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Killing Egyptian Prisoners of War: Does the Phrase "Lest We Forget" Apply to Israeli War Criminals?

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Killing Egyptian Prisoners of War: Does the Phrase "Lest We Forget" Apply to Israeli War Criminals?

Scott R. Morris*

ABSTRACT

This Article offers an analysis of Israel's response, or lack thereof, to the 1995 admission by Israeli war hero General Ayre Biro that he participated in the slaughter of forty-nine unarmed Egyptian prisoners of war in 1956 during Israel's struggle for independence. While in the past Israel has actively pursued the prosecution of war criminals who committed atrocities against its own people under the battle cry "lest we forget," the country has recently shown a strong reluctance to take action against General Biro for his execution of Egyptian prisoners of war. Specifically, Israel reasons that its statute of limitations for murder precludes the prosecution of General Biro in Israel. In this Article, the author argues that General Biro's actions as well as Israel's protective stance toward General Biro constitute violations of international law. Therefore, he asserts, Israel has three legal options: (1) turn over General Biro (voluntarily or through an extradition request) to a mutually agreeable nation

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for trial; (2) try him by a military commission (if recognized by Israeli law); or (3) hand General Biro over to an international tribunal. Upon evaluating the strengths and weaknesses of these options, the author concludes that Israel should refer this case to the United Nations for investigation by an independent prosecutor. This recommended plan of action, he argues, both allows Israel to meet its obligations under international law and prevents Egypt from acquiring personal jurisdiction over General Biro.

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"For a commander to disembarass his army of the presence and charge of prisoners of war by taking their lives would be a barbarity which would be denounced by all civilized nations."¹

I. INTRODUCTION

In early August 1995, Israeli journalists from the weekly magazine *Yerushalayim* approached retired Israeli General Arye Biro and asked him to discuss his experiences during Israel's struggle for independence. The reporters approached General Biro because he was an Auschwitz survivor and was one of only a handful of surviving warriors who had fought in every Israeli war.² During this interview, these reporters asked him whether a recent historian's report that he had executed Egyptian prisoners of war during the 1956 war was true.³ To the reporters' shock and amazement, General Biro then bluntly recounted graphic details of the slaughter of forty-nine unarmed Egyptians his unit had captured in October, 1956.

This Article begins in Part II with a review of the facts surrounding the recent disclosure by General Arye Biro regarding the killing of the Egyptian prisoners of war in 1956. Part III looks at whether the captured Egyptians were entitled to any protected status under international law. Parts IV thru VII evaluate Israel's response to this incident and its legal obligations under international law. Part VIII provides an overview of Egypt's legal options for judicial action against General Biro, absent Israel's compliance with its international law obligations. Finally, this Article concludes that Israel should refer this matter to the United Nations for investigation by an independent prosecutor.

1. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 791 (2d ed. 1920).

2. See Barton Gellman, *Debate Tainting Image of Purity Wrenches Israelis; A More Open Society Takes Up Killing of POWs During Wars*, WASH. POST, Aug. 19, 1995, at A1 [hereinafter Gellman].

3. *Id.* For a full account of the events surrounding and occurring during the crisis, see S.L.A. MARSHALL, *SINAI VICTORY: COMMAND DECISIONS IN HISTORY'S SHORTEST WAR, ISRAEL'S HUNDRED-HOUR CONQUEST OF EGYPT EAST OF SUEZ, AUTUMN, 1956* (1958); ROBERT HENRIQUES, *ONE HUNDRED HOURS TO SUEZ: AN ACCOUNT OF ISRAEL'S CAMPAIGN IN THE SINAI PENINSULA* (1957).

II. FACTS: THE KILLING OF EGYPTIAN PRISONERS OF WAR AND ISRAELI AND EGYPTIAN RESPONSES

A. *The Killing of Forty-Nine Egyptian POWs*

On August 4, 1995, the newspaper *Ma'ariv* printed the interview with General Biro.⁴ In the interview, General Biro recounted that, as a young company commander, his unit parachuted more than 100 miles behind enemy lines into the Mitla Pass in October, 1956.⁵ The Mitla Pass was one of two main supply routes leading from "central Sinai to the Suez canal."⁶ His unit captured dozens of "scared, broken, exhausted" Egyptian prisoners.⁷ General Biro recalled, "We were hundreds of kilometres behind enemy lines. Egyptian planes were flying over us unhindered. Egyptian troops were pouring into the area, and the prisoners were shouting, 'Just you wait, the Egyptian army will slaughter you.'"⁸

General Biro had received orders to move to Ras Sudar and prepare for another parachute insertion. He did not have enough soldiers to guard or move the prisoners of war (POWs), and he feared that they would compromise his position.⁹ "We couldn't take care of anything else before we got done with them."¹⁰ Therefore, he "shot the prisoners of war in the Mitla Pass . . . [as he] did not have time to deal with POWs. So whoever we

4. Doug Struck, *Israeli Military's "Purity of Arms" Image Attacked*, SACRAMENTO BEE, Sept. 2, 1995, at A15.

5. Gellman, *supra* note 2; see also Barton Gellman, *Israel Tries to Come to Terms With Reported War Atrocities*, HOUSTON CHRONICLE, Aug. 20, 1995, at A33 [hereinafter Gellman 2].

For a detailed discussion of Operation Kadesh, see ARIEL SHARON, WARRIOR: THE AUTOBIOGRAPHY OF ARIEL SHARON 141-53 (1989). The mission of Captain Biro's battalion was to capture and hold the pass until relieved by advancing Israeli mechanized forces. *Id.* at 142.

6. Eric Silver, *Israelis Admit War Crimes; Six Day War Atrocities: Veteran's Account of Captives in Egyptian Uniforms Being Shot in the Desert Adds Fuel to Scandal: "A Prisoner was Given a Shovel and Started to Dig. Then he was Fired At,"* INDEPENDENT, Aug. 18, 1995, at 13.

7. Struck, *supra* note 4.

8. Silver, *supra* note 6. Newspaper accounts described these 49 prisoners differently. Some say the prisoners were civilian contractors working near a quarry. See Marjorie Miller, *New POW Allegations Rock Israel Army*, L.A. TIMES, Aug. 17, 1995, at A8 (calling the victims civilian workers); David Lamb, *Egypt Toughens Position on POW Probe*, HOUSTON CHRONICLE, Sept. 8, 1995, at A20. Other newspaper stories identify the prisoners as Egyptian soldiers. See Gellman 2, *supra* note 5 (identifying the victims as enemy soldiers).

9. Silver, *supra* note 6.

10. Ohad Gozani, *Israelis Tell of Massacre*, DAILY TELEGRAPH, Aug. 16, 1995, at 8.

managed to screw, we screwed.”¹¹ He and his lieutenant did this by having the prisoners lie face down in the sand. “I had a Karl Gustov I had taken from the Egyptians. My officer had an Uzi. The Egyptian prisoners were sitting there with their faces turned to us. We turned to them with our loaded guns and shot them. Magazine after magazine. They didn’t get a chance to react.”¹² “They didn’t cry out.”¹³ “One escaped with bullets in the chest and in the leg, but came back on all fours because he was thirsty.”¹⁴ His solution towards this wounded prisoner of war was simple, “I’m not responsible for the enemy’s stupidity, and surely he very quickly found himself together with his friends [dead].”¹⁵

When asked about who gave the order to kill the prisoners, General Biro replied that his commander “didn’t give an explicit instruction, and I didn’t ask for one. Only a fool can ask his commander for permission to do what he has to do.”¹⁶ General Biro then went on to boast about an interrogation technique he used on three thirsty Egyptian POWs. His intelligence officer tried to question these prisoners, but their only response was “Water, water, water.”¹⁷ General Biro then recalled:

I got tired of all this nonsense. I took my water canteen, opened it, and poured the contents on the ground slowly, slowly in front of the Egyptian officer’s face. . . . One broke down and talked. I closed the canteen, put it back in my belt, pulled my gun out, and gave each of the three a bullet in the head.¹⁸

On another occasion, he admitted ordering his soldiers to kill a truckload of Egyptian soldiers “and irregulars” that were moving towards Ras-al-Sudr, an oil port on the Gulf of Suez.¹⁹ “Six survived the initial bursts of gunfire. . . . They later went to sleep

11. Gellman, *supra* note 2; see also *Try War Criminals, Egypt Urges Israel*, CHI. TRIB., Aug. 23, 1995, at 15A.

12. Serge Schmemmann, *After a General Tells of Killing P.O.W.’s in 1956, Israelis Argue Over Ethics of War*, N.Y. TIMES, Aug. 21, 1995, at A5.

13. Silver, *supra* note 6.

14. See Gozani, *supra* note 10; Marjorie Miller, *Israel to Probe Deaths of Egyptian POWs in ‘56; Sinai: At Cairo’s Request, Defense Officials Will Investigate General’s Claim That Scores Were Shot*, L.A. TIMES, Aug. 16, 1995, at A4 [hereinafter Miller, *Israel to Probe Deaths*].

15. Miller, *Israel to Probe Deaths*, *supra* note 14; see also Gozani, *supra* note 10.

16. Miller, *Israel to Probe Deaths*, *supra* note 14.

17. Struck, *supra* note 4.

18. *Id.* Another account stated that General Biro taunted the thirsty Egyptian prisoners “by pouring water from his canteen into the sand” and then killing them with a captured Egyptian automatic weapon. Gellman 2, *supra* note 5; Serge Schmemmann, *Israel Won’t be Tried for Executing POWs; Auschwitz Survivor Admits Atrocities*, HOUSTON CHRONICLE, Aug. 21, 1995, at A9.

19. Gozani, *supra* note 10.

with the rest. Blood was coming out of every hole in the flatbed truck and in huge quantities."²⁰ In all, fifty-six Egyptians died in the engagement.

General Biro has no remorse for the killings. His only remorse was his admitted sloppiness in its execution. "After all, it was really my mistake. I mean, not the shooting of the prisoners, but the fact that I forgot to unchain their hands after they were killed and before we cleared off."²¹

B. Egyptian and Israeli Government Responses

When Egyptian officials heard of this news report on August 16, 1995 they immediately demanded an explanation. In a less reserved manner, the Egyptian populace reacted with shock to the disclosures and demanded an immediate investigation. "Islamist and leftist opposition groups [began] pressing the Egyptian government to cut relations with Israel over the POW allegations."²² In recalcitrant response, General Biro warned he could implicate several other key Israeli leaders "if they try to throw me to the wolves."²³ Potentially implicated by his threats were his commanders during this period, Mr. Rafael Eitan and Mr. Ariel Sharon, both currently serving in the Israeli Parliament. After the 1956 war, Mr. Eitan, General Biro's battalion commander during this incident, rose to become Israel's chief of staff, while Mr. Sharon (his brigade commander) later served as Israel's Defense Minister.²⁴

Following General Biro's disclosure, several other witnesses and scholars raised allegations of similar atrocities committed by Israeli soldiers during the 1956 and 1967 wars.²⁵ These

20. *Id.*

21. Miller, *Israel to Probe Deaths*, *supra* note 14.

22. Samia Nakhoul, *Israel and Egypt Fail to Resolve POW Dispute*, Reuters, Sept. 5, 1995, available in LEXIS, News Library, CURNWS File.

23. Gellman 2, *supra* note 5.

24. *Israel in Turmoil Over POW Deaths; Reports of '67 Slayings Follow Ex-General's Comment About '56 Slaughter*, DALLAS MORNING NEWS, Aug. 17, 1995, at 18A [hereinafter *Israel in Turmoil Over POW Deaths*].

This is not the first time Mr. Eitan has been implicated in war crimes. In September 1982, Christian Lebanese forces under the command of then Israeli Chief of Staff Lieutenant General Eitan massacred 300 civilians in Palestinian refugee camps in West Beirut. See Weston D. Burnett, *Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra*, 107 MIL. L. REV. 71, 174-75 (1985) (concluding that Mr. Eitan committed a grave breach under a command responsibility theory).

25. See, e.g., Gellman, *supra* note 2; Miller, *supra* note 8 (Three hundred Egyptian POWs allegedly were shot at El Arish in the Sinai in 1967 by a unit led by current housing minister Binyamin Ben Eliezer.); *Israel in Turmoil Over POW Deaths*, *supra* note 24; *POW Killings: Israel Says Charges Come Too Late for*

allegations also reached the top of the Israel government. For example, in 1967, Prime Minister Yitzhak Rabin was then the Army's Chief of Staff.²⁶ It was during this time period that an Israeli historian and a reporter alleged that the Army was fully aware of these atrocities, but suppressed their disclosure.

Apparently, the existence of these alleged atrocities were known by the Israeli military and perhaps even the Egyptian government.²⁷ The Israeli military, however, actively suppressed their existence to maintain the "purity of arms" image portrayed to both Israeli citizens and the world as a whole.²⁸ One reporter alleged that he discovered these atrocities and "had tried to publish accounts of the killings for decades but was prohibited by

Prosecution; 20-Year Limit: But a Justice Official Calls the Wartime Atrocities "Unlawful and Intolerable," ATLANTA J. & CONST., Aug. 29, 1995, at A4 [hereinafter *POW KILLINGS*] (explaining that military historian Aryeh Yitzhaki believes Israeli soldiers killed 1,000 Egyptian POWs in the 1967 war); Struck, *supra* note 4 (explaining that former member of Israel Parliament and spokesman for the Israel Army during the 1967 war, Michael Bar-Zohar, recounted observing three Egyptian POWs being stabbed to death by two Israeli Army cooks, as well as other incidents of maltreatment of POWs); Silver, *supra* note 6 (On June 7, 1967, Gabriel Brun, a Jerusalem journalist alleged he saw the actual execution of five Egyptian POWs with their hands tied behind their back and heard the execution of between 120-150 more. These atrocities allegedly occurred at El Arish airfield in the Sinai Desert.). One author reports that the El Arish incident began after some of the prisoners opened fire upon and killed two Israeli soldiers after the prisoners surrendered. See *Israelis Killed Prisoners in '67 War, Historians Say*, TORONTO STAR, Aug. 17, 1995, at A19 [hereinafter *Israelis Killed Prisoners*].

While the atrocities cited are horrible and inexcusable, there was also another, more human side of the Arab-Israeli conflict which occurred during the same time period these crimes were committed. During the 1956 war, Egyptian POWs were taken by Israeli soldiers *and ordinary citizens*, provided meals in Israeli homes and provided tours of Israel. See Carl Alpert, *When Israelis Treated Egyptians POWs as . . . Tourists*, JERUSALEM POST, Oct. 1, 1995, at 7, available in LEXIS, News Library, CURNWS File.

26. *POW KILLINGS*, *supra* note 25.

27. For an article stating Egypt knew of these atrocities, see Geneive Abdo, *Killings of Arab POWs Called War Crimes Israelis Slowly Admitting Role but Refuse to Pay for Massacres in '56, '67 Conflicts*, DALLAS MORNING NEWS, Sept. 16, 1995, at 11A. Egypt reportedly knew of the killings but intentionally chose to ignore the reports. The purported reason for ignoring reports was "fear of arousing a rebellion within the army against Egypt's peace treaty with Israel." Youssef M. Ibrahim, *Sept. 17-23: Mass Graves; Egypt Says Israel Shot P.O.W.'s in '67 War*, N.Y. TIMES, Sept. 24, 1995, § 4, at 2. In 1960, an Egyptian physician published a book alleging he observed Israeli massacres of Egyptian POWs. The Egyptian government banned the book. Abdo, *supra*.

Israeli historian Aryeh Yitzhaki worked for the Army's history department after the Six Day War. After the war, he collected dozens of statements from Israeli soldiers who allegedly admitted killing Egyptian POWs. Mr. Yitzhaki alleges that upon reporting these incidents to his superiors, his report was locked away in a safe. *Israel Reportedly Killed POWs in '67 War*, WASH. POST, Aug. 17, 1995, at A30.

28. *Israel in Turmoil Over POW Deaths*, *supra* note 24; Gellman, *supra* note 2; *Israelis Killed Prisoners*, *supra* note 25.

government censors."²⁹ Atrocities such as these strike at the heart of the Israeli Defense Force's (IDF) long-held belief of moral superiority to other armed forces.³⁰

The Israeli government initially dismissed the allegations under the premise that both sides had committed atrocities and an investigation would lead to opening Pandora's box.³¹ On August 20, 1995, the Israel Cabinet publicly stated that they did not intend to punish General Biro for his acts, citing as authority Israel's twenty-year statute of limitations.³² This position was formalized on August 28, 1995, when the Israeli Attorney General admitted that the alleged acts were "unlawful and intolerable acts," yet opined that Israel's twenty-year statute of limitations had run on these potential murder charges.³³ The Attorney General Michael Ben-Yair stated Israel's war crimes laws, which have no statute of limitations, relate only to Nazi war crimes, their collaborators, and the crime of genocide.³⁴ Finally, in response to newspaper criticisms on the matter, the Attorney General noted that Israel was "not a signatory to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes

29. Miller, *Israel to Probe Deaths*, *supra* note 14.

30. Miller, *supra* note 8.

31. David Makovsky, *Rabin: No One's Interest Served by Probing POW Killings*, JERUSALEM POST, Aug. 21, 1995, at 12, available in LEXIS, News Library, CURNWS File; *The Killing of Prisoners*, JERUSALEM POST, Aug. 21, 1995, at 6, available in LEXIS, News Library, CURNWS File; see also Mubarak: *Israeli Soldiers Should Stand Trial for Killing POWs*, JERUSALEM POST, Aug. 23, 1995, at 12, available in LEXIS, News Library, CURNWS File [hereinafter *Mubarak*].

It should be noted that Israel historians did, in fact, identify numerous incidents of Egyptian war crimes. For example, the same historian who raised the killing of 49 POWs by General Biro also revealed that at least 80 Israel POWs were murdered by their Egyptian captors in the 1973 war. See *Israel Calls on Egypt to Condemn War "Lies" Against Ambassador*, Agence France Presse, Aug. 31, 1995, available in LEXIS, News Library, CURNWS File; see also Abraham Rabinovich, *People Who Live in Glass Houses*, JERUSALEM POST, Sept. 8, 1995, at 6, available in LEXIS, News Library, CURNWS File (citing numerous incidences of Egyptian soldiers killing prisoners); Lisa Beyer, *A Soldier's Confession; Admitting to Killing Egyptian POWs in 1956, a Veteran Stirs a Nation's Conscience*, TIME MAG., Aug. 28, 1995, at 21 (citing several instances where both Israeli and Egyptian soldiers are alleged to have murdered POWs).

32. Israeli Criminal Procedure Law (Consolidated version), 5742-1982, ch. 1, § 9; see also Schmemmann, *supra* note 18, and *Israel Can't Prosecute for POW Killings*, WASH. TIMES, Aug. 29, 1995, at A9.

33. MINISTRY OF JUSTICE, STATE OF ISRAEL, DECISION OF THE ATTORNEY GENERAL (Aug. 28, 1995) [hereinafter DECISION OF THE ATTORNEY GENERAL]; A-G; *No Basis for Trials in Alleged POW Killings*, JERUSALEM POST, Aug. 29, 1995, at 1, available in LEXIS, News Library, CURNWS File [hereinafter A-G].

34. A-G, *supra* note 33.

Against Humanity of 1968.”³⁵ While expressing regret over the alleged incidents, he concluded Israeli officials could take no legal action against General Biro or any other person involved in the murder of POWs.

Egypt's response to these disclosures was restrained. Initially, they chose to handle the matter “quietly through diplomatic channels because [the allegations] cannot be resolved through the media.”³⁶ Egypt steadfastly maintained, however, that war crimes are not subject to statute of limitations.³⁷ It was not until August 14, 1995, that Egypt officially responded to the news reports. On this date, Egyptian Foreign Minister Amr Moussa disclosed that his offices had requested a report of the alleged killings.³⁸ Opposition newspapers in Egypt, however, began urging retribution against Israel.³⁹ On August 19, 1995, an Egyptian lawyer stated he was suing Israel in a Cairo court seeking \$100 million dollars in compensation for the families of executed POWs.⁴⁰ By August 22, 1995, under growing public pressure, Egyptian President Hosni Mubarak called for an investigation of the alleged offenses and punishment for any former soldier who may have committed such atrocities.⁴¹ The Egyptian government was concerned about ensuring that the quarrel did not escalate.⁴² Yet, Israel refused to open a formal inquiry into the alleged atrocities.⁴³

35. *Id.* Apparently, the Attorney General is referring to G.A. Res. 2391 which states that statutes of limitations are not applicable to war crimes. See *infra* notes 137, 138 and accompanying text.

