

# [The term laws of war refers to the rules governi](https://assignbuster.com/the-term-laws-of-war-refers-to-the-rules-governi/)

The term “ laws of war” refers to the rules governing theactual conduct of armed conflict. This idea that there actually exists

rules that govern war is a difficult concept to understand. The simple

act of war in and of itself seems to be in violation of an almost

universal law prohibiting one human being from killing another. But

during times of war murder of the enemy is allowed, which leads one to

the question, “ if murder is permissible then what possible “ laws of

war” could there be?” The answer to this question can be found in the

Charter established at the International Military Tribunals at

Nuremberg and Tokyo:

Crimes against Humanity: namely, murder, extermination,

enslavement, deportation, and other inhumane acts committed against

any civilian population, 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. Leaders, organizers, instigators, and accomplices

participating in the formulation or execution of a common plan or

conspiracy to commit any of the foregoing crimes are responsible for

all acts performed by any persons in execution of such plan. 1 The

above excerpt comes form the Charter of the Tribunal Article 6 section

C, which makes it quite clear that in general the “ laws of war” are

there to protect innocent civilians before and during war.

It seems to be a fair idea to have such rules governing armed

conflict in order to protect the civilians in the general location of

such a conflict. But, when the conflict is over, and if war crimes

have been committed, how then are criminals of war brought to justice?

The International Military Tribunals held after World War II in

Nuremberg on 20 November 1945 and in Tokyo on 3 May 1946 are excellent

examples of how such crimes of war are dealt with. (Roberts and Guelff

153-54) But, rather than elaborate on exact details of the Tribunals

of Nuremberg and Tokyo a more important matter must be dealt with.

What happens when alleged criminals of war are unable to be

apprehended and justly tried? Are they forgotten about, or are they

sought after such as other criminals are in order to serve justice?

What happens if these alleged violators are found residing somewhere

other than where their pursuers want to bring them to justice? How

does one go about legally obtaining the custody of one such suspect?

Some of the answers to these questions can be found in an analysis of

how Israel went about obtaining the custody of individuals that it

thought to be guilty of Nazi War Crimes. Not only will one find some

of the answers to the previously stated questions, but also one will

gain an understanding of one facet of international law and how it

works.

Two cases in specific will be dealt with here. First, the

extradition of Adolf Eichmann from Argentina, and second, the

extradition of John Demjanjuk from the United States of America. These

cases demonstrate two very different ways that Israel went about

obtaining the custody of these alleged criminals. The cases also

expose the intricacy of International Law in matters of extradition.

But, before we begin to examine each of these cases we must first

establish Israel’s right to judicial processing of alleged Nazi war

criminals.

To understand the complications involved in Israel placing

suspected Nazi war criminals on trial, lets review the history of

Israel’s situation. During World War II the Nazis were persecuting

Jews in their concentration camps. At this time the state of Israel

did not exist. The ending of the war meant the ending of the

persecution, and when the other countries discovered what the Nazis

had done Military Tribunals quickly followed. Some of the accused war

criminals were tried and sentenced, but others managed to escape

judgement and thus became fugitives running from international law.

Israel became a state, and thus, some of the Jews that survived the

concentration camps moved to the state largely populated by people of

Jewish ancestry. Israel felt a moral commitment because of its large

Jewish population and set about searching for the fugitive Nazi war

criminals.

The situation just described is only a basic overview of what

happened. The state of Israel views itself as the nation with the

greatest moral jurisdiction for the trial of Nazi war criminals, and

other states around the Globe agree with Israel’s claim. (Lubet and

Reed 1) Former Israeli Attorney General Gideon Hausner was interested

in confirming Israel as the place for bringing to justice all those

suspected of genocide of Jews. Hausner sought to confirm Israel’s

status by proposing to the United States that they extradite Bishop

Valerian Trifa to Israel for trial as a war criminal. Israel was

reluctant to support Hausner’s proposal, which resulted in delaying

the extradition process and thus gave Trifa the time needed to find a

country willing to give him residency. Portugal granted Trifa

residency and thus Hausner’s proposal was in vain.

