

1963

# Jurisdictional Aspects of the Eichmann Case

Vanni E. Treves

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

Treves, Vanni E., "Jurisdictional Aspects of the Eichmann Case" (1963). *Minnesota Law Review*. 2458.  
<https://scholarship.law.umn.edu/mlr/2458>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

# Jurisdictional Aspects of the Eichmann Case

*Israel's prosecution of Adolph Eichmann for the part he played in Nazi Germany's plan to exterminate the Jews has evoked a wealth of comment concerning various policy and ethical considerations. Far less has been written about Israel's power to subject Eichmann to its jurisdiction. In this Article, Mr. Treves analyzes whether the exercise of jurisdiction by the District Court of Jerusalem was proper under existing principles of international law. After discussing the various bases of international penal jurisdiction, he concludes that the court, by going to the very limits of existing rules of international law, was justified in asserting its jurisdiction in the Eichmann case.*

Vanni E. Treves\*

It would be emphasizing the obvious to say that the Eichmann trial is one of the most momentous trials of history; one which will never be forgotten. . . . [It] was imperatively necessary. Its omission would have been a gaping chasm in the geography of the human spirit.<sup>1</sup>

Thus did Justice Musmanno of the Supreme Court of Pennsylvania, formerly Judge of the International War Crimes Tribunal at Nuremberg, express his view of the significance of the *Eichmann* case. Although it represents an extreme and avowedly partisan position, Justice Musmanno's statement serves to indicate that despite all of the criticism directed at Israel's course of conduct, it would be a mistake to minimize the importance of the many issues involved. Much of the literature that appeared with quite remarkable promptness was of a largely documentary and unashamedly sensational nature.<sup>2</sup> But the trial's purely legal aspects aroused vast professional response, manifested by the spate of articles that anticipated the judgment.<sup>3</sup> Eichmann's name had been included

\* Articled Clerk to Macfarlanes, Solicitors of the Supreme Court, London.

1. Musmanno, *The Objections in Limine to the Eichmann Trial*, 35 TEMP. L.Q. 1, 20 (1961).

2. E.g., CLARKE, *EICHMANN, THE MAN AND HIS CRIMES* (1960); DONOVAN, *MAN OF SLAUGHTER* (1960); REYNOLDS, KATZ & ALBOUDY, *MINISTER OF DEATH: THE ADOLF EICHMANN STORY* (1960).

3. Articles and books written before the judgment was delivered on December 11th to 13th, 1961, include ROGAT, *THE EICHMANN TRIAL AND*

in the official list of Nazi war criminals sought by the United Nations after the war.<sup>4</sup> His capture thus provided a new point of focus for challenges and visions that, 15 years earlier, the Nuremberg Trials had similarly evoked.

The prosecution of Eichmann involved, of course, many policy and ethical considerations. Prime Minister Ben-Gurion suggested that the primary objectives of the trial were educational.<sup>5</sup> Others saw it as a supreme vindication, transcending existing law, of man's right to the basic prerequisites of civilized existence.<sup>6</sup> Still others viewed it as a reassertion of Israel's importance and responsibilities both as a nation and as the leader of world Jewry.<sup>7</sup>

These considerations must be seen in light of the following abbreviated facts. Eichmann was shown at Nuremberg to have headed that section of the Gestapo charged with the implementation of the " 'final solution' of the Jewish question."<sup>8</sup> In May, 1960, he was found in Argentina by concentration camp survivors and eventually was removed in secrecy to Israel. The details of his transportation and apparent abduction still await clarification, but Argentina held the Israeli Government responsible, alleging that the action of the Israeli "volunteers" on Argentinian territory had violated that country's sovereign rights. In a complaint filed with the United Nations Security Council under article 33 of the United Nations Charter, Argentina asserted that Israel's conduct consti-

---

THE RULE OF LAW (1961); Baade, *The Eichmann Trial: Some Legal Aspects*, 1961 DUKE L.J. 400; Comer, *The Eichmann Trial: Historic Justice?* 23 GA. B.J. 491 (1961); Cutler, *The Eichmann Trial*, 4 CAN. B.J. 352 (1961); Gibbon, *Some Thoughts on the Eichmann Incident and the International Rule of Law*, 32 MAN. B. NEWS 79 (1960); Green, *The Eichmann Case*, 23 MODERN L. REV. 507 (1960); Katz, *The Role of Law in International Affairs as Illustrated by the Eichmann Case*, 84 N.J.L.J., Jan. 12, 1961, p. 1; Musmanno, *supra* note 1; Robinson, *Eichmann and the Question of Jurisdiction*, 30 COMMENTARY 1 (1960); Silving, *In re Eichmann: A Dilemma of Law and Morality*, 55 AM. J. INT'L L. 307 (1961); Taylor, *Large Questions in the Eichmann Case*, N.Y. Times, Jan. 22, 1961, § 6 (Magazine), p. 11; Note, 46 CORNELL L.Q. 326 (1961). See generally Meron, *Public International Law Problems of the Jurisdiction of the State of Israel*, 88 JOURNAL DU DROIT INTERNATIONAL 986 (1961).