36. *Sao Tome E principe; Egypt's Ambassador on Handling of POW Issue*, BBC Summary of World Broadcasts, Sept. 2, 1995, (Source: Voice of the Arabs, Cairo, in Arabic 0515 gmt 1 Sep 95), available in LEXIS, News Library, CURNWS File (telephone interview of the Egyptian ambassador to Israel, Muhammad Basyuni, by Muhammad al-Aswad in Cairo).

37. *Id.*

38. Mubarak, *supra* note 31.

39. *Egypt Outraged by Reported POW Killings*, ATLANTA J. & CONST., Aug. 19, 1995, at A3.

40. *Egyptian Lawyer Threatens to Sue Israel for \$100m. Over Alleged Killings*, JERUSALEM POST, Aug. 20, 1995, at 2, available in LEXIS, News Library, CURNWS File.

41. *Basslouny: We Have Not Yet Received Report on POW Killings*, JERUSALEM POST, Aug. 24, 1995, at 12, available in LEXIS, News Library, CURNWS File; *Kurdish Conflict; Egyptian Papers Criticize Israel Over POW Issue, Demand Damages and Trials*, BBC Summary of World Broadcasts, Aug. 30, 1995 (Source: MENA news agency, Cairo, in Arabic 0605 gmt 29 Aug 95), available in LEXIS, News Library, CURNWS File; see also Nakhoul, *supra* note 22.

42. Mubarak, *supra* note 31.

43. See *Killing of Egyptian POWs Creates Tension, Anti-Israeli Feelings*, Compass Newswire, Sept. 1, 1995, available in LEXIS, News Library, CURNWS File.

On August 31, 1995, President Mubarak used public diplomacy to raise the issue to the international community. During an interview with German radio and television, he stated his government's position. Essentially, President Mubarak did not criticize Israel; rather, he condemned the potential individual perpetrators of the crimes. President Mubarak demanded "an investigation, at least to inform the public."⁴⁴ He also discussed the incident with an Israeli television journalist at which time he again requested Israel to investigate the incident.⁴⁵ To support its request for an investigation, the Egyptian government submitted three matters to the Israeli Deputy Foreign Minister when he visited Cairo on September 4, 1995. First, Egypt presented a list of names of Israeli officers and soldiers suspected of committing the atrocities. Second, Egypt proposed a combined commission of inquiry into the matter. Specifically, it demanded "that Israel hold a serious, fair and just inquiry based on facts into the issue of the killing[s]. . . ." ⁴⁶ Third, Egypt demanded that Israel apologize for the incidents.⁴⁷

Israel responded to Egypt's demands by stating that "it would provide Egypt with full information on Egyptian POWs killed by Israeli soldiers in 1956 and 1967, but ruled out any official apology or the prosecution of those responsible."⁴⁸ This response was unacceptable to Egypt. Consequently, Egyptian Foreign Minister Amr Moussa publicly repeated Egypt's demands. "Egypt's position is clear: It calls for an immediate investigation into this grave matter, especially when there is an unequivocal (Israeli) confession to the killings."⁴⁹ Israeli Deputy Foreign

44. *Sao Tome E Principe; Mubarak Interviewed on POW Issue, Iraq, Bosnia, Sudan, Elections*, BBC Summary of World Broadcasts, Sept. 2, 1995 (Source: MENA news agency, Cairo, in Arabic 1330 gmt 31 Aug 95), available in LEXIS, News Library, CURNWS File.

45. *Nigeria; Mubarak Speaks to Israeli TV on POW Issue, Peace Process, Iraq*, BBC Summary of World Broadcasts, Sept. 4, 1995 (Source: Channel 2 TV, Jerusalem, in Hebrew 1700 gmt 1 Sep 95), available in LEXIS, News Library, CURNWS File.

46. *Baz Demands that Israel Should Hold Inquiry into POW Affair*, BBC Summary of World Broadcasts, Sept. 9, 1995 (Source: Arab Republic of Egypt Radio, Cairo, in Arabic 1730 gmt 6 Sep 95), available in LEXIS, News Library, CURNWS File.

47. *Report: Egyptians to Present List of IDF Men Who Allegedly Murdered POWs*, JERUSALEM POST, Sept. 3, 1995, at 12, available in LEXIS, News Library, CURNWS File [hereinafter *Egyptians to Present List*].

48. Lee Keath, *Israel Rules Out Apology for Killings of Egyptian POWs*, Agence France Presse, Sept. 4, 1995, available in LEXIS, News Library, CURNWS File.

49. Bahaa Elkoussy, *Egypt, Israel Diplomats Discuss POWs*, UPI, Sept. 5, 1995, available in LEXIS, News Library, CURNWS File; see also Nakhoul, *supra* note 22; Mariam Sami, *Egypt, Israel Meet on Killing of Egyptian POWs*, AP, Sept. 5, 1995, available in LEXIS, News Library, CURNWS File.

Minister Elie Dayan continued to insist that the killings were "the acts of individuals and even in international law there is a time limitation" for punishing war criminals.⁵⁰ According to him, the twenty-year statute of limitations "is not a special Israeli law, it is an international principle because after forty years people will say: 'we can't find any witnesses now, we can't find any proof.'"⁵¹ An Egyptian Deputy Foreign Minister countered, asserting the matter was not closed:

These are war crimes and Israel must adopt the same attitude and logic as it does in demanding the trials of former (Nazi) war criminals.

We believe that Israel's commitment to the conventions it has signed, particularly the Third Geneva Convention (on POWs), should be greater than its national law otherwise there won't be any international law.⁵²

Under increasing pressure, both domestically and by Egypt,⁵³ Israel's ministry of defense reported that it was drafting an amendment to exempt all war crimes (grave breaches) from the statute of limitations. This amendment, however, would not apply retroactively.⁵⁴ Israel also agreed to provide compensation to the families of victims of the incident "out of . . . humanitarian considerations."⁵⁵ It nevertheless continued to refuse to investigate the matter, claiming too much time had elapsed to interview witnesses and gather proof.⁵⁶

The Egyptian government and public reacted bitterly to the Israeli response—it was too little, too late. Egypt's Deputy Foreign

50. *Israel, Egypt Clash Over POW Massacres*, Agence France Presse, Sept. 5, 1995, available in LEXIS, News Library, CURNWS File [hereinafter *Israel, Egypt Clash*].

51. *Id.*

52. *Id.*

53. David Lamb, *Egypt Toughens Position on POW Probe*, HOUSTON CHRONICLE, Sept. 8, 1995, at A20 [hereinafter *Lamb, Egypt Toughens Position*]; David Lamb, *Egypt Toughens Stance on POW Deaths; Mideast: Cairo Presses Israel for Probe of Alleged Slayings in 1956 and 1967. Some Fear Revelations Could Damage Relations*, L.A. TIMES, Sept. 8, 1995, at A10 [hereinafter *Lamb, Egypt Toughens Stance*].

54. *Israel to Amend Statute of Limitations on War Crimes, But Not Retroactively*, BBC Summary of World Broadcasts, Sept. 9, 1995 (Source: Voice of Israel, Jerusalem, in Hebrew 0500 gmt 8 Sep 95), available in LEXIS, News Library, CURNWS File.

55. *Israel Ready to Compensate Families of Egyptian POWs*, AP Worldstream, Sept. 6, 1995, available in LEXIS, News Library, APINTL File; see also *Israel May Compensate Egypt for POWs Official*, Reuters, Nov. 14, 1995, available in LEXIS, News Library, CURNWS File; *Israel Ready to Pay Compensation to Egyptian POW Families: Envoy*, Agence France Presse, Sept. 7, 1995, available in LEXIS, News Library, CURNWS File; Lamb, *Egypt Toughens Position*, *supra* note 53.

56. See Lamb, *Egypt Toughens Position*, *supra* note 53.

Minister, Dr. Usumah al-Baz, responded by reasserting "that international law provides special protections for POWs; this makes crimes against them an issue not subject to the statute of limitations."⁵⁷ The Egyptian public acted less diplomatically. On September 20, 1995, the furor over these alleged incidents resulted in violence in Cairo. Egypt's Lawyers Human Rights Committee, which is dominated by Islamic fundamentalists, organized the rally. It was held to protest the Egyptian government's handling of the POWs issue. During the rally, a man in the crowd accused the speaker of lying about Israelis murdering Egyptian POWs.⁵⁸ In response, the crowd beat and kicked him as the crowd accused him of being an Israeli spy.⁵⁹ "Egyptians are . . . angry at their own government for not having taken action, or investigated this matter, or pressed for compensation."⁶⁰

Meanwhile, the situation between the nations intensified after an Egyptian expedition discovered two mass graves in the Sinai. These shallow graves, containing thirty to sixty skeletal remains, were discovered near an air base outside El-Arish.⁶¹ Of significance, the location of these bodies corroborated earlier reports by former Egyptian POWs and nomadic Bedouins who claimed that Israeli soldiers murdered Egyptians they captured on June 6 and 7, 1967, near the El-Arish air base during the Six Day War.⁶²

C. Egypt's Legal Actions

In part because of Israel's intransigence, the Egyptian government established an independent commission to address directly the facts and law relating to this incident. This

57. *Relations with Israel: POW Issue; Amr Musa Stresses Need for Investigation into Killing of POWs*, BBC Summary of World Broadcasts, Sept. 7, 1995, (Source: MENA News Agency, Cairo, in Arabic 1540 gmt 5 Sep 95), available in LEXIS, News Library, CURNWS File (quoting the broadcast and not the direct words of the Deputy Foreign Minister).

58. See Mae Ghalwash, *Rally Shows Depth of Emotions Over Killings of Prisoners*, AP Worldstream, Sept. 21, 1995, available in LEXIS, News Library, APINTL File.

59. *Id.*

60. Siona Jenkins, *POW Deaths Turn Egyptians Against Leaders*, WASH. TIMES, Oct. 8, 1995, at A9.

61. *Egypt Says Graves Hold Slain POWs*, CHI. TRIB., Sept. 21, 1995, at 15; Youssef M. Ibrahim, *Egypt Discovers Mass Graves; Dead Were Victims of Israel During '67 War*, HOUSTON CHRONICLE, Sept. 21, 1995, at A20; Youssef M. Ibrahim, *Egypt Says Israelis Killed P.O.W.'s in '67 War*, N.Y. TIMES, Sept. 21, 1995, at A1.

62. See *Egyptian POW Graves Said Found in Sinai*, UPI, Sept. 20, 1995, available in LEXIS, News Library, CURNWS File; see also sources cited *supra* note 25.

commission was called the Egyptian National Commission on Fact-Finding and Defending the Rights of Egyptian POWs (Egyptian Commission). The Egyptian Commission began preparing a legal memorandum and documentary evidence for the international community, citing the facts and authority for war crimes prosecution against identified Israelis who allegedly participated in the war crimes.⁶³ These documents have been forwarded to the U.N. Secretary General. A portion of the forwarded documents includes the list of names compiled by Egypt of Israeli officers and soldiers who allegedly participated in the atrocity.⁶⁴ This Egyptian Commission intends to ask the United Nations to convene an international war crimes tribunal similar to that established at Nuremberg and for the atrocities committed in the former Yugoslavia.⁶⁵ Further, the Egyptian Government acknowledged that it would formally present evidence "at the competent courts" against the State of Israel for violations of the Geneva Convention on Prisoners of War.⁶⁶ While Egypt intends to file suit in Israel, its Counselor-at-Law stated that Egypt may present its case before other international judicial forums.⁶⁷ The forum he was referring to is most likely the International Court of Justice in The Hague.⁶⁸ Despite the increased tension between the two nations, Egypt's ambassador to Israel, Mohammed Bassiouni, continued to emphasize that the alleged incidents "would not affect the peace treaty between the two countries."⁶⁹

By this time, several Egyptian attorneys had filed suits in local courts against Israel claiming \$40 billion in damages on behalf of the victims' families. One of these cases was scheduled for trial in the Damanhu court of First Instance in Buhayrah

63. *Egypt May Hit Israel with War Crimes*, WASH. TIMES, Sept. 17, 1995, at A9; *National Commission to Prepare List of Charges in POW Cases*, BBC Summary of World Broadcasts, Sept. 19, 1995 (Source: MENA News Agency, Cairo, in Arabic 1620 gmt 16 Sep 95), available in LEXIS, News Library, CURNWS File; *Egyptian Panel to Prepare Charges in Israeli "War Crimes Case,"* Deutsche Presse-Agentur, Sept. 16, 1995, available in LEXIS, News Library, CURNWS File [hereinafter *Egyptian Panel to Prepare Charges*].

64. *See Egyptians to Present List*, *supra* note 47.

65. *Egyptian Panel to Prepare Charges*, *supra* note 63.

66. Bahaa Elkoussy, *Egypt to Sue Israel Over POW Deaths*, UPI, Sept. 26, 1995, available in LEXIS, News Library, CURNWS File.

67. *Egyptian Government to File Suit on Slain POWs*, Deutsche Presse-Agentur, Sept. 26, 1995, available in LEXIS, News Library, CURNWS File [hereinafter *Egyptian Government to File Suit*]; *Egypt to Take Israeli Massacre Suspects to Court*, Agence France Presse, Sept. 27, 1995, available in LEXIS, News Library, CURNWS File.

68. *Egyptian Government to File Suit*, *supra* note 67; Elkoussy, *supra* note 66.

69. *Graves and Questions in the Sinai*, N.Y. TIMES, Sept. 22, 1995, at A30.

Governorate as early as October 10, 1995.⁷⁰ However, the Israeli embassy in Cairo "refused to accept the notification of the suit."⁷¹ Therefore, the judge ordered notice be sent via diplomatic channels and rescheduled the trial for December 12, 1995.⁷²

During meetings in Washington in late September 1995, between Israel Prime Minister Yitzhak Rabin and Egyptian President Hosni Mubarak, President Mubarak again pressed Prime Minister Rabin for an investigation.⁷³ Prime Minister Rabin made two concessions. First, Israel finally agreed to establish a military commission to investigate the allegations.⁷⁴ The proposal has Israeli historians conducting the investigation and handing over their report to the Egyptian government. The actual investigation, however, did not begin until March 1996, when the Prime Minister appointed a reserve general, Aharon Doron, to investigate this allegation, as well as other cases of alleged abuse of POWs by both Israeli and Egyptian soldiers.⁷⁵ Second, Prime Minister Rabin finally acknowledged Israel's responsibility for the POW murders that occurred both in 1956 and 1967.⁷⁶ Some reports assert that Egypt and Israel have even agreed that those found responsible for the crimes would be tried, probably in

70. See *Egyptian Government to File Suit*, *supra* note 67; Abdo, *supra* note 27 (reporting a claim for \$1 billion as the sum); *Sierra Leone; Lawyer's 1bn-dollar Damages Suit Over POWs Against Israel's Peres, Ambassador*, BBC Summary of World Broadcasts, Sept. 18, 1995 (Source: MENA News Agency, Cairo, in Arabic 0546 gmt 16 Sep 95), available in LEXIS, News Library, CURNWS File.

71. *Billion-dollar Case Against Rabin for POWs Opens*, Agence France Presse, Oct. 10, 1995, available in 1995 WL 7865934.

72. *Id.* According to this report, another case was set for October 28, which is seeking \$100 million in damages. All told, there are at least 10 such suits pending in Egyptian courts. *Id.*

73. George Moffett, *Mubarak Presses Israel on Charges of POW Deaths*, CHRISTIAN SCI. MONITOR, Oct. 2, 1995, at 1; Youssef M. Ibrahim, *On a New Peace and Old Atrocities: Mubarak Reflects*, N.Y. TIMES, Sept. 26, 1995, at A11.

74. *Rabin Considers Inquiry into POW Massacres*, Agence France Presse, Sept. 28, 1995, available in LEXIS, News Library, CURNWS File.

75. *Israeli General to Probe War Crimes Reports*, Reuters, Mar. 26, 1996, available in LEXIS, News Library, CURNWS File; *Okinawa Dentes U.S. Base Lease*, USA TODAY, Mar. 27, 1996, at 8A.

Another report states "Egypt and Israel will also form a joint committee to locate the grave of POWs killed in the Sinai Peninsula." It goes on to assert that the parties agree to "put those found responsible on trial." *Report: Egypt, Israel Agree to Investigate POW Deaths*, AP Worldstream, Oct. 5, 1995, available in LEXIS, News Library, APINIL File.

76. *Israel Admits Responsibility in Massacre of Egyptian POWs*, Agence France Presse, Sept. 30, 1995, available in LEXIS, News Library, CURNWS File; *Israel "Takes Responsibility" for Deaths of Egyptian POWs*, BBC Summary of World Broadcasts, Oct. 2, 1995 (Source: Voice of Israel, Jerusalem, in Hebrew 1600 gmt 30 Sep 95), available in LEXIS, News Library, CURNWS File.

Israel.⁷⁷ Egyptian resolve with regard to this matter is steadfast. "Egypt will not forget this issue and will continue to bring it up until we find an acceptable resolution."⁷⁸

III. WERE THE CAPTURED EGYPTIANS ENTITLED TO ANY PROTECTED STATUS?

Little serious debate exists that the hostilities between Israel and Egypt in the Sinai in 1956 were anything but an "armed conflict" within the meaning of common Article 2 to the Geneva Conventions.⁷⁹ Even in armed conflict, however, the laws of war regulate who may be killed. International law recognizes that the armed forces to a conflict consist of combatants and noncombatants. Every combatant in an armed conflict may be killed. Even certain noncombatants who are aiding in the war effort may be killed. These persons may only be killed or wounded, however, under the laws of war if they are able and willing to fight or resist capture. Once they can no longer resist

77. See *Egypt, Israel Agree to Investigate POW Deaths*, AP, Oct. 6, 1995, available in LEXIS, News Library, CURNWS File; *Probe on POW Deaths*, AP On-Line, Oct. 6, 1995, available in LEXIS, News Library, CURNWS File (citing a leading Arabic-language, London-based newspaper, Al-Hayat, for this assertion).

78. *Israel May Compensate Egypt for POWs Official*, Reuters, Nov. 14, 1995, available in LEXIS, News Library, CURNWS File. The Egyptian media continues to flame the public anger over the treatment of Egyptian POWs at the hands of the Israelis during the 1956 and 1967 wars. Egyptian press reports allege that the Israeli army used Egyptian POWs "for live target practice, abused their bodies and sold their organs for transplants . . ." *Egyptian Ambassador Summoned Over Allegations Israel Killed POWs*, Agence France Presse, Feb. 12, 1996, available in LEXIS, News Library, CURNWS File; *Israel Killed Egyptian POWs for Body Parts*, JERUSALEM POST, Feb. 9, 1996, available in 1996 WL 406884; *Israel Angry Over Egyptian Press Reports on POWs*, Xinhua General News Service, Feb. 12, 1996.

79. When referring to a "common Article," one is referring to those articles which are identical within each of the four Geneva Conventions. The two most common examples are common Article 2 and common Article 3. Common Article 2 refers to those conflicts of an international character while common Article 3 refers to internal armed conflicts. The four Geneva Conventions are: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, T.I.A.S. No. 3362 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, T.I.A.S. No. 3363 [hereinafter GWS(Sea)]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, T.I.A.S. No. 3364 [hereinafter GPW]; and, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, T.I.A.S. No. 3365 [hereinafter GCC], all reprinted in DEPARTMENT OF ARMY, PAMPHLET 27-1, TREATIES GOVERNING LAND WARFARE (Dec. 7, 1956) [hereinafter DA PAM. 27-1].

Common Article 2 provides in pertinent part: "[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties."

or they lay down their arms and surrender, combatants and noncombatants may not be killed or wounded. If captured by the enemy, combatants and some noncombatants have a right to be treated as a POW.⁸⁰ POWs are protected persons on the battlefield. Persons who intentionally wound or kill protected persons are guilty of a war crime. Were the persons General Biro killed lawful targets or "protected persons" within the meaning of the Geneva Conventions? If they were lawful targets, General Biro has immunity for the warlike act of killing another combatant. If, however, they were "protected persons," General Biro is not immune. As analyzed below, the captured Egyptians were entitled to protection under international law.

