

LEGAL ISSUES OF THE EICHMANN TRIAL

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"Kings and those who are invested with a Power equal to that of Kings, have a Right to exact Punishments, not only for Injuries committed against themselves, or their Subjects, but likewise, for those which do not particularly concern them, but which are, in any Persons whatsoever, grievous Violations of the Law of Nature or Nations."

Grotius, *De Jure Belli ac Pacis*, 2.20.40.1 (1625) (1738 Eng. transl. pp. 436-37).

There is no need, at the present time, to recount the fascinating tale of the way in which Adolf Eichmann, the prime mover in the inauguration and execution of Nazi Germany's concept of the "Final Solution" of the so-called Jewish problem,¹ was traced, abducted and brought to Israel.² From the point of view of the international lawyer examining the trial, this aspect of the Eichmann case is only important to the extent to which it raised fundamental problems of law in the course of the judicial proceedings against him.³ Nor is it necessary to pay attention to the political or emotional reasons that may have motivated Israel and its political leaders in holding the trial,⁴ or the prosecution in bringing evidence to explain the historical and sociological origins of anti-semitism.⁵ In fact, the judges expressly rejected such evidence and reasons in coming to their decision.⁶

INTERNATIONAL KIDNAPPINGS

However, there is one matter arising out of the recovery of Eichmann which, strictly, has nothing to do with Eichmann himself, though Dr. Servatius, his defense counsel, did maintain that the Israeli courts could have no jurisdiction since the accused was brought before the court as a result of what he alleged was a breach

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¹ See, e.g., Poliakov, *The Harvest of Hate* (1954) (Eichmann's name appears forty times in the index).

² See, e.g., Pearlman, *The Capture of Adolph Eichmann* (1961); Reynolds, *Minister of Death* (1960).

³ For an account of the legal problems involved in the kidnapping, see Baade, *The Eichmann Trial*, 1961 Duke L.J. 400; Green, *The Eichmann Case*, 23 *Modern L. Rev.* 507 (1960); Melo, *El Caso Eichmann y la Soberania Argentina*, 8 *Rev. Der. Int'l* 99 (1960); Silving, *In Re Eichmann: A Dilemma of Law and Morality*, 55 *Am. J. Int'l L.* 307 (1961).

⁴ Thus, Mr. Ben-Gurion is reported to have said: "[O]ne of our motives . . . is to make the details of his case known to the generation of Israelis who have grown up since the holocaust." *N.Y. Times*, Dec. 18, 1960, § 6 (Magazine), p. 62, col. 4.

⁵ See evidence of Professor Salo Baron, Professor of Jewish History, Columbia Univ., in Transcript of Trial of A.G., *Israel v. Adolf, Son of Adolf Karl Eichmann*, Crim. Case 40/61 (cited hereafter as Transcript—this is an uncorrected copy of the Transcript, made available by Dr. S. Rosenne, Legal Advisor, Ministry of External Affairs, Israel).

⁶ Transcript, Judgment, § 2, pp. 1-2.

of international law and no state should be allowed to take advantage of its own wrong-doing. It should be remembered, however, that as a counterpart to the principle *ex injuria jus non oritur* there exists the maxim *ex factis jus oritur*, to which may be attached the principle *summum jus summa injuria*.

Before considering the trial itself, it is therefore necessary to inquire whether Israel did break any rule of international law either with regard to the abduction or the mounting of the trial. In this regard the basic principle of international law is that what is not expressly forbidden is permitted. This was clearly laid down by the Permanent Court of International Justice in its judgment in the *S.S. Lotus*, which also concerned a problem of jurisdiction:

“Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

“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 . . . most suitable. . . .

“The Court therefore must, in any event, ascertain whether or not there exists a rule of international law limiting the freedom of States to extend the criminal jurisdiction

of their courts to a situation uniting the circumstances of the present case.”⁷

It cannot be denied that to exercise the power of arrest in foreign territory is to attempt to exercise one's jurisdiction. If the arrest has been made with the consent of the local sovereign there can be no breach of international law, and any right that may be involved will be that of the individual affected under the local law by way of some such process as *habeas corpus*.⁸ If there has been no such consent, then prima facie a breach of international law has been committed.⁹ This breach, however, only concerns the state which has effected the arrest and that in which the arrest has taken place. In so far as the person arrested is concerned, since the individual does not possess legal personality under international law,¹⁰ he is unable to appear before any international court and is reduced to pleading that the court which purports to try him has no jurisdiction because he is brought before it only as a result of a breach of international law. Such a plea was put forward in *Molvan v. Attorney General, Palestine*¹¹ when the Judicial Committee of the Privy Council pointed out that even so fundamental a principle of international law as the freedom of the seas¹² did not operate for the benefit of a ship as such, but only in the interest of the flag state.

Not every incursion into foreign territory involves a breach of sovereignty and of international law for which international reparation may be demanded. It is only those which result in state responsibility, and no state can be held liable for every act committed by its nationals. Otherwise it might be argued that an illegal immigrant committing a crime involves the responsibility of the state of which he is a national. Incursions by state organs or officials, or by individuals at the instigation of the state, would result in international responsibility. In so far as abduction is concerned the difference between the two types of action is well brought out in a comment by Secretary of State Adams in 1822 regarding the

⁷ Case of the S.S. "Lotus," P.C.I.J., ser. A, No. 10, at 18-19, 21 (1927).

⁸ See, e.g., procedure under (U.K.) Extradition Acts, 1870-1932 (33 & 34 Vict., c. 52, and 22 & 23 Geo. 5, c. 39).

⁹ "A person may be carried out of the country to answer for crime . . . only by the authority of the highest executive officials and in accordance with treaty provisions governing extradition. An unlawful arrest is merely an offense against the peace and dignity of the state; an unlawful carrying of a citizen beyond its boundaries to be dealt with by the laws of another state is a violation of the sovereignty of the former." *Collier v. Vaccaro*, 51 F.2d 17, 19 (4th Cir. 1931).

¹⁰ See Green, *The Individual and His Status in International Law*, 1 *Indian J. Int'l L.* 415 (1961).

¹¹ [1948] A.C. 351.

¹² Schwarzenberger, *The Fundamental Principles of International Law*, 87 *Hague Recueil* 195, 358 (1955).

removal of one Hooper from New York to Canada: "[A] communication has been made by the Canadian government to the British minister residing here, stating that the transportation of Mr. Hooper from within the State of New York into Canada was made entirely by citizens or persons residing in the State, in which no person subject to the Canadian government cooperated. Should this prove to be the fact, the only remedy for the violation of our jurisdiction appears to be by legal process within the State of New York against the offenders."¹³

Argentina's Dispute With Israel

When it became known that Eichmann had been taken from Argentina to Israel, the Argentine government charged Israel with having violated Argentine territory by an illegal exercise of authority therein. At first Israel maintained that Eichmann had left Argentina voluntarily, although this suggestion was later abandoned. Of far more importance was the statement that he had not been abducted by Israeli officials, but by "volunteers," only some of whom were Israeli citizens. Israel expressed regrets for this conduct, but drew attention to the surrounding circumstances which had motivated the abduction and maintained that these justified the act and the Israeli intention to bring him to trial. The Israeli explanation was met by an assertion by Argentina that her sovereignty had been violated, even if the individuals concerned had been private persons and Eichmann had voluntarily agreed to accompany them to Israel. It was further alleged that the expression of regret amounted to an admission of guilt, and that by the decision to detain and try Eichmann the Israeli government had assumed responsibility for the act. In asserting that Israel had acknowledged liability by its expression of regret, the Argentine government ignored the form of the note from Israel, which did not concede that there had been any breach of Argentine sovereignty: "If the volunteer group violated Argentine law or interfered with matters within the sovereignty of Argentina, the Government of Israel wishes to express its regrets."¹⁴ While it is clear that the abductors infringed Argentine criminal law, it may be argued that their incursion into Argentina was no more a breach of sovereignty than would be a flying visit by a bank robber. In view of this, the government of Israel was not acknowledging liability but, in accordance with international comity and the friendly relations of states which are in diplomatic contact with

¹³ 4 Moore, Digest of Int'l Law 328. See also 2 McNair, Int'l Law Opinions 288.

¹⁴ U.N. Doc. No. 5/4342 (1960). For a discussion of the diplomatic correspondence and the Security Council debate, see Silving, *supra* note 3.

each other, indicated its sorrow at the fact that Israelis had thus affronted Argentine dignity. In so far as the assertion that the assumption of criminal jurisdiction amounts to state responsibility, it is true that a court is a state organ and the state will certainly be liable if its judgment or proceedings amount to a denial of justice.¹⁵ On the other hand, although there have been many cases where abduction has led to diplomatic protests,¹⁶ there is little or no evidence, even where the abduction has been effected by public officials, for the institution of a trial to be considered as itself constituting a breach of international law, although the extradition of the kidnappers has sometimes been conceded.¹⁷

In fine, Argentina demanded reparations from Israel in the form of the return of Eichmann and the punishment of his kidnappers by Israel. In view of the fact that there was no extradition treaty in force between Argentina and Israel the Argentine authorities had no legal right to demand the surrender of the kidnappers; nor are they entitled to demand that a third state shall institute criminal proceedings against anyone within its territorial jurisdiction; nor, in the absence of treaty or some clear rule of customary law, have they any right to demand that a state shall not institute criminal proceedings against a person within its territory—a matter that, as has been indicated, has long been settled by the World Court.¹⁸

Israel rejected the Argentine demands and Argentina referred the issue to the Security Council under Article 33 of the Charter of the United Nations, which refers to "any dispute, the continuance of which is likely to endanger the maintenance of international peace and security." Israel, perhaps not surprisingly, maintained that a single breach of Argentine law by private persons could not be construed as constituting a danger to peace. During the debate that ensued, it became clear that no member of the Security Council was prepared to condone Eichmann's acts or deny that he should be tried for them, nor did Argentina assert that its right to protect Eichmann had been infringed or that any asylum granted to him had been violated. On the other hand, it became clear that if he were tried before an international tribunal in which represen-

¹⁵ *E.g.*, Chattin Claim (United States v. Mexico), U.S.-Mexican Gen. Claims Comm'n, 4 U.N. Rep. Int'l Arb. Awards 282 (1927).

¹⁶ See 2 Moore, Digest of Int'l Law 382; 2 Hackworth, Digest of Int'l Law 309-13, 320, 321.

¹⁷ See the Martinez kidnapping regarding private kidnapping, 2 Hackworth, *op. cit. supra* note 16, at 321, and Ker v. Illinois, 119 U.S. 436 (1886), in which the Supreme Court referred to the liability of a state official to be extradited for such a kidnapping. See also O'Higgins, *Unlawful Seizure and Irregular Extradition*, 36 Brit. Yb. Int'l L. 279 (1960).

¹⁸ See text accompanying note 7 *supra*.

tatives of eastern Europe participated, or by a court in one of the eastern European countries in which the extermination camps had been situated or whose nationals had been victims, it was extremely likely that the trial would be used to make political capital for the eastern side in the cold war and to mount a bitter attack upon the way in which former Nazis retained positions of authority in the Federal Republic of Germany. Since such allegations would not have been allowed to go by default and would have been countered by the *tu quoque*, the whole nature and purpose of the trial would have been changed.

The resolution adopted by the Security Council,¹⁹ with its tendency to find for both Argentina and Israel, shows something of the wisdom of Solomon. The Council affirmed that:

“[V]iolation of the sovereignty of a Member State is incompatible with the Charter of the United Nations, [and that] *repetition* of acts such as that giving rise to this situation would involve a breach of the principles upon which international order is founded creating an atmosphere of insecurity and distrust incompatible with the preservation of peace. . . . [Nevertheless], mindful of the universal condemnation of the persecuted of the Jews under the Nazis, and of the concern of the people of all countries that Eichmann should be brought to appropriate justice for the crimes of which he is accused [,] this resolution should in no way be interpreted as condoning the odious crimes of which Eichmann is accused [, the Council] declares that acts *such as that under consideration*, which affect the sovereignty of a Member State and therefore cause international friction, *may, if repeated*, endanger international peace and security [and] *requests* the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and rules of international law.” (Emphasis added.)

