
**CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW
INTERNATIONAL WAR CRIMES PROJECT**

**MEMORANDUM FOR THE
OFFICE OF THE PROSECUTOR**

**ISSUE 18: SURRENDER OF INDICTEES AND NON-INDICTED
CRIMINALS FROM THE UNITED STATES TO THE ICTR**

NOTEBOOK 4

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I. Introduction and Summary of Conclusions*

A. Issues

This memorandum addresses U.S. law authorizing “surrender” of indicted accused arrested in the United States to the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”). The first part of this memorandum identifies the difference between surrender and extradition. The second part of this memorandum includes a note on the surrender proceedings of Elizaphan Ntakirutimana. The third part of this memorandum discusses the status of these indictees or non-indicted criminals after the sunset of the Tribunals. Particular attention is paid to their refugee and immigration status under U.S. law with reference to the situation of former World War II Nazis.

B. Summary of Conclusions

(1) The Surrender Agreements Allow Surrender to the Tribunals Without an Extradition Treaty

Transfers to the Tribunals are deemed surrender, not extradition. In international law, if a fugitive is requested by a State with which no extradition arrangement already exists, there is no general international duty to extradite or punish the fugitive.¹ The surrender agreements between the U.S. and the Tribunals eliminate most of the traditional exceptions to extradition when a traditional Article II Treaty is absent.

* ISSUE 18: Prepare a summary and analysis of U.S. law authorizing “surrender” of indicted accused arrested in the United States to ICTY and ICTR. Prepare a note on the surrender proceedings (through the U.S. Supreme Court) of E. Ntakirutimana. How is surrender different than extradition? What happens to these indictees or non-indicted criminals after the sunset of the Tribunals? Will their refugee status be affected (analyze this with reference to the situation of former World War II Nazis)?

¹ GEOFF GILBERT, TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW: EXTRADITION AND OTHER MECHANISMS 47 (1998). [Reproduced in the accompanying notebook at Tab 55.]

(2) The Surrender Proceedings of Elizaphan Ntakirutimana Lead to the Conclusion That it is Constitutional to Surrender an Indicted Criminal to the Tribunals With a Statute and an Executive Agreement

Even though the *Ntakirutimana* trilogy failed in its attempt to define concrete guidelines that the government or future courts can follow in future surrender proceedings to the Tribunals, the Fifth Circuit did hold that it is constitutional to surrender an indicted criminal to the Tribunals with a statute and an executive agreement. The Fifth Circuit affirmed the trial court's order denying Ntakirutimana's writ of habeas corpus regarding an extradition request and lifted a stay of extradition stemming from charges of genocide by the ICTR. The Fifth Circuit held that a statute authorized extradition and evidence supported probable cause. The ultimate goal of the government—to surrender Ntakirutimana to the ICTR—was accomplished. However, the majority opinion is not a ringing endorsement of the Tribunal's claim. The *Ntakirutimana* trilogy—the magistrate, district court, and court of appeals decisions—believe two important revelations about genocide and mass violations of human rights. First, the decisions did not rely on past genocide cases or principles of international law showing that ordinarily good people can be induced to commit terrifying crimes. Second, the decisions did not discuss that the “community of nations” has sought an extended jurisdictional reach for genocide prosecutions.

(3) U.S. Law Precludes Immigration Relief to Indictees and Non-Indicted Criminals Who Have Committed Acts of Genocide

Even though the Ex Post Facto provision of the United States Constitution has precluded criminal prosecution of World War II Nazis, civil deportation and denaturalization proceedings embody the spirit of Nuremberg and remain the norm for dealing with indicted and non-indicted war criminals. The Immigration and

Naturalization Act of 1990 (“INA of 1990”) bars immigration relief to aliens who have participated in Nazi persecution or who have committed acts of genocide. Specifically, the INA of 1990 contains, among other provisions, the following restrictions: (a) ineligibility for admission; (b) preclusion from waiver of inadmissibility; (c) denaturalization; (d) ineligibility for withholding of removal on grounds of anticipated persecution; (e) deportation; (f) ineligibility for voluntary departure; and (g) ineligibility for cancellation of removal.² U.S. case law dealing with Nazi war criminals is helpful in analyzing the refugee and immigration status of former World War II Nazis, and assists courts and lawmakers in ascertaining the refugee and immigration status of indictees or non-indicted criminals from Rwanda or the Former Yugoslavia.

II. Factual Background

Unlike the International Military Tribunal at Nuremberg (“Nuremberg Tribunal”), where the victorious Allied Forces surrendered defendants, the ICTR is entirely dependent on states’ fulfilling their obligations under the ICTR Statute, adopted as a Chapter VII binding resolution of the United Nations Security Council (U.N.S.C.) to arrest and surrender accused in their home countries.³ Following the death in a plane crash of, among other people, the President of Rwanda, elements of Rwanda’s majority Hutu group initiated a massive wave of killings directed primarily against the minority Tutsi group.⁴ From April 6 to the end of June 1994, an estimated 500,000 to 1 million

² See *infra* notes 192-212 and accompanying text.

³ Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFF., Summer 1993, at 122, 133 (“in contrast to Nuremberg, the ad hoc tribunal for the former Yugoslavia will probably not enjoy the cooperation of the authorities controlling the territory in which the crimes were committed”) [Reproduced in the accompanying notebook at Tab 79.] See also Statute of the International Tribunal for Rwanda (hereinafter ICTR Statute) [Annex to U.N. SCOR Res. 955] art. 28, reprinted in 33 ILM 1598, 1612 (1994). [Reproduced in the accompanying notebook at Tab 1.]

⁴ *Elizaphan Ntakirutimana v. Janet Reno, et al*, 184 F.3d 419, 421 (1999). [Reproduced in the accompanying notebook at Tab 27.]

persons were killed.⁵ United Nations (“U.N.”) and other investigations established that the mass killings were planned in advance of the plane crash and were motivated by ethnic hatred.⁶

After the Tutsi tribe triumphed and overthrew the Hutu government, the new Tutsi-dominated government asked the U.N. to create an international war crimes tribunal. As a result, the U.N.S.C. acting under Chapter VII of the U.N. Charter, adopted Resolution 955, establishing an international tribunal to prosecute those responsible for the genocide.⁷ Appended to the resolution was the Statute governing the ICTR, which required U.N. member states to “cooperate fully with the International Tribunal and its organs” and to “comply without undue delay with any request for . . . the arrest or detention of persons” and for the “surrender or the transfer of the accused” to the ICTR.⁸

In accordance with its obligations under the U.N. resolution, the United States entered into an executive agreement with the ICTR, the Agreement on Surrender of Persons (“Surrender Agreement”), in which the United States undertook to “surrender to the Tribunal . . . persons . . . found in its territory whom the Tribunal has charged with . . . a violation or violations within the competence of the Tribunal.”⁹

On February 10, 1996, Congress enacted a statute, section 1342 of the National Defense Authorization Act for Fiscal Year 1996 (“Defense Act of 1996”), implementing the two executive agreements with the ICTR and ICTY concerning surrender of

⁵ *Id.*

⁶ *Id.*

⁷ U.N. SCOR Res. 955, *supra* note 3. [Reproduced in the accompanying notebook at Tab 1.]

⁸ ICTR Statute, *supra* note 3, art. 28, §§ 1, 2(d) & (e). [Reproduced in the accompanying notebook at Tab 1.]

⁹ Agreement on Surrender of Persons, January 24, 1995, U.S.-Int’l Trib. Rwanda, *available in* 1996 WL 165484. [Reproduced in the accompanying notebook at Tab 17.]

accused.¹⁰ Section 1342, amending the provisions of chapter 209 of title 18, United States Code, provides that the existing statutes relating to extradition¹¹ “shall apply in the same manner and extent to the surrender of persons . . . to . . . the International Tribunal for Rwanda, pursuant to the [surrender] agreement.”¹² Section 1342 modified U.S. domestic law to comply with ICTR requests to arrest and surrender fugitives.¹³

III. The Use of Surrender When Extradition is Unavailable

A. Definition of Surrender

Technically, transfers to the Tribunal are deemed surrender, not extradition.¹⁴ In international law, if a fugitive is requested by a State with which no extradition arrangement already exists, there is no general international duty to extradite or punish the fugitive.¹⁵ Under international law, a state is free to extradite and is not limited to the explicit terms of the treaty as a matter of comity.¹⁶ “Nations are authorized,

¹⁰ National Defense Authorization Act of 1996, Pub. L. No. 104-106, § 1342, 110 Stat. 186, 486 (1996) (“Judicial Assistance to the International Tribunal for Yugoslavia and to the International Tribunal for Rwanda”) [hereinafter NDAA]. [Reproduced in the accompanying notebook at Tab 3.]

¹¹ See 18 USC §§ 3181-3196 (1996). [Reproduced in the accompanying notebook at Tab 3.]

¹² NDAA § 1342(a)(1)(B). [Reproduced in the accompanying notebook at Tab 3.]

¹³ Kenneth J. Harris and Robert Kushen, *Prosecuting International Crime: Surrender of Fugitives to the War Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations with the U.S. Constitution*, 7 CRIM. L.F. 561, 564 (1996). [Reproduced in the accompanying notebook at Tab 70.]

Modifications have historically taken a variety of forms: statutes, executive actions, and international agreements. While the Tribunals are supranational entities, the means of surrender to them have been shaped to a certain extent by the law and practice of individual states in the area of bilateral extradition. *Id.*

¹⁴ The government used the term “extradition” in its requests to the Federal District Court and the Fifth Circuit Court of Appeals. Due to common use of the two terms, the decisions used both surrender and extradition interchangeably.

¹⁵ GILBERT, *supra* note 1, at 47. [Reproduced in the accompanying notebook at Tab 55.]

¹⁶ See *United States v. Alvarez-Machain*, 504 U.S. 655, 666 (1992) (“to imply from the terms of this Treaty that it prohibits obtaining the presence of an individual by means outside of the procedures the Treaty establishes requires a much larger inferential leap, with only the most general of international law principles to support it.”) It should be noted that neither Appellant or Appellee relied on the Supreme Court’s opinion in *Alvarez-Machain*. [Reproduced in the accompanying notebook at Tab 44.]

notwithstanding the terms of an extradition treaty, to voluntarily render an individual to the other country on terms completely outside of those provided in the Treaty.”¹⁷

When the accused is already in the custody of the national authorities of the state concerned as a result of a provisional arrest order issued by Office of the Prosecutor at the Tribunals, or action taken by the national authorities on their own initiative, the Tribunal may issue an order for the surrender of the accused.¹⁸ The term surrender refers to the situation in which a person is already in custody pursuant to action taken by national authorities under national law.¹⁹ An order by a Trial Chamber for the surrender or transfer of persons to the custody of the Tribunal is considered to be the application of an enforcement measure under Chapter VII of the U.N. Charter.²⁰ The ICTR Statute refers to orders for surrender rather than requests for extradition to distinguish an order issued by the Tribunal from a request made by a state.²¹ This is the fundamental difference between the terms surrender and extradition.

According to Professors Morris and Scharf, the use of surrender is consistent with the Nuremberg precedent. Morris and Scharf argue that a state will not be relieved of the obligation to comply with a surrender order where domestic legal impediments to extradition exist. This general principle has its basis in Rule 58,²² identifying

¹⁷ GILBERT, *supra* note 1, at 47. [Reproduced in the accompanying notebook at Tab 55.]

¹⁸ VIRGINIA MORRIS AND MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, A DOCUMENTARY HISTORY AND ANALYSIS 207 (1995). [Reproduced in the accompanying notebook at Tab 52.]

¹⁹ *Id.* at 7 N. 555.

²⁰ *Id.* at 209-10.

²¹ *Id.* at 210.

²² International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (1995), *entered into force* 29 June 1995.

National Extradition Provisions

The obligations laid down in Article 28 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused to the Tribunal which may exist under the national law or extradition treaties of the State concerned.

international law supremacy over national law, based in member states' obligations in the U.N. Charter.²³ The Nuremberg precedent is particularly pertinent to the case of accused being surrendered to the Tribunals because the U.N. General Assembly unanimously approved the principles.²⁴ Morris and Scharf thus argue that surrender is not extradition and should not require a treaty. Many countries now surrender fugitives to the Tribunals without any treaty on this basis.

B. Process of Surrender and the Constitutional Dilemma

In the United States, the rules of extradition are inapplicable in these situations since they are not expressly incorporated in the Statutes, Rules or domestic legislation regarding the ICTR.²⁵ The United States Supreme Court has held, however, that the executive is not constitutionally authorized to surrender accused (extradite) without concurrence of the legislative branch.²⁶ The constitutional question concerns what form that concurrence must take. Extradition from the United States has been effected pursuant to bilateral extradition treaties in all but a very few cases. The exceptions usually involve situations where a country is not then wholly independent of the United

²³MORRIS AND SCHARF, *supra* note 18, at 212-13. [Reproduced in the accompanying notebook at Tab 52.]

²⁴*Id.* at 10 (referring to the Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95, U.N. GAOR, U.N. Doc. A/64/Add 1, at 188 (1946)).

²⁵GILBERT, *supra* note 1, at 49. [Reproduced in the accompanying notebook at Tab 55.]

²⁶*See Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8-9 (1936) (“The surrender of its citizens by the Government of the United States must find its sanction in our law. It cannot be doubted that the power to provide for extradition is a national power; it pertains to the national government and not to the States... But, albeit a national power, it is not confided to the Executive in the absence of treaty or legislative provision. At the very beginning, Mr. Jefferson, as Secretary of State, advised the President: ‘The laws of the United States, like those of England, receive every fugitive, and no authority has been given to their Executives to deliver them up.’... As stated by John Bassett Moore in his treatise on Extradition—summarizing the precedents—‘the general opinion has been, and practice has been in accordance with it, that in the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power’). [Reproduced in the accompanying notebook at Tab 49.]

States.²⁷ The Surrender Agreements thus represent a departure from U.S. bilateral extradition treaties by eliminating traditional exceptions to extradition and thus foreclosing certain implied defenses that result from the absence of an extradition treaty.