A. *Were the Egyptians Entitled to POW Status?*

No question exists whether these forty-nine persons were within the custody and control of General Biro's unit. Therefore, the question becomes, do they qualify for protected status under the Geneva Conventions? This determination is important. Whether or not the Egyptians were "protected persons" will determine whether a war crime occurred. The reports identify the forty-nine victims differently; some identify them as civilian contract workers for the Egyptian forces, and others call the group a mixture of Egyptian soldiers and irregular forces. In either case, General Biro's statements clearly demonstrate that victims were no longer fighting his forces. If these persons were entitled to protection under the Third Convention, the protections

80. Hague Convention No. IV Respecting the Laws and Customs of War on Land and Annex Thereto Embodying Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 30 Stat. 2277, T.I.A.S. No. 539 [hereinafter HR], reprinted in DA PAM. 27-1, *supra* note 79, at 5, 8 and 12 (HR, Annex, arts. 3 & 23(c)); L. OPPENHEIM, DISPUTES WAR AND NEUTRALITY 338-39 (H. Lauterpacht ed., 7th ed. 1952); DEPARTMENT OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 62 (July 18, 1956) [hereinafter FM 27-10].

Some might ask why cite to military publications. The answer is simple. First, most practitioners of public international law relating to war are military lawyers who have access to these documents. Second, in reality, military lawyers are on the cutting edge in this area. Military publications routinely comprise the consensus of contemporary thought in the arena of law as it applies to military operations. Further, since military publications are used by the practitioners in conducting military operations, they are the epicenter of any change in this area of law. See W. Michael Reisman & William K. Lietzau, *Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict*, in 64 UNITED STATES NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES, THE LAW OF NAVAL OPERATIONS 1 (Horance B. Robertson, Jr. ed., 1991). For example, The United States Army Judge Advocate General's School produces annually the premier document on the legal aspects of military operations. See THE INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, THE OPERATIONAL LAW HANDBOOK (1996).

begin "from the time they fall into the power of the enemy" and remain in force "until their final release and repatriation."⁸¹

Article 4 of the Third Convention defines those persons entitled to POW protected status. It provides in pertinent part:

A. Prisoners of war . . . are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict. . . .

(4) Persons who accompany the armed forces without actually being members thereof, such as . . . supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card. . . .⁸²

In one version, the persons killed by General Biro's unit were Egyptian soldiers. If so, those persons qualified under Article 4A(1) for prisoner of war protected status. In the other reported version, the persons killed were a mix of Egyptian regulars and civilian contractors. Those civilian contractors should also qualify for prisoner of war protected status under Article 4A(4), as quoted above. The only issue would seem to be the issuance of identification cards by the Egyptian Army verifying their status. We may never find the answer to the identification card issue because the identities of the victims are not currently known, records of this nature are probably lost or destroyed, and evidence is unlikely to be recovered from the bodies exposed for forty years to the elements in the Sinai.

If the circumstances of the civilian contractor's capture made their status unclear, the Third Convention defines General Biro's obligation towards them as follows:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy belong to any of the categories enumerated in Article 4, such person shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.⁸³

The presumption of POW protection can only be denied by this competent tribunal. No such competent tribunal ever occurred before General Biro summarily executed the prisoners. Therefore, the captured prisoners' status was never properly denied.

The Protocols to the 1949 Geneva Conventions goes even further. It provides that "[w]hen persons entitled to protection as

81. DA PAM. 27-1, *supra* note 79, at 70 (GPW, art. 5).

82. *Id.* at 68-70 (GPW, art. 4); *see also id.* at 10 (HR, *supra* note 80, Annex, art. 13).

83. *Id.* at 70 (GPW, art. 5).

prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation . . . they shall be released and all feasible precautions shall be taken to ensure their safety."⁸⁴ The commentary to the Protocols goes to great length to explain that this provision includes those whose status is in doubt and emphasizes that "there is actually an obligation here: 'they shall be released' whenever the condition of evacuation . . . cannot be met."⁸⁵

The persons captured by General Biro's unit were POWs within the meaning of the Third Convention. Therefore, they were entitled to all of the Convention's protections. POWs have a right to be treated humanely, and "any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited *and will be regarded as a serious breach of the present Convention.*"⁸⁶ This protection is absolute, regardless of the tactical situation on the battlefield:

A commander may not put his prisoners to death because their presence retards his movements or diminishes his power of resistance by necessitating a large guard, or by reason of their consuming supplies, or because it appears certain that they will regain their liberty through the impending success of their forces. It is likewise unlawful for the commander to kill his prisoners on grounds of self-preservation, *even in the case of airborne or commando operations*, although the circumstances of the operation may make necessary rigorous supervision of and restraint upon the movement of prisoners of war.⁸⁷

84. PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I) arts. 46-47 [hereinafter PJ], *reprinted in* DEPARTMENT OF ARMY, PAMPHLET 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 33 (Sept. 1, 1979) [hereinafter DA PAM. 27-1-1].

85. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 489-91 (Yves Sandoz et al., eds., 1987).

86. DA PAM. 27-1, *supra* note 79, at 72-73 (GPW, art. 13) (emphasis added).

87. FM 27-10, *supra* note 80, ¶ 85 (emphasis added); *see also* GREAT BRITAIN WAR OFFICE, THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW ¶1105, 137 (1958); *accord* MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 103-04 (1959); 10 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 205 (1968).

The concept that a captured prisoner thereafter may not be killed pre-dates the 1949 Conventions. In 1863, President Lincoln ordered published General Order No. 100, a codification of the laws of war prepared by Professor Francis Lieber. Article 71 of the "Lieber Code" provides:

Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs

B. *If not POWs, Were the Egyptian Prisoners Protected Civilians Within the Fourth Convention?*

Every civilian has some protection on the battlefield. The degree of protection, however, is dependent upon whether they fit within the definitions of Article 4 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Convention).⁸⁸ Assuming, *arguendo*, that these civilian contractors were not POWs, they were still entitled to protected status under the Fourth Convention. As stated earlier, the conflict between Israel and Egypt rose to the level of an Article 2 conflict. The Fourth Convention applies to Article 2 conflicts.⁸⁹ It protects *in toto* innocent civilians who happen to be within the control of a party to the conflict.⁹⁰ "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."⁹¹ The only restriction to this proposition would be evidence of the prisoners being spies or mercenaries.⁹²

to the Army of the United States, or is an enemy captured after having committed his misdeed.

Instructions for the Government of Armies of the United States in the Field, Prepared by Francis Lieber, Promulgated as General Order No. 100 by President Lincoln, Apr. 24, 1863, reprinted in THE HENRY DUNANT INSTITUTE, THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3, 13 (Dietrich Schindler & Jiri Toman eds., 1973).

88. DA PAM. 27-1, *supra* note 79, at 135-93 (GCC).

89. *See id.* at 135 (GCC, art. 2).

90. Even if they do not qualify for protections under GCC Article 4, they still receive minimal protections under GCC Articles 13-26, and arguably receive protections under the expanded view of common Article 3. *See Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4 (June 27), *reprinted in* 25 I.L.M. 1023 (1986); *see also* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554 (1995) (asserting that international law-making bodies have been unsympathetic towards extending to national wars the protective rules applicable to international war).

91. DA PAM. 27-1, *supra* note 79, at 136 (GCC, art. 4).

92. For denial of protections for being a spy, *see id.* at 5, 13 (HR, *supra* note 80, art. 29); FM 27-10, *supra* note 80, ¶¶ 75-78.

For denial of POW protections for being a spy or mercenary, *see* PI, *supra* note 84, arts. 46-47. The United States is not a signatory to Protocol I and disagrees with denying mercenaries prisoner of war protections. *See* Richard R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323 (1951) (assessing the roles played in the law of belligerent occupation by the military power of the occupant, international law and municipal law); John R. Cotton, *The Rights of Mercenaries as Prisoners of War*, 77 MIL. L. REV. 143 (1977) (defining "mercenary" and analyzing laws governing their treatment when taken as prisoners of war). It should be noted that denial of prisoner of war status does not mean that they are no longer "protected persons."

No evidence exists thus far which would support such an allegation in this case. The Egyptian civilian contractors captured by General Biro's soldiers were "in the hands of a Party to the Conflict." The length of time a civilian is in the hands of a unit is immaterial. Pictet's Commentary provides that "the Convention should be applied as soon as troops are in foreign territory and in contact with the civilian population there. . . . *Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets.*"⁹³ Therefore, the civilian Egyptians qualified for protection under the Fourth Convention. One of the acts prohibited by this Convention is murder of protected civilians.⁹⁴

Finally, it must be noted that there exists no other category on the battlefield for these prisoners:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no intermediate status; nobody in enemy hands can be outside the law.*⁹⁵

IV. DOES THE STATE OF ISRAEL HAVE ANY OBLIGATIONS UNDER INTERNATIONAL LAW FOR THE ACTS OF ITS SOLDIERS?

Whether these victims were POWs or civilians, both the Third and Fourth Conventions prohibit the willful killing of such protected persons.⁹⁶ The willful killings in this case constitute grave breaches.⁹⁷ All grave breaches enumerated in the Third

93. COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 59-60 (Jean S. Pictet ed., 1958) (emphasis added) [hereinafter IV COMMENTARY].

94. DA PAM. 27-1, *supra* note 79, at 145 (GCC, art. 32).

95. IV COMMENTARY, *supra* note 93, at 51. Of course, this assumes that the victims were, *in fact*, Egyptians and not Israeli civilians.

Since no evidence exists in this case that any of the Egyptian prisoners were medical personnel, this article will not address that issue. However, for a review of the rights and obligations afforded medical personnel, see ALMA BACCINO-ASTRADA, MANUAL ON THE RIGHTS AND DUTIES OF MEDICAL PERSONNEL IN ARMED CONFLICTS (1982).

96. DA PAM. 27-1, *supra* note 79, at 115 (GPW, art. 130) and 183 (GCC, art. 147); see also FM 27-10, *supra* note 80, ¶ 502.

97. Grave breaches are defined in an article common, with minor variations, to the four conventions. They are those breaches:

involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great

and Fourth Conventions are "war crimes."⁹⁸ One author has described grave breaches as "international crimes par excellence."⁹⁹

Israeli officials initially argued that these acts were acts of individuals, and that the State of Israel was not responsible for their actions. This position, however, is untenable. According to international law, "[p]risoners of war are *in the hands of the enemy Power*, not the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them."¹⁰⁰ Furthermore, "[n]o High Contracting Party shall be allowed to absolve itself . . . of any liability incurred by itself . . . in respect of [grave breaches]."¹⁰¹ Thus, international law clearly places the *governmental* responsibility for the acts in this case upon the shoulders of Israel. Criminal responsibility, however, vests with the responsible individuals. The State of Israel ultimately accepted *governmental* responsibility for its agents' wrongful acts in 1956 and 1967. The furor, of course, is their failure to hold these individuals *criminally* responsible. Instead, they offered the families of the victims monetary compensation.

V. IS ISRAEL OBLIGATED TO OFFER MONETARY DAMAGES TO THE VICTIMS' FAMILIES?

The Hague Regulations make it clear that "a belligerent, which violates [its] provisions shall, if the case demands, be liable

suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

DA PAM. 27-1, *supra* note 79, at 115 (GPW, art. 130); *see id.* at 41 (GWS, art. 50), 63 (GWS(Sea), art. 51), and 183 (GCC, art. 147); *see also The Abbaye Ardennes Case*, IV UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, Case No. 22, at 97 (1945) (involving the trial of S.S. Brigadeführer Kurt Meyer for the murder of 48 captured Canadian POWs executed during the Normandy invasion); *see generally*, OPPENHEIM, *supra* note 80, at 573 n.1.

98. COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 617 (Jean S. Pictet ed., 1960) [hereinafter III COMMENTARY]; IV COMMENTARY, *supra* note 93, at 583.

99. Christine Van den Wijngaert, *War Crimes, Crimes Against Humanity, and Statutory Limitations*, in 3 INTERNATIONAL CRIMINAL LAW 89, 91 (M. Cherif Bassiouni ed., 1987).

100. DA PAM. 27-1, *supra* note 79, at 72 (GPW, art. 12) (emphasis added); *see also id.* at 8 (HR, *supra* note 80, Annex, art. 4) (explaining that prisoners of war are in the power of the hostile government, but not of the individuals or corps who capture them).

101. *Id.* at 115 (GPW, art. 131) and 184 (GCC, art. 148); *see also* FM 27-10, *supra* note 80, ¶ 503.

to pay compensation."¹⁰² The obligation to provide compensation is not limited to violations of the Hague Regulations and applies to all violations of the laws of war.¹⁰³ This obligation is in addition to, not in lieu of, other obligations under the Geneva Conventions, such as the obligation to search for and prosecute or hand over war criminals.¹⁰⁴ Therefore, to the extent that Israel is offering compensation to the victims' families, it is complying with its international obligations.¹⁰⁵ Egypt could argue that such

102. The Hague Regulations provide, "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." DA PAM. 27-1, *supra* note 79, at 6 (HR, *supra* note 80, art. 3); *see also* III COMMENTARY, *supra* note 98, at 630; OPPENHEIM, *supra* note 80, at 592-95. Article 24(5) of the unratified Hague Rules of Air Warfare provides a similar compensation requirement. Hague Rules of Air Warfare, *reprinted in* THE HENRY DUNANT INSTITUTE, *supra* note 87, at 210.

103. OPPENHEIM, *supra* note 80, at 594. It should be remembered that the Geneva Conventions *supplement* the Hague Regulations and do not replace them. *See* DA PAM. 27-1, *supra* note 79, at 116 (GPW, art. 135) and 185 (GCC, art. 154).

104. *See* H. Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT'L L. 58, 65 (1944) (comparing the Hague regulations with the Geneva Convention).

105. While Israel has an international legal obligation to compensate Egypt for its violations, it is another matter for an Egyptian civil attorney to sue the State of Israel for compensation to families of the killed prisoners. It is likely that Israel will assert both a sovereign immunity and a statute of limitations argument for any claims of civil liability. In fact, Israel already seems to be asserting sovereign immunity in Egypt. The Israeli embassy in Cairo continues to refuse any civil summons by the local courts relating to this matter. *Israel Said Willing to Compensate Families of Slain POWs*, Deutsche Presse-Agentur, Nov. 14, 1995, available in LEXIS, MDEAFR Library, DPA File.

Because Israel and Egypt were in a state of war until they signed the peace treaty in 1979, the issue arises of whether war tolls any statute of limitations for civil suits. *See* Note, *Does War Toll the Statute of Limitations?*, 57 COLUM. L. REV. 1140, 1140 (1957). Arguably, the statute of limitations was tolled by Israel fraudulently concealing the facts so plaintiffs would not have knowledge to bring an action. Under U.S. law, war does not suspend statutes of limitations. *Soriano v. United States*, 352 U.S. 270, 275 (1957); *see also* 6 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 379 (Department of State ed., 1943). Israeli laws during this period were based upon the British practice because of the British occupation of Palestine pursuant to the League of Nations Mandate. Great Britain's practice until 1945 was that war had no effect on the statute of limitations. *See* James B. Thayer et al., *The Effect of a State of War Upon Statutes of Limitation or Prescription*, 17 TUL. L. REV. 416, 429-42 (1943) (discussing various nations' application of tolling statutes of limitations during war); Charles N. Gregory, *The Effect of War on the Operation of Statutes of Limitation*, 28 HARV. L. REV. 673, 673-75 (1915). However, Great Britain enacted the Limitation (Enemies and War Prisoners) Act of 1945 which tolls statutes of limitations during war "while the said party was an enemy." R.G., *Limitations in War-Time*, 95 THE LAW JOURNAL 61, 61 (1945). Therefore, at least the argument exists that Israel as a successor sovereign, absent subsequent legislation on its part, follows the same tolling principle during periods of war. If this is so, the civil statute of limitations

action is a tacit admission by Israel of its international obligation in this affair under the laws of war. Israel, however, will surely assert that such compensation is no more than *solacia* payments unrelated to any formal obligation and not an admission of responsibility.

VI. IS ISRAEL OBLIGATED TO INVESTIGATE THESE ALLEGED KILLINGS?

Egypt requested an inquiry into the alleged massacres. Both the Third and Fourth Conventions require that an inquiry occur upon the request of a High Contracting Power who is "a Party to the conflict."¹⁰⁶ A "High Contracting Power" is nothing more than a nation that has become a party to the Conventions. Egypt, Israel, and 183 other nations are parties to the Geneva Conventions.¹⁰⁷

The Israeli Attorney General responded that not only did the municipal statute of limitations preclude prosecution, but "nor is there any justification for an inquiry into these events or those involved, since an investigation can only be justified when there is the legal possibility of ultimate criminal proceedings."¹⁰⁸ The Attorney General is incorrect. The Conventions allow parties to the conflict to determine the manner of the investigation. If parties cannot agree, however, they should choose an arbitrator "who will decide the procedure to be followed."¹⁰⁹ If the investigation determines that a violation occurred, the parties have an affirmative obligation to prevent similar violations from recurring. To meet this obligation, a party has a wide range of options. Depending on the seriousness of the violation, remedial action ranging from prosecution to training soldiers not to commit further violations could be considered appropriate. Fortunately,

in Israel did not begin to run until 1979. Whether this argument benefits plaintiffs' attorneys remains to be seen.

106. DA PAM. 27-1, *supra* note 79, at 116 (GPW, art. 132) and 184 (GCC, art. 149).

107. The issue of whether a nation has ratified the Geneva Conventions is probably irrelevant. First, most nations and international scholars consider the Conventions to be reflective of customary international law. *See generally*, Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 351 (1987) (discussing the conventions as customary law). Second, only six nations have *not* ratified them. Of those six, one is a party to the 1929 Geneva Conventions, Lithuania. The other five nations are Eritrea, Marshall, Micronesia, Nauru, and Palau. *See* ICRC, *Conventions De Geneve Du 12 Aout 1949 et Protocoles Additionnels du 8 Juin 1977: Ratifications, Adhesions et Successions Au 30 Juin 1995* [DDM/JUR95/3385-CPS 15] (July 6, 1995).

108. DECISION OF THE ATTORNEY GENERAL, *supra* note 33.

109. DA PAM. 27-1, *supra* note 79, at 116 (GPW, art. 132) and 184 (GCC, art. 149).

Israel did not heed their Attorney General's advice. Both parties have apparently agreed to a joint commission to investigate the allegations.¹¹⁰ If an investigation does occur, Israel will have complied with this requirement.

VII. IS ISRAEL OBLIGATED TO PROSECUTE GENERAL BIRO FOR THESE KILLINGS?

As signatories to the Geneva Convention, Israel is bound to comply with its treaty obligations. "[E]very State party has not only the right, but the duty to enact rules making grave breaches a punishable offence and instituting criminal proceedings, irrespective of the place where the unlawful acts occurred."¹¹¹ Every nation has an affirmative "obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality before its own courts."¹¹² Further "it is clear that it was the intent of the conventions that all signatory states would be obligated to enact penal legislation which would extend to *all persons* and to all grave breaches *no matter where committed*. Thus, the convention adopts the principle of universal jurisdiction. . . ."¹¹³ The reason for this is that the offense constitutes a crime against mankind and is considered to be one of universal jurisdiction, not one of merely national concern. This duty extends not only to enemy war criminals, but also to a state's own nationals who commit war crimes.¹¹⁴

General Biro admits to killing forty-nine unarmed Egyptian prisoners during the 1956 war. Absent some sort of mental incapacity or coercion at the time the statement was given (and no such evidence currently exists), General Biro's admission is

110. See *supra* notes 74-75 and accompanying text. Such special agreements are authorized by the Convention itself. See DA PAM. 27-1, *supra* note 79, at 70 (GPW, art. 6).

111. Christian Tomuschat, *Crimes Against the Peace and Security of Mankind and the Recalcitrant Third State*, 24 ISR. Y.B. HUM. RTS. 41, 56 (1995).

112. DA PAM. 27-1, *supra* note 79, at 115 (GPW, art. 129) and 183 (GCC, art. 146).

113. Albert J. Esgain & Waldemar A. Solf, *The 1949 Geneva Convention Relative to the Treatment of Prisoners of War: Its Principles, Innovations, and Deficiencies*, MIL. L. REV., Bicent. Issue 1975, at 303, 339 (emphasis added). Esgain & Solf also agree that non-belligerent nations have jurisdiction to punish grave breaches "during a conflict to which they were not parties." *Id.* at 339 n.165.

