1986

Aggression against Authority: The Crime of Oppression, Politicide and Other Crimes against Human Rights

Jordan J. Paust

Follow this and additional works at: https://scholarlycommons.law.case.edu/jil

Part of the International Law Commons

Recommended Citation
Available at: https://scholarlycommons.law.case.edu/jil/vol18/iss2/4
Aggression Against Authority: The Crime of Oppression, Politicide And Other Crimes Against Human Rights

by Jordan J. Paust*

"The laying a Country desolate with Fire and Sword, declaring War against the natural rights of all Mankind, and extirpating the Defenders thereof from the Face of the Earth, is the Concern of every Man . . . ."¹ So wrote the American revolutionary Thomas Paine in February of 1776. The war against human rights² of which he wrote had already led to the 1775 Declaration of the Causes and Necessity of Taking Up Arms, which had denounced Parliament’s “cruel and impolitic purpose of enslaving the [the colonials] . . . by violence . . . .”, the British government’s “intemperate rage for unlimited domination”, acts of “cruel aggression”, and numerous “oppressive measures” that had reduced our political ancestors “to the alternative of chusing an unconditional submission to the tyranny of irritated ministers, or resistance by force.”³ As the world knows, our ancestors chose armed revolution as the self-help sanction response to aggression against the authority of the people,⁴ and our revolution served as a precursor for numerous others in the Americas, Europe, and elsewhere, even into the twentieth century.⁵

Although the war against human rights and the crime of political oppression led to no criminal sanctions against the King of England and his retainers, an international trial would not have been completely unprecedented. For the oppression of persons under his charge and actions against the “laws of God and man,” the Burgundian Peter von

---

² That the Founders considered this and similar phrases to be the equivalent of the phrase “human rights,” see J. PAUST, ON HUMAN RIGHTS: THE USE OF HUMAN RIGHT PRECEPTS IN U.S. HISTORY AND THE RIGHT TO AN EFFECTIVE REMEDY IN DOMESTIC COURTS (forthcoming); Paust, Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content, 27 How. L.J. 145, 221, 221 n.281 (1984) [hereinafter cited as Paust, Human Dignity].
⁵ Id. at 547 n.6.
Hagenbach was deprived of his knighthood and then executed with an order, "Let justice be done." The trial of von Hagenbach for the improper administration of pledged territories on the Upper Rhine had occurred at Breisach in 1474 at the order of the Archduke of Austria and was presided over by twenty-eight judges from allied towns. Far more frequently however, as today, the trial of violators of international law has occurred domestically if at all.

Presently, violations of international law are a legal concern of the international community; nevertheless, the enforcement of criminal sanctions is left primarily with the nation-state. This circumstance may operate satisfactorily, given universal jurisdiction over the individual violators of international law, the lack of validity of any domestic statute of limitation or other attempted grant of immunity, the lack of sovereignty...

---

7 G. Schwarzenberger, II. International Law 462-66 (1968). At Naples in 1268, Conradin von Hohenstafen was executed after being tried for initiating an unjust war, thus setting the first known precedent for criminal sanctions against what Paine might have rephrased as a war against human rights. Bierzanek, The Prosecution of War Crimes in I. A Treatise On International Criminal Law 559-60 (M. Bassiouni & V. Nanda eds. 1973). The propriety of military action against a ruler who oppresses his or her people was also recognized later in the Seventeenth Century. See, infra note 75, and accompanying text.
10 Id. at 211-13, and references cited therein.
11 Id.

For this general reason and because international law is part of supreme federal law, the recent district court decision in Artukovic was erroneous in recognizing a time limitation for civil sanctions even though none are appropriate for criminal sanctions. Handel v. Artukovic, 601 F.Supp. 1421, 1429-31 (S.D. Cal. 1985). There is no time limitation mentioned in the Universal Declaration of
eign immunity for violations of international law, and the lack of any principle of double jeopardy concerning international crime. However, reliance on state enforcement has proven to be inadequate in far too many instances. This inadequacy is especially apparent in the case of aggression against authority and the crime of oppression when foreign state elites find it convenient to tolerate violations of international law while the domestic populace is unable to overthrow local tyrants who feign to represent them.

When most of the governmental processes of the world are categorizable as being only partly free or nonfree, when martial law or similar executive decrees are widespread and ban effective political participation and opposition to insecure governmental elites, when the media are among the first to be restrained and cannot even report acts of Human Rights and sanctions are to be universally available and effective. Declaration of Human Rights, supra this note, at art. 8; M. HUDSON, INTERNATIONAL TRIBUNALS 85 (1944) ("No statute of limitations exists in international law to bar the presentation of disputes or claims . . . ."); Paust, Human Dignity, supra note 2, at 186, 186 n.186. Even an attempted grant of asylum or pardon should relate only to criminal sanctions and not to civil suits for recovery of stolen property or damages. More importantly, any sort of attempt to grant immunity is impermissible under the peremptory norm of nonimmunity for international crime. On the recovery of property, see also note 101 infra.

See Paust, Federal Jurisdiction, supra note 9, at 226-49, and references cited therein; Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights: Nonimmunity for Violations of International Law Under the FSIA, 8 Hous. J. Int'l L. (forthcoming). See also Jimenez v. Aristegueta, 311 F.2d 547, 557-58 (5th Cir. 1962), cert. denied sub nom. Jimenez v. Hixon, 373 U.S. 914 (1963) (even "common crimes" of a dictator "were not acts of . . . sovereignty," acts of state, nor acts "in an official capacity" entitled to any sort of immunity, but were "crimes committed by the Chief of State done in violation of his position" despite claim to the contrary).

