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## THE TRIAL OF ADOLF EICHMANN AND THE PROTECTION OF UNIVERSAL HUMAN RIGHTS UNDER INTERNATIONAL LAW

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On May 23, 1960, Israeli Prime Minister David Ben Gurion announced to the Knesset that Adolf Eichmann had been apprehended.

I have to inform the Knesset that a short time ago one of the greatest of the Nazi war criminals, Adolf Eichmann, who was responsible together with the Nazi leaders for what they called "the final solution of the Jewish question," . . . was found by Israel Security Services. . . . [He is] already under arrest in Israel, and will shortly be put on trial under the [Nazis and Nazi Collaborators Act].<sup>1</sup>

The Eichmann trial has been referred to by one legal scholar as one of the great dramas of legal history.<sup>2</sup> The trial is important not only because it involved the prosecution of one of the most infamous of Nazi war criminals, but because it is one of the few contemporary efforts to enforce serious human rights violations in a domestic court of law.

This article describes and analyzes some of the legal issues raised by the Eichmann trial. Eichmann's role in the "Final Solution" is outlined, and his escape, apprehension, and the diplomatic controversy

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1. M. PEARLMAN, *THE CAPTURE AND TRIAL OF ADOLF EICHMANN* 60 (1963).

2. Schwarzenberger, *The Eichmann Judgment*, 15 *CURRENT LEGAL PROBLEMS* 248 (1962).

surrounding his abduction are described. Next, the legal issues involved in Eichmann's trial are explored. In conclusion, the implications of the Eichmann trial for the role and function of international law are suggested.

### I. EICHMANN'S ROLE IN THE THIRD REICH AND THE IMPACT OF THE "FINAL SOLUTION"<sup>3</sup>

Eichmann contended throughout the trial that he was a transportation expert who was merely following orders.<sup>4</sup> However, the historical record indicates that Eichmann had primary authority over matters pertaining to the "Final Solution," was personally involved in almost all aspects of the extermination of Jews and other peoples, and relentlessly pursued the extermination of the Jews even after Germany had lost the war.<sup>5</sup>

Eichmann's organizational skill in deporting Jews was primarily responsible for his ascendancy within the Nazi hierarchy.<sup>6</sup> He was able to force 45,000 Jews out of Austria in eight months during 1939—only 19,000 Jews left Germany during the same period—and in eighteen months he "cleansed" Austria of 60% of its Jewish population (150,000).<sup>7</sup> Eichmann described this process to visiting functionaries from Berlin in the following manner:

This is like an automatic factory, like a flour mill connected with some bakery. At one end you put in a Jew who still has

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3. It is generally agreed that Eichmann realized that by specializing in the "Jewish problem" he could rise rapidly in the Nazi hierarchy. Eichmann familiarized himself with the standard anti-Semitic literature; became acquainted with well-known anti-Semites; studied Jewish religion, customs, and political and nationalistic movements; developed a superficial knowledge of Yiddish; briefly visited Palestine; and became an expert on the organization of the Jewish community in Germany. Eichmann used this background to write a manual on "Zionist Matters for the Use of SS Personnel" and lectured to the Army on "The Worldwide Zionist Organization, Its Structure and Purposes" and on "The New Zionist Organization." M. PEARLMAN, *supra* note 1, at 186-200.

Eichmann's great opportunity for advancement came when he was sent to Vienna to head the Central Office of Jewish Emigration, which was designed to facilitate the deportation of Jews. It was there that Eichmann displayed his organizational ability. M. PEARLMAN, *supra* note 1, at 191. Eichmann was then sent to Prague to expel the Jews of Bohemia and Moravia. Because of his success, in January 1940, Eichmann was placed in charge of the new Gestapo Jewish Affairs, IV B4. This office was responsible for the execution of Nazi policy toward the Jews in Germany and all German-occupied territories. *See generally*, H. ARENDT, EICHMANN IN JERUSALEM 21-219 (rev. & enl. ed. 1976); J. DONOVAN, EICHMANN MAN OF SLAUGHTER 9-98 (1960); G. HAUSNER, JUSTICE IN JERUSALEM 27-261 (1968); H. ZEIGER, THE CASE AGAINST ADOLF EICHMANN 11-188 (1960).

4. M. PEARLMAN, *supra* note 1, at 467. Eichmann contended he was guilty from the "human point of view" but not from the "legal point of view." *Id.*

5. *See infra* notes 6-25 and accompanying text.

6. H. ARENDT, *supra* note 3, at 44.

7. *Id.*

some property, a factory, or a shop, or a bank account, and he goes through the building from counter to counter, from office to office, and comes out at the other end without any money, without any rights, with only a passport on which it says: "You must leave the country within a fortnight. Otherwise you will go to a concentration camp."<sup>8</sup>

Eichmann was largely responsible for the ghettoization of Jews. His first attempt at ghettoization was the "Nisko Plan," a plan for the creation of an autonomous Jewish province on the Polish-Soviet border. During mid-winter deportees from Austria and Czechoslovakia were transported to the new province and were required to construct a town, drill for oil, and raise or buy their own food. Eichmann's attempt to create a Jewish province failed. He then implemented a ghettoization policy, deporting Jews to concentrated areas in such cities as Warsaw, Lodz, Tarnopol, and Cracow.<sup>9</sup>

Pursuant to the order of Reichs Marshall Hermann Goering, Reinhard Heydrich, who at the time headed the Reich Security main office, instructed Eichmann to draw up a draft plan for the "Final Solution."<sup>10</sup> The plan was adopted at the Wannsee Conference of January 20, 1942, which was attended by fifteen high-ranking officials of the Third Reich, including Eichmann.<sup>11</sup> The Wannsee Plan anticipated that the "Final Solution" would be applied to approximately eleven million Jews. Evacuation and emigration were termed "temporary measures" prefatory to the "Final Solution." Initially, Jews were to be utilized "under the necessary guidance," as workers in the East. This would lead to a reduction in numbers, but "the residue, which [would] doubtlessly be the most robust part, [would] have to be treated accordingly, as it [would] be a nucleus for a new Jewish rebuilding. . . ."<sup>12</sup>

After implementation of the "Final Solution," Eichmann resisted and prevented the emigration of Jews to safety, particularly to Palestine.<sup>13</sup> On November 17, 1942, Eichmann wrote to the Foreign Ministry that "[i]t is not the task of the German authorities to promote the emigration of Jews, but to hinder it, or at least to undertake delaying actions."<sup>14</sup>

The *Einsatzgruppen* or "Operational Units" were used in the Soviet Union to exterminate Soviet Jews and German Jews sent to

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8. *Id.* at 46.

9. G. HAUSNER, *supra* note 3, at 53-68.

10. M. PEARLMAN, *supra* note 1, at 172-3.

11. G. HAUSNER, *supra* note 3, at 94.

12. T. FRIEDMAN, *THE HUNTER* 167 (1961).

13. M. PEARLMAN, *supra* note 1, at 182 and 437.

14. *Id.* at 434.

Russia. Eichmann was responsible for arranging for the deportation of German and Russian Jews and for handing over the deportees to the *Einsatzgruppen*. There is evidence that Eichmann observed the *Einsatzgruppen*'s operations and received reports confirming the *Einsatzgruppen*'s receipt and extermination of Jews and the seizure of Jewish property. Eichmann also was responsible for issuing regulations specifying which Jews fell within the *Einsatzgruppen*'s responsibility.<sup>15</sup>

Eichmann was involved in almost all of the activities of the extermination camps. For instance, he selected the site of the Auschwitz concentration camp,<sup>16</sup> participated in the decision to substitute Zyklon B gas vans for shooting as a mode of exterminating internees,<sup>17</sup> took responsibility for supplying the camps with Zyklon B gas,<sup>18</sup> and observed the extermination process on numerous occasions.<sup>19</sup>

Eichmann also ordered the killing of Jews. For instance, the German Minister to the puppet Serbian Government inquired as to what was to be done with Serbian Jewish internees. Rademacher, in the Foreign Ministry, responded, "Eichmann suggests shooting."<sup>20</sup> In reprisal for the assassination of Heydrich, the Germans destroyed the Czech village of Lidice. Documents established Eichmann's involvement in the death of eighty-one non-Jewish children orphaned by the destruction of Lidice.<sup>21</sup>

The possibility of German defeat motivated Eichmann to accelerate the implementation of the "Final Solution." In April 1944, the German Army entered Hungary. Eichmann personally supervised the Hungarian deportations and in three months was responsible for deporting 437,402 Hungarian Jews to Auschwitz. Despite Himmler's orders to close down Auschwitz, in October and November 1944, Eichmann deported tens of thousands of additional Hungarian Jews to Auschwitz.<sup>22</sup>

In another effort to frustrate Himmler's orders to halt the extermination of Jews, Eichmann, during the fall of 1944, ordered his men to evict 50,000 Hungarian Jews from their homes and march them 120 miles to the Austrian border for the alleged purpose of putting them to work building fortifications for the German Army.<sup>23</sup>

15. G. HAUSNER, *supra* note 3, at 78-81.

16. T. FRIEDMAN, *supra* note 12, at 271.

17. *Id.* at 271-2; M. PEARLMAN, *supra* note 1, at 392-3.

18. M. PEARLMAN, *supra* note 1, at 392.

19. *Id.* at 375-7.

20. *Id.* at 182-3.

21. *Id.* at 352. The children were taken from the village, sent to Lodz in Poland, and killed. *Id.*

22. *Id.* at 356-73.

23. *Id.* at 365-6. Another example of Eichmann's attempt to frustrate the spirit of a

Salo Baron, professor of Jewish History at Columbia University, summarized in part the impact of the "Final Solution":

In Poland out of 3,300,00 only 73,955 were left. Out of Germany's 500,000 there were now only 15,000 to 20,000. In Czechoslovakia 14,000 were left, and so on. In the witness's birthplace, in Galicia, which was then part of Austria there had been a flourishing community of 20,000 Jews when he visited it in 1937. When he revisited it in 1958, there were only 20 Jews left alive. And in each case, the number of small children among the survivors was infinitely small, so that hope for a future Jewish revival in Europe was stifled in advance.<sup>24</sup>

## II. EICHMANN DURING THE POST-WAR YEARS

At the Nuremberg Tribunal, Dieter Wisliceny, one of Eichmann's chief assistants, accused Eichmann of being one of the principal figures in the implementation of the "Final Solution."<sup>25</sup> Eichmann, realizing that the Allies would make a concerted effort to locate him and to bring him to trial, escaped to Lower Saxony. He worked there for over three years before managing, in 1950, to gain passage to Argentina. He was joined by his wife and sons in 1952 and, after a series of odd jobs, obtained a position as a foreman with the automobile firm of Mercedes-Benz in Buenos Aires.<sup>26</sup>

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directive occurred when Himmler ordered SS commandants in Poland to evacuate the extermination camps and march the internees into Germany. Eichmann immediately issued "supplementary working instructions" stating that "if in the course of the evacuation, the Jews should offer resistance or cause difficulties, they are to be most severely punished." G. HAUSNER, *supra* note 3, at 266.