4. Jerusalem Post, June 15, 1960.

5. "In my opinion, the importance of the capture of Adolf Eichmann and of his trial in Israel lies . . . in the privilege . . . of having the entire story of the Holocaust revealed in an Israel court, so that the facts should be known and remembered by the youth in Israel." Ben-Gurion, quoted in Jerusalem Post, May 29, 1960; *accord*, Ben-Gurion, *The Eichmann Case as Seen by Ben-Gurion*, N.Y. Times, Dec. 18, 1960, § 6 (Magazine), pp. 7, 62.

6. Silving, *supra* note 3, at 336.

7. ROGAT, *op. cit. supra* note 3, at 16.

8. INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS 250 (1947); see *id.* at 252.

tuted a breach of international law and a danger to international peace and security.<sup>9</sup> The Security Council, after debate, adopted a resolution censuring Israel and requesting that it make appropriate reparation.<sup>10</sup> But strenuous diplomatic measures produced a joint communique of the two states in August, 1960, whereby they resolved "to view as settled the incident which was caused in the wake of the action of citizens of Israel, which violated the basic rights of the State of Argentina."<sup>11</sup> Eichmann was then charged with "crimes against the Jewish people," "crimes against humanity," and "war crimes," under the specific provisions of the Nazis and Nazi Collaborators (Punishment) Law,<sup>12</sup> and was tried before the District Court of Jerusalem.

9. See U.N. SECURITY COUNCIL OFF. REC. 15th year, 865th-68th meetings (S/PV. 865-68) (1960).

10. U.N. Doc. No. S/4349 (1960).

11. Attorney Gen. of Israel v. Adolf, the Son of Karl Adolph Eichmann, District Court of Jerusalem, Crim. Cas. 40/61, No. 40 (unofficial translation in University of Illinois Law Library) [hereinafter cited as Judgment]; see *id.* No. 50.

12. Nazis and Nazi Collaborators (Punishment) Act, 5710-1950. English text in STATE OF ISRAEL, GOVERNMENT YEARBOOK 189, 5712 (1951-1952) [reprinted in UNITED NATIONS, YEARBOOK ON HUMAN RIGHTS FOR 1950, at 163 (1952)]. The statute provides that:

1. (a) A person who

(1) Has committed, during the period of the Nazi regime, in any enemy country, an act constituting a crime against the Jewish people;

(2) Has committed, during the period of the Nazi regime, in an enemy country, an act constituting a crime against humanity; or

(3) Has committed, during the period of the Second World War, in an enemy country, an act constituting a war crime, is liable to the death penalty.

(b) In this section, "crime against the Jewish people" means any of the following acts, committed with intent to destroy the Jewish people in whole or in part:

(1) Killing Jews;

(2) Causing serious bodily or mental harm to Jews;

(3) Placing Jews in living conditions calculated to bring about their physical destruction;

(4) Imposing measures intended to prevent births among Jews;

(5) Forcibly transferring Jewish children to another national or religious group;

(6) Destroying or desecrating Jewish religious or cultural assets of value;

(7) Inciting to hatred of Jews;

"Crime against humanity" means any of the following acts: murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds;

"War crime" means any of the following acts: murder, ill-treatment or deportation to slave labour or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder

The right to object on the international plane to the district court's exercise of jurisdiction was, as a result, limited to the Federal Republic of Germany, for Eichmann was a naturalized German national.<sup>13</sup> It is established that diplomatic representations on behalf of an alien injured by the action of the organs of another state in a manner violating international law may be made only by the state of which the victim is a national. This general rule found expression in the Permanent Court of International Justice when it held:

[I]n taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to intervention on behalf of its own nationals. . . .<sup>14</sup>

The Federal Republic of Germany made no such representations. Indeed, it welcomed the prosecution and offered its assistance in the preparation of the evidence.<sup>15</sup> But it does not follow from the absence of protest by Germany that the district court's assertion of jurisdiction accords with reasonable standards of international legality. In the circumstances of this case, Germany's forbearance might be attributed as much to imponderable, nonlegal considerations as to acceptance of Israel's jurisdictional claims.<sup>16</sup> This Arti-

---

of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity.