Since the Council expressly rejected any intention to condone “the odious crimes of which Eichmann is accused” and declared its awareness “of the concern of the people in all countries that Eichmann should be brought to appropriate justice” for those crimes, it is clear that it did not envisage his surrender to Argentina as being part of the “appropriate reparation” recommended. In international law, satisfaction for a breach may range from explanations to damages,²⁰ and since Israel had already ex-

¹⁹ U.N. Doc. No. S/4349 (1960); 7 U.N. Rev. 15 (1960).

²⁰ Bissonnette, *La Satisfaction comme mode de Reparation en Droit International* (1952).

pressed its regrets to Argentina, it is difficult to imagine what form of reparation the Security Council had in mind. The affront to Argentine dignity resulting from acts of private individuals—or even from state agents—could certainly not be greater than the infringement of Albanian sovereignty caused by British warships sweeping mines from Albanian waters without consent. Yet in the *Corfu Channel Case* Albania expressly declared her readiness to accept a statement that her sovereignty had been violated as appropriate satisfaction.²¹ In fact, the differences between Argentina and Israel were rapidly settled after the Security Council debate. Diplomatic relations between the two states had been interrupted, but on August 3, 1960, a Joint Communique was issued proclaiming that “the Governments of Israel and the Republic of the Argentine, imbued with the wish to give effect to the resolution of the Security Council of June 23, 1960, in which the hope was expressed that the traditionally friendly relations between the two countries will be advanced, have decided to regard as closed the incident that arose out of the action taken by Israel nationals which infringed fundamental rights of the State of Argentina,”²² and two months later full diplomatic relations were resumed.

The Position of Germany

The method of settlement adopted by the two states is important in that it removes any further claim Argentina might have possessed to protest against Eichmann's trial. This means that the only other country which could make such a protest is that of his nationality. Far from doing so, Germany announced her willingness to provide the prosecution with such documentary evidence in her possession as might prove useful,²³ and cooperated in the taking of affidavits from defense witnesses who feared that if they visited Israel to give evidence they might find themselves in the same straits as Eichmann. This fact is significant, for some of the critics²⁴ of the trial have made much of the Harvard Draft Convention on Jurisdiction with Respect to Crime.²⁵ Article 16 states that “in exercising jurisdiction under this Convention, no State shall prosecute . . . any person who has been brought within its territory or a place subject to its authority by recourse to

²¹ *Corfu Channel Case*, [1949] I.C.J. Rep. 4, 35.

²² Rosenne, 6,000,000 Accusers: Israel's Case Against Eichmann 210-11 (1961). This gives the opening speeches of counsel, the indictment and the Nazis Punishment Law.

²³ For suggestion that this is in accord with modern German view of invalidity of certain Nazi legislation, see Silving, *supra* note 3, at 342-45, and section entitled “*Ungerichtes Recht*” *infra*.

²⁴ Rogat, *The Eichmann Trial and the Rule of Law* 28 (1961).

²⁵ 29 Am. J. Int'l L. 435 (Supp. 1935).

measures in violation of international law or international convention. . . ." It goes on to provide, however, that jurisdiction may be exercised if "the consent of the State or States whose rights have been violated by such measures" has been obtained. As has been indicated, although Argentina never gave her consent to the trial of Eichmann, she was clearly estopped from protesting by reason of the agreement reached with Israel liquidating the incident. Further, Argentina was already under certain international obligations with regard to the surrender of wanted war criminals long before the Eichmann incident arose.²⁶ It is also relevant to note that in their commentary the draftsmen "frankly conceded that the present article is in part of the nature of legislation . . . [and] in Great Britain, the United States, and perhaps elsewhere, the national law is not in accord with this article in cases in which a person has been brought within the State or a place subject to its authority by recourse to measures in violation of customary international law."²⁷

By agreeing to co-operate with the Israel authorities, Germany gave her consent to the trial in so far as that was necessary. In fact, a member of the Federal German public prosecutor's department, whose principal task was investigating war crimes and crimes against humanity, declared that the Israeli court was trying Eichmann in a representative capacity, representing the legal powers vested in the Federal Republic.²⁸ There are, however, certain matters of German law which require consideration. In the first place, it was difficult for Germany to acquiesce in the abduction of a German citizen in circumstances where it might be alleged that a prosecution is merely a respectable way to portray political persecution, and there are some who have described the Eichmann trial as such.²⁹ The Protection of Liberty Act, 1951,³⁰ amended the German Penal Code so that "any person who, by ruse, threat or force, conveys another person to a place outside the territory to which this Act applies . . . thereby exposing him to the danger of political persecution . . . shall be liable to penal servitude for life [, although] if there are extenuating circumstances, the penalty shall be imprisonment for not less than three months." Further, German nationals enjoy a legal right to diplomatic protection as

²⁶ See Green, *Recent Trends in the Law of Extradition*, 6 Cur. L. Prob. 274, 289 (1953); *Political Offences, War Crimes and Extradition*, 11 Int'l & Comp. L.Q. 329, 345 (1962).

²⁷ 29 Am. J. Int'l L. 624, 628 (Supp. 1935).

²⁸ Transcript, Sess. 120, p. H.-1 (Dr. Servatius).

²⁹ For criticism based on the "political" significance of the trial, see Rogat, *op. cit. supra* note 24, at 4-5, 12, 16-19, 36-37.

³⁰ [1951] U.N. Y.B. on Human Rights 110.

against other states,³¹ and this right is enforceable before the administrative courts.³² Governmental action is, however, discretionary and the attempt made to compel the Federal Republic to bear the cost of Eichmann's defense failed.³³ It was held that legal assistance abroad being a matter of discretion, the Foreign Minister was entitled to conclude that the federal government's reputation would be substantially damaged if responsibility for the defense were assumed, and that the general interest must be considered first.

German governmental intervention could also be met by the plea of estoppel. By the German Penal Code, German criminal law applies to acts committed abroad by an alien, if the acts were punishable under the law of the place where committed, provided the offender is on German territory and is not extradited, although extradition would be permissible according to the nature of the act committed.³⁴ In the light of this, there is justice in the comment: "If Germany claims [the right] to try an Israeli Eichmann for offences committed in Israel, Germany cannot fairly object to Israel's claim to try a German Eichmann for offences committed in Germany."³⁵

The argument that the illegal means employed to bring the accused within the jurisdiction invalidated the trial was fundamental to the defense. It would have been simple for the Israeli court to adopt the approach that since it was obliged to apply the laws of the Knesset this was an end of the matter.³⁶ What it did, however, was to examine the problem in some detail, paying due attention to the practice of other countries.

IMPARTIALITY OF JUDICIAL TRIBUNALS

Before considering this aspect of the defense, it is as well to refer to another objection raised by Dr. Servatius. He contended that Eichmann could not receive a fair trial in Israel because of the emotional and political overtones which attached to it and be-

³¹ "German consuls . . . have to grant to German nationals . . . in all their affairs, counsel, advice and protection . . ." German Consular Ordinance § 1 (1867).

³² German Federal Constitution, Art. 19(4). See Geck, *Der Anspruch des Staatsbürgers auf Schutz gegenüber dem Ausland nach deutschem Recht*, 17 *Zeitschrift für Ausländisches Recht und Völkerrecht* 476 (1957) (cited in Baade, *supra* note 3, at 410).

³³ Eichmann v. Auswärtiges Amt. Bonn, Oberwaltungsgericht, Cologne (1961) (cited in Schwarzenberger, *The Eichmann Judgment*, 15 *Cur. L. Prob.* 248, 249 (1962)). For the dismissal of the appeal by the Munster Higher Administrative Court, see *The Times* (London), Nov. 1, 1961, § 1, p. 6, col. 7.

³⁴ German Penal Code § 1(4) (iii) (1871), as amended 1953 and 1957.

³⁵ Baade, *supra* note 3, at 420.

³⁶ Transcript, Judgment, § 10, p. 8.

cause the judges themselves might be prejudiced for the same reasons.³⁷ In view of the large number of Jews murdered in the course of the "Final Solution," the judges, being human, must have been emotionally involved. They were, however, trained judges who had grown up in a system that taught them to put any feelings of personal sympathy or involvement behind them, and unless judges become automata they must have personal feelings when hearing cases of a disgusting or horrifying nature, such as those of Heath (1946) or Haigh (1949).³⁸ It has never been suggested that an English judge should not be allowed to try a person charged with treason against the United Kingdom—although in 1962 an attempt was made to have Judge Lawton declare himself incompetent to try an accused who had been a prisoner while the judge's father was governor of the jail concerned³⁹—nor a Negro judge a Negro accused, or one accused of offenses against Negroes. Even Catholic judges sometimes administer justice in divorce cases, while on the international level judges have been known to find against their own state.⁴⁰ That a judge is able to put his personal feelings in proper perspective is well brought out by the way Judge Bucknill carried out his duties in the *Seddon* case (1912)⁴¹ when he discovered that the accused was a fellow mason.

The Eichmann case is not the first occasion that national judges have had to hear cases involving the rights of co-nationals against a foreign state, nor is it the first time that they have been aware of the danger that national sentiment might color their judicial approach. Thus, in the arbitration concerning indemnity under the Florida Treaty,

"[The commissioners] were deeply impressed with the delicacy of their situation. As American citizens they could but sympathize with their countrymen for the injuries they had sustained. . . . In all such cases, however, [they] have struggled to suppress every sentiment which citizens of a nation, the rights of whose people have been so extinguished, would naturally entertain; and, endeavouring to review these proceedings with the impartial eye of those utterly indifferent to the causes which produced them, the Commission has pursued this course."⁴²

³⁷ Rosenne, *op. cit. supra* note 22, at 179-81.

³⁸ Critchley, *Trial of Neville Heath* (1951); Dumboyne, *Trial of J.G. Haigh* (1953).

³⁹ *The Times* (London), Nov. 21, 1962. *But see Johnson v. Darr*, 114 Tex. 516, 272 S.W. 1098 (1925); Franck, *The Quest for Impartiality in Legal Systems*, 2 *Cur. L. & Soc. Prob.* 177, 182 (1961).

⁴⁰ See, *e.g.*, Lord McNair's opinion in *Corfu Channel Case*, [1949] I.C.J. Rep. 4, 36.

⁴¹ Young, *Trial of the Seddons* xxvi (1914).

⁴² 5 Moore, *International Arbitrations* 4512-13 (1898).

If the argument of the defense on this ground had been conceded, it would have been virtually impossible for war criminals to be tried anywhere. Further, it was expressly recognized in the Moscow Declaration of 1943 that war criminals would "be brought back to the scene of their crimes and judged on the spot by the peoples they have outraged."⁴³

It is true that one of the judges had, in an earlier case, made comments about Eichmann before he had been captured,⁴⁴ but no observer at the trial, and least of all defense counsel, has seen fit to make any criticism of the conduct of the judges. At the same time, it must be recognized that statements were made by leading Israeli personalities during the trial⁴⁵ which might easily have been treated as contempt of court in the United Kingdom. Care must however be taken not to assume that one's own juridical standards and practices are of universal application, and that any state not applying them falls below the standards of the rule of law. This is by no means true, and is in the same category as those who confuse the principles of law generally recognized by civilized nations, taking themselves as the acme of civilization,⁴⁶ with general principles of law recognized by civilized nations⁴⁷ which amount to rules of international law.⁴⁸ In fact, the principles of law differ so from civilized nation to civilized nation that it is almost true to say that the principle that murder is a crime and punishable as such is the sole one to qualify. This standard of civilization⁴⁹ is of particular importance as regards one aspect of the trial itself and relates to the law and rules of evidence. This problem, however, is best discussed when aspects of the Nazis and Nazi Collaborators (Punishment) Law of 1950⁵⁰ are analyzed.

It is not the intention here to discuss the course of the trial or the evidence that was presented. By and large, the details of the tragedy of European Jewry were well known long before Eichmann was kidnapped, and it was because of this knowledge that the kidnappers carried out their exercise. A long series of trials and personal records brought out the details of the horror, and as

⁴³ *History of the U.N. War Crimes Commission*, H.M.S.O. 107 (1948).

⁴⁴ Rosenne, *op. cit. supra* note 22, at 180.

