JUDICIAL DECISIONS

By Covey Oliver

Of the Board of Editors

Jurisdiction of Israel to try Eichmann—international law in relationship to the Israeli Nazi Collaborators (Punishment) Law

The Attorney-General of the Government of Israel *v.* Eichmann.[1] Criminal Case No. 40/61. Mimeographed, unofficial translation prepared by the Israeli Government for the convenience of the public.
District Court of Jerusalem. Judgment of Dec. 11, 1961.

Adolf Eichmann was abducted from Argentina and brought to trial in Israel under the Nazi Collaborators (Punishment) Law, enacted after Israel became a state and after the events charged against Eichmann during the Nazi era in Germany. Section 1 (a) of the law provides:

> A person who has committed one of the following offences—
> 1) did, during the period of the Nazi regime, in a hostile country, an act constituting a crime against the Jewish people;
> 2) did, during the period of the Nazi regime, in a hostile country, an act constituting a crime against humanity;
> 3) did, during the period of the Second World War, in a hostile country, an act constituting a war crime;
> is liable to the death penalty.

Counsel for Eichmann objected to the jurisdiction of the Court, *inter alia,* on grounds based on international law. [Excerpted opinion follows.]

. . . . .

8. Learned Counsel does not ignore the fact that the Israel law applicable to the acts attributed to the accused vests in us the jurisdiction to try this case. His contention against the jurisdiction of the Court is not based on this law, but on international law. He contends—

(a) that the Israel law, by inflicting punishment for acts done outside the boundaries of the State and before its establishment, against persons who were not Israel citizens, and by a person who acted in the course of duty on behalf of a foreign country ("Act of State") conflicts with international law and exceeds the powers of the Israel legislator;

(b) that the prosecution of the accused in Israel upon his abduction from a foreign country conflicts with international law and exceeds the jurisdiction of the Court.

[1] Opinion excerpted by Covey Oliver as to the international law issues considered.

9. Before entering into an analysis of these two contentions and the legal questions therein involved we will clarify the relation between them. These two contentions are independent of each other. The first contention which negates the jurisdiction of the Court to try the accused for offences against the law in question is not bound up with or conditional upon the circumstances under which he was brought to Israel. Even had the accused come to the country of his own free will, say as a tourist under an assumed name, and had he been here arrested upon the verification of his true identity, the first contention of Counsel that the Israel Court has no jurisdiction to try him for any offences against the law in question would still stand. The second, additional, contention is that no matter what the jurisdiction of the Israel Court is to try offences attributed to the accused in usual circumstances, that jurisdiction is in any case negated by reason of the special circumstances connected with the abduction of the accused in a foreign country and his prosecution in Israel. We will therefore deal with the two questions seriatim.

10. The first contention of Counsel that Israel law is in conflict with international law and that therefore it cannot vest jurisdiction in this Court, raises the preliminary question as to the validity of international law in Israel and as to whether in the event of a clash between it and the laws of the land, it is to be preferred to the laws of the land. The law in force in Israel resembles that which is in force in England. See Oppenheim (-Lauterpacht), International Law, 8th Ed., 1955 § 21 a, p. 39:

> "As regards Great Britain, the following points must be noted: (a) All such rules of customary International Law as are either universally recognised or have at any rate received the assent of this country are *per se* part of the law of the land. To that extent there is still valid in England the common law doctrine, to which Blackstone gave expression in a striking passage, that the Law of Nations is part of the law of the land."

But on the other hand (p. 41):

> "(c) English statutory law is absolutely binding upon English courts, even if in conflict with International Law, although in doubtful cases there is a presumption that an Act of Parliament did not intend to overrule International Law. The fact that International Law is part of the law of the land and is binding directly on courts and individuals does not mean that English law recognises in all circumstances the supremacy of International Law.
> (Note 3) It is of importance not to confuse, as many do, the question of the supremacy of International Law and of the direct operation of its rules within the municipal sphere. It is possible to deny the former while fully affirming the latter."

See also—*Croft v. Dunphy* [1933] A.C. 156 (p. 164):

> "Legislation of the Imperial Parliament, even in contravention of generally acknowledged principles of International Law, is binding upon and must be enforced by the Courts of this country, for in these Courts the legislation of the Imperial Parliament cannot be challenged as ultra vires (*Mortensen v. Peters*)."

And also—*Polites v. Commonwealth of Australia* (1945) 70 C.L.R. 60 (Annual Digest, 1943–1945, Case No. 61):

> "The Commonwealth Parliament can legislate on these matters in breach of international law, taking the risk of international complications. This is recognised as being the position in Great Britain. . . . The position is the same in the United States of America. . . . It must be held that legislation otherwise within the power of the Commonwealth Parliament does not become invalid because it conflicts with a rule of international law, though every effort should be made to construe Commonwealth statutes so as to avoid breaches of international law and of international comity."

As regards Israel, the Deputy President Justice Cheshin said in *Criminal Appeal 174/54* (10 Piske Din, 5, p. 17):

> "As regards the question of the adoption by the national law of the principles of international law, we may safely accept Blackstone's view in his Commentaries on the Laws of England, (Book IV, Chap. 5):
>
> 'In England . . . the law of nations . . . is . . . adopted in its full extent by the common law, and is held to be part of the law of the land . . . without which it must cease to be a part of the civilized world.'
>
> And that is the case in other countries such as the U.S.A., France, Belgium, and Switzerland, where the usages of international law have been acknowledged as part of the law of the land . . ."

With respect to statutory law, President Olshan said in High Court Case 279/51 (6 Piske Din 945, p. 966):

> "It is a well known rule that a local statutory law must be construed in accordance with the rules of public international law, if only its tenor does not postulate another construction."

And in Criminal Appeal 5/51 (5 Piske Din 1061) Mr. Justice Sussman said (p. 1065):

> "It is a well known rule that in interpreting the law, the Court shall endeavour, as far as possible, to avoid a clash between the national law and the rules of international law which are binding upon the State; but this rule is only one of the rules in interpretation. It holds good only where we are concerned with the common law. As regards statutory law, where the will of the legislator is clear from its wording, the will of the legislator must be enforced without regard to any contradiction between that statutory law and international law. . . . Moreover, the Courts of this country derive their jurisdiction not from the system of international law but from the laws of the land."

Our jurisdiction to try this case is based on the Nazis and Nazi Collaborators (Punishment) Law, *a statutory law the provisions of which are unequivocal.* The Court has to give effect to the law of the Knesset, and we cannot entertain the contention that this law conflicts with the principles of international law. For this reason alone Counsel's first contention must be rejected.

11. But we have also perused the sources of international law, including the numerous authorities mentioned by learned Counsel in his comprehensive written brief upon which he based his oral pleadings, and by the learned *Attorney-General* in his comprehensive oral pleadings, and failed to find any foundation for the contention that Israel law is in conflict with the principles of international law. On the contrary, we have reached the conclusion that the law in question conforms to the best traditions of the law of nations.

The power of the State of Israel to enact the law in question or Israel's "right to punish" is based, with respect to the offences in question, from the point of view of international law, on a dual foundation: The universal character of the crimes in question and their specific character as being designed to exterminate the Jewish people. In what follows we shall deal with each of these two aspects separately.

12. The abhorrent crimes defined in this law are crimes not under Israel law alone. These crimes which afflicted the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself ("delicta juris gentium"). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, in the absence of an International Court the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial. The authority and jurisdiction to try crimes under international law are *universal.*

13. This universal authority, namely the authority of the "forum deprehensionis" (the Court of the country in which the accused is actually held in custody) was already mentioned in the Corpus Juris Civilis (see: C. 3, 15, "ubi de criminibus agi oportet") and the towns of northern Italy had already in the Middle Ages taken to trying specific types of dangerous criminals ("banniti, vagabundi, assassini") who happened to be within their area of jurisdiction without regard to the place in which the crimes in question were committed (see *Donnedieu de Vabres:* Les Principes Modernes du Droit Pénal International, 1928, p. 136). Maritime nations have also since time immemorial enforced the principle of universal jurisdiction in dealing with pirates, whose crime is known in English law *"piracy jure gentium."* See *Blackstone,* Commentaries on the Laws of England, Book IV, Chap. 5 "Of Offences against the Law of Nations", p. 68:

> "The principal offences against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds . . . 3. Piracy."

p. 71:

> "Lastly, the crime of piracy, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke (3. Inst. 113) *hostis humani generis.* As, therefore, he has renounced all the benefits of society

> and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right by the rule of self-defence, to inflict that punishment upon him which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property."

See also *In re Piracy Jure Gentium,* [1934] A.C. 586 (per Viscount Sankey L.C.):

> "With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes by its own nationals wherever committed, it is also recognised as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but *hostis humani generis* and as such he is justiciable by any State anywhere."

14. *Hugo Grotius* had already raised in 1625 in his famous book "De Jure Belli ac Pacis" the basic question of the "right to punish" under international law, the very question learned Counsel submitted.

In Book Two, Chapter 20 "De Poenis" (on punishment) the author says *inter alia*:

> "Qui punit, ut recte puniat, jus habere debet ad puniendum, quod jus ex delicto nocentis nascitur."
> ("In order that he who punishes may duly punish, he must possess the right to punish, a right deriving from the criminal's crime.")

In the writer's view, the object of punishment may be the good of the criminal, the good of the victim, or the good of the community. According to natural justice, the victim may take the law into his hand, and himself punish the criminal, and it is also permissible for an innocent man to inflict punishment upon the criminal; but all such natural rights have been limited and restrained by organised society and have been delegated to the Courts of Law. The learned author here adds the important words (italics ours):

> "Sciendum quoque est reges, et qui par regibus jus obtinent, jus habere poenas poscendi non tantum ob injurias in se aut subditos suos commissas, sed et ob eas quae ipsos peculiariter non tangunt, sed in quibusvis personis *jus naturae aut gentium immaniter violantibus.*"
> ("It must also be known that kings and any who have rights equal to the rights of kings may demand that punishment be imposed not only for wrongs committed against them or their subjects but also for all such wrongs as do not specifically concern them, but *violate in extreme form,* in relation to any persons, *the law of nature or the law of nations.*")

And he goes on to explain:

> "Nam libertas humanae societati per poenas consulendi, quae initio, ut diximus, penes singulos fuerat, civitatibus ac judiciis institutis penes summas potestates resedit, non proprie qua aliis imperant, sed qua nemini parent. Nam subjectio aliis id jus abstulit."
> ("For the liberty to serve the welfare of human society by imposing penalties which had at first been, as already stated, in the hands of the individuals, has been exercised since the constitution of states and courts, by those with the supreme authority, not because they dominate others, but because they are subject to no one. For subjection to government has taken this right away from others.")

It is therefore the moral duty of every sovereign state (of the "kings and any who have rights equal to the rights of kings") to enforce the natural right to punish, possessed by the victims of the crime whoever they may be, against criminals whose acts have "violated in extreme form the law of nature or the law of nations." By these pronouncements the father of international law laid the foundations for the future definition of the "crime against humanity" as a "crime under the law of nations" and to universal jurisdiction in such crimes.

15. *Vattel* says in his book "Le Droit des Gens" (1758) Book I, Chap. 19, paragraphs 232–233, *inter alia:*

> "Car la Nature ne donne aux hommes et aux Nations le droit de punir, que pour leur défence et leur sûreté; d'où il suit que l'on ne peut punir que ceux par qui on a été lésé.
>
> Mais cette raison même fait voir, que si la Justice de chaque Etat doit en général se borner a punir les crimes commis dans son territoire, il faut excepter de la règle ces scélérats, qui, par la qualité & la fréquence habituelle de leurs crimes, violent toute sûreté publique, & se déclarent les ennemis du Genre-humain. Les empoisonneurs, les assassins, les incendiaires de profession peuvent être exterminés partout ou on les saisit; car ils attaquent & outragent toutes les Nations, en foulant aux pieds les fondemens de leur sûreté commune. C'est ainsi que les Pirates sont envoyés à la potence par les premiers entre les mains de qui ils tombent."

Wheaton says in his "Elements of International Law", 5th English Ed., 1916, p. 104 (italics ours):

> "The judicial power of every independent state . . . extends . . . to the punishment of piracy *and other offences against the law of nations,* by whomsoever and wheresoever committed."

