. CONF. REP. No. 783, 99th Cong., 2d Sess. 86, 87-88 (1986), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS at 1960-1961.

199. Donnelly, *supra* note 190, at 611.

200. See *supra* notes 44-47 and accompanying text.

201. Omnibus Diplomatic Security and Anti-terrorism Act, Pub. L. No. 99-399, §1202, codified as amended at 18 U.S.C. §2331, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 853, 896-97.

202. See *supra* notes 178-199 and accompanying text.

203. See *supra* notes 14-40 and accompanying text.

204. See Omnibus Diplomatic Security and Anti-terrorism Act, Pub. L. No. 99-399, §1202, codified as amended at 18 U.S.C. §2331, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 853.

government has a primary interest in the welfare of its citizens. With Nazi war criminals, the victim was, at the time of the crime, a non-U.S. citizen.²⁰⁵ The U.S. government, therefore, has a secondary interest²⁰⁶ in the victim's welfare. Accordingly, the United States leaves punishment to states with primary responsibility. Unfortunately, the states whose nationals were persecuted have not consistently asserted jurisdiction over the prosecution of Nazi war criminals.²⁰⁷

Terrorists and Nazi war criminals should not be treated differently due to the status of their victims, because none of the five principles of jurisdiction²⁰⁸ are based solely on the victim's nationality. In actuality, terrorists and Nazi war criminals are similar. Both are foreign nationals who have committed violent acts outside U.S. territory and therefore they must be treated the same.

The most common characteristic of terrorists and Nazi war criminals is the violent extraterritorial crimes they have committed. For example, terrorists commit acts of terrorism. Although there has been difficulty in actually defining terrorism,²⁰⁹ the Foreign Intelligence Surveillance Act defines international terrorism as ". . . violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State."²¹⁰ Moreover, the only limit the Anti-terrorism Act²¹¹ puts on the definition of terrorism is that it does not include normal street crimes or barroom brawls.²¹² Either definition of terrorism is, therefore, broad enough to encompass Nazi war crimes.

205. All of the victims of the Holocaust were East and West Europeans.

206. The primary interest is of the states whose nationals, at the time of the crimes, were persecuted.

207. See Moeller, *supra* note 29, at 839. See, e.g., *In re Valerian Trifa*, No. a 7-819-396 (Imm. Ct., Detroit, Mich., Oct. 4, 1982), in which the United States obtained a deportation order for Trifa. Nevertheless, the United States tried for over one year to find a state willing to accept him, because Rumania, the country of his birth, refused.

208. See *supra* notes 14-40 and accompanying text.

209. See *supra* note 197.

210. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783, 50 U.S.C. §1801 (1983).

211. Omnibus Diplomatic Security and Anti-terrorism Act, Pub. L. No. 99-399, §1202, codified as amended at 18 U.S.C. §2331, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 853, 896-97.

212. H.R. CONF. REP. NO. 783, 99th Cong., 2d Sess. 86, 87-88, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS at 1960 (1986).

Nazi war crimes were not ordinary crimes. Nazi war crimes were violent acts dangerous to human life. They were acts in violation of the criminal laws of the United States²¹³ and of other states.²¹⁴ It is arguable that the definition of war crimes²¹⁵ encompasses terrorism. The U.S. government, however, would argue that the distinction between crime and terrorism is that the former is motivated by self-interest and the latter seeks to effect political change.²¹⁶ This distinction is not dispositive, because terrorism is a crime which can both stem from self-interest and seek to result in political change. Thus, this distinction by definition must not be used by the United States as an excuse from prosecuting Nazi war criminals.

While there are differences between Nazi war criminals and terrorists, the similarities²¹⁷ are compelling. Moreover, there is room within the broad definition of terrorism proscribed by the Anti-terrorism Act²¹⁸ to include Nazi war crimes as extraterritorial offenses punishable by the United States. The U.S. Congress can thereby pattern new legislation after the Anti-terrorism Act, explicitly conferring jurisdiction on the federal courts over Nazi war criminals.

