CHAPTER SIX: INTERNATIONAL CRIMINAL LAW

In the last Chapter, we used as an example of a multilateral treaty the Convention for the Prevention of All Forms of Discrimination Against Women. This treaty, as we saw, attempted to spell out certain human rights. Are there treaties that spell out certain human obligations? The twentieth century has seen a proliferation of such treaties, which can be grouped under the general title “international criminal law.” In the opinion of many international scholars, these treaties in the aggregate have given rise to a customary international law of international crimes.

A. War Crimes


Hague Convention (IV) Respecting the Laws and Customs of War on Land
Signed at The Hague, 18 October 1907.

ENTERED INTO FORCE January 26, 1910. [Among the ratifying states: Austria-Hungary, Belgium, Brazil, China, Cuba, Denmark, Ethiopia, Finland, France, Germany, Japan, Luxembourg, Mexico, Netherlands, Norway, Poland, Portugal, Romania, Russia, Sweden, Switzerland, United Kingdom, United States. Among the states that signed but did not ratify are: Argentina, Bulgaria, Chile, Greece, Italy, Persia, Serbia, Turkey. Among the states that neither signed nor ratified the treaty are Canada, Egypt, Honduras and India.]

**Article 1**
The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention.

**Article 2**
The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.

**Article 3**
A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

**Article 5**
The present Convention shall be ratified as soon as possible. The ratifications shall be deposited at The Hague.

**Article 7**
The present Convention shall come into force, in the case of the Powers which were a party to the first deposit of ratifications, sixty days after the date of the proce-s-verbal of this deposit, and, in the case of the Powers which ratify subsequently or which adhere, sixty days after the notification of their ratification or of their adhesion has been received by the Netherlands Government.

**Article 8**
In the event of one of the Contracting Powers wishing to denounce the present Convention, the denunciation shall be notified in writing to the Netherlands Government, which shall at once communicate a duly certified copy of the notification to all the other Powers, informing them of the date on which it was received. The denunciation shall only have effect in regard to the notifying Power, and one year after the notification has reached the Netherlands Government.

**ANNEX TO THE CONVENTION**

**REGULATIONS RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND**

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

**ART. 2.** The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

**ART. 3.** The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.
ART. 4. Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them. They must be humanely treated. All their personal belongings, except arms, horses, and military papers, remain their property.

ART. 5. Prisoners of war may be interned in a town, fortress, camp, or other place, and bound not to go beyond certain fixed limits, but they cannot be confined except as in indispensable measure of safety and only while the circumstances which necessitate the measure continue to exist.

ART. 6. The State may utilize the labor of prisoners of war according to their rank and aptitude, officers excepted. The tasks shall not be excessive and shall have no connection with the operations of the war...

ART. 7. The Government into whose hands prisoners of war have fallen is charged with their maintenance. In the absence of a special agreement between the belligerents, prisoners of war shall be treated as regards board, lodging, and clothing on the same footing as the troops of the Government who captured them.

ART. 8. Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary. Escaped prisoners who are retaken before being able to rejoin their own army or before leaving the territory occupied by the army which captured them are liable to disciplinary punishment. Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of the previous flight.

ART. 9. Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, and if he infringes this rule, he is liable to have the advantages given to prisoners of his class curtailed.

ART. 13. Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.

ART. 18. Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of whatever church they may belong to, on the sole condition that they comply with the measures of order and police issued by the military authorities.

ART. 20. After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.

ART. 22. The right of belligerents to adopt means of injuring the enemy is not unlimited.

ART. 23. In addition to the prohibitions provided by special Conventions, it is especially forbidden:
(a) To employ poison or poisoned weapons;
(b) to kill or wound treacherously individuals belonging to the hostile nation or army;
(c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;
(d) To declare that no quarter will be given;
(e) To employ arms, projectiles, or material calculated to cause unnecessary suffering;
(f) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;
(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;
(h) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party. A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

ART. 24. Ruses of war and the employment of means necessary for obtaining information about the enemy and the country are considered permissible.

ART. 25. The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.

ART. 26. The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.

ART. 27. In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.
ART. 28. The pillage of a town or place, even when taken by assault, is prohibited.

ART. 36. An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

ART. 42. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

ART. 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

ART. 44. A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense.

ART. 46. Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.

ART. 50. No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

ART. 52. Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country. Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

ART. 56. The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

NOTES AND QUESTIONS
FOR CLASSROOM DISCUSSION

1. The Hague Convention you have just read has never been terminated. In this respect, it remained in force during World War II. But did the Convention apply during World War II? Look at Article 2. Then look at the note at the beginning of the treaty, specifying certain states that did not become parties to the treaty. Finally, recall the states that were involved in the Second World War. What can you conclude as to the applicability of the Hague Convention to the Second World War?


3. If the Convention itself does not apply directly to individuals, what is the purpose of Article 1? Do you think such an article can be effective? To what extent was it effective during the major wars of the twentieth century?

4. Note the clarity and specificity of many of the provisions of the Annex. Read again articles 25 and 28 of the Annex; these are flat-out prohibitions which, one can imagine, would be very hard to enforce in a total war.

5. The Hague Conventions of the turn of the century entered into force at a time when resort to war was itself not prohibited by international law. But in 1928, after the experience of the first world war, the nations of the world sent their representatives to Paris to sign the following historic treaty.

Kellogg-Briand Pact
Treaty Providing for the Renunciation of War as an Instrument of National Policy
Done at Paris, Aug. 27, 1928.
L.N.T.S. 57

The High Contracting Parties:
Deeply sensible of their solemn duty to promote the welfare of mankind;
Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;
Convinced that all changes in their relations with one another should be sought only by pacific means and be
the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty;

Hopeful that, encouraged by their example, all the other nations of the world will join in this human endeavor and by adhering to the present Treaty as soon as it comes into force bring their peoples within the scope of its beneficent provisions, thus uniting the civilized nations of the world in a common renunciation of war as an instrument of their national policy;

Have decided to conclude a Treaty and for that purpose have appointed as their respective Plenipotentiaries:

[Here follow the names of Plenipotentiaries.]

who, having communicated to one another their full powers found in good and due form have agreed upon the following articles:

Article 1
The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article 2
The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Article 3
The present Treaty shall be ratified by the High Contracting Parties named in the Preamble in accordance with their respective constitutional requirements, and shall take effect as between them as soon as all their several instruments of ratifications shall have been deposited at Washington.

This Treaty shall, when it has come into effect as prescribed in the preceding paragraph, remain open as long as may be necessary for adherence by all the other Powers of the world. Every instrument evidencing the adherence of a Power shall be deposited at Washington and the Treaty shall immediately upon such deposit become effective as between the Power thus adhering and the other Powers parties hereto.

NOTES AND QUESTIONS
FOR CLASSROOM DISCUSSION

1. Did the Kellogg-Briand pact provide any remedy for its breach? What remedy could it provide? If nation A violates the pact and starts a war, what remedy is there for the violation other than joining in the war against A?

2. A cynic might conclude that the Kellogg-Briand pact is meaningless because it contains no remedy for its breach. But consider the individuals who start a war of aggression. After the war, is it not possible that the Kellogg-Briand pact might be applied to them? Might they not be charged with the crime of waging unlawful war in violation of the Kellogg-Briand pact? Yet, how could they be so charged if the Kellogg-Briand pact says nothing about crimes and nothing about individual responsibility?

3. At the conclusion of World War II, the victorious Allied Powers set up war-crimes tribunals at Nuremberg and in the Far East. Many individuals within the losing Axis nations were indicted and tried. Two of the most prominent treaties that were referred to by the tribunals were the ones you have just read—the Hague Convention on Land War and the Kellogg-Briand Pact. How could they apply to World War II? What use could be made of them? We begin with excerpts from the agreement of the Allied Powers that constituted the Nuremberg tribunal. It is followed by a substantial excerpt from the lengthy judgment of the Nuremberg Tribunal. Included in the judgment were individual judgments as to each of the defendants. We will focus on just one of these—the indictment and conviction of Admiral Donitz. Notice, when you read it, what defenses were available to Donitz and whether the Tribunal succeeded in justifying its judgment against him.

The Nuremberg Charter
Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal
Done at London, Aug. 8, 1945.
Entered into force, Aug. 8, 1945
82 U.N.T.S. 279b

Article 6.
The International Military Tribunal shall have the power to try and punish persons who, acting in the interests of the
European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes:

(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(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 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.

Article 7.
The official position of Defendants, whether as heads of State, or responsible officials in Government departments, shall not be considered as freeing them from responsibility, or mitigating punishment.

Article 8.
The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Article 16.
In order to ensure fair trial for the Defendants, the following procedure shall be followed:

(a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the Trial.

(b) During any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him.

(c) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.

(d) A defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel.

(e) A defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution.

Reading Assignment: *International Law Anthology*, pp. 233-36 ("Defenses to War Crimes")

Final Judgment of the Nuremberg Tribunal
1 International Military Tribunal, Trial of the
Major War Criminals 171 (1947)

A copy of the Indictment in the German language was served upon each defendant in custody, at least 30 days before the Trial opened.

This Indictment charges the defendants with Crimes against Peace by the planning, preparation, initiation, and waging wars of aggression, which were also wars in violation of international treaties, agreements, and assurances; with War Crimes; and with Crimes against Humanity. The defendants are also charged with participating in the formulation or execution of a common plan or conspiracy to commit all these crimes.

The Trial, which was conducted in four languages—English, Russian, French, and German—began on 20 November 1945, and pleas of "Not Guilty" were made by all the defendants except Bormann.

The hearing of evidence and the speeches of Counsel concluded on 31 August 1946. Four hundred and three open sessions of the Tribunal have been held. Thirty-three witnesses gave evidence orally for the Prosecution against the individual defendants, and 61 witnesses, in addition to 19 of the defendants, gave evidence for the Defense. Copies of all the documents put in evidence by the Prosecution have been supplied to the Defense in the German language. Much of the evidence presented to the Tribunal on behalf of the Prosecution was documentary
evidence, captured by the Allied armies in German army headquarters, Government buildings, and elsewhere. Some of the documents were found in salt mines, buried in the ground, hidden behind false walls and in other places thought to be secure from discovery. The case, therefore, against the defendants rests in a large measure on documents of their own making, the authenticity of which has not been challenged except in one or two cases.

The individual defendants are indicted under Article 6 of the Nuremberg Charter.

The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world.

To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.

The first acts of aggression referred to in the Indictment are the seizure of Austria and Czechoslovakia; and the first war of aggression charged in the Indictment is the war against Poland begun on 1 September 1939.

Before examining that charge it is necessary to look more closely at some of the events which preceded these acts of aggression. The war against Poland did not come suddenly out of an otherwise clear sky; the evidence has made it plain that this war of aggression, as well as the seizure of Austria and Czechoslovakia, was premeditated and carefully prepared, and was not undertaken until the moment was thought opportune for it to be carried through as a definite part of the preordained scheme and plan. For the aggressive designs of the Nazi Government were not accidents arising out of the immediate political situation in Europe and the world: they were a deliberate and essential part of Nazi foreign policy.

From the beginning, the National Socialist movement claimed that its object was to unite the German People in the consciousness of their mission and destiny, based on inherent qualities of race, and under the guidance of the Fuhrer.

For its achievement, two things were deemed to be essential: the disruption of the European order as it had existed since the Treaty of Versailles, and the creation of a Greater Germany beyond the frontiers of 1914. This necessarily involved the seizure of foreign territories.

War was seen to be inevitable, or at the very least, highly probable, if these purposes were to be accomplished. The German People, therefore, with all their resources, were to be organized as a great political-military army, schooled to obey without question any policy decreed by the State.

The invasion of Austria was a premeditated aggressive step in furthering the plan to wage aggressive wars against other countries. As a result Germany's flank was protected, that of Czechoslovakia being greatly weakened. The first step had been taken in the seizure of "Lebensraum;" many new divisions of trained fighting men had been acquired; and with the seizure of foreign exchange reserves, the rearmament program had been greatly strengthened.

It was contended before the Tribunal that the annexation of Austria was justified by the strong desire expressed in many quarters for the union of Austria and Germany; that there were many matters in common between the two peoples that made this union desirable; and that in the result the object was achieved without bloodshed.

These matters, even if true, are really immaterial, for the facts plainly prove that the methods employed to achieve the object were those of an aggressor. The ultimate factor was the armed might of Germany ready to be used if any resistance was encountered. Moreover, none of these considerations appear from the Hossbach account of the meetings of 5 November 1937 to have been the motives which actuated Hitler; on the contrary, all the emphasis is there laid on the advantage to be gained by Germany in her military strength by the annexation of Austria.

The conference of 5 November 1937 made it quite plain that the seizure of Czechoslovakia by Germany had been definitely decided upon. The only question remaining was the selection of the suitable moment to do it.

On 31 August 1938 Hitler approved a memorandum by Jodl dated 24 August 1938, concerning the timing of the order for the invasion of Czechoslovakia and the question of defense measures. This memorandum contained the following:

Operation Grun will be set in motion by means of an ‘incident’ in Czechoslovakia, which will give Germany provocation for military intervention. The fixing of the exact time for this incident is of the utmost importance.

These facts demonstrate that the occupation of Czechoslovakia had been planned in detail long before the Munich Conference.

By March 1939 the plan to annex Austria and Czechoslovakia had been accomplished. The time had now come for the German leaders to consider further acts of aggression. In the opinion of the Tribunal, the events of the days immediately preceding 1 September 1939 demonstrate the determination of Hitler and his associates to carry out the declared intention of invading Poland at all costs, despite appeals from every quarter. With the ever increasing evidence before him that this intention would lead to war with Great Britain and France as well, Hitler was resolved not to depart from the course he had set for himself. The Tribunal is fully satisfied by the evidence that
the war initiated by Germany against Poland on 1 September 1939 was most plainly an aggressive war, which was to develop in due course into a war which embraced almost the whole world, and resulted in the commission of countless crimes, both against the laws and customs of war, and against humanity.

The aggressive war against Poland was but the beginning. The aggression of Nazi Germany quickly spread from country to country. It is clear that as early as October 1939 the question of invading Norway was under consideration. The defense that has been made here is that Germany was compelled to attack Norway to forestall an Allied invasion, and her action was therefore preventive.

It must be remembered that preventive action in foreign territory is justified only in case of `an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment of deliberation.'" (The Caroline Case, Moore's Digest of International Law, II, 412). How widely the view was held in influential German circles that the Allies intended to occupy Norway cannot be determined with exactitude. Quisling asserted that the Allies would intervene in Norway with the tacit consent of the Norwegian Government. The German Legation at Oslo disagreed with this view, although the Naval Attache at that Legation shared it.

When the plans for an attack on Norway were being made, they were not made for the purpose of forestalling an imminent Allied landing, but, at the most, that they might prevent an Allied occupation at some future date.

When the final orders for the German invasion of Norway were given, the diary of the Naval Operations Staff for 23 March 1940 records: `A mass encroachment by the English into Norwegian territorial waters . . . is not to be expected at the present time.' And Admiral Assmann's entry for 26 March says: `British landing in Norway not considered serious.'

Documents which were subsequently captured by the Germans are relied on to show that the Allied plan to occupy harbors and airports in Western Norway was a definite plan, although in all points considerably behind the German plans under which the invasion was actually carried out. These documents indicate that an altered plan had been finally agreed upon on 20 March 1940, that a convoy should leave England on 5 April, and that mining in Norwegian waters would begin the same day; and that on 5 April the sailing time had been postponed until 8 April. But these plans were not the cause of the German invasion of Norway. Norway was occupied by Germany to afford her bases from which a more effective attack on England and France might be made, pursuant to plans prepared long in advance of the Allied plans which are now relied on to support the argument of self-defense.

It was further argued that Germany alone could decide, in accordance with the reservations made by many of the Signatory Powers at the time of the conclusion of the Kellogg-Briand Pact, whether preventive action was a necessity, and that in making her decision her judgment was conclusive. But whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced.

The Nuremberg Charter defines as a crime the planning or waging of war that is a war of aggression or a war in violation of international treaties. The Tribunal has decided that certain of the defendants planned and waged aggressive wars against 12 nations, and were therefore, guilty of this series of crimes. This makes it unnecessary to discuss the subject in further detail, or even to consider at any length the extent to which these aggressive wars were also `wars in violation of international treaties, agreements, or assurances.'

The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal.

The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law. The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the Court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law.

The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement. But in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the Prosecution and the Defense, and will express its view on the matter.

It was urged on behalf of the defendants that a fundamental principle of all law--international and domestic--is
that there can be no punishment of crime without a pre-existing law. "Nullum crimen sine lege, nulla poena sine lege." It was submitted that ex post facto punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

In the first place, it is to be observed that the maxim nullum crimen sine lege, nulla poena sine lege is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the Government of Germany, the defendants, or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.

This view is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned. The General Treaty for the Renunciation of War of 27 August 1928, more generally known as the Pact of Paris or the Kellogg-Briand Pact, was binding on 63 nations, including Germany, Italy, and Japan at the outbreak of war in 1939. The question is, what was the legal effect of this Pact? The nations who signed the Pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact. As Mr. Henry L. Stimson, then Secretary of State of the United States, said in 1932:

War between nations was renounced by the signatories of the Kellogg-Briand Treaty. This means that it has become throughout practically the entire world an illegal thing. Hereafter, when nations engage in armed conflict, either one or both of them must be termed violators of this general treaty law. We denounce them as law breakers.

But it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offenses against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention. In interpreting the words of the Pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.

The view which the Tribunal takes of the true interpretation of the Pact is supported by the international history which preceded it. In the year 1923 the draft of a Treaty of Mutual Assistance was sponsored by the League of Nations. In Article I the Treaty declared "that aggressive war is an international crime," and that the parties would "undertake that no one of them will be guilty of its commission." The draft treaty was submitted to 29 states, about half of whom were in favor of accepting the text. The principal objection appeared to be in the difficulty of defining the acts which would constitute "aggression," rather than any doubt as to the criminality of aggressive war. The preamble to the League of Nations 1924 Protocol for the Pacific Settlement of International Disputes ("Geneva Protocol"), after "recognizing the solidarity of the members of the international community," declared that "a war of aggression constitutes a violation of this solidarity and is an international crime." It went on to declare that the
contracting parties were "desirous of facilitating the complete application of the system provided in the Covenant of
the League of Nations for the pacific settlement of disputes between the States and of ensuring the repression of
international crimes." The Protocol was recommended to the members of the League of Nations by a unanimous
resolution in the assembly of the 48 members of the League. These members included Italy and Japan, but Germany
was not then a member of the League.

Although the Protocol was never ratified, it was signed by the leading statesmen of the world, representing the
vast majority of the civilized states and peoples, and may be regarded as strong evidence of the intention to brand
aggressive war as an international crime.

At the meeting of the Assembly of the League of Nations on 24 September 1927, all the delegations then
present (including the German, the Italian, and the Japanese), unanimously adopted a declaration concerning wars of
aggression. The preamble to the declaration stated:

The Assembly:

Recognizing the solidarity which unites the community of nations;
Being inspired by a firm desire for the maintenance of general peace;
Being convinced that a war of aggression can never serve as a means of settling international disputes, and is
in consequence an international crime . . .

The unanimous resolution of 18 February 1928 of 21 American republics at the Sixth (Havana) Pan-American
Conference, declared that "war of aggression constitutes an international crime against the human species."

All these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction
which the Tribunal placed upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is
criminal. The prohibition of aggressive war demanded by the conscience of the world, finds its expression in the
series of pacts and treaties to which the Tribunal has just referred.

It is also important to remember that Article 227 of the Treaty of Versailles provided for the constitution of a
special Tribunal, composed of representatives of five of the Allied and Associated Powers which had been
belligerents in the first World War opposed to Germany, to try the former German Emperor "for a supreme offense
against international morality and the sanctity of treaties." The purpose of this trial was expressed to be "to
vindicate the solemn obligations of international undertakings, and the validity of international morality." In Article
228 of the Treaty, the German Government expressly recognized the right of the Allied Powers "to bring before
military tribunals persons accused of having committed acts in violation of the laws and customs of war."

It was submitted that international law is concerned with the actions of sovereign States, and provides no
punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are
not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the
Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon
individuals as well as upon States has long been recognized. In the recent case of Ex parte Quirin, 317 U.S. 1
(1942), before the Supreme Court of the United States, persons were charged during the war with landing in the
United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the Court, said:

From the very beginning of its history this Court has applied the law of war as including that part of the law of
nations which prescribes for the conduct of war, the status, rights, and duties of enemy nations as well as enemy
individuals.

He went on to give a list of cases tried by the Courts, where individual offenders were charged with offenses
against the laws of nations, and particularly the laws of war. Many other authorities could be cited, but enough has
been said to show that individuals can be punished for violations of international law. Crimes against international
law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can
the provisions of international law be enforced.