C. Section 1342's Impact on Existing Law Relating to Extradition

Section 1342 of the Defense Act of 1996 amends chapter 209 of title 18 of the U.S. Code, Crimes and Criminal Procedure, in order to implement the Surrender Agreement. Chapter 209 contains provisions addressing those critical aspects of extradition practice not normally governed by bilateral extradition treaties.²⁸ Until the enactment of section 1342, these extradition provisions did not refer to the surrender of criminals to international tribunals, such as the ICTR. Accordingly, section 1342(a)(1) of the legislation amends chapter 209 of title 18 to make these provisions equally applicable to the surrender of persons to the Tribunals pursuant to the Surrender Agreements. Most significant are those provisions that grant authority to the executive branch to surrender a fugitive at the conclusion of U.S. judicial proceedings.²⁹ Section 3186³⁰ confers final authority upon the Secretary of State to surrender fugitives with respect to whom U.S. courts have ruled that the requirements for extradition have been met, while section 3196 permits the surrender of U.S. citizens even where the applicable treaty does not oblige the United States to do so.³¹

²⁷ The government also relied on a 1985 congressional-executive agreement allowing extradition from the United States, the Marshall Island Extradition Framework, with the courts applying Title 18, chapter 209. (referring to the executive agreement between the United States and the Marshall Islands, Extraditions from the United States to the Marshall Islands pursuant to the extradition provisions of an executive-agreement, the Agreement on Extradition, Mutual Assistance in Law Enforcement Matters, and Penal Sanctions of Oct. 10, 1986, U.S.-Marshall Is. & Fed. States of Micronesia, TIAS No. 1161).). *See* Harris and Kushen, *supra* note 13, at 578, n. 47. [Reproduced in the accompanying notebook at Tab 70.]

²⁸ Harris and Kushen, *supra* note 13, at 590. [Reproduced in the accompanying notebook at Tab 70.]

²⁹ *Id.* at 591.

³⁰ 18 U.S.C. 3186 (2002). [Reproduced in the accompanying notebook at Tab 3.]

³¹ 18 U.S.C. 3196 (2002). [Reproduced in the accompanying notebook at Tab 3.]

In addition, several sections provide the framework for U.S. proceedings pursuant to a *foreign country's* request for extradition.³² Section 3184 sets forth the procedures for the issuance of arrest warrants and the conduct of U.S. judicial proceedings.³³ Section 3188 provides U.S. judicial authorities with discretion to release a fugitive in the event of excessive delay in surrendering him or her to the requesting authority.³⁴ Section 3190 provides for the admission of evidence in an extradition proceeding where that evidence has been certified by the principal U.S. diplomatic or consular officer resident in the country requesting extradition.³⁵ Section 3191 provides for the production of witnesses on behalf of indigent fugitives.³⁶ Finally, section 3194 governs the authority of agents of the requesting state to transport a surrendered fugitive from U.S. territory,³⁷ and section 3195 governs the allocation of the costs of extradition.³⁸ Section 1342(a)(4) specifies for surrender proceedings, as in international extradition proceedings, that neither the Federal Rules of Evidence nor the Federal Rules of Criminal Procedure are applicable.³⁹ Section

³² Harris and Kushen, *supra* note 13, at 591. [Reproduced in the accompanying notebook at Tab 70.]

³³ 18 U.S.C. 3184 (2002). [Reproduced in the accompanying notebook at Tab 3.]

³⁴ 18 U.S.C. 3188 (2002). [Reproduced in the accompanying notebook at Tab 3.]

³⁵ 18 U.S.C. 3190 (2002). [Reproduced in the accompanying notebook at Tab 3.] Since the Tribunals are not sovereign states, section 1342(a)(2) of the implementing legislation extends section 3190 authority to such principal U.S. diplomatic or consular officers so that they may certify the evidence forwarded in support of a surrender request. NDAA § 1342(a)(2). [Reproduced in the accompanying notebook at Tab.] Section 1342(a)(3) of the act ensures that the United States is responsible for most costs, by stating that the agreements' cost provisions prevail over those in 18 U.S.C. § 3195. NDAA § 1342(a)(3). The Tribunals bear the cost only of transporting fugitives and translating documents. With this modification, the practice with respect to the Tribunals corresponds to modern extradition treaty practice. Harris and Kushen, *supra* note 13, at 592.

³⁶ 18 U.S.C. 3191 (2002). [Reproduced in the accompanying notebook at Tab 3.]

³⁷ 18 U.S.C. 3194 (2002). [Reproduced in the accompanying notebook at Tab 3.]

³⁸ 18 U.S.C. 3195 (2002). [Reproduced in the accompanying notebook at Tab 3.]

³⁹ NDAA § 1342(a)(4). *See* Fed. R. Evid. 1101(d)(3) [Reproduced in the accompanying notebook at Tab 4.] *See* Fed. R. Crim. P. 54(b)(5) [Reproduced in the accompanying notebook at Tab 5.] Extradition proceedings have their own rules of evidence and procedure that are more flexible in part because foreign governments should not be expected to be versed in U.S. criminal law and procedure. Harris and Kushen, *supra* note 13, at 592. [Reproduced in the accompanying notebook at Tab 70.] *Grin v. Shine*, 187 U.S. 181, 184-85 (1902) (where the Supreme Court considered the extradition of a fugitive to Russia even though the evidence supporting the petition did not meet the requirements of the treaty between the two countries). [Reproduced in the accompanying notebook at Tab 29.]

1342(a)(4) aligns itself with an old Supreme Court decision holding that even if extradition is not authorized by a treaty, the Court should uphold it based on a *lesser evidentiary showing*. In reaching this conclusion, the Court held that “Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient.”⁴⁰ Until section 1342’s implementation, Congress had yet to provide for this lesser evidentiary showing.

IV. Surrender Proceedings Through U.S. Supreme Court of Ntakirutimana: Summary and Analysis of U.S. Law Authorizing “Surrender” of Indicted Accused and Arrested in the United States to ICTY and ICTR

A. Practical and Constitutional Issues: Congressional-Executive Agreements as a Basis for Surrender?

This section identifies the major challenge to the extradition of Ntakirutimana—that the United States cannot surrender a criminal to a Tribunal without an affirmative grant of extradition authority from Congress to the executive branch through a treaty or statute.⁴¹ However, there appears to be no constitutional bar to using a multilateral instrument *per se* as the legal basis for granting a surrender request. While section 3181 applies only “during the existence of any treaty of extradition with [a] foreign government,” it does not specify that this treaty be bilateral or be solely for the purpose of extradition.⁴²

The U.S. government had one option to rely on in surrendering Ntakirutimana. The Surrender Agreement, combined with section 1342, is the only method to surrender criminals such as Ntakirutimana. Reliance on current multilateral instruments, such as

⁴⁰ *Grin*, 187 U.S. at 191. [Reproduced in the accompanying notebook at Tab 29.]

⁴¹ Harris and Kushen, *supra* note 13, 578-79. [Reproduced in the accompanying notebook at Tab 70.]

⁴² *Id.* at 580.

the U.N. Charter, Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“Torture Convention”), and the Geneva Conventions pose a constitutional problem for the purpose of surrender because neither the executive branch during the negotiation process nor the Senate during the ratification process envisioned their usage in this manner.⁴³ The U.N. Charter, for example, does not speak at all about the extradition or surrender of fugitives. Consequently, the invocation of the U.N. Charter for the basis of surrender could raise concerns about the Senate's constitutional role in the treaty-making process.⁴⁴ Moreover, because the implementing legislations for the Genocide Convention,⁴⁵ the Geneva Conventions,⁴⁶ and the Torture Convention⁴⁷ do not address surrender, U.S. courts might consider the invocation of these agreements by themselves as a basis for surrender legally inadequate.⁴⁸

B. The Obligation to Surrender Under International Law

⁴³ UN CHARTER; implemented by 22 U.S.C. §§ 287-287e (1946). [Reproduced in the accompanying notebook at Tab 6.]

⁴⁴ Harris and Kushen, *supra* note 13, at 579. [Reproduced in the accompanying notebook at Tab 70.]

⁴⁵ Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951), [hereinafter Genocide Convention]; implemented by 18 U.S.C. §§ 1091-1093 (1988). [Reproduced in the accompanying notebook at Tab 7.]

⁴⁶ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *adopted* Aug. 12, 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *adopted* Aug. 12, 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, *adopted* Aug. 12, 1949, 75 U.N.T.S. 135, 6 U.S.T. 3317 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *adopted* Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 [hereinafter Geneva Convention IV] (all entered into force Oct. 21, 1950); implemented War Crimes Act of 1996, Pub. L. No. 104-192, § 2401(b), 110 Stat. 2104 (1996) (statute proscribing grave breaches of Geneva Conventions applicable only where defendant is member of U.S. armed forces or U.S. national). [Reproduced in the accompanying notebook at Tab 8.]

⁴⁷ Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (*as modified in* 24 I.L.M. 535) (entered into force June 26, 1987), [hereinafter Torture Convention]; implemented by 18 U.S.C. § 2340 (2002). [Reproduced in the accompanying notebook at Tab 9.]

⁴⁸ Harris and Kushen, *supra* note 13, at 581. [Reproduced in the accompanying notebook at Tab 70.]

The obligation on U.N. member states to render various forms of assistance to the Tribunals (including but not limited to arrest, detention, and surrender) derives from chapter VII of the U.N. Charter.⁴⁹ Chapter VII gives the U.N.S.C. broad responsibility "with respect to threats to the peace, breaches of the peace, and acts of aggression," with specific authority to "decide what measures shall be taken . . . to maintain or restore international peace and security."⁵⁰ Under article 41 of the Charter, the UNSC "may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon Members of the United Nations to apply such measures."⁵¹ The obligation on member states to carry out these measures is explicitly stated in article 48(1) of the Charter: "The action required to carry out decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations."⁵²

The essence of the obligation on States to surrender fugitives to the Tribunals is not present in the U.N. charter, but is expressed in operative paragraph 4 of U.N.S.C. Resolution 827 (Yugoslavia),⁵³ and operative paragraph 2 of Resolution 955 (Rwanda), which both read as follows:

[The Security Council] *Decides* that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under

⁴⁹ *Id.* at 565. Brief for the Respondent/Appellee at 25-26, *Elizaphan Ntakirutimana v. Janet Reno et al.*, 184 F.3d 419 (5th Cir. 1999) (No. 98-41597). [Reproduced in the accompanying notebook at Tab 83.] (Citing Declaration of Michael J. Matheson, contained in Addendum E of the Brief, "The Department of State, through the Matheson declaration, has made clear its view that the Tribunal is lawfully created under the authority of the Security Council.")

⁵⁰ UN CHARTER art. 39. [Reproduced in the accompanying notebook at Tab 21.]

⁵¹ UN CHARTER art. 41. [Reproduced in the accompanying notebook at Tab 21.]

⁵² UN CHARTER art. 48(1). [Reproduced in the accompanying notebook at Tab 21.]

⁵³ S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., par. 4, S/RES/827 (1993). [Reproduced in the accompanying notebook at Tab 20.]

their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute⁵⁴

Moreover, article 19 of the ICTY Statute,⁵⁵ and article 18 of the ICTR Statute⁵⁶ describe a state's duty to arrest criminals upon a showing of an offense. Orders for arrest, detention, surrender, or transfer of persons in a particular case can be issued upon confirmation of an indictment against that person.⁵⁷ Under these articles, indictments must be based on a finding by the prosecutor, and confirmed by a judge of a trial chamber that the prosecutor has established a prima facie case of an offense within the jurisdiction of the Tribunal.⁵⁸

C. The ICTR Indictments of Ntakirutimana

In June 1996, the ICTR charged Elizaphan Ntakirutimana, a seventy-two-year-old Rwandan national, with genocide, complicity in genocide, conspiracy to commit genocide, and three separate crimes against humanity (murder of civilians, extermination of civilians, and inhuman acts).⁵⁹ In September, 1996, the ICTR confirmed a second

⁵⁴ ICTR Statute, *supra* note 3, art. 28. [Reproduced in the accompanying notebook at Tab 1.] Article 28 states, in relevant part:

1. States shall cooperate with the International Tribunal [for Rwanda] in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: . . .
 - (d) the arrest or detention of persons;
 - (e) the surrender or the transfer of the accused to the International Tribunal [for Rwanda].

⁵⁵ 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 (hereinafter ICTY Statute), U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), art. 19, adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993). [Reproduced in the accompanying notebook at Tab 2.]

⁵⁶ ICTR Statute, *supra* note 3, art. 18. [Reproduced in the accompanying notebook at Tab 1.]

⁵⁷ Harris and Kushen, *supra* note 13, at 567. [Reproduced in the accompanying notebook at Tab 70.]

⁵⁸ *Id.*

⁵⁹ Brief of the Respondent/Appellee, *supra* note 49, at Addendum B, The International Criminal Tribunal for Rwanda, Indictment of June 17, 1996. [Reproduced in the accompanying notebook at Tab 83.]

indictment charging Ntakirutimana and his son with genocide, complicity in genocide, conspiracy to commit genocide, crimes against humanity, and serious violations both of common Article 3 of the Geneva Conventions and of Additional Protocol II.⁶⁰

On September 26, 1996, Ntakirutimana was arrested by U.S. law enforcement authorities in Laredo, Texas, where he was lawfully residing. A former pastor of the Seventh Day Adventist Church in Mugonero, Rwanda, and an ethnic Hutu, he was accused of luring several hundred ethnic Tutsis to his church complex in the days immediately following the death of Rwandan President Habyarimana, and then participating in the attack on the complex that left many of the Tutsis dead. Ntakirutimana was also accused of working with armed bands in the Bisesero region to hunt down both the survivors of that attack and other Tutsis.⁶¹ The tradition in Rwanda was to take shelter in churches. Because pastors are Christian, it was thought that nothing harmful could happen in the churches. Ntakirutimana, the church president, was personally instructing Tutsis to gather at the Adventist complex.⁶² However as time passed, it was Ntakirutimana who called for the elimination of Tutsis seeking refuge in the church.⁶³

D. Ntakirutimana Trilogy: Part I—Magistrate Notzon

⁶⁰Brief of the Respondent/Appellee, *supra* note 49, at Addendum B, The International Criminal Tribunal for Rwanda, Indictment of Sept. 7, 1996. [Reproduced in the accompanying notebook at Tab 83.]

⁶¹ See generally PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES 25-43 (1998) (describing the events in Mugonero and Bisesero, including Ntakirutimana's alleged role therein. Gourevitch takes his title from a letter sent to Ntakirutimana on April 15, 1994, by a number of Tutsi pastors who had taken refuge in the Mugonero church; their prediction was correct). [Reproduced in the accompanying notebook at Tab 59.]

⁶² *Id.* at 27.

⁶³ *Id.* at 28-31.