114. See Robert R. Baxter, *The Municipal and International Law Basis of Jurisdiction Over War Crimes*, 28 BRIT Y.B. INT'L. L. 382, 391 (1951); FM 27-10, *supra* note 80, ¶ 511.

prima facie evidence that these acts, in fact, occurred. Under U.S. common law, only corroboration, however slight, is necessary to convict based on a voluntary confession. Under Israeli law, in most cases, corroboration of an accused's confession is not required.¹¹⁵ In fact, if an accused Israeli refuses to testify on his own behalf during a trial, that "may serve to corroborate the prosecution's evidence."¹¹⁶ This is especially true once the Israeli prosecutor makes a *prima facie* case against an accused.¹¹⁷ The Israeli courts will admit a confession once it is satisfied that the statement was freely and voluntarily made.¹¹⁸ Even in the case of an illegally obtained confession, Israeli courts still have discretion to admit this evidence.¹¹⁹ For this reason, the rest of this Article assumes that these murders occurred, the victims were protected persons within the Geneva Conventions, and General Biro's statements would be admissible in Israeli courts.

Israel proffers that it cannot comply with Egypt's request to prosecute General Biro for two reasons. First, it asserts that under its domestic law, the statute of limitations has run for the crime of murder, and the only exceptions to this prescription apply to Nazi war crimes and the crime of genocide. Second, it argues that international law recognizes that thirty-eight years is too long a period after which to prosecute someone for

115. See Ernst Livneh, *The Law of Evidence (Amendment) Law, 1968*, 5 ISR. L. REV. 268, 271 (1970). The exceptions to corroboration of witness statements involve statements by relatives, accomplices, and certain sex offenses, particularly those where children are the victims. *Id.* at 270-73.

116. Miriam Gur-Arye, *Forty Years of Criminal Law: Developments in Case Law Re the Requirements of Fault*, 24 ISR. L. REV. 560, 599 (1990); see Israeli Criminal Procedure Law (Consolidated version), 1982, §§ 152, 162, 36 L.S.I. 35 (1981-82).

117. Gur-Arye, *supra* note 116, at 600.

This readiness to limit the right to remain silent derives from the view that, under certain circumstances, a lack of response is both unnatural and illogical if the defendant is not guilty. One who is silent attempts to hide something because his conscience is not clear; he is presumed to have a consciousness of guilt. A suspect's failure to answer spontaneously during police interrogation may give rise to such an impression, and even more so, a defendant's refusal to testify in court on his own behalf . . .

Id. (footnotes omitted).

118. *Id.* at 602.

119. The Israeli Supreme Court has:

held that promises, threats, extended and exhausting interrogation, and other psychological methods or acts of violence that are not severe do not bring about the automatic exclusion of a confession. Rather, the court must examine whether, in the specific case before it, such conduct actually deprived the suspect of his free will.

Id. at 603-04.

international violations.¹²⁰ As the analysis below shows, Israel's facially crisp domestic legal arguments become less persuasive after considering alternate jurisdictional theories under international law.

A. *The Applicability of Israel's Statute of Limitations*

1. Arguments Against the Application of Israel's Statute of Limitations

One cannot dispute the veiled position that Israel's domestic law provides for a twenty-year statute of limitations for the municipal law crime of murder;¹²¹ however, does such statute of limitations apply to a crime under *international* law for committing a grave breach? The State of Israel knew of these offenses and failed to take affirmative steps to punish the wrongdoer, as was its obligation under international law. Clearly, it is an untenable position for a nation to proclaim that even though it hid the facts from the world community, especially the Muslim community, its own statute of limitations cradles one of its own citizens who committed war crimes. When one nation acts inconsistently with regard to its affirmative obligations under international law, it cannot hide behind its domestic law statutes to suppress its obligations. Israel's actions caused a tolling of the statute of limitations during the period in which it actively censored the acts and identities of potential war criminals.¹²²

120. At least one other potential argument exists. Some scholars have argued that jurisdiction over war criminals ends upon signing a peace treaty, absent a provision in the treaty to the contrary. See OPPENHEIM, *supra* note 80, at 587, 611-12; Esgain & Solf, *supra* note 113, at 339 n.166. Under this argument, Israel's jurisdiction, as well as any other nation's jurisdiction, to prosecute under international law ended in 1979 since the Peace Accord between Israel and Egypt contained no such provision. However, with the expanding acceptance of the universal jurisdiction ongoing in the international legal community, the continued validity of this argument is suspect. See Fania Domb, *Treatment of War Crimes in Peace Settlements—Prosecution or Amnesty?*, 24 ISR. Y.B. INT'L HUM. RTS. 253, 259 (1994).

121. Israeli Criminal Procedure Law (Consolidated version), 1982, § 9, 36 L.S.I. 35 (1981-82), provides in part:

9. (a) Unless otherwise provided by law, a person shall not be brought to trial for an offense if a period as stated hereunder has elapsed since the date of its commission:

(1) in the case of a felony punishable with death or life imprisonment—twenty years.

122. Tolling of civil statutes of limitations during the period of war is not uncommon. See *supra* note 105. However, rarely have courts addressed the applicability of statutes of limitations to war crimes. A primary reason for this is

The Israeli Attorney General's decision only addresses the conventional domestic prescription law arguments. Yet, Israel's municipal law directly incorporates customary international law. "Israeli law on the question of the relationship between international law and internal law - that is in order to settle the question of whether a given provision of public international law has become part of Israeli law - distinguishes between conventional law and customary international law. . . . ' According to the consistent judgments of this Court [the Israeli Supreme Court], customary international law is part of the law of the land, subject to Israeli legislation setting forth a contradictory provision."¹²³ Consequently, "rules of (customary) international law are *automatically* assimilated into Israeli law and become a part thereof. . . ."¹²⁴ Therefore, customary international law, including those provisions of a treaty that codify such laws, are the law of Israel.¹²⁵

Israel's argument assumes that state war crimes are subject to a national statute of limitations. There must be a distinction

that alleged Nazi war criminals, even if found and indicted, frequently die before their actual trial begins. In at least three cases in France, Nazi war criminals died with charges pending, but the actual trials had yet to commence. Marilyn August, *Former Vichy Official Inches Toward Trial for War Crimes*, AP, Mar. 2, 1996, available in LEXIS, News Library, WIRE File. In fact, this author could find only one such case. Federation Nationale Des Deportés et Internes Résistants et Patriotes and Others v. Barbie, 78 I.L.R. 125 (Cass. Crim. 1985). In the *Barbie* case, the appellate court set aside Barbie's war crimes counts in his conviction citing French prescription law. *Id.* at 127, 136, 139; see also *Barbie*, 100 I.L.R. 331 (Cass. Crim. 1988) (reaffirming non-applicability of a statute of limitations for crimes against humanity); Touvier, 100 I.L.R. 338, 362 (Ct. of Appeal of Paris & Cass. Crim. 1992) (acknowledging that no statute of limitations exists for crimes against humanity); see generally Glaeser, 74 I.L.R. 700 (Cass. Crim. 1976). However, the court based its ruling by calculating the prescription period beginning with the termination of hostilities. In this case, Israel and Egypt remained in a state of war until 1979. Therefore, following the *Barbie* rationale, the Israel prescription law would not bar prosecuting General Biro until 1999, 20 years after the signing of the Peace Accord.

A practical issue arises with this tolling argument. Who would raise the argument in an Israeli Court? From the Attorney General's initial opinion, he is predisposed to simply use domestic law. General Biro can and clearly would raise the statute of limitations defense. Would the Israel government allow its Attorney General's office to admit Israel's complicity in hiding these facts? It seems unlikely this would occur.

123. *Affo and Others v. Commander of the I.D.F. Forces in the West Bank and Others*, H.C. 785/87, et al., (1988), reprinted in 29 I.L.M. 139, 156 (1990) [hereinafter *The Affo Case*] (quoting YORAM DINSTEIN, INTERNATIONAL LAW AND THE STATE 146 (1971)) (emphasis added).

124. *Id.* The passage goes on to reaffirm the traditional rule that "in cases of a frontal collision between such rules and the statutory law, the statutory law takes precedence." *Id.*

125. *Id.* at 158.

between municipal crimes and international crimes.¹²⁶ "It is a well-established principle that a State cannot invoke its municipal legislation as a reason for avoiding its international obligations."¹²⁷ "In its origins, international criminal law goes back to customary international rules, which have long since prohibited piracy and war crimes."¹²⁸ "War criminals are punished, fundamentally, for breaches of international law. They become criminals according to the municipal law of the belligerent only if their actions find no warrant in and is contrary to international law."¹²⁹ Here, the municipal prescription law appears inconsistent with international law because international law does not recognize the statute of limitations concept as an international legal norm.¹³⁰ "A rule of Municipal Law, which ostensibly seems to conflict with the Law of Nations, must, therefore, if possible, always be so interpreted as to avoid such conflict."¹³¹ Because of this important distinction, the statute of limitations itself is subject to scrutiny, especially when one looks at the practice of Israel and the international community as a whole.

In 1964, the Israeli legislature, the Knesset, squarely addressed the question of any statute of limitations applying to war crimes. They "proclaimed categorically" that Nazi war crimes were not covered by these provisions.¹³² In fact, the Knesset

126. The Israel Supreme Court recognized this distinction in *Attorney General of Israel v. Eichmann*, 36 I.L.R. 277, 287, 293. (Isr. Ct. 1962).

127. L. OPPENHEIM, *PEACE* 350 (H. Lauterpacht ed., 8th ed. 1955) [hereinafter *PEACE*].

128. Yoram Dinstein, *International Criminal Law*, 5 ISR. Y.B. HUM. RTS. 55, 56 (1975).

129. Lauterpacht, *supra* note 104, at 64.

130. "The statutory limitation of crimes is not a principle recognized by all States in their internal legislation, and it has certainly not crystallized as an international legal norm." YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENSE* 131 (Grotius Publications ed., 1988) (footnote omitted). In a questionnaire conducted in the 1960s, a majority of international law authors believed war criminals should not benefit from prescription laws. Van den Wijngaert, *supra* note 99, at 94. In 1953, a report asserted that the concept of a statute of limitations "did not exist in present International Law." *Report on the 1953 Committee on International Criminal Jurisdiction*, U.N. GAOR, 9th Sess., Supp. No. 12, at 20, U.N. DOC. A/2645 (1953); see also U.N. GAOR, Int'l Crim. Jurisdiction Comm., 8th Sess., 19th mtg., at 13-20, U.N. Doc. Aac.65/SR 19 (1953); Friedl Weiss, *Time Limits for the Prosecution of Crimes Against International Law*, 53 BRIT. Y.B. INT'L L. 163, 185 (1982).

131. *PEACE*, *supra* note 127, at 46. "[H]owever, in cases of a frontal collision between such rules and the statutory law, the statutory law takes precedence." *The Affo Case*, *supra* note 123, at 156 (quoting YORAM DINSTEIN, *INTERNATIONAL LAW AND THE STATE* 146 (1971)).

132. Dr. Natan Lerner, Statement at the Symposium on War Crimes, Crimes Against Humanity and Statutory Limitations (May 28, 1968) [hereinafter Lerner Statement].

Committee on Foreign Relations and Security conveyed to all governments with whom it had diplomatic relations "deep concern" that Nazis war criminals might elude justice because of national statutes of limitations.¹³³ In furtherance of its efforts, the Knesset, as early as 1950, enacted legislation excepting Nazi war criminals from its prescription laws.¹³⁴ In June 1964, a Declaration of the International Conference of Jurists held in Warsaw proclaimed:

[I]n international law, there is no principle establishing periods of limitation in general and a period of limitation for the prosecution of war crimes. . . . It would be a violation of international law if a country . . . refused to prosecute Nazi crimes on the pretext that the crimes in question were merely individual homicides punishable under ordinary law.¹³⁵

Israel would be hard pressed to argue that there exists a distinction between Nazi war criminals and multiple murder war criminals.

The international community has adopted specific standards for the non-applicability of a statute of limitations for war crimes. A 1966 study, ordered by the U.N. Secretary-General, concluded:

[I]nternational crimes are fundamentally different from ordinary domestic crimes and that the reasons normally invoked in favour of statutory limitation for crimes under municipal law do not apply to them. It furthermore interpreted the silence of all international legal texts adopted after the Second World War on that point as deliberate acceptance by the international "legislator" of the principle of "non-prescription" of those crimes.¹³⁶

In addition, in 1968, the U.N. General Assembly adopted Resolution 2391.¹³⁷ This U.N. Resolution adopts a legislative approach by creating a convention that prohibits the applicability

133. *Id.*

134. See Nazi and Nazi Collaborators (Punishment) Law, 5710-1950, §12, reprinted in FUNDAMENTAL LAWS OF THE STATE OF ISRAEL 162 (J. Badi ed., 1961) [hereinafter FUNDAMENTAL LAWS]. Early on, the Knesset established its concern for the statute of limitations for war criminals. The very first new criminal laws passed after Israel's independence were the Punishment of Nazi Collaborators and Punishment of Genocide Laws which excepted these international crimes from the national statute of limitations. Gabriel Bach, *Development of Criminal Law in Israel During the 25 Years of Its Existence*, 9 ISR. L. REV. 568, 572 (1974).

135. Lerner Statement, *supra* note 132.

136. Weiss, *supra* note 130, at 180 (footnotes omitted) (citing U.N. Doc. E/CN.4/906 (1966)).

137. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73 [hereinafter Statute of Limitations Convention], reprinted in THE HENRY DUNANT INSTITUTE, *supra* note 87, at 925; see also Rob Kent, *Letter to the Editor*, OBSERVER, Sept. 10, 1995 (arguing that Israel's refusal to prosecute veterans who killed Egyptian POWs is contrary to international law).

of any statute of limitations for grave breaches enumerated in the Geneva Conventions.¹³⁸ Israel has yet to ratify this convention; however, they did vote in favor of its passage and subsequent implementation.¹³⁹ Unfortunately, given that only forty-one nations are party to the convention,¹⁴⁰ one must question its citation alone as definitive international legal authority.

Why have only 41 of the 185 U.N. members ratified this treaty? Many countries, including Israel, while embracing the general concept, did not sign the Convention because they objected to the wording used in portions of it.¹⁴¹ They found the broad definitions of "crimes against humanity" disconcerting.¹⁴² Instead of ratifying this Convention, the European nations opted to draft another treaty with more palatable language.¹⁴³ Nevertheless, the tenor within the international community favors the general principle of the non-applicability of prescription laws.¹⁴⁴ To this extent, the Convention may reflect customary international law. This argument is reinforced when one looks at the practice of nations, especially that of Israel.

If one looks at Israel's consistent practice before the General Assembly regarding the obligation to search for, arrest, and punish war criminals, this argument carries weight. Israeli law can and should be viewed in light of what it professes to the

138. Statute of Limitations Convention, *supra* note 137, at 75 (art. 1(a)). For a thorough discussion of this Convention, see Robert H. Miller, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 65 AM. J. INT'L L. 476 (1971).

139. See THE HENRY DUNANT INSTITUTE, *supra* note 87, at 928.

140. Telephone Interview with a U.N. Treaty Section research assistant (Oct. 24, 1995).

141. For the Israeli perspective of this Convention, see Natan Lerner, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes*, 4 ISR. L. REV. 512, 535 (1969). It is clear from press releases by the U.S. delegation to the Convention that the U.S. favored the Convention "to make clear that under international law there are no periods of limitation applicable to war crimes." *Handel v. Artukovic*, 601 F. Supp. 1421, 1430 (C.D. Cal. 1985) (citing Press Releases U.S.-U.N. 220 (Nov. 26, 1968)); see also DEPARTMENT OF THE NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 9 (REV. A)/ FMFM 1-10, ¶ S6.2.5.3 (1989) ("There is no statute of limitations on the prosecution of war crimes . . .").

142. See THE HENRY DUNANT INSTITUTE, *supra* note 87, at 933; Polyukhovich v. Commonwealth of Australia, 91 I.L.R. 1, 35 (Austl. 1991). They were also concerned about the retroactive effect the Convention may have on any crimes for which the statute of limitations had already lapsed.

143. European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, *opened for signature* Jan. 25, 1974, 13 I.L.M. 540 (1974). However, even this Convention is of limited precedential value because not enough European countries have ratified it either.

144. See, e.g., *JK v. Public Prosecutor*, 87 I.L.R. 93 (HR 1981) (Neth.) (holding Dutch domestic statute of limitation law does not apply to violations of the laws of war). *But see supra* note 122 and accompanying text.

international community. Israel has consistently voted for U.N. resolutions promoting the arrest, extradition, and punishment of war criminals. One of the more important of these affirmations occurred with U.N. Resolution 3074, *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*.¹⁴⁵ This Resolution provides in pertinent part:

. . . that the United Nations, in pursuance of the principles and purposes set forth in the Charter concerning the promotion of co-operation between peoples and the maintenance of international peace and security, proclaims the following principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity:

1. War crimes and crimes against humanity, *wherever* they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes *shall be* subject to tracing, arrest, trial and, if found guilty, to punishment.

145. G.A. Res. 3074, U.N. GAOR 3d Comm., 28th Sess., 2187th plen. mtg., Supp. No. 30, at 78, U.N. Docs. A/9326 and A/9030 (1973), *reprinted* in 1973 U.N.Y.B. 573, U.N. Sales No. E.75.I.1; *see also* 14 UNITED NATIONS RESOLUTIONS, SERIES I: RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY, 1972-1974, 304-05 (Dusan J. Djonovich ed., 1978). The vote was 94-6 with 29 abstentions and 12 delegates absent. *Id.* at 153. Both Egypt and Israel voted in favor of this resolution. *Id.*

Other General Assembly resolutions reaffirming a nation's obligations towards war criminals include: G.A. Res. 3, U.N. GAOR 1st Comm., 1st Sess., pt. 1, 32d plen. mtg., at 9, U.N. Doc. A/64 (1946) (Extradition and Punishment of War Criminals); G.A. Res. 95, U.N. GAOR 6th Comm., 1st Sess., pt. 1, 55th plen. mtg., at 188, U.N. Doc. A/64/Add. 1 (1946) (Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal); G.A. Res. 170, U.N. GAOR, 2d Sess., 102d plen. mtg., at 102, U.N. Doc. A/519 (1947) (Surrender of War Criminals and Traitors); *see also* E.S.C. Res. 1158, U.N. ESCOR, 41st Sess., 1445th plen. mtg., Supp. No. 1, at 22, U.N. Doc. E/4264 (1966) (Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity); E.S.C. Res. 1074D, U.N. ESCOR, 39th Sess., 1392d plen. mtg., Supp. No. 1, at 23, U.N. Doc. E/4117 (1965) (requesting member States to ensure "in accordance with international law and national laws, the criminals responsible for war crimes and crimes against humanity are traced, apprehended and equitably punished by competent courts"); G.A. Res. 2712, U.N. GAOR, 30th Comm., 25th Sess., Supp. No. 28, 1930th plen. mtg., at 78-79, U.N. Doc. A/8028 (O.N. Khlestov ed., 1970) (requesting member States to bring war criminals to justice). All these documents, as well as others germane to international crimes during war are *reprinted* in RESPONSIBILITY FOR WAR CRIMES AND CRIMES AGAINST HUMANITY- DOCUMENTS (O.N. Khlestov ed., 1970). Except for G.A. Res. 2712 noted above, Israel did not have an opportunity to vote for the resolutions cited in this paragraph. One reason is that Israel did not become a member of the United Nations until 1949. A second reason is that Israel is not a member of the U.N. Economic and Social Council. As for G.A. Res. 2712, the resolution passed without a roll call vote being requested. Therefore, the record is silent on how Israel voted in this instance. Telephone Interview with Ms. Ramona Kohrs, Reference Librarian, U.N.S.A. Reference Desk (Oct. 3, 1996).

2. Every State has the right to try its own nationals for war crimes or crimes against humanity.
3. States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.
4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them.
5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity *shall be* subjected to trial and, if found guilty, to punishment, as a general rule *in the countries in which they committed those crimes*. In that connexion, States shall co-operate on questions of extraditing such persons.
6. States shall co-operate with each other in the collection of information and evidence which would help to bring to trial the persons indicated in paragraph 5 above and shall exchange such information.
7. In accordance with article 1 of the Declaration on Territorial Asylum of 14 December 1967, States *shall not grant asylum to any person* with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity.
8. States *shall not* take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of person guilty of war crimes and crimes against humanity.
9. In co-operating with a view to the detection, arrest and extradition of persons against whom there is evidence that they have committed war crimes and crimes against humanity and, if found guilty, their punishment, States shall act in conformity with the provisions of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.¹⁴⁶

As Judge Baxter of the International Court of Justice has argued:

[t]he actual conduct of States in their relations with other nations is only a subsidiary means whereby the rules which guide the conduct of States are ascertained. The firm statement by the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts.¹⁴⁷

146. G.A. Res. 3074, U.N. GAOR 3d Comm., 28th Sess., 2187th plen. mtg., Supp. No. 30, at 78, U.N. Docs. A/9326 and A/9-30 (1973), *reprinted in* 1973 U.N.Y.B. 573, U.N. Sales No. E.75.I.1 (emphasis added).