3. (a) A person who, during the period of the Nazi regime, in an enemy country, was a member of, or held any post or exercised any function in, an enemy organization is liable to imprisonment for a term not exceeding seven years.

Of the 15 counts of the indictment, four came under § 1(a)(1), seven under § 1(a)(2), one under § 1(a)(3), and three under § 3(a). Eichmann was convicted under the whole or part of every count. Judgment No. 244.

13. Green, *supra* note 3, at 512: "It has never been suggested that Eichmann has given up or lost his German nationality."

14. The Railway Line Panevezys-Saldutiskis, P.C.I.J., ser. A/B, No. 76, at 16 (1939). A forceful and, it is believed, accurate gloss on this dictum may be found in the award of the United States-Mexican General Claims Commission in *Dickson Car Wheel Co. (United States v. United Mexican States)*, 4 U.N. Rep. Int'l Arb. Awards 669 (1931). In its advisory opinion in the *Reparations for Injuries Case*, the International Court of Justice emphasized anew that the national state normally has the sole legal interest. *Reparation for Injuries Suffered in the Service of the United Nations*, [1949] I.C.J. Rep. 174. For a summary of the rule, its rationale, and the exceptions to it, see SCHWARZENBERGER, *INTERNATIONAL LAW* 590-602 (3d ed. 1957).

15. Jerusalem Post, May 25, 1960; Hamilton, *Eichmann & the U.N.*, N.Y. Times, June 26, 1960, § 4, p. 9, cols. 7-8.

16. A desire to avoid reviving the past in its own courts and the in-

cle is, therefore, devoted to answering this question: On what, if any, grounds of international law could a competent state so inclined have impugned the exercise of jurisdiction in the Eichmann case?

## I. BASES OF PENAL JURISDICTION

### A. GENERAL PRINCIPLES OF JURISDICTION

It has been charged that "everything connected with the proceedings against Eichmann is tainted with lawlessness . . . . To try him according to the forms of law is to make a mockery of law."<sup>17</sup> The district court, on the other hand, came to the conclusion "that the law in question conforms to the best traditions of the law of nations."<sup>18</sup> Possibly no more authoritative starting point can be found for the resolution of this basic disagreement than in the classification of the general principles of penal jurisdiction made by the Harvard Draft Convention:

[F]irst, the territorial principle, determining jurisdiction by reference to the place where the offence is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offence; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offence; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offence.<sup>19</sup>

Only the protective principle and the universality principle were directly in point in the *Eichmann* case. The passive personality principle was regarded as relevant by various learned forecasters of the judgment but, as will be seen, was virtually ignored when the judgment was delivered. However, a short excursion into the scope of the first two—the principles of territoriality and nationality, termed by the Draft Convention as "of primary importance" and "universally accepted," respectively<sup>20</sup>—may give some useful insights.

---

creased risk of anti-Semitic demonstrations if the Federal Republic had instituted proceedings are obvious reasons for the German Government's quiescence.

17. Washington Post, May 27, 1960, p. A16, col. 2 (editorial).

18. Judgment No. 11.

19. Harvard Research in International Law, *Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. SUPP. 435, 445 (1935).

20. *Ibid.*

### 1. *The Territoriality Principle*

The territorial principle is one of the ingrained postulates of both national and international law. In the opinion of the United States Supreme Court in *The Chinese Exclusion Case*, "jurisdiction over its own territory . . . is an incident of every independent nation."<sup>21</sup> In the words of Mr. Justice Holmes, "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done,"<sup>22</sup> and that country has jurisdiction with regard to any crime committed within its territory.<sup>23</sup> The most significant justification for the rule derives from the notion that the state is a totally autonomous, self-sufficient, sovereign entity, alone responsible for the maintenance of that internal order and obedience to the law for which it has the primary concern.<sup>24</sup>

Some would place equal emphasis on the procedural rationale of the territorial principle. To Sir Hersch Lauterpacht, the principle is no more than "a rule of convenience in the sphere of the law of evidence. It is not a requirement of justice or even a necessary postulate of the sovereignty of the State."<sup>25</sup> Obviously, it is at the scene of a crime that evidence of it may most easily be obtained, witnesses found, and a trial speedily held. Also, trial and punishment at the *locus delicti* will normally have the greatest deterrent value.<sup>26</sup> In light of these factors, the assertion has been made that in claiming jurisdiction, "Israel can appeal to the basic reasoning underlying the 'territoriality principle.'"<sup>27</sup> Although it is clear that there was no lack of evidence at the trial, however, the court noted the Attorney General's publicized intention to prosecute any suspected war criminals in attendance as witnesses.<sup>28</sup> While arrangements were made for the taking of affidavits and for cross-examination before foreign tribunals, the understand-

21. 130 U.S. 581, 603 (1889).

22. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

23. Harvard Research in International Law, *supra* note 19, at 480.

24. See DONNEDIEU DE VABRES, *LES PRINCIPES MODERNES DU DROIT PENAL INTERNATIONAL* 11-13 (1928). See generally LEWIS, *FOREIGN JURISDICTION AND THE EXTRADITION OF CRIMINALS* 30 (1859).

25. Lauterpacht, *Allegiance, Diplomatic Protection and Criminal Jurisdiction Over Aliens*, 9 *CAMB. L.J.* 330, 348 n.61 (1947).

26. GLUECK, *WAR CRIMINALS: THEIR PROSECUTION AND PUNISHMENT* 80 (1944).

27. Robinson, *supra* note 3, at 3. In support of his argument Dr. Robinson, who was assistant to the Attorney General in the *Eichmann* case, pointed out that the 300,000 survivors of the Nazi extermination plan at present in Israel constitute the greatest concentration of potential witnesses anywhere; and that for years at least three research institutes in Israel have been collecting and organizing material relating to the Nazi regime.

28. Judgment No. 54(c).

able reluctance of former Nazis to appear before the court largely derogated from whatever direct applicability the territorial theory might have had to the *Eichmann* case.<sup>29</sup>

Although the territorial theory remains the principal basis of international penal jurisdiction, the vast increase in the speed of travel and communication and the development of novel means of transmitting news and sound have necessitated significant additions to it. Indeed, it has been suggested that "we would do well in abandoning any notion of the so-called territoriality of criminal laws."<sup>30</sup> There has been a change of emphasis away from the physical *locus* of an event to the effect that it has on the values and interests of the states and individual citizens concerned. This change is manifested by two extensions that, it is said, threaten the punishment not only of persons who commit infractions of the criminal law actually within the state, but also of persons who commit such infractions as are *in contemplation of law* within the state.<sup>31</sup>

The first extension—termed the subjective territorial principle—permits a state to prosecute for crime begun within its frontiers but consummated abroad. The Harvard Draft Convention commented that "it is not to be doubted that States are competent internationally to apply an unqualified subjective test."<sup>32</sup> The second extension is termed the objective territorial principle, and is no more than the converse of the first; it establishes the jurisdiction of a state to prosecute for acts that, although commenced abroad, have had consequences within its territory.<sup>33</sup> This principle, of course, falls outside the facts of the *Eichmann* case. But it should be noted that the borderline between any wide application of it and the application of the protective principle, which the court judged to be one of the primary foundations of its jurisdiction, may well be very narrow.<sup>34</sup>

---

29. See DONNEDIEU DE VABRES, *op. cit. supra* note 24, at 11.

30. Baade, *supra* note 3, at 416. Levitt also would reject it, at least in common-law jurisdictions. Levitt, *Jurisdiction Over Crimes*, 16 J. CRIM. L. & CRIMINOLOGY 316, 498-506 (1926).

31. See Cook, *The Application of the Criminal Law of a Country to Acts Committed by Foreigners Outside the Jurisdiction*, 40 W. VA. L. REV. 303, 312 (1934). Both trends have manifested themselves in Israel's law. Meron, *supra* note 3, at 992.

32. Harvard Research in International Law, *supra* note 19, at 487.

33. Report on Extraterritorial Crime and the Cutting Case, [1887] FOREIGN REL. U.S. 757, 777 (1888). The same principle was applied by the Permanent Court of International Justice in the case of the S.S. "Lotus," P.C.I.J., ser. A, No. 10 (1927); see 1 TRAVERS, LE DROIT PENAL INTERNATIONAL 166-239 (1922).

34.

The recognition of an objective territorial jurisdiction by States



## 2. *The Nationality Principle*

Since the right to exercise jurisdiction over nationals is undisputed, and since there could be no possibility of Israel claiming this right against Eichmann, who was a German citizen, it would be superfluous to make more than a mention of it here.<sup>35</sup> Indeed, it is a common view that its regulation is a matter purely of municipal law.<sup>36</sup> Common-law courts, in applying the principle somewhat sparingly, have reflected the fact that a great majority of countries have imposed by legislation a variety of limitations upon its application. Normally these take the form of a restrictive enumeration of those offences committed abroad for which a national may be tried by the State to which he owes allegiance. These provisions are strong indications that the nationality principle is not as important as territoriality.