⁴⁵ See statements by Rabbi Nurock, Member of the Knessett, on Martyrs' Day, April 13, 1961, *The Times* (London), April 14, 1961, p. 13, col. 5, and Mr. Ben-Gurion in Independence Day Broadcast, *id.*, April 21, 1961, p. 12, col. 6.

⁴⁶ *Cheni v. Cheni*, [1963] 2 Weekly L.R. 17, 30.

⁴⁷ Green, *General Principles of Law and Human Rights*, 8 Cur. L. Prob. 162, 177-78, 179-80, 183 (1955).

⁴⁸ I.C.J. Stat., Art. 38(c).

⁴⁹ Schwarzenberger, *The Standard of Civilisation in International Law*, 8 Cur. L. Prob. 212 (1955).

⁵⁰ Rosenne, *op. cit. supra* note 22, at 309.

early as the Nuremberg Trial itself Eichmann's role was indicated.⁵¹ The major difference between the earlier trials and that of Eichmann lies in the fact that the former were concerned with war crimes and crimes against humanity in general. From the point of view of the relevant tribunals, the Jewish holocaust was purely incidental. So much was this so, that the International Military Tribunal at Nuremberg expressly declared its inability to assume jurisdiction over offenses against the Jews, "revolting and horrible [though] many of these crimes were."⁵² At Jerusalem, on the other hand, the court was primarily though not exclusively concerned with Nazi Germany's Jewish program, and the accused was charged with anti-Jewish atrocities, not as a subsidiary to any other activities, but as bearing chief responsibility for their organization. The evidence given at the trial served to fill in the detail, providing the fullest account of the whole miserable operation, emphasizing how far Germany had sunk from any standard of civilization or the rule of law.

On the other hand, Eichmann's activities bear some resemblance to the behavior of an earlier German exterminator. During the American Civil War Henry Wirz had been responsible for ill-treating some 30,000 federal prisoners at Andersonville, and causing the death of one-third of them, by way of ill-treatment, exposure to cold, starvation, shooting, tearing to pieces by dogs, and medical experiments. Like Eichmann, Wirz gloated over his work and declared his intention to complete it regardless of the orders of his superiors. He boasted that "he would starve every damned Yankee that was there, [that] he was killing more Yankees than [General] Lee, [and] wouldn't stop for [Confederate] General Winder or any other general until he thought fit."⁵³

KIDNAPPING AND THE POSITION OF THE ACCUSED

In so far as Eichmann is concerned, the kidnapping raises problems involving both international and municipal law. As has already been seen,⁵⁴ questions in the field of international law relate only to Argentina and Israel and, as the court pointed out in its judgment, with the Argentine-Israeli settlement "there no longer subsisted any violation of international law. In these circumstances the accused cannot be presumed to be speaking on behalf of Argentina and cannot claim rights which that sovereign

⁵¹ Nuremberg Judgment, [1946] Cmd. 6964, pp. 62-64.

⁵² *Id.* at 65. See also Schwebel, *Crimes Against Humanity*, 23 Brit. Yb. Int'l L. 178, 204 (1946).

⁵³ Trial of Wirz, H.R. Exec. Doc. No. 23, 40th Cong., 2d Sess. 8, pp. 44, 145, 148 (1868).

⁵⁴ See text accompanying notes 10-12 *supra*.

state had waived.”⁵⁵ Here the court’s attitude is similar to that of Judge Bissonnette of Quebec:

“[T]o impose, through a judicial decision, [privileges] upon a State which does not claim any, would be casting a slur upon its dignity, its sovereignty, and, through a gesture as ungracious as unexpected, would elevate a simple suit to a degree of international importance and create, at least in theory, a diplomatic conflict contrary to the will of the executive power itself.”⁵⁶

As regards the breaches of municipal law, Eichmann’s position was equally weak. “It is an established rule of law that a person standing trial for an offence against the laws of the land may not oppose his being tried by reason of the illegality of his arrest or of the reasons whereby he was brought to the area of jurisdiction of the country.”⁵⁷ In taking this view the court was maintaining the *jurisprudence constante* of Palestine/Israel. In *Katz v. O.C., Polish Military Prison, Jerusalem*, Chief Justice Fitzgerald came “to the conclusion that, provided the Court Martial is properly constituted, and provided the accused, who is before it, is subject to its jurisdiction, the circumstances in which he was arrested and arrived before the Court are not relevant to the jurisdiction of the Court.”⁵⁸ When the court is not a military court but an ordinary civil court—and Eichmann was tried before the district court in Jerusalem—there is no problem concerning the constitution of the court and there is a presumption that the accused is subject to its jurisdiction by virtue of his presence. In such a case, when a party is liable to be detained on a criminal charge, the court will not inquire into the manner in which the capture was effected.⁵⁹ In the picturesque language of Lord Chief Justice Cockburn, “it would be said, ‘Nay, you are here, and you are charged with having committed a crime, and you must stand your trial. We leave you to settle with the party who may have done an illegal act in bringing you into this position; you settle with him.’”⁶⁰ The most recent statement on this matter to be made by an English judge was that of Lord Chief Justice Goddard in *Ex parte Elliott*⁶¹: “[W]e have no power to

⁵⁵ Transcript, *Judgment*, § 44, p. 41.

⁵⁶ *Rose v. The King*, [1947] 3 D.L.R. 618, 648. The word “privileges” has replaced “immunity” in the original.

⁵⁷ Transcript, *Judgment*, § 41, p. 37.

⁵⁸ *Katz v. O.C., Polish Military Prison, Jerusalem*, [1946] 11 P.L.R. 355, [1943-1945] Ann. Dig. 165, 167.

⁵⁹ *Ex parte Scott*, [1829] 9 B & C 446, 448 (Lord Tenterden, C.J.).

⁶⁰ *Rex v. Nelson and Brand* (cited by O’Higgins, *supra* note 17, at 285). See also *In re Walton*, [1905] 11 Ont. L.R. 94.

⁶¹ [1949] 1 All E.R. 373, 377. See also *In re Walton*, *supra* note 60; *La-Forest, Extradition To and From Canada* 30 (1961).

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. The circumstances in which the applicant may have been arrested . . . are no concern of this court."

The practice in the United States is the same. According to the *Corpus Juris Secundum*,⁶²

"[T]he manner in which accused is brought before the court . . . is ordinarily immaterial in so far as jurisdiction over him is concerned. . . . [T]he fact that accused has been illegally arrested or that he has by trickery, force . . . or without legal authority, or by any illegal means, been brought within the territorial jurisdiction of a state or federal court, does not oust the jurisdiction of that court. . . . Even if in any case there should be a conflict of jurisdiction between two courts, accused, who is before one court for trial, cannot take advantage of the fact that his presence has been illegally or improperly obtained."

This statement expresses a constant practice stemming from *Ker v. Illinois*⁶³ and culminating in *Frisbie v. Collins*,⁶⁴ and applies not only to conflicts between the jurisdictions of sovereign states, but also to conflicts involving American state jurisdictions. Moreover, the exercise of jurisdiction in such circumstances in no way involves a breach of the United States Constitution, for "due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."⁶⁵

In so far as an actual kidnapper himself is concerned, he may of course be tried for this offense if caught in the country from which the kidnapping has been effected. Furthermore, kidnapping is usually an extraditable crime and it would be open to the state of refuge to apply for the kidnapper to be extradited to it. This point is well illustrated by *Collier v. Vaccaro*:⁶⁶ "It is no defense to the crime of kidnapping that an accused may have thought that he had a right to arrest and carry the person arrested out

⁶² 22 C.J.S. *Criminal Law* §§ 144, 146 (1955).

⁶³ 119 U.S. 436 (1886).

⁶⁴ 342 U.S. 519 (1952).

⁶⁵ *Id.* at 522. See also *Hatfield v. Warden of State Prison*, 88 F. Supp. 690, 691 (E.D. Mich. 1950).

⁶⁶ 51 F.2d 17, 19, 20 (4th Cir. 1931). In fact the Department of State refused to extradite Vaccaro.

of the country or that he did not intend to violate the law. The gist of the offence is the forcible carrying out of the state; and where this intention is shown to have existed, it is immaterial that accused may have thought that he was acting within the law."

The right of an American court to try an accused who is before it is so extensive as to apply even though the accused has come within the jurisdiction under the protection of a safe conduct. In the *Wirz* case, the accused alleged that he was covered by the 1865 convention of surrender which permitted officers and men to return to their homes, without being disturbed by the authorities of the United States so long as they observed the local law. He further maintained that he had only surrendered in return for a promise of a safe conduct issued on behalf of General Wilson, at whose headquarters he was, "in violation of said promise and agreement, seized and put in close confinement." The court accepted the view of the Judge Advocate that:

"[I]f General Wilson sent for the prisoner for any purpose whatever, promising him a safe return, and afterwards discovered that he was guilty of having committed most atrocious crimes, he was fully justified in revoking the safe-guard by himself given, and taking immediate steps to bring the criminal to justice. A general always has the right to rescind his own order; and I think General Wilson would have found it difficult to answer to his superior officers if he had released from arrest, and allowed to return to his home, so great a criminal as the prisoner at the bar stands charged with being, rather than violate the promise set out in the plea. . . . [As regards the amnesty issued by the President,] the most that could, with any plausibility be claimed is that all acts of war committed by this prisoner as a belligerent, and coming within the usages of civilized warfare, may be considered as pardoned, but it cannot be admitted for one moment that anything short of a special pardon by the President of the United States, setting forth precisely the offences pardoned, can give exemption from trial for acts in violation of the laws and customs of civilized warfare, especially when they involve crimes so enormous and atrocious as those charged upon the prisoner here arraigned."⁶⁷

Safe conducts also figured prominently in the Eichmann case. The defense sought to show that Eichmann was not the senior executive that the prosecution maintained, and also wished to

⁶⁷ Trial of *Wirz*, *supra* note 53, at 13, 15.

cast doubt on statements made by other members of the Nazi hierarchy, not all of whom had been tried for war crimes, in which they placed major responsibility for the "Final Solution" upon Eichmann's shoulders. The intention was to indicate that many of these statements were perjured, having been made in an attempt to hide the responsibility and participation of the persons making them. In some cases the persons involved were known collaborators of Eichmann, whose whereabouts, while known to the defense, were not always known to the prosecution. Dr. Servatius wished to cross-examine these individuals, many of whom feared that if they went to Israel they were more likely to find themselves in the dock than in the witness box. That these fears were not unfounded was made clear by Attorney-General Hausner: "A man who committed a crime against the Jewish nation—and an enquiry will prove it—will be brought to justice in Israel if he comes within the boundaries of this country,"⁶⁸ and the court pointed out that it was unable to order the executive to promise safety to such persons.⁶⁹ On the other hand, the Attorney-General confirmed that in two cases, where he did "not know about crimes against the Jewish people," he was prepared to guarantee safe conducts, even though the persons concerned had been members of organizations which were regarded as criminal by Israeli law.⁷⁰ By Section 12 of the Nazis and Nazi Collaborators (Punishment) Law, under which Eichmann was being tried, prosecutions for membership of such organizations were proscribed after twenty years. In the light of the ruling in the *Wirz* case, however, it may be questioned whether the Attorney-General would have been bound by his undertaking if subsequent investigation showed that the persons concerned had committed crimes against the Jewish people, for in *Re Friston*⁷¹ Brett, M.R., specifically stated: "It is clear that there is no privilege from arrest upon a criminal charge."

Previous tribunals trying persons accused of atrocities have also been faced with the same problem. Senior officers of the Indian National Army were tried in 1946 with, among other offenses, murder and causing grievous bodily harm to Indian prisoners of war. In the major trial held in the Red Fort, Delhi,⁷² a number of Japanese military and governmental officials were brought by the prosecution on behalf of the defense, and none of these was subsequently held. On the other hand, Lord Schuster

⁶⁸ Transcript, Sess. 16, p. S-1.

⁶⁹ *Id.* Sess. 20, p. B-1.

⁷⁰ *Id.* Sess. 17, p. FF-1.

⁷¹ [1883] 11 Q.B.D. 545, 552.