147. R.R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L. L. 275, 300 (1965-66).

Citing the 1982 statute of limitations, the Israeli Attorney General opined that General Biro could not be punished.¹⁴⁸ Yet, Israel admits that its law is defective and is considering amending it to prevent future problems with war criminals. Israel is of the opinion, however, that the changes would not be retroactive. Using this logic, the statute of limitation provisions promulgated by Israel in 1982 do not apply to offenses which occurred in 1956. Thus, one must look at Israeli prescription law as it existed in 1956. What was the statute of limitations in Israel? The answer to this question is illusive, but Israel did have in effect a twenty-year prescription in 1956 for the crime of murder.¹⁴⁹ Therefore,

148. See *supra* note 33 and accompanying text.

149. Prior to 1948, the territory which now comprises Israel was called Palestine. S. Ginossar, *Israel Law: Components and Trends*, 1 ISR. L. REV. 380, 384 (1966). The Ottoman empire conquered Palestine in 1516 and maintained control over it until the British Expeditionary Force occupied Great Britain in 1917. *Id.* at 380-82. Under a League of Nations Mandate, Great Britain was entrusted to govern Palestine to "secure the establishment of the Jewish national home." *Id.* at 382. The British military government followed the customary international law of maintaining in effect the domestic law as it existed prior to Turkey entering the war against Britain on November 1, 1914, unless otherwise incompatible with its duties. The criminal law and procedure in effect at that time was the Ottoman Penal Code of 1838. Therefore, the Ottoman Criminal and Procedural Codes continued in effect unless otherwise amended by Ordinance. For a discussion of the initial legal problems facing this occupation force, see Norman Bentwich, *The Legal Administration of Palestine Under the British Military Occupation*, 1 BRIT. Y.B. INT'L L. 139 (1920-21). Military ordinances gradually replaced the Ottoman Code. During the 26 years of British rule, the Islamic-based laws of Palestine were supplemented or replaced by the English common law model. For example, in 1936, the British military government enacted an entirely new criminal code. *Palestine Gazette*, No. 652, Supp. 1, Dec. 14, 1936, reprinted in I GOVERNMENT OF PALESTINE: ORDINANCES, REGULATIONS, RULES, ORDERS AND NOTICES 285-408 (1936). Under this code, murder was punishable by death. *Id.* at 215. However, Israel abolished capital punishment in 1954 for all crimes except for a murder conviction under the Nazis and Nazi Collaborators (Punishment) Law, and treason in time of war. *Penal Law Revision (Abolition of the Death Penalty for Murder) Law*, 5714-1954, 8 L.S.I. 63 (1954). The 1936 Criminal Code ordinance became effective January 1, 1937. III GOVERNMENT OF PALESTINE: ORDINANCES, REGULATIONS, RULES, ORDERS AND NOTICES 1427 (1936). In 1948, Israel finally received its independence from Britain. *Declaration of the Establishment of the State of Israel*, 1 L.S.I. 3, reprinted in FUNDAMENTAL LAWS, *supra* note 134, at 8-11. One of its government's first duties was to promulgate an ordinance. It provided that "[t]he law which existed in Palestine on [May 14, 1948] shall remain in force . . . subject to such modifications as may result from the establishment of the State and its authorities." *Law and Administration Ordinance*, 5708-1948, 1 L.S.I. 7, reprinted in *id.* at 15. Therefore, until Israel consolidated its criminal law in 1965, three distinct sources of law applied in Israel: (1) Ottoman law in force on November 1, 1914, when Turkey entered the war against Britain; (2) British Military Occupation Ordinances and English common law drawn from during this period; and, (3) Israeli laws enacted since receiving independence in 1948. See M. Shalgi, *Legislation: The New Code of Criminal Procedure in Israel*, 1 ISR. L. REV. 448 (1966) (explaining the significance

while the Attorney General's reasoning was faulty, his ultimate conclusion was correct.

If Israel is to honor its vote for Resolution 3074, it clearly must co-operate with Egypt in finding the truth; and if the allegations bear fruit, punish a war criminal, even one of its own generals. From the consistent resolutions of the General Assembly, the obligation to search for, arrest, punish, or hand such person over for trial under the U.N. Charter towards war criminals seems clear.

2. An Argument for Applying Israel's Statute of Limitations Based on U.N.G.A. Resolutions

The General Assembly only has the authority to make recommendations to the international community. Its resolutions lack any binding authority in and of themselves.¹⁵⁰ For this reason, some are cynical of the precedential value of a General Assembly Resolution.

The members of the General Assembly typically vote in response to political not legal considerations. They do not conceive of themselves as creating or changing international law. It normally is not their intention to affect international law but to make the point which the resolution makes. The issue often is one of image rather than international law: states will vote a given way repeatedly not because they consider that their reiterated votes are evidence of a practice accepted as law but because it is politically unpopular to vote otherwise. The U.N. General Assembly is a forum in which states can express their views; the expressed views of states undeniably may be elements of that state practice which can give rise to customary international law; but what states do is more important than what they say. It is especially more important

of the changes in the new code of criminal procedure in Israel); *see also* FUNDAMENTAL LAWS, *supra* note 134, at 5.

In addressing the statute of limitation question, Israel did not enact any specific legislation in this area between 1948 and 1956, except to exempt the Nazis and Nazi Collaborators law from the law of prescription. Paragraph 12 in this legislation refers to the Fifth Chapter of the Ottoman Code of Criminal Procedure and 20 years being the normal prescription time for murder. FUNDAMENTAL LAWS, *supra* note 134, at 166. While unable to find an English translation of the Ottoman Code of Criminal Procedure in effect in 1956, the Turkish Criminal Code of 1926 also provided for a 20-year statute of limitation for murder. *See* 9 THE TURKISH CRIMINAL CODE: THE AMERICAN SERIES OF FOREIGN PENAL CODES 44 (Orhan Sepiçi & Mustafa Ovaçık trans., 1965) (providing an English translation of the Turkish Criminal Code). For a complete discussion of the complexity in finding Israeli law prior to 1965, *see* DANIEL FRIEDMANN, THE EFFECT OF FOREIGN LAW ON THE LAW OF ISRAEL (1975) (a compilation of 3 articles originally published in 10 ISR. L. REV. 192, 324, 515 (1975)).

150. *See* U.N. CHARTER arts. 10-14; MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 143 (1985) (examining the interaction of sovereign states through the use of treaties).

than what they may say in General Assembly context. General Assembly resolutions are neither legislative nor sufficient to create custom, not only because the General Assembly is not authorized to legislate but also because its members, as Professor Arangio-Ruiz tellingly sums it up, don't "mean it." That is to say, in fact, states often don't meaningfully support what a resolution says and they almost always do not mean that the resolution is law. This may be as true or truer in the case of unanimously adopted resolutions as in the case of majority-adopted resolutions.¹⁵¹

However, this argument has already been countered and rebuked by Israel's Supreme Court:

While it must be conceded that the General Assembly cannot enact new law, it has already adopted resolutions declaring what it finds to be an *existing* rule of international law. Perhaps the most important of such resolutions have been the affirmation of the Nuremberg principles. . . .¹⁵²

Regardless of which argument ultimately prevails, Israel has already conceded that its statute of limitations is flawed and is considering changing its law. This will cure this issue prospectively, but Israel maintains that the change will not be retroactive.¹⁵³ At a minimum, the opinion of the General Assembly possesses great moral force for Israel to fulfill its obligations to the international community.

B. *Universal Jurisdiction Argument*

"The law relating to jurisdiction over conventional war crimes is partly governed by Convention, and partly by customary international law."¹⁵⁴

151. Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, PROC. OF THE AM. SOC'Y OF INT'L L. 301, 301-03 (1979), *excerpt reprinted in* INTERNATIONAL LAW ANTHOLOGY 105-06 (Anthony D'Amato ed., 1994) (footnote omitted); see F. Blaine Sloan, *The Binding Force of a 'Recommendation' of the General Assembly of the United Nations*, 25 BRIT. Y.B. INT'L. L. 1 (1948) (providing an analysis of the binding effect of General Assembly recommendations on members of the U.N.).

152. Attorney-General of Israel v. Eichmann, 36 I.L.R. 277, 297 (Isr. Ct. 1962) (quoting F. Blaine Sloan, *The Binding Force of a 'Recommendation' of the General Assembly of the United Nations*, 25 BRIT. Y.B. INT'L. L. 1, 24 (1948)).

153. *Liba't: Israel May Allow Prosecution of Soldiers for War Crimes*, JERUSALEM POST, Sept. 10, 1995, at 12, available in LEXIS, News Library, CURNWS File.

154. A.R. Carnegie, *Jurisdiction Over Violations of the Laws and Customs of War*, 39 BRIT. Y.B. INT'L. L. 402, 406 (1963); see Statute of the International Court of Justice, art. 38, 59 Stat. 1055, T.S. No. 993 (1945) (stating that the International Court of Justice applies international conventions, international and general principles of law to its decisions).

It is the breach of international law, not national law, that gives rise to universal jurisdiction. The universality of jurisdiction for grave breaches under the Geneva Conventions "is original and not subsidiary."¹⁵⁵ Thus, "[a] war crime . . . is not a crime against the law or criminal code of any individual nation, but a crime against the *jus gentium*. The laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers."¹⁵⁶ Universal jurisdiction for war crimes is customary international law. If Israeli law permits the use of universal jurisdiction (which it does),

the trial of war criminals under international law permits the direct application of a uniform law of a specialized nature to acts which are distinguished from common law crimes by reason of their occurrence in time of war. International law also surmounts the jurisdictional barrier, as municipal law cannot, by recognizing the universality of jurisdiction enjoyed by war crimes tribunals.¹⁵⁷

Since the statute of limitations applies to Israel's national law of murder, and not the international war crime of willfully killing POWs or innocent civilians protected under the Geneva Convention, the statute of limitations cannot prevent even Israel from prosecuting General Biro under international law.¹⁵⁸ Granted, Israel's national law provided it with concurrent jurisdiction for the municipal offense of murder.¹⁵⁹ Nevertheless,

155. Carnegie, *supra* note 154, at 408; Rüdiger Wolfrum, *The Decentralized Prosecution of International Offenses Through National Courts*, 24 ISR. Y.B. HUM. RTS. 183, 188 (1994) (stating the proposition that "[n]ational prosecution based upon the principle of universal jurisdiction and the prosecution of offenders through an international criminal tribunal are not necessarily mutually exclusive") (emphasis added). Wolfrum also states:

[I]t is by now established in international law that grave violations of human rights, such as kidnapping, murder, etc., are no longer exclusively the internal affairs of individual States—whether or not an international agreement . . . specifically provides for prosecution in accordance with the principle of universal administration of justice. . . . This principle creates no impediment to the prosecution of international law breaches through an international criminal tribunal or, based on the principle of universal administration of justice, through national courts.

Id. at 197.

156. *Trial of Lothar Elsentrager and Others*, 14 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORT OF TRIALS OF WAR CRIMINALS, Case No. 84, 8, 15 (1949) (Notes on the case).

157. Baxter, *supra* note 114, at 390.

158. See generally Theodor Meron, *Public International Law Problems of the Jurisdiction of the State of Israel*, 88 J. DROIT INT'L 986 (1961) (discussing the jurisdictional theories available to Israeli courts).

159. *Accord United States v. List*, 8 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORT OF TRIALS OF WAR CRIMINALS, Case No. 35, 34, 54 (1946) ("Such crimes are punishable by the country where the crime was committed or by the

what is at issue with grave breaches is the breach of international law.

International law gives all States the right to punish or limit the prosecution of offenses that itself does not declare criminal.¹⁶⁰ Israel's municipal statute of limitations, which now precludes it from prosecuting General Biro under municipal law, does not extend to its universal jurisdiction under international law to punish General Biro for his international crime. It is this breach of international law which is the gravamen of the offense. Any national criminal statute of limitation is an act of grace by a sovereign whereby it surrenders its right to prosecute municipal crimes. However, "[i]nternational law distinguishes between crimes as defined by it and crimes as defined by municipal law and it makes a corresponding distinction between jurisdiction to try crimes as defined by international law and jurisdiction to try crimes as defined by municipal law."¹⁶¹ In this case, international customary law can be directly applied. As an instrument of international law, the municipal court must not look to national prescription law, but must apply international customary prescription law as automatically incorporated into Israeli law. Under customary international law, no prescription law exists for grave breaches.

If punishment of an offender on the basis of . . . universal jurisdiction is effected through national rather than not existent international criminal tribunals, the national courts act in the interest of the international community or the respective treaty membership. In these cases, international law broadens national criminal jurisdiction in the prescription and enforcement in regard to the offence, the offender or both. . . . Seen in this light, these State courts act as instruments of the decentralized enforcement of international law.¹⁶²

*If international law provides for the punishment of individuals, the penalizing can be applied directly instead of through domestic law.*¹⁶³

belligerent into whose hands the criminals have fallen, the jurisdiction being concurrent.") (emphasis added).

160. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 305 (4th ed. 1990).

161. Polyukhovich v. Australia, 91 I.L.R. 1, 43 (Austl. 1991).

162. Wolfrum, *supra* note 155, at 188.

163. *Id.* at 186 (footnotes omitted).

The proposition that a nation may use universal jurisdiction to try a national over whom it has control finds support in the military tribunals after World War II. It must be admitted that Germans were not the only ones who were guilty of committing war crimes; other violators of international law could, no doubt, *be tried and punished by the state of which they were nationals*, by the offended state if it can secure jurisdiction of the person, or by an international tribunal if of competent authorized jurisdiction. *The Justice Case*, 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 970 (1951) (emphasis added).

Therefore, Israel has "the universal *power* vested in every State to prosecute for crimes of this type committed in the past—a power which is based on *customary* international law."¹⁶⁴

As the material drawn from international agreements and UNGA resolutions acknowledges, international law recognises a State to have universal jurisdiction to try suspected war criminals whether or not that State is under an obligation to do so and whether or not there is any international concern that the State should do so.¹⁶⁵

Support for this jurisdictional argument originated with the post-World War II military tribunals¹⁶⁶ and continues within the academic community.¹⁶⁷ Subsequently, universal jurisdiction for war crimes has been recognized by several other nations' courts,

164. Attorney-General of Israel v. Eichmann, 36 I.L.R. 277, 304 (Isr. Ct. 1962).

165. *Polyukhovitch*, 91 I.L.R. at 39.

166. See *The Hadamar Trial*, 1 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, Case No. 4, 53 (1945) [hereinafter *The Hadamar Trial*] (Notes on the case). The Military Commission adopted the following reasoning originally proffered in Willard B. Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CAL. L. REV. 177 (1945):

[T]he general doctrine recently expounded and called "universality of jurisdiction over war crimes," which has the support of the United Nations War Crimes Commission and according to which every independent State has, under International Law, jurisdiction to punish not only pirates but also war criminals in its custody, regardless of the nationality of the victim or of the place where the offence was committed, particularly where, for some reason, the criminal would otherwise go unpunished.

The Hadamar Trial, *supra* note 166, at 53. The U.N. War Crimes Commission stated that "the right to punish war crimes . . . is possessed by any independent State . . ." 15 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 26 (1949); see also Covey Oliver, *Judicial Decisions Involving Questions of International Law: Excerpt of the International Law Issues in the Opinion of Attorney-General of Israel v. Eichmann*, 56 AM. J. INT'L L. 805, 811 (1962) (stating that international law allows a State to punish an offender for the Commission of particular acts); Baxter, *supra* note 114, at 390; JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW 379-81 (1990) (citing the proposition that violation of the laws and customs of war can result in punishment by any state under the principle of universality).

167. See generally Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 800-15 (1988) (providing a thorough review of the case law supporting this jurisdictional basis for prosecuting war criminals); Thomas H. Sponsler, *The Universality Principle of Jurisdiction and the Threatened Trials of American Airmen*, 15 LOY. L. REV. 43 (1968-69) (examining the changes in the universality principle of jurisdiction since World War II, its restrictions, and the proposed trials of U.S. pilots by the North Vietnamese); Carnegie, *supra* note 154 (looking for the limits of a State's right to exercise criminal jurisdiction as it sees fit); GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 46 (1991) (discussing universal jurisdiction, how it is established, and what types of crimes should be punished under this principle).

including U.S. courts.¹⁶⁸ More importantly, the U.N. General Assembly unanimously adopted a resolution affirming "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal."¹⁶⁹ This

168. See *In re Demjanjuk*, 612 F. Supp. 544, 556 (N.D. Ohio 1985), *aff'd*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) ("International law provides that certain offenses may be punished by any state because the offenders are 'common enemies of all mankind and all nations have an equal interest in their apprehension and punishment.'"); *Regina v. Finta*, 82 I.L.R. 425, 439-46 (Can. H.C. of Justice 1989) (stating that war crimes against humanity are violations of recognized international law). For a general discussion of how other nations' courts have applied the universal jurisdiction concept, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. a (1987) [hereinafter RESTATEMENT]. For a more detailed discussion of the court decisions in other States faced with the idea of universal jurisdiction, see Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2560 n. 91 (1991).

169. G.A. Res. 95, U.N. GAOR 6th Comm., 1st Sess., pt. 1, 55th plen. mtg., at 188, UN Doc. A/64/Add.1 (1946), *reprinted in* I UNITED NATIONS RESOLUTIONS, SERIES I: RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY, 1946-1947 (Dusan J. Djonovich ed., 1978); see also G.A. Res. 3, U.N. GAOR 1st Comm., 1st Sess., pt. 1, 32d plen. mtg., at 9, U.N. Doc. A/64 (1946), *reprinted in id.* at 5-6.

The United Nations later reaffirmed and further defined these principles in 1950 with the *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and Judgment of the Tribunal*, U.N. GAOR, 5th Sess., Supp. No. 12, U.N. Doc. A/1316 (1950), *reprinted in* THE LAWS OF WAR: A COMPREHENSIVE COLLECTION OF PRIMARY DOCUMENTS ON INTERNATIONAL LAWS GOVERNING ARMED CONFLICT 335-36 (W. Michael Reisman & Chris T. Antoniou eds., 1994). There are seven Principles adopted in this resolution. Those pertinent to these facts are:

PRINCIPLE I. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

PRINCIPLE II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law *does not relieve* the person who committed the act from responsibility under international law, provided a moral choice was in fact possible to him.

PRINCIPLE IV. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

PRINCIPLE V. Any person charged with a crime under international law has the right to a fair trial on the facts and law.

PRINCIPLE VI. The crimes hereinafter set out are punishable as crimes under international law:

....

b. War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment of prisoners of war or of 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. . . .

PRINCIPLE VII. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

solidified the arguments that the prescriptions, which were the subject of the Nuremberg Trials, were customary international law and confirmed jurisdiction independent of any nation's restrictions aimed at municipal crimes.¹⁷⁰ This customary international law was codified in the Geneva Conventions. "It is now generally accepted that breaches of the laws of war, and especially of the Hague Convention of 1907 and the Geneva Convention of 1949, may be punished by any state which obtains custody of persons suspected of responsibility."¹⁷¹

Israeli courts support the position that special legislation is not required to gain jurisdiction over war criminals.¹⁷² Israel as a nation has aggressively sought the extradition and punishment of war criminals.¹⁷³ When Argentina denied Israel's extradition

Id. (emphasis added).

Other resolutions urging states to cooperate in the prosecution and punishment of war criminals include: G.A. Res. 2583, U.N. GAOR, 24th Sess., Supp. No. 30, 1834th plen. mtg., at 58, U.N. Doc. A/7630 (1969); G.A. Res. 2712, U.N. GAOR, 25th Sess., Supp. No. 28, 1930th plen. mtg., at 78-79, U.N. Doc. A/8028 (1970); and G.A. Res. 2840, U.N. GAOR, 26th Sess., Supp. No. 29, 2025th plen. mtg., at 88, U.N. Doc. A/8429 (1971).

170. See generally, 2 BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT 22 (1980) (arguing that international law requires international crimes be punished).