### B. THE BURDEN OF PROOF

The two principles outlined above have not been the subject of very much controversy. But unfortunately the same cannot be said of the other bases of extraterritorial penal jurisdiction. The major problem relating to their scope and legality can possibly best be indicated by the following question: May a state punish an alien for any extraterritorial crime unless a clearly established rule of international law to the contrary can be indicated? This issue is of great importance in the *Eichmann* case, for although the court declared itself content to rely on subsisting, positive rules of international law to establish its jurisdiction, it is believed that in fact its judgment marks a significant advance and, in a number of respects, may go beyond these pre-existing rules. If this belief is correct, it must be well established that the court was entitled to progress, whether by volition or not, beyond the law of nations as it found it. Only after the legality of any innovation is ascertained may one go on to ask whether it is beneficial.

This question is made considerably harder to answer by the

---

which maintain the territorial theory without expressly admitting any exceptions from it clearly reduces very considerably the extent of the difference between the view of such States and that of those which claim that the territorial theory is subject to exceptions.

League of Nations Committee of Experts for the Progressive Codification of International Law, *Criminal Competence of States in Respect of Offences Committed Outside Their Territory*, 20 AM. J. INT'L L. SPEC. SUPP. 252, 255 (1926).

35. See Harvard Research in International Law, *supra* note 19, at 519-39, for a comprehensive treatment.

36 Beckett, *The Exercise of Criminal Jurisdiction Over Foreigners*, 6 BRIT. YB. INT'L L. 44, 45 (1925).

paucity of case material and diplomatic correspondence relating to it. Only infrequently does a state assert jurisdiction over foreigners in circumstances that leave it open to another state to protest. Still more infrequently does the latter, which is only morally bound to do so, take any strong action on behalf of its national. The judgment of the Permanent Court of International Justice in the "*Lotus*" case<sup>37</sup> does constitute a notable landmark. It was regarded as "momentous" by some and denigrated by others.<sup>38</sup> While the court in the *Eichmann* case said that it was "not guided" by the "*Lotus*" case, the court's reasoning would have rested on far stronger foundations if it had been relied upon.

In the "*Lotus*" case, Turkey attempted to apply to a French citizen a section of its Penal Code that imposed liability on "any foreigner who . . . commits an offense abroad to the prejudice of Turkey or of a Turkish subject . . . ."<sup>39</sup> In accepting Turkey's argument that any state could exercise extraterritorial jurisdiction of this nature as long as international law did not prohibit it, the Permanent Court of International Justice said:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.<sup>40</sup>

---

37. Case of the S.S. "*Lotus*," P.C.I.J., ser. A, No. 10 (1927).

38. Among the most fervent Anglo-American supporters of the judgment was Berge, who thought it "momentous." Berge, *The Case of the S.S. "Lotus,"* 26 MICH. L. REV. 361 (1928). "The *Lotus* case should be hailed with delight by those who welcome judicial decisions based upon a realistic view of human relations." Berge, *Conflicts in Respect to Criminal Jurisdiction*, 24 PROCEEDINGS OF AM. SOC. INT'L L. 34, 38 (1930). Brierly, however, strongly allied himself with the dissenting judges. Brierly, *The Lotus Case*, 44 L.Q. REV. 154 (1928). See also Note, 37 YALE L.J. 484 (1928). For references to articles in foreign publications, see I OPPENHEIM, INTERNATIONAL LAW 333 n.3 (8th ed. 1955). It is significant that, writing two years before the judgment, Beckett thought "the only answer" to the jurisdictional problems later posed by the "*Lotus*" case to be contrary to the one reached by the majority of the Permanent Court of International Justice. At that time, he found it generally agreed that the propositions that international law imposed no limitations upon a state's jurisdiction over aliens or that states formerly possessed unlimited rights which in some cases they had relinquished in the course of time were both untenable. Beckett, *supra* note 36, at 45. See Judgment No. 39 (referring erroneously to the International Court of Justice as the court that decided the "*Lotus*" case).

39. Turkish Penal Code, Law No. 765 of March 1, 1926, art. 6, *Journal Officiel*, n 320, du 13 Mars 1926 (Turkey); see Case of the S.S. "*Lotus*," P.C.I.J., ser. A, No. 10, at 14 (1927).

40. *Id.* at 18.

The five dissenting judges refused to accept Turkey's argument.