⁷² See Ram, *Two Historic Trials in Red Fort 120-25* (1946); Green, *The Indian National Army Trials*, 11 *Modern L. Rev.* 47, 55 (1948).

has disclosed that in the practice of the Allied Military Administration in Austria similar leniency did not always operate.⁷³

SECONDARY EVIDENCE

Denial of the right of safe-conduct did not mean that Eichmann was unable to bring the evidence of his defense witnesses before the court. Under the Nazis Punishment Law, "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." Such a provision is virtually essential in war crimes trials, particularly when the accused is charged with mass offenses amounting to crimes against humanity. In such cases the best evidence against the accused often consists of official documents, not always signed by him, emanating from his national headquarters or other command offices. In addition, there are the statements, implicating the accused or describing events from which his offenses are alleged to have arisen, made by persons who have been tried and perhaps executed in earlier trials. Apart from this type of evidence, documentary material has occasionally been found in the ruins of concentration camps and ghettos, and this, together with photographs found on German soldiers, is often the only evidence of what occurred. The Attorney-General pointed out that whereas the occupied territories counted their casualties, in the case of the Jewish people it was a matter of counting survivors. To have insisted on verbal evidence only, would have meant that in many cases no evidence of any kind was possible. In others, it would have meant unnecessary reopening of old wounds and torture of the survivors.

This problem had already been faced by the Nuremberg Tribunal which tried Goering and the other major war criminals. By Article 19 of the London Agreement⁷⁴ establishing the Tribunal, it was provided that "the Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value." It was also enjoined to "take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes, and the records and findings of military or other Tribunals of any of the United Nations."⁷⁵ Similar provisions were embodied in the reg-

⁷³ Lord Schuster in reply to a question after delivery of lecture on *Military Government in Austria*, in [1947] J. Soc. Pub. T.L. 80.

⁷⁴ [1945] Cmd. 6903.

⁷⁵ *Id.*, art. 21.

ulations concerning war crimes trials issued by most of the United Nations during and after the Second World War,⁷⁶ and it may well be said that there is now a generally recognized principle that in such trials any evidence may be admitted that is likely to assist the court in ascertaining the truth. In any case, care must be taken not to assume a "holier than thou" attitude, in accordance with which the critic tends to regard any deviation from the law of evidence as he knows it as proof that the legal system practicing this deviation is a system which knows not the rule of law.⁷⁷ Furthermore, in the case of the Israeli law, the court was expressly enjoined to place on record the reasons which prompted it to allow any deviation from the normal Israeli law of evidence, and such deviations were allowed to both the defense and the prosecution.⁷⁸

Documents of the kind mentioned above can never serve the same purpose as a live witness who is subjected to examination and cross-examination. In order partially to fill the gap arrangements were made through the Israel Foreign Office for persons whose evidence was required by the defense to be examined by, for example, an examining magistrate in Germany, usually in the presence of a representative of each side.⁷⁹ It was not possible for the defense fully to invoke the Israeli Law of Legal Aid to Foreign States, 1956, for this requires full reciprocity. In accordance with this law and letters which passed between Israel and the German Federal Republic the latter would give Israel the same legal assistance as that state gave Germany, and German witnesses could be subpoenaed to appear before a foreign court, provided they received an amnesty and safe conduct for eight days. This could not apply however, as there was no reciprocity since the Attorney-General could not force an Israeli to appear in a foreign court.⁸⁰ In any case, the Attorney-General had already made it clear that no amnesty could issue for anyone wanted for crimes against the Jewish people, and where Von Thadden, Jewish *Referent* in the Foreign Office, was concerned, he specifically announced that this man would be arrested as soon as he set foot in Israel.⁸¹

⁷⁶ See, e.g., British Royal Warrant, Army Order 81/45, Reg. 8 (1945) (analyzed in Annex 1 to U.N. War Crimes Comm'n, 1 Law Rep. of Trial of War Criminals 105).

⁷⁷ For a similar attitude in connection with nullity of marriage, see *Cheni v. Cheni*, [1963] 2 Weekly L.R. 17.

⁷⁸ Transcript, Sess. 16 (pp. C-1, J-1), 20 (p. B-1 (actual ruling by court)), and 25 (pp. A-1, B-1); Judgment, § 140, p. 128.

⁷⁹ *Id.* Sess. 17, p. Dd-1.

⁸⁰ *Id.* at p. Cc-1.

⁸¹ *Id.* at pp. Ee-1, Ff-1.

RETROACTIVITY OF CRIMINAL LAW

Another plea put forward by the defense was based on the retroactivity of the Nazis Punishment Law. This law was passed in 1950 and provides for the punishment of crimes against the Jewish people, crimes against humanity, war crimes, certain specific crimes defined by the Criminal Code (provided they were directed against persecuted persons), and the crime of membership in "enemy organizations." These crimes had to be committed in "enemy territory," that is to say in Nazi Germany, an Axis country, or territory *de facto* under the control of Germany or an Axis Power during the Nazi regime, extending from January 30, 1933, to May 8, 1945, or during the Second World War, that is between September 1, 1939, and August 14, 1945. In the dates selected, the Israel Knesset differed from the Nuremberg Tribunal, which interpreted its constituent instrument as precluding it from considering any offense against humanity which was not directly connected with one of the other offenses over which the Tribunal had jurisdiction, and was of the "opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, [although] from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity."⁸² Since the Tribunal had jurisdiction over the offense of planning to wage aggressive war, it would have been feasible for it to have included within its competence atrocities committed, even against Germans, before the outbreak of hostilities. Courts established in accordance with Law No. 10 of the Control Council for Germany as well as the Tokyo Tribunal are not limited to the period of the Second World War—the Tokyo Tribunal and the American Military Commissions in the Far East went back to the Mukden incident in 1931.⁸³ In fact, although the Israel Tribunal had competence to go back to the accession of the Nazis, it found that it had not been proved that Eichmann had participated in mass persecution until his transfer to Vienna in 1938 and that he had not taken part in the "Crystal Night" pogrom in that city.⁸⁴

The Nazis Punishment Law also differed from the Nuremberg Tribunal in its view of membership of a criminal organization. While the latter did not consider that membership alone was suf-

⁸² Nuremberg Judgment, *op. cit. supra* note 51, at p. 65.

⁸³ See Schwelb, *supra* note 52, at 214-21.

⁸⁴ Transcript, *Judgment*, § 184, p. 164.

ficient to constitute personal liability,⁸⁵ by the Israeli law "any person who, during the period of the Nazi regime, in an enemy country, was a member of, or held any post or exercised any function in, an enemy organization is liable to imprisonment for a term not exceeding seven years." The definition of "enemy organization" is wider than that of criminal organization at Nuremberg. It includes those organizations declared criminal at Nuremberg, and also "any other body of persons which existed in any enemy country and the object of which was to carry out or assist in carrying out actions of an enemy administration directed against persecuted persons." This definition is wide enough to include the governmental administrations in each occupied territory. Eichmann was a member of criminal organizations in the Nuremberg sense, but even he was acquitted of membership before May 1940, because this was barred under the twenty years prescription clause in the Israeli law.⁸⁶

In view of the fact that the dates mentioned in the law all relate to the period before the establishment of the State of Israel it cannot be denied that *prima facie* the Nazis and Nazi Collaborators (Punishment) Law is retroactive, and this has been confirmed by the Supreme Court of Israel sitting as the Court of Criminal Appeals. In *Honigman v. Attorney-General*⁸⁷ it described this law as:

"... 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 the purpose which the State had in mind in enacting it—that these too should be extraordinary."

It is perhaps not surprising, therefore, that the law applies even to one who is a member of a persecuted group: "a person who was himself persecuted and confined in the same camps as his victims can, from the legal point of view, be guilty of a crime

⁸⁵ Nuremberg Judgment, *op. cit. supra* note 51, at p. 67.

⁸⁶ Transcript, Judgment, § 244, p. 197.

⁸⁷ [1953] Int'l L. Rep. 542, 543 (1951).

against humanity if he performs inhumane acts against his fellow prisoners. In contrast to a war criminal, the perpetrator of a crime against humanity does not have to be a man who identified himself with the persecuting regime or its evil intention.”⁸⁸

Dr. Servatius had been among the defending counsel at Nuremberg, and although the plea of retroactivity had been rejected by the International Military Tribunal as well as the other war crimes tribunals in Germany, he again maintained that retroactive criminal legislation is contrary to the very basis of the rule of law. In order to assist his argument Dr. Servatius referred to the Universal Declaration of Human Rights⁸⁹ and the European Convention on Human Rights,⁹⁰ both of which provide that “no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed.” This plea ignores the fact that the Universal Declaration of Human Rights is only a declaration of policy and not a binding legal instrument imposing obligations upon anybody.⁹¹ Furthermore, the European Convention only binds those States which are parties to it and these do not include Israel. It should also not be overlooked that both instruments recognize that if the act or omission amounted to a criminal offense under international law, the bar on retroactivity could not be considered to apply. In so far as war crimes *stricto sensu* are concerned, these have long been recognized as offenses against international law, and even if one discounts the resolution of the General Assembly⁹² affirming the principles of international law recognized by the Nuremberg Judgment in so far as other atrocities are concerned, there is little room for argument with the view of Judge Musmanno in the *Einsatzgruppen Case*:⁹³ “[N]o one can claim with the slightest pretense of reasoning that there is any taint of *ex post factoism* in the law of murder.”

Dr. Servatius himself recognized that “in circumstances of emergency there may be room for exceptional legislation. Exceptional legislation may also be just law if it has a just objective,

⁸⁸ Attorney General v. Enigster, [1952] Int'l L. Rep. 540, 542. See also arrest of Birenblatt charged as Jewish guard in Nazi camps, The Times (London), Feb. 5, 1963; *id.* April 1, 1963.

⁸⁹ [1948] U.N. Y.B. on Human Rights 467 (art. 11(a)).

⁹⁰ [1950] U.N. Y.B. on Human Rights 420 (art. 7(1)).

⁹¹ See, e.g., statements by British and Australian delegates during preparatory discussion, U.N. Doc. Nos. A/C.3/SR.164 p. 8 (Dec. 10, 1948), and A/PV.181 p. 11 (Nov. 24, 1948). See also comments by Mrs. Roosevelt, President of Drafting Commission, U.N. Doc. No. E/CN.4/SR.48 p. 7 (1948), and Prime Minister Atlee, House of Commons, *Hansard*, 460, H.C., col. 17 (Jun. 18, 1949).

⁹² Res. 95 (I), 1946-47 U.N. Y.B. 254 (1946).

⁹³ [1948] Ann. Dig. 656, 658.

but the exceptional law with which we are concerned has a punitive objective. The object of punishment should be the protection of the state itself and the protection of the citizens of the punishing state. This protection is achieved by restraining the criminal and restraining others who think to do like he does. But the punishment which this law presupposes cannot serve any of these purposes. The notion of revenge is making an appearance [and] the State of Israel has rejected the idea of revenge."⁹⁴ It is submitted, that here counsel for the defense shows a somewhat restricted view of the purpose of punishment and war crimes trials generally. He ignores the reasons for criminal jurisdiction ever being granted on a universal basis, as in the case of piracy, and implies that if an accused were successful in completely wiping a people from the face of the earth there would no longer be any reason to punish him, for there would no longer be any citizens to protect. This view perhaps explains counsel's comment that "humanity is under no danger from the accused. When Hitler's regime came to an end, he became a peace-loving citizen."⁹⁵ Apart from any need for emergency legislation to create a crime, Eichmann himself stated:

"[I] saw in the murder of Jews, in the extermination of the Jews one of the most hideous crimes in the history of mankind. . . . Already then I saw in this violent solution of the Jewish problem something illegal, something hideous and heinous. . . . For my work in assisting this programme I am guilty. This is quite clear. To this extent I certainly cannot abdicate from responsibility and I could not attempt to do this, because in legal terms I am certainly guilty of being an accomplice to this. This I see clearly myself and I accept this."⁹⁶

In view of the clear knowledge and realization of guilt indicated in these comments, it is surprising that Eichmann still found it possible to say that "legally I do not consider myself guilty. . . . Guilty in a human sense: Yes."⁹⁷ A similar attitude was shown by Georg Heuser at his trial in Germany in October 1962: "I feel myself partly Guilty but not in everything."⁹⁸

The Nazis and Nazi Collaborators (Punishment) Law did not create new offenses. What it did from the point of view of substantive law was to introduce a new nomenclature for long rec-

⁹⁴ Rosenne, 6,000,009 Accusers: Israel's Case Against Eichmann 182 (1961).