The provisions of Article 228 of the Treaty of Versailles already referred to illustrate and enforce this view of
individual responsibility.

The principle of international law, which under certain circumstances, protects the representatives of a state,
cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot
shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.
See Article 7 of the Nuremberg Charter.

On the other hand the very essence of the Charter is that individuals have international duties which transcend
the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain
immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its
competence under international law.

It was also submitted on behalf of most of these defendants that in doing what they did they were acting under
the orders of Hitler, and therefore cannot be held responsible for the acts committed by them in carrying out these orders. The Charter specifically provides in Article 8:

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment.

The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.

The evidence relating to War Crimes has been overwhelming in its volume and its detail. It is impossible for this Judgment adequately to review it, or to record the mass of documentary and oral evidence that has been presented. The truth remains that War Crimes were committed on a vast scale, never before seen in the history of war. They were perpetrated in all the countries occupied by Germany, and on the High Seas, and were attended by every conceivable circumstance of cruelty and horror. There can be no doubt that the majority of them arose from the Nazi conception of "total war," with which the aggressive wars were waged. For in this conception of "total war," the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity. Everything is made subordinate to the overmastering dictates of war. Rules, regulations, assurances, and treaties all alike are of no moment; and so, freed from the restraining influence of international law, the aggressive war is conducted by the Nazi leaders in the most barbaric way. Accordingly, War Crimes were committed when and wherever the Fuhrer and his close associates thought them to be advantageous. They were for the most part the result of cold and criminal calculation.

On some occasions, War Crimes were deliberately planned long in advance. In the case of the Soviet Union, the plunder of the territories to be occupied, and the ill-treatment of the civilian population, were settled in minute detail before the attack was begun. As early as the autumn of 1940, the invasion of the territories of the Soviet Union was being considered. From that date onwards, the methods to be employed in destroying all possible opposition were continuously under discussion.

Similarly, when planning to exploit the inhabitants of the occupied countries for slave labor on the very greatest scale, the German Government conceived it as an integral part of the war economy, and planned and organized this particular War Crime down to the last elaborate detail.

Other War Crimes, such as the murder of prisoners of war who had escaped and been recaptured, or the murder of Commandos or captured airmen, or the destruction of the Soviet Commissars, were the result of direct orders circulated through the highest official channels.

The Tribunal proposes, therefore, to deal quite generally with the question of War Crimes, and to refer to them later when examining the responsibility of the individual defendants in relation to them. Prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity. Civilian populations in occupied territories suffered the same fate. Whole populations were deported to Germany for the purposes of slave labor upon defense works, armament production, and similar tasks connected with the war effort. Hostages were taken in very large numbers from the civilian populations in all the occupied countries, and were shot as suited the German purposes. Public and private property was systematically plundered and pillaged in order to enlarge the resources of Germany at the expense of the rest of Europe. Cities and towns and villages were wantonly destroyed without military justification or necessity.

The Tribunal is of course bound by the Charter, in the definition which it gives both of War Crimes and Crimes against Humanity. With respect to War Crimes, however, the crimes defined by Article 6, Section (b), of the Charter were already recognized as War Crimes under international law. They were covered by Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929. That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument.

But it is argued that the Hague Convention does not apply in this case, because of the "general participation" clause in Article 2 of the Hague Convention of 1907. That clause provided:

The provisions contained in the regulations (Rules of Land Warfare) referred to in Article I as well as in the present Convention do not apply except between contracting powers, and then only if all the belligerents are parties to the Convention.

Several of the belligerents in the recent war were not parties to this Convention.

In the opinion of the Tribunal it is not necessary to decide this question. The rules of land warfare expressed in
the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But
the convention expressly stated that it was an attempt "to revise the general laws and customs of war," which it thus
recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized
nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6(b)
of the Charter.

A further submission was made that Germany was no longer bound by the rules of land warfare in many of the
territories occupied during the war, because Germany had completely subjugated those countries and incorporated
them into the German Reich, a fact which gave Germany authority to deal with the occupied countries as though
they were part of Germany. In the view of the Tribunal it is unnecessary in this case to decide whether this doctrine
of subjugation, dependent as it is upon military conquest, has any application where the subjugation is the result of
the crime of aggressive war. The doctrine was never considered to be applicable so long as there was an army in the
field attempting to restore the occupied countries to their true owners, and in this case, therefore, the doctrine could
not apply to any territories occupied after 1 September 1939.

With regard to Crimes against Humanity there is no doubt whatever that political opponents were murdered in
Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror
and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organized and
systematic. The policy of persecution, repression, and murder of civilians in Germany before the war of 1939, who
were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the
same period is established beyond all doubt. To constitute Crimes against Humanity, the acts relied on before the
outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the
Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been
satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal
therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the
meaning of the Charter, but from the beginning of the war in 1939 War Crimes were committed on a vast scale,
which were also Crimes against Humanity; and insofar as the inhumane acts charged in the Indictment, and
committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or
in connection with, the aggressive war, and therefore constituted Crimes against Humanity.

[The Tribunal hereinafter makes findings relative to each individual Defendant, among them findings relative
to Admiral Donitz.]

DONITZ
Donitz is indicted on Counts One [Conspiracy to Wage Wars of Aggression], Two [Crimes against Peace], and
Three [War Crimes]. In 1935 he took command of the first U-boat flotilla commissioned since 1918, became in
1936 commander of the submarine arm, was made Vice-Admiral in 1940, Admiral in 1942, and on 30 January 1943
Commander-in-Chief of the German Navy. On 1 May 1945 he became the Head of State, succeeding Hitler.

COUNT ONE. Although Donitz built and trained the German U-boat arm, the evidence does not show he was
privy to the conspiracy to wage aggressive wars or that he prepared and initiated such wars. He was a line officer
performing strictly tactical duties. He was not present at the important conferences when plans for aggressive wars
were announced, and there is no evidence he was informed about the decisions reached there.

COUNT TWO. Donitz did, however, wage aggressive war within the meaning of that word as used by the
Charter. Submarine warfare which began immediately upon the outbreak of war, was fully coordinated with the
other branches of the Wehrmacht. It is clear that his U-boats, few in number at the time, were fully prepared to wage
war.

It is true that until his appointment in January 1943 as Commander-in-Chief he was not an `Oberbefehlshaber.' But this statement underestimates the importance of Donitz' position. He was no mere army or
division commander. The U-boat arm was the principal part of the German fleet and Donitz was its leader. The High
Seas fleet made a few minor, if spectacular, raids during the early years of the war, but the real damage to the enemy
was done almost exclusively by his submarines as the millions of tons of Allied and neutral shipping sunk will
testify. Donitz was solely in charge of this warfare. The Naval War Command reserved for itself only the decision as
to the number of submarines in each area. In the invasion of Norway, for example, Donitz made recommendations in
October 1939 as to submarine bases, which he claims were no more than a staff study, and in March 1940 he made
out the operational orders for the supporting U-boats, as discussed elsewhere in this Judgment.

That his importance to the German war effort was so regarded is eloquently proved by Raeder's
recommendation of Donitz as his successor and his appointment by Hitler on 30 January 1943 as Commander-in-
Chief of the Navy. Hitler, too, knew that submarine warfare was the essential part of Germany's naval warfare.

From January 1943, Donitz was consulted almost continuously by Hitler. The evidence was that they
conferred on naval problems about 120 times during the course of the war.

As late as April 1945, when he admits he knew the struggle was hopeless, Donitz as its Commander-in-Chief urged the Navy to continue its fight. On 1 May 1945 he became the Head of State and as such ordered the Wehrmacht to continue its war in the East until capitulation on 9 May 1945. Donitz explained that his reason for these orders was to insure that the German civilian population might be evacuated and the Army might make an orderly retreat from the East.

In the view of the Tribunal, the evidence shows that Donitz was active in waging aggressive war.

COUNT THREE. Donitz is charged with waging unrestricted submarine warfare contrary to the rules of submarine warfare laid down in the London Naval Agreement of 1930.

The Prosecution has submitted that on 3 September 1939 the German U-boat arm began to wage unrestricted submarine warfare upon all merchant ships, whether enemy or neutral, cynically disregarding the Protocol; and that a calculated effort was made throughout the war to disguise this practice by making hypocritical references to international law and supposed violations by the Allies.

Donitz insists that at all times the Navy remained within the confines of international law and of the Protocol. He testified that when the war began, the guide to submarine warfare was the German Prize Ordinance taken almost literally from the Protocol, that pursuant to the German view, he ordered submarines to attack all merchant ships in convoy, and all that refused to stop or used their radio upon sighting a submarine. When his reports indicated that British merchant ships were being used to give information by wireless, were being armed, and were attacking submarines on sight, he ordered his submarines on 17 October 1939 to attack all enemy merchant ships without warning on the ground that resistance was to be expected. Orders already had been issued on 21 September 1939 to attack all ships, including neutrals, sailing at night without lights in the English Channel.

On 24 November 1939 the German Government issued a warning to neutral shipping that owing to the frequent engagements taking place in the waters around the British Isles and the French Coast between U-boats and Allied merchant ships which were armed and had instructions to use those arms as well as to ram U-boats, the safety of neutral ships in those waters could no longer be taken for granted. On 1 January 1940 the German U-boat Command, acting on the instructions of Hitler, ordered U-boats to attack all Greek merchant ships in the zone surrounding the British Isles which was banned by the United States to its own ships and also merchant ships of every nationality in the limited area of the Bristol Channel. Five days later a further order was given to U-boats to “make immediately unrestricted use of weapons against all ships” in an area of the North Sea, the limits of which were defined. Finally, on 18 January 1940, U-boats were authorized to sink, without warning, all ships “in those waters near the enemy coasts in which the use of mines can be pretended.” Exceptions were to be made in the cases of United States, Italian, Japanese, and Soviet ships.

However, the proclamation of operational zones and the sinking of neutral merchant vessels which enter those zones presents a different question. This practice was employed in the war of 1914-18 by Germany and adopted in retaliation by Great Britain. The Washington Conference of 1922, the London Naval Agreement of 1930, and the Protocol of 1936 were entered into with full knowledge that such zones had been employed in the first World War. Yet the Protocol made no exception for operational zones. The order of Donitz to sink neutral ships without warning when found within these zones was therefore, in the opinion of the Tribunal, a violation of the Protocol.

It is also asserted that the German U-boat arm not only did not carry out the warning and rescue provisions of the Protocol but that Donitz deliberately ordered the killing of survivors of shipwrecked vessels, whether enemy or neutral. The Prosecution has introduced much evidence surrounding two orders of Donitz—War Order Number 154, issued in 1939, and the so-called “Laconia” Order of 1942. The Defense argues that these orders and the evidence supporting them do not show such a policy and introduced much evidence to the contrary. The Tribunal is of the opinion that the evidence does not establish with the certainty required that Donitz deliberately ordered the killing of shipwrecked survivors. The orders were undoubtedly ambiguous, and deserve the strongest censure.

The evidence further shows that the rescue provisions were not carried out and that the Defendant ordered that they should not be carried out. The argument of the Defense is that the security of the submarine is, as the first rule of the sea, paramount to rescue, and that the development of aircraft made rescue impossible. This may be so, but the Protocol is explicit. If the commander cannot rescue, then under its terms he cannot sink a merchant vessel and should allow it to pass harmless before his periscope. These orders, then, prove Donitz is guilty of a violation of the Protocol.

In view of all of the facts proved and in particular of an order of the British Admiralty announced on 8 May 1940, according to which all vessels should be sunk at night in the Skagerrak, and the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that Nation entered the war, the sentence of Donitz is not assessed on the ground of his breaches of
the international law of submarine warfare.

Donitz was also charged with responsibility for Hitler's Commando Order of 18 October 1942. Donitz admitted he received and knew of the order when he was Flag Officer of U-boats, but disclaimed responsibility. He points out that the Navy had no territorial commands on land, and that submarine commanders would never encounter commandos.

In one instance, when he was Commander-in-Chief of the Navy, in 1943, the members of the crew of an Allied motor torpedo boat were captured by German Naval Forces. They were interrogated for intelligence purposes on behalf of the local Admiral, and then turned over by his order to the SD and shot. Donitz said that if they were captured by the Navy their execution was a violation of the Commando Order, that the execution was not announced in the Wehrmacht communiqué, and that he was never informed of the incident. He pointed out that the Admiral in question was not in his chain of command, but was subordinate to the Army general in command of the Norway occupation. But Donitz permitted the order to remain in full force when he became Commander-in-Chief, and to that extent he is responsible.

Donitz, in a conference of 11 December 1944, said "12,000 concentration camp prisoners will be employed in the shipyards as additional labor." At this time Donitz had no jurisdiction over shipyard construction, and claims that this was merely a suggestion at the meeting that the responsible officials do something about the production of ships, that he took no steps to get these workers since it was not a matter for his jurisdiction and that he does not know whether they ever were procured. He admits he knew of concentration camps. A man in his position must necessarily have known that citizens of occupied countries in large numbers were confined in the concentration camps.

In 1945 Hitler requested the opinion of Jodl and Donitz whether the Geneva Convention should be denounced. The notes of the meeting between the two military leaders on 20 February 1945 show that Donitz expressed his view that the disadvantages of such an action outweighed the advantages. The summary of Donitz' attitude shown in the notes taken by an officer, included the following sentence: "It would be better to carry out the measures considered necessary without warning, and at all costs to save face with the outer world." The Prosecution insisted that "the measures" referred to meant the Convention should not be denounced, but should be broken at will. The Defense explanation is that Hitler wanted to break the Convention for two reasons: to take away from German troops the protection of the Convention, thus preventing them from continuing to surrender in large groups to the British and Americans, and also to permit reprisals against Allied bombing raids. Donitz claims that what he meant by "measures" were disciplinary measures against German troops to prevent them from surrendering, and that his words had no reference to measures against the Allies; moreover that this was merely a suggestion, and that in any event no such measures were ever taken, either against Allies or Germans. The tribunal, however, does not believe this explanation. The Geneva Convention was not, however, denounced by Germany. The Defense has introduced several affidavits to prove that British naval prisoners of war in camps under Donitz' jurisdiction were treated strictly according to the Convention, and the Tribunal takes this fact into consideration, regarding it as a mitigating circumstance.

The Tribunal finds Donitz is not guilty on Count One of the Indictment, and is guilty on Counts Two and Three. [He was sentenced to ten years' imprisonment.]

NOTES AND QUESTIONS

FOR CLASSROOM DISCUSSION

1. The final verdicts rendered by the International Military Tribunal relative to each of the leading Nazi Germans tried at Nuremberg--for Conspiracy to Wage Wars of Aggression (Count 1), for Crimes against Peace, i.e., initiating or waging wars of aggression (Count 2), for War Crimes (Count 3), and for Crimes against Humanity (Count 4)--are summarized in the following table from D’Amato, Gould & Woods, “War Crimes and Vietnam”, 57 Cal. L. Rev. 1055, 1062 (1969), reprinted in 3 The Vietnam and International Law 407, 414 (R. Falk ed. 1972):

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<th>Defendant</th>
<th>Counts</th>
<th>Sentence</th>
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Total Indictments 22 17 18 17  
Total Convictions  8 13 16 15  

Key:
0 = Indicted but not convicted  
1 = Indicted and convicted  
A = Ten years imprisonment  
B = Fifteen to twenty years imprisonment  
C = Life imprisonment  
D = Death by hanging  

2. What does this chart suggest with respect to the controversial "Crimes Against Humanity" charge? Was it necessary to prosecute the Nazi leaders under this charge? How many of them could have been convicted under the traditional "war crimes" category? Would it have been desirable, from a world law perspective, to omit the "Crimes Against Humanity" charge entirely?  

3. Schacht was in charge of the military-industrial complex of Germany. His defense was that he simply did what any businessperson in the same position would do in any country that was mobilizing for war and subsequently entered into war. Is there any reason he should have been indicted?  

4. Did the Tribunal deal adequately with the defendants' objection that international law was being applied to them retroactively? Was the defendants' objection as persuasive with respect to the charge of war crimes as to the charge of crimes against humanity?  

5. Go back to Questions 1, 2, and 3 in this Chapter directly following the Hague Convention. Does the Tribunal's decision change your answers to those questions?  

6. In the years immediately following the Nuremberg verdicts, there was a general consensus in the legal community that it was unjust to convict the Nazi defendants. The phrase "victor's justice" was often heard. But time has treated the Nuremberg verdicts well. Today, the significance—perhaps even the inevitability—of Nuremberg is the overwhelming consensus in the informed legal community. Do you join this consensus? Interestingly, of all the verdicts handed down, the single verdict in the case of Grand Admiral Donitz—invoking only a ten-year prison sentence—remains the most contested and controversial. Karl Donitz was released from Spandau prison in 1956. General Telford Taylor, U.S. Chief Counsel at Nuremberg, later made a major concession in his book Nuremberg and Vietnam: An American Tragedy 86 (1970): "the Tribunal found that [Donitz] had neither been present at Hitler's conferences nor informed about his plans, and based the conviction on the fact that Donitz waged aggressive war because his submarines were 'fully prepared to wage war.' On that basis every commander of combat troops or ships would have been equally guilty, but the Tribunal's opinion showed no awareness of these far-reaching implications." For an interesting compilation of documents and testimonials about Admiral Donitz, see H. K. Thompson Jr. & Henry Strutz, Doenitz at Nuremberg: A Reappraisal (1976).  

7. Did the Tribunal deal fairly with Admiral Donitz? How did it handle the issue of "tu quoque"? Do you agree with the argument presented in the Anthology, pp. 234-35, on this issue as applied to Donitz?  

8. The other side of the coin of "superior orders" is "command responsibility." If the lower-ranked soldier who is carrying out his superior's orders is nevertheless liable for the commission of war crimes, shouldn't the
commander issuing the orders also be liable? Clearly the Nazi leaders at Nuremberg were prosecuted not just for the crimes they personally may have committed, but mainly for the crimes that they ordered to be committed. Yet consider the following logical paradox. An order to a subordinate to commit a war crime is itself illegal— that is, the order itself is invalid. If the subordinate goes ahead and commits the crime, there is no “superior orders” defense; the subordinate should have refused to carry out the illegal order. Suppose the subordinate carries out the order and is prosecuted for committing a war crime. Suppose his superior is also prosecuted for issuing the order that resulted in the commission of a war crime. The superior may then argue: “My order was clearly illegal. It should not have been carried out. My subordinate had no legal right to carry out my order. In fact, you convicted him of a war crime because he had no legal right to carry out my order. You convicted him of a war crime because he committed the war crime himself, and not because he was following an order. He couldn’t have been following an order, because there was no order—the order was invalid. Hence, you prosecuted and convicted the proper person—namely, my subordinate, who himself on his own initiative committed the war crime. And therefore justice was done. It would be inconsistent for you to prosecute me for issuing an invalid order, an order that was not legally an order. My order was invalid the moment I uttered it. If it were valid, then my subordinate should have been acquitted. But he was convicted. Therefore, I cannot be convicted. I did nothing. I spoke some words, but the words were invalid and no one should have paid any attention to them. My words had no coercive power. They carried no authority. I did nothing that is legally actionable. Hence, I cannot be prosecuted under your theory of command responsibility.”

How would you reply to this paradoxical argument?

9. The leading case of command responsibility is In Re Yamashita. It does not address the “paradox” of command responsibility taken up in the previous Question. Does it at least address the central problem of command responsibility—the nature and proof of the evidence needed to establish command responsibility?

In Re Yamashita

Mr. Chief Justice STONE delivered the opinion of the Court.

Prior to September 3, 1945, petitioner was the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands. On that date he surrendered to and became a prisoner of war of the United States Army Forces in Baguio, Philippine Islands. On September 25th, petitioner was served with a charge prepared by the Judge Advocate General’s Department of the Army, purporting to charge petitioner with a violation of the law of war. On October 8, 1945, petitioner, after pleading not guilty to the charge, was held for trial before a military commission of five Army officers. The order appointed six Army officers, all lawyers, as defense counsel. Throughout the proceedings which followed, including those before this Court, defense counsel have demonstrated their professional skill and resourcefulness and their proper zeal for the defense with which they were charged.

The trial then proceeded until its conclusion on December 7, 1945, the commission hearing two hundred and eighty-six witnesses, who gave over three thousand pages of testimony. On that date petitioner was found guilty of the offense as charged and sentenced to death by hanging.

Neither Congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge preferred against him is of a violation of the law of war. The charge, so far as now relevant, is that petitioner, between October 9, 1944 and September 2, 1945, in the Philippine Islands, “while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he . . . thereby violated the laws of war.”