Israel, sometime after losing their opportunity of obtaining

Trifa, decided that Hausner’s idea of establishing Israel as the place

to bring Nazi war criminals to trial was a good one, which lead them

to seek the extradition of John Demjanjuk from the United States. The

Wall Street Journal reported:

Israel’s request for the extradition of a suspected Nazi war

criminal living in the U. S. . . appears to be a test case that could

determine whether Israel pursues other suspects . . . The decision to

seek the extradition of Mr. Demjanjuk follows months of negotiations

between U. S. and Israel officials about specific cases and the broader

question of whether Israel wanted to go through with extraditions

requests . . . Gideon Hausner, who prosecuted Eichmann, said Israel’s

decision to ask the U. S. to extradite Nazis for trial in Jerusalem

is an important step. “ This creates the opportunity for at least tacit

admission of Israel’s special position with regard to crimes against

Jews anywhere in the world,” he says. 2 After much negotiations the

United States arrested Demjanjuk in November of 1983. On April 15,

1985 United States District Judge Frank Battisti ruled in favor of

Demjanjuk’s extradition. After the Sixth Court of Appeals affirmed

Battisti’s ruling and the Supreme Court denied Demjanjuk’s petition

for certiorari, Demjanjuk arrived in Israel on February 27, 1986.

(Lubet and Reed 3) It would appear, from what has been presented, that

the extradition process is simple. But this conclusion is not correct

because there are a few issues that make extradition problematic. One

such issue that complicates the process of extradition is that of

identification and proof.

Leading Nazi war criminals such as Adolf Eichmann and Klaus

Barbie offer no real dispute in the matter of identification, but war

criminals that were not so prominent leave room to question whether

they truly are who they are accused of being. The type of criminal

cases that most of us are familiar with are those that attempt to

prove whether a defendant committed a particular act or acts.

Extradition cases involve two distinct questions: 1) The prosecution

must prove that the defendant is actually the person sought by the

requesting country. 2) The court must find probable cause to believe

that the accused committed the offense. 3

In Demjanjuk extradition case Judge Battisti concluded that

identification “ requires only a threshold showing probable cause.” 4

How this threshold is achieved can be done through the aid of a

photograph comparison with the accused, fingerprints, or an

eyewitness.

In the matter of probable cause the appellate court used the

formulation of “ any evidence warranting the finding that there was

reasonable ground to believe the accused guilty.” 5 Furthermore it has

been indicated that the extradition process incorporates these rules:

Probable cause to support extradition may be based entirely on

hearsay, and the defendant cannot present exculpatory evidence, which

the presiding judge would have to weigh or balance. 6 It must be kept

in mind that the extradition process does not attempt to prove the

innocence or guilt of the accused but rather whether the individual is

whom he or she is accused of being. The accuracy of the identification

is an issue that is resolved during the course of the actual trial,

and not in the extradition process. Simply identifying Demjanjuk does

not make him extraditable, the requirement of criminality has to be

met as well. Concerning the requirement of criminality the Stanford

Journal of Law said the following:

The rule of dual criminality generally provides that

extradition may be had only for acts extraditable by treaty and

considered criminal in both the requested and requesting

jurisdictions…Since sovereigns rarely define crimes using identical

phrases and since treaty terms may be ambiguous or out of date, a

substantial jurisprudence has developed interpreting and applying the

requirement of criminality. 7 In the case of Demjanjuk Israel was

charging him with “ the crimes of murdering Jews, which are offenses

under sections 1 to 4 of the Nazi and Nazi Collaborators (Punishment)

Law.” 8 The precise phrase, “ murdering Jews,” is not mentioned in the

United States-Israel Extradition Treaty, also the previously mentioned

phrase does not exist in current American penal statute.

But, according to the American rule of dual criminality a way

away around this small detail can be found:

The law does not require that the name by which the crime is

described in the two countries shall be the same; nor that the scope

of the liability shall be coextensive, or, in other respects, the same

in the two countries. It is enough if the particular act charged is

criminal in both jurisdictions. 9 It is clear to see that the

previously mentioned American rule on dual criminality gives the

United States the option of recognizing “ murdering Jews” as simply to

mean “ murder.” Therefore, the requirement of dual criminality in the

case of John Demjanjuk is satisfied.

The issues of identification and probable cause, along with

the requirement of criminality help to demonstrate the complexities

involved in the extradition process. Two more brief issues to consider

regarding Demjanjuk’s extradition are the questions of

extraterritoriality and extratemporality.

Extraterritoriality in relation to the case of Demjanjuk would

have only been an issue had another country along with Israel

requested the extradition of John Demjanjuk. In the case where two

countries are requesting the same individual the Secretary of State

would have to weigh the various forums’ contacts in order to determine

which request to honor. Israel has unofficially been recognized as the

desirable nation for bringing Nazi war criminals to trial. Germany,

Poland, and the U. S. S. R., for example, all waived their potential

requests for the extradition of Eichmann in favor of trial by Israel.