See Paust, My Lai and Vietnam, supra note 8, at 121-22 and references cited therein; Paust, Letter, 71 Am. J. Int'l L. 508, 510-11 (1977). It is apparent that Article 14(7) of the 1966 Covenant on Civil and Political Rights applies only to the domestic prosecution of a domestic offense. Article 15 applies to violations of both national and international law, unlike Article 14(7) which has no references to offenses against international law. International Convention on Civil and Political Rights, G.A. Res. 2200, 21 GOAR Supp. (No. 16) 52, U.N. Doc. A/6316 (1967), reprinted in 6 I.L.M. 368, 373 (1967). What this means is that even after state X has convicted a person for an international offense and such person has served time in a state X jail, if that person travels to state Y (so that state Y has jurisdiction to enforce), state Y can also prosecute such person for a violation of international law, affording the accused all human rights to due process that otherwise exist.


See Id. at 633-62 (states and areas where emergency decrees or martial law have been imposed); International Commission of Jurists, States of Emergency: Their Impact on Human Rights, 9 Yale J. World Pub. Ord. 1 (1982) (Symposium).
oppression and crimes against authority, such inadequacy is only exacerbated. If legitimate authority and self-determination are to be far more widespread in the twenty-first century, greater attention must be paid to the problem posed by aggression against authority and to various sanction strategies that can be employed to combat political oppression. One obvious need involves further effort to clarify relevant prohibitions under international law and to relate them to the crime of oppression or to possible criminal sanctions against certain acts of political oppression.

I. AGGRESSION AND THE UNITED NATIONS CHARTER

The relatively recent effort of the United Nations General Assembly (General Assembly) to define aggression and to reiterate its prohibition under the United Nations Charter (U.N. Charter) is only partly adequate to this task. It is useful in demonstrating certain proscribed actions directed "against the sovereignty, territorial integrity or political independence of another state," but it falls short of providing any fur-
ther guidance concerning proscribed acts of aggression by a government against its own people. The Resolution on the Definition of Aggression calls upon all states to refrain from "all acts of aggression and other uses of force contrary to the Charter of the United Nations and the Declaration on Principles of International Law," and reaffirms "the duty of States not to use armed force to deprive peoples of their right to self-determination. . . ." It notes that nothing contained in the definition "could in any way prejudice the right to self-determination . . . of peoples forcibly deprived of that right . . . nor the right of these peoples to struggle to that end and to seek and receive support . . .," notes that "the question whether an act of aggression has been committed must be considered in the light of all the circumstances," and notes that "acts enumerated . . . are not exhaustive. . . ." Moreover, the definition affirms that aggression also includes the use of armed force "in any other manner [than the proscribed attacks against another state, which is] inconsistent with the Charter," but does not provide further clarification. Nonetheless, "[a] war of aggression," the Declaration affirms, "is a crime against international peace." In this sense, the Declaration reaffirms recognition in the authoritative 1970 Declaration on Principles of International Law that "[a] war of aggression constitutes a crime against the peace, for which there is responsibility under international law."

Under the U.N. Charter, "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" is proscribed. As the Declaration on Principles of International Law affirms, "[s]uch a threat or use of force constitutes a violation of international law and the Charter . . .," and is tied also to "the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determi-

---

22 Definition of Aggression, supra note 20, at § 3 (emphasis added).
23 Id. at Annex, preamble.
24 Id. at Annex, art. 7.
25 Id. at Annex, preamble, See also infra note 81 and accompanying text.
26 Definition of Aggression, supra note 20, at Annex, art. 4.
27 Id. at Annex, art. 1. On this point, see also U.N. CHARTER, art. 2, para. 4.
28 Definition of Aggression, supra note 20, at Annex, art. 5, para. 2.
30 U.N. CHARTER art. 2, para. 4.
31 Declaration on Friendly Relations, supra note 29.
32 Id.
nation. . . ."33 Because article 1, paragraph 2, of the U.N. Charter recognizes respect for self-determination of peoples as a major purpose, and because article 2, paragraph 4, prohibits the threat or use of force in any manner inconsistent with the purposes of the United Nations, it is clear that the threat or use of force against the self-determination of a people entitled to such right is proscribed by the Charter.

Other resolutions of the General Assembly have affirmed this interconnected prohibition and implicitly confirm that the use of force in violation of article 2(4) to deprive a people of self-determination constitutes a crime against peace.34 In fact, the General Assembly has resolutely condemned "all forms of oppression, tyranny and discrimination . . . wherever they occur,"35 and has strongly condemned racism and all "totalitarian" ideologies and practices. The General Assembly stated that such ideologies and practices:

which are based on terror and racial intolerance, are incompatible with the purposes and principles of the Charter of the United Nations and constitute a gross violation of human rights and fundamental freedoms which may jeopardize world peace and the security of peoples.36

With respect to the latter practices, the General Assembly has also called upon all states to prosecute the perpetrators of such violations.37 More recently, the International Law Commission has made an inviting recognition that "an international crime may result . . . from . . . a serious breach of an international obligation of essential importance for safeguarding the right of self-determination. . . ."38 The Commission also noted that "domination" of a people "by force" may constitute a crime against self-determination.39 This recognition can undoubtedly apply to the use of force by a government to deprive a people of self-determination and thus to engage in acts of "domination" and political oppression.

The right of a given people to political self-determination is also a fundamental human right40 and is interconnected necessarily with sev-

33 Id. In fact, the same language appears in the Declaration in connection with the principle concerning the threat or use of force and the principle of self-determination.
34 Paust and Blaustein, supra note 15, at 30-31 and references cited therein. Professor Blaustein and I have agreed that such a use of force constitutes a crime against peace. Id. at 31. Others undoubtedly have made a similar recognition. See infra, notes 38, 39, 48 and accompanying text.
37 G.A. Res. 2545, supra note 36.
38 Draft Articles on State Responsibility, supra note 20, art. 19, para. 3(b).
39 Id.
eral other important human rights, including the right of individuals freely to participate in the political process.\textsuperscript{41} The respect for and observance of human rights is also a major purpose of the U.N.,\textsuperscript{42} and article 2, paragraph 4, of the Charter prohibits the threat or use of force in any manner "inconsistent with the Purposes of the United Nations." Thus, it is clear that an additional interconnected basis exists for the proscription of the threat or use of force against political self-determination. For a similar reason, aggression against authority is proscribed by the U.N. Charter.\textsuperscript{43}