On October 18, 1996, the U.S. government filed its first request for Ntakirutimana's surrender.⁶⁴ The surrender request was first heard by Magistrate Judge Marcel C. Notzon (S.D. Tex.). On December 17, 1997, Notzon denied surrender without a hearing. Notzon's decision was based on a number of questionable legal rulings.⁶⁵ First, he claimed that the United States had no authority to extradite to the ICTR, finding no instance where an extradition has occurred without a treaty.⁶⁶ Notzon deemed the absence of a treaty "a fatal defect," held the provisions of section 1342 unconstitutional, and failed to consider the legal effect of the United States' obligations under the U.N. Charter and the Surrender Agreement between the United States and the ICTR.⁶⁷

Second, Notzon considered the question of probable cause. The magistrate stated (1) that the affidavit of the Belgian police officer implicating Ntakirutimana did not include a statement establishing the witnesses' veracity and reliability, and (2) that there was no indication of the condition of the interviews and whether the witnesses "were placed under oath prior to making their statements."⁶⁸ He also criticized the adequacy of specific statements by the witnesses. Notzon concluded that the information in the affidavit did not "rise to the level of probable cause."⁶⁹

E. Ntakirutimana Trilogy: Part II—District Judge Rainey

⁶⁴ Brief for the Respondents/Appellee, *supra* note 49, at 2. [Reproduced in the accompanying notebook at Tab 83.]

⁶⁵ Bartram S. Brown, *Primacy of Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 412 (1998). [Reproduced in the accompanying notebook at Tab 63.]

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *In re Surrender of Ntakirutimana*, 988 F. Supp. 1038, 1043 (S.D.T.X. 1997). [Reproduced in the accompanying notebook at Tab 35.]

⁶⁹ *Id.* at 1044.

In response, the U.S. Departments of State and Justice coordinated with the ICTR to refile its request on January 29, 1998, which was assigned to District Judge Rainey.⁷⁰ An extradition request that has been denied can be renewed even if no new evidence is present.⁷¹ Mr. Ntakirutimana was once again arrested.⁷²

Judge Rainey resolved both the constitutional and, with the assistance of additional affidavits, the probable cause claim in the government's favor in an August 6, 1998 ruling.⁷³ The court opined that the U.S. Constitution does not require that surrender be made pursuant to an Article II treaty and that the evidence against Mr. Ntakirutimana sufficed to establish probable cause.⁷⁴

On August 26, 1998, Ntakirutimana filed a petition for habeas corpus.⁷⁵ The prospective extraditee can challenge the grant of a request by a limited form of review available by means of his only recourse, habeas corpus, which, in turn, is appealable.⁷⁶ The judge does not engage in plenary review, and the judge may be the same one as in

⁷⁰ Brief for the Respondent/Appellee, *supra* note 49, at 3. [Reproduced in the accompanying notebook at Tab 83.] Extradition decisions are non-appealable under 18 U.S.C. 3184. *Ahmad v. Wigen*, 910 F.2d 1063, 1065 (2d Cir. 1990). [Reproduced in the accompanying notebook at Tab 22.]

⁷¹ M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW & PRACTICE* 778 (3d ed. 1996). [Reproduced in the accompanying notebook at Tab 58.] *See also, United States v. Doherty*, 786 F.2d 491, 496 (2d Cir. 1988) (“the Government's only remedy following denial of an extradition request is to refile the request with another extradition magistrate”). [Reproduced in the accompanying notebook at Tab 45.] *See also, Hooker v. Klein*, 573 F.2d 1360, 1367-8 (9th Cir. 1978) (“it is well settled that a finding of lack of probable cause does not bar the state from rearresting the suspect on the same charges. Because the extraditing court does not render judgment on the guilt or innocence of the fugitive, it cannot be said that an order of extraditability constitutes a final judgment for purposes of *res judicata*”). [Reproduced in the accompanying notebook at Tab 31.]

⁷² Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 A.J.I.L. 102, 132 (2000). [Reproduced in the accompanying notebook at Tab 77.]

⁷³ *In re Surrender of Ntakirutimana*, 1998 U.S. Dist. LEXIS 22173 (S.D.T.X. 1998). [Reproduced in the accompanying notebook at Tab 34.]

⁷⁴ Murphy, *supra* note 72, at 132. [Reproduced in the accompanying notebook at Tab 77.]

⁷⁵ Brief for the Respondent/Appellee, *supra* note 49, at 3. [Reproduced in the accompanying notebook at Tab 83.]

⁷⁶ *Id.* *See generally* BASSIOUNI, *supra* note 71, 737-38, 778-79. [Reproduced in the accompanying notebook at Tab 58.] *See also, In re Mackin*, 668 F.2d 122, 128 (2d Cir. 1981). [Reproduced in the accompanying notebook at Tab 33.]

the extradition hearing.⁷⁷ Although the habeas hearing is appealable, the standard of review is highly deferential to the trial judge. A petition for habeas corpus is usually presented to the federal district court following a grant of extradition, although the decision need not be final before such relief is sought.⁷⁸ The prospective extraditee can also seek review before the circuit court of appeals from a denial of habeas corpus, and if that is denied he may petition the Supreme Court for a writ of *certiorari*.⁷⁹ In a habeas corpus proceeding, the court's consideration is limited to:

“matters of jurisdiction, the existence of a valid treaty of extradition, whether the accused is actually the person whose extradition is sought, whether there is ‘probable cause’ both to believe he is the person sought and that the evidence presented is sufficient to convince a reasonable person that there are reasonable grounds to believe that he should be brought to trial, and finally that there are no grounds under the treaty or United States law that would preclude extradition.”⁸⁰

Judge Rainey heard the habeas appeal and denied it.

Ntakirutimana argued, in addition to his treaty and probable cause arguments, that the U.N. Charter did not authorize the U.N.S.C. to establish the ICTR and that the ICTR could not guarantee his fundamental rights. The court quickly dismissed these as “beyond the scope of habeas review.”⁸¹

F. Ntakirutimana Trilogy: Part III—Fifth Circuit Appeal

The decision by the Fifth Circuit Court of Appeals consisted of a majority opinion by Judge Garza, a concurring opinion by Judge Parker, and a dissenting opinion by Judge DeMoss.

⁷⁷ *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1408 (9th Cir, 1988) (“[A] judge who presides over an extradition hearing need not recuse and may hear a habeas corpus action.”) [Reproduced in the accompanying notebook at Tab 39.]

⁷⁸ Bassiouni, *supra* note 71, at 737. [Reproduced in the accompanying notebook at Tab 58.]

⁷⁹ *Id.* at 738.

⁸⁰ *Id.*

⁸¹ *Elizaphan Ntakirutimana v. Janet Reno et al*, 184 F. 3d 419, 430 (5th Cir. 1999). [Reproduced in the accompanying notebook at Tab 27.]

(1) Constitutional Question

Judge Garza, in the majority opinion, rejected Ntakirutimana's broader constitutional argument that "The Constitution of the United States requires an Article II treaty ratified by the Senate for the surrender of any person by the United States to the International Criminal Tribunal for Rwanda."⁸² Judge Garza distinguished the facts in *Valentine v. United States ex rel. Neidecker*⁸³ from the facts in the case before him.

Ntakirutimana unsuccessfully argued that the government could not rely on *Valentine* to give power to surrender because legal authority could come from two sources: a treaty which is part of the supreme law of the land or congressional enactment.⁸⁴ However, as the majority opinion made clear, the legal instruments in *Valentine* were not sufficient because neither authorized the President to surrender an American citizen.⁸⁵

Ntakirutimana argued that the power to make treaties is vested exclusively in the President with the advice and consent of the Senate, and relied on the words of the Constitution, the debates in the Constitutional Convention, and the *Federalist* defense of the proposed Constitution.⁸⁶ He also claimed that U.N. Charter is not an extradition treaty.⁸⁷ Judge Garza concluded that the United States can act constitutionally either by treaty or by executive agreement authorized by statute (forming a congressional-executive agreement).⁸⁸ Judge Garza found that the Constitution "contemplates alternative modes of international agreements. . . not strictly congruent with the

⁸² Appellant's Reply Brief, at 1, *Elizaphan Ntakirutimana v. Janet Reno et al.*, 184 F.3d 419 (5th Cir. 1999) (No. 98-41597). [Reproduced in the accompanying notebook at Tab 82.]

⁸³ *Supra* note 26. [Reproduced in the accompanying notebook at Tab 49.]

⁸⁴ *Ntakirutimana*, 184 F.3d at 424-25. [Reproduced in the accompanying notebook at Tab 27.]

⁸⁵ Appellant's Reply Brief, *supra* note 82, at 8. [Reproduced in the accompanying notebook at Tab 82.]

⁸⁶ *Id.* at 1-2.

⁸⁷ *Id.* at 2.

⁸⁸ *Ntakirutimana*, 184 F.3d at 426-27. (Citing Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW §§ 4-5 at 228-29 (2d ed. 1988).) [Reproduced in the accompanying notebook at Tab 27.]

formalities required by the Constitution's Treaty Clause."⁸⁹ He cited *Valentine*, among other authorities, to show that the Supreme Court has repeatedly stated that a treaty or statute may confer the power to extradite.⁹⁰ Moreover, the treaty-making process remains untainted because the President may still elect to submit a treaty to the Senate, instead of submitting legislation to Congress, depending on the circumstances.⁹¹

Even though no specific precedent made it impermissible to allow surrender in the absence of a treaty, Judge Garza also recognized that no specific precedent exists for extradition to a foreign entity in the absence of a treaty.⁹² He rejected, however, the claim that this historical practice reflected a constitutional limitation. He noted that when the Supreme Court held in *Valentine* that the Constitution did not authorize the President, acting alone, to extradite citizens, it stated that his power "is not confided to the Executive in the absence of treaty or legislative provision."⁹³ The court in *Valentine* was more concerned that the necessary authority to surrender an American citizen was

⁸⁹ *Id.* at 426

⁹⁰ *Id.*

⁹¹ *Id.* at 427 (citing Restatement (Third) of Foreign Relations Law, § 303 cmt. e (hereinafter Restatement (Third)) (1986) ("*Congressional-Executive agreements*. Congress may enact legislation that requires, or fairly implies, the need for an agreement to execute the legislation. Congress may authorize the President to negotiate and conclude an agreement, or to bring into force an agreement already negotiated, and may require the President to enter reservations. See, e.g., § 468, Reporters' Note 6. Congress may also approve an agreement already concluded by the President. Congress cannot itself conclude such an agreement; it can be concluded only by the President, who alone possesses the constitutional power to negotiate with other governments. Since any agreement concluded as a Congressional-Executive agreement could also be concluded by treaty (see Subsection (1) and Comment *b*), either method may be used in many cases. The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance. Which procedure should be used is a political judgment, made in the first instance by the President, subject to the possibility that the Senate might refuse to consider a joint resolution of Congress to approve an agreement, insisting that the President submit the agreement as a treaty"). [Reproduced in the accompanying notebook at Tab 90.]

⁹² He rejected the argument that there is controlling precedent compelling the conclusion that NDAA § 1342 provides a lawful basis for the government's request. Brief of the Respondent/Appellee, *supra* note 49, at 18-20. [Reproduced in the accompanying notebook at Tab 83.] See also, Brief of the Lawyers Committee for Human Rights as *Amicus Curiae* in Opposition to Appeal, at 14-16, *Elizaphan Ntakirutimana v. Janet Reno et al.*, 184 F.3d 419 (5th Cir. 1999) (No. 98-41597). [Reproduced in the accompanying notebook at Tab 84.]

⁹³ *Ntakirutimana*, 184 F.3d at 424 (quoting *Valentine*, 299 U.S. at 8). [Reproduced in the accompanying notebook at Tab 27.]

missing in the form of a statute (the treaty included an exception clause barring delivery of a country's own citizens).⁹⁴

One circuit court decision, *Williams v. Rogers*, interpreted the Supreme Court's ruling to mean that the government's power to extradite must be given by statute or treaty, and "requires only that there be a showing of some authority, whether in form of congressional dictate or policy, or the provisions of an existing treaty, to provide a legitimate basis for the surrender of fugitives from justice by this country to another."⁹⁵ *Williams* dealt with the remanding of a U.S. serviceman to stand trial in a country from which he had been erroneously permitted to return to the United States.

At least one court, *Hilario v. United States*, also permitted extradition pursuant to a statute authorizing extradition of United States citizens, and a treaty that, like that in *Valentine*, permitted but did not require such extradition.⁹⁶ The *Hilario* court held that section 3196 "fill[ed] a gap in our domestic law to *allow* the Secretary of State to surrender persons under the treaty."⁹⁷

Judge DeMoss, in dissent, claimed that a "structural reading of the Constitution compels the conclusion that most international agreements must be ratified according to the Treaty Clause of Article II"⁹⁸; that is, by a two-thirds vote of the Senate. By contrast, he noted, the statute at issue here – a floor amendment to the 1996 National Defense Authorization Act – "slipped into law through the back door, without any public

⁹⁴ *Id.* at 425 n. 11.

⁹⁵ *Williams v. Rogers*, 449 F.2d 513, 521 (8th Cir. 1971) (interpreting *Valentine*). [Reproduced in the accompanying notebook at Tab 51.]

⁹⁶ *Hilario v. United States*, 854 F.Supp. 165 (E.D.N.Y. 1994). [Reproduced in the accompanying notebook at Tab 30.]

⁹⁷ *Id.* at 170 (as quoted in Brief of the Respondent/Appellee, *supra* note 49, at 19-20, N. 10.) (emphasis added). [Reproduced in the accompanying notebook at Tab 83.]

⁹⁸ *Ntakirutimana*, 184 F.3d at 431. [Reproduced in the accompanying notebook at Tab 27.]

discussion or debate about its substantive merits.”⁹⁹ Judge DeMoss criticized the authorities relied on by the majority to extradite Ntakirutimana.¹⁰⁰ First, he argued that the extradition bears no relation to the subject matter of the Defense Act of 1996, and that nothing related to the extradition provision was included in the original bills proposed to Congress because extradition was not relevant to its subject matter.¹⁰¹ It was not, continued Judge DeMoss, until Senator Arlen Specter (R-Pa) proposed it as a floor amendment, after a request from the President, that the Senate accepted it without discussion.¹⁰²

Judge DeMoss conceded that some kinds of international agreements might be made outside the treaty process. Nonetheless, “if the Treaty Clause is to have any meaning,” other kinds may be concluded only by treaty, and historical practice indicated that extradition is one of the subjects so restricted.”¹⁰³ Judge DeMoss expressed concern with not only constitutional law, but with the reach of international law: he described the government as enforcing a warrant issued by the ICTR, “a nonsovereign entity created by the United Nations Security Council, purporting to ‘DIRECT’ the officials of our sovereign nation to surrender the accused.”¹⁰⁴

(a) Two Historical Periods of Congressional-Executive Power

⁹⁹ *Id.* at 433.

