

## CORRESPONDENCE

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### TO THE EDITORS IN CHIEF:

As Chief Prosecutor at Nuremberg, Justice Jackson prophetically warned: "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." More recently, the Final Report of the UN Commission of Experts investigating international crimes in the former Yugoslavia added: "peace in the future requires justice." In sharp contrast, Professor Anthony D'Amato's allegedly secret UN deal and his apparently serious, yet "distasteful," "economic approach"<sup>1</sup> offer, not peace at any price, but what would more likely result in a short-lived peace at a terrible price.

Whether or not Professor D'Amato's uncharacteristic musings about wealthy war criminals, lackey lobbyists, theoretic "advantages," "chips" and the like, and a secret deal, would have any realistic impact on a lasting peace in the Balkans,<sup>2</sup> his postulated "bargain" with international criminals is simply not possible under international law. For example, parties to the Genocide Convention "undertake to prevent and to punish" genocide (Art. I) and have agreed that "[p]ersons committing genocide . . . shall be punished" regardless of personal status (Art. IV). Further, these obligations are now customary. Indeed, as early as 1946, the General Assembly affirmed that "the punishment of the crime of genocide is a matter of international concern," and today, the Report of the UN Secretary-General concerning crimes in the former Yugoslavia (a report approved by the Security Council) has recognized that genocide "is a crime under international law for which individuals shall be tried and punished." Recent Security Council resolutions recognize the same individual and state responsibilities for related crimes under "humanitarian law," one (at least) promising that perpetrators "will be held individually responsible."<sup>3</sup> Additionally, the Security Council has declared that land obtained by force or "ethnic cleansing" was obtained unlawfully and "will not be permitted to affect the outcome of . . . negotiations."<sup>4</sup> The *Restatement* rightly adds: "A state violates customary law if it . . . encourages genocide, fails to make genocide a crime or to punish persons guilty of it, or otherwise condones genocide."<sup>5</sup> Addressing "the universal character" of the Genocide Convention, the International Court of Justice recognized early that such a character is an aspect "both of the condemnation of genocide and of the cooperation required 'in order to liberate mankind from such an odious scourge.'"<sup>6</sup> It is evident, therefore,

<sup>1</sup> See generally Anthony D'Amato, *Peace vs. Accountability in Bosnia*, 88 AJIL 500 (1994).

<sup>2</sup> Also, to assume that an "economic" or return of land and spoils-type "bargain" with Hitler after the near "cleansing" of Jews from much of Europe and his unlawful acquisition of "assets" would really punish, deter or ultimately serve peace seems quite unreal. Further, what relations might exist between "economic" factors and Lt. Calley's "cleansing" of My Lai or Serbian use of mass rape and bombardments of civilians as part of genocidal "ethnic cleansing" remain a mystery.

<sup>3</sup> SC Res. 787, para. 7 (Nov. 10, 1992), reprinted in 31 ILM 1481, 1483 (1992).

<sup>4</sup> *Id.*, para. 2. See also SC Res. 889 (Dec. 15, 1993); SC Res. 820 (Apr. 17, 1993).

<sup>5</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §702, comment *d* (1987).

<sup>6</sup> Reservations to the Convention on Genocide, 1951 ICJ REP. 15, 23 (Advisory Opinion of May 28).

that a newer and related peremptory character as *jus cogens* should reach both the prohibition of genocide<sup>7</sup> and universal sanction responsibilities.<sup>8</sup>

Under the 1949 Geneva Conventions, signatories (which include nearly all states) have an express "obligation to search for persons alleged to have committed, or to have ordered . . . , grave breaches, and shall bring such persons, regardless of their nationality, before [their] own courts" for the initiation of prosecution or, alternatively, shall extradite them to another party to the Conventions<sup>9</sup> or, under the Statute for the International Criminal Tribunal, to the Tribunal. Moreover, there is an absolute obligation of each signatory under common Article 1 of the Conventions "to respect and to ensure respect" for the Conventions "in all circumstances." Signatories simply cannot agree to nonprosecution of those reasonably accused of grave breaches without violating these and other provisions of Geneva law.