Bills of particulars, filed by the prosecution by order of the commission, allege a series of acts, one hundred and twenty-three in number, committed by members of the forces under petitioner’s command, during the period mentioned. The first item specifies the execution of “a deliberate plan and purpose to massacre and exterminate a large part of the civilian population of Batangas Province, and to devastate and destroy public, private and religious property therein, as a result of which more than 25,000 men, women and children, all unarmed noncombatant civilians, were brutally mistreated and killed, without cause or trial, and entire settlements were devastated and destroyed wantonly and without military necessity.” Other items specify acts of violence, cruelty and homicide inflicted upon the civilian population and prisoners of war, acts of wholesale pillage and the wanton destruction of religious monuments.
It is not denied that such acts directed against the civilian population of an occupied country and against prisoners of war are recognized in international law as violations of the law of war. Articles 4, 28, 46, and 47, Annex to Fourth Hague Convention (1907). But it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. That this was the precise issue to be tried was made clear by the statement of the prosecution at the opening of the trial.

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

This is recognized by the Annex to Fourth Hague Convention of 1907, respecting the laws and customs of war on land. Article I lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be "commanded by a person responsible for his subordinates." And Article 43 of the Annex to the Fourth Hague Convention requires that the commander of a force occupying enemy territory, as was petitioner, "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.

We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution. There is no contention that the present charge, thus read, is without the support of evidence, or that the commission held petitioner responsible for failing to take measures which were beyond his control or inappropriate for a commanding officer to take in the circumstances. We do not here appraise the evidence on which petitioner was convicted. We do not consider what measures, if any, petitioner took to prevent the commission, by the troops under his command, of the plain violations of the law of war detailed in the bill of particulars, or whether such measures as he may have taken were appropriate and sufficient to discharge the duty imposed upon him. These are questions within the peculiar competence of the military officers composing the commission and were for it to decide. It is plain that the charge on which petitioner was tried charged him with a breach of his duty to control the operations of the members of his command, by permitting them to commit the specified atrocities. This was enough to require the commission to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed on him by the law of war and to pass upon its sufficiency to establish guilt.

We conclude that the detention of petitioner for trial and his detention upon his conviction, subject to the prescribed review by the military authorities were lawful, and that the petition for certiorari, and leave to file in this Court petitions for writs of habeas corpus and prohibition should be, and they are

Denied.

Mr. Justice MURPHY, dissenting.

The Fifth Amendment guarantee of due process of law applies to "any person" who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects.
The strike had miscarried, and General MacArthur's land wedge was firmly implanted in the vulnerable flank of the Japanese Army, with headquarters in the Philippines. The reconquest of the Philippines by the armed forces of the United States began approximately at the time when the petitioner assumed this command. Combined with a great and decisive sea battle, an invasion was made on the island of Leyte on October 20, 1944.

In the six days of the great naval action the Japanese position in the Philippines had become extremely critical. Hostilities ceased and he voluntarily surrendered. At that point he was entitled, as an individual protected by the due process clause of the Fifth Amendment, to be treated fairly and justly according to the accepted rules of law and procedure. He was also entitled to a fair trial as to any alleged crimes and to be free from charges of legally unrecognized crimes that would serve only to permit his accusers to satisfy their desires for revenge.

A military commission was appointed to try the petitioner for an alleged war crime. The trial was ordered to be held in territory over which the United States has complete sovereignty. No military necessity or other emergency demanded the suspension of the safeguards of due process. Yet petitioner was rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence and summarily sentenced to be hanged. In all this needless and unseemly haste there was no serious attempt to charge or to prove that he committed a recognized violation of the laws of war. He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge. This indictment in effect permitted the military commission to make the crime whatever it willed, dependent upon its biased view as to petitioner's duties and his disregard thereof, a practice reminiscent of that pursued in certain less respected nations in recent years.

That there were brutal atrocities inflicted upon the helpless Filipino people, to whom tyranny is no stranger, by Japanese armed forces under the petitioner's command is undeniable. Starvation, execution or massacre without trial, torture, rape, murder and wanton destruction of property were foremost among the outright violations of the laws of war and of the conscience of a civilized world. That just punishment should be meted out to all those responsible for criminal acts of this nature is also beyond dispute. But these factors do not answer the problem in this case. They do not justify the abandonment of our devotion to justice in dealing with a fallen enemy commander. To conclude otherwise is to admit that the enemy has lost the battle but has destroyed our ideals.

War breeds atrocities. From the earliest conflicts of recorded history to the global struggles of modern times inhumanities, lust and pillage have been the inevitable by-products of man's resort to force and arms. Unfortunately, such despicable acts have a dangerous tendency to call forth primitive impulses of vengeance and retaliation among the victimized peoples. The satisfaction of such impulses in turn breeds resentment and fresh tension. Thus does the spiral of cruelty and hatred grow.

If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness. Justice must be tempered by compassion rather than by vengeance. In this, the first case involving this momentous problem ever to reach this Court, our responsibility is both lofty and difficult. We must insist, within the confines of our proper jurisdiction, that the highest standards of justice be applied in this trial of an enemy commander conducted under the authority of the United States. Otherwise stark retribution will be free to masquerade in a cloak of false legalism. And the hatred and cynicism engendered by such retribution will supplant the great ideals to which this nation is dedicated. I find it impossible to agree [with the majority of the Court] that the charge against the petitioner stated a recognized violation of the laws of war.

It is important, in the first place, to appreciate the background of events preceding this trial. From October 9, 1944, to September 2, 1945, the petitioner was the Commanding General of the 14th Army Group of the Imperial Japanese Army, with headquarters in the Philippines. The reconquest of the Philippines by the armed forces of the United States began approximately at the time when the petitioner assumed this command. Combined with a great and decisive sea battle, an invasion was made on the island of Leyte on October 20, 1944.

In the six days of the great naval action the Japanese position in the Philippines had become extremely critical. Most of the serviceable elements of the Japanese Navy had become committed to the battle with disastrous results. The strike had miscarried, and General MacArthur's land wedge was firmly implanted in the vulnerable flank of the
enemy. There were 260,000 Japanese troops scattered over the Philippines but most of them might as well have been on the other side of the world so far as the enemy's ability to shift them to meet the American thrusts was concerned. If General MacArthur succeeded in establishing himself in the Visayas where he could stage, exploit, and spread under cover of overwhelming naval and air superiority, nothing could prevent him from overrunning the Philippines.

Biennial Report of the Chief of Staff of the United States Army, July 1, 1943, to June 30, 1945, to the Secretary of War, p. 74.

By the end of 1944 the island of Leyte was largely in American hands. And on January 9, 1945, the island of Luzon was invaded.

Yamashita's inability to cope with General MacArthur's swift moves, his desired reaction to the deception measures, the guerrillas, and General Kenney's aircraft combined to place the Japanese in an impossible situation. The enemy was forced into a piecemeal commitment of his troops.

Ibid, p. 78. It was at this time and place that most of the alleged atrocities took place. Organized resistance around Manila ceased on February 23. Repeated land and air assaults pulverized the enemy and within a few months there was little left of petitioner's command except a few remnants which had gathered for a last stand among the precipitous mountains.

As the military commission here noted, "The Defense established the difficulties faced by the Accused with respect not only to the swift and overpowering advance of American forces, but also to the errors of his predecessors, weaknesses in organization, equipment, supply with especial reference to food and gasoline, training, communication, discipline and morale of his troops. It was alleged that the sudden assignment of Naval and Air Forces to his tactical command presented almost insurmountable difficulties. This situation was followed, the Defense contended, by failure to obey his orders to withdraw troops from Manila, and the subsequent massacre of unarmed civilians, particularly by Naval forces. Prior to the Luzon Campaign, Naval forces had reported to a separate ministry in the Japanese Government and Naval Commanders may not have been receptive or experienced in this instance with respect to a joint land operation under a single commander who was designated from the Army Service."

The day of final reckoning for the enemy arrived in August, 1945. On September 3, the petitioner surrendered to the United States Army at Baguio, Luzon. He immediately became a prisoner of war and was interned in prison in conformity with the rules of international law. On September 25, approximately three weeks after surrendering, he was served with the charge in issue in this case. Upon service of the charge he was removed from the status of a prisoner of war and placed in confinement as an accused war criminal. Arraignment followed on October 8 before a military commission specially appointed for the case. Petitioner pleaded not guilty. He was also served on that day with a bill of particulars alleging 64 crimes by troops under his command. A supplemental bill alleging 59 more crimes by his troops was filed on October 29, the same day that the trial began. No continuance was allowed for preparation of a defense as to the supplemental bill. The trial continued uninterrupted until December 5, 1945. On December 7 petitioner was found guilty as charged and was sentenced to be hanged.

The petitioner was accused of having "unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes." The bills of particular further alleged that specific acts of atrocity were committed by "members of the armed forces of Japan under the command of the accused." Nowhere was it alleged that the petitioner personally committed any of the atrocities, or that he ordered their commission, or that he had any knowledge of the commission thereof by members of his command.

The findings of the military commission bear out this absence of any direct personal charge against the petitioner. The commission merely found that atrocities and other high crimes "have been committed by members of the Japanese armed forces under your command...that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and noncommissioned officers...that during the period in question you failed to provide effective control of your troops as was required by the circumstances."

In other words, read against the background of military events in the Philippines subsequent to October 9, 1944, these charges amount to this: "We, the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. In those respects we have succeeded. We have defeated and crushed your forces. And now we charge and condemn you for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking your ability to maintain effective control. Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so widespread we will not bother to charge or prove that you committed, ordered or condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of
inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization which we ourselves created in large part. Our standards of judgment are whatever we wish to make them.” Nothing in all history or in international law, at least as far as I am aware, justifies such a charge against a fallen commander of a defeated force. To use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality.

International law makes no attempt to define the duties of a commander of an army under constant and overwhelming assault; nor does it impose liability under such circumstances for failure to meet the ordinary responsibilities of command. The omission is understandable. Duties, as well as ability to control troops, vary according to the nature and intensity of the particular battle. To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations. Such calculations become highly untrustworthy when they are made by the victor in relation to the actions of a vanquished commander. Objective and realistic norms of conduct are then extremely unlikely to be used in forming a judgment as to deviations from duty. The probability that vengeance will form the major part of the victor's judgment is an unfortunate but inescapable fact. So great is that probability that international law refuses to recognize such a judgment as a basis for a war crime, however fair the judgment may be in a particular instance. It is this consideration that undermines the charge against the petitioner in this case. The indictment permits, indeed compels, the military commission of a victorious nation to sit in judgment upon the military strategy and actions of the defeated enemy and to use its conclusions to determine the criminal liability of an enemy commander. Life and liberty are made to depend upon the biased will of the victor rather than upon objective standards of conduct.

The Court's reliance upon vague and indefinite references in certain of the Hague Conventions and the Geneva Red Cross Convention is misplaced. Thus the statement in Article 1 of the Annex to Hague Convention No. IV of October 18, 1907, to the effect that the laws, rights and duties of war apply to military and volunteer corps only if they are "commanded by a person responsible for his subordinates," has no bearing upon the problem in this case. Even if it has, the clause "responsible for his subordinates" fails to state to whom the responsibility is owed or to indicate the type of responsibility contemplated. Reference is also made to the requirement of Article 43 of the Annex to Hague Convention No. IV, that the commander of a force occupying enemy territory "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." But the petitioner was more than a commander of a force occupying enemy territory. He was the leader of an army under constant and devastating attacks by a superior re-invading force. This provision is silent as to the responsibilities of a commander under such conditions as that.

There are numerous instances, especially with reference to the Philippine Insurrection in 1900 and 1901, where commanding officers were found to have violated the laws of war by specifically ordering members of their command to commit atrocities and other war crimes.2 And in other cases officers have been held liable where they knew that a crime was to be committed, had the power to prevent it and failed to exercise that power.3 In no recorded instance, however, has the mere inability to control troops under fire or attack by superior forces been made the basis of a charge of violating the laws of war.

The Government claims that the principle that commanders in the field are bound to control their troops has been applied so as to impose liability on the United States in international arbitrations. Case of Jeanneau, 1880, 3 Moore, International Arbitrations (1898) 3000; Case of The Zafiro, 1910, 5 Hackworth, Digest of International Law (1943) 707. The difference between arbitrating property rights and charging an individual with a crime against the laws of war is too obvious to require elaboration. But even more significant is the fact that even these arbitration cases fail to establish any principle of liability where troops are under constant assault and demoralizing influences by attacking forces. The same observation applies to the common law and statutory doctrine, referred to by the Government, that one who is under a legal duty to take protective or preventive action is guilty of criminal homicide if he willfully or negligently omits to act and death is proximately caused. No one denies that inaction or negligence may give rise to liability, civil or criminal. But it is quite another thing to say that the inability to control troops under highly competitive and disastrous battle conditions renders one guilty of a war crime in the absence of personal culpability. Had there been some element of knowledge or direct connection with the atrocities the problem would be entirely different. Moreover, it must be remembered that we are not dealing here with an ordinary tort or criminal action; precedents in those fields are of little if any value. Rather we are concerned with a proceeding involving an international crime, the treatment of which may have untold effects upon the future peace of the world. That fact must be kept uppermost in our search for precedent.

The only conclusion I can draw is that the charge made against the petitioner is clearly without precedent in international law or in the annals of recorded military history. This is not to say that enemy commanders may escape punishment for clear and unlawful failures to prevent atrocities. But that punishment should be based upon charges
fairly drawn in light of established rules of international law and recognized concepts of justice.

But the charge in this case, as previously noted, was speedily drawn and filed but three weeks after the petitioner surrendered. The trial proceeded with great dispatch without allowing the defense time to prepare an adequate case. Petitioner's rights under the due process clause of the Fifth Amendment were grossly and openly violated without any justification. All of this was done without any thorough investigation and prosecution of those immediately responsible for the atrocities, out of which might have come some proof or indication of personal culpability on petitioner's part. Instead the loose charge was made that great numbers of atrocities had been committed and that petitioner was the commanding officer; hence he must have been guilty of disregard of duty. Under that charge the commission was free to establish whatever standard of duty on petitioner's part that it desired. By this flexible method a victorious nation may convict and execute any or all leaders of a vanquished foe, depending upon the prevailing degree of vengeance and the absence of any objective judicial review.

At a time like this when emotions are understandably high it is difficult to adopt a dispassionate attitude toward a case of this nature. Yet now is precisely the time when that attitude is most essential. While peoples in other lands may not share our beliefs as to due process and the dignity of the individual, we are not free to give effect to our emotions in reckless disregard of the rights of others. We live under the Constitution, which is the embodiment of all the high hopes and aspirations of the new world. And it is applicable in both war and peace. We must act accordingly. Indeed, an uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander, can do more lasting harm than all of the atrocities giving rise to that spirit. The people's faith in the fairness and objectiveness of the law can be seriously undercut by that spirit. The fires of nationalism can be further kindled. And the hearts of all mankind can be embittered and filled with hatred, leaving forlorn and impoverished the noble ideal of malice toward none and charity to all. These are the reasons that lead me to dissent in these terms.

Mr. Justice RUTLEDGE, dissenting.

Not with ease does one find his views at odds with the Court's in a matter of this character and gravity. Only the most deeply felt convictions could force one to differ. That reason alone leads me to do so now, against strong considerations for withholding dissent.

More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late.

This long-held attachment marks the great divide between our enemies and ourselves. Theirs was a philosophy of universal force. Ours is one of universal law, albeit imperfectly made flesh of our system and so dwelling among us. Every departure weakens the tradition, whether it touches the high or the low, the powerful or the weak, the triumphant or the conquered. If we need not or cannot be magnanimous, we can keep our own law on the plane from which it has not descended hitherto and to which the defeated foes' never rose.

With all deference to the opposing views of my brethren, whose attachment to that tradition needless to say is no less than my own, I cannot believe in the face of this record that the petitioner has had the fair trial our Constitution and laws command.

It was a great patriot who said: "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself."  

NOTES AND QUESTIONS
FOR CLASSROOM DISCUSSION

1. Should General Yamashita have been convicted as a war criminal?
2. Justice Murphy, dissenting, said, "Had there been some element of knowledge or direct connection with the atrocities the problem would be entirely different." General Yamashita was commanding general of the Japanese forces as well as governor of the Philippines. Couldn't knowledge of the atrocities be imputed to him? Wasn't he connected to the atrocities by virtue of his position as commander?
3. Even if knowledge of the atrocities could have been imputed to General Yamashita, should that have been enough to convict him of war crimes? If not, what additional evidence should be required?
4. Suppose General Yamashita, under the chaotic conditions prevailing at the time, was powerless to prevent
the commission of war crimes. Would it be enough to convict him if evidence could be adduced showing that he approved of the commission of the war crimes? What if there was no evidence as to whether he approved or disapproved?

5. The United Nations Security Council, under Chapter 7 of the U.N. Charter, has established a War Crimes Tribunal to prosecute and try war criminals in former Yugoslavia. The Statute of the International Tribunal incorporates the provisions of the four Geneva Conventions of 1949; these treaties accomplish in much more detail what the Hague Conventions covered at the turn of the century. However, the crime of rape, while mentioned in the Geneva Conventions, is not given prominence as a major war crime. Read and consider the discussion of rape in the Anthology (next assigned reading), and then, as you read the Statute of the War Crimes Tribunal, note how the crime is now incorporated in the statute.

Assigned Reading: *International Law Anthology*, pp. 229-30 (``Rape '').

Statute of the International Tribunal
The Yugoslav War Crimes Tribunal

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as ``the International Tribunal'') shall function in accordance with the provisions of the present Statute.

Article 1
The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 2
The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

Article 3
The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

Article 4
1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:
(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;
(d) attempt to commit genocide;
(e) complicity in genocide.

Article 5
The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

Article 6
The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 7
1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Article 8
The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

Article 9
1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

Article 10
1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.
2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:
(a) the act for which he or she was tried was characterized as an ordinary crime; or
(b) the national court proceedings were not impartial or independent, were designed to shield the accused from
international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 11
The International Tribunal shall consist of the following organs:
(a) The Chambers, comprising two Trial Chambers and an Appeals Chamber;
(b) The Prosecutor, and
(c) A Registry, servicing both the Chambers and the Prosecutor.

Article 12
The Chambers shall be composed of eleven independent judges, no two of whom may be nationals of the same State, who shall serve as follows:
(a) Three judges shall serve in each of the Trial Chambers;
(b) Five judges shall serve in the Appeals Chamber.

Article 13
1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

2. The judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:
(a) The Secretary-General shall invite nominations for judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;
(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality;
(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-two and not more than thirty-three candidates, taking due account of the adequate representation of the principal legal systems of the world;
(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the eleven judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-Member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

3. In the event of a vacancy in the Chambers, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of paragraph 1 above, for the remainder of the term of office concerned.

Article 21
1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) to be tried without undue delay;
(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment to him in any such case if he does not have sufficient means to pay for it;
(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) to have the free assistance of any interpreter if he cannot understand or speak the language used in the International Tribunal;

(g) not to be compelled to testify against himself or to confess guilt.

Article 22
The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 23
1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 24
1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offense and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

NOTES AND QUESTIONS
FOR CLASSROOM DISCUSSION

1. As this Coursebook is written, a three-cornered war rages in Bosnia. The three warring factions—the Serbs, Muslims, and Croats—are also intermittently engaged in peace negotiations. By the time you read these words, (1) a peace treaty may have been signed and (2) the U.N. War Crimes Tribunal may be active and functioning. But it is difficult, at the time these words are written, to see how both (1) and (2) can be actualized. The difficulty lies in the fact that the leaders of the warring factions, who would have to agree on a treaty of peace, are also persons who may be prosecuted by the U.N. War Crimes Tribunal. What would induce these leaders to sign a peace treaty if, directly thereafter, they would find themselves in jeopardy of being prosecuted as war criminals? Unless some presently unforeseeable event were to occur, would it not appear most difficult to attain simultaneously the dual goals of peace and war-crimes accountability?

2. Despite the label, a "war crime" does not have to occur during war. On June 5, 1993, twenty-four soldiers serving in Somalia under the United Nations flag were killed, and fifty-six others were wounded, in an attack allegedly ordered by General Mohamed Aideed, head of a political faction in Mogadishu. The soldiers were ambushed while they were in the process of distributing food to Somali citizens. Professor Tom Farer (one of the authors of the Anthology) was engaged by the U.N. Security Council to investigate the situation. Here are excerpts from his report.

Under the Nuremberg Principles, applied by the Allied Powers after World War II and subsequently reaffirmed by a unanimous General Assembly, individuals are subject to penal sanctions for conspiracy to commit and the commission of crimes against peace, crimes against humanity, and violations of international humanitarian law. As originally defined to fit the circumstances of the World War's atrocities, the crimes implied authors acting in the name of some sort of public authority. But in the years since Nuremberg, the emergence of international protected human rights together with exponential growth in the interdependence of societies and in the vulnerability of public interests to conspiracies by private actors has required an extension of international criminal law to include them. Thus private persons who attack international commercial aircraft or conspire to exterminate some ethnic group (i.e. to commit genocide) are international criminals even if they are unconnected with any government.