Hyde says in his "International Law (Chiefly as Interpreted and Applied by the United States)," Vol. 1, 2nd Ed. (1947) in paragraph 241 (p. 804):

> "In order to justify the criminal prosecution by a State of an alien on account of an act committed and consummated by him in a place outside of its territory . . . it needs to be established that there is a close and definite connection between that act and the prosecutor, and on which is commonly acknowledged to excuse the exercise of jurisdiction. There are few situations where the requisite connection is deemed to exist . . . The connection is, however, apparent when the act of the individual is one which the law of nations itself renders

> internationally illegal or regards as one which any member of the international society is free to oppose and thwart."

It must be added that the learned author, who (in keeping with the Anglosaxon tradition) is generally meticulous and rigid in his pronouncements on the question of criminal jurisdiction with respect to crimes committed by foreigners abroad (see also his further remarks *ibid* p. 805 and his supporting reference to the dissenting opinion of Justice Moore in the "Lotus" case), specifically favours an excess of jurisdiction with respect to "offences under the law of nations." See also *ibid.* para. 11(a) (p. 33):

> "The commission of particular acts, regardless of the character of the actors, may be so detrimental to the welfare of the international society that its international law may either clothe a State with the privilege of punishing the offender, or impose upon it the obligation to endeavour to do so. . . . In both situations, it is not unscientific to declare that he is guilty of conduct which the law of nations itself brands as internationally illegal. For it is by virtue of that law that such sovereign acquires the right to punish and is also burdened with the duty to prevent or prosecute."

Glaser in "Infraction Internationale," 1957, defines each of the crimes dealt with here, especially the "crime against humanity" and the "genocide crime" as "infractions internationales" or "crime d'ordre international" (p. 69), and says (p. 31):

> "Les infractions internationales sont soumises, aussi longtemps qu'une juridiction criminelle internationale n'existe pas, au régime de la *répression* ou de la *compétence universelle.* Dans ce régime, les auteurs de pareilles infractions peuvent être poursuivis et punis en quelque pays que ce soit, donc sans égard au lieu où l'infraction a été commise: *Ubi te invenero, ibi te judicabo.*"

Cowles, in "Universality of Jurisdiction over War Crimes", 33 California Law Review (1945), p. 177 *et seq.,* states in the following terms the reasons for the rule of law as to the "universality of jurisdiction over war crimes" which was adopted and determined by the United Nations War Crimes Commission (See: Law Reports of Trials of War Criminals, Vol. 1, p. 53):

> "The general doctrine recently expounded and called 'universality of jurisdiction over war crimes', which has the support of the United Nations War Crimes Commission and according to which every independent State has, under International Law, jurisdiction to punish not only pirates but also war criminals in its custody, regardless of the nationality of the victim or of the place where the offence was committed, particularly where, for some reason, the criminal would otherwise go unpunished."

Instances of the extensive use made by the Allied Military Tribunals of the principle of universality of jurisdiction of war crimes of all classes (including "crimes against humanity") will be found in Vols. 1–15 of the Law Reports of Trials of War Criminals.

16. We have said that the crimes dealt with in this case are not crimes under Israel law alone, but are in essence offences against the law of nations. Indeed, the crimes in question are not a figment of the imagination of the legislator who enacted the law for the punishment of Nazis and Nazi collaborators, but have been stated and defined in that law according to a precise pattern of international laws and conventions which define crimes under the law of nations. The "crime against the Jewish people" is defined on the pattern of the genocide crime defined in the "Convention for the prevention and punishment of genocide" which was adopted by the United Nations Assembly on 9.12.48. The "crime against humanity" and the "war crime" are defined on the pattern of crimes of identical designations defined in the Charter of the International Military Tribunal (which is the Statute of the Nuremberg Court) annexed to the Four-Power Agreement of 8.8.45 on the subject of the trial of the principal war criminals (the London Agreement), and also in Law No. 10 of the Control Council of Germany of 20.12.45. The offence of "membership of a hostile organisation" is defined by the pronouncement in the judgment of the Nuremberg Tribunal, according to its Charter, to declare the organisations in question as "criminal organisations", and is also patterned on the Council of Control Law No. 10. For purposes of comparison we shall set forth in what follows the parallel articles and clauses side by side. [Comparison omitted]. . . .

17. The crime of "genocide" was first defined by Raphael Lemkin in his book "Axis Rule in Occupied Europe" (1944) in view of the methodical extermination of peoples and populations, and primarily the Jewish people by the Nazis and their satellites (after the learned author had already moved, at the Madrid 1933 International Congress for the Consolidation of International Law, that the extermination of racial, religious or social groups be declared "a crime against international law"). On 11.12.46 after the International Military Tribunal pronounced its judgment against the principal German criminals, the United Nations Assembly, by its Resolution No. 96 (I), unanimously declared that "genocide" is a crime against the law of nations. That resolution said:

> "Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these groups, and is contrary to moral law and to the spirit and aims of the United Nations.
> "Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.
> "The punishment of the crime of genocide is a matter of international concern.
> "THE GENERAL ASSEMBLY, THEREFORE,
> "AFFIRMS that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices—whether private individuals, public officials

or statesmen, and whether the crime is committed on religious, racial, political or any other grounds—are punishable:
"INVITES the Member States to enact the necessary legislation for the prevention and punishment of this crime;
"RECOMMENDS that international co-operation be organized between States with a view to facilitating the speedy prevention and punishment of the crime of genocide, and, to this end,
"REQUESTS the Economic and Social Council to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly."

On 9.12.48, the United Nations Assembly adopted unanimously the convention for the prevention and punishment of the crime of genocide. The preamble and the first Article of the convention follow:

"The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96(1) dated 11 December 1946 that Genocide is a crime under international law contrary to the spirit and aims of the United Nations and condemned by the civilized world;

Recognizing that at all periods of history Genocide has inflicted great losses on humanity; and

Being convinced that in order to liberate mankind from such an odious scourge international co-operation is required,

Hereby agree as hereinafter provided:

Article I

The contracting Parties Confirm

that genocide, whether committed in time of peace or in time of war is a crime under international law, which they undertake to prevent and to punish.

18. On 28.5.51, the International Court of Justice gave, at the request of the United Nations Assembly, an Advisory Opinion on the question of the reservations to that convention on the prevention and punishment of the crime of genocide. The Advisory Opinion said *inter alia* (p. 23):

"The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th, 1946). The first consequence arising from this conception is that the principles [underlying the Convention are principles] which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation [of genocide and of the co-operation required] 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention). The Genocide Convention was therefore intended

> by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States."

19. In the light of the recurrent affirmation by the United Nations in the 1946 Assembly resolution and in the 1948 convention, and in the light of the advisory opinion of the International Court of Justice, there is no doubt that genocide has been recognized as a crime under international law in the full legal meaning of this term, and at that ex tunc; that is to say: the crimes of genocide which were committed against the Jewish people and other peoples were crimes under international law. It follows therefore, in the light of the acknowledged principles of international law, that the jurisdiction to try such crimes is universal.

20. This conclusion encounters a serious objection in the new light of Article 6 of the convention which provides that:

> "Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

Prima facie this provision might appear to yield support for an argumentum e contrario, the very contention voiced by the learned Counsel against the applicability of the principle of universal jurisdiction and even against any exterritorial jurisdiction with respect to the crime in question: if the United Nations failed to give their support to universal jurisdiction by each country to try a crime of genocide committed outside its boundaries, but has expressly provided that, in the absence of an international criminal tribunal, those accused of this crime shall be tried by "a competent court of the country in whose territory the act was done" how may Israel try the accused for a crime that constitutes "genocide"?

21. To reply to that reservation we must direct attention to the distinction between the rules of customary and the rules of conventional international law, a distinction which also found expression in the Advisory Opinion of the International Court of Justice with respect to the convention in question. That convention fulfills two roles simultaneously: in the sphere of customary international law it re-affirms the deep conviction of all peoples that "genocide, whether [committed] in time of peace or in time of war, is a crime under international law" (Article 1). That confirmation which, as stressed in the Advisory Opinion of the International Court of Justice, was given "unanimously by fifty-six countries" is "of universal character," and purport of which is that "the principles inherent in the convention are acknowledged by the civilised nations as binding on the country *even without a conventional obligation*" (*ibid.*). "The principles inherent in the convention" are *inter alia*, the criminal character of the acts defined in Article 2 (that is, the article upon which the definition of "a crime against the Jewish people" in the Israel law has been patterned), the penal liability for any form of participation in this crime (Article 3),

the want of immunity from penal liability for rulers and public officials (Article 4), and the fact that for purposes of extradition no political "character" may be assigned to any such crime (Article 7). These principles are "recognised by civilised nations" according to the conclusion of the International Court of Justice, and are "binding on the countries even without a conventional obligation"; that is to say, they constitute part of the customary international law. The words "approve" in Article 1 of the convention and "recognise" in the Advisory Opinion indicate approval and recognition ex tunc, namely the recognition and confirmation that the above-mentioned principles had already been part of the customary international law at the time of the perpetration of the shocking crime which led to the United Nations' resolution and the drafting of the convention—crimes of genocide which were perpetrated by the Nazis. Thus far as to the first aspect of the convention (and the important one with respect to this judgment): the confirmation of certain principles as established rules of law in customary international law.

22. The second aspect of the convention, which is the practical object for which it was concluded, is: the determination of the conventional obligations between the contracting parties to the convention for the prevention of such crimes *in future* and the punishment therefor in the event of their being committed. Already in the UN resolution 96(I) there came, after the "confirmation" that the crime of genocide constitutes a crime under international law, an "invitation," as it were, to all States-Members of the United Nations "to enact the necessary legislation for the prevention and punishment of this crime," together with a recommendation to organise "international cooperation" between the countries with a view to facilitating the "prevention and swift punishment of the crime of genocide," and to this end the Social and Economic Council was charged with the preparation of the draft convention. Accordingly the "affirmation" that genocide, whether committed in time of peace or in time of war, constitutes a crime under international law is followed in Article 1 of the convention by the obligation assumed by the contracting parties who "undertake to prevent and punish it," and by Article 5 they "undertake to pass the necessary legislation to this end."

In the wake of these obligations of the contracting parties to prevent the perpetration of genocide by suitable legislation and enforce such legislation against future perpetrators of the crime, comes Article 6 which determines the Courts that will try those accused of this crime. It is clear that Article 6, like all other articles which determine the conventional obligations of the contracting parties, is intended for cases of genocide which will occur in future after the ratification of the treaty or adherence thereto by the country or countries concerned. It cannot be assumed, in the absence of an express provision in the convention itself, that any of the conventional obligations, including Article 6, will apply to crimes which had been perpetrated in the past. It is of the essence of conventional obligations, as distinct from the confirmation of existing principles, that unless another intention is implicit, their application shall

be *ex nunc* and not *ex tunc*. Article 6 of the convention is a purely pragmatic provision, and does not presume to confirm a subsisting principle. Therefore, we must draw a clear line of distinction between the provision in the first part of Article 1, which says that "the contracting parties confirm that genocide, whether [committed] in time of peace or in time of war, is a crime under international law," a general provision which confirms the principle of customary international law that "is binding on all countries even without conventional obligation," and the provision of Article 6 which is a special provision in which the contracting parties pledged themselves to the trial of crimes that may be committed in future. Whatever may be the purport of this obligation within the meaning of the convention, (and in the event of differences of opinion as to the interpretation thereof the contracting party may, under Article 9, appeal to the International Court of Justice) it is certain that it constitutes no part of the principles of customary international law which are also binding outside the conventional (contractual) application of the convention.

23. Moreover, even the conventional application of the convention, it cannot be assumed that Article 6 is designed to limit to the principle of territoriality the jurisdiction of countries to try genocide crimes. Without entering into the general question of the limits of municipal criminal jurisdiction, it may be said that all agree that customary international law does not enjoin to try its citizens for offences they committed abroad (and in the light of subsisting legislation in many countries against the extradition of their citizens the prevalence of such an authority is essential to prevent criminals from behaving in a "hit and run" manner by fleeing to their own country). Had Article 6 meant to provide that those accused of genocide shall be tried *only* by "a competent court of the country in whose territory the crime was committed" (or by an "international court" which has not been constituted), then that article would have foiled the very object of the convention "to prevent genocide and inflict punishment therefor." In the Sixth Commission the delegates of several countries have pointed to this case, as well as to other cases of acknowledged jurisdiction in many countries, such as the commission of crimes against the citizens of the country, and after a lengthy debate it was agreed to append the following statement to the report of the commission:

> "The first part of Article VI contemplates the obligation of the State in whose territory acts of genocide have been committed. Thus, in particular, it does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State." (U.N. Doc. A/C.6/SR. 134, p. 5)

The words "in particular" are designed neither to negate nor to affirm jurisdiction in other cases.