24. M. PEARLMAN, *supra* note 1, at 229-30. Baron also testified that the contemporary Jewish population is twelve million. If not for the Holocaust, the total contemporary Jewish population (including the estimated natural increase) would be twenty million. In comparison, despite the destruction of Hiroshima and Nagasaki, the population of Japan is one-third larger than it was prior to the war. Professor Baron pointed out that the Holocaust not only exterminated millions of Jews, but also destroyed centers of Jewish history, culture, and learning. In Poland, for instance, 88 percent of the Jewish communities were destroyed. *Id.*

25. M. PEARLMAN, *supra* note 1, at 9-11. Wisliceny testified that Eichmann had been the principal executive officer in the program to exterminate the Jews. Toward the end of the war, Eichmann had told him he would "leap laughing into the grave with extraordinary satisfaction at the knowledge that he had helped to exterminate five million Jews." Wisliceny was hanged at the end of 1946. *Id.* at 11. Goering commented, "Wisliceny is just a little swine who looks like a big one, because Eichmann is not here." G. HAUSNER, *supra* note 3, at 270. Eichmann thus emerged as the principal figure in the execution of the "Final Solution." M. PEARLMAN, *supra* note 1, at 9.

26. G. HAUSNER, *supra* note 3, at 268-72; M. PEARLMAN, *supra* note 1, at 29-41. Aided by two organizations of ex-Nazis—ODESSA (Organization der SS Angehoerigen) and Die Spinne (The Spider)—Eichmann was transported from Lower Saxony to a monastery in Genoa where a sympathetic Franciscan monk provided him with a refugee passport bearing the name of Ricardo Klement, a German national born in Bolzano, Italy. He initially was employed as a labor organizer by the Capri Construction Company in the province of

Over the next several years rumors circulated that Eichmann was alive and living in various Arab states.<sup>27</sup> But, during late 1957, the Israeli Security Service received information that Adolf Eichmann was in Argentina. The Israelis pursued Eichmann for two years before locating and, on May 11, 1960, kidnapping him. He was interrogated for over a week and was flown to Israel.<sup>28</sup> Before leaving Buenos Aires, Eichmann signed a statement (dated May, 1960) that he was going to Israel "of my own free will" to stand trial.<sup>29</sup>

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Tucuman, which employed various ex-Nazis. From 1952 on, Eichmann held various jobs; at the Mercedes-Benz firm, he was known as "SS Lieutenant Colonel Adolf Eichmann, in retirement."

Eichmann talked about his past freely and at one point recorded a number of conversations with Willem Sassen, a Dutch ex-Nazi. The conversations were transcribed and covered 659 typewritten pages. The manuscript was obtained by the Israelis and used at the trial. *Id.*

27. By the late 1940's the United Nations War Crimes Commission's list of "wanted" persons had been reduced from a million to several thousand. Telford Taylor, Chief Counsel for the Nuremberg prosecution, stated, "We then looked for Eichmann most assiduously and if we had found him, we would have tried him." G. HAUSNER, *supra* note 3, at 272.

As the years passed, the Allies arguably became concerned with establishing a strong, stable West German Government as a barrier against Soviet aggression. Pursuing and prosecuting ex-Nazis would only needlessly revive the tensions of World War II. Israel Security Services devoted its efforts to protecting Israel against the subversive efforts of Israel's Arab neighbors. The pursuit of ex-Nazis was undertaken by private individuals, such as Tuvia Friedman and Simon Wiesenthal. *Id.* at 273.

28. Israel would later contend the kidnapping was carried out by "volunteers," but it seems to have been carried out by the Israel Security Services. The individuals involved in the Eichmann kidnapping were "volunteers" only to the extent they were asked whether they desired to participate in the mission rather than being ordered to do so. The pursuit of Eichmann was approved by Ben Gurion; preliminary legal opinions were solicited; Isser Harel, chief of Israel Security Services, supervised the mission; and over thirty individuals (many of whom required forged documents) were involved in the mission. D. EISENBERG, U. DAN and E. LANDAU, *THE MOSSAD 16-30* (1978); I. HAREL, *THE HOUSE ON GARIBALDI STREET* (1975).

Arendt offers three justifications for the Eichmann kidnapping: Argentina's "impressive record" for not extraditing Nazi criminals—West Germany had unsuccessfully sought the extradition from Argentina of Karl Klingenfuss and Dr. Josef Mengele; the fact that the extradition treaty between Argentina and Israel had not been ratified; the fact that Argentina's fifteen-year statute of limitations on war crimes connected with World War II had "tolled" on May 7, 1960. H. ARENDT, *supra* note 3, at 264.

29. I, the undersigned, Adolf Eichmann, declare of my own free will that, since my true identity has been discovered, I realize that it is futile for me to attempt to go on evading justice. I state that I am prepared to travel to Israel to stand trial in that country before a competent court. I understand that I shall endeavour to give a straightforward account of the facts of my last years of service in Germany so that a true picture of the facts may be passed on to future generations. I make this declaration of my own free will. I have been promised nothing, nor have any threats been made against me. I wish at last to achieve inner peace. As I am unable to remember all the details and may be confused about certain facts, I ask to be granted assistance in my endeavours to establish the truth by being given access to documents and evidence.

Adolf Eichmann

Buenos Aires, May 1960

15 U.N. SCOR Supp. (Apr.-June 1960) at 31-2, U.N. Doc. S/4342 (1960) [hereinafter cited as U.N. Doc. S/4342].

Eichmann explained his decision to cooperate with the Israeli Government as being

### A. *The Diplomatic Debate*

Following Ben Gurion's May 23 announcement that Eichmann had been apprehended, the Israeli government sent a *note verbale* in response to an Argentine inquiry<sup>30</sup> justifying Eichmann's kidnapping. Israel expressed regret over any violation of Argentinian law and, in order to exculpate itself of any responsibility for breaching Argentine sovereignty, explained that Eichmann had come voluntarily to Israel to stand trial. The note also expressed the hope that Argentina would overlook this violation of its sovereignty given "the special significance" of bringing to trial the man responsible for the murder of millions of Jewish people.<sup>31</sup>

On June 8, Ben Gurion sent a letter to President Frondizi of Argentina reiterating the points made in the *note verbale*. While Ben Gurion did not underestimate the seriousness of the formal violation of Argentine law, he was "confident that there can be very few people in the world who have failed to understand the profound motives and supreme moral justification for this act."<sup>32</sup> The Argentine Government expressed appreciation over Israel's apology, but insisted that Israel provide Argentina reparation in the form of the return of Eichmann and the extradition of those responsible for the kidnapping. If such "appropriate reparation" was not forthcoming, Argentina threatened to take the Eichmann issue to the United Nations.<sup>33</sup>

Following the failure of Israeli and Argentine officials to reach a compromise agreement,<sup>34</sup> Argentina requested an "urgent meeting" of

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based upon his weariness with running from authorities and upon his desire to "lift the burden of guilt from German youth" by submitting to punishment. H. ARENDT, *supra* note 3, at 242.

30. U.N. Doc. S/4342, *supra* note 29, at 31. On June 1, Argentine Foreign Minister Diogenes Taboada called Israeli Ambassador Arveh Levavi and requested "a concrete and official declaration on reports that Eichmann had been captured in Argentina." Taboada added that "[i]f it is proved that an act violating international law was committed within Argentine territory, my government will adopt measures in accordance with the nature of the case." M. PEARLMAN, *supra* note 1, at 64.

Argentina's decision to react strongly was, in part, motivated by a desire to divert attention from the government's embarrassment over having permitted Eichmann to enter Argentina and for failing to ferret him out. M. PEARLMAN, *supra* note 1, at 63.

31. U.N. Doc. S/4342, *supra* note 29, at 31-2. Ambassador Levavi also pointed out that the volunteers who had transported Eichmann to Israel were "themselves among the survivors of the Nazi holocaust who placed this historic mission above all other considerations." M. PEARLMAN, *supra* note 1, at 64.

32. U.N. Doc. S/4342, *supra* note 29, at 33.

33. 15 U.N. SCOR Supp. (Apr.-June 1960) at 24-6, U.N. Doc. S/4334 (1960). Argentina contended that the Israeli Government could not dismiss its responsibility for the Eichmann kidnapping since it had "publicly sided with and congratulated the authors of the deed, and thus appear[ed] fully to endorse their action." *Id.* at 25.

34. Unsuccessful efforts were made to arrange a meeting between Ben Gurion and Frondizi, both of whom were scheduled to be in Europe in mid-June. At the same time,

the United Nations Security Council to consider "the violation of the sovereign rights of the Argentine Republic resulting from the illicit and clandestine transfer of Adolf Eichmann from Argentine territory to the territory of the State of Israel."<sup>35</sup>

The next day, the Israeli Foreign Ministry received President Frondizi's reply to Prime Minister Ben Gurion. Frondizi pointed out that although Argentina condemned the crime of genocide, the "very principles of international coexistence are likely to be impaired if the relations between states are not conducted according to the juridical norms which are universally accepted."<sup>36</sup> Argentina expressed its willingness to entertain any "request that the Government of Israel may present concerning Eichmann, when he is returned to Argentina."<sup>37</sup>

### *B. The Security Council Debate*

The Security Council debate reiterated the points raised in the diplomatic exchange between Israel and Argentina. Hoping to avert any escalation of the Argentine-Israeli situation, the Security Council struggled to find a compromise solution.<sup>38</sup>

Dr. Amadeo of Argentina argued that Israel implicitly had recognized its responsibility for the abduction of Eichmann by the "volunteers" when Israel attempted to justify and apologize for the volunteers' actions and announced its plans to bring Eichmann to trial.<sup>39</sup> Thus, Israel owed Argentina "appropriate reparation" for violating Argentine sovereignty.<sup>40</sup>

Argentina argued that all States had an interest in condemning Eichmann's abduction that "because of the dangers which this act and its possible repetition engender for the maintenance of peace and international security."<sup>41</sup> Eichmann's abduction could be used as precedent

Professor Enrique Rodriguez Fabregat, Uruguay's ambassador to the United Nations, arranged a June 14 meeting between Dr. Mario Amadeo, Argentina's ambassador to the United Nations; Michael Comay, Israel's ambassador to the United Nations; and Israeli Foreign Minister, Mrs. Golda Meier. They discussed the Eichmann controversy for two hours, but Israel refused to turn Eichmann over to Argentina as requested. The next day Dr. Amadeo submitted Argentina's request for "an urgent meeting of the Security Council." M. PEARLMAN, *supra* note 1, at 69-70.

35. 15 U.N. SCOR Supp. (Apr.-June 1960) at 27, U.N. Doc. S/4336 (1960). The request for the Security Council meeting also alleged Eichmann's abduction was "contrary to the rules of international law and the purposes and principles of the Charter of the United Nations and [was] creating an atmosphere of insecurity and mistrust incompatible with the preservation of international peace." *Id.*

36. M. PEARLMAN, *supra* note 1, at 70-71.

37. *Id.*

38. *See generally*, 15 U.N. SCOR (865th mtg.), U.N. Doc. S/P.V. 865 (1960)—15 U.N. SCOR (868th mtg.), U.N. Doc. S/P.V. 868 (1960).