Under international law, the legitimate authority of a government exists on the basis of the "will of the people" expressed through a relatively full, free, and equal participation of individuals in the political process.\textsuperscript{44} Such a standard of authority is now entrenched in many interrelated human rights and the precept of self-determination; each is ultimately protected in the U.N. Charter and subsequent authoritative decisions.\textsuperscript{45} When force is used to oppress individual or group participation in the political process and is used to change the dynamic outcome of such a process identifiable in an aggregate will of individuals, such a use of force constitutes an aggression against authority, human rights and the process of self-determination. Hence, such a use of force violates articles 1(2), 1(3), 2(4) and 56 of the U.N. Charter.\textsuperscript{46} It is among the more odious of violations, posing a threat to several fundamental Charter precepts, and can affect the rights of numerous victims — more numerous in fact than the victims of ordinary violations of international law or many other forms of international crime.

More recently, the General Assembly applied these international precepts while condemning the governmental process of South Africa. The General Assembly reaffirmed the need for the "establishment of a non-racial democratic society based on majority rule, through the full and free exercise of adult suffrage by all the people in a united and unfragmented South Africa;" and recognized the "legitimacy of . . . [the] struggle [by the oppressed people of South Africa] to eliminate apartheid and establish a society based on majority rule with equal participation by

\textsuperscript{41} See Paust, The Human Right to Participate, supra note 4, at 562-66 and references cited therein.
\textsuperscript{42} U.N. CHARTER preamble, arts. 1(3), 55(c) and 56.
\textsuperscript{43} Id. at art. 2, para. 4.
\textsuperscript{45} Paust, Political Opposition, supra note 44.
\textsuperscript{46} U.N. CHARTER arts. 1(2), 1(3), 2(4) and 56. See Paust & Blaustein, supra note 15, at 11-12 n.39, 30-31; Paust, Political Opposition, supra note 44, at 187.
all the people of South Africa. The General Assembly, in its nearly unanimous resolution, also condemned the South African "regime for defying relevant resolutions of the United Nations and persisting with the further entrenchment of apartheid, a system declared a crime against humanity and a threat to international peace and security.

Such an oppression of the authority of the people is a form of political slavery that is not only violative of human rights and self-determination, but also constitutes treason against humanity which should increasingly be recognized as a crime of oppression and a crime against humanity.

II. OFFENSES AGAINST HUMAN RIGHTS

A question arises whether violations of human rights are independently sanctionable by criminal prosecution. Several international scholars have recognized that criminal sanctions for violations of basic human rights are entirely appropriate. In fact, it has long been expected more generally that violations of international law are subject to both criminal and civil sanctions within the domestic legal process. As


48 G.A. Res. 2, supra note 47, at § 3. See G.A. Res. 183L, supra 47, and infra note 58. Article 19(3)(c) of the Draft Articles on State Responsibility, adopted by the International Law Commission, also declares, "an international crime may result . . . from . . . a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;" Draft Articles on State Responsibility, supra note 20. It is suggested that aggression against authority and widespread political oppression pose a similar threat and are actually interrelated with the process of apartheid in South Africa. See also McCaffrey, Current Development Note, 79 Am. J. Int'L L. 755, 756 (1985). See M. McDougal, H. Lasswell & L. Chen, Human Rights and World Public Order 523-30, 546-50 (1980); Draft Articles on State Responsibility, supra note 20, at art. 19, para. 3(b) (crime against self-determination).

49 Professor Blaustein and I have argued that they are subject to criminal sanctions. Paust & Blaustein, supra note 15, at 29-31.

50 For example, Kutner, Reisman, Wright, Bassiouni and Derby. Paust, Federal Jurisdiction, supra note 9, at 215, n.97. See also M. Bassiouni, International Criminal Law—A Draft International Criminal Code 30 n.31 (1980); supra notes 36-37 and accompanying text. Further, widespread violations of basic human rights seem especially suited for coverage under the International Law Commission's criteria, supra note 48. Additionally, they are of "universal concern" and subject to widespread condemnation within the ambit of criteria recognized in the Draft Restatement, infra note 78 and accompanying text; infra note 79. See also Paust, Federal Jurisdiction, supra note 9, at 223 n.134; supra note 1 and accompanying text.

51 See J. Paust, supra note 2; Paust, Federal Jurisdiction, supra note 9, at 211-14. Early in our history, Justice Wilson recognized that "infractions of . . . [the law of nations] form a part of . . . [the common law] code of criminal jurisprudence," Henfield's Case, 11 F. Cas. at 1107 (Wilson, J.
AGGRESSION AGAINST AUTHORITY

noted in another study:

It is incorrect to categorically state that violations of human rights may not be prosecuted as an international crime. Violations of human rights intertwined with the law of armed conflict, genocide, and general crimes against humanity can obviously result in state or international tribunal prosecution. Criminal adjudication of human rights has been sporadic due to the lack of an overall and effective sanctioning process. Beyond the fact that numerous perpetrators of violations of human rights during armed conflict have been punished, there have been past instances of effective sanctioning against individuals for violations of other types of human rights—especially when an ad hoc sanction process was expressly constituted under an international agreement.  

Interestingly, the United States, in response to a French denial of a U.S. request for the extradition of two aircraft hijackers, characterized the actions of the accused as “an offense against the human rights of passengers and crew.” It will not be surprising to see more references to “offenses against . . . human rights” as the international community pays greater attention to the full range of possible responses to violations of international law and, particularly, to violations of basic human rights. As previously recognized, a modern, post-Nuremberg problem involves the application of the laws of armed conflict, genocide, the precept of self-determination, and general human rights in various circumstances of social violence. Thus, violations of human rights, in times of relative peace or armed conflict, might increasingly be responded to with criminal sanctions.