171. BROWNLEE, *supra* note 160, at 305; see also Carnegie, *supra* note 154, at 424 (citing a trend in the development of international law toward "universal jurisdiction over all serious war crimes"); GILBERT, *supra* note 167, at 223 (stating that war crimes are "triable by a court anywhere in the world, although it would be preferable . . . that they be tried in the state where the crime was committed"); *Interim Report of the Commission of Experts Established Pursuant to Security Resolution 780*, U.N. SCOR, 47th Sess., at 20, ¶ 72, U.N. Doc. S/25274 (1992) ("Jurisdiction for war crimes is governed by the universality principle and, hence, is vested in all States, whether parties to the conflict or not.").

172. See GILBERT, *supra* note 167, at 222-23 (finding that "Israel's claim to jurisdiction is made under the universal, the passive personality, and the protective principles"). However, the United States may have a contrary view. See GENEVA CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS, EXEC. RPT. NO. 9, REPORT OF THE SENATE COMM. ON FOREIGN RELATIONS, ON EXECUTIVES D, E, F, AND G, 84th Cong., 1st Sess. (June 27, 1955), at 27 (explaining that during the advice and consent hearings before the Senate, their report opined "that the grave breaches provisions cannot be regarded as self-executing, and do not create international criminal law"); *Geneva Conventions for the Protection of War Victims: Hearings Before the Senate Committee on Foreign Relations*, 84th Cong., 1st Sess. (June 3, 1955).

173. For example, between June, 1960, and October 31, 1966 "Israeli authorities examined 10,629 witnesses, of whom 536 were heard in the presence of judges, prosecutors and defense counsel of the Federal Republic of Germany." Between the beginning of 1965 until 1968, 506 witnesses were heard by Israeli tribunals at the request of the Federal Republic of Germany, including 269 German nationals who were interrogated. *Study as Regards Ensuring the Arrest, Extradition and Punishment of Persons Responsible for War Crimes and Crimes Against Humanity and the Exchange of Documentation Relating Thereto*, U.N. ESCOR, 25th Sess., at 31, U.N. Doc. E/CN.4/983 (1969) [hereinafter UN REPORT].

request for Nazi war criminal Adolf Eichmann, Israel utilized the doctrine of self-help to enter Argentina, where they then took Eichmann and transported him back to Israel to stand trial for war crimes.¹⁷⁴ Adolf Eichmann was the architect of the "final solution"—the mass extermination of over six million Jews in Nazi concentration camps during World War II. Israel did not become an independent sovereign until 1948. What legal theory gave a nation, which did not exist as a sovereign at the time the atrocities occurred, jurisdiction to try this war criminal in 1961? Israeli courts cited universal jurisdiction under customary international law as one of the bases for the prosecution of this war criminal.¹⁷⁵

The abhorrent crimes defined in this law are crimes not under Israel law alone. These crimes which afflicted the whole of mankind and shocked the conscience of nations are grave offenses against the law of nations itself ("delicta juris gentium"). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, in the absence of an International Court the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial. The authority and jurisdiction to try crimes under international law are *universal*.¹⁷⁶

174. For a thorough discussion of the events surrounding his capture, trial, and hanging, see Matthew Lippman, *The Trial of Adolf Eichmann and the Protection of Universal Human Rights Under International Law*, 5 HOUS. J. INT'L L. 1 (1982). See also Michael H. Cardozo, *When Extradition Fails, Is Abduction the Solution?*, 55 AM. J. INT'L L. 127 (1961) (referring to Israel's abduction of Eichmann from Argentina in order to prosecute his war crimes); Helen Silving, *In re Eichmann: A Dilemma of Law and Morality*, 55 AM. J. INT'L L. 307 (1961) (examining the capture of Eichmann by Israel and the subsequent reaction of the U.N. Security Council); D. Lasok, *The Eichmann Trial*, 11 INT'L & COMP. L.Q. 355 (1962) (providing a case study on Israel's trial of Eichmann).

Israel is not the only nation who has on occasion utilized self-help to abduct a criminal from another sovereign. See *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (Mexican national kidnapped and brought to the United States for trial of violations of U.S. criminal laws).

175. See *Attorney-General of Israel v. Eichmann*, 36 I.L.R. 18, 26 (Isr. D.C. J. 1961), *aff'd*, 36 I.L.R. 277 (Isr. Ct. 1962) (stating that the "jurisdiction to try crimes under international law is *universal*"). One of the charges against Eichmann was a war crime violation. *Id.* at 14, 275.

176. Oliver, *supra* note 166, at 808; see also S.Z. Feller, *Jurisdiction Over Offenses with a Foreign Element*, in *A TREATISE ON INTERNATIONAL CRIMINAL LAW* (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

Israel's supreme court reinforced the district court's opinion, stating,

[T]he crimes attributed to the appellant [are crimes which] harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, *pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement*, to try the appellant.

Eichmann was convicted of both war crimes and crimes against humanity.¹⁷⁷ Citation to Israel case law is important because Israel follows the common law notion of *stare decisis*, "and it is generally accepted in Israel that decisions of the courts constitute a source of law."¹⁷⁸

Assuming, *arguendo*, that Israel's own conduct in hiding these atrocities is overlooked and that Israel continues to refuse to recognize its authority to apply universal jurisdiction in this case (as applied by both international tribunals and Israeli courts), this does not mean that Israel's obligations to the international community has ended. Israel must still exercise the mechanisms provided by international treaty and customary law if it refuses to try a war criminal within its custody.

C. Extradition

A second option available to Israel is to turn General Biro over to another nation or international tribunal for prosecution. Both Conventions provide that a nation with control over an alleged war criminal "may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case."¹⁷⁹ As mentioned earlier, General Biro's admissions alone would constitute sufficient evidence to establish a *prima facie* case. The question thus becomes, how does another state get custody over General Biro?

The normal procedure for delivering accused criminals from one sovereign to another is called "extradition."¹⁸⁰ Only serious offenses qualify as grounds for extradition.¹⁸¹ The mass murder of forty-nine protected persons clearly qualifies. If an extradition

Eichmann, 36 I.L.R. at 304 (bold-faced emphasis added).

177. The fact Eichmann was convicted of *both* war crimes and crimes against humanity becomes significant when countering argument which cites *Barble* as authority for applying domestic statute of limitations in this case. See *supra* note 122.

178. FRIEDMANN, *supra* note 149, at 47 (footnote omitted). For a discussion of Israeli court's development and application of *stare decisis* see *id.* at 48-52.

179. See DA PAM. 27-1, *supra* note 79, at 115 (GPW, art. 129) and 183 (GCC, art. 146).

180. U.S. statutory authority for extradition is located at 18 U.S.C. §§ 3181, 3184, 3186, 3188-95 (1994); see also *Terlinden v. Ames*, 184 U.S. 270, 289 (1902).

181. See RESTATEMENT, *supra* note 168, § 475 cmt. c.

treaty does exist between nations, murder is routinely included as an offense qualifying for extradition between states.¹⁸²

Another obstacle is the political offense exception. "[A] political offense may be an act that although it is in itself a common crime, acquires a predominantly political character because of the circumstances and motivations under and for which it was committed."¹⁸³ "[P]ractically all extradition treaties and relevant national laws contain a reservation on non-extradition for political offenses. . . ."¹⁸⁴ However, it is generally recognized that "war crimes do not qualify as political offenses and hence cannot bar extradition to a seeking country."¹⁸⁵ Some scholars have even argued that to use the political offense exception in order not to extradite a war criminal "is a serious breach of the international obligation of every State not to give asylum to those guilty of aggression upon all law and humanity."¹⁸⁶ Therefore, this objection will not hinder extradition.

A third principle is that "extradition is to be granted only if the act the fugitive is sought for is an extraditable crime according to the law of the demanding state as well as that of the

182. See John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1454 (1988). The U.S.-Israel extradition treaty includes the crime of murder as an extraditable offense. Convention Relating to Extradition, Dec. 10, 1962, U.S.-Isr., 14 U.S.T. 1707.

183. See GERHARD VON GLAHN, *LAW AMONG NATIONS* 294 (6th rev. ed. 1992) (footnote omitted). For a thorough discussion of this exception, see CHRISTINE V. WIJNGAERT, *THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION* (1980).

184. VON GLAHN, *supra* note 183, at 293.

185. *Id.* at 890; Dinstein, *supra* note 128, at 70; Wolfrum, *supra* note 155, at 197 ("[O]ffenses prosecuted on the basis of the principle of universal administration of justice are not political offenses, meaning that this objection cannot be raised to hinder a request for extradition. This is recognized in relation to the prosecution of war crimes.") (footnote omitted); Lauterpacht, *supra* note 104, at 90-91 ("[A]cts which *per se* constitute common crimes and which are contrary to rules of war cannot legitimately be assimilated to political offences"); L.C. Green, *Political Offences, War Crimes and Extradition*, 11 INT'L & COMP. L.Q. 329, 339 (1962) ("[I]t must be borne in mind that the 'normal' type of war crime committed by a serving soldier against the laws of war, such as the shooting of a prisoner of war . . . is not in any way politically motivated and may be treated, for the purposes of extradition, as a common crime."); see also Artukovic v. Rison, 784 F.2d 1354 (9th Cir. 1986). Some conventions specifically state grave breaches shall not be considered political offenses. See, e.g., Additional Protocol to the European Convention on Extradition, *opened for signature* Oct. 15, 1975, Europ. T.S. No. 86. Israel, the United Kingdom and 19 other nations are party to this extradition treaty. See GILBERT, *supra* note 167, at 21, 31 n. 31 (listing the States that signed the treaty); Theodor Meron, *Israel and the European Extradition System*, 5 ISR. L. REV. 75 (1970).

186. Manuel R. Garcia-Mora, *War Crimes and the Principle of Non-Extradition of Political Offenders*, 9 WAYNE L. REV. 269, 278 (1963); see also Silving, *supra* note 174, at 324.

requested Party."¹⁸⁷ The fact that the crime is no longer a *prosecutable* crime in the requested state is not necessarily a bar to extradition.¹⁸⁸

The practical sticking point is that extradition must be in accordance with Israeli law. If Egypt or any other nation's prosecutors formally indict General Biro based upon grave breach charges under the laws of war, does Israeli law permit his extradition? Israel's national extradition law and extradition treaties seem to preclude General Biro's extradition. The most liberal of Israel's extradition treaties are those between itself and the United States¹⁸⁹ and Great Britain.¹⁹⁰ The extradition between the United States and Israel provides that the requested party "shall not decline to extradite a person sought because such person is a national of the requested Party."¹⁹¹ What about Great Britain? Just recently, England began the trial of a British citizen for war crimes.¹⁹² The treaty between Great Britain and

187. Hans Schultz, *The General Framework of Extradition and Asylum*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 309 (Cherif Bassiouni & Ved P. Nanda eds., 1973), excerpt reprinted in INTERNATIONAL LAW ANTHOLOGY 238 (Anthony D'Amato ed., 1994). This concept is commonly called the "double criminality" requirement.

188. *In re Demjanjuk*, 612 F. Supp. 544, 569 (N.D. Ohio 1985), *aff'd*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

189. 1963 Extradition Treaty, Dec. 10, 1962, U.S.-Isr., 14 U.S.T. 1707 (entered into force Dec. 5, 1963) [hereinafter U.S.-Isr. Treaty]. This article does not devote much effort to fully analyzing an extradition of General Biro for practical reasons. In practice, the United States does not prosecute war criminals for crimes committed outside U.S. territory or control. The U.S. practice is to extradite alleged war criminals to other nations. "The American Office of Special Investigations has removed 48 alleged Nazi war criminals from the United States in the 15 years it has existed. Only four of them have been tried, two in Germany, one in Yugoslavia and one in Israel." *A Nazi's Flawed Trial*, N.Y. TIMES, Aug. 8, 1996, at A26.

190. Agreement Between Israel and United Kingdom of Great Britain and Northern Ireland, for the Reciprocal Extradition of Criminals, Apr. 4, 1960, 377 U.N.T.S. 331 [hereinafter U.K.-Isr. Treaty].

191. U.S.-Isr. Treaty, *supra* note 189, art. IV. U.S. courts recognize that international law is part of U.S. national law. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

192. See Ned Temko, *The Banality of Doing Good*, GUARDIAN, July 15, 1995, at 27 (explaining that an 84 year old man is being tried for his deeds as a police chief in Nazi-occupied Byelorussia during World War II).

Great Britain is one of the few nations to enact specific legislation to comply with GPW, *supra* note 79, art. 129. Their Geneva Convention Act of 1957 "makes the grave breach of willfully killing a prisoner of war punishable by life imprisonment . . ." See Howard S. Levie, *Penal Sanctions for Maltreatment of Prisoners of War*, 56 AM. J. INT'L L. 433, 455 n.90 (1962). Britain has also enacted the War Crimes Act of 1991 which enables its national courts to try its citizens for offenses that occurred on the Continent. See generally *England to Try Russian for War Crimes*, N.Y. TIMES, Apr. 16, 1996, at A4; *Israel's War on Lebanon and Britain's "Mad Cow" Disease and Nazi Crime Trial*, MIDEAST MIRROR, Apr. 17, 1996.

Israel contains no provision relating to nationality, and thus, it applies irrespective of the requested person's nationality.¹⁹³ Therefore, it would appear that either Great Britain or the United States could request extradition of General Biro based upon these treaties.

This may be problematic. First, both treaties with Israel bar extradition when the prosecution or the enforcement of the penalty for the offense has become barred by lapse of time according to the laws of the requesting Party or would be barred by lapse of time *according to the laws of the requested Party* had the offense been committed in its territory.¹⁹⁴ Since Israel's twenty-year statute of limitations arguably bars prosecution in Israel, General Biro might not be extraditable to either country. Second, The U.K.-Israel Treaty limits extradition to offenses committed within the territory of one party when the accused is "found within the territory of the other Party."¹⁹⁵ Here, since Israel has custody over a person who committed an offense in Israeli territory, not British territory, arguably no extradition can occur.¹⁹⁶

Finally, another obstacle to extradition is Israel's national extradition law. When Israel entered into its extradition treaty obligations with the United States and Great Britain, its national extradition law specifically allowed them to extradite an Israeli national to another nation.¹⁹⁷ This is no longer the case. In 1978, Israel's legislative body, the Knesset, amended Israel's extradition statute to preclude extradition of an Israeli national, if that person was an Israeli citizen at the time he committed the

193. See I.A. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 101-02 (1971).

194. U.S.-Isr. Treaty, *supra* note 189, art. VI(3) (emphasis added). The U.K.-Isr. Treaty, *supra* note 190, art. 5, contains similar language.

195. U.K.-Isr. Treaty, *supra* note 190, art. 1.

196. Another possible scenario exists. General Biro captured his prisoners when he was behind enemy lines; he was on Egyptian soil. However, by the time the executions occurred his main forces had arrived and the land was occupied by Israel. Even in this scenario, the treaty with Britain seems to preclude extradition.

197. See Theodor Meron, *Israel and the European Extradition System*, 5 *ISR. L. REV.* 75, 77 (1970); S.Z. Feller, *The Scope of Reciprocity in Extradition*, 10 *ISR. L. REV.* 427, 427 (1975).

offense.¹⁹⁸ Where a treaty and a statute cannot be reconciled, it is generally accepted that the last in time controls.¹⁹⁹

All of these extradition impediments, however, are nullified by the nature of the offense in this case. In most cases, extradition is not part of customary international law. Therefore, a state is usually only obligated to extradite if it has a treaty obligation to do so.²⁰⁰ However, under customary international law, there is a duty to hand over war crimes upon demand regardless of whether an extradition treaty exists.²⁰¹ Customary international law is part of the law of Israel.²⁰² "This theory relies on international

198. See Theodor Meron, *Non-Extradition of Israeli Nationals and Extraterritorial Jurisdiction: Reflections on Bill No. 1306*, 13 *ISR. L. REV.* 215, 215 (1978). Section 1 of Israel's extradition law now provides that "[a] person who is in Israel may only be extradited to another State if he is not an Israeli national and only in accordance with this Law." *Id.* But see III COMMENTARY, *supra* note 98, at 623 ("Most national laws and international treaties on the subject preclude extradition of accused who are nationals of the State detaining them. In such cases, Article 129 quite clearly implies that the States detaining the accused must bring him before its own courts.") (emphasis added).

199. See *Head Money Cases*, 112 U.S. 580, 599 (1884); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *The Chinese Exclusion Case*, 130 U.S. 581, 600, 602-03 (1889). However, the last in time rule is under increased criticism by the academic community that argues the rule is inconsistent with the Framers' intent. See Louis Henkin, *Treaties in a Constitutional Democracy*, 10 *MICH. J. INT'L L.* 406, 425-26 (1989); Jordan J. Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 *VA. J. INT'L L.* 393, 393 (1988); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 *VA. L. REV.* 1071, 1076 (1985).

200. 1 M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 319 (2d rev. ed. 1987); Hans Schultz, *The Classic Law of Extradition and Contemporary Needs*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 309-10 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973); see also *United States v. Rauscher*, 119 U.S. 407, 411-12 (1886) (The principle of international law recognizes no right to extradition apart from treaty.).

201. BROWNLEE, *supra* note 160, at 315 n.94 (citing two other articles in support of this position); Silving, *supra* note 174, at 324. ("Argentina had a duty [even absent an extradition treaty] not to withhold war criminals from justice, whether by granting them asylum or by affording them haven of refuge under any other title."); Garcia-Mora, *supra* note 186, at 285 ("Moreover, it is apparently the view of the Conventions that the surrender of an offender to a signatory State is not at all dependent upon the existence of an extradition treaty between the parties."); Joyce A.C. Gutteridge, *The Geneva Conventions of 1949*, 26 *BRIT. Y.B. INT'L L.* 294, 306 (1949) ("[I]t is clearly not intended that persons who commit grave breaches of the Geneva Convention should only be handed over to another High Contracting Party for trial if an extradition treaty exists between the two states concerned."); see also Edward M. Wise, *The Obligation to Extradite or Prosecute*, 27 *ISR. L. REV.* 268, 280 (1993).

202. *The Affo Case*, *supra* note 123, at 156. The Israeli Supreme Court succinctly stated the interface between Israeli municipal law and international law as follows:

solidarity and universal justice, to which the State applied to is duty bound to lend its assistance even in the absence of any diplomatic agreement."²⁰³ Prior to this incident, Israel supported creating an international convention on the extradition of war criminals, codifying this customary law.²⁰⁴

There is growing scholarly agreement that certain international fundamental rights are *jus cogens* norms—peremptory norms that all states are required to respect.²⁰⁵ "The system that evolved as a consequence of the adoption of the United Nations Charter and the conduct of the Nuremberg trials incorporated the principle that universal rules may be established from which no derogation is permitted. Thus, the concepts of international crimes and *jus cogens* norms became widely accepted in international law"²⁰⁶

One of these fundamental principles under international criminal law is *aut dedere aut judicare*—prosecute or extradite. This theory dates back to Grotius.²⁰⁷ Its purpose is to ensure that crimes under international law are punished and that the perpetrators of such crimes have no safehaven *anywhere*. While this principle has been codified in all four of the 1949 Geneva Conventions, the obligation also arises independently under customary international law.²⁰⁸ Under the concept of *jus cogens*, any treaty provision which conflicts with an international peremptory norm is void. This proposition has been codified in

To summarize, according to the law applying in Israel, an international treaty does not become part of Israeli law unless—

- (1) Its provisions are adopted by way of legislation and to the extent that they are so adopted, or,
- (2) The provisions of the treaty are but a repetition or declaration of existing customary international law, namely, the codification of existing custom.

Id. at 158.

203. UN REPORT, *supra* note 173, at 41. This document cites as support the writings of such distinguished international scholars as Grotius, Barbeyrac, Burlamaqui, and Vattel. Unfortunately, the document does not provide citation authority where one might find the basis for this proffer within these preeminent authors' writings.

204. *Id.* at 63.

205. For summaries of this theory, see Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55 (1966); Alfred V. Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571 (1937).

206. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 543 (1993).

207. 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* (THE LAW OF WAR AND PEACE) 526-29 (Francis W. Kelsey trans., 1925).