The relevance of the dissenters' positions to an assessment of the *Eichmann* judgment may now more clearly be seen. For if, as Brierly argued,<sup>41</sup> the dissenters were correct, then any departure by the district court from firmly established principles of international law must be condemned as a violation of international law. It must be admitted at the outset that considerable logic, as well as his own impressive authority, lend credence to Brierly's view. Any contrary argument carries with it the necessary implication that the principles of international penal jurisdiction have been created by the imposition of limitations upon the otherwise unlimited extraterritorial competence of states. This reasoning, impliedly adopted by the majority in the "*Lotus*" case, Brierly rejects as historically unsound, for there is agreement that the original conception of law was personal and that each state claimed jurisdiction over its own nationals alone. Only after some development did the principle of territorial jurisdiction arise, granting the sovereign competence over aliens and citizens alike within its domain.

For all the attractiveness of this thesis, the majority decision in the "*Lotus*" case "is still accepted on the general points of international law,"<sup>42</sup> and it is submitted, rightly so. Any other result would not only have been incompatible with the present state of international law, but in addition, would have stifled what future development may be foreseen. In dissent, Judge Loder vigorously criticized the majority's position as amounting to recognition that "every door is open unless it is closed by treaty or by established custom."<sup>43</sup> Nevertheless, this is an apt characterization of the draughty condition of international law. Vast spheres of transnational action are regulated by little more than political expediency and vague canons of morality. They find few counterparts on the national plane, where the crosscurrents of municipal law have, with time, engulfed every conceivable human activity. State action would be paralyzed if an accepted custom or a ratified treaty had always to be proffered in justification of it. Extraterritorial jurisdiction is not, therefore, an attribute of sovereignty with which international law invests states. Rather, as the "*Lotus*" case made clear, it is the competence that results from the *absence* of legal restriction upon the full, free exercise of that sovereignty.

This is not to say that where international law provides no guid-

---

41. Brierly, *supra* note 38, at 155.

42. Green, *supra* note 3, at 513; *accord*, Meron, *supra* note 3, at 986.

43. Case of the S.S. "*Lotus*," P.C.I.J., ser. A, No. 10, at 34 (1927).

ing rules, state activity will be quite unfettered. Both a country's laws and their enforcement must always conform to the minimum international standards.<sup>44</sup> If the conduct of state officials clearly violates such principles of law as are everywhere recognized, then any state, out of basic humanitarian motives, might assume the right to protest.<sup>45</sup> It could not be suggested that Israel's exercise of jurisdiction could be assailed on these or similar grounds. If any generalization about the proceedings is sustainable, it is that, as at Nuremberg, the pressures and publicity imposed upon the district court and others responsible for the trial merely served to heighten the necessity of scrupulous regard for fairness and impartiality toward the accused.

## II. THE UNIVERSALITY PRINCIPLE

With the approach indicated by the "*Lotus*" case firmly in mind, the universality principle of jurisdiction may now be considered. According to this principle, a court may punish solely as a consequence of having physical power over the defendant—the nationality of the offender and the victim and the place of the crime may all be ignored. The Harvard Draft Convention, while recognizing that this principle has been asserted in some measure by many states and disputed by a lesser number of others, thought it "admittedly auxiliary in character" and felt that the jurisdictional ends served by it could be adequately reached on other principles.<sup>46</sup> The judgment in the *Eichmann* case, however, relied heavily upon the universality principle.<sup>47</sup>

---

44. "It is an established fact that a State may violate its international obligations by applying its laws to aliens, laws which do not fulfill the requirements of the international standard." ROTH, *THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS* 135 (1949).

45. *Neer* (United States v. United Mexican States), 4 U.N. Rep. Int'l Arb. Awards 60, 61-62 (1926):

[T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.

46. Harvard Research in International Law, *supra* note 19, at 445.

47. The court found the crimes charged to be *delicta juris gentium*, or offenses against the law of nations, in that they menaced humanity as a whole:

Therefore, so far from international law negating or limited [*sic*] 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*.

Judgment No. 12.