No act could by its very character more perfectly exemplify an international crime than the use of force against United Nations soldiers to prevent them from carrying out their responsibilities. Such use of force is a plain challenge to the ability of the United Nations to maintain international peace and security and hence to that minimum order on which all other collective human interests depend.
After examining evidence of motive, means, and opportunity, Professor Farer concludes:

The claim that General Mohamed Farah Hassan Aideed authorized the 5 June 1993 attack on Pakistani forces serving under the United Nations Flag and that the attack was executed by elements of the political faction known as the SNA is supported by clear and convincing evidence. The attack constitutes a violation of international law and thus makes General Aideed and his senior colleagues liable to prosecution before an international tribunal or the criminal courts of any state.

3. Why do you think it has taken so long for the international community to focus on rape as a serious international crime?

4. How do the provisions of the charter of the Yugoslav War Crimes Tribunal compare with the provisions of the Nuremberg charter? Which is more progressive? Which is more comprehensive?

B. Extradition

Reading Assignment: International Law Anthology, pp. 238-41.

In Re Mackin
668 F.2d 122 (2d Cir. 1981)

FRIENDLY, Circuit Judge:

This appeal by the United States relates to a decision of United States Magistrate Naomi Reice Buchwald (the Magistrate) of the District Court for the Southern District of New York dated August 13, 1981. The decision denied a request by the Government of the United Kingdom of Great Britain and Northern Ireland for the extradition of Desmond Mackin pursuant to Article VIII of the Extradition Treaty between the United States and the United Kingdom. The Treaty, which is the successor to the very limited provision in Article 27 of Jay's Treaty, 8 Stat. 116 (1794), and Article X of the Webster-Ashburton Treaty of 1842, 8 Stat. 572, was signed on June 8, 1972 and entered into force on January 21, 1977, 28 U.S.T. 227, T.I.A.S. 8468.

The requested extradition was based upon Mackin's indictment in Northern Ireland on charges of attempted murder, on March 16, 1978, of a British soldier, Stephen Wooton, in Andersonstown, Belfast, Northern Ireland; wounding Wooton with intent to do grievous bodily harm, and possession of firearms and ammunition. Mackin was arrested in Northern Ireland after the incident but was released on bail and failed to appear for trial there, entered the United States illegally and was apprehended by the Immigration and Naturalization Service.

After taking extensive evidence, receiving briefs and hearing argument, the Magistrate delivered a lengthy and thorough opinion. She concluded that the United Kingdom had satisfied its burden, under Article IX(1) of the Treaty, of producing evidence "sufficient according to the law of the requested Party . . . to justify the committal for trial of the person sought if the offense of which he is accused had been committed in the territory of the requested Party . . ." However, the Magistrate declined to issue the certificate to the Secretary of State on the ground that the offenses charged came within Article V(1)(c)(i) of the Treaty, which states:

(1) Extradition shall not be granted if: (c)(i) the offense for which extradition is requested is regarded by the requested Party as one of a political character . . .

The Magistrate pointed to cases holding or indicating that the political offense exception is not limited to "purely" political offenses against a government, such as treason, sedition and espionage, but extends also to "relative" political offenses, to wit, crimes against persons or property which are incidental to a war, revolution, rebellion or political uprising at the time and site of the commission of the offense. She found that: (1) at the time of the offenses charged against Mackin the Provisional Irish Republican Army (IRA) was conducting a political uprising in the portion of Belfast where the offenses were committed; (2) that Mackin was an active member of IRA; and (3) that the offenses committed against the British soldier were incidental to Mackin's role in the IRA's political uprising in Belfast. Accordingly, she concluded that the crimes for which Mackin was indicted were "of a political character" within the meaning of Article V(1)(c)(i) of the Treaty.

As indicated above, the United States has appealed from the Magistrate's decision to deny the request of the United Kingdom, and in the alternative has sought mandamus to require her to grant the request. In addition to challenging the Magistrate's conclusion that Mackin's crime was "of a political character", the Government contends that decision whether an offense falls within Article V(1)(c)(i) is committed exclusively to the executive branch.

The rock on which the Government's arguments shatter is the long-standing recognition that courts shall determine whether a particular offense comes within the political offense exception. This principle was in existence at least as long ago as when In re Kaine was decided in 1852. Four years after enactment of the Act of August 12, 1848, Justice Catron, speaking for four members of the Supreme Court, wrote that "extradition without an unbiased hearing before an independent judiciary . . . (is) highly dangerous to liberty, and ought never to be allowed in this
country." Although this statement is directed at extradition proceedings in general and not specifically at the political offense issue, Justice Catron's opinion gives no indication that the political offense issue ought to be treated differently from other issues at the extradition hearing. More importantly, an example cited by Justice Catron, relating to the alleged mistreatment of one Jonathan Robbins, suggests that the members of the Court joining in his opinion were of the view that "an unbiased hearing before an independent judiciary" was particularly necessary in cases where the political offense exception is at issue.

In 1799 Jonathan Robbins (also variously referred to as Thomas Nash and Nathan Robbins) was surrendered by the United States to British naval officials, pursuant to Article 27 of Jay's Treaty. The British sought Robbins' extradition for a murder allegedly committed aboard a British naval vessel. Jay's Treaty contained no provision regarding the procedure to be followed in extradition cases, and at the time there was no legislation on the subject. Believing he had a relatively free hand, President Adams arranged the delivery of Robbins by instructing District Judge Bee of South Carolina to hand the extraditee over to the British. Adams' action caused an extraordinary national outcry. As Professor Moore notes, "(t)he case created great excitement, and was one of the causes of the overthrow of John Adams' administration." The outcry against Adams' action seems to have arisen, in large part, from the widespread perception that Robbins was an American seaman who had been impressed into the British navy and that the murder for which he was charged had occurred either in the course of a mutiny or while fleeing from the British in an escape attempt. Robbins' supporters apparently conceded that he had committed a murder, yet argued that a murder committed in fleeing from illegal impressment should not be extraditable. Although the term "political offense" was not current at the time, and apparently was not used in the debates surrounding the Robbins case, the argument made on Robbins' behalf bears many resemblances to the political offense doctrine. In both instances an otherwise extraditable crime is thought to be rendered nonextraditable by the circumstances surrounding its commission and by the motives of the criminal.

In 1908, a foreign ambassador wrote to the Secretary of State, proposing that a provision be included in the extradition treaty about to be entered into, whereby the political offense determination would be made by the courts of the requested country. In response, Secretary Elihu Root wrote:

According to the system of jurisprudence obtaining in the United States, the question as to whether or not an offense is a political one is always decided in the first instance by the judicial officer before whom the fugitive is brought for commitment to surrender. If the judicial authorities refuse to commit the fugitive for surrender on the ground that he is a political offender, or for any other reason, the matter is dead. Bearing in mind, therefore that under our system of jurisprudence, it is not possible for any fugitive who claims to be a political offender to be extradited, it is hoped that your Government will be satisfied without insisting upon the insertion of an express stipulation providing that the question as to whether an offense is political shall be decided by the judicial authorities.8

As the law now stands, both the judicial and the executive branches have recognized that the decision whether a case falls within the political offense exception is for the judicial officer. The Government cites us to no overriding principle which dictates a contrary result. While the policy arguments made by the Government are not without force, particularly in an age of spreading terrorism, they are not so overwhelming as to justify us in concluding that the 1848 statute and its successors did not mean that the judicial officer should decide whether the offense for which extradition is sought is political. We therefore conclude that the Magistrate correctly sustained her own power to decide the political offense question and thus, for reasons heretofore explained, there is no basis for our issuing mandamus.

The Government's appeal is dismissed for lack of jurisdiction. Its alternative application for mandamus is entertained solely on the issue of the Magistrate's jurisdiction to rule on the political offense exception and is otherwise dismissed; the portion entertained is denied on the merits. Mackin's petition for habeas corpus is dismissed for want of jurisdiction. Mackin may recover his costs.

In Re Doherty

SPRIZZO, District Judge:

Petitioner United States of America, acting on behalf of the United Kingdom of Great Britain and Northern Ireland, has requested the extradition to the United Kingdom of respondent Joseph Patrick Thomas Doherty. This request is made pursuant to the Treaty of Extradition between the United States of America and the United Kingdom of Great Britain and Northern Ireland, effective Jan. 21, 1977. The Government of the United Kingdom seeks Doherty's extradition on the basis of his conviction in Northern Ireland on June 12, 1981 for murder, attempted
mugger, and illegal possession of firearms and ammunition, and for offenses allegedly committed in the course of his escape from H.M. Prison, Crumlin Road, Belfast, on June 10, 1981.

The incidents giving rise to the extradition request are briefly as follows. Respondent Doherty was a member of the provisional Irish Republican Army ("IRA"). On May 2, 1980, at the direction of the IRA, Doherty and three others embarked upon an operation "to engage and attack" a convoy of British soldiers.

Doherty testified that he and his group took over a house at 371 Antrim Road in Belfast, and awaited a British Army convoy. Some three or four hours later, a car stopped in front of 371 Antrim Road and five men carrying machine guns emerged. These men, members of the Special Air Service of the British Army ("SAS"), and Doherty's group fired shots at each other.

In the exchange of gunfire Captain Herbert Richard Westmacott, a British army captain, was shot and killed. Doherty was arrested, charged with the murder, among other offenses, and held in the Crumlin Road prison pending trial. On June 10, 1981, after the trial was completed but before any decision by the Court, Doherty escaped from the prison along with seven others. He was convicted in absentia on June 12, 1981 of murder, attempted murder, illegal possession of firearms and ammunition, and belonging to the Irish Republican Army, a proscribed organization.

Pursuant to Article IX of the Treaty, the Court must be satisfied that probable cause exists with respect to the offenses for which the requesting party seeks Doherty's extradition. Petitioner produced a Certificate of Conviction for the offenses related to the death of Captain Westmacott, and a Warrant for Arrest of Doherty with respect to the escape from the Crumlin Road prison. Doherty has not contested that he is, in fact, the person named in those documents, or named as respondent herein. Indeed, he testified as to his involvement in both the May 2, 1980 incident which resulted in the death of Captain Westmacott and the June 10, 1981 prison escape. Therefore, the Court finds that probable cause clearly exists.

Doherty asserts that the extradition request must be denied, however, pursuant to Article V(1)(c)(i) of the Treaty, the "political character" exception. The Court must determine, therefore, whether the offenses for which Doherty was convicted in relation to the May 2, 1980 incident, and those for which he is accused in connection with the escape from prison, are of a political character.

It seems clear, as the evidence established, that the centuries old hatreds and political divisions which were spawned by England's conquest of Ireland in medieval times continue to resist any permanent resolution. Instead they have smoldered, sometimes during long periods of quiescence, only to repeatedly erupt with tragic consequences. The offenses which give rise to this proceeding are but the latest chapters in that unending epic. The Provisional Irish Republican Army, of which respondent is a member, claims to be a contemporary protagonist in that ancient struggle. The evidence established that the Irish Republican Army and more particularly the IRA, had for a time lost much public support and had indeed become dormant, while other groups, emulating the pattern of civil rights groups in this country, sought to achieve an amelioration of alleged political and economic deprivations by peaceful means. It is indeed unfortunate that those efforts failed, but fail they did. Perhaps, given the long standing enmities, anxieties, and fears that exist between the Unionists and Republicans in Ireland, it was too much to expect that they would succeed. Nevertheless it was the collapse of those peaceful efforts that ironically led to a resurgence of the IRA.

On January 30, 1972 in Londonderry, what started out as a peaceful demonstration ended in a bloody confrontation in which 13 civilians were killed. Since British troops were regarded as at least in part responsible for that tragedy, their presence which had been initially welcomed, became a subject of increasing antipathy and concern. The result was a fresh impetus for the IRA, and increasing support for those who would resolve Ireland's political problems by violence.

Following the resurgence of the IRA, the level of violence both by the IRA and armed Loyalist groups continued to escalate in a continuing and seemingly inexorable series of events that between 1972 and 1979 claimed the lives of over 1,770 persons, nearly 1,300 of whom were civilian casualties, and injured hundreds of others. This alarming and at times wanton destruction of life and property necessitated the enactment of special laws, including the creation of special Diplock Courts to try political offenders, and transformed the Catholic areas of Belfast and Londonderry into zones of military occupation.

Were the Court persuaded that all that need be shown to sustain the political offense exception is that there be a political conflict and that the offense be committed during the course of and in furtherance of that struggle, the respondent would clearly be entitled to the benefits of that exception. However, that conclusion is but the beginning and not the end of the analysis that must be made to determine whether in fact Doherty may be properly extradited.

How then is the political exception doctrine to be construed and what factors should limit its scope? Not every act committed for a political purpose or during a political disturbance may or should properly be regarded as a political offense. Surely the atrocities at Dachau, Aushwitz, and other death camps would be arguably political
within the meaning of that definition. The same would be true of My Lai, the Bataan death march, Lidice, the Katyn Forest Massacre, and a whole host of violations of international law that the civilized world is, has been, and should be unwilling to accept. Indeed, the Nuremberg trials would have no legitimacy or meaning if any act done for a political purpose could be properly classified as a political offense. Moreover, it would not be consistent with the policy of this nation as reflected by its participation in those trials, for an American court to shield from extradition a person charged with such crimes.

The Court concludes therefore that a proper construction of the Treaty in accordance with the law and policy of this nation, requires that no act be regarded as political where the nature of the act is such as to be violative of international law, and inconsistent with international standards of civilized conduct. Surely an act which would be properly punishable even in the context of a declared war or in the heat of open military conflict cannot and should not receive recognition under the political exception to the Treaty. The Court rejects the notion that the political offense exception is limited to actual armed insurrections or more traditional and overt military hostilities. The lessons of recent history demonstrate that political struggles have been commenced and effectively carried out by armed guerillas long before they were able to mount armies in the field. It is not for the courts, in defining the parameters of the political offense exception, to regard as dispositive factors such as the likelihood that a politically dissident group will succeed, or the ability of that group to effect changes in the government by means other than violence, although concededly such factors may at times be relevant in distinguishing between the common criminal and the political offender.

Nor is the fact that violence is used in itself dispositive. Instead the Court must assess the nature of the act, the context in which it is committed, the status of the party committing the act, the nature of the organization on whose behalf it is committed, and the particularized circumstances of the place where the act takes place.

Considering the offenses for which extradition is sought in the light of these precepts, the Court is constrained to conclude that the political offense exception clearly encompasses those offenses. We are not faced here with a situation in which a bomb was detonated in a department store, public tavern, or a resort hotel, causing indiscriminate personal injury, death, and property damage. Such conduct would clearly be well beyond the parameters of what and should properly be regarded as encompassed by the political offense exception to the Treaty. Whatever the precise contours of that elusive concept may be, it was in its inception an outgrowth of the notion that a person should not be persecuted for political beliefs and was not designed to protect a person from the consequences of acts that transcend the limits of international law.

Nor is this a case where violence was directed against civilian representatives of the government, where defining the limits of the political offense exception would be far less clear. Similarly, this is not a case where the alleged political conduct was committed in a place other than the territory where political change was to be effected, a circumstance that would in all probability render the political offense exception inapplicable. Finally, the Court is not presented with facts which establish that hostages were killed or injured or where the principles embodied in the Geneva Convention have clearly been violated.

Instead, the facts of this case present the assertion of the political offense exception in its most classic form. The death of Captain Westmacott, while a most tragic event, occurred in the context of an attempted ambush of a British army patrol. It was the British Army’s response to that action that gave rise to Captain Westmacott’s death. Had this conduct occurred during the course of more traditional military hostilities there could be little doubt that it would fall within the political offense exception. The only issue remaining therefore is does the political exception become inapplicable because the IRA is engaged in a more sporadic and informal mode of warfare.

The Court is not unmindful of the fact that it would be most unwise as a matter of policy to extend the benefit of the political offense exception to every fanatic group or individual with loosely defined political objectives who commit acts of violence in the name of those so called political objectives. Therefore it is proper for the Court to consider the nature of an organization, its structure, and its mode of internal discipline, in deciding whether the act of its members can constitute political conduct under an appropriate interpretation of the Treaty.

However, the IRA, as the evidence showed, while it may be a radical offshoot of the traditional Irish Republican Army, has both an organization, discipline, and command structure that distinguishes it from more amorphous groups such as the Black Liberation Army or the Red Brigade. Indeed, as the testimony established, its discipline and command structure operates even after its members are imprisoned and indeed, as Doherty testified, it was at the direction of the IRA that he escaped and then came to the United States.

Given that defined structure, the fact that the IRA may not be likely to achieve its objectives does not deplete its acts of their political character. This Court cannot, in interpreting the Treaty, make the political exception concept turn upon the Court’s assessment of the likelihood of a movement’s success. History is replete with examples of political and insurrectionary movements that have succeeded in effecting political changes that were believed to be
improbable if not impossible.

The Court is not, however, persuaded by the argument that respondent's offense must or should be regarded as political merely because the United Kingdom has recognized the necessity to enact special legislation and to create special courts to deal with the problems created by the escalating violence between Republicans and Unionists in Northern Ireland. If that were the case, any lawless group could create political status for itself by merely escalating the level of this lawlessness to a point where the government is constrained to deal with it by special remedies.

The Court also specifically rejects respondent's claim that the Diplock Courts and the procedures there employed are unfair, and that respondent did not get a fair trial and cannot get a fair trial in the courts of Northern Ireland. The Court finds the testimony of the Government witnesses as to this issue both credible and persuasive. The Court concludes that both Unionists and Republicans who commit offenses of a political character can and do receive fair and impartial justice and that the courts of Northern Ireland will continue to scrupulously and courageously discharge their responsibilities in that regard. Nevertheless, the fairness of the administration of justice in those courts does not and cannot deprive respondent's offenses of their essentially political character.11

In sum, the Court concludes for the reasons given that respondent's participation in the military ambush which resulted in Captain Westmacott's death was an offense political in character. The Court further concludes that his escape from Crumlin Road prison, organized and planned as the evidence established that it was, under the direction of the IRA and to effect its purposes rather than those of Doherty himself, was also political.12 That conduct and all of the various and sundry charges which are connected therewith and for which extradition is sought are not extraditable offenses under Article V(1)(c)(i) of the Treaty. The request for extradition is therefore denied.

Quinn v. Robinson
783 F.2d 776 (9th Cir. 1986)

REINHARDT, Circuit Judge:

Pursuant to the Extradition Treaty of June 8, 1972, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468, the United Kingdom (Great Britain and Northern Ireland) seeks the extradition of William Joseph Quinn, a member of the Irish Republican Army ("IRA"), in order to try him for the commission of a murder in 1975 and for conspiring to cause explosions in London in 1974 and 1975. After a United States magistrate found Quinn extraditable, Quinn filed a petition for a writ of habeas corpus. The district court determined that Quinn cannot be extradited because a long-standing principle of international law which has been incorporated in the extradition treaty at issue—the political offense exception—bars extradition for the charged offenses. The United States government, on behalf of the United Kingdom, appeals.

This case requires us to examine the parameters of a foreign sovereign's right to bring about the extradition of an accused who maintains that the offenses with which he is charged are of a political character. Ultimately we must determine whether the political offense exception is applicable to the type of violent offenses Quinn is alleged to have committed. We undertake this task with the aid of very little helpful precedent. The United States Supreme Court has discussed the political offense exception only once, and then during the nineteenth century. See Ornelas v. Ruiz, 161 U.S. 502 (1896). The only time we considered the subject, see Karadzole v. Artukovic, 247 F.2d 198 (9th Cir.1957), the Supreme Court vacated our opinion, 355 U.S. 393 (1958), an opinion which, in any event, has subsequently been roundly and uniformly criticized.13 Only one circuit has previously considered in any detail how or whether the exception applies when the accused person or persons have engaged in conduct involving the use of some of the more violent techniques or tactics that have come to mark the activities of contemporary insurgent or revolutionary movements. Eain v. Wilkes, 641 F.2d 504 (7th Cir.), cert. denied, 454 U.S. 894 (1981). Therefore, we must carefully examine the historic origins of the political offense exception, analyze the various underpinnings of the doctrine, trace its development in the lower courts and elsewhere, and seek to apply whatever principles emerge to the realities of today's political struggles.

In the case before us, we find, for reasons we will explain in full, that the charged offenses are not protected by the political offense exception. We vacate the writ of habeas corpus and remand to the district court. We hold that Quinn may be extradited on the murder charge but that the district court must consider Quinn's remaining defense to the conspiracy charge before extradition is permitted for that offense.