Even if Congress refuses to extend the universality principle as *ultra vires* U.S. law, this principle is still applicable, because crimes against humanity are similar to the old crimes of piracy and he who commits such crimes becomes like the pirate in international law.²¹⁹ Piracy is the exception to the territorial principle²²⁰ which, in the absence of an international penal code, would remain the primary legal principle for responsibility in trying Nazi war criminals. This principle would confer U.S. jurisdiction to prosecute and punish Nazi war criminals, although the crime was committed outside U.S. territory. The prosecution of Nazi war criminals demands immediate attention and the United States must assert jurisdiction over them if its resolve to preserve justice is genuine.

213. See generally, *In re Yamashita*, 327 U.S. 1 (1945).

214. See generally, Genocide Convention, Dec. 9, 1948, 78 U.N.T.S. 277.

215. See *supra* note 16 for the definition of "war crimes."

216. See Donnelly, *supra* note 190, at 613.

217. See *supra* notes 205-216 and accompanying text.

218. See *supra* note 179 for the broad definition of terrorism punishable by the Anti-terrorism Act.

219. See generally, Geneva Convention on the High Seas, Apr. 28, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. See also H. ARENDT, *EICHMANN IN JERUSALEM* 240 (1963).

220. See *Draft Convention*, *supra* note 14, at 563.

C. U.S. Legal and Moral Obligations for Prosecuting Nazi War Criminals

Legally, the United States has a duty under international law to punish Nazi war criminals. As a signatory to the London Agreement²²¹ and a member of the International Military Tribunal (“Tribunal”),²²² the United States is obligated to assist in trying and punishing the major war criminals of the European Axis.²²³ Under the London Agreement, the United States was required either to extradite the Nazi war criminal to stand trial in the state recognizing jurisdiction or to deliver the criminal to the Tribunal at Nuremberg.²²⁴ Although the Tribunal is now defunct,²²⁵ the U.S. government still views the London Agreement as a binding international instrument.²²⁶

In the absence of the Tribunal - as a supranational court in which to prosecute Nazi war criminals - the alternative available to the United States under the London Agreement is extradition. In the absence of a state requesting the criminal’s extradition, the U.S. duty, under customary international law - pursuant to the maxim *aut dedere aut judicare* - is to place the criminal on trial under its own law.²²⁷ Thus, the United States is legally obligated to prosecute Nazi war criminals where the alternative is setting the criminal free.

The United States is also morally obligated to punish Nazi war criminals. Nazi war crimes are not unique to any country, but are, in fact, violations of the laws of nations.²²⁸ “It is therefore the moral duty of every sovereign state to . . . enforce the natural right to punish, possessed by the victims of the crime whoever they may

221. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 279 [hereinafter London Agreement]. The London Agreement was signed by the United States, France, Great Britain, and the Soviet Union as a formal pledge “. . . to deliver Nazi war criminals to a swift and sobering justice.” Note, *supra* note 164, at 858.

222. See Charter of the International Military Tribunal, London Agreement, art. 6, 59 Stat. 1547, E.A.S. No. 472, 82 U.N.T.S. 279, 286.

223. See Moeller, *supra* note 29, at 799.

224. *Id.* at 802; see also London Agreement, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 279.

225. See Moeller, *supra* note 29, at 799. The Tribunal disbanded on Oct. 1, 1946. See Note, *supra* note 157, at 858.

226. See Moeller, *supra* note 29, at 802; see also London Agreement, 59 Stat. 1547, E.A.S. No. 472, 82 U.N.T.S. 279.

227. See Moeller, *supra* note 29, at 803. See also M. Bassiouni, *International Extradition*, U.S. L. AND PRAC. ch. 2, §2 (1983).

228. Oliver, *supra* note 120, at 812.

be, against criminals whose acts have 'violated in extreme form the law of nature or the law of nations.'"²²⁹ Thus, the United States must enforce its citizens²³⁰ rights to bring the criminals to sobering justice. The moral obligation of the United States also has roots in the Genocide Convention.