This is the trend with respect to treaties calling for domestic criminal sanctions against certain specific deprivations (whether or not human rights are mentioned as such), such as unlawful kidnappings and the taking of hostages, attacks on or the hijacking of civil aircraft, attacks on .

charge to grand jury). The statement represents a common approach at the time and is broad enough to cover any infraction, including a violation of human rights law.

---

52 Paust & Blaustein, supra note 15, at 29 (citations omitted).
54 See Paust & Blaustein, supra note 15, at 38.
internationally protected persons,\textsuperscript{57} the practice of apartheid,\textsuperscript{58} other acts of impermissible terrorism\textsuperscript{59} and other acts of impermissible racial discrimination,\textsuperscript{60} and draft conventions, such as that on the prevention and suppression of torture.\textsuperscript{61} Several studies also affirm a post-Nuremberg interconnection between human rights law and newer developments in the humanitarian law of armed conflict,\textsuperscript{62} and one can expect greater attention to human rights when the law of armed conflict is criminally enforced.

III. GENOCIDE AND POLITICAL OPPRESSION

Acts of genocide directed against "a national, ethical, racial or religious group, as such,"\textsuperscript{63} may be motivated by, or result in, the political oppression of members of such groups and impermissibly interfere with the process of authority and self-determination. To that extent, the cus-

\begin{footnotesize}
\textsuperscript{60} 1965 International Convention on the Elimination of All Forms of Racial Discrimination, art. 4, 660 U.N.T.S. 195.
\textsuperscript{62} \textit{See} M. \textsc{Bassiouni}, \textit{supra} note 50, at 43; M. \textsc{McDougal}, H. \textsc{Lasswell} & L. \textsc{Chen} \textit{supra} 48, at 181 n.55; \textit{NEW HUMANITARIAN LAW OF ARMED CONFLICT} (A. Cassese ed. 1979); Draper, \textit{Human Rights and the Law of War}, 12 Va. J. \textsc{Int'l} L. 326 (1972) (extended discussion of the interconnection between human rights law and the humanitarian law of armed conflict); \textsc{Paust} & \textsc{Blaustein}, \textit{supra} note 15, at 15-18 and references cited therein; \textit{Symposium}, 33 Am. U.L. Rev. No. 1 (1983).
\end{footnotesize}
temporary prohibition of genocide, with concomitant universal enforcement jurisdiction, can be useful in opposing aggression against authority and political oppression. Additionally, it does not matter that such attacks happen to coincide with attacks on "political" groups. Attacks on the groups specified in the treaty and which are motivated by, or result in, political oppression of such persons can be criminally sanctioned. Moreover, today it can be recognized that whether or not attacks on "political" groups as such involve acts of genocide, such attacks are necessarily violative of the precept of self-determination and fundamental human rights. As such, they constitute aggression against authority, a


65 As a customary prohibition, there is now universal enforcement jurisdiction. DRAFT RESTATEMENT, supra note 64, at § 404 and Reporter's Note thereto, and Reporter's Note 3 to § 702(a); M. McDOUGAL, H. LASSWELL & L. CHEN, supra note 48, at 215, 354-56; Paust, Federal Jurisdiction, supra note 9, at 211-13, 224, 224 n.136; Paust & Blaustein, supra note 15, at 20-21. Article 6 of the Genocide Convention does not state that persons charged with genocide must (or shall) only be charged and tried in a state in which the alleged acts take place—the customary competence of all states to prosecute is certainly broader and in the future, Article 6 should be interpreted consistently with custom in the case of any ambiguity. Id. at 21 n.72. See also Attorney General of the Government of Israel v. Adolf Eichmann, 36 I.L.R. 33 (D.C. Jerusalem 1962), aff'd. 36 I.L.R. 277 (S. Ct. of Israel 1962). On this last point, Arthur Goldberg and Richard Gardner have also noted that it is recognized in "an agreed interpretation of Article VI which is contained in the relevant U.N. committee report, [that Article VI] 'does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the state.' " Goldberg & Gardner, Time to Act on the Genocide Convention, 58 A.B.A.J. 141, 143 (1972) (quoting J. ROBINSON, THE GENOCIDE CONVENTION—A COMMENTARY 83-84 (1960)). See also L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 977-978, 985 (1973); Starkman, supra note 64, at 47, 50.

66 See M. BASSIOUNI, supra note 50, at 72; P. Drost, II THE CRIME OF STATE: GENOCIDE 62 (1959); L. SOHN & T. BUERGENTHAL, supra note 65, at 929. Although the United States favored inclusion of an express category of 'political' group within article 2 of the Genocide Convention, and such was included in the 1946 General Assembly resolution on Genocide, such a catagory was dropped later in order to gain a quicker and more widespread ratification. Comment, Genocide: A Commentary on the Convention, 58 YALE L.J. 1142, 1145 (1949). Early in 1986, the U.S. Senate voted 93 to 1 in favor of a resolution directing the President to seek renewed negotiations concerning inclusion of political groups within those specified in the Genocide Convention. See Washington Weekly Report, vol. 12, No. 7, at 3 (UNA-USA Feb. 21, 1986).
violation of the U.N. Charter, the crime of oppression, and what the International Law Commission has recognized as a crime against self-determination. To the extent that violations of relevant human rights are criminally sanctioned, any gap in coverage by the Genocide Convention will prove to be of little import.

Nevertheless, it may be important to emphasize these recognitions in a new international instrument, if only to further sanctify criminal proscription and to provide additional guidance concerning the contours of present prohibitions. For that purpose, a draft Convention on the Prevention and Punishment of the Crime of Politicide is offered in the annex to this article. Politicide, as a useful rallying term, can encompass more odious forms of aggression against authority, the crime against self-determination, the crime of political oppression, and so forth, while providing a logically related focus in supplementation of the Genocide Convention.