The right of a foreign sovereign to demand and obtain extradition of an accused criminal is created by treaty. In the absence of a treaty there is no duty to extradite, see Valerie Epps, The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence, 20 Harv. Int'l L.J. 61, 74 (1979); cf. M. Cherif Bassiouni, International Extradition: A Summary of Contemporary American Practice and a Proposed Formula, 15 Wayne L.Rev. 733, 734 (1969) (in Western world, "extradition is a matter of favor or comity rather than a legal
The murder with which Quinn is charged took place on February 26, 1975. On that day, Police Constables Gilhooley were each found on at least one item at each location.

Searches of two flats in the London area conducted during this time period revealed explosives, detonators, fuses, and diagrams of bomb construction. Fingerprints matching those of Quinn, his alleged co-conspirators, and Heath Street in London. The bomb was defused and Quinn's fingerprints were found on the Irish newspaper that had been used to wrap the bomb. Quinn's fingerprints were found on the timing mechanism.

1. On January 18, 1974, a hollowed-out copy of the Bible containing a bomb was mailed to and received by Bishop Gerard William Tickle in London. At that time, Bishop Tickle was the Roman Catholic Bishop to the British Armed Forces. Quinn's fingerprints were found on the wrapping paper around the bomb, which was defused without causing any harm. Quinn's fingerprints were found on the book in which the bomb was concealed.

2. On January 30, 1974, a letter bomb was sent to the Surrey, England home of Crown Court Judge John Huxley Buzzard who, at that time, was a senior Treasury Prosecuting Counsel. When Judge Buzzard began to open the package, it partially exploded, lacerating his face, hands, and wrist and causing the loss of the ends of two fingers on his left hand. Quinn's fingerprints were on the wrapping around the bomb.

3. On February 4, 1974, a letter bomb was sent to the offices of Max Aitken, Chairman of the Daily Express newspaper in London. Aitken's assistant secretary, who partially opened the package, believed it looked suspicious and called a security guard. As the security guard picked up the package, it partially exploded and the officer lost most of the fingers on his left hand. Quinn's fingerprints were found on the book in which the bomb was concealed.

4. On December 20, 1974, a bomb was found in the foyer adjacent to the loading platform at Aldershot Railway Station in Hampshire County, England. The bomb was defused without causing any harm, and the fingerprints of a number of Quinn's alleged co-conspirators were found on the wrapping paper and bomb mechanics.

5. On December 21, 1974, a bomb was discovered in an attache case in the archway entrance to the Kings Arms Public House in Warminster, England. The bomb was defused and the fingerprints of Gilhooley, a fugitive who was not indicted as a co-conspirator, were found on its timing mechanism.

6. On January 27, 1975, a bomb was found in a black bag on the front step of the Charco-Burger Grill on Heath Street in London. The bomb was defused and Quinn's fingerprints were found on the Irish newspaper that had been used to wrap the bomb.

Searches of two flats in the London area conducted during this time period revealed explosives, detonators, fuses, and diagrams of bomb construction. Fingerprints matching those of Quinn, his alleged co-conspirators, and Gilhooley were each found on at least one item at each location.

The murder with which Quinn is charged took place on February 26, 1975. On that day, Police Constables

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Adrian Blackledge and Leslie White were patrolling the West Kensington area of London on foot, looking for burglary suspects. Blackledge saw a man engaged in "suspicious" behavior, such as looking around and changing directions. Blackledge lost sight of the man but later, while White was on a lunch break, saw the suspect reappear from one of a number of houses on Fairholme Road. Blackledge approached the man while he waited at a bus stop, identified himself as a police officer, and asked the man where he had been. The suspect was unable to give Blackledge the address of the house he had emerged from and gave his name as William Rogers. The suspect said he would take Blackledge to the home he had visited, began to walk away, then ran. A chase ensued, and other plainclothes police officers, including Temporary Detective Constable Derek Hugh Wilson, joined in. Police Constable Stephen Tibble, who was on a motorcycle dressed in civilian clothes, caught up to the suspect, got off his motorcycle, and assumed a crouched position. The suspect shot Tibble three times and ran, evading the other officers. Tibble died that afternoon.

On December 12, 1975, British police arrested Quinn’s alleged co-conspirators after a six-day siege with hostages in a flat in London. In the flat they discovered, among other things, a revolver. Bullets fired from this revolver revealed rifling characteristics similar to those on the bullets recovered from Tibble’s body.

On May 14, 1975, Constable Blackledge was taken to the Special Criminal Court in Dublin, where Quinn was appearing on the charge of being a member of the IRA. Blackledge pointed Quinn out to Rollo Watts of the Special Branch of New Scotland Yard and identified Quinn as the man who had shot Tibble. On October 8, 1981, Watts was shown a photograph of Quinn taken in San Francisco on September 30, 1981, at the time of Quinn’s arrest by the FBI. Watts identified Quinn as the man that Blackledge had identified in Ireland six years earlier.

The first-known extradition treaty was negotiated between an Egyptian Pharaoh and a Hittite King in the Thirteenth Century B.C. However, the concept of political offenses as an exception to extradition is a rather recent development. In the centuries after the first known extradition treaty, and throughout the Middle Ages, extradition treaties were used primarily to return political offenders, rather than the perpetrators of common crimes, to the nations seeking to try them for criminal acts. It was not until the early nineteenth century that the political offense exception, now almost universally accepted in extradition law, was incorporated into treaties.

The French and American revolutions had a significant impact on the development of the concept of justified political resistance, see Declaration des droits de l’homme et du Citoyen du 26 aout 1789, art. 2, incorporated as La preamble de la Constitution de 1791 (declaring as an inalienable right “la resistance a l’oppression”); La Constitution de 1793, art. 120 (France “donne asile aux etrangers bannis de leur patrie pour la cause de la liberte.”); The Declaration of Independence para. 1 (U.S.1776) (“Whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it.”). In 1834, France introduced the political offense exception into its treaties, and by the 1850’s it had become a general principle of international law incorporated in the extradition treaties of Belgium, England, and the United States as well.

The political offense exception is premised on a number of justifications. First, its historical development suggests that it is grounded in a belief that individuals have a right to resort to political activism to foster political change. This justification is consistent with the modern consensus that political crimes have greater legitimacy than common crimes. Second, the exception reflects a concern that individuals—particularly unsuccessful rebels—should not be returned to countries where they may be subjected to unfair trials and punishments because of their political opinions. Third, the exception comports with the notion that governments—and certainly their nonpolitical branches—should not intervene in the internal political struggles of other nations.

None of the political offense provisions in treaties includes a definition of the word “political.” Thus, the term “political offense” has received various interpretations by courts since the mid-nineteenth century. Not every offense that is politically motivated falls within the exception. Instead, courts have devised various tests to identify those offenses that comport with the justifications for the exception and that, accordingly, are not extraditable.

Within the confusion about definitions it is fairly well accepted that there are two distinct categories of political offenses: “pure political offenses” and “relative political offenses.” Pure political offenses are acts aimed directly at the government, and have none of the elements of ordinary crimes. These offenses, which include treason, sedition, and espionage, do not violate the private rights of individuals. Because they are frequently specifically excluded from the list of extraditable crimes given in a treaty, courts seldom deal with whether these offenses are extraditable, and it is generally agreed that they are not.

The definitional problems focus around the second category of political offenses—the relative political offenses. These include otherwise common crimes committed in connection with a political act, or common crimes committed for political motives or in a political context. Courts have developed various tests for ascertaining whether the nexus between the crime and the political act is sufficiently close for the crime to be deemed not extraditable. The judicial approaches can be grouped into three distinct categories: (1) the French “objective” test;
(2) the Swiss "proportionality" or "predominance" test; and (3) the Anglo-American "incidence" test.

The early French test,14 considered an offense non-extraditable only if it directly injured the rights of the state. Applying this rigid formula, French courts refused to consider the motives of the accused. The test primarily protects only pure political offenses, and is useless in attempts to define whether an otherwise common crime should not be extraditable because it is connected with a political act, motive, or context. Because politically motivated and directed acts may injure private as well as state rights, the objective test fails to satisfy the various purposes of the political offense exception. Nevertheless, this test has one benefit: because it is so limited, it is not subject to abuse; perpetrators of common crimes will not be protected because of alleged political motivations.

In contrast to the traditional French test, Swiss courts apply a test that protects both pure and relative political offenses. The Swiss test examines the political motivation of the offender, but also requires (a) a consideration of the circumstances surrounding the commission of the crime, and (b) either a proportionality between the means and the political ends, or a predominance of the political elements over the common crime elements.

The comprehensiveness and flexibility of the "predominance" or "proportionality" test allows it to be conformed to changing realities of a modern world. But because the relative value of the ends and the necessity of using the chosen means must be considered, the criteria applied by Swiss courts incorporate highly subjective and partisan political considerations within the balancing test. The test explicitly requires an evaluation of the importance of the stakes, the desirability of political change, and the acceptability of the means used to achieve the ends. The infusion of ideological factors in the determination which offenses are non-extraditable threatens both the humanitarian objectives underlying the exception and the concern about foreign non-intervention in domestic political struggles. Moreover, it severely undermines the notion that such determinations can be made by an apolitical, unbiased judiciary concerned primarily with individual liberty.

The "incidence" test that is used to define a non-extraditable political offense in the United States and Great Britain was first set forth by the Divisional Court in In re Castioni, [1891] 1 Q.B. 149 (1890). In that case, the Swiss government requested that Great Britain extradite a Swiss citizen who, with a group of other angry citizens, had stormed the palace gates and killed a government official in the process. Castioni did not know the victim or have a personal grudge against him. The habeas court considered:

whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and [up]rising in which he was taking part.

Id. at 159 (per Denman, J.). The court denied extradition, finding that Castioni's actions were "incidental to and formed a part of political disturbances," and holding that common crimes committed "in the course" and "in the furtherance" of a political disturbance would be treated as political offenses.

Although both the United States and Great Britain rely explicitly on Castioni, each has developed its own version of the incidence test. British courts proceeded first to narrow the exception in 1894. In In re Meunier, [1894] 2 Q.B. 415, the court extradited a French anarchist charged with bombing a cafe and military barracks, concluding that anarchist action is not incident to a two-party struggle for political power. The court held that the political offense exception protects those who seek to substitute one form of government for another, not those whose actions disrupt the social order and whose "efforts are directed primarily against the general body of citizens."

The United States, in contrast to Great Britain, has adhered more closely to the Castioni test in determining whether conduct is protected by the political offense exception. The seminal United States case in this area is In re Ezeta, 62 F. 972 (N.D.Cal.1894), in which the Salvadoran government requested the extradition of a number of individuals accused of murder and robbery. The fugitives maintained that the crimes had been committed while they unsuccessfully attempted to thwart a revolution. Extradition was denied because the acts were "committed during the progress of actual hostilities between contending forces," and were "closely identified" with the uprising "in an unsuccessful effort to suppress it." However, an alleged act that occurred four months prior to the start of armed violence was held not to be protected by the incidence test despite the accused's contention that El Salvador's extradition request was politically motivated.

As we noted at the outset, the Supreme Court has addressed the political offense issue only once. In Ornelas v. Ruiz, 161 U.S. 502 (1896), Mexico sought the extradition of an individual for murder, arson, robbery, and kidnapping committed in a Mexican border town, at or about the time revolutionary activity was in progress. The Court allowed extradition on the basis that the habeas court had applied an improper, non-deferential standard of review to the extradition court's findings. It continued by listing four factors pertinent to the political offense inquiry in the case: (1) the character of the foray; (2) the mode of attack; (3) the persons killed or captured; and (4) the kind of property taken or destroyed. It found that although the raid (in December 1892) may have been contemporaneous with a revolutionary movement (in 1891), it was not of a political character because it was essentially unrelated to
the uprising. The Court noted that the purported political aspects of the crimes were negated "by the fact that immediately after this occurrence, though no superior armed force of the Mexican government was in the vicinity to hinder their advance into the country, the bandits withdrew with their booty across the river into Texas." Since Ornelas, lower American courts have continued to apply the incidence test set forth in Castioni and Ezeta with its two-fold requirement: (1) the occurrence of an uprising or other violent political disturbance at the time of the charged offense, and (2) a charged offense that is "incidental to" "in the course of," or "in furtherance of" the uprising, see, e.g., Eain, 641 F.2d at 519. While the American view that an uprising must exist is more restrictive than the modrit British view and while we, unlike the British, remain hesitant to consider the motives of the accused or the requesting state, American courts have been rather liberal in their construction of the requirement that the act be "incidental to" an uprising.

The recent lack of consensus among United States courts confronted with requests for the extradition of those accused of violent political acts committed outside the context of an organized military conflict reflects some confusion about the purposes underlying the political offense exception. The premise of the analyses performed by modern courts favoring the adoption of new restrictions on the use of the exception is either that the objectives of revolutionary violence undertaken by dispersed forces and directed at civilians are by definition, not political, see, e.g., Eain, 641 F.2d at 519 ("Terrorist activity seeks to promote social chaos.")., or that, regardless of the actors' objectives, the conduct is not politically legitimate because it "is inconsistent with international standards of civilized conduct," Doherty, 599 F.Supp. at 274. Both assumptions are subject to debate.

A number of courts appear tacitly to accept a suggestion by some commentators that begins with the observation that the political offense exception can be traced to the rise of democratic governments. Because of this origin, these commentators argue, the exception was only designed to protect the right to rebel against tyrannical governments, see e.g., Valerie Epps, supra at 65, and should not be applied in an ideologically neutral fashion.

These courts then proceed to apply the exception in a non-neutral fashion but, in doing so, focus on and explicitly reject only the tactics, rather than the true object of their concern, the political objectives. The courts that are narrowing the applicability of the exception in this manner appear to be moving beyond the role of an impartial judiciary by determining tacitly that particular political objectives are not "legitimate."

We strongly believe that courts should not undertake such a task. The political offense test traditionally articulated by American courts, as well as the text of the treaty provisions, see, e.g., Treaty, supra p. 781, at art. V(1)(c), is ideologically neutral. We do not believe it appropriate to make qualitative judgments regarding a foreign government or a struggle designed to alter that government. Such judgments themselves cannot be other than political and, as such, involve determinations of the sort that are not within the judicial role.

A second premise may underlie the analyses of courts that appear to favor narrowing the exception, namely, that modern revolutionary tactics which include violence directed at civilians are not politically "legitimate." This assumption, which may well constitute an understandable response to the recent rise of international terrorism, skews any political offense analysis because of an inherent conceptual shortcoming. In deciding what tactics are acceptable, we seek to impose on other nations and cultures our own traditional notions of how internal political struggles should be conducted.

The structure of societies and governments, the relationships between nations and their citizens, and the modes of altering political structures have changed dramatically since our courts first adopted the Castioni test. Neither wars nor revolutions are conducted in as clear-cut or mannerly a fashion as they once were. Both the nature of the acts committed in struggles for self-determination, and the geographic location of those struggles have changed considerably since the time of the French and American revolutions. Now challenges by insurgent movements to the existing order take place most frequently in Third World countries rather than in Europe or North America. In contrast to the organized, clearly identifiable, armed forces of past revolutions, today's struggles are often carried out by networks of individuals joined only by a common interest in opposing those in power. It is understandable that Americans are offended by the tactics used by many of those seeking to change their governments. Often these tactics are employed by persons who do not share our cultural and social values or mores. Sometimes they are employed by those whose views of the nature, importance, or relevance of individual human life differ radically from ours. Nevertheless, it is not our place to impose our notions of civilized strife on people who are seeking to overthrow the regimes in control of their countries in contexts and circumstances that we have not experienced, and with which we can identify only with the greatest difficulty. It is the fact that the insurgents are seeking to change their governments that makes the political offense exception applicable, not their reasons for wishing to do so or the nature of the acts by which they hope to accomplish that goal.

Politically motivated violence, carried out by dispersed forces and directed at private sector institutions, structures, or civilians, is often undertaken--like the more organized, better disciplined violence of preceding
revolutions—as part of an effort to gain the right to self-government. We believe the tactics that are used in such internal political struggles are simply irrelevant to the question whether the political offense exception is applicable. First, we doubt whether the designers of the exception contemplated that it would protect acts of international violence, regardless of the ultimate objective of the actors. Second, in cases of international terrorism, we are being asked to return the accused to the government in the country where the acts were committed: frequently that is not a government the accused has sought to change. In such cases there is less risk that the accused will be subjected to an unfair trial or punishment because of his political opinion. Third, the exception was designed, in part, to protect against foreign intervention in internal struggles for political self-determination. When we extradite an individual accused of international terrorism, we are not interfering with any internal struggle; rather, it is the international terrorist who has interfered with the rights of others to exist peacefully under their chosen form of government.

There is no need to create a new mechanism for defining "political offenses" in order to ensure that the two important objectives we have been considering are met: (a) that international terrorists will be subject to extradition, and (b) that the exception will continue to cover the type of domestic revolutionary conduct that inspired its creation in the first place. While the precedent that guides us is limited, the applicable principles of law are clear. The incidence test has served us well and requires no significant modification. The growing problem of international terrorism, serious as it is, does not compel us to reconsider or redefine that test. The test we have used since the 1800's simply does not cover acts of international terrorism.

The incidence test has two components—the "uprising" requirement and the "incidental to" requirement. The first component, the requirement that there be an "uprising," "rebellion," or "revolution," has not been the subject of much discussion in the literature, although it is firmly established in the case law. Most analyses of whether the exception applies have focused on whether the act in question was in furtherance of or incidental to a given uprising. Nevertheless, it is the "uprising" component that plays the key role in ensuring that the incidence test protects only those activities that the political offense doctrine was designed to protect.

As we have noted, the political offense doctrine developed out of a concern for the welfare of those engaged in a particular form of political activity—an effort to alter or abolish the government that controls their lives—and not out of a desire to protect all politically motivated violence. The uprising component serves to limit the exception to its historic purposes. It makes the exception applicable only when a certain level of violence exists and when those engaged in that violence are seeking to accomplish a particular objective. The exception does not apply to political acts that involve less fundamental efforts to accomplish change or that do not attract sufficient adherents to create the requisite amount of turmoil. Thus, acts such as skyjacking (an act that has never been used by revolutionaries to bring about a change in the composition or structure of the government in their own country) fall outside the scope of the exception.

Equally important, the uprising component serves to exclude from coverage under the exception criminal conduct that occurs outside the country or territory in which the uprising is taking place. The term "uprising" refers to a revolt by indigenous people against their own government or an occupying power. That revolt can occur only within the country or territory in which those rising up reside. By definition acts occurring in other lands are not part of the uprising. The political offense exception was designed to protect those engaged in internal or domestic struggles over the form or composition of their own government, including, of course, struggles to displace an occupying power. It was not designed to protect international political coercion or blackmail, or the exportation of violence and strife to other locations—even to the homeland of an oppressor nation. Thus, an uprising is not only limited temporally, it is limited spatially.

While determining the proper geographic boundaries of an "uprising" involves a legal issue that ordinarily will be fairly simple to resolve, there may be some circumstances under which it will be more difficult to do so. We need not formulate a general rule that will be applicable to all situations. It is sufficient in this case to state that for purposes of the political offense exception an "uprising" cannot extend beyond the borders of the country or territory in which a group of citizens or residents is seeking to change their particular government or governmental structure.

It follows from what we have said that an "uprising" can exist only when the turmoil that warrants that characterization is created by nationals of the land in which the disturbances are occurring. Viewed in that light, it becomes clear that had the traditional incidence test been applied in Eain, the result would have been identical to that reached by the Seventh Circuit. When PLO members enter Israel and commit unlawful acts, there is simply no uprising for the acts to be incidental to. The plain fact is that the Israelis are not engaged in revolutionary activity directed against their own government. They are not seeking to change its form, structure, or composition through violent means. That the PLO members who commit crimes are seeking to destroy Israel as a state does not help bring them within the political offense exception. In the absence of an uprising, the violence engaged in by PLO
members in Israel and elsewhere does not meet the incidence test and is not covered by the political offense exception. To the contrary, the PLO's worldwide campaign of violence, including the crimes its members commit in the state of Israel, clearly constitutes "international terrorism."

In short, the Eain and Doherty courts' objective that this country not become a haven for international terrorists can readily be met through a proper application of the incidence test. It is met by interpreting the political offense exception in light of its historic origins and goals. Such a construction excludes acts of international terrorism. There is no reason, therefore, to construe the incidence test in a subjective and judgmental manner that excludes all violent political conduct of which we disapprove. Moreover, any such construction would necessarily exclude some forms of internal revolutionary conduct and thus run contrary to the exception's fundamental purpose. For that reason, we reject the Eain test and especially the concept that courts may determine whether particular forms of conduct constitute acceptable means or methods of engaging in an uprising.

We believe the traditional liberal construction of the requirement that there be a nexus between the act and the uprising is appropriate. There are various types of acts that, when committed in the course of an uprising, are likely to have been politically motivated. There is little reason, under such circumstances, to impose a strict nexus standard. Moreover, the application of a strict test would in some instances jeopardize the rights of the accused.

