THE EICHMANN CASE

THE Israeli announcement that Karl Adolph Eichmann was to stand trial in Israel for his part in the liquidation of the Jews during the Second World War raises ethical, political and legal problems.

It may well be that Israel has many moral grounds for seeking justice against this "enemy of the Jewish people." This paper will not, however, examine such claims, nor is it concerned with the Security Council discussion of the Argentine-Israel dispute consequent upon Eichmann's removal from Argentina and his transportation to Israel. It is true that the speeches in the debate were full of legal argument, with constant reference to the rights of both states in international law, and with some representatives expressing the view that the Israeli apology constituted sufficient reparation. The vote of the members of the Council, however, was not based on legal considerations. The Security Council is a political body, not a court of law. Its members are states represented by political officials who cast their votes in accordance with the instructions they receive from their foreign offices, and these instructions are based on the political motivations of the state concerned.[1] Similarly, it was political convenience which led Israel and Argentina eventually to announce that, in accordance with the resolution of the security council, they regarded the incident as closed.

In this paper only two aspects of the legal problems involved will be examined. First, there is the issue of the forcible removal of an individual from one state in order that he may stand trial in the territory of another. Secondly, there is the question of the claim by a state to exercise jurisdiction over an alien for crimes committed abroad against individuals who did not possess the nationality of the state which seeks to try the alleged criminal.

ABDUCTION

International law recognises that every state is completely sovereign within its own territory. This sovereignty, normally speaking, is only limited by treaties regulating specific issues, or by customary law concerning such matters as the immunity from jurisdiction of diplomatic representatives or foreign state organs. A state is therefore entitled to give asylum to those who seek it, or to admit only such aliens as it may feel inclined to allow into its territory. Generally, asylum to an alleged fugitive criminal is only restricted in accordance with the terms of an extradition treaty between the

[1] See, *e.g.*, the Joint Dissenting Opinion on *Admission of a State to Membership in the United Nations, I.C.J. Reports 1948*, p. 82, at p. 85.

state of refuge and the demanding state,[2] or by a specific agreement, such as that relating to the surrender of named war criminals after the Second World War.[3] Similarly, it is only when special agreements exist that aliens are admitted into a state without visas.[4] Even then, the states concerned normally retain the right to exclude any intending visitors whom they consider to be undesirable.

When private individuals smuggle their way into a foreign state they may well be breaking that state's laws, but their action does not involve the international responsibility of their home state. If, on the other hand, the aliens were acting with the connivance or on the initiative of their home state, the international responsibility of that state would be involved if any breach of the local law was intended to be the result of the incursion. It is obvious, of course, that the kidnapping of a national, or of a refugee alien, would constitute such a breach of law. In the latter part of the nineteenth century and during the early years of the twentieth century such kidnappings were not unknown between the United States and Mexico and even between the United States and the United Kingdom.[5] Perhaps the most famous of such international kidnappings is that of Herr Jacob-Salomon by German agents from Switzerland in 1935.[6]

Should the kidnapping be purely the result of private enterprise, the state from which the individual had been abducted would have to seek its remedy by requesting the surrender of the kidnappers from the state to which they had gone, and at the same time to request the return of the victim. There would be a legal obligation to surrender the kidnappers only if there were an extradition treaty, specifying kidnapping as an extraditable crime, between the two countries concerned.[7] In so far as Eichmann is concerned, it must be pointed out that although an extradition treaty has been signed between Israel and Argentina, it has not been ratified and therefore does not apply. Even if it were to be ratified today, it is likely that it would be clearly provided by the two states that the treaty was not retroactive so as to apply to offences committed before it came into effect.

[2] See Green, "Recent Trends in the Law of Extradition," 6 *Current Legal Problems*, 1953, p. 274.