39. 15 U.N. SCOR (865th mtg.) at 12, U.N. Doc. S/P.V. 865 (1960). *See supra* note 28.

40. *Id.* at 6.

41. *Id.* at 3-5.

to justify, in the future, the violation of the sovereignty of other States.<sup>42</sup> In addition, Doctor Amadeo pointed out that Israel's action threatened the safety of all refugees and aliens, those "millions of men and women who seek protection outside their native lands."<sup>43</sup>

Dr. Amadeo concluded that no exception to the principle of sovereignty could be permitted: "One single breach in juridical order will cause the whole structure to fall" and without this order "no civilized life will survive upon the face of the earth."<sup>44</sup> Argentina asked the Security Council to declare that Israel's acts "may, if repeated, endanger international peace and security" and to request Israel "to proceed to an appropriate reparation in conformity with . . . the rules of international law."<sup>45</sup>

Mr. Correa of Ecuador pointed out that it was contradictory for Israel to claim the privileges and benefits of international law when it did not respect the rules.<sup>46</sup> As pointed out by Sir Claude Corea of Ceylon, these rules should not be disregarded by Israel because it is the small states such as Israel that benefit from the provisions of international law which protect the sovereignty of nation-states.<sup>47</sup>

In addition, the Ceylonese delegate argued that moral norms are relative and uncertain and should not be used by Israel to justify the abrogation of positive international law. He observed that international law was at too formative a stage of development to permit a State to unilaterally define when a rule of positive law is to be abrogated.<sup>48</sup>

In rebuttal, Mrs. Golda Meir of Israel argued that Eichmann's abduction was an "isolated violation of Argentine law"<sup>49</sup> which "must be seen in the light of the exceptional and unique character of the crimes attributed to Eichmann, on the one hand, and the motives of those who

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42. *Id.* at 22.

43. *Id.* at 18-20. The distinction between a "criminal and a person in asylum must arise out of the law and must be decided by the authority which has legitimate jurisdiction over the two situations." *Id.*

The Israeli-Argentine extradition treaty had been signed (on May 9), but not ratified, by both countries. Article 11 of the treaty provides that the complaining State can require the provisional arrest of the person whose extradition is requested. Article 12 provides that the individual whose extradition is requested be transferred by the State having the individual in custody to the place designated by the state requiring his presence. Most importantly, the treaty also provides that agents of the complaining State, when in the territory of the other State for the purpose of arresting an individual whose extradition has been granted, are subject to the authority of the State in whose territory they are present. *Id.* at 21-2.

44. *Id.* at 22.

45. *Id.* at 26.

46. 15 U.N. SCOR (867th mtg.) at 19-20, U.N. Doc. S/P.V. 867 (1960).

47. 15 U.N. SCOR (868th mtg.) at 11, U.N. Doc. S/P.V. 868 (1960).

48. *Id.*

49. 15 U.N. SCOR (866th mtg.) at 8, U.N. Doc. S/P.V. 866 (1960).

acted in this unusual manner, on the other hand.”<sup>50</sup> Mrs. Meir insisted that, at any rate, the Security Council lacked jurisdiction over the matter since Eichmann had been abducted by private individuals and, legally, Israel bore no responsibility for the actions of private individuals.<sup>51</sup> Further, given Eichmann’s illegal presence in Argentina, Argentina was in a weak position to argue that it had legal interest in guaranteeing Eichmann’s protection within its borders.<sup>52</sup> Finally, Mrs. Meir pointed out that the real threat to peace lay, not in Eichmann’s abduction, but, in “Eichmann at large, Eichmann unpunished, Eichmann free to spread the poison of his twisted soul to a new generation.”<sup>53</sup> Eichmann’s abductors had attempted to uphold the rule of law by handing Eichmann over to the Israeli Government to be tried in a court of law for his crimes.<sup>54</sup> “Is this a threat to peace—Eichmann brought to trial by the very people to whose total physical annihilation he dedicated all his energies. . . ?”<sup>55</sup>

Mr. Sobolev of the Soviet Union and Mr. Lewandowski of Poland argued that Argentina had contravened its legal responsibility under the Nuremberg Agreement, various multi-lateral declarations, and a United Nations resolution to apprehend and either punish or extradite Eichmann.<sup>56</sup> Mr. Correa of Ecuador pointed out, in support of the Israeli position, that the importance of bringing Eichmann to trial was attested to by the fact that the origin of the United Nations coincided with the defeat of Nazism and the international community’s determination to punish Nazi war criminals and prevent any repetition of such acts.<sup>57</sup>

Mr. Lodge of the United States then proposed two amendments to the Argentine resolution in order to insure that it reflect, in addition to the importance of maintaining the rule of international law, all nations’ abhorrence of Eichmann’s activities and the desire of the international community to encourage friendly relations between Argentina and Israel.<sup>58</sup> Mr. Lodge, supported by the delegates from the United Kingdom and France, said that he considered that adequate reparation “will have been made by the expression of views by the Security Council in the pending resolution taken together with the statement of the Foreign Minister of Israel making apology on behalf of the Government of

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50. *Id.*

51. *Id.* at 17.

52. *Id.* at 18-20.

53. *Id.* at 21.

54. *Id.* at 20.

55. *Id.* at 21.

56. *Id.* at 23-26; 15 U.N. SCOR (867th mtg.) at 3, U.N. Doc. S/P.V. 867 (1960).

57. 15 U.N. SCOR (867th mtg.) at 16-7, U.N. Doc. S/P.V. 867 (1960).

58. 15 U.N. SCOR (866th mtg.) at 31-6, U.N. Doc. S/P.V. 866 (1960).

Israel.”<sup>59</sup>

The amended resolution was unanimously passed by the Security Council.<sup>60</sup> The Soviet Union and Poland abstained based upon a fear that the resolution’s provision that Argentina receive “adequate reparation” might be interpreted in such a manner as to require Israel to return Eichmann to Argentina, which might result in Eichmann’s escaping prosecution.<sup>61</sup>

### C. *The Post-Security Council Debate Negotiation*

On June 28, Argentina’s Foreign Minister requested a response from the Israeli Ambassador “in the light of the Security Council’s deliberations.”<sup>62</sup> Israel replied on July 4, reiterating the moral considerations justifying Eichmann’s abduction and trial, making another formal apology, and expressing the view that the regrets already made to the Argentine Government constituted, as was suggested during the Security Council debate, adequate reparation.<sup>63</sup>

Argentina responded by arranging a compromise solution. On July 20, the Argentine Foreign Minister handed a note to the Israeli Ambassador to Argentina declaring that his government was “not satisfied” that the regrets expressed by Israel constituted adequate reparation.<sup>64</sup> Two days later, Israeli Ambassador Levavi was declared *persona non grata* by the Argentine Government. However, the Legal Advisor to the Israeli Government, Shabtai Rosenne, was quietly welcomed to Argentina.<sup>65</sup> The two governments agreed to an exchange of new ambassadors and, on August 3, the governments issued a joint communiqué in which they announced their decision “to regard as closed the incident that arose out of the action taken by Israeli nationals which infringed fundamental rights of the State of Argentina.”<sup>66</sup>

## III. THE TRIAL OF ADOLF EICHMANN

The Jerusalem trial was concerned with issues beyond the guilt of a single defendant: “It is not an individual that is in the dock at this historic trial, and not the Nazi regime alone, but anti-semitism

59. 15 U.N. SCOR (867th mtg.) at 2, U.N. Doc. S/P.V. 867 (1960).

60. 15 U.N. SCOR (868th mtg.) at 31, U.N. Doc. S/P.V. 868 (1960). For the text of the resolution, see 15 U.N. SCOR Supp. (Apr.-June 1960) at 35, U.N. Doc. S/4349.

61. See 15 U.N. SCOR (868th mtg.) at 36-40, U.N. Doc. S/P.V. 868 (1960) (explanation by Mr. Sobolev of the Soviet Union); *id.* at 31-5 (explanation by Mr. Lewandowski of Poland).

62. M. PEARLMAN, *supra* note 1, at 76.

63. *Id.* at 77.

64. *Id.* at 78.

65. *Id.* at 78-9.

66. *Id.* at 79.

throughout history.”<sup>67</sup> The Israeli Government perceived the trial as a vehicle to educate the peoples of the world—and Jews in particular—concerning the dangers of totalitarianism, to chronicle the suffering of Jews during the Third Reich, and to demonstrate the justification and necessity for the Jewish State of Israel.<sup>68</sup>

Ben Gurion envisioned the trial as serving to reinforce democratic values by demonstrating to “people here and . . . throughout the world the danger of authoritarian society” so that “the truth will serve as an effective educational weapon to assure that [the horrors of Nazism] will never recur.”<sup>69</sup> The trial was intended to communicate the dangers of anti-semitism and to remind the nations of the world that they bore responsibility for permitting the “destruction of six million Jews.”<sup>70</sup>

The very fact of the trial was intended to heighten every Jew’s consciousness of his Jewishness and force him to reconsider its meaning.<sup>71</sup> The chronicling of Jewish suffering during the Third Reich served to educate young Israelis about the Holocaust and the importance of a Jewish homeland. In addition, it was hoped that the Eichmann trial would remind the assimilated Jews of the United States that they too might one day face a holocaust and that the State of Israel was their only haven from prosecution.<sup>72</sup> It was also important for these Jews and the world to know that Israel would act with strength and force against its enemies. Israel was thus serving notice that the classical conception of meekness and subservience would not be a part of the identity of the new Jews of Israel.<sup>73</sup>

Finally, the trial of Eichmann directed attention to West Germany’s seeming indifference toward pursuing and prosecuting ex-Nazis. The West German Government, during the four-month period prior to the Eichmann trial, responded by indicting and bringing to trial a large number of ex-Nazis.<sup>74</sup>

67. H. ARENDT, *supra* note 3, at 19 (quoting Ben Gurion).

68. *Id.* at 9-18; Y. ROGAT, *THE EICHMANN TRIAL AND THE RULE OF LAW* 4-17 (1961). Many of the criticisms of the trial stem from the various historical and political functions of the trial. At times, the prosecution seemed more concerned with documenting the Jewish experience during the holocaust than with prosecuting Eichmann. As a result, the rules of evidence and the judicial function were often compromised. *See infra*, notes 94-174 and accompanying text.

69. Y. ROGAT, *supra* note 68, at 4.

70. H. ARENDT, *supra* note 3, at 9-10 (quoting Ben Gurion).

71. Y. ROGAT, *supra* note 71, at 17.

72. *Id.* at 18; H. ARENDT, *supra* note 3, at 10.