Under the liberal nexus standard, neither proof of the potential or actual effectiveness of the actions in achieving the group's political ends, In re Castioni, [1891] 1 Q.B. 149, 158-59 (1890) (refusing to consider whether the act was a wise mode of promoting the cause) (per Denman, J.), nor proof of the motive of the accused, Eain, 641 F.2d at 519, or the requesting nation, Garcia-Guillern, 450 F.2d at 1192, is required. Nor is the organization or hierarchy of the uprising group or the accused's membership in any such group determinative.

When extradition is sought, the "offender" at this stage in the proceedings has ordinarily only been accused, not convicted, of the offense. It would be inconsistent with the rights of the accused to require proof of membership in an uprising group. For example, the accused might be able to show that the acts were incidental to the uprising but might be unable to prove membership because he or she did not commit the offense or was not a member of the group. Furthermore, requiring proof of membership might violate the accused's Fifth Amendment rights both because it might force him to supply circumstantial evidence of guilt of the charged offense and because membership in the group itself might be illegal. Also, we question how one proves membership in an uprising group. Uprising groups often do not have formal organizational structures or document membership. In addition, it is entirely possible to sympathize with, aid, assist, or support a group, help further its objectives and its activities, participate in its projects, or carry on parallel activities of one's own, without becoming a member of the organization. Still, one may be acting in furtherance of an uprising.

Under the liberal nexus test we have traditionally applied, or even under a strict nexus standard, there is no justification for distinguishing, as Doherty suggests, between attacks on military and civilian targets. The "incidental to" component, like the incidence test as a whole, must be applied in an objective, non-judgmental manner. It is for the revolutionaries, not the courts, to determine what tactics may help further their chances of bringing down or changing the government. All that the courts should do is determine whether the conduct is related to or connected with the insurgent activity. It is clear that various "non-military" offenses, including acts as disparate as stealing food to sustain the combatants, killing to avoid disclosure of strategies, or killing simply to avoid capture, may be incidental to or in furtherance of an uprising. To conclude that attacks on the military are protected by the exception, but that attacks on private sector institutions and civilians are not, ignores the nature and purpose of the test we apply, as well as the realities of contemporary domestic revolutionary struggles.

We should add that the spatial limitations imposed under the "incidental to" component may not be circumvented by reliance on the "incidental to" component. As we said earlier, for the political offense exception to be applicable at all, the crime must have occurred in the country or territory in which the uprising was taking place, not in a different geographic location.

Quinn is accused of having been a member of a conspiracy involving the Balcombe Street Four and he does not challenge the probable cause finding on this charge; his fingerprints were found on the bombs and within the flats where bombs were constructed. There is no evidence that he was involved in the conspiracy for other than political reasons, and his alleged co-conspirators, the Balcombe Street Four, were convicted of politically motivated bombings. Moreover, the IRA's use of bombing campaigns as a political tactic is well-documented. Accepting the magistrate's factual findings, which are not clearly erroneous, and applying the legal standards we have explained above, we think it quite clear that if an uprising, as that term is defined for purposes of the political offense exception, existed at the time the offenses were committed, the bombings were incidental to that uprising.

Furthermore, because various disparate acts may be incidental to an uprising, we agree with the district court's conclusion that the Tibble murder would be incidental to the uprising, although we believe the analysis performed
by both the magistrate and the district court is in error with respect to this incident. It does not matter if the killer's motivation in killing Officer Tibble was to conceal a bomb factory or to avoid capture. A murder of a police officer is related to an uprising whether the reason for the act is to avoid discovery of munitions or to avoid reduction of "forces" by capture.

Regardless which of these goals motivated the killer, if an uprising existed at the time, this offense as well was incidental to it.

[Although there was clearly an uprising in Northern Ireland], we cannot conclude that the uprising extended to England. We do not question the fact that throughout the time of the alleged conspiracy, some politically motivated violence was taking place in England as well as in Northern Ireland. However, in general the violent attacks and the responses to them were far less pronounced outside of Northern Ireland. It is clear from the record that the level of violence outside Northern Ireland was insufficient in itself to constitute an "uprising."

There is a second and even more significant reason why the "uprising" prong is not met in this case. As the magistrate found, what violence there was was not being generated by citizens or residents of England. In fact, the magistrate determined that a large percentage of the bombing incidents in England were attributable to the Balcombe Street Four. The critical factor is that nationals of Northern Ireland, seeking to alter the government in that territorial entity, exported their struggle for political change across the seas to a separate geographical entity -- and conducted that struggle in a country in which the nationals and residents were not attempting to alter their own political structure.

We do not ignore the constitutional, legal, and military relationship between England and Northern Ireland. The ties are so well established that had evidence of the relationship not been presented to the magistrate, judicial notice would have been appropriate. It is beyond dispute that during the time of the conspiracy with which Quinn is charged, Northern Ireland was, in essence under British rule: the British government had dissolved the Northern Ireland Parliament, declared a state of emergency, and made the Secretary of State for Northern Ireland directly answerable for the government of Northern Ireland to the United Kingdom Parliament at Westminster.

We do not question whether the IRA sought to coerce the appropriate sovereign. Nor do we pass judgment on the use of violence as a form of political coercion or the efficacy of the violent attacks in England. But, as we have already said, the word "uprising" means exactly that: it refers to a people rising up, in their own land, against the government of that land. It does not cover terrorism or other criminal conduct exported to other locations. Nor can the existence of an uprising be based on violence committed by persons who do not reside in the country or territory in which the violence occurs.

In light of the justifications for the political offense exception, the formulation of the incidence test as it has traditionally been articulated, and the cases in which the exception has historically been applied, we do not believe it would be proper to stretch the term "uprising" to include acts that took place in England as a part of a struggle by nationals of Northern Ireland to change the form of government in their own land. Accordingly, we need not decide whether had an uprising occurred, the protection afforded by the exception would have been extended to one who, like Quinn, is a citizen of a different and uninvolved nation. Because the incidence test is not met, neither the bombing conspiracy nor the murder of Police Constable Tibble is a non-extraditable offense under the political offense exception to the extradition treaty between the United States and the United Kingdom.

The conspiracy to cause explosions and the murder with which Quinn is charged do not fall within the political offense exception. Although an uprising existed in Northern Ireland at the time the charged offenses were committed, there was no uprising in England. The crimes did not take place within a territorial entity in which a group of nationals were seeking to change the form of the government under which they live; rather the offenses took place in a different geographical location.

We vacate the writ of habeas corpus and remand to the district court. We hold that Quinn may be extradited on the murder charge.

DUNIWAY, Circuit Judge (concurring in the judgment):

My principal difficulty is with part V of Judge Reinhardt's thoughtful and careful opinion. The uprising component serves to exclude from coverage under the exception criminal conduct that occurs outside the country or territory in which the uprising is taking place. The term "uprising" refers to a revolt by indigenous people against their own government or an occupying power. That revolt can occur only within the country or territory in which those rising up reside. By definition acts occurring in other lands are not part of the uprising.

The limitation may be useful to us in this case, but I doubt that it is a valid one. To consider an old example, let us suppose that the treaty was in effect immediately following the revolutionary war, and his majesty's government sought to extradite John Paul Jones for piracy in British waters. Would we grant extradition because there was no uprising in Great Britain?
Assume that we had a comparable treaty with the government of Nicaragua. Suppose that, today, a citizen of Nicaragua, active in the so-called contras, were to sink a vessel owned by the Sandinista government on the high seas, and flee to this country. Would we grant extradition because his act did not take place within the territorial waters of Nicaragua? Particularly today, with the airplane, the helicopter, the high speed motor vehicle, the railroad, the speedboat and submarine, genuinely revolutionary activities can take place outside the geographic boundaries of the requesting state. I fear that if we adopt the geographic limitation propounded in the opinion today, we will find ourselves trying to work our way around it tomorrow.

I much prefer the rationale of the Seventh Circuit in Eain v. Wilkes, 641 F.2d 504, 521 (7th Cir. 1981). There, the court held that the political character of the offense provision does not apply to ``the indiscriminate bombing of the civilian population.” I cannot believe that the framers of the treaty intended that the exception would embrace the kind of activities that the record in this case reveals. As the Eain court said, ``We recognize the validity and usefulness of the political offense exception, but it should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere.”

This case does not involve the ``random bombing” that Eain involved. But every letter bomb to which Quinn was connected was directed to an innocent, albeit influential, civilian who had no direct connection to the troubles in Northern Ireland. Nor does the fact that Tibble was a policeman make any difference. The evidence does not indicate that Quinn knew or believed that he was a policeman. Moreover, it would make no difference if he did either know it or believe it. The killing of Tibble was an attempt to avoid arrest for extraditable offenses. The fact that Tibble was a policeman cannot metamorphose that killing, which, on its face, was a murder to escape arrest, into an offense regarded by the United States as one of a political character.

FLETCHER, Circuit Judge, concurring and dissenting:
I respectfully dissent from my colleagues’ conclusion that Quinn may now be extradited on the murder charge. The decision facing this court is excruciatingly difficult. Quinn is accused of hideous crimes--violent and cruel and some of them cowardly. Innocent victims were targeted for receipt of letter bombs mailed anonymously. A decision that the full force of the law should not be invoked to punish persons found guilty of such acts seems inconceivable. However, the political offense exception to the treaty of extradition has a long history of protecting persons rebelling against their governments.

This longstanding tradition among western nations is an acknowledgment of the right of the governed to oppose unjust governments. Although the nations, ours included, have acknowledged the heinous nature of violent political crimes, they have nonetheless, under treaties and statutes, denied extradition when an individual’s conduct falls within the narrow exception for the “political offense.”

I concur in Judge Reinhardt’s conclusion in Part VI that if an uprising existed at the time the offenses were committed, the bombings and the Tibble murder were incident to that uprising. I disagree, however, with his further conclusion that because the level of violence in Northern Ireland far exceeded that in England, the uprising did not extend to England.

I find persuasive the magistrate’s and district court’s findings that a severe political uprising existed in the United Kingdom, including England, at the time the acts of which Quinn is accused took place. The magistrate recognized the constitutional unity of Northern Ireland and Great Britain, and noted the numerous violent incidents that occurred in areas outside Northern Ireland, particularly in and around London. I cannot agree with Judge Reinhardt’s conclusion that when IRA members revolt against their British rulers in Northern Ireland, such acts are protected under the political offense exception, whereas the identical violent acts carried out against the same British rulers in London lose their protected status.

I disagree that this interpretation of the “uprising” component of the political offense exception sanctions previously extraditable violent acts. Judge Reinhardt is rightly concerned that “uprising” not encompass “terrorism or other criminal conduct exported to other locations.” I share his concern. But in my view, the acts of Irish nationalists against the British in London are not international “terrorism or other criminal conduct exported to other locations.” The longstanding ties between England and Northern Ireland, which Judge Reinhardt acknowledges are “well established,” cannot be avoided or ignored. Although Northern Ireland may have been “separated” from Great Britain by treaty when the Irish Free State was created, it remained a part of the United Kingdom with representation in the British Parliament and it has been occupied by British troops lo these many years. The acts of terrorism in England by members of the IRA can hardly be termed acts of international terrorism.

NOTES AND QUESTIONS
FOR CLASSROOM DISCUSSION

135
1. Should the Executive Branch, rather than the Judicial Branch, make the decision whether a crime qualifies for the political offense exception? What are the best reasons for allocating the decision to the Executive? What are the best reasons for allocating the decision to the Judiciary?

2. How does the court limit the scope of the political offense exception in *In Re Doherty*? Would international terrorists be protected under the court's definition of the political offense exception?

3. What factors did the court apply to determine whether Doherty's acts fell within the political offense exception? What factors did the court reject?

4. In *Quinn v. Robinson* the court outlines four different tests for determining whether Quinn qualified for the political offense exception to extradition. Which one did the court ultimately adopt? How did the majority's test differ from the test in *Eain v. Wilkes* which the court cites?

5. Do you agree with Judge Duniway that the *Quinn* test of a definite geographic limitation is too amorphous?

6. The changing style of revolutions blurs the line between uprisings and terrorist acts. Was the *Quinn* court justified in its efforts to ensure that international terrorists would not be protected by the political offense exception or did the court go farther than necessary? How persuasive do you find Judge Fletcher's dissent?

7. How important is political motivation in the *Quinn* court's view?

**Reading assignment:** *International Law Anthology*, pp. 242-45.

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**Supplementary Extradition Treaty**

**Between the United States and the United Kingdom**

The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland;

Desiring to make more effective the Extradition Treaty between the Contracting Parties, signed at London on 8 June 1972 (hereinafter referred to as "the Extradition Treaty");

Have resolved to conclude a Supplementary Treaty and have agreed as follows:

**Article 1**

For the purposes of the Extradition Treaty, none of the following offenses shall be regarded as an offense of a political character:

(a) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature at The Hague on 16 December 1970;

(b) an offense within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature at Montreal on 23 September 1971;

(c) an offense within the scope of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, opened for signature at New York on 14 December 1973;

(d) an offense within the scope of the International Convention against the Taking of Hostages, opened for signature at New York on 18 December 1979;

(e) murder;

(f) manslaughter;

(g) maliciously wounding or inflicting grievous bodily harm;

(h) kidnapping, abduction, false imprisonment or unlawful detention, including the taking of a hostage;

(i) the following offenses relating to explosives:

1. the causing of an explosion likely to endanger life or cause serious damage to property; (2) or conspiracy to cause such an explosion; (3) or the making or possession of an explosive substance by a person who intends either himself or through another person to endanger life or cause serious damage to property;

(j) the following offenses relating to firearms or ammunition:

1. the possession of a firearm or ammunition by a person who intends either himself or through another person to endanger life; or (2) the use of a firearm by a person with intent to resist or prevent the arrest or detention of himself or another person;

(k) damaging property with intent to endanger life or with reckless disregard as to whether the life of another would thereby be endangered;

(l) an attempt to commit any of the foregoing offenses.

**Article 2**

Article V, paragraph (1)(b) of the Extradition Treaty is amended to read as follows:
“(b) the prosecution for the offense for which extradition is requested has become barred by lapse of time according to the law of the requesting Party; or”

Article 3

Article VIII, paragraph (2) of the Extradition Treaty is amended to read as follows:

“(2) A person arrested upon such an application shall be set at liberty upon the expiration of sixty days from the date of his arrest if a request for his extradition shall not have been received. This provision shall not prevent the institution of further proceedings for the extradition of the person sought if a request for extradition is subsequently received.”

Article 4

This Supplementary Treaty shall apply to any offense committed before or after this Supplementary Treaty enters into force, provided that this Supplementary Treaty shall not apply to an offense committed before this Supplementary Treaty enters into force which was not an offense under the laws of both Contracting Parties at the time of its commission.

Article 5

This Supplementary Treaty shall form an integral part of the Extradition Treaty and shall apply:

(a) in relation to the United Kingdom: to Great Britain and Northern Ireland, the Channel Islands, the Isle of Man and the territories for whose international relations the United Kingdom is responsible;

(b) to the United States of America;

and references to the territory of a Contracting Party shall be construed accordingly.

Article 6

This Supplementary Treaty shall be subject to ratification and the instruments of ratification shall be exchanged at London as soon as possible. It shall enter into force upon the exchange of instruments of ratification. It shall be subject to termination in the same manner as the Extradition Treaty.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Supplementary Treaty.

DONE in duplicate at Washington this twenty-fifth day of June, 1985.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

( Illegible Signature )

FOR THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND: ( Illegible Signature )

NOTES AND QUESTIONS
FOR CLASSROOM DISCUSSION

1. You have just read the Supplementary Treaty between the United States and Great Britain which creates numerous exceptions to the political offense exception. Is Professor Blakesley, in the reading on p. 242, correct in saying that these exceptions eviscerate the political offense exception between these two countries?

2. Doesn’t the political offense exception still apply between the United States and Great Britain with respect to the following crimes: treason and espionage? Does it apply only to “peaceful” acts of treason or espionage?

3. Consider the debate between Steven Lubet and Jordan Paust in the Anthology. What is Lubet’s solution to the possibility of Great Britain becoming tyrannical? What about Paust’s argument that even democratic governments can act in outrageous ways?

C. Abduction

United States v. Alvarez-Machain
Supreme Court of the United States

Facts (as stated by the Supreme Court):

Respondent, Humberto Alvarez-Machain, is a citizen and resident of Mexico. He was indicted for participating in the kidnap and murder of United States Drug Enforcement Administration (DEA) special agent Enrique Camarena-Salazar and a Mexican pilot working with Camarena, Alfredo Zavala-Avelar. The DEA believes that respondent, a medical doctor, participated in the murder by prolonging agent Camarena’s life so that others could further torture and interrogate him. On April 2, 1990, respondent was forcibly kidnapped from his medical office in Guadalajara, Mexico, to be flown by private plane to El Paso, Texas, where he was arrested by DEA officials. The District Court concluded that DEA agents were responsible for respondent’s abduction, although they
were not personally involved in it.\textsuperscript{15}

Respondent moved to dismiss the indictment, claiming that his abduction constituted outrageous governmental conduct, and that the District Court lacked jurisdiction to try him because he was abducted in violation of the extradition treaty between the United States and Mexico. Extradition Treaty, May 4, 1978, United States-United Mexican States, 31 U.S.T. 5059, T.I.A.S. No. 9656. The District Court rejected the outrageous governmental conduct claim, but held that it lacked jurisdiction to try respondent because his abduction violated the Extradition Treaty. The district court discharged respondent and ordered that he be repatriated to Mexico.

The Court of Appeals affirmed the district court’s finding that the United States had authorized the abduction of respondent, and that letters from the Mexican government to the United States government served as an official protest of the Treaty violation. Therefore, the Court of Appeals ordered that the indictment against respondent be dismissed and that respondent be repatriated to Mexico.

\textit{Excerpts from the Amicus Brief Submitted by Mexico}:

Mexico regards respondent’s abduction from Mexican territory as a deliberate disregard by the United States of its obligations under the extradition treaty. Respondent’s abduction by agents of the United States is incompatible with established principles of international law and with express undertakings by the United States in recent bilateral and multilateral agreements on mutual legal assistance in penal matters and on cooperation in combatting narcotics trafficking that were in force between Mexico and the United States at the time of respondent’s abduction. Under general international law, and under these specific agreements, the United States is obligated to respect Mexico’s sovereignty and territorial integrity and not to perform functions of authority in Mexican territory.

Mexico repeatedly protested to the United States government the treaty violations and the attendant infringement of its territorial integrity, and it requested respondent’s return to Mexico. Its diplomatic protests and its request for respondent’s repatriation have gone unanswered.

The United States’ disregard of its commitments to Mexico undermines the rule of law in international relations to which both States are strongly committed. Mexico has a manifest interest ensuring that treaties to which it and the United States are parties are interpreted and applied by United States courts consistently with the treaty’s text, history, object and purpose.

The United States’ argument that the extradition treaty does not address abductions of Mexican nationals from Mexican territory, and that such “extraterritorial arrests” are conducted “outside the extradition context,” does not withstand analysis. The treaty, like all international accords, must be interpreted against the background of relevant rules of international law applicable to the relations between the parties. Of particular relevance to the forcible removal of a person by agents of a foreign state are the established international law principles of independence of states, non-intervention in internal affairs, legal equality, and respect for territorial integrity. These principles are the foundation upon which all extradition treaties are constructed. For a state to send its agents to another State to apprehend or abduct that State’s nationals for trial elsewhere is incompatible with the established international legal order. There was, therefore, no reason for Mexico to insist that the extradition treaty contain express language that, absent permission from Mexico, the United States could exercise no police powers in the Mexican territory. At no time during the negotiation of the extradition treaty did the United States’ negotiators state or suggest that the United States reserved to itself the right to secure the presence of Mexican nationals for trial in the United States “outside the extradition context,” and there exists no such reservation to the treaty.

Article 9 of the extradition treaty leaves it to the discretion of each State whether to extradite its nationals. During the negotiation of Art. 9, the Mexican negotiators expressly informed the United States negotiators of the restraints that Mexican laws impose on the President of Mexico with respect to the extradition of Mexican nationals. Consequently, the parties included a second paragraph similar to one contained in most modern U.S. extradition treaties with civil law countries to assure that Mexicans whose extradition was denied solely on the basis of nationality would be prosecuted by Mexico.

In this case, the United States did not inquire whether Mexico was prepared to deliver the respondent for trial in the United States, nor did it afford Mexico the opportunity to try the respondent in its own courts. Instead, in disregard of the stipulations of the extradition treaty and its responsibilities under established principles of international law, the United States abducted the respondent from Mexico, brought him without the consent of the Mexican government to the United States for trial, and deprived him of the rights guaranteed to him by the Constitution and laws of Mexico.