[3] See Resolution of the General Assembly, adopted unanimously, February 13, 1946 (H.M.S.O., *History of the United Nations War Crimes Commission*, 1948, p. 411) and that of October 31, 1947, adopted by 42 votes to 7 (*ibid.*, p. 413); also Green, p. 289.

[4] Exchange of Notes, October 1, 1958, between the governments of the United Kingdom and Morocco for the mutual abolition of visas and passports, Cmnd. 633 (1959).

[5] Some of these cases are discussed in Hackworth, *Digest of International Law*, 1941, vol. 2, pp. 309–312 and 320.

[6] Preuss, "Kidnapping of Fugitives from Justice on Foreign Territory," 29 *American Journal of International Law*, 1935, p. 502.

[7] See *e.g.*, comments by United States Supreme Court in *Ker* v. *Illinois* (1886) 119 U.S. 436. See, further, the refusal of an Argentine court to extradite Jan Durcansky as there is no treaty between Argentina and Czechslovakia, *The Times*, July 22, 1960.

In the event of there being no extradition treaty between the states involved, it is a matter of discretion, sometimes described as comity, for the addressee of the demand to decide whether to comply with the request or not. Should the kidnappers be aliens, difficulties will arise. Normally, expulsion orders against aliens are effected by returning the aliens concerned to the state of which they happen to be nationals, and this will probably not be the state from which they removed their victim. If the kidnappers have returned to their home state, the addressee may be completely unable to comply with the request if no extradition treaty exists. It is not usual for a state to be able to deport its own nationals—in fact, many extradition treaties expressly so provide [8]—and any attempt to do so would probably result in proceedings similar to habeas corpus.

The victim of the kidnapping would himself not be protected by an extradition treaty, for this only applies to the surrender of an alleged fugitive from justice. There might be an obligation upon the state to which the victim has been brought to rescue him from his kidnappers. This does not mean, however, that there is an obligation to return him to the country from which he has been brought. In fact, after he had been "rescued" he would be liable to arrest and trial in the country in which he now finds himself. In *Ex p. Elliott* an attempt was made by the applicant, a deserter who had been arrested in Brussels by British military police in the presence of Belgian police officers, to secure his release on habeas corpus on the ground that he had been wrongly arrested. Lord Goddard dismissed the application, pointing out that "if a person is arrested abroad and he is brought before a court in this country charged with an offence which that court has jurisdiction to hear . . . he is charged with an offence against English law, the law applicable to the case. . . . We have no power to go into the question, once a prisoner is in lawful custody in this country, of the circumstances in which he may have been brought here" [9]

The situation is entirely different when marauders operate at the instance of their state, or are on a mission from their state. Here it must be remembered that in his first statement after it became known that Eichmann was in Israel, Prime Minister Ben-Gurion claimed personal credit for the operation. Later, he disclaimed all personal knowledge and described the affair as one of purely private initiative.

An invasion by state agents, whether by force of arms or not, of the territory of another state constitutes a breach of the sovereignty of that state and involves the responsibility of the state of which the offenders are agents. In the cases referred to above

[8] See United States-German Extradition Treaty, 1930, Art. 3, and *Valentine* v. *U.S., ex rel. Neidecker* (1936) 299 U.S. 5, for a discussion of a similar provision in the United States-French Extradition Treaty, 1909.

[9] [1949] 1 All E.R. 373, at pp. 376, 377.

between the United States and Mexico, as well as in the Vincenti case between the United States and the United Kingdom in 1920,[10] the normal practice was to terminate the proceedings against the kidnapped offender and, as a matter of comity, often to offer to return him to the state from which he had been brought and to extradite the kidnappers in accordance with the treaty, if their extradition should be requested. In 1886, however, the United States Supreme Court made it clear that protests against the exercise of jurisdiction arising from a kidnapping could not be made by the accused, but would have to be made by the state which considered itself wronged.[11]