N. Robinson, who refers to the resolution of the Sixth Commission, adds (p. 84) in his "The Genocide Convention, 1960":

> "The legal validity of this statement is, however, open to question. It was the opinion of many delegations that 'Article VI was not

intended to solve questions of conflicting competence in regard to the trial of persons charged with Genocide; that would be a long process. Its purpose was merely to establish the obligations of the State in which an act of Genocide was committed' F (A/C.6/SR. 132, p. 9). However, as the chairman rightly pointed out, the report of the Sixth Committee could only state that a majority of the Committee placed a certain interpretation on the text; that interpretation could not be binding on the delegations which had opposed it. 'Interpretations of texts had only such value as might be accorded to them by the preponderance of opinion in their favor' F (A/C.6/SR. 132, p. 10). It is obvious that the Convention would be open to interpretation by the parties thereto; should disputes relating to the interpretation arise, the International Court of Justice would be called upon to decide what is the correct interpretation. In dealing with such problems, the Court could obviously use the history of the disputed article."

P. N. Drost, says in "The Crime of State," Vol. II: Genocide (1959) (pp. 101–102):

"In the discussions many delegations expressed the opinion that Article VI was not meant to solve questions of conflicting or concurrent criminal jurisdiction. Its purpose was merely to lay down the duty of punishment of the State in whose territory the act of genocide was committed. (U.N. Doc. A/C.6/SR. 132) . . . It seems clear that the Article does not forbid a Contracting Power to exercise jurisdiction in accordance with its national rules on the criminal competence of its domestic courts. General international law does not prohibit a state to punish aliens for acts committed abroad against nationals."

The learned author proceeds to say on p. 131:

"Also the courts of the country to which the criminals belong by reason of nationality, were expressly mentioned in the debates as being competent, if the *lex fori* so admits, to exercise penal jurisdiction in cases arising abroad. The *forum patriae rei* was recognized as equally competent under the domestic law applying in such case the principle of active personality. But then, many states apply in certain cases the principle of protective jurisdiction which authorizes the exercise of jurisdiction over aliens in respect of crimes committed abroad when the interests of the state are seriously involved. When the victim of physical crime is a national of the state which has arrested the culprit, the principle of passive personality may come the case.

"By way of exception—and the crime of genocide surely must be considered exceptional in this respect—the principle of universal repression is applied to crimes which have been committed neither by nor against nationals nor against public interests nor on the territory of the state whose courts are considered competent nevertheless to exercise criminal jurisdiction by reason of the international concern of the crime or the international interest of its repression. None of these forms of complementary competence additional to the territorial jurisdiction as basic competence of the domestic courts has been excluded under Article VI of the present Convention. There was no need to stipulate these jurisdictional powers which all states possess unless particular provisions of international law prohibit or limit the exercise."

24. This convention may be joined to the four Geneva conventions of 12.8.49:

> (Geneva Conventions for 1) the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 2) of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 3) Relative to the Treatment of Prisoners at War, 4) Relative to the Protection of Civilian Persons in Time of War).

These conventions provide that—

> "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches (of the Convention as defined in the following Article), and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case."

(Article 49 of convention No. 1, Article 50 of convention No. 2, Article 129 of convention No. 3 and Article 146 of convention No. 4). Here is established the principle of "universality of jurisdiction with respect to war crimes," as compulsory jurisdiction of the High Contracting Parties, an obligation from which none of them may withdraw and which none of them may waive (as expressly stated in the above-mentioned convention). That obligation is binding not only on the belligerents, but also on the neutrals among them. See *British Manual of Military Law,* Part III (The Law of War on Land), *1958,* para. 282, note 2. *M. Greenspan,* The Modern Law of Land Warfare, 1959, p. 503.

25. On the other hand, in the convention for the prevention and punishment of genocide States-Members of the United Nations have not reached quite so far-reaching an agreement, but have contented themselves with the determination of territorial jurisdiction as a *compulsory minimum.* It is the consensus of opinion that the absence from this convention of a provision establishing the principle of universality (and, with that, the failure to constitute an international criminal tribunal) is a grave defect in the convention which is likely to weaken the joint efforts for the prevention of the commission of this abhorrent crime and the punishment of its perpetrators, but there is nothing in this defect to make us deduce any tendency against the principle of the universality of jurisdiction with respect to the crime in question. It is clear that the specification in Article 6 of the territorial jurisdiction, apart from the jurisdiction of the non-existent international tribunal, is not exhaustive, and every sovereign State may exercise its existing powers within the limits of customary international law, and there is nothing in the adherence of a country to the convention to waive powers which are mentioned in Article 6. It is in conformity with this view that the law for the Prevention and Punishment of Genocide, 5710–1950, provided in Article 5 that "any person who did outside of Israel an act which is an offence under this law may be tried and punished in Israel as though he did the act in

Israel." This law does not apply with retroactive effect and does not therefore pertain to the offences dealt with in this case. Our view as to the universality of jurisdiction is not based on this law or on this interpretation of Article 6 of the convention, but derives from the basic nature of the crime of genocide as a crime of utmost gravity under international law. The significance and relevance of the treaty to this case is in the confirmation of the international nature of the crime, a confirmation which was unanimously given by the United Nations Assembly and to which also adhered, among other peoples, the German people (in 1954 the German Federal Republic adhered to the convention and enacted a law (BGBL II, 729) which gave effect to the convention in Germany, and added to the German criminal law Article 220A against genocide (Völkermord), a crime defined according to Article 2 of the convention). The "crime against the Jewish people" under section 1 of the Israel law constitutes a crime of "genocide" within the meaning of Article 2 of the convention, and inasmuch as it is a crime under the law of nations, Israel's legislative authority and judicial jurisdiction in this matter is based upon the law of nations.

26. As to the crimes defined in Article 6 of the Charter of the International Military Tribunal, that Tribunal said in its judgment on the "principal war criminals" (IMT Vol. 1, p. 218) *inter alia:*

> "The Charter is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."

As regards the crimes defined in the Control Council Law No. 10 which was taken as a basis, among other cases, for 12 important cases tried by the United States Military Tribunals in Nuremberg, it was stated in the judgment passed on the "Jurists" ("Justice Case", Trials of War Criminals, Vol. III, 954 ff) (p. 968):

> "The IMT Charter, the IMT judgment, and Control Council Law 10 are merely 'great new cases in the book of international law.' . . . Surely C.C. Law 10, which was enacted by the authorised representatives of the four greatest Powers on earth, is entitled to judicial respect when it states, "Each of the following acts is *recognized* as a crime." Surely the requisite international approval and acquiescence is established when 23 states, including all of the great Powers, have approved the London Agreement and the IMT Charter without dissent from any state. Surely the IMT Charter must be deemed declaratory of the principles of international law in view of its recognition as such by the General Assembly of the United Nations."

The judgment then proceeds to quote from the resolution which was unanimously adopted on 11.12.46 by the United Nations Assembly the words—

> "The General Assembly . . . affirms the principles of international law recognized by the Charter of the Nuernberg Tribunal and the judgment of the Tribunal."

Proceeding, the judgment draws a distinction between the substantive principles of international law which lay down that "war crimes" and "crimes against humanity" whenever and wherever they were committed, and the actual enforcement of these universal principles which may come up against barriers of national sovereignty.

> "We are empowered to determine the guilt or innocence of persons accused of acts described as 'war crimes' and 'crimes against humanity' under rules of international law. At this point, in connection with cherished doctrines of national sovereignty, it is important to distinguish between the rules of common international law which are of universal and superior authority on the one hand, and the provisions for enforcement of those rules which are by no means universal on the other. . . . As to the punishment of persons guilty of violating the laws and customs of war (war crimes in the narrow sense), it has always been recognized that tribunals may be established and punishment imposed by the state into whose hands the perpetrators fall. These rules of international law were recognized as paramount, and jurisdiction to enforce them by the injured belligerent government whether within the territorial boundaries of the state or in occupied territory, has been unquestioned. (*Ex parte Quirin,* 317 U.S. 1; *In re: Yamashita,* 327 U.S. 1, 90 L. Ed.) However, enforcement of international law has been traditionally subject to practical limitation. Within the territorial boundaries of a state having a recognized, functioning government presently in the exercise of sovereign power throughout its territory, a violator of the rules of international law could be punished only by the authority of the officials of that state. The law is universal, but such a state reserves unto itself the exclusive power within its boundaries to apply or withhold sanctions. . . . Applying these principles, it appears that the power to punish violators of international law in Germany is not solely dependent on the enactment of rules of substantive penal law applicable only in Germany. . . . Only by giving consideration to the extraordinary and temporary situation in Germany can the procedure here be harmonized with established principles of national sovereignty. In Germany an international body (the Control Council) has assumed and exercised the power to establish judicial machinery for the punishment of those who have violated the rules of the common international law, a power which no international authority without consent could assume or exercise within a state having a national government presently in the exercise of its sovereign powers."

It is clear from these pronouncements that the contention that the Nuremberg International Military Tribunal and the tribunals which were established in Germany by virtue of the Control Council Law No. 10 derive their jurisdiction from the capitulation and lack of sovereignty of Germany at that time, is true only with respect to the direct exercise of criminal territorial jurisdiction in Germany, such as was exercised by the above-mentioned tribunals, but she has adopted for herself substantive rules of universal validity in the law under discussion, the rules of international law on the subject of "war crime" and "crime against humanity." The judgment proceeds to say (p. 983):

> "Whether the crime against humanity is the product of statute or of common international law, or, as we believe, of both, we find no injustice to persons tried for such crimes. They are chargeable with knowledge that such acts were wrong and were punishable when committed."

It is hardly necessary to add that the "crime against the Jewish people," which constitutes the crime of "genocide" is nothing but the gravest type of "crime against humanity" (and all the more so because both under Israel law and under the convention a special intention is requisite for its commission, an intention that is not required for the commission of a "crime against humanity"). Therefore, all that has been said in the Nuremberg principles on the "crime against humanity" applies *a fortiori* to the "crime against the Jewish people." If authority is needed for this, we find it in the same judgment, which says:

> "As the prime illustration of a crime against humanity under C.C. Law 10, which by reason of its magnitude and its international repercussions has been recognized as a violation of common international law, we cite 'genocide'. . ."

It is not necessary to recapitulate in Jerusalem, 15 years after Nuremberg, the grounds for the legal rule on the "crime against humanity," for these terms are written in blood, in the torrents of the blood of the Jewish people which was shed. "That law," said Aroneanu in 1948, "was born in the crematoria, and woe to him who will try to stifle it."

> ("Cette loi est née dans les fours crématoires; et malheur à celui qui tenterait de l'étouffer.")

(Quoted by Boissarie in his introduction to *Eugène Aroneanu,* Le Crime contre l'Humanité, 1961.)

The judgment against the Operation Groups of 10.4.48, (Einsatzgruppen Case), TWC IV, 411 ff. (p. 498) says on the same subject:

> "Although the Nuernberg trials represent the first time that international tribunals have adjudicated crimes against humanity as an international offense, this does not, as already indicated, mean that a new offense has been added to the list of transgressions of man. Nuernberg has only demonstrated how humanity can be defended in court, and it is inconceivable that with this precedent extant, the law of humanity should ever lack for a tribunal.
>
> "Where law exists a court will rise. Thus, the court of humanity, if it may be so termed, will never adjourn."

27. We have already dealt with the 'principle of legality' that postulates "Nullum crimen sine lege, nulla poena sine lege," and what has been stated above with respect to the municipal law is also applicable to international law. In the Judgment against the "Major War Criminals" it is stated (p. 219):

> "In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but it is in general a principle of justice."

That is to say, the penal jurisdiction of a State with respect to crimes committed by 'foreign offenders' insofar as it does not conflict on other grounds with the principles of international law, is not limited by the prohibition of retroactive effect.

It is indeed difficult to find a more convincing instance of a just retroactive legislation than the legislation providing for the punishment of war criminals and criminals against humanity and against the Jewish people, and all the reasons justifying the Nuremberg judgments justify *eo ipse* the retroactive legislation of the Israel legislator. We have already referred to the decisive ground of the existence of a "criminal intent" (*mens rea*), and this ground recurs in all the Nuremberg judgments. The accused in this case is charged with the implementation of the plan for the "final solution of the problem of the Jews." Can any one in his reason doubt the absolute criminality of such acts? As stated in the Judgment in the case of "Operation Groups" (p. 459):

> ". . . There is (not) any taint of ex-post-facto-ism in the law of murder."