At the outset, two conceptions of universality must be distinguished. The first refers to "crimes under international law"; it confers jurisdiction quite irrespective of where a crime was committed, for the legal basis of any prosecution is quite simply custody of the accused. The United Nations Committee on International Criminal Jurisdiction thus agreed "that it was now a well-established fact that certain acts were criminal by virtue of international law, irrespective of whether they were criminal or not under any national legal system."<sup>48</sup> The one such act about which there is general agreement is piracy on the high seas; as to others, there is such wide divergence in the scope of national codes, laws, and projects that any precise classification is impossible.<sup>49</sup>

The second conception of universality regards it as a secondary means of repression, and is built upon the Grotian precept *aut dedere aut punire*.<sup>50</sup> Prima facie, the right to punish remains fundamentally territorial, and every state is bound to give effect to it by extraditing offenders found on its soil. But if no extradition is requested, or if it is for any reason impossible, then the *judex deprehensionis*<sup>51</sup> is entitled to inflict punishment. There are very few codes that do not affirm, subject to this and often other safeguards, some conditional variant of the universal principle.<sup>52</sup> In justification of such provisions, it is said that the frequent inefficacy of extradition procedures makes action on the part of the state where the criminal seeks refuge imperative. In these cases, jurisdiction is "based upon the ideas that civilized nations are interconnected and inter-related; that what is harmful to one is very likely to prove harmful to all the rest,"<sup>53</sup> and "that the mere fact of living together in groups makes it necessary at *all* times and in *all* places to fix upon a certain number of types of conduct which must be checked if group life is to continue."<sup>54</sup> Jurisdiction,

---

48. International Criminal Jurisdiction Comm., Report, U.N. GEN. ASS. OFF. REC. 7th Sess., Supp. No. 11, at 4 (A/2136) (1952).

49. Harvard Research in International Law, *supra* note 19, at 569-72.

50. Either to give or to punish.

51. Detecting judge.

52. Harvard Research in International Law, *supra* note 19, at 575 *passim*; DONNEDIEU DE VABRES, *op. cit. supra* note 24, at 156. The Harvard Draft Convention follows the approach of many codes in making an offer of surrender to the state where the crimes were committed a prerequisite of jurisdiction. The Italian Penal Code is one of those that also requires an offer of surrender to the state of which the offender is a national, but the draft finds this condition unnecessary. CODICE PENALE art. 10 (Italy 1930). In the context of the *Eichmann* case, which of these latter views is adopted is of no importance since Eichmann's national state was also the scene of most of his crimes.

53. Levitt, *supra* note 30, at 496.

54. Cook, *supra* note 31, at 329.

therefore, finds support not only in the effrontery to the concept of international law constituted by a criminal wandering at large with impunity, but also in the latent desire for self-preservation that finds expression in both forms of the universality theory.

There is little agreement whether this subsidiary universal principle is properly applicable to all crimes, as de Vabres would wish,<sup>55</sup> or only to the most heinous ones. In any event, it differs considerably in substance from universal jurisdiction exercised irrespective of the claims or requests for extradition of other states. Indeed, Hall suggests that as "the refusal of an offer to surrender is the equivalent of consent to the trial of a prisoner by the state making the offer, the jurisdiction afterwards exercised does not take the form of a jurisdiction exercised as of right."<sup>56</sup> Following this view, it has been suggested that the *Eichmann* case represents an instance of universality in the form of law enforcement by proxy.<sup>57</sup> Admittedly, according to the narrower conception of universality, Germany would have the prior right to try the accused. But it would be equally clear that the implementation of the first part of the Grotian maxim—the admonition to surrender the criminal—would not have been easy. No extradition treaty between the Federal Republic of Germany and Israel has been signed, and while extradition in the absence of a treaty is possible, negotiations to this end would have been severely handicapped by the lack of diplomatic relations between the two countries. Moreover, Israel, especially eager to hold a trial, might have regarded West Germany's approval of the proceedings as a waiver of extradition. The district court might, however, have effected the latter part of the maxim—to punish—by reliance on universality in its subsidiary sense.

The court did not do so. It held the crimes charged to be "in essence offences against the law of nations,"<sup>58</sup> offering "the broadest possible, though not the only, basis for Israel's jurisdiction . . ."<sup>59</sup> No mention was made of West Germany's interests nor of the possibility of extradition that might have stemmed from

---

55. Donnedieu de Vabres, *Pour Quels Delits Convient-il d' Admettre la Competence Universelle*, 9 REVUE INTERNATIONALE DE DROIT PENAL 315, 316 (1932). On the other hand, the great variety of the claims to punish *delicta juris gentium* under the first conception of universality leads Donnedieu de Vabres to exclude that basis of jurisdiction altogether (save only in the case of piracy). He argues that the principle of universality should only be applied where no other can be. *Ibid.*

56. HALL, INTERNATIONAL LAW 262 (8th ed. 1924).

57. Baade, *The Eichmann Trial: Some Legal Aspects*, 1961 DUKE L.J. 400, 419.

58. Judgment No. 16.

59. Judgment No. 17.

them. Universality of jurisdiction was asserted in its fullest scope, that is in the first of the two senses outlined above. Its other, more conservative application did not appear in the judgment, for the court held Eichmann responsible for *delicta juris gentium*,<sup>60</sup> punishable, through its juridical nature, by any nation with the accused in its grasp. Four such crimes will be examined: piracy, war crimes, crimes against humanity, and genocide. The last three are relevant because Eichmann was found guilty of them; the first, piracy, because it is their precursor and was viewed as such by the court.