Where an extradition treaty does exist, and the addressee declines to comply with the demand made upon it, or if it ignores the protests made when no treaty exists, the offended state may consider referring the matter to the International Court of Justice. The difficulty here is that the Court only possesses compulsory jurisdiction if the two states involved have accepted its jurisdiction by reason of declarations made under the "Optional Clause" (Article 36) of the Statute of the Court. While Israel has made such a declaration, Argentina has not. It would therefore be necessary for the two states to come to an express agreement to submit the case to the Court. In accordance with its Statute, the Court would be able to issue the equivalent of an injunction against Israel in the form of an Order prescribing interim measures of protection [12] and, by way of final judgment, could order the return of the kidnapped individual in order to re-establish the *status quo ante*, which is the normal purpose of international judicial process when a tort has been committed.[13] If, as a result for example of an execution carried out consequent upon a judicial sentence, the return of the fugitive were no longer possible, the Court could order reparation by way of damages instead.[14]

What has been said so far ignores the possibility that the state from which the abduction had taken place might itself have been in default. At the end of the Second World War the Government of Argentina announced its willingness to surrender for trial any Axis or Fascist war criminals seeking asylum within its territory.[15] In June 1960, however, Argentina declined to surrender such an individual at the request of the German Federal Republic.[16] One

[10] Hackworth, *loc. cit.*, p. 320.

[11] *Ker* v. *Illinois*, 119 U.S. 436—the accused had been kidnapped in Peru by a United States marshal.

[12] Statute, Art. 41.

[13] *Chorzów Factory Case* (1928), Permanent Court of International Justice, Series A, No. 17: "Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed" (p. 47).

[14] See Schwarzenberger, "Fundamental Principles of International Law," 87 *Hague Recueil*, 1955, p. 195, at pp. 353–354.

[15] *The Times*, February 8, 1945.

[16] *Ibid.*, June 9, 1960. See, also, the refusal by Judge Issaurale to order the extradition of Durcansky to Czechoslovakia, *ibid.*, July 22, 1960.

cannot ignore the fact that Germany was not a party to any such agreement, nor for that matter was Israel—unless it can be argued that it has succeeded to British rights in this connection. However, the undertaking was general, and intended to ensure that such offenders did not evade justice.

JURISDICTION

What has been described as Hitler's "final solution" of the Jewish problem has frequently been called genocide, and some of those who have commented on the Eichmann case have accused him of having committed this offence. Yet others have said that it was only because he had disappeared that he was not among those indicted before the International Military Tribunal at Nuremberg. The latter forget that Bormann was tried before that court *in absentia*, so that mere non-availability would not have inhibited jurisdiction. The accused at Nuremberg were the "Major War Criminals of the European Axis" "whose offences have no particular geographical location." [17] Eichmann's crimes had a definite location and were primarily committed at Auschwitz [18] so that, on this ground too, he was not strictly eligible for trial before this Tribunal.

As regards genocide, it was not until the General Assembly of the United Nations drew up its Convention in December 1948,[19] that an authoritative definition of this offence was evolved. Both Argentina and Israel have ratified the Convention and, by Article 7, it was agreed that genocide was not a political crime and, therefore, "the Contracting Parties pledge themselves in such cases to grant extradition *in accordance with their laws and treaties in force.*" [20] Even had there been such an extradition treaty in existence between the two countries, Israel would not have possessed jurisdiction to try Eichmann under the Convention. By Article 6 "persons charged with genocide . . . shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with regard to those Contracting Parties which shall have accepted its jurisdiction." The *locus* of Eichmann's alleged offences was certainly not the State of Israel, and, so far, there is no international penal tribunal in existence.

To reject this basis of jurisdiction against Eichmann does not amount to saying that Israel is unable to try him. In accordance

[17] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, August 8, 1945, Art. 1 (Cmd. 6903—1946).

[18] For an objective account of conditions in Auschwitz, see Castle, *The Password is Courage*, 1954, pp. 158 *et seq.* (The personal record of a British Warrant Officer.)