73. Y. ROGAT, *supra* note 71, at 16; H. ARENDT, *supra* note 3, at 10.

74. H. ARENDT, *supra* note 3, at 14-8. Arendt refers to the results as “amazing.” Even before Eichmann’s trial began, Richard Baer, the successor to Rudolf Hess, was arrested, as were most of the members of the so-called Eichmann Commando: Franz Novak, who lived as a printer in Austria; Dr. Otto Hunsche, who had settled as a lawyer in West Germany; Hermann Krumney, who had become a druggist; Gustav Richter, former “Jewish adviser”

## IV. THE INDICTMENT OF ADOLF EICHMANN

Eichmann was tried under the Nazis and Nazi Collaborators (Punishment) Act, 1950, which is

fundamentally different in its characteristics, in the legal and moral principles underlying it and in its spirit, from all other criminal enactments usually found on the Statute books. The law is *retroactive* and *extraterritorial* and its object, *inter alia*, is to provide a basis for the punishment of crimes which are not comprised within the criminal law of Israel, being the special consequence of the Nazi regime and its persecutions . . . . It is *more severe* than criminal statutes . . . . What is the reason for all this? Only one answer is possible: the circumstances in which the crimes were committed were *extraordinary*; and therefore it was only right and proper that this Law, its application, employment, and purpose which the State had in mind in enacting it—that these too should be *extraordinary*.<sup>75</sup>

Article One of the Act punishes any “crime against the Jewish people” and any “crime against humanity” which was committed during “the period of the Nazi regime”<sup>76</sup> or any “war crime” committed

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in Rumania; and Willi Zopf, who had filled the same post in Amsterdam. “Although evidence against them had been published in Germany years before, . . . not one of them had found it necessary to live under an assumed name . . . the reluctance of the local courts to prosecute these crimes showed itself only in the fantastically lenient sentences meted out to the accused.” *Id.* at 14-5.

75. *Honigan v. Attorney-General*, 18 I.L.R. 538, 543 (S. Ct. Israel 1953) (emphasis added). Application of the Nazis and Nazi Collaborators (Punishment) Act to Eichmann raises the question of whether an Israeli Court, under international law, could punish Eichmann for acts which were committed between 1939 and 1944 (prior to Israel’s being recognized as a State) outside Israeli territory by an individual who was not a citizen of Israel, against individuals who were not citizens of Israel, and made punishable under an Act passed by the Israeli Parliament in 1950.

Different approaches were adopted by various countries to prosecute Nazi war criminals. They either were tried under the ordinary provisions of the penal law (United Kingdom); under special legislation retroactively criminalizing certain activities undertaken during the Third Reich (Poland); or by amending the ordinary criminal legislation so as to either increase penalties for certain offenses characteristic of Nazi activity or permit the derogation of certain principles, such as the standards of evidence, in order to facilitate the trial of Nazi war criminals (the majority of countries and Israel).

Jurisdiction was granted to special civilian courts (Czechoslovakia, Rumania, Holland, Austria, Bulgaria, Hungary, Poland), to special military courts (United Kingdom, Australia, Canada, Greece, Italy), or to the ordinary courts (Norway, Denmark, Yugoslavia). P. PAPADATOS, *THE EICHMANN TRIAL* 32-3 (1964).

76. *YEARBOOK ON HUMAN RIGHTS FOR 1950* 163 (1952) (a publication of the United Nations) [hereinafter cited as U.N. YEARBOOK]. The offense of a “crime against the Jewish people” encompasses killing Jews, causing serious bodily or mental harm to Jews, placing Jews in living conditions calculated to bring about their physical destruction, imposing measures intended to prevent births among Jews, forcibly transferring Jewish children to another national or religious group, destroying or desecrating Jewish religious or cultural assets of value, and inciting the hatred of Jews. These acts, to be punishable under the Act,

during "the period of the Second World War" in "an enemy country."<sup>77</sup> All these crimes are punishable by the death penalty.<sup>78</sup>

Article Two punishes acts already punishable under the Israeli penal code when committed in an "enemy country" during the "period of the Nazi regime" against a "persecuted person." The penalties for these offenses are the same as those provided under the Israeli penal code.<sup>79</sup>

Article Eight provides that defendants prosecuted under the Nazis and Nazi Collaborators (Punishment) Act may not raise the defenses of constraint, necessity, justification, or exercise of judicial function.<sup>80</sup>

must have been "committed with intent to destroy the Jewish people in whole or in part." U.N. YEARBOOK, *supra* at 163.

The offense of a "crime against humanity" is defined in accordance with the definition contained in the Agreement of London, P. PAPADATOS, *supra* note 75, at 34, and encompasses murder, extermination, enslavement, starvation, or deportation or other inhumane acts committed against any civilian population, and persecution on national, racial, religious, or political grounds. U.N. YEARBOOK, *supra*, at 163-4.

"Crimes against the Jewish people" and "crimes against humanity," to be punishable under the Act, must have occurred during the "period of the Nazi regime." This period is defined in the Act as encompassing the period beginning on January 30, 1933, and ending on May 8, 1945. U.N. YEARBOOK, *supra*, at 165.

The Nuremberg Tribunal interpreted its constituent instrument as precluding it from considering any crime against humanity which was not directly connected with one of the other offenses (*e.g.*, waging an aggressive war, war crimes) over which the Tribunal had jurisdiction. The Tribunal was unable to declare that acts before 1939 were crimes against humanity within the meaning of its Charter. Green, *Legal Issues of the Eichmann Trial*, 37 TUL. L. REV. 641, 659 (1963).

77. The definition of "war crimes" also follows that contained in the Agreement of London, P. PAPADATOS, *supra* note 75, at 34, and includes "murder, ill-treatment or deportation to slave labor or for any other purpose of civilian populations of or in occupied territory; murder or ill-treatment of prisoners-of-war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages or devastation not justified by military necessity." U.N. YEARBOOK, *supra* note 30, at 164.

"War crimes," to be punishable under the Act, must have been committed in "enemy country." "Enemy country" is defined as Germany during the period of the Nazi regime; any other Axis State during the period of the war between it and the Allied Powers; "any territory which, during the whole or part of the period of the Nazi regime, was *de facto* under German rule . . . any territory which was *de facto* under the rule of any other Axis State during the whole or part of the period of the war between it and the Allied Powers. . . ." U.N. YEARBOOK, *supra* note 76, at 165.

78. U.N. YEARBOOK, *supra* note 76, at 163.

79. *Id.* at 164.

80. *Id.* These defenses are established by sections 16-9 of the Israeli penal code. See P. PAPADATOS, *supra* note 75, at 36-8.

However, this is modified by Article 11(b) of the Act which provides, as grounds for mitigation of punishment, the fact that a defendant committed an offense with the intent to avert consequences more serious than those resulting from the offense. Article 11(a) provides for mitigation of punishment if a defendant committed an offense under conditions which, "but for [Article Eight], would have exempted him from criminal responsibility or constituted a reason for pardoning the offense" and he did "his best to reduce the gravity of the consequences of the offense." However, under both Articles 11(a) and 11(b), if a defendant has been convicted of any offense under Article One, the court may not impose a lighter punishment than ten years imprisonment. U.N. YEARBOOK, *supra* note 76, at 165.

In addition, under Article Ten, if a "persecuted person" has "done or omitted to do any act" which constitutes an offense under the Act, the court "shall release him from criminal responsibility" if he did or omitted to do the act "in order to save himself from the danger of

Article Nine states that an individual who has committed an offense under the Act may be prosecuted in Israel despite the fact that the defendant already has been tried abroad, "whether before an international tribunal or tribunal of a foreign state, for the same offense." In such cases the Israeli court, in determining the appropriate sentence, takes into consideration the sentence the defendant has served abroad.<sup>81</sup> Article Twelve establishes a twenty-year statute of limitations for offenses under the Act. However, there is no statute of limitations for offenses under Article One.<sup>82</sup>

Article Fifteen declares that the court may deviate from the rules of evidence if "it is satisfied that this will promote the ascertainment of the truth and the just handling of the case." Whenever the court decides to deviate from the rules of evidence it must "place on record the reasons which prompted its decision."<sup>83</sup>

Eichmann was indicted on fifteen counts under the Nazis and Nazi Collaborators (Punishment) Act. Counts One through Four charged Eichmann with "crimes against the Jewish people." Counts Five through Seven charged him with "crimes against humanity" directed against Jews. Count Eight charged Eichmann with "war crimes" against the inhabitants of the States occupied by Germany and other Axis powers. Counts Nine through Twelve alleged that Eichmann had committed "crimes against humanity" against Poles, Slovenes, Gypsies, and Czechoslovakians. Counts Thirteen through Fifteen charged Eichmann with membership in a "hostile [criminal] organization."<sup>84</sup>

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immediate death threatening him and the court is satisfied that he did his best to avert the consequences of the act or omission." The individual also shall be released from criminal responsibility if he did or omitted to do the act with intent to avert consequences more serious than those which would have resulted from the act or omission and the individual actually averted them. However, Article Ten does not apply to an act or omission constituting an offense under Article One. U.N. YEARBOOK, *supra* note 76, at 165.

81. U.N. YEARBOOK, *supra* note 76, at 164-5. Any unfairness which might result from such double punishment also may be controlled by Article 14, which provides that a prosecution under the Act may be instituted only by the Attorney General. *Id.* at 165.

82. *Id.* at 165.

83. *Id.*

84. P. PAPADATOS, *supra* note 75, at 111-24.

V. THE CONVICTION AND SENTENCING OF ADOLF EICHMANN<sup>85</sup>

Eichmann was convicted under all counts.<sup>86</sup> Eichmann asked the Court<sup>87</sup> to be lenient in sentencing him because of his insignificant role in the "Final Solution": "My guilt lies in my obedience, my compliance with the duties of the service, and my oath of allegiance to the flag."<sup>88</sup> Eichmann contended that he never "persecuted Jews with lustful eagerness"<sup>89</sup> and that he was being "sentenced for the deeds of others."<sup>90</sup>

At the Court's one hundred twenty-first session, over eight months after the trial began, Judge Landau delivered the District Court's sentence. The Court held that although the death penalty was discretionary, the heinous nature of Eichmann's crimes and the absence of mitigating circumstances required imposition of the death penalty.<sup>91</sup>

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85. The evidence presented by the prosecution followed two patterns. The first was the presentation of oral testimony and documentary evidence attesting to Eichmann's general involvement in the "Final Solution." The second was the presentation of evidence of Eichmann's involvement in the extermination program in each country and in the concentration camps. M. PEARLMAN, *supra* note 1, at 227.

Eichmann was on the stand from June 20 to July 24, for a total of thirty-three and a half sessions. Sixty-two sessions, out of a total of one hundred and twenty-one, were spent recording the testimony of one hundred prosecution witnesses. The presentation of their testimony lasted from April 24 to June 12. H. ARENDT, *supra* note 3, at 223.

86. *The Eichmann Trial*, in 2 THE LAW OF WAR 1627, 1653-7 (L. Friedman ed. 1972) [hereinafter referred to as L. FRIEDMAN]. Eichmann was convicted under Counts 1-4, but acquitted of all acts under those counts committed prior to August, 1941. *Id.* at 1654. This appears to be based upon the Nuremberg precedent of limiting criminal liability to acts connected with the waging of war.