208. DA PAM. 27-1-1, *supra* note 84, at 65 (PI, art. 85(5)).

the Vienna Convention on the Law of Treaties.²⁰⁹ Unfortunately, this treaty does not directly affect this incident. It was signed in 1969. The Geneva Conventions were signed in 1949. The Convention on Treaties only effects treaties which come into effect after its effective date.²¹⁰ It does, however, provide persuasive evidence that the principle of *jus cogens* itself is a peremptory norm of international law.²¹¹ A recognized peremptory norm is the duty to protect POWs in a belligerent's hands and the killing POWs is a war crime.²¹² Therefore, no extradition treaty provisions that derogate this norm are permissible.²¹³

"It is taken for granted that the contracting parties intend something reasonable and something not inconsistent with generally recognized principles of International Law."²¹⁴ The reasonable interpretation, and the only one consistent with general principles of international law in the case of war crimes, is that the obligation *not* to extradite nationals only applies to *national* crimes and not crimes of universal concern within the world community.

It is universally recognized that the 1949 Geneva Conventions codify customary international law. A careful reading of paragraph 2 of Article 129, following simple sentence and paragraph structure rules, proves enlightening. It provides:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have order to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with its own legislation, hand such persons over for trial to another High Contracting Party concerned,

209. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679. In pertinent part, this Convention provides:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Id. art. 53.

210. *Id.* art. 4.

211. This seems to be the U.S. position. See RESTATEMENT, *supra* note 168, §§ 102 cmts. h-k, 331 cmt. e.

212. See generally Fania Domb, *Jus Cogens and Human Rights*, 6 ISR. Y.B. HUM. RTS. 104 (1976).

213. This is not to say that the terms in the extradition treaties at issue are necessarily void; it merely means that they must be interpreted in light of existing norms.

214. PEACE, *supra* note 127, at 952.

provided such High Contracting Party has made out a *prima facie* case.

The first sentence of the article is mandatory language, while the second sentence is discretionary.²¹⁵ For the specific offenses articulated in the Geneva Conventions as grave breaches, "the Conventions create universal mandatory criminal jurisdiction among contracting States."²¹⁶ The second sentence makes a critical reference to the first sentence. In the first sentence, the obligation applies to "such persons, *regardless* of their nationality." This obviously includes the prosecution of one's own national. The use of the phrase "such persons" refers to the earlier portion of the first sentence; it is a form of grammatical shorthand. The phrase "such person" means those "persons alleged to have committed, or to have ordered to have committed . . . grave breaches." The second sentence reaffirms this obligation. Use of the words "such persons" in the second sentence refers to those persons identified in the first sentence. Therefore, if a High Contracting Party chooses the option of not prosecuting, it must extradite, after a *prima facie* showing, "persons alleged to have committed, or to have ordered to be committed . . . grave breaches . . . *regardless of their nationality*."²¹⁷ Under the *jus cogens* theory, any other domestic or treaty obligation inconsistent with an international peremptory norm is void.

The second sentence of this paragraph is significant in another respect. This discussion thus far has assumed the phrase "hand such persons over for trial" means extradite. Most other commentators have equally assumed the same meaning. If that is the case, however, why did the drafters of the conventions not simply use "extradite"—a term which has clear legal significance? After all, the legal term extradition had by this time been used in international law for centuries.²¹⁸ Instead, they used the phrase "hand such persons over for trial" intentionally to avoid the issues associated with the traditional concepts of

215. III COMMENTARY, *supra* note 98, at 623.

216. The Prosecutor v. Dusko Tadic, Case No. IT-94-1-AR72, DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION BY THE UNITED NATIONS INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF FORMER YUGOSLAVIA SINCE 1991, ¶ 79 (Oct. 2, 1995) [hereinafter TRIBUNAL JURISDICTION MOTION].

217. *But see* Esgain & Solf, *supra* note 113, at 345 (explaining GPW Article 129 "imposes no obligation on states to enact extradition legislation or to extradite war criminals even when they are unwilling or unable to bring them to trial for their offenses").

218. For the historical evolution of the term extradition, see Edward M. Wise, *Extradition: The Hypothesis of a Civitas Maxima and the Maxim Aut Dedere Aut Judicare*, 62 REVUE INT'L DE DROIT PENAL 109 (1991).

extradition. This understanding comes from the historical context of when this article was drafted. During preparations for the post-World War II war crimes trials, the Allies began developing theories for prosecution. One of the early issues identified was the mechanism for apprehension of war criminals. The London International Assembly was one of several organizations which pursued this endeavor. While an unofficial body of the League of Nations, the Allied Governments appointed members who in-turn made recommendations back to them about war crimes trial issues.²¹⁹ These recommendations were closely followed by the Allied governments. This Commission "felt that the machinery of extradition is a slow and cumbersome business, ill-suited to speedy retribution after a war."²²⁰ They were concerned that war criminals could seek refuge in other nations because of the legal technicalities of extradition as they had developed up to that time.

It was therefore suggested that the term *extradition* should be reserved for the traditional handing over of persons charged with extraditable offences, and a new terminology was proposed, viz: (a) *surrender* for the *handing over* of a war criminal by an Axis to a United Nation; (b) *transfer* for the *handing over* of a war criminal by one United Nation to another. Both these operations could be carried out administratively, without judicial process or interference by any court.²²¹

This technical distinction was later adopted by the U.N. War Crimes Commission. The Allied governments thereafter established administrative procedures "devoid of all the impediments deriving from the strict judicial procedure in the case of extradition proper."²²² The procedures that developed included the requirement that a nation must first establish a *prima facie* case prior to the administrative machinery handing over such persons to another nation for trial.

Contemporaneous with the War Crimes Commission actions, the General Assembly was reaffirming this position. In October 31, 1947, the U.N. General Assembly passed a resolution by a majority vote (42 - 7). It was the first resolution to confirm the administrative procedure of handing over war criminals, provided a requesting nation offers *prima facie* evidence of the accused's guilt.²²³

219. HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 99 (1948) [hereinafter HISTORY OF THE UN WAR CRIMES COMMISSION].

220. *Id.* at 103; *see also id.* at 392-434.

221. *Id.* at 103-04.

222. *Id.* at 399.

223. *Id.* at 413-14.

Concurrent with the ongoing war crimes trials and the U.N. General Assembly resolutions in this area, a Diplomatic Conference was developing the 1949 Geneva Conventions. The problem of creating the penal sanctions to the Conventions was entrusted to the "Joint Committee."²²⁴ During discussions by the Special Committee of the Joint Committee, the commentary to penal sanction text proves enlightening. It was noted that the current article was already an improvement over existing law.

[T]he handing over of accused persons has been made conditional by the clause which lays down that the Power asking for an accused who is in the hands of another Power has to make out a *prima facie* case. It seems clear, however, that if a Contracting Party does not hand over an accused person, it *has to* bring him to trial before its own courts.²²⁵

During additional discussions over the wording in this proposed article, the Italian and Monegasque Delegates proposed using the word "extradition" in lieu of "handing over." The Italian Delegate also proposed to limit a nation's obligation to search for war criminals and bring them before that nation's courts. The use of the word extradition had also been proposed by a committee of experts commissioned by the International Committee of the Red Cross in its draft of the penal sanctions articles proposal.²²⁶

The Joint Committee rejected the proposal. The Netherlands Delegate explained to the Committee that use of this word was not practicable because of the various national applications and treaties relating to extradition law. "The notion 'handing over' was a notion of *customary international law* in so far as it was extensively practised by States after the last war in connection

224. See COMMENTARY, I GENEVA CONVENTION FOR THE AMELIORATIONS OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 360 (Jean S. Pictet ed., 1952) [hereinafter I COMMENTARY].

225. *Fourth Report Drawn up by the Special Committee of the Joint Committee*, July 12, 1949, in II-B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, 115 [hereinafter *Joint Committee Report*] (emphasis added).

226. I COMMENTARY, *supra* note 224, at 358-59. However, in its initial submittal to the Diplomatic Conference, the International Committee of the Red Cross proposed language consistent with the "hand over" words ultimately adopted. They proposed in 1948 the following article:

Each Contracting Party shall be under obligation to search for the persons alleged to be guilty of breaches of the present Convention, whatever their nationality, and in accordance with its own laws or with the conventions prohibiting acts that may be considered as war crimes, to indict such persons before its own tribunals, or to *hand them over for judgment* to another Contracting Party.

COMMENTARY, II GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA 262 (Jean S. Pictet ed., 1960) (emphasis added).

with activities of the United Nations War Crimes Commission."²²⁷ The Netherlands Delegate also addressed the Italian delegate's attempt to limit a nation's obligations under the proposed article. He explained that each nation, including neutral states, should have this responsibility. "The principle of universality should be applied here. The Contracting Party in whose power the accused is, should either try him or hand him over to another Contracting Party."²²⁸ After this explanation, the proposal was withdrawn, and no further comment on this distinction seems to have occurred. Thus, one can see the causal link between the drafters' intent and the ongoing practice of the War Crimes Commission.

From a historical context and a review of the record of the Diplomatic Conference on this subject, it seems evident that this article's drafters made a special point not to associate the obligation to "hand such persons over" with the legal mechanism of extradition. The authority they cite is customary international law. The confusion in this area seems to originate in the commentaries themselves. Pictet inartfully substitutes the word extradition in his editorial comments on this common article. Thus, without looking at the contextual interplay between the War Crimes Commission and the Diplomatic Conference developing the 1949 Conventions, any reasonable researcher would assume the technical consequences of Pictet's use of the term "extradition." As has been demonstrated, the obligation is not to prosecute or extradite, but to prosecute or hand such persons over to another High Contracting Party. The drafters of the Convention went to extraordinary lengths to avoid using the word "extradition" because of the associated technical consequences. In sum, "the correct interpretation of a given provision in the law stems not only—though primarily—from the language of the provision, but also from the purpose of the law, *the flaw which it comes to correct*, and from the circumstances surrounding it."²²⁹ The grammatical distinction is subtle, but it profoundly impacts the extradition shield war criminals would attempt to raise as a bar to prosecution.

Another argument is that any treaty provision that precludes the extradition of a war criminal violates a nation's obligations under the U.N. Charter. The U.N. General Assembly has frequently and consistently advocated the punishment or extradition of war criminals in resolutions voted for by Israel. "In the event of a conflict between the obligations of the Members of

227. *Joint Committee Report*, *supra* note 225, at 117 (emphasis added).

228. *Id.* at 116.

229. *The Affo Case*, *supra* note 123, at 143 (quoting *C.A. 31/63 Feldberg v. Director for the Purposes of the Land Improvement Tax Law*, 17 P.D. 1231, at 1235); *see also id.* at 144, 154.

the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter *shall* prevail."²³⁰

Here, the obligation not to harbor General Biro is recognized by the General Assembly in the *Universal Declaration of Human Rights*.²³¹ Article 14(2) provides that the right to asylum "may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."²³² This obligation extends to asylum whether it be *de jure* or *de facto*. By failing to prosecute or hand General Biro over to another High Contracting Party, Israel is providing *de facto* asylum in violation of these fundamental tenets of international law. As indicated, the United Nations has spoken clearly and continuously of the obligation to search for and prosecute war criminals or to hand them over to another nation who will take such action. Israel's case law supports this argument. "There is considerable foundation for the view that the grant of asylum by *any* country to a person accused of a major crime of this type and the prevention of his prosecution constitute an abuse of the sovereignty of that country contrary to its obligation under international law."²³³

As mentioned above, Israeli municipal law appears to preclude the extradition of an Israeli national. General Biro is an Israeli national. It therefore would seem that Israel's extradition law precludes his extradition for these offenses. Fortunately, Israel recognizes and incorporates customary international law into its domestic law, without legislation being required. "This type of norm, to the extent that it exists in the field of extradition, constitutes an integral part of Israeli extradition law, even if it finds no formal or explicit expression in Israeli domestic or international statutes."²³⁴ Again, this municipal law must be

230. U.N. CHARTER art. 103. The Security Council has the authority to enforce or modify international obligations of member states. If a qualified majority vote results from the 15 members in a Resolution, the members states are legally obligated to adhere to it and can themselves be subject to appropriate sanctions for failure to comply with a Security Council Resolution. See U.N. CHARTER arts. 25, 35-51.

231. G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) reprinted in BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW: SELECTED DOCUMENTS* 381-86 (1991).

232. *Id.* at 383.

233. Attorney-General of Israel v. Eichmann, 36 I.L.R. 18, 74 (Isr. D.C.J. 1961) (emphasis added), *aff'd*, 36 I.L.R. 277 (Isr. Ct. 1962).

234. S.Z. Feller, *The Legal Position of Israel as Requested State Which Refuses Extradition*, in ISRAELI REPORTS TO THE XI INTERNATIONAL CONGRESS OF COMPARATIVE LAW 329 (Stephen Goldstein ed., 1982).

interpreted to limit extradition only for municipal crimes, not international crimes.

A rule of Municipal Law, which ostensibly seems to conflict with the Law of Nations, must, therefore, if possible, always be so interpreted as to avoid such conflict. In case of a gap in the statutes of a State *regarding certain rules necessitated by the Law of Nations*, such rules ought to be presumed by the courts to have been tacitly adopted by such Municipal Law.²³⁵

The gap that exists here is an inadvertent oversight in Israel's law reaffirming its obligation under international law to ensure the handing over of *any* war criminal. Having tirelessly sought the moral high ground in pursuit of war criminals who committed atrocities against its own people under the battle cry "Lest we forget," Israel seems to have forgotten that even Israelis can commit war crimes. Whether or not Israel will honor this obligation remains to be seen.²³⁶

While Egypt would obviously like to acquire custody of General Biro, it seems politically unacceptable for Israel to turn over an Israeli to Egypt.²³⁷ Moreover, Israel and Egypt currently do not have an extradition treaty which, as stated, is the usual method of transfer. Of course, Egypt does not agree with this position. In fact, "senior Egyptian judges and professors of

235. PEACE, *supra* note 127, at 46 (emphasis added).

236. As previously noted, the decision of whether to extradite is left to the discretion of the requested State. This shortcoming has not gone unnoticed. With hopes of strengthening the more generalized battle against international crimes, the United Nations recently created a Model Treaty on Extradition. See Model Extradition Treaty, G.A. Res. 45/116 (1991); *Report of the Eighth United Nations Congress on the Prevention of Crimes and Treatment of Offenses*, UN Doc. A/Conf. 144/28, at 71 (1990). For a discussion of this Model Treaty, see Roger S. Clark, *Crime: The UN Agenda on International Cooperation in the Criminal Process*, 15 NOVA L. REV. 475, 485-89 (1991).

237. Any complaint by General Biro about being handed over to Egypt has been previously answered by the international community. It might serve Egypt well in any future briefs before an international forum to quote the words of Quincy Wright:

[A] criminal [cannot] complain that he is entitled to be tried by an impartial and neutral Court and not by a Court constituted by the enemy. All he is entitled to is a trial on fact and law conducted on the principles of elementary justice. A burglar cannot complain that he is being tried by a jury of honest citizens. Trials of international criminals are watched by the world and the Court knows that it is also itself on trial. Not only is the practice of trials of war offences by Military Courts of the other belligerents established by International Law, but it is obviously the only practicable course, certainly in such circumstances as those now existing.

HISTORY OF THE U.N. WAR CRIMES COMMISSION, *supra* note 219, at 550; see also UNITED NATIONS WAR CRIMES COMMISSION, XII LAW REPORTS OF TRIALS OF WAR CRIMINALS 63 (1949) (holding an accused does not have the right to demand that he be tried in a particular forum; his only right is to a fair trial).

international law met at Cairo University and issued a statement claiming Cairo's right to demand the extradition of Israelis responsible for those war crimes to stand trial in Egypt."²³⁸ Conversely, it is probably politically unacceptable for Israel to harbor an admitted war criminal. Argentina, for example, has historically harbored Nazi war criminals, and it has paid a high price diplomatically. As recently as August 1995, an Argentine lower court refused to grant extradition of former Nazi SS Captain Erich Priebke accused by Italy of committing war crimes.²³⁹ The ruling subjected Argentina to an outcry in the international community.²⁴⁰ The lower court ruling barring extradition was later reversed by Argentina's Supreme Court, and Mr. Priebke was extradited to Italy to stand trial for war crimes.²⁴¹ The Italian

238. Bahaa Elkoussy, *Egypt, Israel Debate Peace, POWs*, UPI, Oct. 12, 1995, available in LEXIS, News Library, CURNWS File.

239. Priebke is charged with the massacre of 335 Italians, including 75 Jews. The SS ordered the reprisal in 1944 for an ambush that left 33 German soldiers dead. The bodies were buried in the Ardeatine caves on the outskirts of Rome. Paddy Agnew, *Nazi Trial Reopens Bitter Wounds for Italy*, IRISH TIMES, May 11, 1996, available in LEXIS, News Library, CURNWS File; Peter Shadbolt, *Ex-Nazi to be Extradited to Italy*, UPI, Nov. 3, 1995, available in LEXIS, News Library, CURNWS File; Daniel Williams, *Nazi Horror Still Haunts Eternal City: SS Officer Faces Trial In Roman Massacre*, WASH. POST, Nov. 22, 1995, at A19; see also *Prosecutor to Question Man Who Says He Saw Massacre*, AP, Dec. 12, 1995, available in LEXIS, News Library, AP File; Celestine Bohlen, *Italian War-Crimes Trial Opens*, N.Y. TIMES, Dec. 8, 1995, at A12; Celestine Bohlen, *Rome Tribunal Opens Trial of Ex-Nazi in Massacre of 335*, N.Y. TIMES, May 9, 1996, at A5; *Milestones*, TIME, Apr. 15, 1996, at 15; Daniel Williams, *Ex-Nazi's Trial, Book on Gassing Bring Fascism Back Into Focus*, WASH. POST, May 7, 1996, at A14.

The Priebke case is interesting because of the similarities in how the alleged atrocities came to light. The Argentine government arrested Mr. Priebke in May, 1994, after he was interviewed by the ABC television network. In his interview, he admitted he took part in an execution squad that committed the worst massacre in Italy during World War II.

240. See, e.g., Oscar Florman, *Argentina: Nazi Officer Priebke's Extradition Denied*, Inter Press Service, Aug. 24, 1995, available in LEXIS, News Library, CURNWS File; see generally *Argentina in Uproar over Police Who Hugged Alleged Nazi*, Agence France Presse, Dec. 14, 1995, available in LEXIS, News Library, CURNWS File.

241. Ironically, the Italian military tribunal convicted Priebke for his involvement in the 1944 massacre, but ruled it could not sentence him because of Italy's domestic statute of limitations. The Italian Court's 125-page opinion was released to the media on September 30, 1996. At the time this article was written, an English version of the opinion was not available to the author. However, news reports provide a summary of the court's opinion. One newspaper reported that the court found mitigating factors that allowed for the domestic statute of limitations to apply. The mitigating factors being, that in the 50 years since the massacre, Priebke distanced himself from his Nazi past. *Judges: Priebke Acquitted for "Impeccable Behaviour" Since 1945*, Deutsche Presse-Agentur, Oct. 1, 1996, available in LEXIS, News Library, CURNWS File; *Court Explains Verdict in Priebke Case*, Agence France Presse, Sept. 30, 1996, available in LEXIS, News Library, CURNWS File; *Rome Court Papers Reveal Judges Thought Priebke*

military court found Priebke guilty, but also found mitigating factors allowing the court to apply a domestic statute of limitations. Ironically, the Israeli foreign ministry "expressed its shock at the decision taken by the military court in Italy. . . . It is inconceivable that Priebke, who admitted to personally

'Not Particularly Cruel', JERUSALEM POST, Oct. 1, 1996, at 4, available in LEXIS, News Library, CURNWS File. Another basis provided by the courts was Priebke was just "acting under orders from his Nazi superiors." Andrew Gumbel, *Why Italy Cannot Bring War Criminals to Justice*, INDEPENDENT, Aug. 8, 1996, at 13, available in LEXIS, News Library, CURNWS File. Another newspaper reported that the court found a lack of aggravating factors; that is, the murder of 335 innocent civilians was not done with cruelty and premeditation. *Priebke Cleared of Most Serious Charges in WWII Massacre*, JERUSALEM POST, Aug. 2, 1996, at 1, available in LEXIS, News Library, CURNWS File.