(Lubet and Reed 44-45)

In the matter of extratemporality, the trial judge presiding

over the Demjanjuk case ruled that murder was not barred by lapse of

time because the United States recognizes no statue of limitations for

that offense. (Lubet and Reed 58) Even if murder were to be barred by

lapse of time Demjanjuk could still have been extradited because of

his misrepresentation of his wartime activities during his immigration

process. Demjanjuk could have then been viewed as fleeing from justice

and thus no statute of limitations would have been extended to him.

The extradition process of Demjanjuk because it only involves two

countries would appear to be an easy process to complete. Even when

countries are cooperative, as were the United States and Israel,

concerning extradition it is clear that issues such as identification

and probable cause, requirement of criminality, extraterritoriality,

and extratemporality demonstrate how complex the process of

extradition can be. Certainly, Israel could have avoided the

complexities and length of time involved in extradition and gone about

obtaining Demjanjuk the same way they obtained Eichmann, but that

method, although it was effective, caused a bit of a commotion in the

international community.

Adolf Eichmann of the Reich Security Main Office was the

alleged strategist behind the so-called “ final solution of the Jewish

question.” 10 There have been roughly six million murders attributed to

him, so it is easy to understand why concentration camp survivors

spent fifteen years searching for him. Perseverance paid off when

Eichmann was found in Argentina living under an assumed name. A group

of volunteers, some of whom were Israeli citizens acting without the

support or direction of the Israeli Government, removed Eichmann from

Argentina and brought him to Israel where they turned him over to

government so that a trial could take place. So far it can be seen

that this method of extradition is quicker and less complicated than

the Demjanjuk method of extradition. There is no need for

identification or probable cause, requirement of dual criminality,

extraterritoriality, or extratemporality. The process is as simple as

it sounds; Eichmann was found and Eichmann was removed. Although the

method for extradition of Eichmann was quick it did result in leaving

Argentina very upset.

Argentina felt that Israel’s exercise of authority upon

Argentine territory was an infringement on its sovereignty. Israel

defended itself by claiming that Eichmann left Argentina voluntarily,

and the Israeli Government claimed that the group that removed

Eichmann was working under its own direction and not that of the

Israeli Government. Israel even went so far as to issue a letter

expressing their regrets for the actions taken by the free acting

group:

If the volunteer group violated Argentine law or interfered

with matters within the sovereignty of Argentina, the Government of

Israel wishes to express its regrets. 11

Argentina’s rejoined that even if Eichmann left Argentina on

his own free will that Israel should be responsible for the actions of

the private persons who were Israeli citizens. One simple point to be

made here in reply to Argentina’s argument is that only some of the

persons involved with the Eichmann removal were Israeli citizens.

There is a small possibility that the persons who were Israeli

citizens were only mere accessories to the act, guilty of only

marginal involvement. Furthermore, the responsibility of states in

connection with the acts of private persons is predicated upon

territorial jurisdiction and not the bond of nationality. (Svarlien

136) Israel has no jurisdiction within Argentina and thus has no power

over the actions of its citizens within Argentina’s borders. The sole

power of jurisdiction in this matter lays in the hands of Argentina,

and since the claim that Eichmann left voluntarily has neither been

shown to be false or expressly denied it appears that no real

Argentine law has been violated.

Argentina went on further to argue that Israel’s note

expressing their regret in the matter of Eichmann’s removal can be

viewed as an apology, which constitutes an admission of guilt. The

phrasing of the note of regret sent by Israel is embedded clearly with

conditional terms, which makes it difficult, if not impossible, to

derive an admission of guilt from it. At no time in the note does

Israel praise or approve the volunteer group actions, and neither does

Israel try to justify what was done. If anything can clearly be

derived from the note it is that Israel in fact does regret the

actions of the volunteer group, and possibly even condemns their

behavior. But, Argentina’s claim that the note is an admission of

guilt is hardly an argument worth pursuing. Argentina’s strongest

argument against the abduction of Eichmann is that Israel chose to

detain Eichmann after he had been captured.

Argentina claimed that even though the abduction of Eichmann

was an act committed by private citizens, the Israeli Government’s

decision to detain and try Eichmann made them an accessory. This point

is Argentina’s strongest argument because it is known that the

jurisdiction of the court reaches only as far as the borders of the

state of which it is in. If the court had no jurisdiction in the

nation of the original seizure, then by what right does that court

have to detain and try the accused? The only problem with Argentina’s

final argument on the Eichmann abduction is that proof of forcible

seizure or arrest must be presented. Since the abductors were acting

of their own free will it is doubtful that they arrested Eichmann in

the name of Israel. It is, however, quite possible that the abductors

used some force in the removal of Eichmann, but again, use of force

must be proved to give validity to Argentina’s final argument.