87. The District Court Tribunal was comprised of Moshe Landau, a member of the Supreme Court, and two regular district court judges, Benjamin Halevi and Dr. Yitzhak Raveh. All three judges had emigrated to Palestine in 1933 when it was under British Mandate. M. PEARLMAN, *supra* note 1, at 95-6.

Eichmann chose Dr. Robert Servatius of the Cologne Bar as his attorney. Servatius had had considerable experience in defending war criminals. The Knesset passed a special law to permit Servatius to practice before Israeli courts and the Israeli Government paid Servatius \$30,000 to represent Eichmann. The prosecuting attorney was Gideon Hausner, Israeli Attorney General. G. HAUSNER, *supra* note 3, at 302-3.

88. M. PEARLMAN, *supra* note 1, at 615. The major question at sentencing was whether the death penalty was mandatory. In 1954 the Penal Code Amendment (Modes of Punishment) Law was passed whereby "a court which had convicted a person of an offense may impose any penalty not exceeding the penalty prescribed by law for that offense." Servatius argued that the 1954 amendment gave the Court the discretion to sentence Eichmann under Article One of the Nazis and Nazi Collaborators (Punishment) Act to a prison term. *Id.* at 618.

89. *Id.* at 615.

90. *Id.* at 617. Eichmann argued that:

several Nazis of that period, and others, spread lies about me. They wanted either to ease the burden of guilt from their own shoulders onto mine, or to create confusion for reasons which escape me. And to my astonishment, these lies, in exaggerated form, were eagerly repeated in several publications during the fifteen years that followed.

*Id.*

91. *Id.* at 618-19.

The Supreme Court affirmed this sentence, finding that the legislature "could not have envisaged a criminal greater than Adolf Eichmann; and, if we are not to invalidate the will of the legislature, we must impose on Eichmann the maximum penalty provided in Section 1 of the law, that is: the death penalty."<sup>92</sup>

## VI. SOME LEGAL ISSUES RAISED BY THE EICHMANN TRIAL

The Jerusalem trial of Adolf Eichmann raises several legal issues, including the neutrality of the Israeli judges, the questionable legality of Eichmann's kidnapping, the extraterritorial and universal jurisdiction of the Israeli Court, the retroactivity of Israeli law, and the admissibility of the defenses of act of state and superior orders. The District and Supreme Courts' disposition of these issues is summarized in this section.<sup>93</sup>

### A. *The Neutrality of the Israeli Judges*

Dr. Servatius, Eichmann's attorney, argued that the three Israeli District Court judges should be disqualified from hearing the Eichmann case. He contended that reasonable grounds existed for fearing that the judges were biased since the Eichmann trial involved activities in which the State of Israel and the Jewish people had a political interest.<sup>94</sup> Prosecuting attorney Gideon Hausner, on the other hand, argued that it was possible to be just even in face of such a serious crime. "A fair trial is possible even when the judges are under the duty of bottling up in their hearts their personal or national distress so as to judge only

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92. L. FRIEDMAN, *supra* note 86, at 1687. The day following the Supreme Court decision, Eichmann submitted a petition for clemency to the President of Israel, Yitzhak Ben Zvi. President Zvi, following the recommendation of Dr. Dov Joseph, the Minister of Justice, recommended that the sentence be permitted to stand. Eichmann's was to be the first execution in the history of Israel. M. PEARLMAN, *supra* note 1, at 627.

93. The controversial nature of these issues detracted from the attempt by Israel to insure that Eichmann had a "fair trial."

This led Arendt to speculate that perhaps it would have been desirable to have assassinated Eichmann. She points to the precedent of Shalom Schwartzbard, who, in Paris on May 25, 1926, shot and killed Simon Petlyura, the former Ukrainian military official responsible for the pogroms during the Russian civil war that claimed almost one hundred thousand victims. Arendt also refers to the case of Armenian Tehlirian who, in Berlin in 1921, shot Talaat Bey, the major figure in the Armenian pogroms of 1915 which claimed one-third of the Armenian population in Turkey (600,000). Both assassins voluntarily turned themselves over to the authorities and used their trials, successfully, to show the world what crimes had been committed against their people and gone unpunished. H. ARENDT, *supra* note 3, at 264-6.

It is worth noting that neither Schwartzbard or Tehlirian had a national homeland which could have brought their victims to trial.

94. P. PAPADATOS, *supra* note 75, at 40-1.

on the basis of the evidence before them.”<sup>95</sup>

The District Court did not address the issue of whether they should be disqualified based upon “reasonable grounds for anxiety that bias exists.” Instead, the Court stated that those who sat in judgment were professional judges accustomed to weighing evidence; that they were carrying out their task in full view of the public; and that experienced lawyers conducted the defense.<sup>96</sup> The court conceded that judges are “flesh and blood,” but asserted that if they did not have the capacity to overcome their emotions, “no judge would ever be qualified to sit in judgement in a criminal case evoking strong disgust.”<sup>97</sup> The Supreme Court, reviewing the trial record, found that the “learned judges did indeed abide their duty fully and to the end.”<sup>98</sup>

Despite the emotional nature of the trial, the fact that one of the judges had made a derogatory comment about Eichmann at an earlier trial, and the fact that prejudicial statements were made by politicians during the trial, no observer—including defense counsel—criticized the conduct of the judges.<sup>99</sup>

### *B. Eichmann's Abduction*

Dr. Servatius argued that Eichmann had been kidnapped by agents of the State of Israel and that an act not in accordance with international law should not be approved by the Court.<sup>100</sup> Gideon Hausner, in rebuttal, pointed to

an unbroken chain of American and English decisions, dating back over a hundred years, all showing that a court does not inquire into the circumstances under which a person has been brought before it; once he is physically present, the court will proceed to try him. Abduction across frontiers may become a political issue between the countries involved, but it is not a consideration for the court.<sup>101</sup>

The District Court cited English, American, and Israeli authorities which have held that the circumstances of the arrest and the mode of bringing the accused into the jurisdiction have no relevance to his trial

95. Musmanno, *The Objections in Limine to the Eichmann Trial*, 35 *TEMP. L.Q.* 1, 18-9 (1961).

96. *Id.* at 19.

97. *Id.* “It is true that the memory of the Holocaust shocks every Jew to the core. But, now that this case has been brought before us, we are duty bound to overcome these emotions too, whilst sitting in judgment. This duty we shall discharge.” *Id.*

98. L. FRIEDMAN, *supra* note 86, at 1685.

99. Green, *supra* note 76, at 651.

100. M. PEARLMAN, *supra* note 1, at 102.

101. G. HAUSNER, *supra* note 3, at 312.

and which have "consistently refused in all cases to enter into the examination of these circumstances."<sup>102</sup>

The District Court noted that the Harvard "Draft Convention on Jurisdiction with Respect to Crime" provides that no court shall prosecute or punish any person brought within the court's jurisdiction by measures in violation of international law or convention. However, the Court pointed out, the Harvard Draft recognizes that this proposal forms no part of positive international law.<sup>103</sup> In addition, under the Harvard Draft, such a prosecution may be undertaken with "the consent of the State or States whose rights have been violated by such measures."<sup>104</sup> In the instant case, the District Court found that this requirement had been satisfied. Any harm resulting from the violation of Argentine sovereignty and any bar to Israel's prosecution of Eichmann had been removed by the agreement between the governments of Argentina and Israel to view the incident as closed.<sup>105</sup>

### C. Jurisdiction

#### 1. *Extraterritorial Jurisdiction*<sup>106</sup>

Dr. Servatius argued that there were no legally recognizable grounds upon which Israel could base its jurisdiction over Adolf Eichmann: "those victims who had died met their deaths *before Israel came into existence* and could therefore *never have possessed its nationality* . . . the war had terminated and the 'Final Solution' failed *before the*

102. Oliver, *Judicial Decisions*, 56 AM. J. INT'L L. 805, 835 (1962). The Court listed seven principles controlling the kidnapping issue: (1) In the absence of an extradition agreement between the State to which a "fugitive offender" has been brought for trial and the country of "asylum," the Court will not investigate the circumstances in which the "fugitive offender" was detained and brought into the area of jurisdiction. (2) This principle also applies if the offender contends the abduction was carried out by agents of the State prosecuting him. In such cases it is the State's right, not that of the individual, which has been violated. The State's remedy lies in international diplomacy. (3) The aggrieved State may condone the violation of its sovereignty and waive all claims against the offending State. (4) The only instance in which a "fugitive offender" may claim immunity from prosecution is when the individual has been extradited to the country requesting his extradition for a specific offense and thus is not the offense for which he is being tried. (5) Eichmann was not extradited by Argentina to Israel and the State of Israel was not bound by any agreement with Argentina not to try him for the offenses involved in this case. (6) The governments of Israel and Argentina, pursuant to the Security Council Resolution of June 23, 1960, had settled the dispute between them. (7) The rights of asylum and immunity belong to the country of asylum and not to the offender. In any event, Argentina never granted Eichmann asylum or refuge and no breach of these rights occurred. L. FRIEDMAN, *supra* note 86, at 1674-5 (summary by the Supreme Court of the District Court's conclusions on the matter).

103. Oliver, *supra* note 102, at 838.

104. *Id.*

105. *Id.* at 839. See *supra* text accompanying notes 62-6.

106. Extraterritorial jurisdiction is a principle of international law which permits a state to assume legal jurisdiction over acts committed by an alien which occur outside its territorial jurisdiction where: the victim is a citizen of the state ("passive personality"); the act injures the state itself ("protective principle"); or a national of the state has committed a criminal act outside the state's territorial jurisdiction ("nationality principle").

state was created.”<sup>107</sup> Gideon Hausner argued that, given the historical connection between Israel and the Jewish people, Israel could justifiably assert extraterritorial jurisdiction over Eichmann.

The historical connection of the Jewish people with Palestine is recognized in the law of nations. The Jewish National Home which was established here during the period of British rule was established for all Jews, including these millions who are no longer alive. And if there is a State in the world which feels the effects of those crimes on its own body and soul, that State is Israel.<sup>108</sup>

The District Court found that, based both upon the continuity between British Palestine and the State of Israel, and upon the connection between the Jewish people and the State of Israel, Israel had jurisdiction to try offenses committed prior to the formal establishment of the State of Israel. The Jewish “Yishuv” in Palestine, before and during World War II, constituted a “State-on-the-way.”<sup>109</sup> The Nazi crimes were directed at all the Jewish people, including the “Yishuv” in Palestine. However, during World War II, the “Yishuv” lacked the sovereign status required to enact a law directed against the Nazi crimes. The enactment of the Nazis and Nazi Collaborators (Punishment) Act filled the need which had existed previously.<sup>110</sup>

The Court also found that Israel’s right to try Eichmann was enhanced by the participation of Jewish Palestinians in the Allied effort against the Axis powers. Israel’s right to try Eichmann was deemed to be equal to that of any country which shed “the blood of its soldiers.”<sup>111</sup>

107. Green, *supra* note 76, at 667 (emphasis added).

108. M. PEARLMAN, *supra* note 1, at 131.

109. Oliver, *supra* note 102, at 833.

110. *Id.* Musmanno points out that to argue “for such immunity would be like saying that a person who committed murder in the British colony of Pennsylvania on July 3, 1776, could not be tried for murder by the State of Pennsylvania on July 5, 1776.” Musmanno, *supra* note 95, at 14.