IV. CRIMES AGAINST HUMANITY RECONSIDERED

The Principles of the Nuremberg Charter and Judgment recognize that crimes against humanity include:

[M]urder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecution on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Since the crime includes acts done against any population and persecution on political grounds, aggression against authority and political oppression can constitute a crime against humanity if done in connection with "any crime against peace or any war crime."

In the modern, post-Nuremberg setting, it has already been recognized that a "war" of aggression is a crime against peace, and that regimes based on totalitarian ideologies and totalitarian practices can jeopardize world peace and the leaders of such regimes should be criminally prosecuted. Furthermore, it has been recognized that apartheid poses a "threat to international peace" and constitutes a crime against humanity. Textwriters have also recognized that the use of force to deprive a people of self-determination constitutes a crime against peace, a

---

67 See Paust, Political Oppression, supra note 44.
69 See id., at princ. VI(a)(i); supra notes 28-29 and accompanying text.
70 See supra notes 36-37 and accompanying text.
71 See supra note 48 and accompanying text.
realization based in part on authoritative declarations of the General Assembly. Any of these circumstances can also involve efforts by elites to engage in acts of political oppression and aggression against authority. To the extent that they are criminally sanctioned as crimes against peace, the acts of oppression will be regulated.

More generally, however, a crime against peace should also be recognized whenever a violation of international law is of such serious magnitude that it poses a significant threat to peace. The main concern in a post-Nuremberg world is not merely with a war or threat of war between nation-states. Numerous decisions of U.N. bodies and the writings of scholars demonstrate that there is also a pervasive concern of the international community with threats to peace that are posed by non-war actions and events. It is not unusual, for example, to discover a recognized interdependence between peace and human rights, and that significant deprivations of human rights can themselves result in a serious threat to international peace. Where such a threat is reasonably foreseeable as a result of serious violations of international law, as in the case of widespread political oppression and aggression against authority, it is logical and policy-serving to extend recognition of the concept of crimes against peace to such a circumstance. Having done so, one might recognize that such illegality constitutes a crime against humanity as well.

This is not actually a new approach to the problem posed by criminal actions violative of the law of the international community. As early as the 1600s, Grotius recognized that crimes against the law of nations are "offenses which affect human society at large... and which other states or their rulers have a right to deal with." Grotius had also recognized the propriety of a "war" against a ruler who engages in a "manifest oppression" of his or her people, noting that such a military response was "undertaken to protect the subjects of another ruler from oppression" and to assure that they are not further denied "the right of all human society" to freedom from oppression. In that sense, "war" against the...
In 1793, Justice Wilson of the U.S. Supreme Court affirmed a slightly different interconnection between the process of peace and offenses against the international community. While on circuit, Justice Wilson recognized that if an offender against the law of nations is not punished by his own nation such a circumstance can lead to reprisal and even war. The Justice recognized that complicitous acts of aggression “did interrupt, destroy, and break the said firm, inviolable, and universal peace . . . [and offended] against the peace and dignity of the said United States.”76 When territorial rights were involved, the United States early recognized that private violations of the law of nations can constitute an act of “aggression” and a crime against “peace.”77 It is logical that certain other violations of international law that pose a significant threat to peace would be similarly categorized today.

The Draft Restatement also recognizes that a nation-state “may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern. . . .”78 Significant threats to the peace are obviously of a related concern when such threats arise from serious violations of international law. Further guidance contained in the draft is supportive of this general point and can be applied in support of the more specific recognition made here that widespread political oppression and aggression against authority are not only criminally sanctionable but should be related to crimes against peace and crimes against humanity.79

In their seminal work on *Law and Minimum World Public Order*, McDougal and Feliciano also note that the real question concerns the impermissibility of coercion rather than the “technical characteriza-

---

76 Henfield’s Case, 11 F. Cas. at 1108-15, 1120 (Wilson, J., charge to grand jury and indictment). In another early case, it was recognized that an assault on a foreign consul is a violation of the law of nations and “a crime against the whole world” as well as “against the peace . . . of the United States. . . .” Respublica v. DeLongchamps, 1 U.S. (1 Dal.I) 1, 113, 115 (Pa. 1784).


78 Draft Restatement, supra note 64, at § 404.

79 The Draft Restatement adds: “Universal jurisdiction . . . is established in international law as a result of universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations.” Id. at Comment a to § 404 (emphasis added). For additional criteria recognized by the International Law Commission, see supra notes 20, 38-39, 48. Cf. McCaffrey, supra note 48.
tions" of phrases such as "war of aggression," "crimes against peace," "threats to the peace," or "threat or use of force," and that "[i]n the framing of the United Nations Charter the deliberate choice was made to keep these technical characterizations as ambiguous as they appear." Instead of precise definitional exercises, they suggest attention be directed to a range of "relevant factors in context which should rationally affect decision."

Finally, in an effort to clarify relevant prohibitions of political oppression under international law, another affinity between the initiation of a war of aggression and aggression against authority should be noted. At Nuremberg, it was recognized that the initiation of a war of aggression is "the supreme international crime" because "it contains within itself the accumulated evil of the whole," including each resulting individual international crime. Similarly, aggression against authority "contains within itself the accumulated evil of the whole," and when peace is affected it is certainly no less dangerous and of no less import to the international community.

V. SANCTION STRATEGIES IN RESPONSE

Many forms of sanction strategy are useable in response to aggression against authority, politicide, and the crime of oppression. The following are but a few worthy of comment.

A. Revolution and Self-Determination Assistance

In response to governmental oppression of authority, the people of a given community have the right under international law to alter, abolish, or overthrow any such form of government. Such a government would lack authority and could be overthrown in an effort to ensure authoritative government, self-determination, and the human right to relatively free and equal individual participation in the political process.