The Genocide Convention²³¹ affirmed that genocide²³² is a crime under international law, and invited the signatories to enact the necessary legislation for prevention and punishment of the crime.²³³ The Genocide Convention codifies a moral re-awakening of an acknowledgment that every state is obligated under international law to use all necessary measures to bring the Nazi criminals responsible for World War II atrocities to justice.²³⁴

The member states of the Genocide Convention, therefore, made a moral commitment by signing the Convention. The United States ratified the Convention in 1988.²³⁵ The U.S. moral obligation to preventing and punishing such a heinous and universal crime certainly is sincere.

V. CONCLUSION

The United States does not recognize the universality principle that would confer jurisdiction over Nazi war criminals. Current U.S. immigration law limits its bases of jurisdiction over foreign nationals committing extraterritorial crimes.²³⁶ Without the United States' active and effective participation in the search for and prosecution of Nazi war criminals, most of those crimes will continue to go unpunished.

229. *Id.* at 810 (emphasis added).

230. *See supra* notes 150-156 and accompanying text for a discussion of the victims of Nazi war crimes and the perpetrators who emigrated to the United States following World War II and are now naturalized citizens.

231. Oliver, *supra* note 120, at 810. The United Nations General Assembly affirmed, invited, and recommended these goals in its resolution to prevent and punish the crime of genocide. *See id.* at 813. *See also* Genocide Convention, Dec. 9, 1948, 78 U.N.T.S. 277.

232. Genocide is:

. . . a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law . . .

Oliver, *supra* note 120, at 813 (*citing* Resolution 96(I) of the General Assembly, Dec. 11, 1946).

233. *See* Oliver, *supra* note 120, at 815.

234. Moeller, *supra* note 29, at 797.

235. *See supra* note 187.

236. *See supra* note 150 and accompanying text. The Immigration and Nationality Act limits United States legal action over Nazi war criminals to denaturalization, deportation and extradition. *See id.*

The United States must pass legislation that affirmatively asserts jurisdiction over Nazi war criminals. For example, the Israeli statute asserting Israeli jurisdiction over crimes committed extra-territorially and by aliens against Israeli citizens,²³⁷ is used by Israel to confer jurisdiction over Nazi war criminals. And Canada - a country in many ways similar to the United States - recently has enacted a law allowing its courts to prosecute Nazi war criminals. Yet another example of an active commitment to redress harm to a nation's citizens is the Anti-terrorism Act, discussed above.²³⁸ Likewise, Congress must not "close the chapter" on Nazi war crimes and allow the persecutors of the laws to go free.²³⁹

The United States must prosecute and punish Nazi war criminals. There are legal bases for U.S. jurisdiction.²⁴⁰ There are also moral bases for jurisdiction.²⁴¹ Perhaps the U.S. government has inhibitions, because it is a relatively political area of the law. Protecting and preserving its citizens' faith in jurisprudence, however, must be a prime incentive to enact legislation to prosecute and punish the Nazi terrorists who have permanently affected the lives of many U.S. citizens.²⁴²

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237. See *supra* note 108 and accompanying text for a discussion of the Nazi Punishment Laws.

238. Omnibus Diplomatic Security and Anti-terrorism Act of 1986, Pub. L. No. 99-399, §1202, *codified as amended* at 18 U.S.C. §2331, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 853.

239. N.Y. Times, Feb. 4, 1988, at A5, col. 1. For example, Australia, a nation possessing neither territorial nor national jurisdiction, is in the midst of amending its criminal code to include Nazi war crimes (committed abroad) as an offense punishable under Australian law. *Id.*

240. See *supra* notes 150-156 and accompanying text.

241. See A. RYAN, *supra* note 1, at 344 and accompanying text. The moral bases for jurisdiction include the U.S. belief "in the injustice of persecution and the integrity of the law." *Id.*

242. See generally Crawford, *The Holocaust: A Never Ending Agony*, in THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 250-255 (July 1980). Crawford's study verifies the permanent impact on the victims of the Holocaust.