¹⁰⁰ *Id.* at 431-432.

¹⁰¹ *Id.*

¹⁰² NDAA § 1342 provides for the extradition provision in the Surrender Agreement:

the provisions of chapter 209 of title 18, United States Code [18 U.S.C. § 3181 et seq.], relating to the extradition of persons to a foreign country pursuant to a treaty or convention for extradition between the United States and a foreign government, shall apply in the same manner and extent to the surrender of persons, including United States citizens, to . . . (B) the International Tribunal for Rwanda, pursuant to the Agreement Between the United States and the International Tribunal for Rwanda.

¹⁰³ *Ntakirutimana*, 184 F.3d at 435-36. [Reproduced in the accompanying notebook at Tab 27.]

¹⁰⁴ *Id.* at 431 (capitalization in original).

The Garza/DeMoss battle over whether an Article II treaty, subject to Senate consent, was always constitutionally required for the United States to bind itself to an international obligation extends outside of the Fifth Circuit’s opinion. Two historical periods are worth examining to determine how other courts may deal with this issue.

The issue of whether congressional-executive agreements could substitute Article II treaties was intensely debated in the first historical period—1940s to the 1980s.¹⁰⁵ The government relied on the first historical period of the debate, which began to settle after Justice Jackson’s famous concurrence in *Youngstown Sheet & Tube v. Sawyer*, and was solidified in *Dames & Moore v. Regan*, which restated Justice Jackson’s reference to the “continuum of executive authority”: “When the President acts pursuant to an express or implied authorization from Congress . . . the executive action ‘would be supported by the strongest of presumptions and the widest latitude of judicial interpretation.’”¹⁰⁶ Consequently, it was thought that the President’s authority derived from an executive agreement, and supported by Congress, was at its highest.

Ntakirutimana argued that such power was altered in the second historical period—post 1980. He claimed that *Weinberger v. Rossi* limited the scope of *Youngstown Sheet and Tube* and *Dames & Moore*, where the Supreme Court held that “the President may enter into *certain* binding agreements with foreign nations without

¹⁰⁵ See Generally Edwin Borchard, *Shall the Executive Agreement Replace the Treaty*, 53 YALE L. J. 665 (1944) (discussing the validity of substituting the treaty-making process with executive agreements with a majority of Congress). [Reproduced in the accompanying notebook at Tab 67.] See generally Quincy Wright, *The United States and International Agreements*, 38 AJIL 341 (1944) (claiming that the House of Representatives feels coerced at times because formal treaty-making belongs to the President and the Senate). [Reproduced in the accompanying notebook at Tab 75.]

¹⁰⁶ *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (quoting *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 637 (1952)). [Reproduced in the accompanying notebook at Tab 24.]

complying with the formalities required by the Treaty Clause.”¹⁰⁷ Ntakirutimana claimed that even if such consent was not required for all international obligations, it was required for some substantial subset, including extradition agreements.¹⁰⁸ No treaty authorized his extradition, although the government argued that the U.N. Charter would suffice, given that the Tribunal was established by a U.N.S.C. resolution.¹⁰⁹ However, the majority deemed it unnecessary to address whether the U.N. Charter, including obligations created pursuant thereto, is constitutionally sufficient to require actions that might otherwise be infringements on individual liberties. Judge DeMoss, on the other hand, agreed with Ntakirutimana: “there is some variety of agreements which must be accomplished through the formal Article II process,” and this category includes extradition because an extradition agreement is a type of agreement historically found in a treaty and therefore governed by the Treaty Clause.¹¹⁰

(b) The Academic Debate

Whether international agreements require a formal treaty process has recently been the subject of heated academic debate in the United States, inspired in part by the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO), both of which involve major commitments made by the United States without an Article II treaty. The constitutional law professor Laurence Tribe admits, “line drawing in this area is especially complex,” and suggests that a key criterion would be the “impact

¹⁰⁷ *Weinberger v. Rossi*, 456 U.S. 25, 30 n. 6 (1982) (emphasis added). [Reproduced in the accompanying notebook at Tab 50.] See Appellant’s Reply Brief, *supra* note 82, at 3-6. [Reproduced in the accompanying notebook at Tab 82.]

¹⁰⁸ Appellant’s Reply Brief, *supra* note 82, at 7. [Reproduced in the accompanying notebook at Tab 82.]

¹⁰⁹ Brief of Respondent/Appellee, *supra* note 49, at 24. [Reproduced in the accompanying notebook at Tab 83.]

¹¹⁰ *Ntakirutimana*, 184 F.3d at 435-36. [Reproduced in the accompanying notebook at Tab 27.]

of an agreement on state or national sovereignty.”¹¹¹ Tribe contends that the Constitutional makes clear, in Article I, that there is a distinction between treaties, which states may never enter into, and other types of foreign agreements, which states may enter with Congressional approval.¹¹² Similarly, he believes that boundaries should also be created around international agreements that the President, acting alone, may make binding on the United States and the treaty power of the executive that the President must submit for Senate approval.¹¹³

Extradition, especially to an international tribunal with a highly restricted jurisdiction, does not fall within the that category of the former for a number of reasons. Although “agreements relating to extradition . . . have traditionally been passed through the Senate process,”¹¹⁴ the Supreme Court has repeatedly indicated that the Constitution requires congressional assent to extradition but permits that assent to be manifested by treaty or statute.¹¹⁵ Professor Detlev Vagts believes that the executive and legislative branches look to tradition when deciding whether treaties or executive agreements are to be used.¹¹⁶ “Agreements relating to extradition, freedom of establishment, taxation and so forth have traditionally passed through the Senate . . .”¹¹⁷ However, Vagts does not believe that this constitutional battle is of great relevance today.

¹¹¹ Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1266-67 (1995). [Reproduced in the accompanying notebook at Tab 71.] See also Bruce Ackerman & David Golove, *Is NAFTA Constitutional?* 108 HARV. L. REV. 799 (1995). [Reproduced in the accompanying notebook at Tab 64.]. See also Detlev F. Vagts, *International Agreements, the Senate and the Constitution*, 36 COLUM. J. TRANSNAT’L L. 143 (1997) (summarizing the debate). [Reproduced in the accompanying notebook at Tab 66.]

¹¹² Tribe, *supra* note 111, at 1267. [Reproduced in the accompanying notebook at Tab 71.]

¹¹³ *Id.*

¹¹⁴ Vagts, *supra* note 111, at 153. [Reproduced in the accompanying notebook at Tab 66.]

¹¹⁵ *Valentine*, 299 U.S. at 8-9. [Reproduced in the accompanying notebook at Tab 49.] *Grin v. Shine*, 187 U.S. at 191. [Reproduced in the accompanying notebook at Tab 29.] *Terlinden v. Ames*, 184 U.S. 270, 289 (1902). [Reproduced in the accompanying notebook at Tab 42.]

¹¹⁶ Vagts, *supra* note 111, at 153. [Reproduced in the accompanying notebook at Tab 66.]

¹¹⁷ *Id.*

Tribe counters that the Treaty Clause would, wrongly, be purely optional if congressional-executive agreements are considered full substitutes for treaties.¹¹⁸ According to Tribe, the WTO Agreement, which began as a congressional-executive agreement, ended up receiving more than the required supermajority vote in the Senate, and consequently it made little difference whether the agreement was processed through the Treaty Clause of Article II or the congressional-executive agreement with bicameral approval.¹¹⁹ Moreover, Tribe states that NAFTA, which received fewer votes in the Senate than the Treaty Clause would have required, is not considered a treaty under the terms of the Treaty Clause, and he therefore firmly believes that the shortcut taken by NAFTA is not a “free-form” method of bypassing the Treaty Clause.¹²⁰

Most commentators, unlike Tribe, and to an extent Vagts, widely accept the congressional-executive agreement as a complete alternative to a treaty.¹²¹ Professor Louis Henkin states, “There is little—or nothing—that is dealt with by treaty that could not also be the subject of legislation by Congress.”¹²² The role of the Senate is not prejudiced because Congress can authorize or approve the agreement and implement it simultaneously.¹²³ Because international agreements are primarily international acts and make domestic law only incidentally, neither Congresses, nor Presidents, nor courts, have

¹¹⁸ See generally Ackerman and Golove, *supra* note 111. [Reproduced in the accompanying notebook at Tab 64.] (A feud exists between the authors and Tribe over the ability to substitute formal treaties for congressional-executive agreements. The articles of the respective authors are primarily written to counter the other’s views on the subject). Tribe, *supra* note 111, at 1227. [Reproduced in the accompanying notebook at Tab 71.]

¹¹⁹ Tribe, *supra* note 111, at 1227. [Reproduced in the accompanying notebook at Tab 71.]

¹²⁰ *Id.*

¹²¹ LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 217 (Norton ed. 1972). [Reproduced in the accompanying notebook at Tab 57.]

¹²² *Id.* at 194. See Restatement (Third), *supra* note 91, § 303 cmt. e. [Reproduced in the accompanying notebook at Tab 90.]

¹²³ HENKIN, *supra* note 121, at 202. [Reproduced in the accompanying notebook at Tab 57.]

been seriously troubled by these conceptual difficulties and differences.¹²⁴ Even though its use is not as well defined, and difficulties may arise, the congressional-executive agreement remains available to Presidents for wide and general use should the treaty process prove difficult.¹²⁵

In a tripartite system of government, commentators suggest, Congress has numerous means of pressuring the President to use the treaty process in cases where Congress views that process as desirable.¹²⁶ For example, the Clinton administration was criticized for acceding to Senate demands to subject certain military agreements to the treaty process, such as the CFE Flink Agreement.¹²⁷ However, scholars believe that the question of whether to submit to the Treaty Process or to bicameral congressional-executive agreements is a tool for the Executive to prevail over an isolationist legislative branch that plagues U.S. participation in world affairs, or offer concessions to the legislative in a deal for something else.¹²⁸ Consequently, many believe that the Constitution remits to the political branches (and therefore not to the judiciary) whether to employ the treaty process or the congressional-executive agreement alternative.

(2) Issue of Probable Cause

Judge Garza's majority opinion held that the probable cause requirements of the ICTR Statute¹²⁹ are designed to meet the U.S. Constitutional standard and thus the district

¹²⁴ *Id.* at 216-17.

¹²⁵ *Id.* at 218.

¹²⁶ Philip R. Trimble & Alexander W. Koff, *All Fall Down: The Treaty Power in the Clinton Administration*, 16 BERKELEY J. INT'L L. 55, 60-61 (1998). [Reproduced in the accompanying notebook at Tab 74.]

¹²⁷ The Flink Agreement updates the Treaty on Armed Conventional Forces in Europe. *See* Conventional Forces in Europe Flink Agreement, May 14, 1997, 36 I.L.M. 980. [Reproduced in the accompanying notebook at Tab 19.]

¹²⁸ Trimble and Koff, *supra* note 126, at 55. [Reproduced in the accompanying notebook at Tab 74.]

¹²⁹ ICTR Statute, *supra* note 3, art. 8. [Reproduced in the accompanying notebook at Tab 1.]

court did not err in dismissing the habeas petition.¹³⁰ As the court noted, the finding “must be upheld if there is any competent evidence in the record to support it.”¹³¹ The affidavits were sufficient on their face: the witnesses were ordinary citizens; they were familiar with Ntakirutimana; they provided first-person evidence of his actions; and their statements corroborated one another.¹³²

Ntakirutimana argued that the ICTR’s submission is unreliable and tainted in its entirety and should be rejected as proof of probable cause,¹³³ and that the purported showing of probable cause fails to meet the Totality of Circumstances standard.¹³⁴ The majority rejected Ntakirutimana’s challenge to the witnesses’ credibility as outside the scope of habeas review.¹³⁵ It also rejected his challenge to the accuracy of the translations, holding that extradition courts can and should “presume that the translations are correct.”¹³⁶ Any other rule would “place an unbearable burden upon extradition courts and seriously impair the extradition process.”¹³⁷ Finally, the majority refused to consider his argument that “eyewitness accounts of traumatic events are inherently unreliable”; that argument had not been raised during the district court proceedings.¹³⁸

Ntakirutimana also made a series of other arguments, including the claim the Tribunal would not protect his right to a fair trial. The court concluded that the rule of noninquiry barred the court (though not the executive, which has the ultimate authority in

¹³⁰ *Ntakirutimana*, 184 F.3d at 427. [Reproduced in the accompanying notebook at Tab 27.]

¹³¹ *Id.* at 427 (quoting *Quinn v. Robinson*, 783 F.2d 776, 791 (9th Cir. 1986)).

¹³² *Id.* at 427-28.

¹³³ Appellant’s Reply Brief, *supra* note 82, at 23. [Reproduced in the accompanying notebook at Tab 82.]

¹³⁴ *Id.* at 27.

¹³⁵ *Ntakirutimana*, 184 F.3d at 428-29. [Reproduced in the accompanying notebook at Tab 27.]

¹³⁶ *Id.* at 430.

¹³⁷ *Id.* (quoting *Tang Yee-Cun v. Immundi*, 686 F.Supp. 1004, 1009 (S.D.N.Y. 1987)). Ntakirutimana argued that there would be a reduced need to verify the accuracy of translations if the translator affirmed, as was done in *Tang Yee-Cun*, that she translated affirmations of all witnesses and ample other evidence existed. See Appellant’s Reply Brief, *supra* note 82, at 30. [Reproduced in the accompanying notebook at Tab 82.]

¹³⁸ *Ntakirutimana*, 184 F.3d at 429. [Reproduced in the accompanying notebook at Tab 27.]

extradition proceedings) from considering the fairness of proceedings following an extradition.¹³⁹ They did not address this issue.

Judge Parker offered a separate Concurring Opinion. Although he would also dismiss the habeas petition, Judge Parker “invited the Secretary [of State] to closely scrutinize the underlying evidence.”¹⁴⁰ He stated that the evidence was “highly suspect” because it relied on “unnamed Tutsi witnesses” and “questionable interpreters,” and suggested that it reflected “a campaign of tribal retribution.”¹⁴¹ Judge Parker was deeply skeptical of the truth of the charges and found it illogical to believe that a man such as Ntakirutimana – who had no criminal record, had long been a peaceful church leader, and was married to a Tutsi – “would somehow suddenly become a man of violence and commit the atrocities for which he stands accused.”¹⁴² Ntakirutimana argued that the government exaggerated the incriminating nature of its evidence—the fact that most of the circumstances the government views as incriminating are consistent with Ntakirutimana’s claim to innocence—and are thus an important circumstance in his favor in assessing probable cause.¹⁴³

(3) Habeas Relief

Ntakirutimana argued that the court should reverse the order denying habeas relief because the ICTR cannot give him a fair trial.¹⁴⁴ The government responded that the court does not have the authority to reach the issue. The majority agreed that due to the limited scope of habeas review, they could not inquire into the procedures that await

¹³⁹ *Id.* at 430 (the court cited *Gallina v. Fraser*, 278 F.2d 77 (2d Cir. 1960, holding that the procedures that will occur in the demanding country are not listed within the scope of habeas review).