---

81 Id. at 61-63. For a suggested set of interrelated factors, see id. at 63-67.
82 Opinion and Judgment in Nazi Conspiracy and Aggression, quoted in M. McDougal & F. Feliciano, supra note 80, at 60-61 n.144.
83 For further guidance, see M. McDougal & F. Feliciano, supra note 80, at 309-33 (discussion and catalog of various sanction strategies); M. McDougal, H. Lasswell & L. Chen, supra note 48, at 219-48, 278-99; Paust, Response to Terrorism: A Prologue to Decision Concerning Private Measures of Sanction, 12 Stan. J. Int'l Stud. 79 (1977). The Strategies which follow are all categorizable under the military or policing function. Others might include use of economic, diplomatic or ideologic strategies addressed in the cited works.
84 For an historical perspective, see Paust, The Human Right to Participate, supra note 4, at 560-79 and references cited therein.
85 Id. at 562-67.
gime contrary to the authority of the people is actually an illegal regime seeking to exercise power in violation of several interrelated international precepts. Hence, it has no right under international law to assure its survival. 86

Moreover, under international law, the effort of a given people to reestablish authority and political self-determination may be supported by other nation-states through the express right to self-determination assistance, a right tied to authoritative interpretation of the U.N. Charter. 87 In the 1970 Declaration on Principles of International Law, for example, the General Assembly affirmed the right to self-determination assistance: "In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter." 88 Subsequently, numerous other U.N. decisions have affirmed the right to self-determination assistance in specific contexts. 89 Interestingly, at the time of the American Revolution it was recognized that armed revolution is a form of "self-defense" for an oppressed people, a recognition that is still worthy of our attention. 90

B. Tyrannicide

In the past, there have been claims that tyrannicide can be part of a lawful strategy in response to political oppression. 91 Today, however, it

86 See Paust, Political Oppression, supra note 44, at 180-88 and references cited therein.
88 Declaration on Principles of International Law, supra note 29. See also 1974 Definition of Aggression, supra note 20.
89 Paust, Illegality of Apartheid, supra note 47. In the context of the emergence of the new state of Bangladesh it was written:

Contextual reality and the serving of all goal values require a new reading of article 51 of the Charter as well, for as a people undergoing the peaceful process of self-determination within an entity find that they must seek it without that entity due to a military crackdown, they should be entitled to self-defense and collective self-defense within the full ambit of . . . the Charter. . . . [W]here an armed attack has occurred against a people seeking self-determination it is not improper to assist those being attacked.

90 See, e.g., Paust, The Human Right to Participate, supra note 4, at 568, 568 n.88.
91 See Kutner, A Philosophical Perspective on Rebellion in INTERNATIONAL TERRORISM AND POLITICAL CRIMES 51, 52-61 (M. Bassiouni ed. 1975) and references cited therein; Zlataric, His-
AGGRESSION AGAINST AUTHORITY

is generally recognized that assassination is impermissible, and some allege that it constitutes an impermissible strategy of terrorism. Nevertheless, the mere assassination of a political official without attempting to produce intense fear or anxiety (i.e., a terror outcome) in a particular target group is not properly classifiable as an act of terrorism. Such an act aims merely at the elimination of a political elite and one can question today whether such an act, when reasonably necessary to oppose aggression against authority and the crime of political oppression, can be part of a permissible responsive strategy. Since assassination usually involves "conviction" and "sentencing" without trial, significant human rights are at stake and it may well be that if tyrannicide is ever viewed again as being permissible, it will constitute the only permitted form of assassination.

With respect to state-sponsored tyrannicide, it is also worth noting that, as in Grotius' time, such a use of force may not offend international norms proscribing certain uses of armed force. For example, the use of force against a tyrant arguably may be permissible under the U.N. Charter if it is not used against the territorial integrity or political independence of another state, but to assure freedom from oppression, self-determination, and the human rights of the people within such a state. In a given circumstance, such force may be reasonably necessary and proportionate whether or not it is used in conjunction with local strategies of violence designed to assure the same outcomes. On balance, it may be consistent with other fundamental purposes of the U.N. Charter. One can still question whether Hitler should have been assassinated in order to avoid more genocide and World War II, even knowing that the assassination of the Archduke of Austria contributed to World War I. Propriety would depend in part upon context. It is also important to


94 For a relevant definitional approach to terrorism, see Paust, *Response to Terrorism, supra* note 93, at 81; Paust, *Federal Jurisdiction, supra* note 9, at 192-93.

95 *Supra* note 75 and accompanying text.

96 See U.N. *Charter* art. 2, para. 4.
note that policy-thwarting consequences can flow from inaction just as readily as from action.

Tyrannicide may even be viewed as a form of punishment for past violations of international law, and thus as a use of force that is engaged in on behalf of the international community when international institutions are unable effectively to act. As such, it would not be directed against the territorial integrity or political independence of another state. Force would be used to assure the enforcement of international criminal law, a law which is basically dependent upon enforcement by nation-states acting on behalf of the community in a context where there is no world police force, criminal court or jail. The elimination of a tyrant without trial as a defense against future oppression, however, may appear to be more acceptable than elimination as punishment. Nevertheless, the question of the permissibility of limited force used to enforce international criminal law is intriguing.97

97In my opinion, this was one of the questions involved in the recent U.S. diversion of an Egyptian aircraft to Italy. Such a very limited use of force was arguably reasonably necessary and proportionate under the circumstances to assure the enforcement of international criminal law on behalf of the community. It was not directed against Egyptian territorial or political independence as such and, on balance, it was arguably consistent with the purposes of the Charter. As such, the action was not violative of article 2(4) of the U.N. Charter or article 14 of the 1979 International Convention Against the Taking of Hostages, supra note 55. The diversion of the aircraft seemed all the more necessary because Egypt had refused to take those accused of hijacking the Italian vessel Achille Lauro into custody and to prosecute or extradite them to a country that would do so. Had Egypt ratified the Hostages Convention, its refusal would have violated articles 5, 6 and 8 of the Convention. If Egypt did not secretly consent to the U.S. enforcement effort, could the U.S. engage in such action to aid in the enforcement of Egyptian obligations when Egypt could not or would not do so? Several of my colleagues argued initially that the U.S. action was impermissible. See, e.g. (quotes of Vagts and Higgins) in, “Scholars Dispute U.S. Right to Intercept Plane,” Houston Post, Oct. 12, 1985, at A 22, col. 2; c.f. Falk, The Danger of Flouting the World Court, Newsday, Nov. 3, 1985, at 1, 10, col. 4. By analogy, the U.S. action may also have been equivalent to the control of foreign ships on the high seas on reasonable suspicion that international law has been violated, an action permitted initially in part to assure sanctions against international crime. See, e.g. La Jeune Eugenie, 26 F. Cas. 832, 842-43 (C.C.D. Mass. 1821) (No. 15, 551); See also Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234-36 (1804); 9 Op. Att'y Gen. 456 (1860); Paust, The Seizure and Recovery of the Mayaguez, 85 YALE L. J. 774, 787-91 (1976). It may also be arguably related to a process of self-defense (i.e., in order to defend against continuous actions of the alleged terrorists).