The Netherlands law of 10.7.47 which amends the preceding law (of 22.10.43) may serve as an example of *municipal retroactive legislation,* in that it added Article 27(A) which provides:

> "He who during the time of the present war and while in the forces of service of the enemy State is guilty of a war crime or any crime against humanity as defined in Art. 6 under (b) or (c) of the Charter belonging to the London Agreement of 8th August, 1945 . . . shall, if such crime contains at the same time the elements of an act punishable according to Netherlands law, receive the punishment laid down for such act."

On the strength of such retroactive adoption of the definition of crimes according to the Nuremberg Charter the Senior Commander of the S.S. and Police in Holland, *Rauter,* was sentenced to death by a Special Tribunal, and his appeal was dismissed by the Special Court of Cassation (see LRTWC XIV, pp. 89 ff.). The double contention "nullum crimen, nulla poena sine lege" was dismissed by the Court of Cassation on the ground that the Netherlands legislator had abrogated this rule (which is expressly laid down in sec. 1 of the Netherlands Criminal Law) with respect to crimes of this kind, and that indeed that rule was not adequate for these crimes. On p. 120 (*ibid.*) it is stated:

> "From what appears above it follows that neither Art. 27(A) of the Extraordinary Penal Law Decree nor Art. 6 of the Charter of London to which the said Netherlands provision of law refers, had, as the result of an altered conception with regard to the unlawfulness thereof, declared after the event to be a crime an act thus far permitted; . . . these provisions have only further defined the jurisdiction as well as the limits of penal liability and the imposition of punishment in respect of acts which already before (their commission) were not permitted by international law and were regarded as crimes . . ."

"In so far as the appellant considers punishment unlawful because his actions, although illegal and criminal, lacked a legal sanction provided against them precisely outlined and previously prescribed, his objection also fails.

"The principle that no act is punishable except in virtue of a legal penal provision which had preceded it, has as its object the creation of a guarantee of legal security and individual liberty, which legal interests would be endangered if acts about which doubts could exist as to their deserving punishment were to be considered punishable after the event.

"This principle, however, bears no absolute character, in the sense that its operation may be affected by that of other principles with the recognition of which equally important interests of justice are concerned.

"These latter interests do not tolerate 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 on the sole ground that a previous threat of punishment was lacking. It is for this reason that neither the London Charter of 1945 nor the judgment of the International Military Tribunal (at Nuremberg) in the case of the Major German War Criminals have accepted this plea which is contrary to the international concept of justice, and which has since been also rejected by the Netherlands legislator, as appears from Art. 27(A) of the Extraordinary Penal Law Decree."

The courts in Germany, too, have rejected the contention that the crimes of the Nazis were not prohibited at the time, and that their perpetrators did not have the requisite criminal intent. It is stated in the judgment of the Supreme Federal Tribunal 1 St/R 563/51 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 executants, 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.

See also BGH 1 St.R 404/60 (NJW 1961, 276), a judgment of 6.12.60 which deals with the murder of mentally deranged persons on Hitler's orders. The judgment says *inter alia* (pp. 277, 278) 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 [did] not shrink from the commission of crimes, and that he who took part in these crimes could not contend that he had mistakenly assumed that a forbidden act was permissible, seeing that these crimes violated basic principles of a rule of law.

The Hebrew rule "No one may be punished unless he was forewarned," which corresponds to the principle of legality according to the Roman rule, hints at the importance of warning that a certain action is prohibited. During the World War Allied governments gave the Nazi criminals recurrent warnings that they would be punished, but these were of no avail.

Henry Stimson was right when he said, as cited in the Judgment on "The Jurists" (p. 976):

> "It was the Nazi confidence that we would never chase and catch them, and not a misunderstanding of our opinion of them, that led them to commit their crimes. Our offense was thus that of the man who passed by on the other side. That we have finally recognized our negligence and named the criminals for what they are is a piece of righteousness too long delayed by fear."

28. Learned Counsel seeks to negate the jurisdiction of the State by contending that the crimes attributed to the accused in counts 1–12 had been committed, according to the Charge Sheet itself, in the course of duty, and constitute "acts of State," acts for which, according to his contention, only the German State is responsible. In this contention Counsel bases himself mainly on the theory of Kelsen, as explained in his works:

> "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals" (1943), 33 California Law Review 530 ff;
> "Peace through Law" (1944) p. 71 ff;
> "Principles of International Law" (1952), p. 235 ff.

Learned Counsel bases himself on the rule "par in parem non habet imperium," that is to say—a sovereign State does not dominate, and does not sit in judgment against, another sovereign State, and deduces therefrom that a State may not try a person for a criminal act that constitutes an "act of State" of another State, without the consent of such other State to that person's trial. In the view of Kelsen only the State in whose behalf the "organ" (ruler or official) had acted is responsible for the violation, through such act, of international law, [for] which the perpetrator himself is not responsible (with the two exceptions of espionage and war treason).

The theory of "Act of State" was repudiated by the International Military Tribunal at Nuremberg, when it said (pp. 222–223):

> "It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. In the recent case of *Ex Parte Quirin* (1942), 317 U.S. 1, before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the Court said:
>
> 'From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights, and duties of enemy nations as well as enemy individuals.'

> He went on to give a list of cases tried by the Courts, where individual offenders were charged with offenses against the laws of nations, and particularly the laws of war. Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. . . . The principle of international law which, under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares:
>
> > 'The official position of defendants, whether as heads of States, or responsible officials in Government departments, shall not be considered as freeing them from responsibility, or mitigating punishment.'
>
> On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorising action moves outside its competence under international law."

It is clear from the context that the last sentence was not meant, as Counsel contends, to limit the rule of the "violation of the laws of war" alone. The Court expressly said, as quoted above, that "the principle of international law [which] under certain circumstances protects the representatives of a State cannot be applied to acts which are condemned as criminal by international law."

Indeed, the theory of Kelsen and his disciples (See Counsel's written brief pp. 14–35), and also the 'limited' theories referred to by Learned Counsel (*ibid.*) are inadmissible. The precedents adduced as authorities for this theory *e.g.* Schooner Exchange *v.* McFaddon (1812) 7 Cranch 116, the memorandum of the American Secretary of State on the subject of the "Caroline," *i.e.* People *v.* McLeod (See Moore, Digest of International Law II, para. 175), and other precedents, do not fit the realities in Nazi Germany. A State that plans and implements a "final solution" cannot be treated as "Par in parem," but only as a gang of criminals. In the judgment on "The Jurists" it is said (p. 984):

> "The very essence of the prosecution case is that the laws, the Hitlerian decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime. We have pointed out that governmental participation is a material element of the crime against humanity. Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions. It can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defense to the charge."

Drost says in his "The Crime of State (Humanicide)" pp. 310–311 (under the caption—"State Crime as Act of State"):

> "Any state officer irrespective of his rank or function, would necessarily go unpunished if his acts of state were considered internationally as the sovereign acts of a legal person. The person who really acted on behalf of the state, would be twice removed from penal justice since the entity whom he represented, by its very nature would be doubly immune from punishment, once physically and once legally. The natural person escapes scotfree between the legal loopholes of state personality and state sovereignty. But then, this reasoning in respect of these too much laboured juristic conceptions should not be carried into the province of penal law.
>
> "Immunity for acts of state constitutes the negation of international criminal law which indeed derives the necessity of its existence exactly from the very fact that acts of state often have a criminal character for which the morally responsible officer of state should be made penally liable."

The contention of Learned Counsel that it is not the accused but the State in whose behalf he had acted, that is responsible for his criminal acts is only true in its second part. It is true that under international law Germany bears not only moral, but also legal, responsibility for all the crimes that were committed as its own "Acts of State," including the crimes attributed to the accused. But that responsibility does not detract one iota from the personal responsibility of the accused for his acts. See Oppenheim-Lauterpacht, § 156 b:

> "The responsibility of States is not limited to restitution or to damages of a penal character. The State, and those acting on its behalf, bear criminal responsibility for such violations of international law as by reason of their gravity, their ruthlessness, and their contempt for human life place them within the category of criminal acts as generally understood in the law of civilised countries. Thus if the Government of a State were to order the wholesale massacre of aliens resident within its territory the responsibility of the State and of the individuals responsible for the ordering and the execution of the outrage would be of a criminal character."
>
> ". . . It is impossible to admit that individuals, by grouping themselves into States and thus increasing immeasurably their potentialities for evil, can confer upon themselves a degree of immunity from criminal liability and its consequences which they do not enjoy when acting in isolation. Moreover, the extreme drastic consequences of criminal responsibility of States are capable of modification in the sense that such responsibility is additional to and not exclusive of the international criminal liability of the individuals guilty of crimes committed in violation of International Law."

See also *ibid.* § 153a (p. 341):

> ". . . No innovation was implied in the Charter annexed to the Agreement of August 8, 1945, for the punishment of the Major War Criminals of the European Axis inasmuch as it decreed individual responsibility for war crimes proper and for what it described as crimes against humanity. For the laws of humanity which are not de-

pendent upon positive enactment, are binding, by their very nature, upon human beings as such."

The repudiation of the contention as to an 'act of State' is one of the principles of international law that were acknowledged by the Charter and Judgment of the Nuremberg Tribunal, and were unanimously affirmed by the United Nations Assembly in its Resolution of 11.12.46. In the formulation (on the directions of the Assembly in its resolution No. II 177) by the International Law Commission of the United Nations, of these acknowledged principles, this principle appears as Principle No. 3:

"The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law."

In resolution No. 96(I) of 11.12.46, too, in which the UN Assembly unanimously affirmed that 'genocide' is a 'crime under international law' it is stated that "principal offenders and associates, whether private individuals, public officials or statesmen" must be punished for the commission of this crime, while the Convention for the Prevention and Punishment of Genocide expressly provides in Art. IV:

"Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

This article affirms a principle acknowledged by all civilised nations, in the words of the International Court of Justice in its Advisory Opinion referred to, and inasmuch as Germany too has adhered to this Convention, it is possible that even according to Kelsen, who requires an international convention or the consent of the State concerned, there is no longer any cause for pleading 'an Act of State.' But the rejection of this plea does not depend on the affirmation of this principle by Germany, for the plea had already been invalidated by the law of nations.

For these reasons we dismiss the contention as to 'Act of State.'

29. In his written brief (pp. 48–50) Learned Counsel has based himself on the exclusive interpretation of the term 'a crime against humanity' given by the Nuremberg International Tribunal according to Art. 6(1) of the Charter, which excludes from its jurisdiction many crimes of this kind which had been committed by Germany before the outbreak of the war. In its Judgment on the Major War Criminals the Tribunal said (p. 254):

"To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is 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."

It is our view that no conclusion may be drawn from this interpretation of the Charter, for it is based on an express proviso to Art. 6(c) of the Charter, which does not appear in the definition of "crime against humanity" in Art. II 1(c) of the Control Council Law No. 10. The last words in the extract cited above: "crimes against humanity *within the meaning of the Charter*" indicate that but for the special proviso to Art. 6(c) the Tribunal would have deemed these crimes "crimes against humanity." It is true that notwithstanding the conspicuous omission of this proviso from the Control Council Law No. 10 two of the American Military Tribunals have decided in subsequent cases (the 'Flick Case' and the "Ministries Case') to apply the above-mentioned proviso to the last-mentioned law; but two other Tribunals have expressed a contrary opinion (in the 'Operation Groups' and the 'Jurists' cases), and we think that their opinion, which conforms to the letter of the law, is correct. See also the reasons—to us convincing—advanced by the Chief American Prosecutor General Taylor in his argument in the 'Jurists' case. It must be noted that judgments under the Control Council Law No. 10 applied the definition of "crime against humanity" to all crimes of this order which were committed during the period of the Nazi regime, *i.e.* from 30.1.33. See *H. Meyerowitz,* "La représsion par les Tribunaux Allemands des Crimes contre l'Humanité," 1960, 233.

No practical importance attaches to this question for the purpose of this case, seeing that most of the crimes attributed to the accused were committed during the war or in connection with it (according to the Nuremberg Judgment Hitler's invasions of Austria and Czechoslovakia constitute "crimes within the jurisdiction of the Tribunal," within the meaning of the proviso to Art. 6(3), see *ibid.* Vol. 22, pp. 643, 662). At all events it seems to us, in the light of the general definition in the Control Council Law No. 10, of "a crime against humanity" that the proviso to Art. 6(3) of the Charter does not limit the substantive nature of a "crime against humanity" under international law, but has only limited the jurisdiction of the Nuremberg Tribunal to try crimes of this kind which are bound up with "war crimes" or "crimes against peace." See also *Oppenheim-Lauterpacht* (7th ed.) II, para. 257, p. 579, note (5) and authorities there cited.