¹⁴⁰ *Id.* at 430

¹⁴¹ *Id.* at 430-31.

¹⁴² *Id.*

¹⁴³ Appellant’s Reply Brief, *supra* note 82, at 32. [Reproduced in the accompanying notebook at Tab 82.]

¹⁴⁴ Brief of Respondent/Appellee, *supra* note 49, at 43. [Reproduced in the accompanying notebook at Tab 83.]

Ntakirutimana in Arusha.¹⁴⁵ The government argued that when an American citizen commits a crime in another country, he cannot complain when he is required to submit to their modes for trial. The government primarily based this argument on *Neeley v. Henkel*, where the court permitted extradition to Cuba, then a territory under United States military authority, pursuant to a statute and consistent with the treaty with Spain, the former colonial power.¹⁴⁶ The majority opinion concluded that this was beyond the scope of habeas review, and that such matters should be left with the Department of State which will have the final say in surrendering the accused to the ICTR.¹⁴⁷

G. Concluding Comments and the Importance of the Trilogy

The Ntakirutimana trilogy failed in its attempt to define guidelines that the government or subsequent courts can follow to address future surrender to the Tribunals (even though the final decision rested with the Fifth Circuit and its decision to surrender Ntakirutimana to the ICTR).¹⁴⁸ First, the Fifth Circuit's majority opinion is not a ringing endorsement of the ICTR. The proceedings wrongly displayed insensitivity to the international and cultural setting of the ICTR.¹⁴⁹ Moreover, the majority refused to

¹⁴⁵ *Ntakirutimana*, 184 F.3d at 430. [Reproduced in the accompanying notebook at Tab 27.]

¹⁴⁶ *Neeley v. Henkel*, 180 U.S. 109 (1901). [Reproduced in the accompanying notebook at Tab 38.]

¹⁴⁷ *Ntakirutimana*, 184 F.3d. at 430. [Reproduced in the accompanying notebook at Tab 27.]

¹⁴⁸ Ntakirutimana filed a motion for stay of extradition pending the filing of a petition for rehearing and/or petition for writ of *certiorari*. The 5th Circuit denied this motion for stay on August 9, 1999 (*see* Order of August 9, 1999, *Elizaphan Ntakirutimana v. Janet Reno et al.*, 184 F.3d 419 (5th Cir. 1999) (No. 98-41597)). [Reproduced in the accompanying notebook at Tab 89.] *See* Motion for Stay Pending further Consideration, August 6, 1999, *Elizaphan Ntakirutimana v. Janet Reno et al.*, 184 F.3d 419 (5th Cir. 1999) (No. 98-41597). [Reproduced in the accompanying notebook at Tab 87.] *See* Opposition to Motion for Stay of Extradition, *Elizaphan Ntakirutimana v. Janet Reno et al.*, 184 F.3d 419 (5th Cir. 1999) (No. 98-41597). [Reproduced in the accompanying notebook at Tab 88.] The petition for a writ of *certiorari* to the Supreme Court was filed on September 20, 1999 and placed on the docket September 21, 1999. *See* Letter to the Clerk of the United States Court of Appeals for the Fifth Circuit, September 22, 1999, *Elizaphan Ntakirutimana v. Janet Reno et al.*, 184 F.3d 419 (5th Cir. 1999) (No. 98-41597) and the Supreme Court denied the petition for writ of *certiorari*. 528 U.S. 1135 (2000). [Reproduced in the accompanying notebook at Tab 86.]

¹⁴⁹ *Cf. Grin v. Shine*, 187 U.S. at 184 (“in the construction and carrying out of [extradition] treaties the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Foreign powers are

address or discredit the argument that reliability problems existed and tainted the effect of its evidence.¹⁵⁰ Further, the majority did not cite to cases, nor expressly reject Ntakirutimana's arguments,¹⁵¹ (1) establishing that there is no requirement that such ordinary citizen-witnesses be placed under oath,¹⁵² and (2) that courts rarely express concern in cases such as Ntakirutimana's which involve ordinary citizens as witnesses.¹⁵³

Similarly, the Fifth Circuit's opinion stresses that it had to defer to the trial judge's decision (and thus a future magistrate could theoretically reach the same decision that no probable cause existed if confronted with a similar factual scenario). The opinion also rejects, solely on procedural grounds, the argument that the "traumatic events" that the witnesses experienced make their accounts "inherently unreliable." And the concurring opinion, although not part of the majority, is troubling because it contends that the decision to prosecute was based on tribal politics.

Second, the magistrate undercut the legitimacy of the witnesses in the affidavit.¹⁵⁴ The magistrate ignored the less stringent "totality of the circumstances" test used to show the basis of an informant's knowledge and veracity.¹⁵⁵ The majority opinion sidestepped Ntakirutimana's contention that probable cause in this case should not be established by accepting the government's evidence.

not expected to be versed in the niceties of our criminal laws"). [Reproduced in the accompanying notebook at Tab 29.]

¹⁵⁰ Ntakirutimana argued that the government's contention that the Totality of the Circumstance Test was satisfied should be rejected. Appellant's Reply Brief, *supra* note 82, at 27-28. [Reproduced in the accompanying notebook at Tab 82.]

¹⁵¹ *Id.* at 27-28.

¹⁵² See generally *Collins v. Loisel*, 259 U.S. 317 (1922). [Reproduced in the accompanying notebook at Tab 23.]

¹⁵³ 2 WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 3.4(a) (3D ED. 1996). [Reproduced in the accompanying notebook at Tab 53.]

¹⁵⁴ *In re Surrender of Ntakirutimana*, 988 F.Supp at 1043. [Reproduced in the accompanying notebook at Tab 27.]

¹⁵⁵ See generally *Illinois v. Gates*, 462 U.S. 213 (1983). [Reproduced in the accompanying notebook at Tab 32.]

The magistrate's deference may have something to do with his political and ideological views about isolationism as he was quoted as saying in one of the largest Texas newspapers that "we are acting here to subordinate U.S. sovereignty to the United Nations."¹⁵⁶

The ideal decision would have incorporated two important revelations about genocide and mass violations of human rights that have become crucial to deciding similar cases. Both revelations are highlighted in the trial of Adolf Eichmann: (1) that ordinarily good people can be induced to commit terrifying crimes and (2) that the "community of nations" has sought an extended jurisdictional reach for genocide prosecutions. The first revelation is clearly defined by Hanna Arendt. While writing about the Eichmann trial in 1961, she exemplified this statement: "The trouble with Eichmann was precisely that so many were like him, and that the many were neither perverted nor sadistic, that they were, and still are, terribly and terrifyingly normal."¹⁵⁷ Arendt described Eichmann and those like him as "a new type of criminal" who commits his crimes "under circumstances that make it well-nigh impossible for him to know or to feel that he is doing wrong."¹⁵⁸ The second revelation is based on the principle of universal jurisdiction.¹⁵⁹ The Geneva Conventions require contracting states to search for those accused of committing or ordering "grave breaches" of humanitarian law and to

¹⁵⁶ David Mclemore, *Rwandan War Crimes Suspect to Remain Jailed in Laredo*, DALLAS MORNING NEWS (Oct. 12, 1996 at 25a). [Reproduced in the accompanying notebook at Tab 65.]

¹⁵⁷ HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 253 (1963). [Reproduced in the accompanying notebook at Tab 56.]

¹⁵⁸ *Id.* at 253.

¹⁵⁹ Ruth Wedgwood, *National Courts and the Prosecution of War Crimes*, at 396 (1 GABRIELLE KIRK McDONALD AND OLIVIA SWAAK-GOLDMAN EDS., *SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW*, 2000). [Reproduced in the accompanying notebook at Tab 76.]

bring them before their national courts (or possibly an international tribunal) for trial.¹⁶⁰ The Israeli trial court opined that genocide was a crime with “harmful and murderous effects . . . so embracing and widespread as to shake the international community to its very foundations.”¹⁶¹ The Ntakirutimana trilogy ignores the gravity of the offenses committed in Rwanda and the majority, concurrence, and dissent concentrate on the procedural obstacles and merits to surrendering the accused. One would think that Judge Garza, and others, could have made a strong argument for the surrender of Ntakirutimana based on the breach of international humanitarian law.

Even though the complicated application of the surrender procedure was not anticipated by the government, scholars argue that the surrender of Ntakirutimana illustrates how “well-functioning national courts will remain a keystone structure for any international criminal tribunal.”¹⁶² However, it remains to be seen whether U.S. courts will consistently adopt the rationale of the Ntakirutimana trilogy in future surrender proceedings. If so, another court might rule differently. However, other courts may incorporate the principles of the Eichmann case concerning genocide and other crimes against humanity as do international tribunals.

V. **Status of Indictees or Non-Indicted Criminals After the Sunset of the Tribunals**

A. **Reference to Situation of Former World War II Nazis**

¹⁶⁰ MORRIS and SCHARF, *supra* note 18, at 10. These provisions “[do] not exclude handing over the accused to an international criminal court whose competence has been recognized by the Contracting Parties.” (quoting JEAN S. PICTET, ED., THE COMMENTARY TO THE GENEVA CONVENTIONS IV 593 (1958). *Id.* at N. 50.

¹⁶¹ *Id.*

¹⁶² *Id.* at 409.

What took place in Rwanda has been referred to as the “third unquestionable genocide of the twentieth century.”¹⁶³ The mass rapes, murder, and torture as part of the systematic Hutu program of ethnic cleansing is reminiscent of Nazi genocide. Similar to the Nuremberg Tribunal, the international community deemed it necessary to create the ICTR. This section examines what happens to these indictees and non-indicted criminals after the sunset of the Tribunals by identifying U.S. law pertaining to the entry of genocidaires¹⁶⁴ and specifically with reference to the situation of former World War II Nazis.

In August 1945, the victorious allied governments of France, the United Kingdom, the United States, and the Soviet Union concluded an agreement providing for the establishment of the International Military Tribunal at Nuremberg (“The Charter”) to try the most notorious Nazis accused of crimes against peace, war crimes, and crimes against humanity.¹⁶⁵ The Charter established binding law for the Nuremberg Tribunal in the war crimes trials.¹⁶⁶ The Charter’s provision for the charge of “crimes against humanity” supplied the rationale behind the U.S. government’s commitment to exclude Nazis from U.S. territory.¹⁶⁷ Although the Ex Post Facto provision of the United States Constitution precludes criminal prosecution of such individuals, the Department of

¹⁶³ Mark Huband, *Rwanda—The Genocide, in Crimes of War*, at 312 (ROY GUTMAN AND DAVID RIEFF, EDS., CRIMES OF WAR, WHAT THE PUBLIC SHOULD KNOW, 1999). [Reproduced in the accompanying notebook at Tab 60.]

¹⁶⁴ This term is used to describe those who commit acts of genocide. *Lindsey Hilsum, Rwanda—Refugees and Genocidaires*, *supra* note 163, at 316. [Reproduced in the accompanying notebook at Tab 60.]

¹⁶⁵ MORRIS and SCHARF, *supra* note 18, at 13. The Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement) provided the blueprint for the Nuremberg Tribunal. [Reproduced in the accompanying notebook at Tab 52.]

¹⁶⁶ *Id.*

¹⁶⁷ Cong. Rec. 31,648 (daily ed. Sept. 26, 1978) (statement of Rep. Fish) (noting that the Immigration and Naturalization Act in force in 1978 did not require the exclusion or deportation of persons who persecuted under the Nazi Government’s orders and finding it necessary to do so as “long overdue” statement of United States policy “to condemn such conduct”). [Reproduced in the accompanying notebook at Tab 85.]

justice sought a need to create a system of civil deportation and denaturalization proceedings to embody the spirit of Nuremberg.¹⁶⁸

B. U.S. Immigration Law and Reference to the Crime of Genocide

(1) Historical Examination and the Evolution of the Law

Thirty years after the sunset of the Nuremberg Tribunal, the Soviets had held many trials to prosecute “Hitlerites” living in the United States, while the United States had held none, and many were living in the United States.¹⁶⁹ This “exodus” of Nazi war criminals into the United States was possible because of lax immigration laws. Congress passed the Displaced Persons Act (“DPA”) in 1948, shortly after World War II, to temporarily eliminate restrictive immigration quotas and to allow relief to persons displaced by war.¹⁷⁰ In 1950, Congress amended section 13 of the DPA to expressly bar issuing an entrance visa “to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin.”¹⁷¹

Congressional adoption of the Immigration and Nationality Act of 1952 (“INA of 1952”) represented the first comprehensive statement of U.S. immigration policy.¹⁷²

¹⁶⁸ Eli M. Rosenbaum, *The Investigation and Prosecution of Suspected Nazi War Criminals: A Comparative Overview*, 21 *Patterns of Prejudice* 17, 17-18 (1987) (explaining the inability to institute criminal proceedings given the Ex Post Facto Clause in the United States Constitution, so that persons who participated in the Nazi persecution enjoy exemption in the United States for all criminal proceedings against them based on their persecutory conduct in Europe during World War II). [Reproduced in the accompanying notebook at Tab 68.]

¹⁶⁹ ALLAN A. RYAN, JR., *QUIET NEIGHBORS: PROSECUTING NAZI WAR CRIMINALS IN AMERICA* 77 (1984). [Reproduced in the accompanying notebook at Tab.] *See also* William J. Eaton, *Soviets Execute Ex-Nazi Guard Deported by U.S.*, *L.A. TIMES*, July 28, 1987, at 1. [Reproduced in the accompanying notebook at Tab 54.]

¹⁷⁰ Displaced Persons Act of 1948, ch. 647, § 2(B), 62 Stat. 1009 (1948) (hereinafter DPA). [Reproduced in the accompanying notebook at Tab 10.]

¹⁷¹ 1950 Amendment to Displaced Persons Act, ch. 262, 64 Stat. 219, 227 (1950) (hereinafter DPA Amendment). [Reproduced in the accompanying notebook at Tab 11.]