⁹⁵ *Id.* at 299.

⁹⁶ Transcript, Sess. 95, pp. V-1, W-1; Sess. 11, p. F-1.

⁹⁷ *Id.* Sess. 88, p. S-1.

⁹⁸ The Times (London), Oct. 16, 1962.

ognized offenses. It is not creating a new offense to describe mass murders of persons who are Jewish as crimes against the Jewish people. "The principle *nullum crimen sine lege* . . . is not an unalterable maxim of natural law,"⁹⁹ nor is it "a limitation of sovereignty, but is in general a principle of justice"¹⁰⁰ and as such must be balanced against other principles of justice for *summum jus summa injuria*.¹⁰¹ As was pointed out by The Netherlands Special Court of Cassation:¹⁰²

"[T]he principle that no act is punishable except in virtue of a legal penal provision which had preceded it, aims at creating a guarantee of legal security and individual liberty. Such legal interests would be endangered if acts as to which doubts could exist with regard to their deserving punishment, were to be considered punishable after the event. However, there is nothing absolute about that principle. Its operation may be affected by other principles whose recognition concerns equally important interests of justice. These latter interests do not permit that extremely serious violations of the generally accepted principles of international law (the criminal character of which was already established beyond doubt at the time they were committed), should not be considered punishable solely on the ground that a threat of punishment was absent."

RETROACTIVITY AND PUNISHMENT

Perhaps the chief innovation of the Israeli statute was to provide a court before which extremely serious violations of the generally accepted principles of law could be tried. Law does not require either a court or a sanction, although "where law exists a court will [inevitably] rise. Thus, the court of humanity, if it may be so termed, will never adjourn."¹⁰³ Numerous countries which had suffered German occupation found it necessary after the Second World War to pass legislation giving their courts jurisdiction to try war crimes, even though the courts had previously enjoyed no such jurisdiction or the criminal law had not expressly recognized the offense. Thus, by the Norwegian Constitution retroactive legislation is forbidden, while international law is not incorporated into national law as in integral part thereof. By the Law for the Punishment of Foreign War Criminals, 1946:¹⁰⁴

⁹⁹ *In re S*, [1947] Ann. Dig. 245.

¹⁰⁰ Nuremberg Judgment, [1946] Cmd. 6964, p. 39.

¹⁰¹ *Phillips v. Eyre*, [1870] 6 Q.B. 1, 23.

¹⁰² *In re Rauter*, [1949] Ann. Dig. 526, 543.

¹⁰³ *In re Ohlendorf*, [1948] Ann. Dig. 656, 665.

¹⁰⁴ Annex 1 to U.N. War Crimes Comm'n, 3 Law Rep. of Trial of War Criminals 81.

"[A]cts which, by reason of their character, come within the scope of Norwegian criminal legislation are punishable according to Norwegian law, if they were committed in violation of the laws and customs of war by enemy citizens or other aliens who were in enemy service or under enemy orders, and if the said acts were committed in Norway or were directed against Norwegian interests. . . . The above provision applies also to acts committed abroad to the prejudice of Allied legal interests or to interests which, as laid down by Royal proclamation, are deemed to be equivalent thereto." (Emphasis added.)

The Norwegian statute also provided for the death penalty in a number of instances in which the ordinary criminal law did not, and in *Public Prosecutor v. Klinge*¹⁰⁵ the defense contended that the statute and the penal provisions were unconstitutional as retroactive. Judge Skau, with whom most of the judges concurred, pointed out, however, that:

"[T]he claim of the Allied belligerent nations, including Norway, to exercise the right to punish war criminals became effective when the war crimes were committed; it was based on and circumscribed by the rules of international law regarding the laws and customs of war. The effect of the [legislation] is therefore merely to authorize the Norwegian courts . . . to make effective the already existing demand for punishment in conformity with the conventions concluded."

The Norwegian provision regarding punishment is of relevance in the Eichmann case. By the Israeli law the death penalty is provided for crimes against the Jewish people, crimes against humanity and war crimes. In 1954¹⁰⁶ Israel abolished the death penalty for murder and with it that section of the Criminal Code Ordinance which prescribed hanging as the mode of execution. This has led to the allegation that the death penalty was specially reintroduced to deal with Eichmann, providing yet further evidence of the retroactive character of the legislation.¹⁰⁷ In fact, this is not the case. When the Nazis Punishment Law was being discussed it was suggested that it provide the same penalty as for murder, but this suggestion was rejected by the Knesset which expressly stipulated the "death penalty." Problems arose, however, because:

"[I]n 1954 the Knesset abolished the death penalty for murder and provided that life imprisonment, 'and this pen-

¹⁰⁵ [1946] Ann. Dig. 262, 264.

¹⁰⁶ Code of Laws 5714, p. 74.

¹⁰⁷ See, e.g., Gollancz, *The Case of Adolf Eichmann* (1961).

alty only,' shall be passed for murder. But it was provided in the said Law that where a person is convicted of murder under § 2 (6) of the Law for the Punishment of Nazis and Their Collaborators, he shall be treated as offenders were treated prior to the abolition of the death penalty for murder . . . that is to say, he shall be sentenced to death without possibility of commuting that sentence. [The Attorney-General recalled this] to prove that the Knesset, even after abolishing the death penalty for murder, directed that the courts shall continue to impose this punishment and this punishment only, on those who committed murder in the time of the Catastrophe. The Knesset did not then concern itself with § 1 of the Law for the Punishment of the Nazis, seeing that it had abolished the death penalty for murder only, but did not abolish it generally with respect to the grave crimes for which the offender would have been liable to this penalty."¹⁰⁸

It is obvious that where a death penalty exists there must be some means for this to be carried out. As has been indicated, when the death penalty for murder was abolished, hanging was abolished too. As a result, when legislation was passed concerning the composition of a district court dealing with offenses involving the death penalty, the repealed section of the Criminal Code Ordinance was reinstated. This is not retroactive legislation. It does not even introduce a penalty greater than that which existed at the time the offense was committed, which would be contrary to both the Universal Declaration and the European Convention on Human Rights. What it does is to prescribe the means by which the existing penalty is to be carried out.

The court did not accept the Attorney-General's contention that the death penalty was obligatory. It pointed out that, whatever may have been the position originally, by the 1954 Law for the Amendment of the Criminal Law (Modes of Punishment), every penalty provided by law is a maximum penalty and therefore the measure of punishment is a matter for the court's discretion. In view of the grave character of the offenses of which Eichmann had been found guilty, the court felt that it had no option but to sentence him to death.¹⁰⁹ This was confirmed by the appellate tribunal, emphasizing that "our knowledge that any treatment meted out to the Appellant would be inadequate—as would be any penalty or punishment inflicted upon him—dare not move us to mitigate the punishment. Indeed, there can be no sense in

¹⁰⁸ Transcript, Sess. 120, p. B-1/2.

¹⁰⁹ *Id.* Sess. 121, p. A-1/2.

sentencing to death, under the Law for the Punishment of Nazis and Nazi Collaborators, one who killed a hundred people,¹¹⁰ while setting free, or merely keeping under guard and security, one who killed millions."¹¹¹

ISRAEL AND THE JEWISH PEOPLE

There is one further element in the Norwegian Law that is of relevance. It will be recalled that the Norwegian courts were given jurisdiction over acts committed by aliens abroad to the prejudice of Allied legal interests or interests deemed to be equivalent thereto. This means that the normal conditions for jurisdiction, namely, nationality of accused or victim, and location of the crime within the jurisdiction, were not considered as essential. It was enough for the royal proclamation to certify that interests equivalent to Allied legal interests had been injured. This departure from the normal conditions of jurisdiction is by no means unusual in war crimes trials. Thus, a British Military Court in Singapore sentenced Tomono Shimio to death by hanging for having unlawfully killed American prisoners of war at Saigon, French Indo-China.¹¹² Further, American Military Tribunals at Nuremberg frequently tried "persons who had been responsible for war crimes before that country had become involved in war."¹¹³ It has been suggested, in fact, that "if a neutral state should, by reason of the availability of the accused, witnesses, and evidence be the most convenient *locus* in which to try a war crime, there is no reason why that state should not perform that function."¹¹⁴ In fact, the British *Manual of Military Law* expressly states that "the courts, whether military or civil, of neutral States may also exercise jurisdiction in respect of war crimes. . . . War crimes are crimes *ex jure gentium* and are thus triable by the courts of all states."¹¹⁵ Such a view provides ample answer to the contention of Dr. Servatius when arguing the appeal: "The State of Israel has no authority to bring to book perpetrators of crimes against humanity; crimes which were committed in any territory under the sun. The State of Israel can only do it with regard to the crimes which were committed within its scope of jurisdiction—against its people."¹¹⁶

¹¹⁰ See, e.g., War Crimes Cases (Israel), [1951] Int'l L. Rep. 538.

¹¹¹ Transcript, Appeal Judgment, III, p. 14.

¹¹² Annex 1 to U.N. War Crimes Comm'n, 1 Law Rep. of Trial of War Criminals 106.

¹¹³ Baxter, *Municipal and International Bases of Jurisdiction Over War Criminals*, 28 Brit. Yb. Int'l L. 382, 391 (1951) (citing cases of Altstötter, Ohlendorf and Milch).

¹¹⁴ *Id.* at 392. See also Cowles, *Universality of Jurisdiction Over War Crimes*, 33 Calif. L. Rev. 177 (1945).

¹¹⁵ The Law of War on Land, pt. III, para. 637 (1958).

¹¹⁶ Transcript, Appeal, Sess. 1, p. N-1.

Despite defense counsel's implied recognition of the Israeli court's authority to try offenses against the Jewish people, which is in accord with the view expressed in the Moscow Declaration that war criminals should be brought for judgment "by the people they have outraged,"¹¹⁷ he did in fact challenge this head of jurisdiction too. Apart from stressing the fact that the alleged crimes were committed abroad by a person who was not an Israeli against victims possessing half the nationalities of Europe, Dr. Servatius made much of the fact that those victims who had died met their deaths before Israel came into existence and could therefore never have possessed its nationality, and that the war had terminated and the "Final Solution" failed before the state was created. For these reasons, he maintained that there were no recognizable grounds on which Israel's claim to exercise jurisdiction could be based. Counsel did not consider the fact that Israel was a Jewish state sufficient to give her authority to try offenses committed against co-religionists before the state was born:

"What is the Jewish nation? International law recognizes only the concept of a State and the people in that State; each State has the authority and competence to increase the privileges of its citizens as the State sees fit. It is the natural duty of the State to defend its citizens, but to expand the jurisdiction of the law of the State is contrary to international law. Since at the time the deed was committed the Jewish State did not exist, there could not have been committed a crime against this State, not even by means of a legal fiction. . . . It is also difficult to understand the contention of the Prosecution. . . . Why should this be regarded as a crime, the destroying of the paraphernalia of organised religion—this is not within the framework of international law."¹¹⁸

Dr. Servatius ignores the point brought out in the *Lotus* decision that a state's jurisdiction may be extended beyond ordinarily recognized limits if there is no rule of international law enjoining it, and that such a prohibitive rule must be clearly proved.¹¹⁹ He also overlooks the true nature of the offenses against the Jewish people with which Eichmann had been charged. These did not relate to "the destroying of the paraphernalia of organised religion." It is true that it was virtually impossible for orthodox Judaism to be practiced in the Nazi empire, but the charge was concerned not with this, but with the organized attempt to destroy the Jewish people which was inherent in the "Final Solution."

¹¹⁷ History of the U.N. War Crimes Comm'n 107 (1948).

¹¹⁸ Transcript, Sess. 114, p. H-1.

¹¹⁹ See note 7 *supra*.

Defense counsel did not agree with those who pointed out that the Israeli court was best qualified to try Eichmann because of his presence in Israel, the presence of survivors and the large number of witnesses of his activities, and the quantity of documents relating to the holocaust to be found there as a result of the activities of specially created research institutes. He contended that Germany as the country of the nationality of the accused as well as of many of the victims, as the *locus* of a number of the offenses and as the depository of many of the original documents, as well as the place of residence of most of the witnesses who refused to come to Israel, was the country most suitable to stage the trial. This argument, however, is not one that can be put forward by the defense, for it imputes to Israel an attempt to displace the jurisdiction of Germany. Such a complaint could only be made by Germany—or, subject to local modifications, by any of the other states interested in Eichmann's activities—and, as has been seen, instead of protesting, Germany was cooperating with Israel.