30. We have discussed at length the international character of the crimes in question because this offers the broadest possible, though not the only, basis for Israel's jurisdiction according to the law of nations. No less important from the point of view of international law is the special connection the State of Israel has with such crimes, seeing that the people of Israel (Am Israel)—the Jewish people (Ha'am Ha'yehudi—to use the term in the Israel legislation)—constituted the target and the victim of most of the crimes in question. The State of Israel's "right to punish" the accused derives, in our view, 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.

This second foundation of penal jurisdiction conforms, according to the acknowledged terminology, to the protective principle or the *compétence réelle.* In England, which, until a short time ago, was considered a country that does not rely on such jurisdiction (see again Harvard Research in International Law, Jurisdiction with Respect to Crime, 1935, AJIL, Vol. 29 (Suppl.) 544) it was said in *Joyce v. D.P.P.* [1946] A.C. 347 (p. 372):

> "The second point of appeal . . . was that in any case no English Court has jurisdiction to try an alien for a crime committed abroad. . . . There is, I think, a short answer to this point. The statute in question deals with the crime of treason committed within or . . . without the realm. . . . No principle of comity demands that a state should ignore the crime of treason committed against it outside its territory. On the contrary a proper regard for its own security requires that all those who commit that crime, whether they commit it within or without the realm, should be amenable to its laws."

Oppenheim-Lauterpacht I § 147, p. 333 says that the penal jurisdiction of the State includes

> "crimes injuring its subjects or serious crimes against its own safety."

Most European countries go much farther than this (See Harvard Research, *ibid.,* p. 546 *et seq.*).

31. *Dahm* says in his "Zur Problematik des Voelkerstrafrechts," 1956 p. 28, that the protective principle is not confined to foreign offences that threaten the "vital interests" of the State, and goes on to explain (pp. 38–39) in his reference to "immanent limitations" of the jurisdiction of the State that a departure therefrom would constitute an "abuse" of its sovereignty. He says:

> "Penal jurisdiction is not a matter for everyone to exercise. There must be a "linking point," a legal connection that links the punisher with the punished. The State may, insofar as international law does not contain rules contradicting this, punish only persons and acts *which concern it more than they concern other States"* (italics by author).

Learned Counsel has summed up his pleadings against the jurisdiction of the Israel legislator by stressing (Session 5, pp. 17–20) that under international law there must be a connection between the State and the person who committed the crime, and that in the absence of an "acknowledged linking point" it was ultra vires the State to inflict punishment for foreign offences.

The doctrine of the "Linking point" is not new. Dahm (*ibid.*) bases himself on *Mendelssohn-Bartholdy,* Vergleichende Darstellung des deutschen und auslaendischen Strafrechts, Allg. Teil VI (1908) 111 ff. And Mendelssohn-Bartholdy himself (*ibid.*) quotes Rolin-Jaequemyns as having said in 1874:

> "Tout le monde est d'accord sur ce point qu'il faut un lien de droit entre celui qui punit et celui qui subit le châtiment."

32. We have already stated above the view of Grotius on "the right to punish," a view which is also based on a "linking point" between the criminal and his victim: Grotius holds that the very commission of the crime creates a legal connection between the offender and the victim, and one that vests in the victim the right to punish the offender or demand his punishment. According to natural justice the victim may himself punish the offender, but the organisation of society has delegated that natural right to the sovereign State. One of the main objects of the punishment is—continues the author of "The Law of Peace and War" (Book 2, chapter 20)—to ensure that "the victim shall not in future suffer a similar infliction at the hands of the same person or at the hands of others" ("ne post hac tale quid patiatur aut ab eodem aut ab aliis").

Grotius also quotes an ancient authority who said that the punishment is necessary to "defend the honour or the authority of him who was hurt by the offence so that the failure to punish may not cause his degradation";

> ("dignitas auctoritasve ejus in quem est peccatum tuenda est, ne praetermissa animadversio contemtum ejus pariat et honorem levet"),

and he adds that all that has been said of the jurisdiction applies to the infringement of all his rights. And again:

> "Ne ab aliis laedatur qui laesus est punitione non quavis, sed aperta atque conspicua quae ad exemplum pertinet obtinetur."

("In order that the victim may not be hurt by others, there must be no mere punishment but a public and striking punishment that will serve as an example.")

Not all jurists use the term "linking point" in an equal connotation. Thus Mendelssohn-Bartholdy holds the opinion that the sovereignty of a country in determining its penal jurisdiction is unlimited, and he resorts to the "linking point" doctrine solely as a scientific device for the classification of the offences specified in positive law: "The number of linking points is as large as the number of offences" (*ibid.*, p. 112). On the other hand, Hyde (*ibid.*, p. 804) demands, as already mentioned,

> "a close and definite connection between that act and the prosecutor, and one which is commonly acknowledged to excuse the exercise of jurisdiction. There are few situations where the requisite connection is deemed to exist . . . The connection . . . is . . . apparent when the act complained of is to be fairly regarded as directed against the safety of the prosecuting State."

Between these two extreme views is the view of Dahm (*ibid.*).

Notwithstanding the difference of opinion as to the closeness of the requisite link, the very term "connection" or "linking point" is useful for the elucidation of the problem before us. The question is: What is the special connection between the State of Israel and the offences attributed to the accused, and whether this connection is sufficiently close to form a foundation for Israel's right of punishment as against the accused. This is no merely technical question but a wide and universal one; for the

principles of international law are wide and universal principles and no articles in an express code.

33. When the question is presented in its widest form, as stated above, it seems to us that there can be no doubt as to what the answer will be. The "linking point" between Israel and the accused (and for that matter between Israel and any person accused of a crime against the Jewish people under this Law) is striking and glaring in a "crime manifest against the Jewish people," a crime that postulates an intention to exterminate the Jewish people in whole or in part. Indeed, even without such specific definition—and it must be noted that the draft law had only defined "crimes against humanity" and "war crimes" (Bills of Law of the year 5710 No. 36, p. 119)—there was a subsisting "linking point," seeing that most of the Nazi crimes of this kind were perpetrated against the Jewish people; but viewed in the light of the definition of "crime against the Jewish people," the legal position is clearer. The "crime against the Jewish people," as defined in the Law, constitutes in effect an attempt to exterminate the Jewish people, or a partial extermination of the Jewish people. If there is an effective link (and not necessarily an identity) between the State of Israel and the Jewish people, then a crime intended to exterminate the Jewish people has a very striking connection with the State of Israel.

34. The connection between the State of Israel and the Jewish people needs no explanation. The State of Israel was established and recognised as the State of the Jews. The proclamation of Iyar 5, 5705 (14.5.48) (Official Gazette No. 1) opens with the words: "It was in the Land of Israel that the Jewish people was born," dwells on the history of the Jewish people from ancient times until the Second World War, refers to the Resolution of the United Nations Assembly of 29.11.47 which demands the establishment of a Jewish State in Eretz Israel, determines the "natural right of the Jewish people to be, like every other people, self-governing, in its sovereign State." It would appear that there is hardly need for any further proof of the very obvious connection between the Jewish people and the State of Israel: this is the sovereign State of the Jewish people.

Moreover, the proclamation of the establishment of the State of Israel makes mention of the very special tragic link between the Nazi crimes, which form the theme of the law in question, and the establishment of the State:

> "The recent holocaust which consumed millions of Jews in Europe, provides fresh and unmistakable proof of the necessity of solving the problem of the homelessness and lack of independence of the Jewish people by re-establishing the Jewish State which would fling open the gates of the fatherland to every Jew and would endow the Jewish people with equality of status within the family of nations.
>
> "The remnants of the disastrous slaughter of the Nazis in Europe together with Jews from other lands persisted in making their way to the Land of Israel in defiance of all difficulties, obstacles and dangers. They have not ceased to claim their right to a life of dignity, freedom and honest toil in their ancestral home.

> "In the Second World War the Jewish people in Palestine made its full contribution to the struggle of the freedom and peace-loving nations against the Nazi forces of evil. Its war effort and the blood of its soldiers entitled it to rank with the peoples that made the covenant of the United Nations."

These words are no mere rhetoric, but historical facts, which international law does not ignore.

In the light of the recognition by the United Nations of the right of the Jewish people to establish their State, and in the light of the recognition of the established Jewish State by the family of nations, the connection between the Jewish people and the State of Israel constitutes an integral part of the law of nations. . . .

36. Counsel contended that the protective principle cannot apply to this case because that principle is designed to protect only an existing State, its security and its interests, while the State of Israel had not existed at the time of the commission of the crime. He further submitted that the same contention was effective with respect to the principle of the "passive personality" which stemmed from the protective principle, and of which some States have made use for the protection of their citizens abroad through their penal legislation. Counsel pointed out that in view of the absence of a sovereign Jewish State at the time of the catastrophe the victims of the Nazis were not, at the time they were murdered, citizens of the State of Israel.

In our view Learned Counsel errs when he examines the protective principle in this retroactive law according to the time of the commission of the crimes, as is the case in an ordinary law. This law was enacted in 1950 with a view to its application during a specified period which had terminated five years before its enactment. The protected interest of the State recognised by the protective principle is in this case the interest existing at the time of the enactment of the law, and we have already dwelt on the importance of the moral and protective task which this law is designed to perform in the State of Israel.

37. The retroactive application of the law to a period precedent to the establishment of the State of Israel does not in itself constitute in respect to the accused (and for that matter, to any accused under this law) a problem on which we have already dwelt above. *Goodhart* says in his "The Legality of the Nurnberg Trial," Juridical Review, April 1946, (p. 8), *inter alia*:

> "Many of the national courts now functioning in the liberated countries have been established recently, but no one has argued that they are not competent to try the cases that arose before their establishment. . . . No defendant can complain that he is being tried by a Court which did not exist when he committed the act."

What is here said of a court which did not exist at the time of the commission of the crime is also valid with respect to a State which was not sovereign at the time of the commission of the crime. The whole political landscape of the Continent of occupied Europe has changed after

the war; there, too, boundaries have changed as has also changed the very identity of States that had existed before, but all this does not concern the accused.

38. All this is said in relation to the accused; but may a new State, at all, try crimes that were committed before it was established? The reply to this question was given in *Katz-Cohen v. Attorney-General,* C.A. 3/48 (Pesakim II, p. 225) wherein it was decided that the Israel courts have full jurisdiction to try offences committed before the establishment of the State, and that "in spite of the changes in sovereignty there subsisted a continuity of law." "I cannot see," said President Smoira, "why that community in the country against whom the crime was committed should not demand the punishment of the offender solely because that community is now governed by the Government of Israel instead of by the Mandatory Power." This was said with respect to a crime committed in the country, but there is no reason to assume that the law would be different with respect to foreign offences. Had the Mandatory legislator enacted at the time an extraterritorial law for the punishment of war criminals (as, to give one example, the Australian legislator had done in the War Criminals Act, 1945, see Section 12) 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 laws applicable to 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, and the interests protected by this law had existed also during the period of the Jewish National Home. The Balfour Declaration and the Palestine Mandate given by the League of Nations to Great Britain constituted an international recognition of the Jewish people, (see *N. Feinberg,* "The Recognition of the Jewish People in International Law," Jewish Yearbook of International Law 1948, p. 15, and authorities there cited), the historical link of the Jewish people with Eretz Israel and their right to re-establish their National Home in that country. The Jewish people has actually made use of that right, and the National Home has grown and developed until it reached a sovereign status. During the period preceding the establishment of the sovereign State the Jewish National Home may be seen as reflecting the rule "nasciturus pro jam nato habetur" (see Feinberg *ibid.*). The Jewish "Yishuv" in Palestine constituted during that period a "State-on-the-way," as it were, which reached in due time a sovereign status. The want of sovereignty made it impossible for the Jewish "Yishuv" in the country to enact a criminal law against the Nazi crimes at the time of the commission thereof, but these crimes were also directed against that "Yishuv" who constituted an integral part of the Jewish people, and the enactment with retroactive application of the law in question by the State of Israel filled the need which had already existed previously.