Mexico and the United States are parties to two recent bilateral treaties on mutual legal assistance and on cooperation in combatting narcotics trafficking, and both States have ratified a multilateral United Nations Convention on the latter subject. Both treaties and the Convention make it explicit that, in rendering assistance to each other and in combatting crime and drug trafficking, the States must carry out their obligations in a manner
consistent with the principles of sovereign equality and territorial integrity. The United States' action in abducting the respondent from the territory of Mexico was in total disregard of these solemn treaty commitments.

The appropriate remedy for the contravention of the treaty that occurred in this case, and the only remedy that will prevent the recurrence of the violation of Mexico's territorial integrity, is the return of respondent to Mexico. Repatriation of a national who was unlawfully abducted from his home State by agents of a foreign State will signify the courts' unwillingness to countenance lawlessness by its law enforcement agents on foreign soil. Unlike the result which frequently follows from the application of the exclusionary rule in the domestic context, ordering the respondent's repatriation will not immunize him from prosecution, as the United States claims. His return to Mexico will only change the place of trial and the applicable law, since Mexico is committed under the extradition treaty to submit the case to its judicial authorities for investigation and prosecution.

Excerpts from the Amicus Brief Submitted by Canada:

Canada and the United States enjoy an undefended border more than 3000 miles in length. The ease with which this border may be crossed accounts for the fact that approximately 50% of all American requests for extradition are made to Canada. In 1991, the United States made 74 requests for extradition to Canada and Canada made 47 requests to the United States. Many of these requests emanate from state and local authorities. Transborder incidents, involving bounty hunters, resulted in an exchange of notes in 1988 between Secretary of State George P. Shultz and Secretary of State for External Affairs Joe Clark in an attempt to partially resolve the problem. The position adopted by the petitioner in this case, however, raises a potentially far more serious problem; the specter not only of federal, but more likely of official state and local incursions to abduct fugitives, where extradition is seen as too costly, too slow or unavailable, in violation of Canada's territorial integrity. This unlawful conduct would in effect be sanctioned in United States law by a decision favoring petitioner.

Canada has an interest in ensuring that its treaties are given that construction and application which their express terms, nature, scope and purpose require. Moreover, Canada has an interest, indeed an obligation to its citizens, in taking all steps necessary to protect the rights of its inhabitants and its sovereign interest in its territorial integrity, guaranteed by the Treaty and international law.

Canada submits that the current position of the United States departs from established practice in the relations between the United States and Canada, and among other nations, on which many extradition treaties have been built. Ultimately it departs as well from common sense underpinnings of all such treaties, which is to substitute the rule of law for force in such matters as national sovereignty, the right to give asylum, and the orderly cooperation in the enforcement of criminal laws. Canada views transborder abductions from Canada to the United States as breaches of the Canada-United States Extradition Treaty and breaches of Canada's sovereignty. Other civilized nations, as well, would not agree with the position of petitioner in this case; they would insist that unless a nation otherwise consents to a removal of a person from its territory, an extradition treaty is the exclusive means for a requesting government to obtain such a removal and that it is the policy of nations to request return of abducted persons. Canada and its component governments do not hold to a policy of abductions from American territory, and if abductions occur, they could not reasonably expect the United States to acquiesce in Canadian courts' disrespect of U.S. sovereignty through exercise of jurisdiction over abducted individuals. The Government of Canada would, upon protest, cooperate to obtain the return of an abducted fugitive.

THE CHIEF JUSTICE delivered the opinion of the Court:

The issue in this case is whether a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts. We hold that he does not, and that he may be tried in federal district court for violations of the criminal law of the United States.

Although we have never before addressed the precise issue raised in the present case, we have previously considered proceedings in claimed violation of an extradition treaty, and proceedings against a defendant brought before a court by means of a forcible abduction. We addressed the former issue in United States v. Rauscher, 119 U.S. 407 (1886); more precisely, the issue of whether the Webster-Ashburton Treaty of 1842, which governed extraditions between England and the United States, prohibited the prosecution of defendant Rauscher for a crime other than the crime for which he had been extradited. Whether this prohibition, known as the doctrine of specialty, was an intended part of the treaty had been disputed between the two nations for some time. Justice Miller delivered the opinion of the Court, which carefully examined the terms and history of the treaty; the practice of nations in regards to extradition treaties; the case law from the states; and the writings of commentators, and reached the following conclusion:

A person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after
his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings.

Unlike the case before us today, the defendant in Rauscher had been brought to the United States by way of an extradition treaty; there was no issue of a forcible abduction.

In Ker v. Illinois, 119 U.S. 436 (1886), also written by Justice Miller and decided the same day as Rauscher, we addressed the issue of a defendant brought before the court by way of a forcible abduction. Frederick Ker had been tried and convicted in an Illinois court for larceny; his presence before the court was procured by means of forcible abduction from Peru. A messenger was sent to Lima with the proper warrant to demand Ker by virtue of the extradition treaty between Peru and the United States. The messenger, however, disdained reliance on the treaty processes, and instead forcibly kidnapped Ker and brought him to the United States.16 We distinguished Ker's case from Rauscher, on the basis that Ker was not brought into the United States by virtue of the extradition treaty between the United States and Peru, and rejected Ker's argument that he had a right under the extradition treaty to be returned to this country only in accordance with its terms.17 We rejected Ker's due process argument more broadly, holding in line with "the highest authorities" that "such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense, and presents no valid objection to his trial in such court."

In Frishie v. Collins, 342 U.S. 519 (1952), we applied the rule in Ker to a case in which the defendant had been kidnapped in Chicago by Michigan officers and brought to trial in Michigan. We upheld the conviction over objections based on the due process clause and the Federal Kidnapping Act and stated:

This Court has never departed from the rule announced in [Ker] that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.

The only differences between Ker and the present case are that Ker was decided on the premise that there was no governmental involvement in the abduction, and Peru, from which Ker was abducted, did not object to his prosecution.18 Respondent finds these differences to be dispositive, contending that they show that respondent's prosecution, like the prosecution of Rauscher, violates the implied terms of a valid extradition treaty. The Government, on the other hand, argues that Rauscher stands as an "exception" to the rule in Ker only when an extradition treaty is invoked, and the terms of the treaty provide that its breach will limit the jurisdiction of a court. Therefore, our first inquiry must be whether the abduction of respondent from Mexico violated the extradition treaty between the United States and Mexico. If we conclude that the Treaty does not prohibit respondent's abduction, the rule in Ker applies, and the court need not inquire as to how respondent came before it.

In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning. The Treaty says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the Treaty if such an abduction occurs. Respondent cites Article 9 of the Treaty which provides:

1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.

2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.

According to respondent, Article 9 embodies the terms of the bargain which the United States struck: if the United States wishes to prosecute a Mexican national, it may request that individual's extradition. Upon a request from the United States, Mexico may either extradite the individual, or submit the case to the proper authorities for prosecution in Mexico. In this way, respondent reasons, each nation preserved its right to choose whether its nationals would be tried in its own courts or by the courts of the other nation. This preservation of rights would be frustrated if either nation were free to abduct nationals of the other nation for the purposes of prosecution. More broadly, respondent reasons, as did the Court of Appeals, that all the processes and restrictions on the obligation to extradite established by the Treaty would make no sense if either nation were free to resort to forcible kidnapping to gain the presence of an individual for prosecution in a manner not contemplated by the Treaty.

We do not read the Treaty in such a fashion. Article 9 does not purport to specify the only way in which one country may gain custody of a national of the other country for the purposes of prosecution. In the absence of an
extradition treaty, nations are under no obligation to surrender those in their country to foreign authorities for prosecution. Extradition treaties exist so as to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established procedures. The Treaty thus provides a mechanism which would not otherwise exist, requiring, under certain circumstances, the United States and Mexico to extradite individuals to the other country, and establishing the procedures to be followed when the Treaty is invoked.

The history of negotiation and practice under the Treaty also fails to show that abductions outside of the Treaty constitute a violation of the Treaty. As the Solicitor General notes, the Mexican government was made aware, as early as 1906, of the Ker doctrine, and the United States' position that it applied to forcible abductions made outside of the terms of the United States-Mexico extradition treaty. Nonetheless, the current version of the Treaty, signed in 1978, does not attempt to establish a rule that would in any way curtail the effect of Ker. Moreover, although language which would grant individuals exactly the right sought by respondent had been considered and drafted as early as 1935 by a prominent group of legal scholars sponsored by the faculty of Harvard Law School, no such clause appears in the current treaty.

Thus, the language of the Treaty, in the context of its history, does not support the proposition that the Treaty prohibits abductions outside of its terms. The remaining question, therefore, is whether the Treaty should be interpreted so as to include an implied term prohibiting prosecution where the defendant's presence is obtained by means other than those established by the Treaty.

Respondent contends that the Treaty must be interpreted against the backdrop of customary international law, and that international abductions are ``so clearly prohibited in international law'' that there was no reason to include such a clause in the Treaty itself. The international censure of international abductions is further evidenced, according to respondent, by the United Nations Charter and the Charter of the Organization of American States. Respondent does not argue that these sources of international law provide an independent basis for the right respondent asserts not to be tried in the United States, but rather that they should inform the interpretation of the Treaty terms.

The Court of Appeals deemed it essential, in order for the individual defendant to assert a right under the Treaty, that the affected foreign government had registered a protest. Respondent agrees that the right exercised by the individual is derivative of the nation's right under the Treaty, since nations are authorized, notwithstanding the terms of an extradition treaty, to voluntarily render an individual to the other country on terms completely outside of those provided in the Treaty. The formal protest, therefore, ensures that the ``offended'' nation actually objects to the abduction and has not in some way voluntarily rendered the individual for prosecution. Thus the Extradition Treaty only prohibits gaining the defendant's presence by means other than those set forth in the Treaty when the nation from which the defendant was abducted objects.

This argument seems to us inconsistent with the remainder of respondent's argument. The Extradition Treaty has the force of law, and if, as respondent asserts, it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation. In Rauscher, the Court noted that Great Britain had taken the position in other cases that the Webster-Ashburton Treaty included the doctrine of specialty, but no importance was attached to whether or not Great Britain had protested the prosecution of Rauscher for the crime of cruel and unusual punishment as opposed to murder.

More fundamentally, the difficulty with the support respondent garners from international law is that none of it relates to the practice of nations in relation to extradition treaties. In Rauscher, we imp lied a term in the Webster-Ashburton Treaty because of the practice of nations with regard to extradition treaties. In the instant case, respondent would imply terms in the extradition treaty from the practice of nations with regards to international law more generally. Respondent would have us find that the Treaty acts as a prohibition against a violation of the general principle of international law that one government may not exercise its police power in the territory of another state. There are many actions which could be taken by a nation that would violate this principle, including waging war, but it cannot seriously be contended an invasion of the United States by Mexico would violate the terms of the extradition treaty between the two nations.

In sum, to infer from this Treaty and its terms that it prohibits all means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice. In Rauscher, the implication of a doctrine of specialty into the terms of the Webster-Ashburton Treaty which, by its terms, required the presentation of evidence establishing probable cause of the crime of extradition before extradition was required, was a small step to take. By contrast, to imply from the terms of this Treaty that it prohibits obtaining the presence of an individual by means outside of the procedures the Treaty establishes requires a much larger inferential leap, with only the most general of international law principles to support it. The general principles cited by respondent simply fail to persuade us that we should imply in the United States-Mexico Extradition Treaty a term prohibiting international
abductions.

Respondent and his amici may be correct that respondent's abduction was "shocking," and that it may be in violation of general international law principles. Mexico has protested the abduction of respondent through diplomatic notes, and the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch.22

We conclude, however, that respondent's abduction was not in violation of the Extradition Treaty between the United States and Mexico, and therefore the rule of Ker v. Illinois is fully applicable to this case. The fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States.

The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

Justice STEVENS, with whom Justice BLACKMUN and Justice O'CONNOR join, dissenting.

The Court correctly observes that this case raises a question of first impression. The case is unique for several reasons. It does not involve an ordinary abduction by a private kidnaper, or bounty hunter, as in Ker v. Illinois, 119 U.S. 436 (1886); nor does it involve the apprehension of an American fugitive who committed a crime in one State and sought asylum in another, as in Frisbie v. Collins, 342 U.S. 519 (1952). Rather, it involves this country's abduction of another country's citizen; it also involves a violation of the territorial integrity of that other country, with which this country has signed an extradition treaty.

A Mexican citizen was kidnaped in Mexico and charged with a crime committed in Mexico; his offense allegedly violated both Mexican and American law. Mexico has formally demanded on at least two separate occasions that he be returned to Mexico and has represented that he will be prosecuted and punished for his alleged offense.23 It is clear that Mexico's demand must be honored if this official abduction violated the 1978 Extradition Treaty between the United States and Mexico. In my opinion, a fair reading of the treaty in light of our decision in United States v. Rauscher, 119 U.S. 407 (1886), and applicable principles of international law, leads inexorably to the conclusion that the District Court and the Court of Appeals for the Ninth Circuit correctly construed that instrument.

The Extradition Treaty with Mexico is a comprehensive document containing 23 articles and an appendix listing the extraditable offenses covered by the agreement. The parties announced their purpose in the preamble: The two Governments desire "to cooperate more closely in the fight against crime and, to this end, to mutually render better assistance in matters of extradition."24 From the preamble, through the description of the parties' obligations with respect to offenses committed within as well as beyond the territory of a requesting party, the delineation of the procedures and evidentiary requirements for extradition, the special provisions for political offenses and capital punishment, and other details, the Treaty appears to have been designed to cover the entire subject of extradition. Thus, Article 22, entitled "Scope of Application" states that the "Treaty shall apply to offenses specified in Article 2 committed before and after this Treaty enters into force," and Article 2 directs that "extradition shall take place, subject to this Treaty, for willful acts which fall within any of [the extraditable offenses listed in] the clauses of the Appendix." Moreover, as noted by the Court, Article 9 expressly provides that neither Contracting Party is bound to deliver up its own nationals, although it may do so in its discretion, but if it does not do so, it "shall submit the case to its competent authorities for purposes of prosecution."

Petitioner's claim that the Treaty is not exclusive, but permits forcible governmental kidnaping, would transform these, and other, provisions into little more than verbiage. For example, provisions requiring "sufficient" evidence to grant extradition (Art. 3), withholding extradition for political or military offenses (Art. 5), withholding extradition when the person sought has already been tried (Art. 6), withholding extradition when the statute of limitations for the crime has lapsed (Art. 7), and granting the requested State discretion to refuse to extradite an individual who would face the death penalty in the requesting country (Art. 8), would serve little purpose if the requesting country could simply kidnap the person. As the Court of Appeals for the Ninth Circuit recognized in a related case, "each of these provisions would be utterly frustrated if a kidnapping were held to be a permissible course of governmental conduct." United States v. Verdugo-Urquidez, 939 F.2d 1341, 1349 (1991). In addition, all of these provisions "only make sense if they are understood as requiring each treaty signatory to comply with those procedures whenever it wishes to obtain jurisdiction over an individual who is located in another treaty nation." Id., at 1351.

It is true, as the Court notes, that there is no express promise by either party to refrain from forcible abductions in the territory of the other Nation. Relying on that omission, the Court, in effect, concludes that the Treaty merely creates an optional method of obtaining jurisdiction over alleged offenders, and that the parties silently reserved the right to resort to self help whenever they deem force more expeditious than legal process.25 If the United States, for
example, thought it more expedient to torture or simply to execute a person rather than to attempt extradition, these options would be equally available because they, too, were not explicitly prohibited by the Treaty.26 That, however, is a highly improbable interpretation of a consensual agreement, which on its face appears to have been intended to set forth comprehensive and exclusive rules concerning the subject of extradition.27 In my opinion, ``the manifest scope and object of the treaty itself,'' Rauscher, 119 U.S., at 422, plainly imply a mutual undertaking to respect the territorial integrity of the other contracting party. That opinion is confirmed by a consideration of the legal context in which the Treaty was negotiated.28

In Rauscher, the Court construed an extradition treaty that was far less comprehensive than the 1978 Treaty with Mexico. The 1842 Treaty with Great Britain determined the boundary between the United States and Canada, provided for the suppression of the African slave trade, and also contained one paragraph authorizing the extradition of fugitives ``in certain cases.'' In Article X, each Nation agreed to ``deliver up to justice all persons'' properly charged with any one of seven specific crimes, including murder.29 After Rauscher had been extradited for murder, he was charged with the lesser offense of inflicting cruel and unusual punishment on a member of the crew of a vessel on the high seas. Although the treaty did not purport to place any limit on the jurisdiction of the demanding State after acquiring custody of the fugitive, this Court held that he could not be tried for any offense other than murder.30 Thus, the treaty constituted the exclusive means by which the United States could obtain jurisdiction over a defendant within the territorial jurisdiction of Great Britain.

The Court noted that the Treaty included several specific provisions, such as the crimes for which one could be extradited, the process by which the extradition was to be carried out, and even the evidence that was to be produced, and concluded that ``the fair purpose of the treaty is, that the person shall be delivered up to be tried for that offense and for no other.'' Id. at 423. The Court reasoned that it did not make sense for the Treaty to provide such specifics only to have the person ``pass into the hands of the country which charges him with the offense, free from all the positive requirements and just implications of the treaty under which the transfer of his person takes place.'' Id. at 421. To interpret the Treaty in a contrary way would mean that a country could request extradition of a person for one of the seven crimes covered by the Treaty, and then try the person for another crime, such as a political crime, which was clearly not covered by the Treaty; this result, the Court concluded, was clearly contrary to the intent of the parties and the purpose of the Treaty. Rejecting an argument that the sole purpose of Article X was to provide a procedure for the transfer of an individual from the jurisdiction of one sovereign to another, the Court stated:

No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.

The opposite view has been attempted to be maintained in this country upon the ground that there is no express limitation in the treaty of the right of the country in which the offense was committed to try the person for the crime alone for which he was extradited, and that once being within the jurisdiction of that country, no matter by what contrivance or fraud or by what pretence of establishing a charge provided for by the extradition treaty he may have been brought within the jurisdiction, he is, when here, liable to be tried for any offense against the laws as though arrested here originally. This proposition of the absence of express restriction in the treaty of the right to try him for other offenses than that for which he was extradited, is met by the manifest scope and object of the treaty itself." Id. at 422.

Thus, the Extradition Treaty, as understood in the context of cases that have addressed similar issues, suffices to protect the defendant from prosecution despite the absence of any express language in the Treaty itself purporting to limit this Nation's power to prosecute a defendant over whom it had lawfully acquired jurisdiction.

Although the Court's conclusion in Rauscher was supported by a number of judicial precedents, the holdings in these cases were not nearly as uniform as the consensus of international opinion that condemns one Nation's violation of the territorial integrity of a friendly neighbor.31 It is shocking that a party to an extradition treaty might believe that it has secretly reserved the right to make seizures of citizens in the other party's territory.32 Justice Story found it shocking enough that the United States would attempt to justify an American seizure of a foreign vessel in a Spanish port:

But, even supposing, for a moment, that our laws had required an entry of the Apollon, in her transit, does it follow, that the power to arrest her was meant to be given, after she had passed into the exclusive territory of a foreign nation? We think not. It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations."

The Apollon, 9 Wheat. 362, 370-371 (1824) (emphasis added).33 The law of Nations, as understood by Justice Story in 1824, has not changed. Thus, a leading treatise explains:
A State must not perform acts of sovereignty in the territory of another State. It is a breach of International Law for a State to send its agents to the territory of another State to apprehend persons accused of having committed a crime. Apart from other satisfaction, the first duty of the offending State is to hand over the person in question to the State in whose territory he was apprehended.

1 Oppenheim's International Law 295 (H. Lauterpacht 8th ed. 1955). Commenting on the precise issue raised by this case, the chief reporter for the American Law Institute's Restatement of Foreign Relations used language reminiscent of Justice Story's characterization of an official seizure in a foreign jurisdiction as ``monstrous'':

When done without consent of the foreign government, abducting a person from a foreign country is a gross violation of international law and gross disrespect for a norm high in the opinion of mankind. It is a blatant violation of the territorial integrity of another state; it eviscerates the extradition system (established by a comprehensive network of treaties involving virtually all states).34

In the Rauscher case, the legal background that supported the decision to imply a covenant not to prosecute for an offense different from that for which extradition had been granted was far less clear than the rule against invading the territorial integrity of a treaty partner that supports Mexico's position in this case. If Rauscher was correctly decided--and I am convinced that it was--its rationale clearly dictates a comparable result in this case.35

A critical flaw pervades the Court's entire opinion. It fails to differentiate between the conduct of private citizens, which does not violate any treaty obligation, and conduct expressly authorized by the Executive Branch of the Government, which unquestionably constitutes a flagrant violation of international law.36 and in my opinion, also constitutes a breach of our treaty obligations. Thus, at the outset of its opinion, the Court states the issue as ``whether a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts.''' That, of course, is the question decided in Ker v. Illinois, 119 U.S. 436 (1886); it is not, however, the question presented for decision today. The importance of the distinction between a court's exercise of jurisdiction over either a person or property that has been wrongfully seized by a private citizen, or even by a state law enforcement agent, on the one hand, and the attempted exercise of jurisdiction predicated on a seizure by federal officers acting beyond the authority conferred by treaty, on the other hand, is explained by Justice Brandeis in his opinion for the Court in Cook v. United States, 288 U.S. 102 (1933). That case involved a construction of a prohibition era treaty with Great Britain that authorized American agents to board certain British vessels to ascertain whether they were engaged in importing alcoholic beverages. A British vessel was boarded 11 1/2 miles off the coast of Massachusetts, found to be carrying unmanifested alcoholic beverages, and taken into port. The Collector of Customs assessed a penalty which he attempted to collect by means of libels against both the cargo and the seized vessel.