¹⁷² Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (1953) (codified at 8 U.S.C. § 1451(a) (1994)) (hereinafter INA of 1952). [Reproduced in the accompanying notebook at Tab 12.]

Unlike the DPA, the INA of 1952 did not contain a provision explicitly excluding persons who assisted in persecution,¹⁷³ allowing Nazis to enter the United States.

At the time of its implementation, few critics predicted that it would facilitate the entry of Nazis into the United States because at the time the regulation of refugees allowed to enter was the primary concern.¹⁷⁴ Until the 1970s, some lawmakers, frustrated by what was openly becoming a policy to ignore the evidence that pointed to the existence of Nazis in the United States, insisted that the Department of Justice investigate suspected Nazi war criminals found in the United States.¹⁷⁵

Congress abolished this loophole by enacting the 1978 Holtzman Amendment.¹⁷⁶ Section 103 of the 1978 Amendment expressly excluded individuals who participated in the Nazi persecution.¹⁷⁷

In 1979, the U.S. Attorney General established the Office of the Special Investigations (the “OSI”), which assumed responsibility for the civil enforcement of the United States immigration and citizenship laws against participants in Nazi-sponsored persecution.¹⁷⁸ The OSI enforces these laws against persons who, acting on behalf of or

¹⁷³ *Id.*

¹⁷⁴ RYAN, *supra* note 169, at 5. [Reproduced in the accompanying notebook at Tab 54.]

¹⁷⁵ *Id.* at 6.

¹⁷⁶ Immigration and Nationality Act -- Nazi-Germany, Pub. L. No. 95-549, 92 Stat. 2065 (1978) (codified at 8 U.S.C. § 1182(a)(3)(E)(i) (1994)) (hereinafter Holtzman Amendment). [Reproduced in the accompanying notebook at Tab 13.]

¹⁷⁷ *Id.* The Act explicitly denied entrance to or made subject to deportation: any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with-

(I) the Nazi government in Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany, ordered, incited, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

¹⁷⁸ *See generally* RYAN, *supra* note 169, at 246-72 (outlining the OSI’s specific history and role in prosecuting perpetrators of Nazi-sponsored persecution). [Reproduced in the accompanying notebook at Tab 54.] The OSI specifically enforces three statutes: (1) 8 U.S.C. 1451(a) (1995), revoking naturalization based on concealment of a material fact or willful misrepresentation [reproduced in the accompanying notebook at Tab 14]; (2) 8 U.S.C. 1182(a)(3)(E) (1995), excluding participants in the Nazi persecution

in association with the Third Reich or its allies, served in organizations that persecuted civilians and prisoners of war.¹⁷⁹ The Attorney General's order of 1979 granted the OSI the Nazi "hunting" duties.¹⁸⁰

The Justice Department now had a mechanism for investigating suspected Nazi war criminals living in the United States. Those criminals, previously allowed to enter now faced the wrath of the OSI which would initiate proceedings to expel them from the United States once it established proof of their complicity in the Nazi atrocities.

Congress enacted the Immigration and Nationality Act of 1990 (the "INA of 1990") that retained the provisions of the Holtzman Amendment and added provisions that precluded entry into the United States for aliens who participated in genocide.¹⁸¹ Specifically, these new provisions affect the refugee status of these suspected war criminals by prohibiting entry to aliens who engaged in conduct that is defined as genocide for purposes of the Genocide Convention.¹⁸² Unfortunately, the section 212(a) language represents the extent of the legislative guidance on interpreting who is a participant of genocide. However, according to the State Department, "although no specific legislative background could be found, *Congress apparently intended to exclude*

[reproduced in the accompanying notebook at Tab 14]; and (3) 8 U.S.C. 1251(a)(4)(D) (1995), deporting aliens who engaged in genocide or assisted in Nazi persecution [Reproduced in the accompanying notebook at Tab 14].

¹⁷⁹ See generally RYAN, *supra* note 169, at 246-72. [Reproduced in the accompanying notebook at Tab 54.]

¹⁸⁰ *United States v. Gecas*, 120 F.3d 1419, 1423 (11th Cir. 1997) (citing Transfer of Functions of the Special Litigation Unit Within the Immigration and Naturalization Service of the Department of Justice to the Criminal Division of the Department of Justice, Order of the U.S. Attorney General, No. 851-79 (Sept. 4, 1979). The order assigned to the OSI responsibility for "detecting, investigating, and, where appropriate, taking legal action to deport ... any individual who was admitted as an alien into ... the United States and who had assisted the Nazis by persecuting any person because of race, religion, national origin, or political opinion." *Id.* [Reproduced in the accompanying notebook at Tab 47.]

¹⁸¹ Immigration and Nationality Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended in scattered sections of 8 U.S.C.), at 212(A)(3)(E). [Reproduced in the accompanying notebook at Tab 14.]

¹⁸² Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 280 (Genocide Convention) [Reproduced in the accompanying notebook at Tab 18.]

any alien whose behavior, though similar to that found excludable under the Nazi provisions, violated more universal standards."¹⁸³

(2) Implementation and Interagency Coordination

The Immigration and Naturalization Service ("INS"), the Department of Justice, and the Department of State conduct implementation of these provisions.¹⁸⁴ Under the current system, aliens seeking either an immigrant or nonimmigrant visa to enter the United States are required to submit a visa application to U.S. officials.¹⁸⁵ Aliens are asked to disclose whether they have participated in Nazi persecution or participated in genocide.¹⁸⁶ In addition, an interagency watch-list identifies individuals suspected of having participated in Nazi persecution or acts of genocide.¹⁸⁷ Furthermore, all cases of

¹⁸³ U.S. Dep't of State, Foreign Affairs Manual, 40.35 (b), at n. 1 (emphasis added) (hereinafter Foreign Affairs Manual). [Reproduced in the accompanying notebook at Tab 93.]

¹⁸⁴ William J. Aceves and Paul L. Hoffman, *Using Immigration Law to Protect Human Rights: A Legislative Proposal*, 20 MICH. J. INT'L L. 657, 666 (1999). [Reproduced in the accompanying notebook at Tab 80.]

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* The Application for Immigrant Visa and Alien Registration asks aliens whether they "participated in Nazi persecutions or genocide," whether they "engaged in genocide," whether they "are a member or representative of a terrorist organization as currently designated by the U.S. Secretary of State," or whether they have committed a crime involving moral turpitude. In contrast, the Nonimmigrant Visa Application asks aliens whether they have "ever ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion under the control, direct or indirect, of the Nazi Government of Germany, or of the government of any area occupied by, or allied with, the Nazi Government of Germany, or have you ever participated in genocide," or whether they are "a member or representative of a terrorist organization." Under the Nonimmigrant Visa Application, therefore, an individual who has committed human rights violations is not obligated to disclose such information on the application. Finally, the Application for Asylum asks aliens to disclose whether "you, your spouse or child[ren] ever caused harm or suffering to any person because of his or her race, religion, nationality, membership in particular social group or political opinion, or ever ordered or assisted in such acts."

¹⁸⁷ *Id.* at 666. In April 1987, the most high-profile use of the watch-list barred Austrian President Kurt Waldheim, from the U.S. because of his participation in the Nazi persecution of civilians and Allied prisoners during World War II. Waldheim joined a list of about 10,000 people at the time with Nazi backgrounds that are barred from entering the United States. Both the Justice and State Departments accused Waldheim of lying about his wartime service. During the summer of 1942, Waldheim, then a German army lieutenant, served in the Axis campaign in Yugoslavia. During that campaign, "partisans and citizens were shot on the spot, and thousands of others were turned over to the Nazi SS or the puppet Croatian regime for slave labor. The Justice Department said Waldheim was responsible for processing these prisoners, including about 220 Jews who were shipped to concentration camps, and of the deportation of 2,000 Jews on the island of Corfu, as well as approving the dissemination of Nazi propaganda. Philip Shenon, *U.S. Disputes Waldheim Assertions*, N.Y. TIMES, Feb. 17, 1988, A3.; Glen Elsasser, *U.S. Bars Kurt Waldheim, Cites Service with Nazis*, CHI. TRIBUNE, Apr. 28, 1987, C1.; Associates Press, *U.S. Bars*

possible ineligibility under the Nazi persecution or genocide provisions require a security advisory opinion from the State Department and if the State Department determines that an alien has participated in acts of Nazi persecution or genocide, a visa may not be issued.¹⁸⁸ If an alien arrives at a U.S. port-of-entry, the INS conducts an eligibility determination by checking the names of such aliens against a separate watch list, known as the National Automated Immigration Lookout System.¹⁸⁹ Aliens who do not require a visa because of their nationality must fill out a Nonimmigrant Visa Waiver Form which nonetheless requires the alien to disclose whether they were ever involved in acts of Nazi persecution or genocide.¹⁹⁰

(3) The Immigration and Nationality Act of 1990

The INA of 1990 precludes entry to aliens who participated in Nazi persecution or who committed acts of genocide. Specifically, the INA of 1990 contains the following restrictions: (a) ineligibility for admission; (b) preclusion from waiver of inadmissibility; (c) denaturalization; (d) ineligibility for withholding of removal on grounds of anticipated persecution; (e) deportation; (f) ineligibility for voluntary departure; and (g) ineligibility for cancellation of removal.¹⁹¹

Waldheim Entry Over Charges of Nazi Past; First Head of State to be Banned, L.A. TIMES, Apr. 27, 1987, 1:1. [Reproduced in the accompanying notebook at Tab 61.] Japanese citizens have also been put on the OSI Watch-List. See Ronald J. Ostrow, *U.S. Bars 2 Repentant Japan Veterans; History: They Were to be Part of Tour Chronicling WWII-Era Atrocities in Which They Participated. Law Forbids Entry to Suspected War Criminals*, L.A. TIMES, June 25, 1998, A9.; see also James Dao, *U.S. Bars Japanese Who Admits War Crime*, N.Y. TIMES, June 27, 1998, A3. [Reproduced in the accompanying notebook at Tab 62.]

¹⁸⁸ Foreign Affairs Manual, *supra* note 183, at 40.35(a) PN. 4, 40.35(b), at N.5. [Reproduced in the accompanying notebook at Tab 93.]

¹⁸⁹ Hoffman and Aceves, *supra* note 184, at 667. [Reproduced in the accompanying notebook at Tab.]

¹⁹⁰ 8 C.F.R. 217.1-2 (1999). In 1986, a visa waiver program was established for visitors from certain countries. [Reproduced in the accompanying notebook at Tab 80.]

¹⁹¹ See *infra* note 192 to 212 and accompanying text. Several other provisions also preclude immigration relief to aliens who participated in Nazi persecution or who committed acts of genocide. See also, 8 U.S.C. 1101(a)(42) (definition of refugee) [Reproduced in the accompanying notebook at Tab 14.]; 8 U.S.C. 1158(b)(2)(A)(i) (addressing an alien's eligibility for political asylum) [Reproduced in the accompanying

(a) Ineligibility for Admission

Aliens who participated in Nazi persecutions or who committed acts of genocide are ineligible for admission into the United States. As currently codified, 8 U.S.C.

1182(a)(3)(E) provides in pertinent part:

(a) Classes of aliens ineligible for visas or admission.

Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

...

(3) Security and Related Grounds

...

(E) Participants in Nazi persecutions or genocide.

(i) Participation in Nazi persecutions.

Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with -

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

(ii) Participation in genocide.

Any alien who has engaged in conduct that is defined as genocide for

notebook at Tab 14]; 8 U.S.C. 1182(d)(1) (eligibility for waiver of any ground of exclusion for nonimmigrants) [Reproduced in the accompanying notebook at Tab 14.]; 8 U.S.C. 1225(c)(1) (eligibility for removal without further hearings) [Reproduced in the accompanying notebook at Tab 14.]; 8 U.S.C. 1231(a)(6) (detention and removal of aliens ordered removed) [Reproduced in the accompanying notebook at Tab 14.]; 8 U.S.C. 1254(c)(2)(A) (temporary protected status) [Reproduced in the accompanying notebook at Tab 14.]; 8 U.S.C. 1255a(d)(2)(B)(ii)(III) [Reproduced in the accompanying notebook at Tab 14.]; 8 U.S.C. 1255(j)(1)(B) (eligibility for adjustment of status to permanent resident status) [Reproduced in the accompanying notebook at Tab 14.]; 8 U.S.C. 1259 (record of lawful admission) [Reproduced in the accompanying notebook at Tab 14.].

purposes of the International Convention on the Prevention and Punishment of Genocide is inadmissible.¹⁹²

(b) Preclusion from Waiver of Inadmissibility

The Attorney General has discretion to waive an alien's ineligibility for admission.¹⁹³ 8 U.S.C. 1182(d)(3) provides that aliens who participated in Nazi persecution or who committed acts of genocide are precluded from receiving a discretionary waiver of inadmissibility. This section provides:

(d). . . temporary admission of nonimmigrants . . .

(1) The Attorney General shall determine whether a ground for inadmissibility exists with respect to a nonimmigrant described in section 101(a)(15)(S) of this title. The Attorney General, in the Attorney General's discretion, may waive the application of subsection (a) of this section (other than paragraph (3)(E)) in the case of a nonimmigrant described in section 101(a)(15)(S) of this title, if the Attorney General considers it to be in the national interest to do so. Nothing in this section shall be regarded as prohibiting the Immigration and Naturalization Service from instituting removal proceedings against an alien admitted as a nonimmigrant under section 101(a)(15)(S) of this title for conduct committed after the alien's admission into the United States, or for conduct or a condition that was not disclosed to the Attorney General prior to the alien's admission as a nonimmigrant under section 101(a)(15)(S) of this title.

...

(3) Except as provided in this subsection, an alien (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and (3)(E) of such subsection), may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General, or (B) who is inadmissible under subsection (a) (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and (3)(E) of such subsection), but who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission, may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General.¹⁹⁴

¹⁹² INA of 1990 § 212(a)(3)(E), 8 U.S.C. 1182(a)(3)(E) (2002). [Reproduced in the accompanying notebook at Tab 14.]

¹⁹³ Aceves and Hoffman, *supra* note 184, at 670. [Reproduced in the accompanying notebook at Tab 80.]

¹⁹⁴ INA of 1990 § 212(d), 8 U.S.C. 1182(d)(3) (2002). [Reproduced in the accompanying notebook at Tab 14.]