[19] Res. 260-C (III), December 9, 1948. See Robinson, *The Genocide Convention*, 1960, p. 146.

[20] Italics added.

with the normal principles of territorial jurisdiction, a state is entitled to exercise its jurisdiction over any person, alien or national, who has offended against its criminal law.

It has sometimes been said that a state is not competent by international law to try an alien for an offence committed abroad. Such an argument in so far as Eichmann is concerned is irrelevant. International law, in the absence of a treaty expressly creating individual rights, only recognises the rights of states.[21] To try an alien in circumstances alleged to infringe international law would constitute a wrong, not against the alien as such, but against the state of which he is a national. The theory of international law in such cases is that the wrong suffered by the alien is in fact an injury to his home state. It has never been suggested that Eichmann has given up or lost his German nationality. The only state, therefore, entitled to protest against the exercise of jurisdiction would be Germany. Israel only recognises the Federal Republic as a state and so the protest would have to come from Bonn. Far from the Federal Government showing any intention to lodge such a protest, the West German authorities have made known their complete willingness to tolerate a trial and to co-operate in any way that they are able.

In the normal course of events, a state will only try an alien for an offence committed abroad if the effects of the offence have been felt in the territory of the state seeking to exercise jurisdiction,[22] or if it is one of its nationals who has been the victim of the crime.[23] It has also been generally accepted that a state is entitled to try captured military personnel for war crimes committed against its nationals in enemy or allied territory and, in these circumstances, states even claim the right to exercise such jurisdiction if the victims possessed the nationality of their allies.[24]

It is, of course, possible for a particular state to pass special legislation to give its courts jurisdiction over aliens within its territory if they have committed any, or specific, offences abroad. In such cases, the state concerned runs the risk of finding itself charged with a breach of international law by the state of which the alien is a national as soon as the attempt is made to bring the accused to trial.[25] Legislation of this kind has in fact been passed in Israel. By this, authority is given to Israeli courts to try any Nazi or other person who, during the Second World War, "committed

[21] See *Molvan* v. *Att.-Gen., Palestine (The Asya)* [1948] A.C. 351.

[22] See *R.* v. *Godfrey* [1923] 1 K.B. 24, and *Joyce* v. *D.P.P.* [1946] A.C. 347.

[23] See Art. 6 of Turkish Penal Code, 1926: "Any foreigner who . . . commits an offence abroad to the prejudice . . . of a Turkish subject . . . shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey."

[24] *e.g., The Peleus Trial*, 1945, before a British war crimes tribunal, Cameron, *The Peleus Trial*, 1948.

[25] See the Cutting incident, United States and Mexico, 1886, Moore, *Digest of International Law*, 1906, vol. 2, pp. 228 *et seq.*

crimes against the Jewish People." Israeli courts must, like those in the United Kingdom, take the law as they find it. It is not part of their function to examine the policy behind the law or to assess the reasons which motivated the legislature in enacting such a law. From their point of view, therefore, jurisdiction over Eichmann would exist.

Although the decision of the Permanent Court of International Justice in *The S.S. Lotus* case,[26] 1927, has come in for much criticism on its application to the facts involved, and has now been dissented from in Article 11 of the 1958 Geneva Convention on the High Seas, it is still accepted on the general points of international law, particularly those concerning sovereignty, which were considered in the judgment. It has never been questioned, for example, that "restrictions upon the independence of states cannot be presumed. . . . Jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory. . . . It does not, however, follow that international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to states to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed states to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, *every state remains free to adopt the principles which it regards as best and most suitable*. . . . In these circumstances, all that can be required of a state is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."[27] In other words, broadly speaking, unless there is a clear rule of international law forbidding a state from pursuing a particular line of conduct, it is allowed to act in this way if it wishes.