Finally, although distinguishable from the kidnapping of Eichmann within Argentine territory (and thus the use of “police” force within foreign territory without foreign state consent), the control or coercion of an aircraft containing alleged international criminals and the kidnapping (or “international criminal kidnapping”?) of Eichmann do raise similar issues. In the case of Eichmann, Israel expressed regret without admitting direct involvement in his seizure, but Israel went on with the trial of Eichmann, who was subsequently prosecuted and hung. See N. LEECH, C. OLIVER & J. SWEENEE, THE INTERNATIONAL LEGAL SYSTEM 51-52 (1973); L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 449-51 (1980). On the use of “police” force abroad, see also United States v. Toscanino, 500 F.2d 267, 277-78 (2d Cir. 1974), reh’g denied, 504 F.2d 1380 (2d Cir. 1974); Tucker v. Alexandroff, 183 U.S. 424, 433 (1902); The Apollon, 22 U.S. (9 Wheat) 362, 370-71 (1824); Goldie, Legal Aspects of the Refusal of Asylum by U.S. Coast Guard on 23 November 1970, 23 NAVAL WAR C. REV. 32, 33-35 (1971).
C. Criminal Prosecution in the U.S.

One sanction strategy implicit in this symposial effort involves the use of criminal sanctions against individual violators of international law. As noted above, there is universal jurisdiction over violations of international law. Moreover, universal enforcement jurisdiction has been exercised in the United States since the dawn of our constitutional history. Although prosecutions of individual violators of international law have occurred in the absence of a federal statute, it is now generally assumed that a statute is needed to impose domestic criminal sanctions.

Some federal laws can be used to reach certain aspects of aggression against authority and political oppression. However, new federal legislation is needed in order to assure adequate competence to criminally sanction all aspects of international illegality. Ratification of the Genocide Convention and adoption of relevant implementing legislation would aid in covering certain gaps in domestic law, yet more is needed. Federal legislation to impose sanctions against aggression in violation of international law, or the crime of oppression, would not be necessary if Congress amended Title 18 of the United States Code to create an offense against human rights. Such a statute is long overdue and would cover relevant conduct. Indeed, so long after Nuremberg, it is shocking that the United States is so ill-prepared to criminally sanction illegal aggression, crimes against peace, genocide, and violations of fundamental human rights. On this fortieth anniversary of Nuremberg it is time for Congress to act.

It is also worth noting, however, contrary to false myth, that the United States has the competence under federal law to prosecute any war crime either in a federal district court or an ad hoc military commis-

---

98 Draft Restatement, supra note 64, at § 404, Comments a, b thereto; see Paust, Federal Jurisdiction, supra note 9.

99 Paust, Federal Jurisdiction, supra note 9, at 211-13.

100 Id. at 212-13, 220 and references cited therein.

101 See Offenses Against Human Rights, 18 U.S.C. § 116 (Draft); Paust, Federal Jurisdiction, supra note 9, at 215-16, 250. The draft legislation should also be supplemented to provide that any real or personal property acquired from relevant violations of international law, or substituted therefore, shall be confiscated for the nation-state in which such deprivations took place or that represents the nationals who were victims of such deprivations. This confiscation would be subject to the right of private victims to recover their property and to sue for and collect money damages for any relevant violation of international law. On this general point, see also Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150 (2d Cir. 1982); Menzel v. List, 267 N.Y.S.2d 804, 49 Misc.2d 300 (Sup. Ct. N.Y.Co. 1966), modified on other grounds, 279 N.Y.S.2d 608 (1st Dept. 1967), modification rev'd, 24 N.Y.2d 91, 298 N.Y.S.2d 979, 246 N.E.2d 742 (1969); Rosenberg v. Fischer, 15 Ann. Dig. 467 (Switzerland Fed. Trib. 1948); The Steamship Appam, 243 U.S. 124, 149-56 (1917); The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 354 (1822); Draft Brief, supra note 13.
sion.\textsuperscript{102} For example, former Nazi war criminals can be prosecuted in the United States if the executive branch has the political will to prosecute such persons instead of seeking merely to deport them or, as some allege, to let them remain free.\textsuperscript{103} Certainly when illegal aggression, genocide, and violations of human rights (including the right to self-determination, to participate in the political process, and thus to freedom from political oppression) occur in connection with violations of the law of war, they can be reached through prosecutions of war crimes. Yet, not all forms of aggression against authority and political oppression occur in time of war. Thus, new federal legislation is needed to enable the United States more adequately to fulfill its international responsibility to prosecute or extradite those persons reasonably accused of having committed international crime under customary or treaty-based law.\textsuperscript{104}

\textbf{D. Civil Sanctions Through Civil Suits}

Civil suits in U.S. courts for violations of international law, especially human rights, are available and entirely appropriate.\textsuperscript{105} Furthermore, there is no immunity for governmental violators of international law.\textsuperscript{106} To the extent that civil sanctions are utilized, they can aid in the overall effort to assure democratic authority, self-determination, and the enjoyment by all persons of their fundamental human rights.