It cannot be denied that *prima facie* there is something attractive in Dr. Servatius's arguments concerning the date of Israel's establishment. On the other hand, it is necessary to examine how far it may be contended that, despite these historical factors, Israel had nevertheless a right to exercise jurisdiction over offenses committed against Jews before its creation in 1948.

Reference has already been made to the universality of jurisdiction over war crimes, and there is certainly a closer relationship between Israel and the Jews of Europe, many of the survivors of whom together with the dependents of the massacred reside in Israel, than there is between a neutral state and the victims of a war crime. Further, the purpose of the "Final Solution" was the total extermination of the Jewish people, first in Europe and later throughout the world. The "Final Solution" was extended to each occupied territory as it fell beneath the Nazi jackboot; attempts were made to persuade Germany's allies to participate so far as their own Jewish populations were concerned—there is a great deal in the documents presented to the court to indicate how, for example, Hungarian and Italian governmental resistance rankled with Eichmann and his colleagues; and even neutral nationals, including Argentinians, were sent to their deaths at Belsen.¹²⁰ That there was a yet closer connection between the "Final Solution" and Palestine as a Jewish state is clear from the statement made by the accused that "emigration to Palestine . . .

¹²⁰ Transcript, *Judgment*, § 154, p. 138.

does not meet with Germany's approval,"¹²¹ as well as the evidence indicating that the Mufti of Jerusalem told Eichmann "that Himmler had agreed to his request that a member of the accused's department should come to Jerusalem to serve as personal adviser to the Mufti, upon the latter's return to Jerusalem after the victory of the Axis Powers."¹²²

In the words of the Court:

"The people is one and the crime is one. The crime attributed to the accused is 'the killing of millions of Jews with intent to exterminate the Jewish people.' The Jewish population now residing in the State of Israel, or the Jewish *Yishuv* which lived in Palestine before the establishment of the State, too, is part of the Jewish people whom the accused sought . . . to exterminate. Although that part of the people was rescued, it was in danger of extermination, as the history of the World War shows. At all events, the extermination of European Jewry which was carried out with intent to exterminate the Jewish people was directed not alone against those Jews who were exterminated, but against the entire Jewish people, including the Jewish population. To argue that there is no connection is like cutting away a tree root and branch and saying to its trunk: I have not hurt you."¹²³

In view of its reasoning, it is not surprising that the Court found that Israel's "right to punish the accused derives . . . from two cumulative sources: a universal source (pertaining to the whole of mankind) 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 their existence."¹²⁴ This view of the situation was confirmed in the appellate judgment: "In the absence of a positive rule of international law banning criminal legislation with retroactive effect, and in the absence also of a moral justification for preventing the application of such legislation to the offenses which are the subject of this Appeal, it follows that the . . . contention . . . that the State of Israel had not existed at the time of the commission of the offenses and its competence to impose punishment therefor is limited to its own citizens is unfounded."¹²⁵

¹²¹ *Id.* § 155, pp. 140-41.

¹²² *Id.* § 156, p. 142.

¹²³ *Id.* § 35, p. 33.

¹²⁴ *Id.* § 30, p. 30.

¹²⁵ Transcript, *Appeal Judgment*, p. I-5.

ISRAEL—A SUCCESSOR TO PALESTINE?

There is another ground on which the claim to jurisdiction may rest. This depends upon the argument that although Israel as such did not exist at the time and could not, therefore, be a belligerent, it was in fact an enemy of Germany as a successor of the Mandatory of Palestine and entitled to all the privileges that would have enured to the United Kingdom as a belligerent had the mandate continued. This appears to have happened with colonial territories that became independent after 1945. Thus no question seems to have been raised as to the right of Cambodia, Indonesia, Laos and Viet Nam to sign the Japanese Peace Treaty in 1951.

Complete subrogation is unknown in international law.¹²⁶ Whenever a new state is created there is a measure of succession to the rights and duties of the previous sovereign,¹²⁷ although it is perhaps doubtful whether this goes so far as was considered by Fitzgerald, C.J., Palestine, who held in *Shehadeh v. Commissioner of Prisons, Jerusalem*¹²⁸ that the change from mandate status to independent republic in Lebanon was only a change in the form of government and did not affect the continued validity of the 1921 Extradition Agreement between the mandated territories of Palestine and Lebanon.

When Israel became a separate state continuing legislation was passed as a matter of urgency,¹²⁹ although even without this there was sufficient succession to avoid any legal hiatus or breakdown, and in *Forer v. Guterman*¹³⁰ the Tel Aviv District Court enforced an Order of the Privy Council which had been issued before the proclamation of independence, even though it did not reach the parties until after that date. Again in *Katz-Cohen v. Attorney-General*¹³¹ it was held that the Israeli courts were competent to try a resident for homicide committed before the state came into existence:

“[T]he sense of justice and the public welfare require continuity between the power of punishment of the former sovereign and the power of punishment of the new sovereign, and that this power shall be exercisable also in respect of crimes committed before the commencement of the new ré-

¹²⁶ 1 Schwarzenberger, *International Law* 166, 174 (1957); Schwarzenberger, *Manual of International Law* 81 (1960).

¹²⁷ O'Connell, *The Law of State Succession* (1956).

¹²⁸ [1947] *Ann. Dig.* 42.

¹²⁹ *Law and Administration Ordinance*, *Official Gazette*, No. 2, Supp. No. 1, p. 1 (1948).

¹³⁰ [1948] *Ann. Dig.* 58.

¹³¹ [1949] *Ann. Dig.* 68, 70.

gime. International law provides no authority against continuity. On the contrary, there is ample authority in favour of this continuity after a change of sovereignty, even without specific enactment."

Perhaps the best academic statement of the position in so far as Israel is concerned is that of Dr. Rosenne, Legal Adviser to her Foreign Ministry:

"[T]he municipal law previously in force within the territory will remain in force therein after a change of sovereignty, whether that change takes place as a result of cession or as a consequence of emancipation. The legal consequences of that common practice are that the law takes effect as though it were the municipal law of the new sovereign. He is presumed, in the absence of express enactment, to have enacted it as his own."¹³²

This would mean that 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.¹³³

To say that the law continues is not the same as saying that the state continues, and it was held in *Albohar v. Attorney-General*¹³⁴ that "the State of Israel . . . is not the successor of the Palestine Government. . . . There is no legal nexus having its origin either in a treaty between the two countries or in international law, between the former Mandatory Government and the State of Israel." Foreign states, on the other hand, do not appear to have been so certain as to the non-identity of the state and the mandatory. Thus by Law No. 54 of the Allied High Commission for Germany, the term "United Nations" is wide enough to include "a nation which has become independent after 8 May 1945 and whose territory at that date formed part of an original United Nation." While there can be no doubt that though "the intention of the mandates system [may have been] that mandated territories should be left outside the reach of hostilities . . . the mandatories did in fact use them as military bases during the Second World War"¹³⁵ and treated them in every way as though they were part of their territory. That this was the view of the Palestine courts in so far as foreign policy is concerned is clear from *Kidma Miriam*

¹³² Rosenne, *The Effect of Change of Sovereignty Upon Municipal Law*, 27 *Brit. Yb. Int'l L.* 267, 280 (1950).

¹³³ For a somewhat similar view of the rights of the United Kingdom, though without reference to the question of succession, see Stone, *The Eichmann Trial and the Rule of Law* 11 (1961).

¹³⁴ [1950] *Int'l L. Rep.* 94.

¹³⁵ Castrén, *The Present Law of War and Neutrality* 139 (1954).

*Abdal Mariam v. Filippo Crudelini*¹³⁶ when it was held that, "in the absence of any direction of the Mandatory to do otherwise," recognition of the King of Italy as Emperor of Ethiopia by the United Kingdom was effective for Palestine. Similarly, in the *Petition of Aljouny*¹³⁷ the District Court of Michigan expressly held that Palestine was not neutral: "It was governed by Great Britain as the mandatory power, and Great Britain was at war. . . . The industrial and political life of Palestine was geared to that of Great Britain as its mandatory in the war effort . . . and [in] December 1943 . . . Palestine was deleted from the [United States] list of neutral countries." Even the enemy regarded Palestine as a war theatre, and both Tel Aviv and Haifa were bombed.¹³⁸

This view of the belligerent status of Palestine and of Israel as a result thereof, was confirmed by the three Western Powers in 1950 in connection with their proposals for integrating Western Germany into NATO. In October they informed the government of Israel that they had decided "to take the necessary steps in their legislation to terminate the state of war with Germany. . . . [They] hope that other Governments, including that of Israel if it sees fit, will find it possible to take similar action . . . at about the same time. . . ." ¹³⁹ Accordingly, the British declaration terminating the war with Germany as of 4 p.m. on July 9, 1951, specifically included Israel, as successor to the Palestine mandatory government, among the States subscribing to the decision.¹⁴⁰ Germany takes a similar view, and in the *Palestinian Nationality Case*,¹⁴¹ it was held that "that part of Palestine which became the State of Israel took part in the war against Germany, by virtue of the fact that the United Kingdom was at war with Germany."

This discussion on the problem of succession may be closed with an extract from the Eichmann judgment:

"Had the Mandatory legislator enacted . . . an extraterritorial law for the punishment of war criminals . . . it is clear that the Israel Court would have been competent to try under such law offences which were committed abroad prior to the establishment of the State. The principle of continuity also applies to the power to legislate: the Israel legislator is empowered to amend or supplement the mandatory legislation retroactively by enacting law applicable to

¹³⁶ [1919-1942] Ann. Dig. 51 (1939). This decision should be compared with that of Dr. Lushington in *The Ionian Ships*, 2 Sp. 212 (1855).

¹³⁷ 77 F. Supp. 327 (1948); [1948] Ann. Dig. 693.

¹³⁸ Detroit News, Sept. 8, 1940; *id.* Jan. 28, 1943.

¹³⁹ Rosenne, *op. cit. supra* note 94, at 280.

¹⁴⁰ London Gazette (Supp.), July 6, 1951.

¹⁴¹ [1951] Int'l L. Rep. 55.

criminal acts which were committed prior to the establishment of the State. Indeed, this retroactive law is designed to supplement a gap in the laws of Mandatory Palestine.”¹⁴²

SUPERIOR ORDERS

It was perhaps only to be expected that Eichmann would put forward in his defense the plea of superior orders. In view of the fact that the Nazis Punishment Law expressly excludes those sections of the Criminal Code which recognize the validity of a defense based on lawful orders, the District Court in Jerusalem could not have accepted such a plea.

It is easy for critics to say that this is yet another example of retroactive legislation to deal with a particular type of case. Their view is only strengthened by reference to the fact that the Nuremberg Tribunal, too, was forbidden by the London Charter¹⁴³ from accepting the plea that “the Defendant acted pursuant to order of his Government or of a superior.” Such an approach to the problem, however, ignores both history and municipal criminal law.

As long ago as 1474 at the trial of Peter of Hagenbach at Breisach the accused pleaded before an international tribunal that he did “not recognize any other judge and master but the Duke of Burgundy from whom he had received his commission and his orders. He had no right to question the orders which he was charged to carry out, and it was his duty to obey. Is it not known that soldiers owe absolute obedience to their superiors?”¹⁴⁴ Although it might have been presumed that the knights who were among Peter’s judges might have been inclined to take into consideration the needs of military obedience, they rejected this defense. Similarly, in 1660, during the trials of the regicides, the plea was rejected when put forward by a soldier who commanded the guards at the King’s execution. He had maintained that all he did was as a soldier by the command of his superior officer, whom he must obey or die. The court held that this was no excuse, as the superior officer was a traitor as were all who combined with him, and where the command is traitorous the obedience is likewise traitorous.¹⁴⁵ In this case there is an indication of the awareness of the significance of knowledge of the unlawfulness of the act. The court pointed out that even a simple soldier must have known

¹⁴² Transcript, *Judgment*, § 38, p. 34.

¹⁴³ [1945] Cmd. 6903, art. 8.

¹⁴⁴ I Schwarzenberger, *International Law* 308-09 (1949).