(c) Denaturalization

The provisions on revocation of naturalization are codified at 8 U.S.C. 1451.¹⁹⁵ 8 U.S.C. 1451(a) places the duty to institute denaturalization proceedings where an order admitting a person to citizenship and the certificate of naturalization "were illegally procured or were procured by concealment of a material fact or by willful misrepresentation" on U.S. attorneys.¹⁹⁶ Despite omission of specific reference to Nazis or Nazi persecution, this section has been used to seek denaturalization of aliens who concealed or misrepresented their past association with the Nazis during World War II.¹⁹⁷ It would also apply to aliens who concealed or misrepresented acts of genocide in Rwanda or the former Yugoslavia.¹⁹⁸

(d) Deportation

If an alien, found to be ineligible for immigration benefits, is nonetheless present in the United States, deportation proceedings are instituted. This applies to aliens who were either inadmissible at time of entry, who assisted in Nazi persecution, or who engaged in acts of genocide. 8 U.S.C. 1227(a)(4)(D) provides:

(a) Classes of deportable aliens.

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

- (1) Inadmissible at time of entry or of adjustment of status or violates status.
- (A) Inadmissible aliens.

¹⁹⁵ 8 U.S.C. 1427 (2002) (describing the requirements for naturalization). [Reproduced in the accompanying notebook at Tab 14.]

¹⁹⁶ 8 U.S.C. 1451(a) (2002). [Reproduced in the accompanying notebook at Tab 14.]

¹⁹⁷ Aceves and Hoffman, *supra* note 184, at 672. [Reproduced in the accompanying notebook at Tab 80.] *See generally* Lisa J. Del Pizzo, *Not Guilty-But Not Innocent: An Analysis of the Acquittal of John Demjanjuk*, 18 B.C. INT'L & COMP. L. REV. 137 (1995). [Reproduced in the accompanying notebook at Tab 72.] *See generally* Shari B. Gersten, *United States v. Kungys: Clarifying the Materiality Standard in Denaturalization Proceedings?*, 38 AM. U. L. REV. 429 (1989). [Reproduced in the accompanying notebook at Tab 78.]

¹⁹⁸ Aceves and Hoffman, *supra* note 184, at 672. [Reproduced in the accompanying notebook at Tab 80.]

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

...

(4) Security and related grounds.

...

(D) Assisted in Nazi persecution or engaged in genocide.

Any alien described in clause (i) or (ii) or section 212(a)(3)(E) [8 U.S.C. 1182(a)(3)(E)(i) or (ii)] is deportable.¹⁹⁹

(e) Ineligibility for Withholding of Removal on Grounds of Anticipated Persecution

Aliens who participated in Nazi persecution or who committed acts of genocide are ineligible for the benefits of 8 U.S.C. 1231(b)(3)(A) which precludes the Attorney General from removing an alien to a country where that alien's life or freedom would be threatened because of his race, religion, nationality, membership in a particular social group, or political opinion.²⁰⁰ This exception applies to crimes that extend outside the scope of the definition of genocide. The alien can nonetheless be removed from the United States if the Attorney General decides that the alien ordered, incited, assisted, or participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion. The relevant portion of 8 U.S.C. 1231(b)(3) provides:

(b) Countries to which aliens may be removed.

...

(3) Restriction on removal to a country where alien's life or freedom would be threatened.

(A) In general.

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion,

¹⁹⁹ INA of 1990 § 237(a)(4)(D), 8 U.S.C. 1227(a)(4)(D) (2002). [Reproduced in the accompanying notebook at Tab 14.]

²⁰⁰ 8 U.S.C. 1231(b)(3)(A) (2002). [Reproduced in the accompanying notebook at Tab 14.]

nationality, membership in a particular social group, or political opinion.

(B) Exception.

Subparagraph (A) does not apply to an alien deportable under section 237(a)(4)(D) [8 U.S.C. 1227(a)(4)(D)] or if the Attorney General decides that -

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;²⁰¹

(f) Ineligibility for Voluntary Departure

Under normal proceedings, an alien is allowed to voluntarily depart, which eliminates the five-year bar to entry that attaches to a deportation order.²⁰² The Attorney General has this discretion, and voluntary departure can be requested before removal proceedings or at the conclusion of removal proceedings.²⁰³ This provision is not available to aliens who participated in Nazi persecution or who committed acts of genocide.²⁰⁴ Section 240B(e) that precludes voluntary removal at this stage.²⁰⁵ 8 U.S.C. 1229c(a) provides:

(a) Certain conditions.

(1) In general.

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 240 or prior to the completion of such proceedings, if the alien is not deportable under section 237(a)(2)(A)(iii) or section 237 (a)(4)(B).

...

(b) At conclusion of proceedings.

(1) In general.

The Attorney General may permit an alien voluntarily to depart the United States

²⁰¹ 8 U.S.C. 1231(b)(3)(A) (2002). [Reproduced in the accompanying notebook at Tab 14.]

²⁰² Hoffman and Aceves, *supra* note 184, at 674. [Reproduced in the accompanying notebook at Tab 80.]

²⁰³ *Id.*

²⁰⁴ 8 U.S.C. 1229c(a) (1998). [Reproduced in the accompanying notebook at Tab 14.]

²⁰⁵ See 8 C.F.R. 240.26(b)(1)(E) (2002). [Reproduced in the accompanying notebook at Tab 15.]

at the alien's own expense if, at the conclusion of a proceeding under section 240, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that -

...
(c) the alien is not deportable under section 237(a)(2)(A)(iii) or section 237(a)(4);²⁰⁶

(g) Ineligibility for Cancellation of Removal

According to 8 U.S.C. 1229b(a), the Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien: (a) has been an alien lawfully admitted for permanent residence for not less than 5 years; (b) has resided in the United States continuously for 7 years after having been admitted in any status; and (3) has not been convicted of any aggravated felony.²⁰⁷ However, 8 U.S.C. 1229b(c)(4) provides that the Attorney General may not cancel removal of "an alien who is inadmissible under section 212(a)(3) or deportable under section 237(a)(4),"²⁰⁸ in other words, who participated in Nazi persecution or committed acts of genocide.

The relevant provisions of U.S. immigration law are summarized below. Aliens who participated in Nazi persecutions or who committed acts of genocide are ineligible for admission into the United States. The U.S. Attorney General, which generally has discretion to waive an alien's ineligibility for admission, is precluded from receiving a discretionary waiver of inadmissibility. U.S. attorneys have a duty to institute denaturalization proceedings where an order admitting a person to citizenship and the certificate of naturalization "were illegally procured or were procured by concealment of

²⁰⁶ INA of 1990 § 240B, 8 U.S.C. 1229c(a) (2002). [Reproduced in the accompanying notebook at Tab 14.]

²⁰⁷ INA of 1990 § 240A(c)(4), 8 U.S.C. 1229b(a) (2002). [Reproduced in the accompanying notebook at Tab 14.]

²⁰⁸ INA of 1990 § 240A(c)(4), 8 U.S.C. 1229b(c)(4) (2002). [Reproduced in the accompanying notebook at Tab 14.]

a material fact or by willful misrepresentation."²⁰⁹ If an alien, found to be ineligible for entry, is nonetheless present in the United States, deportation proceedings are instituted. This applies to aliens who were either inadmissible at time of entry, who assisted in Nazi persecution, or who engaged in acts of genocide. The alien can nonetheless be removed from the United States if the Attorney General decides that the alien ordered, incited, assisted, or participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion, even though the Attorney General is otherwise precluded from removing an alien to a country where that alien's life or freedom would be threatened because of his race, religion, nationality, membership in a particular social group, or political opinion.²¹⁰ Finally, the provision of voluntary departure, which eliminates the five-year bar to entry that attaches to a deportation order, is not available to aliens who participated in Nazi persecution or who committed acts of genocide.²¹¹

C. Case Law Analyzing the Refugee and Immigration Status of Former World War II Nazis

U.S. case law dealing with Nazi war criminals is helpful in analyzing the refugee and immigration status of those accused of genocide and may be of assistance in deciding how the refugee and immigration status of indicted or non-indicted criminals from Rwanda or the Former Yugoslavia will be affected.

(1) *Fedorenko v. United States*

²⁰⁹ 8 U.S.C. 1451(a) (2002). [Reproduced in the accompanying notebook at Tab 14.]

²¹⁰ 8 U.S.C. 1231(b)(3)(A) (2002). [Reproduced in the accompanying notebook at Tab 14.]

²¹¹ 8 U.S.C. 1229c(a) (1998). [Reproduced in the accompanying notebook at Tab 14.]

The Supreme Court's analysis in *Fedorenko v. United States*²¹² is a post-World War II decision dealing with the status of Nazis found in the United States. The case is of use when analyzing deportation and refugee cases due to the similarity of the crimes of World War II Nazis and indicted or non-indicted criminals of Rwanda and the Former Yugoslavia based on the genocide provisions of the INA of 1990.

The Supreme Court held that even involuntary service as a Nazi guard is within the congressional intent to deport Nazi participants. Thus, in a genocide case, a participant may not use involuntary service as a defense.²¹³ In other words, once a court determines that an individual participated in either Nazi persecutions or acts of genocide, the court has no choice but to deport the individual. A court cannot examine such mitigating factors as duration of citizenship in the United States and familial ties in the country.²¹⁴ This demonstrates the strong U.S. policy against admitting individuals who have committed such atrocities.

In 1984, Fyodor Fedorenko became the first person to be deported from the United States to the Soviet Union to face charges that he committed Nazi war crimes.²¹⁵ It is one of the most important cases in the contemporary era dealing with denaturalization and revocation of U.S. citizenship due to wartime activities. Fedorenko was a member of the Russian Army in 1941 before capture by the German army.²¹⁶ Fedorenko spent time at a Nazi camp in Travnicki, Poland, to train as a concentration

²¹² *Fedorenko v. United States*, 449 U.S. 490 (1981). [Reproduced in the accompanying notebook at Tab 28.]

²¹³ See generally Elliott M. Abramson, *Reflections of the Unthinkable: Standards Relating to the Denaturalization and Deportation of Nazis and Those Who Collaborated with the Nazis During World War II*, 57 U. CIN. L. REV. 1311, 1312-24 (1989). [Reproduced in the accompanying notebook at Tab 69.]

²¹⁴ *Id.*

²¹⁵ See William J. Eaton, *Soviets Execute Ex-Nazi Guard Deported by U.S.*, L.A. TIMES, July 28, 1987, at 1. [Reproduced in the accompanying notebook at Tab 81.]

²¹⁶ *Fedorenko*, 449 U.S. at 494. [Reproduced in the accompanying notebook at Tab 28.]

camp guard and later was assigned as a guard at the Nazi concentration camp in Treblinka, Poland, a labor camp at Danzig and then to a prisoner-of-war camp at Poelitz.²¹⁷ Shortly before the British forces entered the city of Poelitz in 1945, he discarded his German uniform to pass as a civilian.²¹⁸ When Fedorenko applied for admission to the United States in 1949, he lied on his visa application by stating that he was a farmer in Poland when the Germans abducted him and forced him to work in a factory until the end of the war.²¹⁹ Not only were his false statements not discovered, but he reused his lies when he applied for naturalization in 1969 during sworn testimony, and the United States granted him citizenship in 1970.²²⁰

In 1977, the government filed a district court action to revoke Fedorenko's citizenship because he procured his naturalization illegally by misrepresenting material facts.²²¹ At trial, Fedorenko admitted his service as an armed guard, conceded that he made false statements to procure the visa, but claimed that he was forced to serve and denied any personal involvement in the atrocities.²²² The district court entered judgment against deportation in favor of Fedorenko, finding that: (1) he was forced to serve as a guard; (2) the false statements were not material; (3) the government had not met its burden in proving that he committed war crimes or atrocities at Treblinka; and (4) even assuming misrepresentation of material facts, equitable and mitigating circumstances

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 496.

²²⁰ *Id.* at 497.

²²¹ *Id.* at 498.

²²² *Id.* at 498-500.

permitted him to retain his citizenship.²²³ The Justice Department appealed to the Fifth Circuit Court of Appeals, which reversed the district court.²²⁴

The Supreme Court affirmed the decision of the Fifth Circuit Court of Appeals.²²⁵ The Supreme Court first held that "an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa . . . Under traditional principles of statutory construction, the deliberate omission of the word 'voluntary' from § 2(a) [of the DPA] compels the conclusion that the statute made all those who assisted in the persecution of civilians ineligible for visas."²²⁶ The decision infers that a solution to involuntary participation was built into the Act by examining the conduct of the individual himself to determine whether it warranted exclusion on the basis of persecution.²²⁷

Second, the Court held that "district courts lack equitable discretion to refrain from entering a judgment of denaturalization against a naturalized citizen whose citizenship was procured illegally or by willful misrepresentation of material facts."²²⁸ The court reasoned that "[a]n alien who seeks political rights as a member of this Nation can rightfully obtain them only upon the terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative and will in respect of a matter so vital to the public welfare."²²⁹ In June 1986, after his deportation, a court in Crimea in the Soviet Ukraine sentenced

²²³ *Id.* at 501-503.

²²⁴ *United States v. Fedorenko*, 587 F.2d 946 (5th Cir. 1979). [Reproduced in the accompanying notebook at Tab 46.]

²²⁵ *Fedorenko*, 449 U.S. at 493. [Reproduced in the accompanying notebook at Tab 28.]

²²⁶ *Id.* at 512.

²²⁷ Abramson, *supra* note 213, at 1319. [Reproduced in the accompanying notebook at Tab 69.]

²²⁸ *Fedorenko*, 449 U.S. at 517. [Reproduced in the accompanying notebook at Tab 28.]

²²⁹ *Id.* at 518 (quoting *United States v. Ginsberg*, 243 U.S. 472, 474-75 (1917)).

Fedorenko to death on charges of treason and taking part in mass executions at the Treblinka death camp.²³⁰

(2) *Petkiewytsch v. INS*

Subsequent to *Fedorenko*, lower courts had great difficulty determining what type of conduct constituted "assisting the persecution of civilians."²³¹ The Sixth Circuit found that Petkiewytsch did not assist in the Nazi effort to the extent of Fedorenko. The court reasoned that not only did Fedorenko deliberately conceal his involvement as a guard, but he also admitted to shooting in the general direction of escaping prisoners during his guard service.²³²

Leonid Petkiewytsch was captured and assigned to a labor-education camp in Kiel, Germany, to serve as a civilian guard.²³³ Petkiewytsch, whose primary responsibility was to prevent prisoners from escaping the camp, was issued a Gestapo SS uniform, given a rifle, and instructed on how to escort prisoners to and from work sites and how to clean and load his rifle.²³⁴ Although he was under orders to shoot anyone attempting to escape, he never used his rifle nor inflicted any physical abuse on the prisoners during his eight-month service as a guard.²³⁵

Petkiewytsch first applied for entrance into the United States in March 1948 under the DPA but was denied entrance because of his stated service as a civilian guard at the labor-education camp.²³⁶ Petkiewytsch reapplied and was granted an admission visa in

²³⁰ Eaton, *supra* note 215. [Reproduced in the accompanying notebook at Tab 81.]