Supplementing this result is another provision common to the Geneva Conventions: "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect to [grave] breaches . . ." <sup>10</sup> There is, as with the customary law of war more generally, no exception to the duty to initiate prosecution or to extradite. There is no power in any single state to grant asylum or some other form of immunity; nor is there such a power among several of the signatories together. There is no power in any signatory to "absolve itself" or any other state by agreement or otherwise. As affirmed at Nuremberg and in subsequent trials, concepts of sovereign, diplomatic or related forms of immunity also do not apply to "acts which are condemned as criminal by international law." As stressed more generally in the authoritative Red Cross commentaries on the Geneva Conventions, enforcement responsibilities under humanitarian law are "absolute."<sup>11</sup> The 1956 U.S. Army Field Manual 27-10, *The Law of Land Warfare*, adds the common and general recognition that sanctions principles documented in Geneva law "are declaratory of the obligations of belligerents under customary international law to take measures for the punishment of war crimes committed by all persons," that is, regardless of the nationality of victims or the place of occurrence.

Similarly, from the late 1960s to the early 1970s, a series of UN General Assembly resolutions evidenced expectations about universal jurisdiction and the duty to engage in criminal sanction efforts. For example, in a 1973 resolution on principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, it was rightly affirmed:

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.

<sup>7</sup> Most agree that the prohibition of genocide is customary *jus cogens*. See, e.g., Jordan J. Paust, *Congress and Genocide: They're Not Going to Get Away With It*, 11 MICH. J. INT'L L. 90, 90-92 & nn. 2-3 (1989).

<sup>8</sup> See *id.* at 92 & n.2.

<sup>9</sup> See, e.g., Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 146, 6 UST 3516, 75 UNTS 287.

<sup>10</sup> See, e.g., *id.*, Art. 148. See generally Jordan J. Paust, *Universality and the Responsibility to Enforce International Criminal Law: No U.S. Sanctuary for Alleged Nazi War Criminals*, 11 HOUS. J. INT'L L. 337, 339 (1989).

<sup>11</sup> See, e.g., COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 602 (Oscar M. Uhler & Henri Coursier eds., 1958); see also *id.* at 15-17, 587, 590-94.

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.

7. . . . 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.<sup>12</sup>

In other resolutions it was also affirmed that a refusal "to co-operate in the arrest, extradition, trial and punishment" of such persons is contrary to the United Nations Charter "and to generally recognized norms of international law."<sup>13</sup> The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, including genocide and serious war crimes, also recognizes the customary obligation of states "to try or extradite" those reasonably accused, and similar recognitions by text writers abound.

Such customary and treaty-based obligations, related even to the UN Charter, pertain even as states vote for UN resolutions or contemplate otherwise permissible measures for peace. In my opinion, the Security Council must itself "act in accordance with the Purposes and Principles" of the Charter (as set forth in Art. 24(2)) and (as expressed in Art. 25) its decisions are only binding if made "in accordance with" the Charter. As readers undoubtedly know, the Charter's purposes and principles include not merely peace, but also security, self-determination, human rights (which also lie behind prohibitions of genocide and most war crimes), "justice," and good faith fulfillment by members of their obligations assumed in accordance with the Charter. Article 1, paragraph 1 expressly recognizes the UN purpose of taking "effective collective measures . . . for the suppression of acts of aggression" and the settlement of disputes that might be peace threatening "in conformity with the principles of justice and international law." Thus, peace itself is to be conditioned by justice and law, a result also evident when one considers the various Charter purposes outlined above and their necessary effect as power-limiting policies or purposes under Articles 24 and 25 of the Charter.

Surely, Professor D'Amato's secret and "distasteful" deal could not be lawful under several treaties, including the UN Charter, nor under customary international law. It would necessarily be *contra obligatio erga omnes*. More egregious would be the short-term and long-term consequences of such a deal, serving as it would the very crimes condemned by humankind—a terrible and unlawful, if not complicitous, price that we simply cannot afford to pay.

JORDAN J. PAUST

TO THE EDITORS IN CHIEF:

In his Editorial Comment *Peace vs. Accountability in Bosnia* (88 AJIL 500 (1994)), Professor Anthony D'Amato makes some interesting arguments suggesting that the simplest and most direct route to peace in the Balkans might be to

<sup>12</sup> GA Res. 3074, UN GAOR, 28th Sess., Supp. No. 30, at 78, UN Doc. A/9030 (1973).

<sup>13</sup> See, e.g., GA Res. 2840, *id.*, 26th Sess., Supp. No. 29, at 88, UN Doc. A/8429 (1971); see also GA Res. 3074, *supra* note 12; GA Res. 96, UN Doc. A/64, at 188 (1946).