¹⁴⁵ Axtell, [1660] Kelyng J. 13.

that it was unlawful to execute one's king or to participate in such execution.¹⁴⁶

The point of departure for the modern approach to this defense is the South African case of *Queen v. Smith*.¹⁴⁷ The accused was charged with shooting civilian prisoners during the Boer War and pleaded that he was acting in accordance with superior orders. In the course of his judgment Judge Solomon declared:

"[I]t is monstrous to suppose that a soldier would be protected where the order is grossly illegal; [but that he] is responsible if he obeys an order not strictly legal . . . is an extreme proposition which the Court cannot accept. . . . [E]specially in time of war immediate obedience . . . is required. . . . I think it a safe rule to lay down that if a soldier honestly believes he is doing his duty in obeying . . . and . . . the orders are not so manifestly illegal that he ought to have known they were unlawful, [he] will be protected by the orders. . . ."

This attitude to superior orders also applied to the German armed forces. By section 47(2) of the Military Penal Code of 1882 any member of the armed forces obeying a superior's order is punishable as an accomplice to a criminal act, if he knew that the order concerned an act which constitutes a crime according to either civil or military law—and this Military Penal Code remained valid throughout the Nazi regime. The significance of section 47 became clear in the judgment of the German Supreme Court arising out of the 1918 sinking of the hospital ship *Llandovery Castle*:¹⁴⁸

"Any violation of the law of nations in warfare is . . . a punishable offence so far as in general, a penalty is attached to the deed. The killing of enemies in war is in accordance with the will of the state that makes war (whose laws as to the legality or illegality on the question of killing are decisive), only in so far as such killing is in accordance with the conditions and limitations imposed by the law of nations. The fact that his deed is a violation of international law must be well known to the doer, apart from acts of carelessness, in which careless ignorance is a sufficient excuse. In examining the question of the existence of this knowledge, the ambiguity of many of the rules of international law, as

¹⁴⁶ A similar attitude in the case of treason may be seen in the address of the Advocate-General in the Indian National Army Trial. See Green, *The Indian National Army Trials*, 11 *Modern L. Rev.* 47, 53-54 (1948).

¹⁴⁷ 17 *So. Afr. Rep.* 561 (1900) (Cape). See also *Regina v. Werner*, 2 *So. Afr. L.R.* 828 (1947); [1947] *Ann. Dig.* 202.

¹⁴⁸ [1921] *Cmd.* 1450; *Cameron, The Peleus Trial* 180 (1948); [1923-24] *Ann. Dig.* 436.

well as the actual circumstances of the case, must be borne in mind, because in war time decisions of great importance have frequently to be made on very insufficient material. This consideration, however, cannot be applied to the case at present before the court. The rule of international law which is here involved is simple and is universally known [invulnerability of hospital ships]. No possible doubt can exist with regard to the question of its applicability. The court must in this instance affirm [the accused's] guilt of killing contrary to law."

During the inter-war years this decision was strongly criticized, particularly by those who believed in the need to maintain military discipline. Thus, in the first edition of his *International Law*¹⁴⁹ Oppenheim states that "in case members of forces commit violations ordered by their commanders, the members cannot be punished, for the commanders alone are responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy." In the first edition of his work published after the First World War the same statement appears, although there is an editorial note indicating that the contrary is sometimes asserted, but the law cannot require an individual to be punished for an act which he was compelled by law to commit,¹⁵⁰ and in the fourth edition by McNair this is described "as a rule of customary International Law."¹⁵¹ It is not until the fifth edition, the first to be edited by Lauterpacht, that any mention is made of the *Llandovery Castle*, which is referred to in a footnote, but is still regarded as not having affected the customary rule.¹⁵² In the sixth edition, and sixth edition revised, brought out by Lauterpacht in 1940 and 1944, there is a complete reversal of the previous view. It is now stated that:

"[T]he fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. . . . Undoubtedly, a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be ex-

¹⁴⁹ 2 Oppenheim, *International Law* § 253 (1st ed. 1906).

¹⁵⁰ *Id.* at 342 n.3 (3d ed. 1921).

¹⁵¹ *Id.* at 410 n.2 (4th ed. 1926).

¹⁵² *Id.* at 454 n.1 (5th ed. 1935).

pected to weigh scrupulously the legal merits of the order received. . . . However . . . the question is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity. . . ." ¹⁵³

This statement of the law is supported by a reference to the decision in the *Llandovery Castle*.

Lauterpacht recognized that this statement was a departure from the former position taken by Oppenheim, and states that "a different view has occasionally been adopted in military manuals and by writers, but it is difficult to regard it as expressing a sound legal principle." ¹⁵⁴ In explanation of the reference to "writers," he comments: "n.2. See, e.g., § 253 of the previous editions of this volume. . . . However, the great majority of writers is in favour of the view advanced in the text."

In so far as military manuals are concerned, while it is true that the German Military Penal Code imposed limitations upon the scope of the defense, the British and United States Manuals of Military Law were wedded to the principle of obedience to orders. Thus, the section on the *Law and Usages of Warfare on Land* in the 1914 edition of the British *Manual* stated:

"Members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their Government, or their commander, are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such orders if they fall into his hands, but otherwise he may only resort to other means of obtaining redress. . . ." ¹⁵⁵

The United States *Rules of Land Warfare* were to similar effect: "Individuals of the armed forces will not be punished for these offences in case they are committed under the orders or sanction of their governments or commanders. . . ." ¹⁵⁶ These provisions were however altered during the course of the Second World War and it was provided in both that the defense of superior orders could not constitute a valid plea in war crimes proceedings, although it was recognized that the plea might justly be taken into consideration in order to mitigate punishment.¹⁵⁷ The British amendment

¹⁵³ *Id.* at 452-3, and 453 n.2 (6th ed. 1944).

¹⁵⁴ *Id.* at 453.

¹⁵⁵ Para. 443. (Oppenheim was the joint author of this part of the Manual.)

¹⁵⁶ Para. 347.

¹⁵⁷ Para. 443 was amended by Amendment 34 (1944) and Change No. 1 of Nov. 15, 1944. The quotation from para. 347 was replaced by an addition

made it clear that the "question is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity." Similar provisions are to be found in the military law of France and the Soviet Union.¹⁵⁸

Much was made of the discrepancies between the different editions of the *Manual* and of the statements in the books by defense counsel in the *Peleus Trial*.¹⁵⁹ Counsel, however, ignored the fact that the opinions of writers are, in the words of Article 38 of the Statute of the World Court, only among the "subsidiary means for the determination of rules of law." This is equally true of a textbook which has been published by a government department. The statements in it are only authoritative if they coincide with rules of law, either as already clearly established or as understood by the judge in any particular case. Further, it is well understood in military circles that both the British and American Manuals are merely for the guidance of officers, and, as the United States Manual makes clear, "those provisions of the Manual which are neither statutes nor the text of treaties to which the United States is a party should not be considered binding upon courts and tribunals applying the law of war. However, such provisions are of evidentiary value in so far as they bear upon questions of custom and practice."¹⁶⁰

In view of this it is necessary to examine whether the unamended texts recognizing the validity of the defense of superior orders were evidence of custom and practice in the municipal law of the United Kingdom and the United States. As regards the former, reference has already been made to *Axtell's Case*, but lest this be regarded as an example of Restoration vengeance, it is worth while pointing out that Dicey was of opinion that "the Minister or servant of the Crown who . . . takes part in giving expression to the Royal will is legally responsible for the act in which he is concerned, and he cannot get rid of his liability by pleading that he acted in obedience to Royal orders. Now supposing that the act done is illegal, the Minister concerned in it becomes at once liable to criminal or civil proceedings in a Court of Law."¹⁶¹ This is in accordance with the statement in *Halsbury's Laws of England*:¹⁶²

to para. 345. Both the original and amended texts are found in Cameron, *op. cit. supra* note 148, at 147-52.

¹⁵⁸ Greenspan, *The Modern Law of Land Warfare* 491 (1959).

¹⁵⁹ Cameron, *op. cit. supra* note 148, at 110-11, 113-14.

¹⁶⁰ Rules of Land Warfare § 1 (1956 ed.).

¹⁶¹ Dicey, *The Law of the Constitution* 322 (1915) (the text is reproduced unchanged in the 1959 edition at 326).

¹⁶² 10 *Halsbury's Laws* §§ 541, 1169 (3d ed. 1961).

"The mere fact that a person does a criminal act in obedience to the order of a duly constituted superior does not excuse the person who does the act from criminal liability. . . . Soldiers and airmen are amenable to the criminal law to the same extent as other subjects. . . . Obedience to superior orders is not in itself a defence to a criminal charge." These comments must be read in the light of the decision in *Regina v. Trainer*:¹⁶³ "[I]n a criminal case an inferior officer must be held justified in obeying the directions of a superior, *not obviously improper or contrary to law*." (Emphasis added.) The significance of this principle in present day English law became clear in December, 1962, when a police officer pleaded guilty to attempting to pervert the course of justice in criminal proceedings. Acting on instructions, the constable had enlarged a hole in a door that he knew was to be inspected by magistrates. At his trial, Howard, J. said: "No order, even if it were given by any superior officer, to do what you attempted to do, can possibly excuse you trying to do it."¹⁶⁴

The position is similar in the United States. In the *Wirz Trial*,¹⁶⁵ in which the charges were closely similar to those brought against Eichmann, the Judge Advocate pointed out—and since the court found him guilty, it may be presumed that the Judge Advocate's reasoning was accepted:

"A superior officer cannot order a subordinate to do an illegal act, and if a subordinate obeys such an order and disastrous consequences result both the superior and the subordinate must answer for it. General Winder could no more command the prisoner to violate the laws of war than could the prisoner do so without orders. The conclusion is plain, that where such orders exist both are guilty. . . . Strongly as it may strike you that strict justice would require the punishment of the arch-conspirator himself . . . you cannot stop the course of justice or refuse to brand [the accused's] guilt as the law and evidence direct. . . . [The accused] executed the bloody work with an industry which was almost superhuman and with a merriment which would have shamed a demon. . . . There could be no collision where the subaltern was only anxious to surpass an incomparable superior. . . . If [the] accused still answer that, admitting the facts charged, he did these things in the exercise of authority lawfully conferred upon him. . . . I answer him in

¹⁶³ 4 F. & F. 105, 111 (1864).

¹⁶⁴ The Times (London), Dec. 15, 1962.

¹⁶⁵ Trial of Wirz, H.R. Exec. Doc. No. 23, 40th Cong., 2d. Sess., pp. 773, 774, 802 (1868).

the language of Lord Mansfield. . . .¹⁶⁶ 'In trying the legality of acts done by military officers in the exercise of their duty, particularly beyond the seas, where cases may occur without the possibility of application for proper advice, great latitude ought to be allowed, and they ought not to suffer for a slip of form, *if their intention appears*, by the evidence, *to have been upright*. It is the same as when complaints are brought against inferior civil magistrates, such as justices of the peace, for acts done by them in the exercise of their civil duty. There the principal inquiry to be made by a court of inquiry is, how the heart stood, and if there appear to be nothing wrong there, great latitude will be allowed for misapprehension or mistake. But, on the other hand, if the heart is wrong, *if cruelty, malice and oppression appear to have occasioned or aggravated the imprisonment, or other injury complained of, they shall not cover themselves with the thin veil of legal forms, or escape, under the cover of a justification the most technically regular, from that punishment which it is your province and your duty to inflict* on so scandalous an abuse of public trust.' (Emphasis added.)

The civil courts, too, have taken the same view of this defense. Thus, in *Riggs v. State*¹⁶⁷ it was held that "any order given by an officer to his private, which does not expressly and clearly show on its face, or in the body thereof, its own illegality, the soldier would be bound to obey, and such order would be a protection to him." American courts have also pointed out that "cases can be imagined where the order is so palpably atrocious as well as illegal that one ought instinctively feel that it ought not to be obeyed by whomever given"¹⁶⁸ so "he . . . cannot avoid liability on the ground of obedience to superior orders for any act which a man of ordinary sense must have known to be a crime."¹⁶⁹ The state of United States law as a result of these and other decisions is summarized in the *Corpus Juris Secundum*:¹⁷⁰

"[A] soldier who executes an illegal order is liable in damages in a civil action to any person injured or aggrieved by the execution of the order. . . . The rules of law as to the liability of a soldier for the execution of the orders of his superiors are the same in criminal as in civil cases; thus, he is not criminally liable for the execution of a lawful

¹⁶⁶ Wall v. M'Namara, 1 Term Rep. 537 (1779).

