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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.

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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.

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

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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.