The historical facts explain the background of the legislation in question; but it seems to us that from a legal point of view the power of the new State to enact retroactive legislation does not depend on that background alone, and is not conditioned by the continuity of law between Palestine and the State of Israel. Let us take an extreme example and assume that the Gypsy survivors, an ethnic group or a nation who were also, like the Jewish people, victims of the "crime of genocide," would have gathered after the War and established a sovereign State in any part of the world. It seems to us that no principle of international law could have denied the new State the natural power to put on trial all those killers of their people who fell into their hands. The right of the 'hurt' group to punish offenders derives directly, as Grotius explained (see *supra*), from the crime committed against them by the offender, and it was only want of sovereignty that denied them the power to try and punish the offender. If the hurt group or people thereafter reaches political sovereignty in any territory, it may make use of such sovereignty for the enforcement of its natural right to punish the offender who hurt them.

All this holds good in respect to the crime of genocide (including the crime against the Jewish people) which, it is true, is committed by the killing of the individuals, but is intended to exterminate the nation as a group. According to Hitler's murderous racialism the Nazis singled out Jews from all other citizens in all the countries of their domination, and carried the Jews to their death solely because of their racial origin. Even as the Jewish people constituted the object against which the crime was directed, so it is now the competent subject to place on trial those who assailed their existence. The fact that that people has become after the catastrophe a subject, where it had hitherto been an object, and has turned from the victim of a racial crime to the wielder of authority to punish the criminals is a great historic right that cannot be dismissed. The State of Israel, the sovereign State of the Jewish people, performs through its legislation the task of carrying into effect the right of the Jewish people to punish the criminals who killed their sons with intent to put an end to the survival of this people. We are convinced that this power conforms to the principles of the law of nations in force. For all these reasons we have dismissed the first contention of Counsel against the jurisdiction of the Court.

39. We should add that the well-known judgment of the International Court of Justice at The Hague in the "Lotus Case" has ruled that the principle of territoriality does not limit the power of the State to try crimes and, moreover, any argument against such power must point to a specific rule in international law which negates the power. We have not guided ourselves by this which devolves, so to speak, the "onus of proof" upon him who contends against such power, but have preferred to base ourselves on positive reasons which establish the jurisdiction of the State of Israel.

40. The second contention of Learned Counsel was that the trial in Israel of the accused following upon his capture in a foreign land is in conflict with international law, and takes away the jurisdiction of the Court. Counsel pleaded that the accused, who had resided in Argentina under an assumed name, was kidnapped on 11.5.60 by the agents of the State of Israel, and was forcibly brought to Israel. He prayed that two witnesses be heard in proof of his contention that the kidnappers of the accused acted on orders they received from the Government of Israel or its representatives, a contention to which Learned Counsel attached considerable importance in an effort to prove that he was brought to Israel's area of jurisdiction in violation of International Law. He summed up his contentions by submitting that the Court ought not to lend its support to an illegal act of the State, and that in these circumstances the Court has no jurisdiction to try the accused.

On the other hand, the Learned Attorney-General pleaded that the jurisdiction of the Court was based upon the Nazis and Nazi Collaborators (Punishment) Law which applied to the accused and to the acts attributed to him in the Charge Sheet; that it is the duty of the Court to do no other than try such crimes; and that in accordance with established judicial precedents in England, the United States and Israel, the Court is not to enter into the circumstances of the arrest of the accused and of his transference to the area of jurisdiction of the State, these questions having no bearing on the jurisdiction of the Court to try the accused for the offences for which he is being prosecuted, but only on the foreign relations of the State. The Attorney-General added that with reference to the circumstances of the arrest of the accused and his transference to Israel, the Republic of Argentina had lodged a complaint with the Security Council of the United Nations, which resolved on 23.6.60, as follows (document S/4349) (exhibit T/1) [omitted] . . .

Pursuant to the above-mentioned Resolution the two Governments reached an agreement on the settlement of the dispute between them . . .

By our Ruling No. 3 of 17.4.61 (Session 6), we dismissed Counsel's objections to the jurisdiction of the Court, and ruled that there is no need to hear the witnesses summoned with reference to his second contention. The following are the reasons for our ruling:

41. 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 means whereby he was brought to the area of jurisdiction of the country. The courts in England, the United States and Israel have ruled continuously that the circumstances of the arrest and the mode of bringing of the accused into the area of the State have no relevance to his trial, and they consistently refused in all cases to enter into the examination of these circumstances . . . [Analysis of authorities omitted.]

47. An analysis of these judgments reveals that the doctrine is not confined to the infringement of municipal laws, as distinct from international laws, but the principle is general and comprehensive, as was

summed up in Moore (*ibid.*) and adopted in Criminal Appeal 14/42 *supra,* or as summed up in *35 Corpus Juris Secundum* § 47 (p. 374):

> "Even though a person has been brought into the country by force or stratagem, and without reference to an extradition treaty, he is within the jurisdiction of domestic courts so as to be liable to trial on a regular indictment and imprisonment under a valid judgment and sentence."

Vide also *Hackworth,* Digest of International Law (Department of State Publication), (1942) IV § 345, pp. 224–228.

Hyde, International Law (1947), II, 1032:

> "Whatever be the right of the State from which he has been withdrawn, the prisoner is not entitled to his release from custody merely by reason of the irregular process by which he was brought into the State of prosecution."

In *United States v. Unverzagt* (1924), 299 Fed. 1015 (1017), the accused pleaded that he was abducted from British Columbia by American officials. The District Court dismissed his application for habeas corpus, stating (p. 1017):

> "The defendant states he is a citizen of the United States. He is now before the courts of the United States. Canada is not making any application to this court in his behalf or its behalf, because of any unlawful acts charged, and if Canada or British Columbia desire to protest, the question undoubtedly is a political matter, which must be conducted through diplomatic channels. The defendant cannot before the court invoke the right of asylum in British Columbia."

In *Ex parte Lopez* (1934) 6 F. Supp. 342 the Court heard the application for habeas corpus by a man who was abducted from Mexico to the United States and there charged with an offence under United States laws. The government of Mexico interfered in the judicial proceedings on the ground that Mexico's sovereignty was violated through the abduction, and asked that the applicant be surrendered to them with a view to their holding him in custody in Mexico pending the hearing of the application for extradition (if any) under the extradition treaty between the two countries. The District Court, basing itself on Ker v. Illinois and subsequent resultant precedents dismissed the applicant's application and also, by reference to State v. Brewster (*supra*) rejected Mexico's intervention, saying:

> "The intervention of the government of Mexico raises serious questions, involving the claimed violation of its sovereignty, which may well be presented to the Executive Department of the United States, but of which this court has no jurisdiction. *State v. Brewster,* 7 Vt. 121."

See also *United States v. Insull* (1934) 8 Federal Suppl. 310 (313).

48. The Anglo-Saxon doctrine was accepted by continental jurists as well. We have already referred above to the views of *Travers.* See also

Dahm, Voelkerrecht (1958), who says, basing himself on Ex parte Elliott, Ex parte Lopez, U. S. v. Insull, and Afuneh v. A.G. (Criminal 14/42), that "even if . . . the accused arrived in the area of jurisdiction by irregular means such as kidnapping or mistake, it is not he, the accused, but only the country wronged which can invoke irregularities of this type, and this does not concern his trial" (p. 280, note 26).

So far as we have been able to examine legal literature, we found only one conflicting precedent, namely *In re Jolis* (Annual Digest 1933–34, Case No. 77), a judgment given by a French Criminal Court of First Instance (tribunal correctionnel) of 1933. The accused, a Belgian citizen, visited a café in a French village and following upon his visit cash was missing from the till. The owner of the café suspected the accused and called in two village constables, and together with them pursued the accused until they apprehended him across the border. *The Belgian Government lodged an official protest with the French Government* against the arrest which was effected in Belgium by French policemen and *demanded the return of the accused.* The Court of Avesnes decided to release the accused on the ground that—

> "The arrest, effected by French officers on foreign territory, could have no legal effect whatsoever, and was completely null and void. This nullity being of a public nature, the judge must take judicial notice thereof. The information leading to the proceedings of arrest . . . and all that followed thereon must therefore be annulled."

49. Criticism of British and American judgments from the point of view of international law was levelled by

> *Dickinson,* "Jurisdiction Following Seizure or Arrest in Violation of International Law," 28 American Journal of International Law (1934), 231,
>
> and *Morgenstern,* "Jurisdiction in Seizures Effected in Violation of International Law," 29 British Yearbook of International Law (1952), 265.

See also Lauterpacht in 64 Law Quarterly Review (1948), p. 100, note (14). It is not for us to enter into this controversy between international jurists, but we would draw attention to two important points in this case: (1) The critics admit that the established political rule is as summed up above; (2) In the case before us it is immaterial how that controversy is to be determined.

In his above-mentioned important essay, Professor Dickinson proposes that the ruling in Ker v. Illinois be set aside and the ruling in U. S. v. Rauscher be pronounced applicable to cases of seizure in violation of international law, and states his view (p. 239) that—

> "In principle, in the international cases, there should be no jurisdiction to prosecute one who has been arrested abroad in violation of treaty or international law."

In conformity with that view the learned author proposes the following provision (p. 653, italics ours) in the Harvard Research for which he is

responsible as part of the "Draft Convention on Jurisdiction with Respect to Crime":

"Article 16. Apprehension in Violation of International Law.

> "In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention *without first obtaining the consent of the State or States whose rights have been violated by such measures.*"

In his observations on that article the author says (p. 624)—

> ". . . It is frankly conceded that the present article is in part of the nature of legislation,"

and adds (p. 628):

> "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."

He proposes this article *de lege ferenda* to ensure "an additional and highly desirable sanction for international law" (p. 624).

It transpires from the learned author's exposition that the proposed "sanction" of the limitation on the jurisdictional power of the State forms no part of positive customary international law. What is more, it is worthy of note that even under the proposed Article 16 the jurisdictional power would not be limited by the right or for the benefit of the accused, but only by the right and for the benefit of the injured state; for after receiving the consent of the country "the rights of which have been violated by the above-mentioned measures," the country within whose limits the accused is found will have jurisdiction under this proposal too, to try the accused. The "sanction" is thus designed to lead to direct negotiations between the two countries concerned at the proper international level, to the end of making good the violation of the sovereignty of the one and the regularisation of the jurisdiction of the other by mutual consent—and the results of the negotiations between the two countries are binding upon the accused. Indeed, it is stated in the explanatory notes (p. 624, italics ours):

> "And if, peradventure, the custody of a fugitive has been obtained by unlawful methods, the present article indicates an appropriate procedure for correcting what has been done *and removing the bar to prosecution and punishment.*"

This proposal in the Harvard Research proves, in our view, that even he who subjects the rule in force to criticism and proposes changes in judicial decisions or by legislation does not negate the basic view that, in substance, the violation by one country of the sovereignty of the other is susceptible of redress as between the two countries and cannot vest in the accused rights of his own.

50. Indeed there can be no escaping the conclusion that the violation of international law through the mode of the bringing of the accused into the territory of the country pertains to the international level, namely the relations between the two countries concerned only, and must find its solution at such level. The violation of the international law of this order constitutes an international tort to which the usual rules of current international law apply. The two important rules in this matter are (see Schwarzenberger, Manual of International Law, 1960, I, 162)—

(a) "The commission of an international tort involves the duty to make reparations;"
(b) "By consent or acquiescence, an international claim in tort may be waived and, in this way, the breach of any international obligation be healed."

Through the joint decision of the Governments of Argentina and Israel of 3.8.60 "to view as settled the incident which was caused through the action of citizens of Israel that has violated the basic rights of the State of Argentina," the country the sovereignty of which was violated, has waived its claims, including the claim for the return of the accused, and any violation of international law which might have been linked with the incident in question has been "cured." Therefore, according to the principles of international law no doubt can be cast on the jurisdiction of Israel to bring the accused to trial after 3.8.60. After that date no cause remains on the score of a violation of international law which could have been adduced by him in support of any contention against his trial in Israel.