²³¹ *Petkiewytsch v. INS*, 945 F.2d 871, 877 (1991). [Reproduced in the accompanying notebook at Tab 40.]

²³² *Id.*

²³³ *Id.* at 872.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 873.

1955 under the INA of 1952, which, as previously explained, then contained no provision denying admission to those who participated in the Nazi persecutions.²³⁷

In July 1985, the INS issued an Order to Show Cause stating that Petkiewytsch was deportable under the Holtzman Amendment of 1978, for "assisting or otherwise participating in Nazi persecution."²³⁸ The court ruled against deportation because the petitioner had not personally engaged in any persecutorial acts and that his "wrongful conduct, at most, was his acceptance under duress of his duties as a civilian labor-education camp guard."²³⁹

The INS appealed the decision to the Board of Immigration Appeals ("Board").²⁴⁰ The Board focused on the issue of whether "the 'objective effect' of the petitioner's conduct controlled and that the 'objective effect' of his service as civilian guard was to assist the Nazis in their persecution of those within Kiel-Hasse by preventing their escape."²⁴¹ The Board determined that Petkiewytsch's actual conduct was irrelevant, because "persons were persecuted based upon race, religion, national origin, or political opinion."²⁴²

The Sixth Circuit Court of Appeals reversed the Board's decision by focusing on Petkiewytsch's personal involvement, concentrating on "whether particular conduct can be considered assisting in the persecution of civilians."²⁴³ Determining the extent of personal involvement required when interpreting the "Nazi participation" under U.S. immigration law was never solidly identified.

²³⁷ *Id.*; see *supra* note 172-73 and accompanying text.

²³⁸ *Id.* at 874.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 874.

²⁴² *Id.* at 875.

²⁴³ *Id.* at 871.

(3) Lower Court Decisions Following *Federenko* and *Petkiewytsch*

This inquiry, determining the extent of personal involvement, left significant discretion to subsequent courts in deciding where the lines should be drawn. In *Schellong v. INS* the Seventh Circuit affirmed the Immigration Appeals' deportation order because the petitioner misrepresented that he had never served at a concentration camp, which was construed as an attempt to mislead government authorities to gain entrance to the United States.²⁴⁴ The same court held in *United States v. Kairys* that the defendant was statutorily excluded from immigration to the United States because of his alleged involvement as a Nazi concentration camp guard.²⁴⁵ Defendant's subsequent naturalization was illegally procured as he did not meet a statutory requirement at time of naturalization. In *Laipenieks v. INS* the Ninth Circuit held that an order finding the petitioner, who was accused of assisting the Nazi government in the persecution of Communists during World War II, deportable was reversed because there was insufficient evidence to show that any of petitioner's investigations resulted in the ultimate persecution of an individual because of his political beliefs.²⁴⁶ The Second Circuit held in *Maikovskis v. INS* that the petitioner was deportable (1) under the Immigration and Nationality Act for making material misrepresentations in his visa application concerning his role as a policeman in Rezekne from 1941 through 1943, where he participated or acquiesced in the arrest of a number of peaceful civilian

²⁴⁴ *Schellong v. INS*, 805 F.2d 655 (7th Cir. 1986). [Reproduced in the accompanying notebook at Tab 41.]

²⁴⁵ *United States v. Kairys*, 782 F.2d 1374 (7th Cir. 1986). [Reproduced in the accompanying notebook at Tab 48.]

²⁴⁶ *Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985). [Reproduced in the accompanying notebook at Tab 36.]

inhabitants of Audrini and in the burning of their dwellings, and (2) under the INA for his assistance to the Nazis.²⁴⁷

(4) John Demjanjuk

The denaturalization and deportation process is a long process that can take up to ten years.²⁴⁸ The alternative, extradition, is an expedited procedure, but is only available when a second nation files a formal request for a particular suspect's extradition.²⁴⁹ U.S. courts have not heard many extradition requests.

John Demjanjuk, a native of the Ukraine, was conscripted into the Soviet Army in 1940, and was captured by German forces.²⁵⁰ He was recruited by the German S.S. in 1942, where he was transferred to Trawniki, Poland, and then sent to work at the Treblinka death camp in Poland, where he operated the gas chambers.²⁵¹ Demjanjuk applied for immigration to the United States in 1948.²⁵² In his visa application, which led to his naturalization in 1958, he misrepresented his whereabouts from 1937 to 1948, and failed to disclose his wartime activities.²⁵³ The Department of Justice initiated denaturalization proceedings, which followed the Federenko precedent. However, in 1983, during the deportation proceedings, Israel requested extradition.²⁵⁴

²⁴⁷ *Maikovskis v. INS*, 773 F.2d 435 (2d Cir. 1985). [Reproduced in the accompanying notebook at Tab 37.]

²⁴⁸ Rosenbaum, *supra* note 168, at 19. [Reproduced in the accompanying notebook at Tab 68.]

²⁴⁹ *Id.* at 19.

²⁵⁰ *U.S. v. Demjanjuk*, 518 F. Supp 1362, 1363-64 (N.D. Ohio 1981). [Reproduced in the accompanying notebook at Tab 43.]

²⁵¹ *Id.* at 1369-70

²⁵² *Id.* at 1370

²⁵³ *Id.*

²⁵⁴ *Demjanjuk v. Petrovsky*, 776 F.2d 571, 575 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). [Reproduced in the accompanying notebook at Tab 25.]

The extradition court first must determine whether the person before the court is the same individual who is charged in the requesting country.²⁵⁵ Next, the court must certify that the offenses charged constitute extraditable offenses under the provisions of the applicable treaty.²⁵⁶ Finally, the court must determine whether there exists probable cause to believe that the accused committed the offenses charged, but the ultimate decision of guilt or innocence lies with the judiciary of the requesting nation.²⁵⁷ The district court found probable cause to believe that Demjanjuk was “Ivan the Terrible,” based on eyewitness affidavits that identified photographs of Demjanjuk as Ivan the Terrible.²⁵⁸ In 1985, the United States District Court for the Northern District of Ohio entered an order certifying to the Secretary of States that Demjanjuk was subject to extradition pursuant to the Extradition Treaty between the United States and Israel.²⁵⁹ The Sixth Circuit affirmed this order, and on February 28, 1986, Demjanjuk was extradited to Israel to stand trial.²⁶⁰

The Supreme Court of Israel eventually acquitted Demjanjuk in 1993 after a sixteen-year legal battle in the United States.

(5) Quantum of Proof and the Applicability of the INA of 1990

The cases of deportation and extradition dealing with Nazi war criminals are based on the utilization of documentary and testimonial evidence to prove that the war time activities of the alleged criminals falls within the definition of Nazi participation.

The surrender proceedings of Ntakirutimana were based on similar eyewitness accounts

²⁵⁵ *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 547 (N.D. Ohio). [Reproduced in the accompanying notebook at Tab 26.]

²⁵⁶ *Id.* at 563

²⁵⁷ *Id.* at 563

²⁵⁸ *Id.* at 547-552.

²⁵⁹ *In re Extradition of Demjanjuk*, 612 F. Supp. at 571. [Reproduced in the accompanying notebook at Tab 26.]

²⁶⁰ *See generally Demjanjuk*, 776 F.2d 571. [Reproduced in the accompanying notebook at Tab 25.]

combined with an indictment by the ICTR. However, in the case where the surrender of a suspected genocide criminal is requested without an indictment, courts will likely look to the evidence forwarded in support of a surrender request by the ICTR, as specified in section 1342(a)(3).²⁶¹ The practice is that orders for surrender can be issued upon confirmation of an indictment against that person.²⁶² There is no case law on the subject to properly determine what quantum of proof is necessary for cases of unindicted persons suspected of genocide. However, U.S. courts may draw on case law dealing with Nazi war criminals.

The United States only became a member-state to the Genocide Convention on November 4, 1988, when Congress passed the Genocide Implementation Act of 1987 ("Implementation Act").²⁶³ The purpose of this Implementation Act was to (1) establish a new federal offense that prohibits the commission of acts with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial or religious group; and (2) to provide penalties for such destruction.²⁶⁴ This ultimate effect of the Implementation Act was to set the legislative course for including genocide as an excludable offense in U.S. immigration law and its inclusion in the INA of 1990.

However, there is no mention of genocide in the legislative history of the INA of 1990. Consequently, the Genocide Convention, the legislative history of the Implementation Act, and Nazi case law serve as the only source of guidance in determining the quantum of proof necessary for cases of unindicted persons suspected of

²⁶¹ NDAA § 1342(a)(3). [Reproduced in the accompanying notebook at Tab 3.] This situation may arise if, during a trial at the ICTR, a suspected genocide criminal implicates other potential genocide criminals who may happen to be living in the United States.

²⁶² Harris and Kushen, *supra* note 13, at 567. [Reproduced in the accompanying notebook at Tab 70.]

²⁶³ 18 U.S.C. §§ 1091-1093 (1988), *see supra* note 45 and accompanying text. [Reproduced in the accompanying notebook at Tab 7.]

²⁶⁴ S. REP. NO. 333, 100th Cong., 2d Sess. 1 (1988), reprinted in 1988 U.S.C.C.A.N. 4156. [Reproduced in the accompanying notebook at Tab 92.]

genocide.²⁶⁵

(a) Legislative History of the Implementation Act

On May 21, 1985, the Senate Foreign Relations Committee voted unanimously to send the Genocide Convention back to the Senate floor for further consideration along with some attached Committee provisions.²⁶⁶ On February 19, 1986, the Senate voted eighty-three to eleven in favor of its ratification subject to Senate Foreign Relations Committee's provisions, which attached two reservations and five understandings to the Implementation Act.²⁶⁷

The Senate's advice and consent is subject to the following understandings, which apply to the obligations of the United States under this Convention:

(1) That the term "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such" appearing in Article II means the specific intent to destroy, in whole or in substantial part, a national, ethnical, racial or religious group as such by the acts specified in Article II.

(2) That the term "mental harm" in Article II(b) means permanent impairment of mental faculties through drugs, torture or similar techniques.

(3) That the pledge to grant extradition in accordance with a state's laws and treaties in force found in Article VII extends only to acts which are criminal under the laws of both the requesting and the requested state and nothing in Article VI affects the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside a state.

(4) The acts in the course of armed conflicts committed without the specific intent required by Article II are not sufficient to constitute genocide as defined by this Convention.

(5) That with regard to the reference to an international penal tribunal in Article VI of the Convention, the United States declares that it reserves the right to effect its participation in *934 any such tribunal only by a treaty entered into specifically for that purpose with the advice and consent of the Senate.²⁶⁸

²⁶⁵ Paul John Chrisopoulos, *Comment, Giving Meaning to the Term "Genocide" as it Applies to U.S. Immigration Policy*, 17 LOY. L.A. INT'L & COMP. L.J. 925, 935 (1995). [Reproduced in the accompanying notebook at Tab 73.]

²⁶⁶ S. REP. NO. 333, *supra* note 264. [Reproduced in the accompanying notebook at Tab 92.]

²⁶⁷ *Id.*

²⁶⁸ RICHARD G. LUGAR, SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, 99th Cong., 1st Sess. 16, at 27 (Comm. Print 1985) [hereinafter REPORT]. [Reproduced in the accompanying notebook at Tab 91.]

Despite these five understandings, and another two reservations,²⁶⁹ the Committee made no recommendation for amending the scope of “genocide” under the Convention.²⁷⁰ The addition of genocide to immigration law occurred two years later to accord with Article V of the Genocide Convention as “necessary legislation to give effect to the provisions of the present Convention.”²⁷¹

(b) Analysis

As previously stated, U.S. courts have had to act as fact-finders in Nazi deportation and extradition cases. No reported decisions have discussed the deportation of aliens who have engaged in genocide since the enactment of the INA of 1990. A U.S. court will have to engage in a similar role when faced with interpreting the genocide provisions of the INA of 1990, and with future surrender requests to the ICTR, in the absence of an indictment. Both the federal district court and the court of appeals in the Ntakirutimana trilogy relied on the submissions of the ICTR, by the U.S. government, and the indictment. Although the Nazi decisions lead to the general rule that courts must inquire into the extent of personal involvement of a person suspected of genocide regardless of whether the actions were voluntary or involuntary, there is significant discretion left to the lower courts. If a U.S. court is supplied and forwarded enough evidence to hold that the suspected criminal did in fact commit acts of genocide, the quantum of proof would be fulfilled, regardless of whether there is an indictment.

VI. Conclusion

²⁶⁹ *Id.* at 18-19. The two reservations included: (1) World Court Reservation and (2) a Constitutional Reservation. *Id.* at 18. The World Court Reservation “gives the United States the option of accepting the jurisdiction of the International Court of Justice in a given dispute under Article IX of the Genocide Convention.” *Id.* at 20. The Constitutional Reservation makes it clear that “if any article is construed to require the United States to act in a way barred by the U.S. Constitution, the Committee’s reservation will excuse the United States from the obligation.”

²⁷⁰ *Id.* at 17.

²⁷¹ Genocide Convention, *supra* note 182, art. 5.

Together, the surrender agreements between the United States and the Tribunals, combined with Congressional enactment of the executive agreements, are a valid substitute for a traditional extradition agreement in the form of an Article II Treaty. The Fifth Circuit followed this interpretation, which is supported by many scholars, in holding that it is constitutional to surrender an indicted criminal to the Tribunals with a statute and an executive agreement in the absence of a treaty.

U.S. law precludes entry to indictees and non-indicted criminals who committed acts of genocide. Specifically, the INA of 1990 contains, among other provisions, the following restrictions: (a) ineligibility for admission; (b) preclusion from waiver of inadmissibility; (c) denaturalization; (d) ineligibility for withholding of removal on grounds of anticipated persecution; (e) deportation; (f) ineligibility for voluntary departure; and (g) ineligibility for cancellation of removal.²⁷² Case law dealing with the situation of former World War II Nazis is helpful in analyzing the refugee and immigration status of indicted or non-indicted criminals from Rwanda or the Former Yugoslavia.

²⁷² See *supra* note 192-212 and accompanying text.