Green argues that Israel succeeded to all the privileges of the United Kingdom with respect to Palestine: “Any legal rights that the United Kingdom might possess against Germany as an enemy state or against Germans as enemy nationals, including the right to try them for war crimes, would pass to Israel.” Green, *supra* note 76, at 671.

111. Oliver, *supra* note 102, at 832. The Court pointed out that the whole political landscape of Europe changed after World War II, and that many states had new boundaries and inhabitants. *Id.* Eighteen other states had a basis in international law for asserting criminal jurisdiction over Eichmann. The Federal Republic of Germany perhaps had primary standing to object to Israel’s assertion of jurisdiction over Eichmann. But “the Federal Republic, far from objecting to Israel’s jurisdiction over Eichmann, ha[d] officially welcomed the prosecution of Eichmann by Israel, and ha[d] offered its assistance for the obtaining of evidence.” Baade, *The Eichmann Trial: Some Legal Aspects*, 1961 DUKE L.J. 400, 410.

In addition, Israel was the country in which a large number of documents pertaining to the Third Reich were deposited, where most witnesses resided, and which had the closest connection with the Jewish populations of Europe. Green, *supra* note 76, at 668; Musmanno, *supra* note 95, at 11. It has been argued that the Jews who were exterminated were

The jurisdiction of Israel over Eichmann's offenses was not only based upon the continuity between Palestine and Israel, but was found by the Court to be the legal right of the Jewish people acting through Israel—their historic, national home—to punish the murderer of six million of their brethren.<sup>112</sup>

The fact that that *people* had become after the catastrophe a *subject*, where it had hitherto been an *object*, and has turned from the *victim* of a racial crime to the *wielder of authority* to punish the criminals is a great historic right that cannot be dismissed. The *State of Israel*, the *sovereign State of the Jewish people*, performs through its legislation the task of *carrying into effect the right of the Jewish people* to punish the criminals who killed their sons with intent to put an end to the survival of this people. We are convinced that this power conforms to the principles of the law of nations. . . .<sup>113</sup>

Lastly, the District Court cited the *Lotus* decision of the International Court of Justice which established that a State may exercise extraterritorial jurisdiction under its municipal law so long as there is no "specific rule in international law which negates the power."<sup>114</sup>

The Supreme Court affirmed the District Court's ruling upholding Israel's extraterritorial jurisdiction to prosecute Eichmann. The Supreme Court explicitly based its ruling on the *Lotus* case and held that State sovereignty "demands the preclusion of any presumption that there is a restriction on its independence." In addition, the penal jurisdiction of "almost all" States has been extended "so as to embrace offenses committed outside its territory."<sup>115</sup> The Court observed that even if Israel were exercising its jurisdiction contrary to international law, this would be a "violation of the rights of the State to which the accused belongs and not a violation of the individual's own rights."<sup>116</sup>

## 2. *Universal Jurisdiction*<sup>117</sup>

Dr. Servatius, in addition to objecting to Israel's claim of extraterritorial jurisdiction, disputed that there was any basis for Israel's

potential citizens of Israel. Musmanno, *supra* note 95, at 13. Many of them were prevented by Eichmann's policies from migrating to Palestine. Green, *supra* note 76, at 668-9.

112. Oliver, *supra* note 102, at 831. The "linking point" between Israel and the accused was seen as striking in the case of crimes against the Jewish people. *Id.*

113. *Id.* at 834 (emphasis added).

114. *Id.* at 834. The Court did not base its decision on the *Lotus* precedent. Case of the S.S. *Lotus*, P.C.I.J., ser. A, No. 10, at 18 (*France v. Turkey* 1927) (French ship *Lotus* collided with Turkish vessel outside Turkish territorial waters. Eight Turkish citizens drowned. The officer on watch on the *Lotus* was arrested by Turkish authorities).

115. L. FRIEDMAN, *supra* note 86, at 1662.

116. *Id.*

117. Universal jurisdiction extends the extraterritorial jurisdiction of states to encompass

claim of universal jurisdiction over Eichmann. Distinguishing Eichmann from the perpetrators of slavery and genocide, who traditionally have been subject to universal jurisdiction, Dr. Servatius argued that those who "perpetrated such acts are enemies of the human race . . . . But humanity is under no danger from Eichmann. When Hitler's regime came to an end, he became a peace-loving citizen."<sup>118</sup> Gideon Hausner, in rebuttal, argued that "any civilized country had the right, nay the duty, to try a person charged with crimes against humanity. How much more did Israel, specially associated as she was with the Nazi program of Jewish extermination, have this right and obligation to try Eichmann."<sup>119</sup>

The District Court held that Israel, in addition to having extra-territorial jurisdiction over Eichmann based upon its status as "the victim nation," had universal jurisdiction over Eichmann.<sup>120</sup> The crimes punished under the Nazis and Nazi Collaborators (Punishment) Act are "not crimes under Israel law alone, but are in essence offences against the law of nations. [The crimes] have been stated and defined in that law according to a precise pattern of international laws and conventions which define crimes under the law of nations."<sup>121</sup> For instance, the offense of a "crime against the Jewish people" is defined on the pattern of crime of genocide adopted by the United Nations<sup>122</sup> and "there is no doubt that genocide has been recognized as a crime under

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acts committed by aliens which are international crimes against the law of nations (such as piracy), regardless of the jurisdiction in which the crime occurred.

The concept is based on Hugo Grotius' statement in "De Jure Belli ac Pacis" that every sovereign state has the moral prerogative to punish those individuals whose acts have violated in extreme form the law of nature or the law of nations. Oliver, *supra* note 102, at 809-10.

There are three approaches to the principle of universal jurisdiction: 1) universal jurisdiction is limited to piracy. This rule is based on the practical reason that pirates have no territorial identification, roam international waters, and are the enemy of all states; 2) universal jurisdiction is a rule of practicality to be applied when the territorial and national principles cannot be applied and after unsuccessful attempts have been made to extradite the individuals to the state in whose territory the offense was committed; 3) universal jurisdiction is applicable for all offenses against the "law of nations" based upon the gravity and wide impact of such offenses. L. FRIEDMAN, *supra* note 86, at 1668-9.

118. G. HAUSNER, *supra* note 3, at 319.

119. M. PEARLMAN, *supra* note 1, at 129.

120. Oliver, *supra* note 102, at 828. According to the Court, Israel's right to punish Eichmann came from two sources: "A universal source . . . which vests the right to prosecute and punish crimes of this order in every State within the family of nations; and a specific or national source which gives the victim nation the right to try any who assault [its] existence." *Id.*

121. *Id.* at 812.

122. *Id.* In addition, "crimes against humanity" and "war crimes" are defined in accordance with the Charter of the International Military Tribunal of Nuremberg. The offense of "membership in a hostile organization" is defined in accordance with the decision of the Nuremberg Tribunal to declare the organizations in question "criminal organizations." *Id.*

international law."<sup>123</sup> The Court stated that in light of the acknowledged principles of international law, "it followed that the jurisdiction to try such crimes is universal."<sup>124</sup>

However, Article Six of the Convention for the Prevention and Punishment of Genocide (1948) provides that jurisdiction over the crime of genocide shall reside in the State in which the act was committed or in "such international penal tribunal as may have jurisdiction."<sup>125</sup> The District Court argued that it cannot be assumed, "in the absence of an express provision in the [C]onvention itself," that any of the obligations in the Convention apply "to crimes which had been perpetrated in the past."<sup>126</sup> In addition, the Court found that Article Six is a "compulsory minimum": it is not exhaustive and does not preclude the exercise of universal jurisdiction over "a crime of utmost gravity under international law."<sup>127</sup>

The Supreme Court stated that it "fully agree[d] with every word said by the Court," and upheld Israel's jurisdiction based primarily upon the "universal character of the crime of which the appellant has been convicted".<sup>128</sup>

The State of Israel . . . was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed.<sup>129</sup>

#### D. Retroactivity of Israeli Law

Dr. Servatius, arguing that the Nazis and Nazi Collaborators (Punishment) Act was retroactive in character, conceded that there might be a necessity for such "exceptional legislation" in circumstances of emergency in order to provide for the protection of the state and its citizens, but contended that the law under which Eichmann was being tried had a "punitive objective."<sup>130</sup> Gideon Hausner contended that

123. *Id.* at 814.

124. *Id.*

125. *Id.* Israel ratified the Genocide Convention in the form of The Crime of Genocide (Prevention and Punishment) Act, 1950. *Id.* at 818.

126. *Id.* at 815. The District Court distinguished between Article One, which affirms that genocide is a crime under international law (a "subsisting principle") and Article Six, which provides for jurisdiction under the Convention (a "pragmatic provision"). *Id.* at 816.

127. *Id.* at 818-9.

128. L. FRIEDMAN, *supra* note 86, at 1674. The Supreme Court preferred not to base its decision on the nationality of Eichmann's victims since some of the offenses were directed against non-Jewish groups (Poles, Slovenes, Czechs, and gypsies). *Id.*

129. *Id.* at 1673.

130. Green, *supra* note 76, at 661-2.

the principles codified in the Act

are but formulations, codifications of principles which have long been accepted by civilized nations. There is nothing new in them. They simply established one thing, that murder is murder, persecution is persecution, robbery is robbery. And even if one shouts ["The Fuehrer has ordered, we obey"], even then, murder is murder, oppression is oppression, and robbery is robbery.<sup>131</sup>

The District Court's opinion on the issue of retroactivity relied on the Nuremberg precedent that "the Charter of the International Military Tribunal is not an arbitrary exercise of power on the part of the victorious [n]ations . . . but is the expression of international law existing at the time of its creation."<sup>132</sup> The Court also pointed out that the Nazi leaders, including Eichmann, were aware of the criminal nature of their actions since they violated the "basic principles on which human society is based."<sup>133</sup>

Moreover, the District Court argued, the penal jurisdiction of a State under international law is not limited by the prohibition of retroactive effect.<sup>134</sup> The maxim *nullum crimen sine lege* is not a limitation of sovereignty; it is a principle of justice. It would be difficult to find a more convincing instance of just, retroactive legislation than the legislation providing for the punishment of war criminals and criminals against humanity and against the Jewish people.<sup>135</sup> The Court observed that the Israeli legislation was not unique and that various courts, including those in Germany, had rejected the contention that the crimes of the Nazis were not prohibited at the time and that their perpetrators did not have the requisite criminal intent.<sup>136</sup>

The Supreme Court affirmed the District Court, holding that Eichmann could not persuasively contend that he was not aware that he was

131. M. PEARLMAN, *supra* note 1, at 120-1.

132. Oliver, *supra* note 102, at 819. The United Nations General Assembly, in a 1946 resolution, affirmed the principles of international law recognized by the charter and the judgment of the Nuremberg Tribunal. *Id.*

133. *Id.* at 823.