There is at present no rule of international law forbidding Israel from trying Eichmann since he is at present in Israel. It may well be, however, that the legislation conferring jurisdiction upon the Israeli courts shows certain departures from traditional concepts of criminal jurisprudence. In the past, criminal jurisdiction has normally depended upon the presence of the accused at the time of

[26] Series A, No. 27.
[27] At pp. 18–19 (italics added).

the commission of the crime; or the nationality of the victim being that of the state exercising jurisdiction; or the accused possessing the nationality of that state; or the effects of the crime being felt within that state; or the accused having committed war crimes within the territory or against the nationals of an ally of the trying state; or on some other factor linking the accused or his offences with the state seeking to try him. In the Eichmann case, none of these tests, with the possible exception of the last if interpreted extensively, exists. The accused is an alien, who committed his offences abroad at a time before the state intending to try him had come into existence. Since Israel did not yet exist, it is difficult to assert that occupied territories in Central Europe were the territories of its allies. It is even more difficult to maintain that the victims possessed its nationality.

The problem of the nationality of claims [28] is one of the most important in the sphere of international responsibility and reparation for international torts. Basically, a state is only permitted to act on the international level on behalf of its own nationals. The right to act on behalf of deceased aliens is not one of the recognised exceptions to the nationality rule.[29] It is generally recognised that the individual who has suffered a wrong involving international responsibility must have possessed the nationality of the claimant state at the time of the injury. While there is no clear agreement as to how long this nationality must continue, there seems little doubt that it must still exist at least at the time that the claim is brought. If nationality is essential for a civil action to be brought by one state against another, there is even stronger ground for asserting that there must be some sort of nationality or *locus* link to permit criminal proceedings against an alien for an offence abroad. Since this tends to reflect the undefended position of stateless persons, it ought also to apply to those who died before the claimant state came into existence.

If the Israeli exercise of jurisdiction is in breach of international law, it is not Eichmann who is entitled to make the protest. International representations may only be made by states. The states in which the crimes were committed, especially Poland, and those of which the victims were nationals, have none of them protested at the Israeli claim to exercise jurisdiction. Further, none of them has really tried to secure the presence of Eichmann in order to bring him to trial. The right of Israel to link itself with the victims of the crimes may be somewhat tenuous in strict law, being based on the ground that, since Israel is a Jewish state created largely as a result of international sympathy arising from the Hitlerite persecution, Israel is entitled to represent Jews who have no nationality or who were the victims of Nazi oppression—a claim

[28] See, *e.g.*, Hurst, *Collected Papers*, 1950, p. 88, and Schwarzenberger, *International Law*, vol. 1, 1957, pp. 590-602.
[29] Schwarzenberger, *ibid.*, pp. 592-596.

that has been recognised by the Federal Republic of Germany [30] —even though they might have died as Polish citizens while Israel was still a British mandated territory. Nevertheless, if Israel had not expressed willingness to institute proceedings against him Eichmann would have got away scot free.

It would appear, therefore, that, in law, despite the appearance of the Israeli measure being an instance of retroactive criminal legislation, it is neither contrary to international law nor to the general principles of law recognised by civilised nations. The only action that may appear to be outside the law is the method by which the accused was obtained. As has been indicated, however, if the kidnappers were private individuals indulging in private enterprise, no international responsibility arises. If they were state representatives, then, should Israel decline to surrender Eichmann or his captors, any claim by Argentina could be expiated in the form of liquidated damages, but no such claim, it would appear, is likely to be lodged.

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[30] Agreement between Israel and the German Federal Republic, September 10, 1952 (*Documents*, Jerusalem, 1953; or German *Bundesgesetzblatt*, 1953, II, p. 37). See also Bentwich, "International Aspects of Restitution and Compensation for Victims of the Nazis," 32 *British Yearbook of International Law*, 1955–56, p. 204, and Robinson, "Reparation and Restitution in International Law as Affecting Jews," 1 *Jewish Yearbook of International Law*, 1948, p. 186.

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