To deny such a remedy would thwart the overall effort and would instead support the oppression of people and their rights under international law. A free and independent legal profession cannot afford to tolerate this outcome. Quite understandably, judicial tolerance of relevant violations of international law was criminally sanctioned at subsequent Nuremberg proceedings.\textsuperscript{107} The precedent can reach to ourselves.\textsuperscript{108}

\textsuperscript{102} See Paust, \textit{After My Lai}, supra note 15, at 10-11 and references cited therein.
\textsuperscript{104} On this international responsibility, see M. Bassiouini, supra note 50, at 24; A. Evans & J. Murphy, supra note 59, at xxxiii-xxxiv, 303, 485-87, 493, 503, 509, 657; Paust, \textit{Federal Jurisdiction}, supra note 9, at 195-96, 226-29 and references cited therein.
\textsuperscript{105} See, J. Paust, supra note 2; Paust, \textit{Federal Jurisdiction}, supra note 9, at 211-15. On the propriety of civil sanctions for genocide, see L. Sohn & T. Buergenthal, supra note 65, at 928-29.
\textsuperscript{106} \textit{Draft Brief}, supra note 13; Paust, \textit{Federal Jurisdiction}, supra note 9, at 221-49.
\textsuperscript{107} See \textit{The Justice Case} (U.S. v. Altstoetter), III \textit{TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS} 3 (1950).
\textsuperscript{108} For a relevant warning two hundred years ago by Thomas Paine, see 2 \textit{THE COMPLETE WRITINGS OF THOMAS PAINE} (P. Foner ed. 1945). "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself." \textit{Id.} at 588.
VI. CONCLUSION

When Jacob Bronowski wrote, in *The Ascent of Man*, of the tyrant's counter-conception of "monstrous certainty" and "the betrayal of the human spirit: the assertion of dogma that closes the mind, and turns a nation, a civilization, into a regiment of ghosts—obedient ghosts, or tortured ghosts," he might just as well have written about the effects of an extended aggression against authority and a treason against humanity, for they are the same. Such effects may have been addressed only partly at Nuremberg, but today one can recognize that aggression against authority and political oppression are violative of international law and can be responded to with various sanction strategies, including criminal prosecution. Finally, a free and independent legal profession cannot afford to join the "regiment of ghosts," but must ever strive to promote authority, self-determination, human rights and human dignity in opposition to the crime of oppression.

"We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to law."  

---


110 INT'S MILIT. TRIB. THE TRIAL OF GERMAN MAJOR WAR CRIMINALS 49-50 (1946). Mr. Jackson as chief prosecutor at Nuremberg.
ANNEX


PREAMBLE

THE CONTRACTING PARTIES,

Having Considered the recognition of the International Law Commission in its 1979 Draft Articles on State Responsibility that actions against self-determination can be criminally sanctioned;

Recognizing that aggression against authority is incompatible with international legal precepts of self-determination and human rights, including the human right of all persons to participate in the political processes of their society and to a governmental process based on the authority of the people as guaranteed in the Universal Declaration of Human Rights;

Considering the obligation of States under the Charter of the United Nations to respect and observe human rights as well as the precept of self-determination;

Recognizing that the individual, having duties to other individuals and to the community to which he or she belongs, is also under a responsibility to respect and observe human rights law;

Being Concerned that serious acts of political oppression continue to thwart the right of peoples to self-determination, the process of legitimate authority of governments, and the interrelated human rights of persons, and that serious crimes of oppression have gone unpunished;

HEREBY AGREE:

Article I

The Contracting Parties confirm that politicide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II

In the present Convention, politicide means, at least, any of the following acts committed with an intent politically to oppress, in whole or in part, any human group, as such:

(a) Killing members of the group;
(b) Terrorizing members of the group;
(c) Kidnapping, incarcerating or arbitrarily restricting the movement of members of the group;
(d) Torturing or causing other serious bodily or mental harm to members of the group;
(e) Arbitrarily restricting access of any members of the group to the media;
(f) Imposing other measures intended to prevent a relatively free participation by members of the group in a political process.

Article III
The following acts shall be punishable:
(a) Politicide;
(b) Conspiracy to commit politicide;
(c) Direct and public incitement to commit politicide;
(d) Attempt to commit politicide;
(e) Complicity in politicide.

Article IV
Persons committing politicide or any of the other acts enumerated in Article III shall be punished upon conviction, whether they are constitutionally responsible rulers, public officials or private individuals. There shall be no form of immunity with regard to the prohibited acts.

Article V
The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide severe and effective penalties for persons guilty of politicide or of any of the other acts enumerated in Article III.

Article VI
1. Persons charged with politicide or any of the other acts enumerated in Article III can be tried by a competent tribunal of any State, given the universal nature of jurisdiction over human rights violations, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

2. Any Contracting Party that has within its territory any person reasonably accused of having committed any of the above acts shall, if it does not extradite such person, be obliged, without exception whatsoever, to take such person into custody and submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offense of a serious nature under the law of that state.

Article VII
1. Politicide and the other acts enumerated in Article III shall not be considered as political crimes for the purposes of extradition.

2. The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

3. The offenses listed in Article III shall be deemed to be included as extraditable offenses in any extradition treaty existing between Contracting Parties or Parties may, at their option, consider this Convention as the legal basis for extradition for such offenses. Contracting Parties
undertake to include the offenses as extraditable offenses in every future extradition treaty to be concluded between them.

**Article VIII**

The Contracting Parties shall also assure that effective civil remedies are available, in accordance with their respective Constitutions, to the victims of offenses listed in Article III, including effective remedies against the perpetrators of such offenses who may be found within their territory in accordance with the right to an effective remedy guaranteed in Article 8 of the Universal Declaration of Human Rights.

**Article IX**, and so forth [as appropriately amended from Articles VIII to XIX of the Genocide Convention, if not also from treaties such as the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 24 U.S.T. 564].