We have said above that, in our view, so far as this case is concerned, it is immaterial how this controversy is to be determined, and we might add that even the slight doubt as to the import of English judicial precedent which was raised by O'Higgins has no practical relevance to this case. The accused was brought to trial after the "violation of international law," upon which the Learned Counsel bases his pleadings, had been made the subject of negotiations between the two countries concerned, and had been settled by their mutual consent. Therefore Counsel had not in effect any foundation in international law for his contention, even if the premise be true that the accused was abducted by the agents of the State of Israel. Insofar as Argentina's sovereignty has been impaired "the incident has been settled," and thereupon the episode of the kidnapping of the accused descended from the level of international law onto the level of municipal law (in the sense of the distinction between the two advanced by Morgenstern, Dickinson, and O'Higgins). Following upon the settlement of the incident between the two countries prior to the bringing of the accused to trial, the judgment may be based without hesitation on the whole range of British, Palestinian and American continuous judicial precedent beginning from Ex parte Scott on to Frisbie v. Collins *et seq.* If the violation of Argentina's sovereignty is excluded from consideration, then the abduction of the accused is no different from any unlawful abduction, whether it constituted a contravention of Ar-

gentine law or Israeli law or both. Thus after the enactment of the Federal Kidnaping Act the United States Supreme Court ruled unanimously in Frisbie v. Collins (1952) 342 U.S. 512 (96 L. Ed. 541), (p. 545):

> "This Court has never departed from the rule announced in *Ker v. Illinois*, 119 U.S. 436, 444, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that 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.
>
> "Despite our prior decisions, the Court of Appeals, relying on the Federal Kidnaping Act, held that respondent was entitled to the writ if he could prove the facts he alleged. The Court thought that to hold otherwise after the passage of the Kidnaping Act 'would in practical effect lend encouragement to the commission of criminal acts by those sworn to enforce the law.' In considering whether the law of our prior cases has been changed by the Federal Kidnaping Act, we assume, without intimating that it is so, that the Michigan officers would have violated it if the facts are as alleged.
>
> "This Act prescribes in some detail the severe sanctions Congress wanted it to have. Persons who have violated it can be imprisoned for a term of years or for life; under some circumstances violators can be given the death sentence. We think the Act cannot fairly be construed so as to add to the list of sanctions detailed a sanction barring a state from prosecuting persons wrongfully brought to it by its officers. It may be that Congress could add such a sanction. We cannot."

On the solid ground of municipal law the accused can have no argument against the jurisdiction of the Court, while his contention based on the "violation of international law" is untenable because such ground did not exist, at all events at the time of his prosecution.

51. The fact that the accused had no immunity, following upon Argentina's assent to view the incident as settled, may also be deduced from *United States ex rel. Donnelly v. Mulligan*, (1935) 76 F. (2d) 511. The appellant was extradited from France to the United States, and before the thirty day period of immunity, prescribed in the extradition treaty between the two countries, had elapsed, the appellant was arrested anew for extradition to Canada. In their first decision (74 F. (2d) 220) the Court of Appeals decided to release the appellant pursuant to the ruling in U. S. v. Rauscher. Subsequently to that decision the President of the French Republic issued an order authorising the United States to surrender the appellant to Canada. When the case came to be reheard, the Court of Appeals decided that the new order of France had deprived the appellant of his immunity under the above-mentioned extradition treaty. Stating its reasons for the judgment the Court said *inter alia* (p. 512):

"The appellant cannot complain if France acted under the treaty, nor can he complain if it acted independent of the treaty as an act of international comity. The French decree consents to his re-extradition; moreover, it may be regarded as a consent given independently of the treaty and as an act of international comity. If under the treaty, it is conclusive upon the appellant. France had the right to give or withhold the asylum accorded him as it saw fit. And it has withheld asylum for the purpose of re-extradition to Canada. The appellant cannot question this action on the part of France."

p. 513:

"Extradition treaties are for the benefit of the contracting parties and are a means of providing for their social security and protection against criminal acts, and it is for this reason that rights of asylum and immunity belong to the state of refuge and not to the criminal."

If the immunity of that appellant which was assured by the extradition treaty whereby France surrendered him to the United States was taken away through France's assent and the withdrawal of her protection of him, there is all the less reason for the present accused who was never protected by the principle of U. S. v. Rauscher to claim personal immunity (for this is what his contention against jurisdiction really amounts to), by reason of the violation of the sovereignty of a country that has waived all her claims with reference to such violation and has not extended any protection to the accused. (See also statements made in Ker v. Illinois (above) on the difference between the right of a sovereign country to offer an offender asylum within its territory and the demand of the offender for the grant of such asylum.) In the words of the summing up in U. S. v. Mulligan, "the rights of asylum and immunity belong to the land of the asylum and not to the offender."

The above-mentioned precedent which is also cited by *Hyde* (*ibid.*) p. 1035 and Oppenheim (-Lauterpacht) (*ibid.*) p. 702 conforms to the principles of current international law. See *Moore,* Extradition (1891) Vol. 1, p. 251:

". . . The immunity of the extradited person . . . rests upon a contract between the two governments . . . His immunity is within the control of the surrendering government, and he could not be permitted to set it up, if that government should waive it."

(279) "The character of a fugitive from justice cannot confer upon him any immunities."

See also Harvard Research in International Law, Draft Convention on Extradition, 29 AJIL (Suppl.) 1935, p. 213 (italics ours):

"Part V: Limitations upon the Requesting State

Article 23. Trial, Punishment and Surrender of Extradited Person.

(1) A state to which a person has been extradited shall not, *without the consent of the State which extradited such person:*

> (a) Prosecute or punish such person for any act committed prior to his extradition, other than that for which he was extradited;
> (b) Surrender such person to another State for prosecution or punishment . . ."

Also section 24 of the Extradition Law 5714-1954:

> "Where a person is extradited to Israel by a foreign country, such person shall not be held in custody or prosecuted for any other offence he committed prior to his extradition, nor be extradited to another country for an offence committed prior to his extradition *unless such foreign country gave its consent in writing to such action,* or if such person failed to leave Israel within sixty days after having been enabled, upon his extradition, so to do, or if he left Israel upon his extradition and returned thereto of his own free will."

Kelsen was right, therefore, when he said in his General Theory of Law and State (1949) p. 237, that:

> "Extradition treaties establish duties and rights of the contracting States only."

and so was Schwarzenberger when he said in 3 Current Legal Problems (1950) (p. 272):

> "It would be . . . a travesty of the real situation to imagine that States intended an extradition treaty to be the *Magna Carta* of the criminal profession, or to be based on any principles of international law which prisoners are 'entitled to invoke in their own right.' "

The words "entitled to invoke in their own right" are aimed against the views of *Lauterpacht,* in 64 Law Quarterly Review (1948) p. 100. There is no doubt that Schwarzenberger represents the dominant view and the rule of law in force on this issue. It is also acknowledged on the continent of Europe, including Germany: *vide Dahm* (*ibid.*), pp. 279–280, and is in actual usage and application in the judicial decisions of most countries (*vide ibid.,* note 26).

52. On the subject of the want of immunity of a fugitive offender by his own right, as distinct from an immunity ensuing from a contractual commitment between sovereign countries, we find some interesting observations in *Chandler v. United States* (1949) 171 F. 2d 921, where it is said (p. 935):

> "Nor was Chandler's arrest in Germany a violation of any 'right of asylum' conferred by international law. In the absence of treaty a State may, without violating any recognized international obligation, decline to surrender to a demanding State a fugitive offender against the laws of the latter. . . . Particularly as regards fugitive political offenders—including, presumably, persons charged with treason . . . —it has long been the general practice of States to give asylum. But the right is that of the State voluntarily to offer asylum, not that of the fugitive to insist upon it. An asylum State might, for reasons of policy, surrender a fugitive political offender—for example, a State might choose to turn over to a wartime ally a traitor who had given aid and comfort to their common enemy—in such a case we

> think that the accused would have no immunity from prosecution in the courts of the demanding State, and we know of no authority indicating the contrary. . . . One can appreciate the considerations which ordinarily would make a State reluctant to give affirmative assistance to a sister State in the apprehension and prosecution of a fugitive charged with a political offence. But these considerations are inapplicable to the wronged State, which naturally would have no qualm or scruple against bringing a fugitive traitor to trial if it could lay hands on him without breaking faith with the asylum State."

It is hardly necessary to state, with reference to the above, that the accused is not at all a "political" criminal; the reverse is the case: The crimes which are attributed to the accused have been condemned by all nations as "abhorrent crimes" whose perpetrators do not deserve any asylum, "political" or other. We have already referred above to Article 7 of the International Convention for the Prevention and Punishment of Genocide which lays down the principle that the "extermination of a people and other acts set out . . . will not be deemed political crimes for the purpose of extradition." What is more, the United Nations Assembly enjoined in recurrent Resolutions (Resolutions of 12–13.2.46 and 31.10.47) of all states, whether or not States-Members of the United Nations, to arrest the war criminals and the perpetrators of crimes against humanity wherever they may hide and to surrender them, even without resort to extradition, with a view to their expeditious prosecution. (See History of War Crimes Commission, pp. 411–414). There is considerable foundation for the view that the grant by any country of asylum to a person accused of a major crime of this type and the prevention of his prosecution constitute an abuse of the sovereignty of the country contrary to its obligation under international law (see *Oppenheim-Lauterpacht, (ibid.)* Vol. 2 p. 588). See also the Resolution passed in Mexico City in March 1945 by the "Inter-American Conference on the Problem of War and Peace," also article by H. Silving, "In Re Eichmann: A Dilemma of Law and Morality," in 55 AJIL (1961) 307, p. 324.

In the Note addressed on 8.6.60 by Argentina to Israel, which was published by the Security Council in "Security Council Official Records, Suppl. for April, May and June 1960, p. 24" document S/4334, the Argentinian nation expressed—

> "its most emphatic condemnation of the mass crimes committed by the agents of Hitlerism, crimes which cost the lives of millions of innocent beings belonging to the Jewish people and many other peoples of Europe,"

and proceeded to say:

> "The fact that one of the aforesaid agents, precisely the one who is accused of having conceived and directed the cold-blooded execution of a vast plan of extermination, should have entered and settled in Argentine territory under a false name and false documents, in obviously irregular circumstances in no way covered by the conditions for territorial asylum or refuge, does not justify the gratuitous assertion that many Nazis live in Argentina."

The question as to whether or not other Nazis reside in Argentina has no relevance to this case, and if we cite from the above-mentioned Note, it is only to show that the position taken by the Government of Argentina is that Argentina has not given asylum or refuge to the accused who entered her territory and settled therein "under a false name and false documents," in "obviously irregular" circumstances which do not in any way tally with "conditions for territorial asylum or refuge." That position conforms to the principles of international law and the Resolution of the Inter-American Conference referred to above. The accused is not a "political" criminal and Argentina has given him no right of "refuge" in her territory, and all that has been said in our precedents on the subject of the want of the right of refuge of a "political criminal" applies to the accused *a fortiori.*

See also *Criminal Appeal 2/41 Youssef Sa'id Abou Durrah v. Attorney-General* (PLR Vol. 8, p. 43) in which the appellant was extradited by Transjordan to Palestine under the Extradition Agreement of 1934 between the two Governments, was charged with murder and sentenced to death by the Court of Criminal Assizes in Jerusalem. Counsel for appellant pleaded (a) that the extradition was effected contrary to the provisions of the Extradition Agreement; (b) that the offence was "political" (and therefore not "extraditable"). The Supreme Court decided (pp. 44–45):

> "It is argued, in the first place, that the extradition proceedings were improper and that therefore the Assize Court had no jurisdiction to try the man. . . . If the Government concerned is satisfied that the provisions of Articles 4, 5 and 6 have been carried out, that, we think, must be the end of the matter, except that possibly the Courts of this country are not entitled to try the man for an offence different from that on which his extradition was obtained.
>
> "Finally it is said that this is a political offence. Under the law of this country, murder is murder pure and simple, whatever the motives may be which inspired it. We know of nothing in the criminal law of this country or of England that creates a special offence called political murder. In any case, even supposing it were a political murder, nothing prevents the man, if he is within the jurisdiction of this country, from being tried for it."

To sum up, the contention of the accused against the jurisdiction of the Court by reason of his abduction from Argentina is in essence nothing but a plea for immunity by a fugitive offender on the strength of the refuge given him by a sovereign State. That contention does not avail the accused for two reasons: (a) According to the established rule of law there is no immunity for a fugitive offender save in the one and only case where he has been extradited by the country of asylum to the country applying for extradition by reason of a specific offence, which is not the offence tried in his case. The accused was not surrendered to Israel by Argentina and the State of Israel is not bound by any agreement with Argentina to try the accused for any other specific offence, or not to try him for the offence with which the Court is concerned in this case.

(b) The rights of asylum and immunity belong to the country of asylum and not to the offender, and the accused cannot compel a foreign sovereign country to give him protection against its will. The accused was a wanted war criminal when he escaped to Argentina by concealing his true identity. It was only after he was captured and brought to Israel that his identity has been revealed, and after negotiations between the two Governments, the Government of Argentina waived its demand for his return and declared that it viewed the incident as settled. The Government of Argentina thereby refused definitely to give the accused any sort of protection. The accused has been brought to trial before a Court of a State which accuses him of grave offences against its laws. The accused has no immunity against this trial, and must stand his trial in accordance with the Charge Sheet.