134. *Id.* at 822. Baade points out that:

some states, such as Denmark, specifically authorize the analogous application of penal statutes to situations not expressly dealt with therein. Secondly, where criminal law is customary, i.e., judge-made, it necessarily is retroactive whenever a new crime is created by judicial decision. . . . Thirdly, even in states with an entirely codified criminal law, judicial decisions on previously doubtful questions, or reversals of previous precedents, are retroactive. Finally, a number of states have enacted expressly retroactive criminal statutes to deal with collaborators after World War II.

Baade, *supra* note 111, at 411.

135. Oliver, *supra* note 102, at 821-2.

136. *Id.* at 823.

violating "deeply-rooted universal moral values."<sup>137</sup> The principles codified in Israeli law had been prohibited "by the law of nations since 'time immemorial,' and. . .the enactment of the law of 1950 was not in any way in conflict with the maxim *nulla poena. . .*"<sup>138</sup> Although ethically "the sense of justice generally recoils from punishing a person for an act committed by him for which at the date of its commission he could not have known [was a crime, the] sense of justice must necessarily recoil even more from the non-punishment of the person who participated in such outrages. . . ." <sup>139</sup>

*E. Admissibility of the Defenses of Act of State and of Superior Orders*<sup>140</sup>

1. *Act of State*

Dr. Servatius argued that

one sovereign state does not dominate or sit in judgment on another sovereign state . . . [A] person who operates on behalf of a state, who carries out, in other words, an 'act of state,' cannot be tried for such an act, if it be criminal, by another state without the concurrence of the former . . . [N]ot the individual but the state on whose behalf he acts is responsible for any violation of international law.<sup>141</sup>

Gideon Hausner pointed to postwar judgments in Germany itself to show that even there the defense of act of state had been rejected.<sup>142</sup>

The District Court rejected the act of state defense, saying that a state that plans and implements a "Final Solution" cannot be treated as *par in parem*, but only as a "gang of criminals."<sup>143</sup> The District Court pointed out that the act of state doctrine had been repudiated in relation to international crimes by the charter and the judgment of the Nuremberg Tribunal and that this position had been adopted by the

137. L. FRIEDMAN, *supra* note 86, at 1661.

138. *Id.*

139. *Id.* at 1660.

140. Act of state is a rule of international law whereby a court of one State will not judge the legality of an act committed by a government official of another State. This rule appears to be aimed at keeping one State from intervening in the internal affairs of another State.

The defense of superior orders may be used when a defendant has committed a criminal act pursuant to the direct orders of a superior military officer or governmental official. It appears to be based upon the notion that the defendant who followed orders lacked the requisite *mens rea* to be liable for a criminal offense.

141. M. PEARLMAN, *supra* note 1, at 567-8. Dr. Servatius relied on the writings of Hans Kelsen.

142. *Id.* at 135.

143. Oliver, *supra* note 102, at 825.

United Nations and by the Convention for the Prevention and Punishment of Genocide.<sup>144</sup>

The Supreme Court held that acts contrary to the law of nations are “completely outside the ‘sovereign’ jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them. . . .”<sup>145</sup> The Court also ruled that the act of state defense was inapplicable due to the fact that the “Final Solution” was based upon the personal orders of Adolf Hitler and was not a part of the formal law of the German State.<sup>146</sup> The Court observed that even if Hitler’s orders had the force of law in Germany, both the laws of that evil State and the orders of the “autocrat who directed its affairs” were invalid under international law and did not “absolve those who participated in committing them” from personal responsibility.<sup>147</sup>

## 2. *Superior Orders*

Dr. Servatius raised the defense of superior orders during his closing argument to the Court:

Everything he did was inspired by the highest authorities, who enforced his obedience by holding him to his oath. Had Eichmann refused to obey, at great personal cost, others would have carried out the task in any case, and his sacrifice would have been in vain. People saw Eichmann the puppet, but they did not see those behind him pulling the strings. . . .<sup>148</sup>

There was no way for a man like Eichmann, Dr. Servatius argued, to “shirk the filthy work.”<sup>149</sup>

144. *Id.* at 827.

145. L. FRIEDMAN, *supra* note 86, at 1677.

Preference should be given to the rule of positive law, supported as it is by due enactment and State power, even when the rule is unjust and contrary to the general welfare, *unless the violation of justice reaches so intolerable a degree that the rule becomes in effect ‘lawless law’ and must therefore yield to justice.*

*Id.* at 1679, quoting G. RADBRUCH, *RECHTSPHILOSOPHIE* 350 (1950) (emphasis added). See also, H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 (1958); Lon Fuller *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 639 (1958).

146. L. FRIEDMAN, *supra* note 86, at 1678. Eichmann testified that the “Final Solution” was not the “law of the Reich. It was the order of the Fuhrer and in accordance with the legal conceptions of the time, . . . the words of the Fuhrer had the force of law.” Green, *supra* note 76, at 681. But German courts have not recognized such decrees as having the status of formal law. Green, *supra* note 76, at 683.

147. L. FRIEDMAN, *supra* note 86, at 1679. The approach of the German courts was to invalidate *ab initio* the “discriminatory and destructive decrees” of the Nazi regime. *Id.* at 1678.

148. G. HAUSNER, *supra* note 3, at 407.

149. *Id.* at 408.

Gideon Hausner pointed out that if the defense argument was accepted, then none of the Nazi leaders could ever have been brought to trial. They could have claimed that Hitler alone was competent to give orders and that they were bound to obey.<sup>150</sup>

The District Court ruled that "all civilized countries" had rejected the defense of superior orders as an exemption from criminal responsibility.<sup>151</sup> The Court found that this rule had been acknowledged by the United Nations<sup>152</sup> and that even the jurists of the Third Reich "did not dare set down on paper that obedience to orders is above all else."<sup>153</sup>

The Court found that Eichmann knew that the order for the physical extermination of the Jews was manifestly unlawful. He had admitted in court that "I already realized at the time that this solution by the use of force was something unlawful, something terrible, but to my regret I was obliged to deal with it in matters of transportation, because of my oath of loyalty from which I was not released."<sup>154</sup> The Court found that although Eichmann realized that the "Final Solution" was unlawful, he "performed his duties at every stage because of an inner conviction. . . , wholeheartedly and willingly."<sup>155</sup>

The Supreme Court also rejected Eichmann's plea. The Court's analysis of the factual record indicated that Eichmann "was the high and mighty one, the commander of all that pertained to Jewish affairs."<sup>156</sup> Although Hitler had formulated the "Final Solution," Eichmann "took a leading part and had a central decisive role."<sup>157</sup> The Court found that there was no evidence that Eichmann had to be coerced or pressured into carrying out his activities; he did so with pleasure, to his own gratification and to the satisfaction of his superiors.<sup>158</sup>

The Supreme Court also observed that even if Eichmann could establish that he had acted pursuant to superior orders, the Nazis and Nazi Collaborators (Punishment) Act recognizes no such defense and

150. M. PEARLMAN, *supra* note 1, at 135.

151. L. FRIEDMAN, *supra* note 86, at 1643.

152. *Id.* "Perhaps it is not a vain hope that the more this recognition takes root in the minds of men, the more they will refrain from following captive after criminal leaders, and then the rule of law and order in the relations between nations will be reinforced." *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 1648.

156. *Id.* at 1685.

157. *Id.* at 1686.

158. *Id.* Rudolf Hess, commandant of the extermination camp at Auschwitz testified that Eichmann did "everything he could to bring about the final solution as fast as possible. The final solution of the Jewish problem was his aim in life." T. FRIEDMAN, *supra* note 13, at 279.

In recommending Eichmann for promotion, the Inspector of the Security Service in Vienna wrote of Eichmann: "His work is good, energetic and shows initiative. He has great capacity for independent action, particularly in organization. He is known as a specialist in his field." M. PEARLMAN, *supra* note 1, at 191.

"no principle recognizing such a defense [is] crystallized in international law."<sup>159</sup> The Nuremberg Tribunal considered the fact that the accused acted pursuant to an order of a superior in mitigation of punishment where justice required.<sup>160</sup> This was not such a case.<sup>161</sup>

## VII. ANALYSIS

The historical significance of the Eichmann trial may lie in the fact that the Courts affirmed the international community's commitment to punish the perpetrators of the crime of genocide and of "crimes against humanity."<sup>162</sup> However, in the last analysis, the trial's contribution to the development of, and respect for, the rule of international law and for human rights may be limited by the Israeli Courts' treatment of the procedural issues discussed in the preceding section.

### A. *Judicial Prejudice*

Most international commentators felt that Eichmann received a fair trial. However, (as has often been suggested) justice must not only be done; it must be seen as being done. If the judicial process is to be respected, it must be perceived as fair. The presence of three Israeli judges lent credence to Eichmann's claim that he was not being given a fair trial.<sup>163</sup>

Perhaps no judge could have been objective when confronted with Adolf Eichmann's crimes, but it is unlikely that suspicions of judicial bias were allayed by the Israeli judges' argument that they were professionals trained to be detached and objective. The Eichmann trial cannot be compared, as it was in the District Court opinion, to the criminal and civil offenses over which these three judges normally presided. In addition, the fact that Eichmann, in general, was given a fair trial does not mean that he received full justice and consideration at trial. As Yasal Rogat observes: "There may be no doubt that a Negro has murdered a Caucasian, but *the level of legality attained* may depend on whether he is tried and convicted in New York or in Mississippi."<sup>164</sup>

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159. L. FRIEDMAN, *supra* note 86, at 1683.

160. *Id.* (e.g., where the defendant followed orders to save his own life.)

161. *Id.* at 1684.

162. H. ARENDT, *supra* note 3, at 274-5. The Nuremberg Tribunal concentrated on "war crimes." The Eichmann trial helped clarify the nature of the crime of genocide and of "crimes against humanity." *Id.*

163. It was suggested that an international court be convened in Jerusalem with presiding judges from each of the countries occupied by the Nazis during World War II. H. ARENDT, *supra* note 3, at 271.

164. Y. ROGAT, *supra* note 68, at 33 (emphasis added).

### B. *Eichmann's Kidnapping*

The integrity of the Eichmann trial was further compromised by the fact that Eichmann was abducted from Argentina. The Israeli Government contended throughout the pre-trial period that Eichmann had been abducted by private citizens and that Israel had no legal responsibility for the actions of these "volunteers." Although it was impliedly conceded at trial that Eichmann had been abducted by Israeli agents, the District Court ruled that international law did not require an inquiry into the circumstances surrounding Eichmann's presence before the Court. As a result of this ruling, the Court implicitly condoned Israel's violation of Argentine sovereignty.<sup>165</sup>

The District Court also denied Eichmann standing to raise the issue of his abduction. The Court found that the "harm" stemming from Eichmann's abduction was suffered by *Argentina as a State rather than by Eichmann as an individual*. As a result, the Court stated that Argentina was entitled to seek reparation for Israel's violation of Argentine sovereignty through diplomatic channels. (The Court failed to mention that since Argentina and Israel had agreed to regard the incident as settled, Israel had as a practical matter escaped any liability for the kidnapping.) The Court's refusal to recognize Eichmann's standing as an individual to raise the issue of his kidnapping is contrary to the human rights movement's efforts to secure for individuals the status of subjects (rather than objects) under international law.