¹⁶⁷ 3 Cold. 85 (Tenn. 1866).

¹⁶⁸ McCall v. McDowell, 1 Abb. 212 (N.Y. 1887).

¹⁶⁹ Franks v. Smith, 142 Ky. 232, 134 S.W. 484, 491 (1911).

¹⁷⁰ 6 C.J.S. *Army and Navy* § 37 (1937). See also Hare, *Constitutional Law* 920 (1889); 1 Wharton, *Criminal Law and Procedure* 258 (1957); Annot., 135 A.L.R. 10, 37 (1941).

order; or one which is fair and lawful on its face; but *an order illegal on its face is no justification* for the commission of a crime." (Emphasis added.)

Israel, too, has adopted a similar approach to the defense of superior orders. In October, 1956, Israeli troops fired upon the Arab villagers of Kfar Kassem in Israel at the time of the outbreak of the Suez operations and, as a result, Israeli officers and men appeared before Judge Halevy, one of the members of the court which later tried Eichmann. In his judgment rejecting the plea, Judge Halevy said:

"Not mere formal illegality . . . nor the kind of illegality that is laboriously unearthed by legal experts, but *a flagrant and manifest violation of the law, a definite and incontrovertible unlawfulness apparent on the face of the order itself, the clearly criminal character of the order or the acts ordered, an unlawfulness glaring to the eye and repulsive to the heart*, provided the eye is not blind and the heart not stony and corrupt—that is the extent of 'manifest unlawfulness' required to release a soldier from his duty of obedience and make him criminally liable for his acts."¹⁷¹ (Emphasis added.)

In the light of these statements of the law as applied by ordinary courts when confronted with the defense of superior orders, there is no need to examine any of the numerous cases that have arisen since 1945 under emergency legislation dealing with the trials of war criminals. This is particularly so as Eichmann himself stated that he was aware that what he was doing was unlawful, but he was bound by his oath.¹⁷² The comments of the Federal German Supreme Court in 1961 are therefore applicable to him: "According to Article 47 (of the Military Penal Code) it is already sufficient if the subordinate—according to his ideas and concepts, through the processes of thought peculiar and familiar to him—has become aware that the act enjoined upon him is wrong."¹⁷³ This attitude of the German judiciary is also seen in the 1963 judgment of the Bonn Assize Court which "emphasized that the accused had supported the Nazi death machine, and for that reason could not plead obedience to higher orders. They had been clearly aware that the extermination of Jews was a crime."¹⁷⁴

Ungerichtes Recht

Closely akin to the rejection of superior orders as a defense is the view that Nazi law was *ungerichtes Recht*—wrongful law. In

¹⁷¹ Chief Military Prosecutor v. Melinki, 13 Pisakim Mehoziim 90 (1958); see also World Jewry (London), Jan. 1959 p. 10.

¹⁷² Transcript, Sess. 95, p. W-1; see text accompanying note 96 *supra*.

¹⁷³ Neue Juristische Wochenschrift, Feb. 23, 1961, p. 373.

¹⁷⁴ The Times (London), April 1, 1963.

the first place it is necessary to point out that the "final solution" was never embodied in a "law," and as Eichmann himself pointed out "the 'final solution of the Jewish question' . . . the putting to death was not law of the Reich. It was the order of the Führer . . . [and] in accordance with the legal conceptions of the time, which were commonly accepted, the words of the Führer had the force of law."¹⁷⁵ A similar view was taken by Dr. Servatius when arguing against the criminal liability of a group:

"The persecution of a group of people without proving their guilt, but only according to the inclination of the legislator is not admissible: this is precisely what Hitler did against the Jews—he dealt with them without issuing any law, without troubling the jurists; he regarded them as members of a criminal organization. It should not be possible to take this principle and elevate it to the rank of a law. No group or organization must be prosecuted collectively."¹⁷⁶

If the defense is prepared to argue like this in order to contest the legal character of the Israeli legislation on criminal organizations, it must be prepared to accept similar contentions directed against the "law" under which Eichmann purported to be acting.

It is true that in the common law the idea of a law which runs counter to a higher natural law being invalid is not acceptable,¹⁷⁷ although in *McCall v. McDowall*¹⁷⁸ it was conceded that an order—law—might be "so palpably atrocious . . . that one ought instinctively feel that it ought not to be obeyed." On the Continent, however, and particularly in Germany since 1945, it is accepted that legislator's law might have to give way before universally recognized principles of law. Even Dr. Servatius accepted that "not everything which a legislator decides is law. The power of legislation has its limits."¹⁷⁹ In fact, the present German position, as expressed in the decisions of the *Bundesgerichtshof*, has been summarized as follows: "Basically, the law required to be known is positive law . . . but that law is assumed to incorporate a minimum standard of morality and to be valid only to the extent that it conforms to certain basic conceptions of justice prevailing among civilized nations."¹⁸⁰

¹⁷⁵ Transcript, Sess. 11, p. D-1.

¹⁷⁶ *Id.* Sess. 114, p. C-1.

¹⁷⁷ See Austin, *The Province of Jurisprudence Determined* 185 (Library of Ideas ed. 1945).

¹⁷⁸ 1 Abb. 212 (N.Y. 1887).

¹⁷⁹ Rosenne, *6,000,000 Accusers: Israel's Case Against Eichmann* 297 (1961).

¹⁸⁰ Ryu & Silving, *Error Juris: A Comparative Study*, 24 U. Chi. L. Rev. 421, 463 (1956).

The legal philosopher who has done most to propagate the idea of *ungerichtetes Recht* is Radbruch:

"Preference must be given to positive law, duly enacted and supported by the authority of effective state power, even where the contents of such law are unjust and do not respond to demands of social utility, unless the contrast between the positive enactment and justice reaches so intolerable a degree that the enactment, being 'wrong law,' must yield to justice. . . . Where justice is not even sought, where equality which constitutes the core of justice is consciously denied in enacting positive law, there the statute is not merely wrong law; rather, it is not law at all."¹⁸¹

Radbruch's views, and the acceptance of them by the German courts, have been adversely criticised by, for example, Hart.¹⁸² In 1949 a German court sentenced a woman in respect of the illegal deprivation of liberty of her husband, resulting from her having reported him to the Nazis in accordance with a law which forbade statements detrimental to the Nazi regime. In the court's view, the Nazi statute "was contrary to the sound conscience and sense of justice of all decent beings." Professor Hart condemns the "unqualified satisfaction" with this decision as "hysteria," maintaining that candor would have been better served by the enactment of retroactive legislation. In his view, it would have been better to say with the Utilitarians that "laws may be law but too evil to be obeyed," than to attempt to say that they were not, and presumably never had been, law. Fuller, on the other hand, takes issue with these views of Hart.¹⁸³ He draws attention to the fact that some Nazi laws remained secret, and when faced with unpublished laws or amendments it was difficult to know what the law could have been. Further, in his view, "moral confusion reaches its height when a court refuses to apply something it admits to be law."

Perhaps Fuller's most telling point lies in his awareness of the moral dilemma which faced the German courts and any legal philosopher attempting to re-establish the rule of law in post-Nazi Germany: "Germany had to restore both respect for law and respect for justice. Though neither of these could be restored without the other, painful antimonies were encountered in attempting to restore both at once, as Radbruch saw all too clearly. Essentially

¹⁸¹ Radbruch, *Rechtsphilosophie* 335, 347 (1950).

¹⁸² Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593, 618-21 (1958).

¹⁸³ Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *Harv. L. Rev.* 630, 650-57 (1958).

Radbruch saw the dilemma as that of meeting the demands of order, on the one hand, and those of good order, on the other."¹⁸⁴

The courts which were faced with the dilemma in practice, apparently were unaware of the dilemma in theory. Thus, in a case in 1951 concerning the validity of Hitler's *Katastrophenbefehl* of March 1945, the Federal Supreme Court "specifically endorsed Radbruch's view that where a positive law altogether denied the principle of equality, it lost the character of law. It also dismissed the view of certain National Socialist jurists that any legally relevant declaration of Hitler which could conceivably be construed as a norm had the force of law. This the court described as 'a degrading self-abandonment of the members of the legal community in favour of an autocrat, which is not worth serious consideration from the point of view of the rule of law'."¹⁸⁵

As regards the view that *Führerbefehle* enjoyed the force of law, the Court of Appeal at Neustadt was most emphatic:

"The *Führerbefehl* of May 19, 1943, cannot form the basis of acquisition of German nationality. It is true that according to Article 1 of this Order all foreign nationals of German origin serving in the German *Wehrmacht* automatically acquired German nationality upon the promulgation of this Order, but the Order itself was devoid of legal validity. According to the Law of March 24, 1933, as subsequently extended, only the Government . . . and the Reichstag were entitled to enact rules having the force of law. The Führer and Chancellor had no such right to enact legislation."¹⁸⁶

Had Eichmann been returned to stand trial in Germany, as had been suggested by his counsel¹⁸⁷ among others, he would have found himself in a position in which the law he put forward as constituting the superior orders under which he acted was regarded as lacking legal validity. He had little cause, therefore, to object if the Israeli Court afforded him the same treatment he would have received from his national tribunals. Particularly is this important as the very acts with which he was charged had been condemned by the German courts:

"It is stated in the judgment of the Supreme Federal Tribunal (1 St/R563/51) that the expulsions of the Jews, the object of which was the death of the deportees, were a continuous crime committed by the principal planners and ex-

¹⁸⁴ *Id.* at 657.

¹⁸⁵ Friedmann, *Legal Theory* 311 (1960).

¹⁸⁶ Compulsory Grant of German Nationality Case, [1951] Int'l L. Rep. 247.

¹⁸⁷ Rosenne, *op. cit. supra* note 179.

ecutants, something of which all other executants should have been conscious, for it cannot be admitted that they were not aware of the basic principles on which human society is based, and which are the common legacy of all civilised nations. There is also a judgment of 1960 (BGH 1 St/R404/60, *Neue Juristische Wochenschrift*, 1961, 276 at 277, 278) which deals with the murder of mentally deranged persons on Hitler's orders. The judgment says that in 1940 at the latest it was clear to any person who was not too naive, certainly to any who were part of the leadership machinery, that the Nazi regime does not shrink from the commission of crimes, and that he who took part in these crimes could not contend that he mistakenly assumed that a forbidden act was permissible, seeing that these crimes violated basic principles of a rule of law."¹⁸⁸

There is one other point in this connection which merits mention. In so far as Eichmann's activities were conducted outside Germany in occupied territory, they had, even if protected by a Nazi law or order, to conform to the international law of military occupation. Where they went beyond the Hague Regulations, therefore, they were invalid, for "the decrees of an occupant are not enactments of a legitimate power, and they do not become incorporated into the national law or the national institutions."¹⁸⁹

* * *

Writing in 1758, Vattel stated that "while the jurisdiction of each State is in general limited to punishing crimes committed on its territory, an exception must be made against those criminals who, by the character and frequency of their crimes, are a menace to public security everywhere and proclaim themselves enemies of the whole human race. Men who by profession are poisoners, assassins or incendiaries may be exterminated wherever they are caught; for they direct their disastrous attacks against all Nations, by destroying the foundation of their common safety."¹⁹⁰ The *Eichmann* case is merely an application of this view of the *Law of Nations*. At the same time it is a response to the demand of that unknown Auschwitz poetess who wrote:¹⁹¹

"Our army will go forth skullbone and jawbone,
And bone to bone, a merciless line,
We, the hunted, the hunters, will cry out to you:
The murdered demand justice at your hands!"

¹⁸⁸ Transcript, *Judgment*, § 27, pp. 24-25.

¹⁸⁹ Decision of Court of Appeal, Liège (1951), 1 Am. J. Comp. L. 120 (1952).

¹⁹⁰ *Le Droit des Gens*, Liv. I, ch. XIX, § 233 (Carnegie transl. p. 93).

¹⁹¹ Rosenne, *op. cit. supra* note 179, at 167.