The court's rationale as reported seems incredible. Obviously, Priebke would distance himself from his criminal Nazi past. He lived in Argentina to protect himself from his past. Surely he was aware of Israel's practice in taking Eichmann back to Israel once they discovered his whereabouts. How this court found that the assemblage of ten innocent civilians for every German soldier killed in the ambush was not premeditation defies logic. Priebke admitted to personally killing two of the 335 massacred and to helped organize the massacre. *Germany Asks Italy to Extradite Priebke and Hass*, JERUSALEM POST, Aug. 14, 1996, at 12, available in LEXIS, News Library, CURNWS File. Priebke had to load his weapon, point his weapon, and pull the trigger at two different unarmed individuals. How much more premeditation does an Italian military court require? Finally, the court allegedly found mitigation in the fact that Priebke was merely following orders. For over 50 years, the international community has denied the validity of this defense. The best summary of the law in this area is as follows:

An unlawful act of a soldier or officer in obedience to an order of his government or his military superior is not justifiable if when he committed it he *actually knew or, considering the circumstances he had reasonable grounds for knowing that the act ordered is unlawful* under (a) the laws and customs of warfare, or (b) the principles of criminal law generally prevailing in civilized nations, or (c) the law of his own country. In applying this rule, whenever the three legal systems clash, *the last shall be subordinate.* (emphasis added).

Trial of Lieutenant-General Shtigeru Sawasa and Three Others, 5 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORT OF TRIALS OF WAR CRIMINALS, Case No. 25, 1, 15 (1946); see generally *id.* at 14-19.

The acquittal caused domestic and international outrage. In response, Germany requested extradition of Priebke so they may try him for this massacre as well as others he reportedly committed. *Germany Asks Italy to Extradite Priebke and Hass*, JERUSALEM POST, Aug. 14, 1996, at 12A, available in LEXIS, News Library, CURNWS File. Additionally, Italy's Minister of Justice issued a new arrest warrant against Priebke for the murder of 15 hostages shot in cold blood he allegedly committed during World War II. Margaret Rigillo, *Wheels of Justice Grind Exceedingly Slow as Heaven's Gate Stays Shut*, HERALD (Glasgow), Sept. 16, 1996, at 9, available in LEXIS, News Library, CURNWS File; *Ex-SS Man Priebke's Case Goes to Italian Constitutional Court*, Agence France Presse, Sept. 5, 1996, available in LEXIS, News Library, CURNWS File; Ian Traynor, *Priebke Sows War Crimes Confusion*, GUARDIAN, Aug. 3, 1996, at 16.

supervising the murder of 335 human beings, should be allowed to walk free."²⁴² Isn't it equally inconceivable that General Biro, who admitted to personally killing 49 unarmed POWs, should be allowed to walk free?

D. Israel's Options in Fulfilling Its International Obligations

Three potential options exist for Israel: (1) turn over General Biro (*voluntarily* or through an extradition request) to a mutually agreeable nation for trial; (2) try him by military commission, if Israeli law recognizes such a tribunal; or (3) hand him over to an international tribunal such as the one currently convened at the Hague. While nothing precludes Israel from voluntarily turning General Biro over to another sovereign, the first option may not be practical.²⁴³ For instance, the United States (presuming General Biro could be tried in a U.S. forum) would not likely be an acceptable nation because of the perception in the Arab community that the United States may not be impartial. As an alternative, Great Britain has no political interest in the outcome of this matter. For that matter, neither does the United States. It is this conflict between a nation's interest in punishing war criminals and political concerns which makes this first option unworkable.

The obligation to search for persons who have committed grave breaches and bring them before one's courts extends to all nations, not just belligerent nations. Yet, war crime trials "by national tribunals of states other than those of the nationality of the victim, the accused or of the locale of the crime have been quite rare."²⁴⁴ In the *practice* of nations, governments are reluctant to settle politically charged allegations of war crimes absent allied participation or direct political benefits to itself.²⁴⁵

The second theoretical possibility is to try General Biro by military commission. Historically, military commissions enforce

242. *Israel Slams Priebeke Court Ruling*, Agence France Presse, Aug. 5, 1996, available in LEXIS, News Library, CURNWS File.

243. In fact, on several occasions nations have expelled citizens because the national statutes of limitations have precluded prosecution under municipal law. See Van den Wijngaert, *supra* note 99, at 93. Many of the "citizens" which were ultimately expelled obtained their citizenship by deceit and were denaturalized and deported based upon this deception. See, e.g., *Federation Nationale Des Deportees et Internes Resistants et Patriotes and Others v. Barbie*, 78 I.L.R. 125 (Cass. Crim. 1985).

244. 2 UNITED NATIONS LEGAL ORDER 1013 (Oscar Schachter & Christopher C. Joyner eds., 1995).

245. See generally, David A. Martin, *Symposium: War Crimes: Bosnia and Beyond: Reluctance to Prosecute War Crimes: Of Causes and Cures*, 34 VA. J. INT'L. L. 255 (1994).

the laws of war as well as military law. The U.N. War Crimes Commission aptly summarized the customary law of military commissions:

As to jurisdiction the traditional rule is that a Military Court, whether national or international, derives its jurisdiction over war crimes from the bare fact that the person charged is within the custody of the Court; his nationality, the place where the offence was committed, the nationality of the victims are not generally material. This has been sometimes described as universality of jurisdiction as being contrary to the general rule that courts have a jurisdiction limited to the national territory or to the nationality of the injured person.²⁴⁶

While Israeli military justice law²⁴⁷ does not specifically authorize usage of a military commission, its modern military justice roots originated from the British military justice system, which does recognize the customary international law usage of military commissions.²⁴⁸

246. 15 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS x (1949) (forward).

247. *Military Justice Law 5715-1955* (1976) (as amended).

248. See generally, M. Zohar, *Modern Trends in Military Law and Their Influence on Israel's Military Justice Law*, in 5 STUDIES IN LAW, SCRIPTA HIEROSOLYMITANA 178 (1958), reprint available at the U.S. Army Judge Advocate General's School's Library, Special Collections. For a summary of the British Manual in effect contemporaneously with these events, see Carnegie, *supra* note 154, at 421. The British used military tribunals after World War II. These tribunals had jurisdiction to try "violations of the laws and usages of war committed during any war in which His Majesty has been engaged at any time after 2nd September, 1939." HISTORY OF THE U.N. WAR CRIMES COMMISSION, *supra* note 219, at 462 (quoting British Army Order 81/1945, U.N.W.C.C. Doc. C.131 of 27.6.45) (emphasis added).

For a discussion of the use of military commissions to try war crimes following U.S. practice, see WINTHROP, *supra* note 1, at 831-84; Military Commissions, 11 Op. Att'y Gen. 297 (1865) (opining that the military tribunal which convicted Booth and his co-conspirators had jurisdiction to try the accused under the laws and customs of war); *Ex parte Quirin*, 317 U.S. 1 (1942); Robinson O. Everett, *Possible Use of American Military Tribunals to Punish Offenses Against the Law of Nations*, 34 VA. J. INT'L. L. 289 (1994); Note, *Jurisdictional Problems Related to the Prosecution of Former Servicemen for Violations of the Law of War*, VA. L. REV. 947, 954-63 (1970); Sheldon Glueck, *By What Tribunal Shall War Offenders be Tried?*, 56 HARV. L. REV. 1059, 1063-74 (1943) (discussing the forums of ordinary national criminal courts, military commissions, multinational military tribunals, and creation of an International Criminal Court); A. Wigfall Green, *The Military Commission*, 42 AM. J. INT'L L. 832 (1948); see generally OPPENHEIM, *supra* note 80, at 566-88. Under current U.S. law, this is probably the only forum available to trial General Biro if tried by the United States.

One should also understand that military commissions are different than some of the occupational courts which preside over the West Bank and Gaza strip. Military officers preside during military commissions and these commissions can be convened at any time. They enforce the laws of war as well as military law. Occupation courts normally consist of civilian judges from the indigenous populace. See IV COMMENTARY, *supra* note 93, at 302-08 (art. 54).

The third option is an *ad hoc* international war crimes tribunal similar to those currently addressing atrocities in the former Yugoslavia²⁴⁹ and Rwanda.²⁵⁰ International law clearly allows the parties to agree to turn the entire matter over to an international court.²⁵¹ These tribunals' charters, however,

These judges enforce the laws in effect in the occupied territory immediately prior to the occupation, subject to modifications by the conquering forces deemed necessary to maintain security or that are an obstacle to enforcing the Fourth Convention. *Id.* at 334-37 (art. 64); *see also* DA PAM. 27-1, *supra* note 79, at 12 (HR, *supra* note 80, art. 23(H)) ("It is especially forbidden . . . to declare abolished, suspended, or inadmissible in a Court of law the rights and actions of the nationals of the hostile party.") and 15 (HR, *supra* note 80, 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."). *See also* OPPENHEIM, *supra* note 80, at 453-55. In addition to local judges, occupying forces often establish military courts to adjudicate matters of security. *See* EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 116 (1993); OPPENHEIM, *supra* note 80, at 446-47, 454. The Fourth Convention specifically authorizes convening military courts in occupied territories to enforce the security ordinances. IV COMMENTARY, *supra* note 93, at 339-41 (art. 66). These courts would be military commissions and they have jurisdiction over local law offenses and offenses violative of the security ordinances. However, as a matter of practice, occupational forces normal only preside over local law offenses if the offense is of a security nature or the offender is a national of the occupying force. *See* THE RULE OF LAW IN THE AREAS ADMINISTERED BY ISRAEL 32 (Isr. Nat'l Section of the Int'l Comm. of Jurists ed., 1981); Allied Kommandatura Law No. 7 of 17 March 1950, *AK Gazette*, at 11 (as amended). The copy of this document is in the authors personal library who actually practiced occupation law in Berlin from 1988 to 1990. For a discussion of occupation law in Berlin, *see* I.D. HENDRY & M.C. WOOD, *THE LEGAL STATUS OF BERLIN* 65-68 (1987). Offenses by occupation force soldiers are handled by traditional courts-martial.

For further discussions on the application of occupation law and its court system in the West Bank and Gaza strip in addition to those already cited, *see* ISRAEL, *THE INTIFADA AND THE RULE OF LAW*, 59-100, 241-46 (David Yahav ed., 1993); Esther R. Cohen, *Justice for Occupied Territory? The Israeli High Court of Justice Paradigm*, 24 COLUM. J. TRANSNAT'L L. 471 (1986); Yaron Butovsky, *Law of Belligerent Occupation: Israeli Practice and Judicial Decisions Affecting the West Bank*, 1983 CAN. Y.B. INT'L L. 217, 219-21; Allan Gerson, *Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank*, 14 HARV. INT'L L.J. 1 (1973).

249. STATUTE OF 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, *reprinted in* 32 I.L.M. 1192-1201 (1993); *see also* REPORT ON THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA: SUBMITTED BY A SPECIAL TASK FORCE OF THE ABA SECTION OF INTERNATIONAL LAW AND PRACTICE (1993).

250. REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 5 OF SECURITY COUNCIL RESOLUTION 955 (1994), U.N. Doc. S/1995/134 (Feb. 13, 1995); *see also* S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/Res./955 (Nov. 8, 1994), *reprinted in* 33 I.L.M. 1598 (1994).

251. III COMMENTARY, *supra* note 98, at 624; DA PAM. 27-1, *supra* note 79, at 70 (GPW, art. 6); *accord* RESPONSE TO THE MOTION OF THE DEFENCE ON THE

currently limit their jurisdiction to offenses committed within the former Yugoslavia and Rwanda. The jurisdictional basis for an international court could be the principle of universal jurisdiction.²⁵² For example, the International Tribunal for war crimes in the former Yugoslavia is currently citing universal jurisdiction as its basis for the trial of Dusko Tadic.²⁵³ The current tribunal's practice supports the argument that universal jurisdiction is original.²⁵⁴

To establish an *ad hoc* tribunal under Chapter VII, the Security Council would have to find that there exists a threat to the peace and security of the international community if General Biro or any other war criminal is not prosecuted.²⁵⁵ The United Nations could make such a finding in this case. First, the very reason there exists universal jurisdiction over these offenses is because they are crimes against mankind as a whole. Deterrence has always served societies well in preventing criminal acts. This fact has been best argued by Cowles and cited for authority by Israel's Supreme Court:

[W]hile the State whose nationals were directly affected has a primary interest, all civilized States have a very real interest in the punishment of war crimes. "The unpunished criminal is itself a menace to the social order." And an offense against the laws of war, as a violation of the law of nations, is a matter of general

JURISDICTION OF THE TRIBUNAL, *The Prosecution of the Tribunal v. Dusko Tadic*, Case No. IT-94-1-T, UNITED NATIONS INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF FORMER YUGOSLAVIA SINCE 1991 (July 7, 1995) [hereinafter PROSECUTOR'S BRIEF].

252. See B. Graefrath, *Universal Jurisdiction and an International Court*, 1 EUR. J. INT'L L. 67, 87 (1990); Wolfrum, *supra* note 155, at 188-89 (stating that "[i]nternational prosecution based upon the principle of universal jurisdiction and the prosecution of offenders through an international criminal tribunal are not necessarily mutually exclusive") (footnote omitted).

253. TRIBUNAL JURISDICTION MOTION, *supra* note 216, ¶¶ 57-59; PROSECUTOR'S BRIEF, *supra* note 251, ¶¶ 57-59.

254. Concurrent with these proceedings a Bosnian Serb municipal court tried and convicted a man of war crimes. *War Crimes; Court Sentences Bosnian Serb War Criminal to 10 Years' Imprisonment*, BBC Summary of World Broadcasts, Sept. 30, 1995 (Source: HINA news agency, Zabreb, in English 1440 gmt 28 Sep 95), available in LEXIS, News Library, CURNWS File.

255. The bases for establishing both the Yugoslavian and Rwandan International Tribunals was Chapter VII of the U.N. Charter. See S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993) (establishing the International Tribunal for the Prosecution of War Crimes in the Former Yugoslavia); UNITED NATIONS, REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808 (1993), U.N. Doc. S/25704 and Annex (May 3, 1993), reprinted in 32 I.L.M. 1159 (1993); S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994) (establishing the International Tribunal for Atrocities Committed in Rwanda).

interest and concern . . . war crimes "are offences against the conscience of civilized humanity."²⁵⁶

Second, given the historic tension in this region of the world, it would seem that the United Nations has a vested interest in ensuring that the peace process continues unabated.

One benefit in having an international tribunal adjudicate this matter is that they are not bound by a national statute of limitations.²⁵⁷ It seems politically and morally acceptable to request the United Nations to extend its tribunals' jurisdiction over this matter until such time as the U.N. Security Council establishes a permanent international criminal tribunal under Chapter VII of the U.N. Charter.²⁵⁸ The International Tribunal Appeals Court best stated the argument for having General Biro's crimes handled by this court.

[O]ne cannot but rejoice that, universal jurisdiction being nowadays acknowledged in the case of international crimes, a person suspected of such offences may finally be brought before an international judicial body for a dispassionate consideration of his indictment by impartial, independent and disinterested judges coming, as it happens here, from all continents of the world.²⁵⁹

VIII. WHAT ARE EGYPT'S OPTIONS SHOULD ISRAEL CONTINUE TO IGNORE ITS OBLIGATIONS UNDER INTERNATIONAL LAW?

Diplomacy, both direct and public, is always a tactic available to Egypt. Israel prides itself on being a nation of laws and a champion of victims of war crimes. Enforcing the Geneva

256. Cowles, *supra* note 166, at 217 (footnote omitted).

257. Craig v. Ministry of Energy of Iran and Others, Case No. 346, 78 I.L.M. 658, 666 (Iran-United States Claims Tribunal 1983).

258. Throughout this century various authors have argued for a permanent international criminal tribunal. See, e.g., Manley O. Hudson, *The Proposed International Criminal Court*, 32 AM. J. INT'L L. 549 (1938); John W. Bridge, *The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law*, 13 INT'L & COMP. L.Q. 1255, 1266-1780 (1964); see generally BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT (1980). For discussions on a permanent International Criminal Court, see M. CHERIF BASSIOUNI, A TREATISE ON INTERNATIONAL CRIMINAL LAW (1993). Pictet himself recognized this possibility. He concluded that Article 129 "does not exclude handing over the accused to an international criminal court whose competence has been recognized by the Contracting Parties." On that point, the Diplomatic Conference *specifically* wished to reserve the future position and not impede the progress of international law." III COMMENTARY, *supra* note 98, at 624. The debate still continues as the United Nations creeps towards an international criminal court. See John Goshko, *U.N. Moving Toward Creation of Criminal Court*, WASH. POST, Apr. 21, 1996, at A27.

259. TRIBUNAL JURISDICTION MOTION, *supra* note 216, ¶ 62.

Conventions is the means to champion victims of war crimes. Israel would be well-served to be reminded of the phrase "Lest we forget." For Israel to transition to peace with its Arab neighbors, it must demonstrate its willingness to enforce international law against not only its neighbors, but against itself. Historically, Israel has aggressively used international law as justification for its actions in punishing war criminals from World War II. Admittedly, the Jewish people suffered millions of deaths at the hands of the Nazis. However, if anything, that should heighten, not diminish, Israel's obligation to punish all war criminals. To argue that there is nothing that can be done or that too much time has passed is the very argument Nazi war criminals or governments sympathetic to the Nazis have used since the end of World War II. Israel did not accept these arguments from Argentina or "Ivan the Terrible."²⁶⁰ The fact that the victims in this case are not Jews does not make the crimes less horrific. To follow down this path of logic is to follow the logic justifying the failure to punish those who committed the horrors suffered in the concentration camps in the former Yugoslavia or Nazi Germany, which General Biro himself experienced firsthand.

Another option is for Egypt to abduct General Biro, just as Israel did Eichmann in 1960, after Argentina refused its extradition request. In a twist of fate, Egypt could cite Israeli practice and case law to support its actions.²⁶¹ This is an unlikely option, however, because it might lead to counter abductions. The long-term political risks far outweigh any possible gain, especially when one considers the ongoing peace process between Israel and its neighbors.

260. See generally Lippmann, *supra* note 174.

261. Another source of authority to support jurisdiction after an abduction is the U.S. court-created *Ker-Frisbie* rule. This rule allows a court to exercise jurisdiction over any fugitive offender who has been brought before a court by whatever means, even illegal ones. The rule provides no basis for the fugitive to challenge his return to the prosecuting jurisdiction. See *Ker v. Illinois*, 119 U.S. 436, 442-44 (1886); *Frisbie v. Collins*, 342 U.S. 519, 522-23 (1952); *United States v. Alvarez-Machain*, 504 U.S. 655, 660-62 (1992). This authority is not a legal basis for the abduction itself, but holds that the act of abduction does not create a bar to prosecution.

IX. CONCLUSION

No greater disgrace can befall the army and through it our whole people, than the perpetration of barbarous outrages upon the innocent and defenseless. Such proceedings not only disgrace the perpetrators and all connected with them, but are subversive of the discipline and efficiency of the army, and destructive of the ends of our movement.

General Robert E. Lee²⁶²

A logical solution to this politically charged situation is to refer the matter to the United Nations and request that the United Nations establish an independent prosecutor to review and investigate the allegations. As a result, Israel would meet its international law obligations while successfully precluding (practically speaking) Egypt from acquiring personal jurisdiction over General Biro. It appears that Egypt is moving in this direction. If a recommendation to indict arises, the Israeli government will not be prosecuting one of its own generals, and the tribunal will occur outside the control of the Egyptian government. While this solution may not seem acceptable to General Biro, his own actions cannot be ignored. General Biro is a survivor of the Holocaust and surely was aware of the post-war trials of the late 1940s. He had direct and personal knowledge of the helplessness protected persons experience. The primary reason for the international law of armed conflict is the protection of the innocent from the horrors of war. If anyone should have known that killing forty-nine helpless POWs was wrong, it would be a survivor of similar atrocities.

The issue of who, when, and how atrocities are committed should be irrelevant to any decision as to possible prosecution. Political considerations should not be part of any legal analysis when confronting grave breaches. To reason otherwise is to jeopardize the integrity and value of the Geneva Conventions and international legal principles themselves. Only a full and open inquiry into the facts can mitigate the tension between these differing cultures and nations. Indifference, after all, is what allowed the Nazis to commit atrocities with impunity.²⁶³ Only

262. EDWARD J. STACKPOLE, *THEY MET AT GETTYSBURG* 31 (1980).

263. Do not misunderstand. I in no way equate Israel in this case with the conduct of Nazi Germany. On the contrary, its proud tradition of punishing war criminals deserves accolades. But the appearance of punishing only war crimes against Jews, absent action in this case, is obvious. The appearance of a double standard is highlighted by former Israeli Defense Minister Ariel Sharon's recent statement that he would, if his party should come to power, try PLO Chairman Yasser Arafat for war crimes. See Howard Goller, *Israel's Sharon Would Try Arafat*

time will tell if Israel and the international community will condone, by silence, a different standard for retired General Biro. Yet, one thing is clear—no one accused of grave breaches should be allowed to go to his grave without atoning for his deeds.