### C. *Jurisdiction*

In addition to the alleged continuity between British Palestine and Israel,<sup>166</sup> the primary basis for the District Court's upholding of Israel's extra-territorial jurisdiction over Eichmann was that Eichmann's crimes were directed against the Jewish people whose historic homeland is the State of Israel. Underlying this argument is the suggestion that a "people" can—and perhaps, should—only receive protection under international law if they are a state. The implication of this argument is that all "peoples" must seek self-determination and recognition as states under international law. This would not only lead to

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165. One of the rationales for the exclusionary rule in the United States is that the introduction at trial of any evidence seized in violation of the constitutional prohibition against unreasonable searches and seizures would compromise the integrity of the judicial process. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

166. The argument based upon the continuity between Palestine and Israel rests on the fiction that Palestine was a "state-on-the-way" and that the Nazis and Nazi Collaborators (Punishment) Act was merely filling a gap in the law of the British territory of Palestine. This argument does not overcome the factual contention that Israel did not exist as a *State* until 1948.

instability in the nation-state system but would also perpetuate the state-based approach of international law.

The District Court's basing of Israel's jurisdiction upon the link between the State of Israel and Eichmann's Jewish victims expands the traditional bases of States' international jurisdiction beyond nationality so as to include "race." Although this may be a step toward breaking down the traditional approach of international law, the protection accorded a person would still depend on his membership in a racial group affiliated with a nation-state rather than on him as an individual. In addition, the establishment of race as a basis for state jurisdiction would permit states to expand their power. For instance, India could intervene to protect the abuse of Asians in Africa, in the Pacific region, or in Western Europe. Lastly, there is the obvious problem of determining an individual victim's racial identity.

The Israeli Supreme Court's assertion of extraterritorial jurisdiction over Eichmann based upon the prerogatives of state sovereignty (as set forth in the *Lotus* case) also establishes a precedent that potentially may be used to limit individual human rights.

[M]ay the U.S.S.R. provide for the punishment of anyone who commits a crime against humanity by "warmongering" actions or by "inciting to hatred" against the Russian people with a specific intent of provoking a world war? . . . [I]f a citizen of foreign State X that provides for capital punishment is killed in a state of the United States that does not have capital punishment, the person charged with the crime might justifiably be transferred to State X and tried there under its laws.<sup>167</sup>

The Supreme Court *primarily* rested Israel's jurisdiction over Eichmann on the principle of universal jurisdiction over "international crimes." Although universal jurisdiction is not a part of *positive* international law, the Court found such jurisdiction to flow from the fact that Eichmann's crimes were offenses against humanity and against the law of nations.

However, the Supreme Court was in the contradictory position of utilizing the concept of universal jurisdiction to justify Israel's prosecution of Eichmann for "crimes against the Jewish people." The trial concentrated on the Nazi's persecution of the Jewish people and little

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167. Y. ROGAT, *supra* note 68, at 27. The assertion of extraterritorial jurisdiction is apt to be based upon the argument that a particular state has a "substantial interest" in prosecuting a particular defendant. But a state with a "substantial interest" in prosecuting a defendant is also likely to be a jurisdiction in which it is difficult for the defendant to obtain a fair trial.

effort was devoted to examining Eichmann's crimes against other peoples. In addition, no attempt was made during the trial to link the historic persecution of the Jews to the genocide practiced against aborigines, native Americans, and other ethnic and racial minorities. The principle of universal jurisdiction was improperly used to prosecute Eichmann for crimes against a particular race (as opposed to a crime against the human race).<sup>168</sup>

#### D. *Retroactivity*

Eichmann's activities, arguably, were not *explicitly* prohibited under international law during the period from 1938 to 1944. The Israeli Courts argued, however, that Eichmann knew or should have known that his actions were illegal. In addition, the Courts observed that Eichmann's destruction of documents, his flight from Germany, and his testimony all circumstantially suggested that he was aware of the illegal character of his actions.

However, it is questionable whether Eichmann knew or should have known that his actions were wrong. Eichmann was rewarded by his superiors for his role in the deportation of Jews. German history is replete with anti-semitism and persecution of Jews, and the "Final Solution" arguably was a logical extension of the forces and influences at work in German society.<sup>169</sup> Historically, there have been numerous societies, such as the American South prior to the Civil War, frontier America during the Nineteenth Century, and the contemporary South Africa, in which the persecution of racial minorities has been deemed both natural, desirable, and necessary.<sup>170</sup>

Even if Eichmann had known that his acts were criminal, he had little reason to believe he would be prosecuted for his activities. Few Germans were prosecuted for war crimes following World War I. In addition, international law contains various documents denouncing genocide, racism, sexism, and the abuse of human rights. Yet in the past several years, individuals who have arguably violated the provisions of these documents—such as Pol Pot in Cambodia or Idi Amin in Uganda—have been accepted as members of the world community and, on occasion, have been given asylum by sympathetic States. If

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168. In addition, "universal jurisdiction" is potentially such an expansive doctrine that, to guard against its possible abuse, it only should be utilized as a basis of jurisdiction of international tribunals.

169. L. DAWIDOWICZ, *THE WAR AGAINST THE JEWS 1933-1945* (1975). See also W. LAQUER, *THE TERRIBLE SECRET: SUPPRESSION OF THE TRUTH ABOUT HITLER'S "FINAL SOLUTION"* (1981).

170. See generally, G. FRIEDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* (1981).

World War II had not occurred, Eichmann may never have been legally accountable to the community of nations for the "Final Solution."

Thus, the argument that Eichmann knew or should have known that his participation in the "Final Solution" was illegal is arguably a legal fiction used to justify application of a retroactive law. The imputation of a "guilty mind" to Eichmann fails to make allowance for the fact that gross violations of human rights often are institutionalized in a nation's domestic policies and culture.

### *E. The Act of State and Superior Orders Defenses*

The Israeli Courts rejected the admissibility of the act of state and superior orders defenses. In general, the Courts' decisions were based upon the Nuremberg precedent and upon the rationale that Germany was a criminal state whose actions during the Third Reich breached all accepted international norms.

Arguably, the view of Germany as a criminal state was a legal fiction used by the Israeli Courts to deny Eichmann the ability to raise these defenses. Prior to the outbreak of World War II, Germany was an accepted member of the community of nations whose treatment of its domestic minorities provoked little protest. It might be contended that Germany's actions *at times* differed only in degree from such actions as the United States' evacuation and incarceration of Japanese-Americans, the dropping of the atomic bomb, and the saturation bombing of Dresden.

The Courts' denial of the admissibility of the act of state and superior orders defenses must be seen as a rule of legal utility: if these defenses had been accepted, it would have been impossible to punish anyone for the crimes of the Nazi regime.<sup>171</sup> The Israeli Courts' denial of Eichmann's right to raise these defenses is ironic given Israel's re-

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171. The Court's rejection of these defenses is, from one perspective, an affirmation that individuals will be held accountable under international law for their actions, even if those actions are in accordance with municipal law. Individuals acting through state instrumentalities can inflict great damage and harm, and, as a matter of policy, should not be insulated from criminal liability.

On the other hand, given the relative nature of the actions of states, the act of state and superior orders defenses arguably insulate individuals from being held fully accountable for acts they may have been forced to perform in the service of coercive state bureaucracies. The question is not whether an individual had a choice in whether to obey an order or to carry out a given policy. A choice is always possible, but it seems unfair to ask an individual to disobey an order and suffer the consequences. This is especially true when the rewards for obeying the dictates of an uncertain (higher) international law are unclear.

Thus, the issue is arguably one of responsibility, not choice. Those individuals, *such as Eichmann*, who designed, implemented, and carried out criminal policies should be held accountable for their actions.

fusal to hold Eichmann's abductors liable. Israel implied in its correspondence with Argentina and during the United Nations debate that Eichmann's kidnapping was an act of the Jewish people and of the State of Israel that could not be morally or legally judged by other nation-states.

### VIII. CONCLUSION

Adolf Eichmann was abducted by Israeli agents from Argentina in violation of Argentine sovereignty. He then was prosecuted by the State of Israel (which was not formally recognized as a State until 1948) for acts Eichmann committed in Europe between 1938 and 1944. He was tried before a tribunal consisting of three Jewish judges under a retroactive law for "crimes against the Jewish people." Eichmann, the first defendant ever charged with this specific offense, was convicted on all fifteen counts, sentenced to death and executed. Virtually all legal commentators agree that Eichmann's trial and the Israeli Courts' rulings were in accordance with international law.<sup>172</sup>

International law provided the Israeli Courts with various principles and fictions with which to legally excuse or justify the abduction and facilitate the trial. International law was thus used as a vehicle for the intellectual legitimization of the self-interested acts of the State of Israel.<sup>173</sup>

The rule of international law will only result in expanded protections for individual human rights when the traditional state-based approach of international law is replaced by a jurisprudence which views State interests as secondary to individual rights. A necessary step in the development of an individual-based international jurisprudence is the

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172. The most notable exceptions are Y. ROGAT, *supra* note 68; P. PAPADATOS, *supra* note 75; Woetzel, *The Eichmann Case in International Law*, 1962 CALIF. L. REV. 671; Silving, *In re Eichmann: A Dilemma of Law and Morality*, 55 AM. J. INT'L L. 307 (1961).

173. The relativity of international law and norms can be illustrated by altering the facts of the Eichmann trial. The actions of a hypothetical State responsible for the abduction, imprisonment, trial, and execution of a hypothetical defendant may be labelled as criminal and condemned by the international community and by legal scholars. Consider: (a) the abduction, imprisonment, trial, and execution of high United States Embassy officials by a revolutionary regime that charges the embassy officials with involvement in torture, training of security police, surveillance of the civilian population, espionage, and interference in the domestic affairs of a foreign State. (b) The abduction, imprisonment, trial, and execution of the head of the South African police by a radical African state which charges the Police Chief with complicity in the international crimes of apartheid and genocide. (c) The abduction, imprisonment, trial, and execution of a former high official in the United States Government by Vietnam which charges the former official with "war crimes" and "crimes against humanity" (having been involved in the United States' bombing, pacification, and defoliant programs during the Vietnam War). (d) The abduction of the "Grand Dragon" of the Ku Klux Klan by a radical African State which charges the "Grand Dragon" with the international crime of inciting to racial hatred and with conspiracy to deny the civil rights of Black Americans.

establishment of a viable international mechanism for prosecuting "international crimes." Otherwise, the enforcement and interpretation of international law will continue to depend on the vagaries of international politics.<sup>174</sup>

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174. See Kutner, *World Habeas Corpus and International Extradition*, 41 U. DET. L.J. 525 (1963); Kutner, *World Habeas Corpus: A Legal Absolute for Survival*, 39 U. DET. L.J. 279 (1962). See generally, Falk, *Theoretical Foundations of Human Rights* in THE POLITICS OF HUMAN RIGHTS 65 (P. Newberg ed. 1980).