For all the above-mentioned reasons we have dismissed the second contention of Counsel and his prayer to hear witnesses on this point . . .

NOTES

Naturalization—petition for—testimony of government witness as to petitioner's attendance at Communist Party meeting in 1935—effect in false denial by petitioner

The trial court was directed to rehear the petition for naturalization, denied on the ground that the petitioner had shown bad moral character in denying, in order to facilitate his naturalization, testimony that many years ago he had attended a Communist Party meeting in Canada. The trial judge had overruled a motion for a new hearing based upon an affidavit disputing the testimony of the government witnesses that petitioner had attended the meeting, but the appellate court's action was taken on the basis of an assumption that the petitioner had made a false denial at his hearing. The court found the ". . . prior history of appellant's relationship with the INS [Immigration and Naturalization Service] illuminating." It included: (1) full disclosure by the applicant of his early involvement with the Communist Party of Canada prior to filing for naturalization in 1946, and an assurance by the Central Office of the Immigration and Naturalization Service that his prior membership would not disqualify him; (2) deportation proceedings in 1947 and disregard of a court ruling that he was entitled to a hearing; (3) requirement of weekly reporting for interrogation over a period of eight and one-half years; (4) six weeks' detention " . . . for no apparent reason . . ." at Ellis Island without bail; (5) and, eventually, an administrative finding that as applicant had been a person of good moral character he might depart voluntarily, rather than be deported. "Without more, these misstatements, if misstatements they were, concerning these olden affairs do not evince a lack of good moral character required by the statute. . . ." *Klig* v. *U. S.*, 296 F.2d 343 (U. S. Ct. A., 2d Cir., Nov. 16, 1961).

Restitution under military occupation order—restoration of pension rights to former German national—taxable income in United States

Petitioner contended that the sum of DM. 45,000, received in 1955 from his former German employer who had been forced to discharge him without pension rights under the racist laws of Nazi Germany, was reparation for personal injuries under British Military Government Law No. 59, and hence not taxable income. Further, petitioner claimed that an interpretation of Internal Revenue Code § 911 that denied the benefit of the exemption for income from sources without the United States to a person who, at the same time the income arose, did not have any connection with the United States (and hence no responsibility for reporting his income to the United States) discriminated against naturalized citizens. The assessment of tax liability was upheld. *Stanford* v. *C. I. R.,* 297 F.2d 298 (U. S. Ct. A., 9th Cir., Oct. 28, 1961).

International trade—dutiable rate—effect of Presidential increase of rate after Tariff Commission had recommended an absolute quota

Under the Trade Agreements Extension Act of 1951, 19 U. S. C. § 1364, the Tariff Commission found that the peril point had been reached with respect to imported spring clothespins, and recommended that the President set a quota. Instead, the President suspended the old rate of duty and imposed a higher rate, which the importer protests. The protest was sustained; the President has the authority to accept or reject the Tariff Commission's recommendation, but not to attempt to limit imports by a different device than the one recommended by the Commission. *Falcon Sales Co.* v. *U. S.,* 199 F. Supp. 97 (U. S. Customs Ct., 1st Div., Oct. 18, 1961).

Human rights—U. N. Charter not self-executing—Treaty of Paris—power of New York State over Puerto Rican

Plaintiff is an American citizen of Puerto Rican birth, now residing in New York. He challenges the application to him of the State literacy test as a pre-requisite to voting on the grounds, *inter alia,* that the test violates his human right to vote, protected by the Charter and the Declaration on Human Rights and exceeds the powers of a State of the Union under Article 9 of the Treaty of Paris, 30 Stat. 1759, providing that the status of the natives of territories ceded by Spain should ". . . be determined by the Congress." The court explained that the Declaration is not a statement of law and that Article 55 of the Charter is not self-executing. The Treaty of Paris was not intended to give persons born in Puerto Rico an immunity against the otherwise valid laws of a State of the Union to which they might move from Puerto Rico. *Camacho* v. *Rogers,* 199 F.Supp. 155 (U. S. Dist. Ct., S. D. N. Y., Oct. 19, 1961).

International claims—repudiation by National Bank of Hungary of its obligation to pay Hungarian exporters' debts in dollars—effect of internal law of Hungary

The plaintiff sought to establish a claim, pursuant to the International Claims Settlement Act, 22 U.S.C. 1631, *et seq.*, against certain property sequestered in the United States by the Attorney General. The claims arose out of the failure of the National Bank to convert into dollars and transmit payments to it by claimant's Hungarian debtors, who were obligated by their contracts to pay in dollars. The Attorney General resisted the claim on the ground that the National Bank did not wrong plaintiff by willful breach, but acted under Hungarian laws restricting or prohibiting certain foreign exchange transactions. The court held for the claimant, finding that the Attorney General had failed to plead and prove the Hungarian law upon which he relied, and that the Hungarian National Bank had not relied upon such law, but rather upon " . . . a change in economic conditions. . . ." The court then added, in what would appear to be rather loosely coupled dictum:

> In this connection it may be observed that the purpose of seizing enemy property is not confiscation. Even in an era of total war, confiscation of enemy property is not sanctioned either by international law or practice. The principal purpose of such seizures is to sequester the property in order to make it impossible for the enemy to use it against this country in time of war. A secondary objective is to secure payment of claims of the United States and its nationals arising against the foreign Government or against the original owners of seized property.
>
> Consequently no reason is perceived for being astute to find justification for a denial of claims of American nationals against such funds. Plaintiffs' claims are valid not only as a matter of law, but as a matter of morals as well. There is no doubt that the group of American banks extended credits to Hungarian exporters; that the National Bank of Hungary undertook to receive repayments and in turn to transmit them to the New York Trust Company; that in large part it failed to do so; and the American banks sustained large losses as a result of this repudiation.

Chemical Bank New York Trust Co. v. *Kennedy,* 199 F. Supp. 256 (U. S. Dist. Ct., D. C., Nov. 27, 1961).

Rupture of diplomatic relations—effect on standing of foreign government to claim immunity for vessel—suspension of action

The holding, reported in 55 A. J. I. L. 749 (July, 1961) on the basis of a mimeographed copy of the opinion, that rupture of diplomatic relations suspends litigation on the issue of the immunity of a vessel owned by a foreign state, is now carried in print. *Dade Drydock Corp.* v. *M/T Mar Caribe,* 199 F. Supp. 871 (U. S. Dist. Ct., S. D. Texas, Jan. 27, 1961).

Private international law—arbitration provision in Indian contract—enforced

A Federal court sitting in diversity of citizenship jurisdiction applied the State rule (Pennsylvania) where it sat as to the proper choice of law on the effect of an arbitration provision in a contract made in India to be performed there. The court found that Pennsylvania would have applied the law of India and that the Indian Arbitration Act of 1940 provides for the enforcement of arbitration provisions by a stay of judicial proceedings pending arbitration. The court ruled that the Federal Arbitration Act, 9 U. S. C. § 1 *et seq.*, was without application, as the contract containing the agreement to arbitrate did not relate to a maritime transaction or involve interstate or foreign commerce. *Cook* v. *Kuljian Corp.*, 201 F. Supp. 531 (U. S. Dist. Ct., E. D. Penna., Jan. 29, 1962).

Immunity of a foreign state—assets of nationalized Czechoslovakian company—suggestion of immunity does not preclude adjudication of title to assets in custody of court

The defendant is a banking corporation organized in Prague in 1869. It was licensed to do business in New York in 1948, some months prior to its merger into a new state-owned banking corporation in Czechoslovakia by an order of the Czechoslovak Government putting into effect a 1945 decree providing for the nationalization of banks. Plaintiff is a substantial creditor of the bank as a result of transactions with it prior to 1939, when he was still a Czechoslovak national. In 1952 a temporary receiver was appointed in New York for defendant, and certain depositaries restrained from transferring property localized in New York to defendant's state-owned successor. The Czechoslovak Government claimed immunity for the latter, and there followed a series of communications from the Department of State on the issue of immunity. The Department also referred to a nationalization claims settlement under negotiation between the United States and Czechoslovakia.

Affirming the decision below dismissing the claim of immunity from the receivership proceeding, 55 A. J. I. L. 748 (July, 1961), the court said:

> . . . It would not seem that the pendency of negotiations between the Department of State and the Czechoslovak Government with reference to claims of American citizens . . . is to be equated with a compact or treaty overriding the public policy of the State of New York . . . Moreover, the suggestion of immunity disclaims any interest on the part of the United States.
>
> The adjudication of rights to property in the custody of the court and within its jurisdiction is a judicial function. . . . In this action defendant has been dealt with as a corporate jural entity, separate and distinct from the Republic of Czechoslovakia. . . . The suggestion of immunity from execution of the property to the Republic of Czechoslovakia does not avail the defendant and has no application to its property. . . . We find the suggestion of immunity does not preclude

> judicial determination of title to the assets of the defendant in the custody of the court allegedly transferred in fraud of defendant's creditors to . . . the Republic of Czechoslovakia . . .

Stevens, J., dissented in part. *Stephen* v. *Zivnostenska Banka, Nat'l Corp.*, 222 N.Y.S. 2d 128 (N. Y. Sup. Ct., App. Div., 1st Dept., Dec. 12, 1961).

Immunity of a foreign state—commercial activities—attachment of debts for exports owing to Cuban state for failure to perform contract

In a suit against Cuba for damages for alleged breach of contract to supply frozen shrimp, plaintiff applied for attachment against debts owed to Cuba, arising of sales of various commodities (sugar, shrimp, tobacco, and cigars) by the Cuban Government to importers in the United States. The court ruled that the attachment warrant should issue because the "new doctrine" of the Department of State (*i.e.*, the "Tate Letter," 26 *Dept. of State Bulletin* 984 (1952)) ". . . applies precisely to Cuba which has taken over many former commercial activities. . . . If Cuba is to be permitted to collect dollars on its commercial activities it must respond in our courts on its commercial contracts." The court went on to say, however, ". . . attachment is usually used to obtain jurisdiction and the defendant can then raise the question of sovereign immunity by appropriate subsequent proceedings." *Three Stars Trading Co.* v. *Republic of Cuba,* 222 N. Y. S. 2d 675 (N. Y. Sup. Ct., Spec. Term, N. Y. Co., Pt. II, Nov. 24, 1961).

Nationalization—Cuba—corporation organized in Cuba—proper counsel to defend corporation in stockholder's action for appointment of receiver

The case at the stage reported involves a dispute as to whether counsel appointed by the president of a Cuban corporation or by the interventor installed by the Castro government should represent the corporation in a proceeding brought by a stockholder for the appointment of a permanent receiver for the assets localized in New York under § 977-b of the Civil Practice Act. 56 A. J. I. L. 217 (January, 1962) reported the appointment of a refereee to take evidence and make findings as to the relevant Cuban laws, decrees, and related matters. The present decision confirms the referee's conclusion that the "Act of State doctrine" does not require extraterritorial recognition of the Cuban appointment as to assets localized in New York and as to ". . . contracts whose 'center of gravity' " is within New York. The court noted that the Cuban Government could intervene in the main proceeding pursuant to § 193-b, subdiv. 1, New York Civil Practice Act. *Mann* v. *Cia. Petrolera Trans-Cuba,* S.A., 223 N.Y. S.2d 900 (N. Y. Sup. Ct., Spec. Term, N. Y. Co., Pt. I, Jan. 2, 1962).

United Nations Headquarters—jurisdiction of New York as to crime

Defendant, an American citizen, was a payroll clerk in the employ of the United Nations. Following his arrest outside the U.N. Headquarters, he was charged with grand larceny allegedly committed within the Headquarters. The defense contention that the State of New York was without jurisdiction with respect to a crime committed within the Headquarters area by an employee of the United Nations was rejected, because (1) the defendant did not come within any of the categories of persons having immunity from process under the Headquarters Agreement, 22 U.S.C. 287, 61 Stat. 756, and New York Penal Law, § 25; (2) the offense charged was within the legislative, criminal jurisdiction of the State of New York, unaffected by the Headquarters Agreement in view of Article III, §§ 7(b) and 8 thereof. The defendant's further contention that the consent given by the United Nations to his prosecution came too late (after indictment) was also rejected. *People* v. *Coumatos,* 224 N.Y.S. 2d 507 (Ct. of Gen. Sessions, N. Y. Co., Jan. 19, 1962).