Argentina filed a complaint with the United Nations Security Council

under Article 33 claiming that Israel violated international law,

which created an atmosphere of insecurity and distrust jeopardizing

the preservation of international peace. (Silving 312) After the

presentation of arguments and debates before the Security Council the

follow declarations were made:

violation of the sovereignty of a Member State is incompatible

with the Charter of the United Nations; repetition of acts such as

that giving rise to this situation would involve a breach of the

principles upon which international order is founded creating an

atmosphere of insecurity and distrust incompatible with the

preservation of peace. The “ adjudicative” part of the resolution. 1.

Declares that acts such as that under considerations, which affect the

sovereignty of a Member State and therefore cause international

friction, may, if repeated, endanger international peace and security;

2. Requests the Government of Israel to make appropriate reparation in

accordance with the Charter of the United Nations and rules of

international law. 12 The important part of the resolutions that the

United Nations reached is the phrase “ if repeated.” It is almost as if

the United Nations said, “ this time we will let the infringement go,

but next we will take action.”

Considering the unique character of the crimes attributed to

Eichmann, and since such crimes are, for the most part, universally

condemned, Israel’s breach of international law seems to have been

tolerated. It is quite possible that had the person who was removed

been someone other than Eichmann the result of the United Nations

Security Council would have been much different.

The two cases of extradition expose the complexities of

international law. In the case of Demjanjuk, Israel went about the

extradition process in the correct manner, which resulted in the

issues of identification and probable cause, requirement of

criminality, extraterritoriality, and extratemporality. When Israel

went about obtaining Adolf Eichmann the issues dealt with were ones

resulting from the method of Eichmann’s apprehension. Eichmann’s

removal from Argentina brought to light the issue of violation of a

country’s sovereignty. In both cases because the accused were being

charged with Nazi war crimes, specifically genocide, there cases seem

to get a little leeway and are not dealt with as extremely as other

cases might be. Nevertheless, their cases demonstrate how one goes

about bringing to justice those charged with violating the laws of

war.

—

FOOTNOTES

1 Roberts, Adam, and Richard Guelff, ed. Documents of the Laws of

War. (Oxford: Clarendon Press, 1982.) 155.

2 Lubert, Steven, and Jan Stern Reed. “ Extradition of Nazis from

the United States to Israel: A Survey of Issues in

Transnational Criminal Law.” Stanford Journal of

International Law. 23 (1986): 3.

3 Lubert, Steven, and Jan Stern Reed. “ Extradition of Nazis from

the United States to Israel: A Survey of Issues in

Transnational Criminal Law.” Stanford Journal of

International Law. 23 (1986): 15.

4 Lubert, Steven, and Jan Stern Reed. “ Extradition of Nazis from

the United States to Israel: A Survey of Issues in

Transnational Criminal Law.” Stanford Journal of

International Law. 23 (1986): 15.

5 Lubert, Steven, and Jan Stern Reed. “ Extradition of Nazis from

the United States to Israel: A Survey of Issues in

Transnational Criminal Law.” Stanford Journal of

International Law. 23 (1986): 18.

6 Lubert, Steven, and Jan Stern Reed. “ Extradition of Nazis from

the United States to Israel: A Survey of Issues in

Transnational Criminal Law.” Stanford Journal of

International Law. 23 (1986): 18.

7 Lubert, Steven, and Jan Stern Reed. “ Extradition of Nazis from

the United States to Israel: A Survey of Issues in

Transnational Criminal Law.” Stanford Journal of

International Law. 23 (1986): 20.

8 Lubert, Steven, and Jan Stern Reed. “ Extradition of Nazis from

the United States to Israel: A Survey of Issues in

Transnational Criminal Law.” Stanford Journal of

International Law. 23 (1986): 23.

9 Lubert, Steven, and Jan Stern Reed. “ Extradition of Nazis from

the United States to Israel: A Survey of Issues in

Transnational Criminal Law.” Stanford Journal of

International Law. 23 (1986): 23.

10 Silving, Helen. “ In Re Eichmann: A Dilemma of Law and Morality”

The American Journal of International Law 55 (1961): 311.

11 Silving, Helen. “ In Re Eichmann: A Dilemma of Law and Morality”

The American Journal of International Law 55 (1961): 318.

12 Silving, Helen. “ In Re Eichmann: A Dilemma of Law and Morality”

The American Journal of International Law 55 (1961): 313.