The Court held that the seizure was not authorized by the treaty because it occurred more than 10 miles offshore.37 The Government argued that the illegality of the seizure was immaterial because, as in Ker, the Court's jurisdiction was supported by possession even if the seizure was wrongful. Justice Brandeis acknowledged that the argument would succeed if the seizure had been made by a private party without authority to act for the Government, but that a different rule prevails when the Government itself lacks the power to seize. Relying on Rauscher, and distinguishing Ker, he explained:

The objection is that the Government itself lacked power to seize, since by the Treaty it had imposed a territorial limitation upon its own authority. The Treaty fixes the conditions under which a ``vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with the applicable laws. Thereby, Great Britain agreed that adjudication may follow a rightful seizure. Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty. Compare United States v. Rauscher, 119 U.S. 407 (1886).

Cook v. United States, 288 U.S., at 120-122.

The same reasoning was employed by Justice Miller to explain why the holding in Rauscher did not apply to the Ker case. The arresting officer in Ker did not pretend to be acting in any official capacity when he kidnaped Ker. As Justice Miller noted, ``the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty or from the government of the United States.” Ker v. Illinois, 119 U.S. at 443. The exact opposite is true in this case, as it was in Cook.38

The Court's failure to differentiate between private abductions and official invasions of another sovereign's territory also accounts for its misplaced reliance on the 1935 proposal made by the Advisory Committee on Research in International Law. As the text of that proposal plainly states, it would have rejected the rule of the Ker case.39 The failure to adopt that recommendation does not speak to the issue the Court decides today. The Court's admittedly ``shocking'' disdain for customary and conventional international law principles, is thus entirely
unsupported by case law and commentary.

As the Court observes at the outset of its opinion, there is reason to believe that respondent participated in an especially brutal murder of an American law enforcement agent. That fact, if true, may explain the Executive's intense interest in punishing respondent in our courts. Such an explanation, however, provides no justification for disregarding the Rule of Law that this Court has a duty to uphold. That the Executive may wish to reinterpret the Treaty to allow for an action that the Treaty in no way authorizes should not influence this Court's interpretation. The way that we perform that duty in a case of this kind sets an example that other tribunals in other countries are sure to emulate.

The significance of this Court's precedents is illustrated by a recent decision of the Court of Appeal of the Republic of South Africa. Based largely on its understanding of the import of this Court's cases--including our decision in Ker v. Illinois--that court held that the prosecution of a defendant kidnaped by agents of South Africa in another country must be dismissed. S v. Ebrahim, S.Afr.L.Rep. (Apr.-June 1991). The Court of Appeal of South Africa--indeed, I suspect most courts throughout the civilized world--will be deeply disturbed by the ``monstrous'' decision the Court announces today. For every Nation that has an interest in preserving the Rule of Law is affected, directly or indirectly, by a decision of this character. As Thomas Paine warned, an ``avidity to punish is always dangerous to liberty'' because it leads a Nation ``to stretch, to misinterpret, and to misapply even the best of laws."

To counter that tendency, he reminds us:

He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.

I respectfully dissent.

Reading Assignment: International Law Anthology, pp. 245-54, 407-08 (on the Alvarez Case).

NOTES AND QUESTIONS
FOR CLASSROOM DISCUSSION

1. What is the Ker-Frisbee doctrine? Is the majority's use of the doctrine persuasive? Or does Justice Stevens' dissent persuade you that the governmental involvement in the abduction requires a different outcome from a case where private citizens are involved?

2. Did the respondent's lawyers give the Supreme Court a "yesable proposition"?

3. What effect did Mexico's formal protests have on the Court's opinion? How important are the formal protests to the dissent? How important should a foreign government's protests be in the case of an individual?

4. According to the Court, is the Extradition Treaty self-executing? How does that issue affect the Court's decision?

5. Having read excerpts from the amicus briefs submitted by Canada and Mexico, the majority opinion of the Supreme Court, the dissenting opinion, and the debate in the Anthology, how would you answer the specific question: "Did the United States violate its Extradition Treaty with Mexico?"

6. If the United States violated its Extradition Treaty with Mexico, did Alvarez have standing to "profit" from the violation by interposing the violation as a defense to the criminal case brought against him?

7. Can the United States Supreme Court ever absolve the United States government of a treaty violation? Can the supreme court of any country absolve its own government of a treaty violation?

8. In the previous Chapter, we studied treaty interpretation. Recall, as well, the article on the subject in the Anthology, pp. 121-24. Was the Supreme Court using international standards of treaty interpretation in the Alvarez Case, or was it using its own standards? Did it make a difference?

9. What purpose does the Extradition Treaty serve in light of the Court's decision? What changes may occur in the international relations between states as a result of this decision?

10. The Majority found that the U.S. did not violate the treaty, but leaves open the question of whether the U.S. violated international law. Can the president violate international law? If he did, would his acts be constitutional? What political reasons might the Court have had in deciding the way it did? Is the debate in the Anthology between Malvina Halberstam and Anthony D'Amato helpful here? Do you agree with D'Amato's attempt to find an alternative approach to resolve this matter without directly challenging the president's power in the realm of foreign affairs?

11. Do you agree with M. Cherif Bassiouni (Anthology p. 245) that there is a "threat to world order" in the practice of interstate abduction?

12. What if Mexico had told the United States, "No, we won't extradite Dr. Alvarez-Machain, and we won't
prosecute him here either!" Would the United States then be justified under the Extradition Treaty in abducting him?

FOOTNOTES Chapter 6

1 In its findings the commission took account of the difficulties faced by the accused, with respect not only to the swift and overpowering advance of American forces, but also to errors of his predecessors, weakness in organization, equipment, supply... training, communication, discipline and morale of his troops.' and 'the tactical situation, the character, training and capacity of staff officers and subordinate commanders, as well as the traits of character of his troops.' It nonetheless found that petitioner had not taken such measures to control his troops as were 'required by the circumstances.' We do not weigh the evidence. We merely hold that the charge sufficiently states a violation against the law of war, and that the commission, upon the facts found, could properly find petitioner guilty of such a violation.


4 2 THE COMPLETE WRITINGS OF THOMAS PAINE 588 (Foner, ed. 1945).


6 In re Kaine, 55 U.S. (14 How.) 103 (1852).

7 1 MOORE, EXTRADITION 550-51 (1922).

8 Letter from Secretary of State Root, dated June 12, 1908; quoted in 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 46 (1942).

9 While the Court is not persuaded that the methods and objectives of the IRA are in fact shared by a majority of the people in Ireland, or indeed by a majority of the Catholics in Northern Ireland, that circumstance is not dispositive of the issue of whether respondent, as a member of that group, is entitled to rely upon the political offense exception to the Treaty. Indeed, at the time of the American Revolution, there were a large number of colonists who not only desired a continued union with England, but regarded the thought of armed opposition to the Crown as both treasonous and abhorrent. Many loyalists suffered the consequences of these beliefs both before and after independence. Given the nature of that history it would indeed be anomalous for an American court to conclude that the absence of a political consensus for armed resistance in itself deprives such resistance of its political character.

10 [Editor's Note: The court here is referring, of course, to war crimes. Note the court's later reference to the Geneva Convention.]

11 The Court is not persuaded by the fact that the current political administration in the United States has strongly denounced terrorist acts and has stated that to refuse extradition in this case might jeopardize foreign relations. The Treaty vests the determination of the limits of the political offense exception in the courts and therefore reflects a congressional judgment that that decision not be made on the basis of what may be the current view of any one political administration.

12 Of course it is clear that where an offense otherwise political in character is committed for purely personal reasons such as personal vengeance or vindictiveness, that circumstance might well deprive the offense of its political character. In this case there is no suggestion that Doherty had any personal hostility to Captain Westmacott.
There is some suggestion that the physical attack upon one of the guards may have had some retaliatory aspects. However, on balance the Court is persuaded that that guard was assaulted because he sought to prevent the escape.


14 It is most clearly represented in In re Giovanni Gatti, [1947] Ann.Dig. 145 (No. 7) (France, Ct.App. of Grenoble).

15 Apparently, DEA officials had attempted to gain respondent's presence in the United States through informal negotiations with Mexican officials, but were unsuccessful. DEA officials then, through a contact in Mexico, offered to pay a reward and expenses in return for the delivery of respondent to the United States.

16 Although the opinion does not explain why the messenger failed to present the warrant to the proper authorities, commentators have suggested that the seizure of Ker in the aftermath of a revolution in Peru provided the messenger with no "proper authorities" to whom the warrant could be presented. See Kester, Some Myths of United States Extradition Law, 76 GEO.L.J. 1441, 1451 (1988).

17 In the words of Justice Miller, the "treaty was not called into operation, was not relied upon, was not made the pretext of arrest, and the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty or from the government of the United States." Ker v. Illinois, 119 U.S. 436, 443 (1886).

[A] case decided during the Prohibition Era in this country dealt with seizures claimed to have been in violation of a treaty entered into between the United States and Great Britain to assist the United States in off-shore enforcement of its prohibition laws, and to allow British passenger ships to carry liquor while in the waters of the United States. The history of the negotiations leading to the treaty is set forth in Cook v. United States, 288 U.S. 102, 111-118 (1933). In that case we held that the treaty provision for seizure of British vessels operating beyond the three-mile limit was intended to be exclusive, and that therefore liquor seized from a British vessel in violation of the treaty could not form the basis of a conviction.

18 Ker also was not a national of Peru, whereas respondent is a national of the country from which he was abducted. Respondent finds this difference to be immaterial. Tr. of Oral Arg. 26.

19 In correspondence between the United States and Mexico growing out of the 1905 Martinez incident, in which a Mexican national was abducted from Mexico and brought to the United States for trial, the Mexican charge wrote to the Secretary of State protesting that as Martinez' arrest was made outside of the procedures established in the extradition treaty, "the action pending against the man can not rest [on] any legal foundation." Letter of Balbino Davalos to Secretary of State reprinted in Papers Relating to the Foreign Relations of the United States, H.R.Doc. No. 1, 59th Cong., 2d Sess., pt. 2, p. 1121 (1906). The Secretary of State responded that the exact issue raised by the Martinez incident had been decided by Ker, and that the remedy open to the Mexican government, namely a request to the United States for extradition of Martinez' abductor had been granted by the United States. Letter of Robert Bacon to Mexican Charge, reprinted in Papers Relating to the Foreign Relations of the United States, H.R.Doc. No. 1, 59th Cong., 2d Sess., pt. 2, at 1121-1122 (1906).

Respondent and the Court of Appeals stress a statement made in 1881 by Secretary of State James Blaine to the governor of Texas to the effect that the extradition treaty in its form at that time did not authorize unconsented to abductions from Mexico. This misses the mark, however, for the Government's argument is not that the Treaty authorizes the abduction of respondent; but that the Treaty does not prohibit the abduction.

20 In Article 16 of the Draft Convention on Jurisdiction with Respect to Crime, the Advisory Committee of the Research in International Law proposed: "In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures." Harvard Research in International Law, 29
21 In the same category are the examples cited by respondent in which, after a forcible international abduction, the offended nation protested the abduction, and the abducting nation then returned the individual to the protesting nation. These may show the practice of nations under customary international law, but they are of little aid in construing the terms of an extradition treaty, or the authority of a court to later try an individual who has been so abducted. More to the point for our purposes are cases such as *The Ship Richmond*, 9 Cranch 102 (1815), and *The Merino*, 9 Wheat. 391 (1824), both of which hold that a seizure of a vessel in violation of international law does not affect the jurisdiction of a United States court to adjudicate rights in connection with the vessel. These cases are discussed, and distinguished, in *Cook v. United States*, 288 U.S., at 122.

22 The Mexican government has also requested from the United States the extradition of two individuals it suspects of having abducted respondent in Mexico, on charges of kidnapping. The advantage of the diplomatic approach to the resolution of difficulties between two sovereign nations, as opposed to unilateral action by the courts of one nation, is illustrated by the history of the negotiations leading to the treaty discussed in *Cook v. United States*, supra. The United States was interested in being able to search British vessels which hovered beyond the 3-mile limit and served as supply ships for motor launches which took intoxicating liquor from them into ports for further distribution in violation of prohibition laws. The United States initially proposed that both nations agree to searches of the other’s vessels beyond the 3-mile limit; Great Britain rejected such an approach, since it had no prohibition laws and therefore no problem with United States vessels hovering just beyond its territorial waters. The parties appeared to be at loggerheads; then this Court decided *Cunard Steamship Co. v. Mellon*, 262 U.S. 100, 43 S.Ct. 504, 67 L.Ed. 894 (1923), holding that our prohibition laws applied to foreign merchant vessels as well as domestic within the territorial waters of the United States, and that therefore the carrying of intoxicating liquors by foreign passenger ships violated those laws. A treaty was then successfully negotiated giving the United States the right to seize beyond the 3-mile limit (which it desired), and giving British passenger ships the right to bring liquor into United States waters so long as the liquor supply was sealed while in those waters (which Great Britain desired).

23 Mexico has already tried a number of members involved in the conspiracy that resulted in the murder of the DEA agent. For example, Rafael Caro-Quintero, a co-conspirator of Alvarez-Machain in this case, has already been imprisoned in Mexico on a 40-year sentence. See Brief for Lawyers Committee for Human Rights as Amicus Curiae 4.

24 In construing a treaty, the Court has the “responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.” *Air France v. Saks*, 470 U.S. 392, 399 (1985). It is difficult to see how an interpretation that encourages unilateral action could foster cooperation and mutual assistance—the stated goals of the Treaty. See also Presidential Letter of Transmittal attached to Senate Advice and Consent 3 (Treaty would “make a significant contribution to international cooperation in law enforcement”). Extradition treaties prevent international conflict by providing agreed-upon standards so that the parties may cooperate and avoid retaliatory invasions of territorial sovereignty. According to one writer, before extradition treaties became common, European States often granted asylum to fugitives from other States, with the result that “a sovereign could enforce the return of fugitives only by force of arms. . . . Extradition as an inducement to peaceful relations and friendly cooperation between states remained of little practical significance until after World War I.” M. Bassiouni, International Extradition and World Public Order 6 (1974). This same writer explained that such treaties further the purpose of international law, which is “designed to protect the sovereignty and territorial integrity of states, and [to] restrict impermissible state conduct.” 1 M. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE Ch. 5, s 2, p. 194 (2d rev. ed. 1987). The object of reducing conflict by promoting cooperation explains why extradition treaties do not prohibit informal consensual delivery of fugitives, but why they do prohibit state-sponsored abductions.

25 To make the point more starkly, the Court has, in effect, written into Article 9 a new provision, which says: “Notwithstanding paragraphs 1 and 2 of this Article, either Contracting Party can, without the consent of the other, abduct nationals from the territory of one Party to be tried in the territory of the other.”

26 It is ironic that the United States has attempted to justify its unilateral action based on the kidnaping, torture, and murder of a federal agent by authorizing the kidnaping of respondent, for which the American law
enforcement agents who participated have now been charged by Mexico. This goes to my earlier point that extradition treaties promote harmonious relations by providing for the orderly surrender of a person by one State to another, and without such treaties, resort to force often followed.

27 Mexico's understanding is that "[t]he extradition treaty governs comprehensively the delivery of all persons for trial in the requesting state 'for an offense committed outside the territory of the requesting Party.'" Brief for United Mexican States as Amicus Curiae 6. And Canada, with whom the United States also shares a large border and with whom the United States also has an extradition treaty, understands the treaty to be "the exclusive means for a requesting government to obtain . . . a removal" of a person from its territory, unless a Nation otherwise gives its consent. Brief for Government of Canada as Amicus Curiae 4.

28 The United States has offered no evidence from the negotiating record, ratification process, or later communications with Mexico to support the suggestion that a different understanding with Mexico was reached.

29 Article X of the Treaty provided: "It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed: and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper Executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive."

30 The doctrine defined by the Court in \textit{Rauscher}--that a person can be tried only for the crime for which he had been extradited--has come to be known as the "doctrine of specialty."


32 When Abraham Sofaer, Legal Adviser of the State Department, was questioned at a congressional hearing, he resisted the notion that such seizures were acceptable: "Can you imagine us going into Paris and seizing some person we regard as a terrorist . . .? How would we feel if some foreign nation--let us take the United Kingdom--came over here and seized some terrorist suspect in New York City, or Boston, or Philadelphia, because we refused through the normal channels of international, legal communications, to extradite that individual?" Bill To Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad: Hearing before the Subcommittee on Security and Terrorism of the Senate Committee on the Judiciary, 99th Cong., 1st Sess., 63 (1985).

33 Justice Story's opinion continued: "The arrest of the offending vessel must, therefore, be restrained to places where our jurisdiction is complete, to our own waters, or to the ocean, the common highway of all nations. It is said, that there is a revenue jurisdiction, which is distinct from the ordinary maritime jurisdiction over waters within the range of a common shot from our shores. And the provisions in the Collection Act of 1799, which authorize a visitation of vessels within four leagues of our coasts, are referred to in proof of the assertion. But where is that right of visitation to be exercised? In a foreign territory, in the exclusive jurisdiction of another sovereign? Certainly not; for the very terms of the act confine it to the ocean, where all nations have a common right, and exercise a common sovereignty. And over what vessels is this right of visitation to be exercised? By the very words of the act, over our own vessels, and over foreign vessels bound to our ports, and over no others. To have gone
beyond this, would have been an usurpation of exclusive sovereignty on the ocean, and an exercise of an universal right of search, a right which has never yet been acknowledged by other nations, and would be resisted by none with more pertinacity than by the American." The Apollon, 9 Wheat. at 371-373.


35 Just as Rauscher had standing to raise the treaty violation issue, respondent may raise a comparable issue in this case. Certainly, if an individual who is not a party to an agreement between the United States and another country is permitted to assert the rights of that country in our courts, as is true in the specialty cases, then the same rule must apply to the individual who has been a victim of this country's breach of an extradition treaty and who wishes to assert the rights of that country in our courts after that country has already registered its protest.

36 "In the international legal order, treaties are concluded by states against a background of customary international law. Norms of customary international law specify the circumstances in which the failure of one party to fulfill its treaty obligations will permit the other to rescind the treaty, retaliate, or take other steps." Vazquez, Treaty-Based Rights and Remedies of Individuals, 92 COLUM. L. REV. 301, 375 (1992).

37 The treaty provided that the boarding rights could not be exercised at a greater distance from the coast than the vessel could traverse in one hour, and the seized vessel's speed did not exceed 10 miles an hour. Cook v. United States, 288 U.S. 102 (1933).

38 The letter written by Secretary of State Blaine to the Governor of Texas in 1881 unequivocally disapproved of abductions by either party to an extradition treaty. In 1984, Secretary of State Schultz expressed the same opinion about an authorized kidnapping of a Canadian national. He remarked that, in view of the extradition treaty between the United States and Canada, it was understandable that Canada was "outraged" by the kidnapping and considered it to be "a violation of the treaty and of international law, as well as an affront to its sovereignty."

39 Article 16 of the Draft provides: "In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures." Harvard Research in International Law, Draft Convention on Jurisdiction with Respect to Crime, 29 AJIL 435, 623 (Supp.1935).

40 As Justice Brandeis so wisely urged: "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting).

41 Certainly, the Executive's view has changed over time. At one point, the Office of Legal Counsel advised the Administration that such seizures were contrary to international law because they compromised the territorial integrity of the other Nation and were only to be undertaken with the consent of that Nation. 4B Op.Off. Legal Counsel 549, 556 (1980). More recently, that opinion was revised and the new opinion concluded that the President did have the authority to override customary international law. Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong., 1st Sess., 45 (1989) (statement of William P. Barr, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice).

The South African court agreed with appellant that an `abduction represents a violation of the applicable rules of international law, that these rules are part of [South African] law, and that this violation of the law deprives the Court. . . of its competence to hear [appellant's] case. . . .'' S.Afr.L.Rep., at 8-9.

2 THE COMPLETE WRITINGS OF THOMAS PAINE 588 (P. Foner ed. 1945).

Ibid.