#### A. PIRACY

The crime of piracy at international law has long been largely obsolete. The power and mobility of national navies caused piracy to lose much of its importance even "before the modern principles of finely discriminated state jurisdictions" and of freedom of the seas became established.<sup>61</sup> As criminality on a world scale became the distinguishing tragedy of modern civilization, however, those engaged in combating it turned anew to the jurisdictional aspects of piracy for guidance,<sup>62</sup> for piracy was the international crime that all nations had for centuries sought to repress, and from which it was natural to draw analogies in the punishment of war crimes. Neither the pirate nor the war criminal respected frontiers or nationalities, and neither could be surpassed in the vileness of his actions. Thus the legal notions underlying piracy *jure gentium*<sup>63</sup> are stanchions both for the general aspects of universal jurisdiction and for their application in the *Eichmann* case.

Due largely to the infrequency of their activities in recent history, no definitive explanation of the peculiar nature of jurisdiction over pirates has been evolved. The major divergence centers on whether they are criminals by the law of nations or only the subjects of an exceptional jurisdiction that may be universally asserted. Blackstone, cited with approval by the district court and himself citing Coke, clearly took the former view, a view followed

---

60. Crimes under the law of nations.

61. Harvard Research in International Law, *Piracy*, 26 AM. J. INT'L L. SUPP. 739, 764 (1932). The commentary to this draft convention is compendiously informative on all aspects of the crime at international law and carefully distinguishes it from piracy under municipal law. This Article is not, of course, concerned with the latter.

62. A more parochial resuscitating force was extensive hijacking during the prohibition era. See Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334 (1925), where it is argued that hijackers could properly be tried as pirates.

63. By the law of nations.

by many subsequent commentators.<sup>64</sup> But the framers of the Harvard Draft Convention on Piracy, drawing on extensive academic opinion, came to the conclusion that:

[P]iracy is not a legal crime or offence under the law of nations. In this respect it differs from the municipal law piracy which is a crime by the law of a certain state. International law piracy is only a special ground of state jurisdiction—of jurisdiction in every state.<sup>65</sup>

They were guided to this judgment by the lack of an international agency to capture pirates, of an international tribunal to try them, or of provisions in the laws of many states making foreigners liable for piratical acts committed outside their ordinary jurisdiction.

Due weight must clearly be given to these factors, for they explain why the recognition of piracy as a crime at international law and the trial and punishment of its perpetrators are perforce left to the municipal law of each country.<sup>66</sup> But the view of Mr. Justice Story—that the man who kills or robs indiscriminately is the enemy of the whole of society<sup>67</sup>—seems the preferable one. While universal jurisdiction found partial explanation in the absence of territorial sovereignty over the high seas, its primary source lay in the fact that pirates were truly *hostes humani generis*,<sup>68</sup> a threat to all sea-going humanity.<sup>69</sup> By their outrageous conduct, they had denied themselves the protection of their own states and left themselves liable to prosecution by all nations. Whether universal jurisdiction over war crimes may be lawfully asserted will be seen

64. "[P]iracy, 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, '*hostis humani generis*.'" 4 BLACKSTONE, COMMENTARIES \*71. Almost two centuries later, Dickinson referred to it as "an international crime." Dickinson, *supra* note 62, at 335.

65. Harvard Research in International Law, *Piracy*, 26 AM. J. INT'L L. SUPP. 739, 759-60 (1932).

66. See *In re Piracy Jure Gentium*, [1934] A.C. 586 (P.C.) (Viscount Sankey). Blackstone and this opinion of the Privy Council were the two authorities on the subject of piracy quoted by the court in the *Eichmann* case.

67. *Harmony v. United States*, 43 U.S. (2 How.) 210, 232 (1844).

68. Enemies of the human race.

69. BRIERLY, *THE LAW OF NATIONS* 240 (5th ed. 1955). But Radin suggests that pirates were punished by merchant communities chiefly because they felt themselves potential victims, rather than because they were aroused to indignation against men who violated a general duty to humanity. "Hostes" should therefore be translated in the semi-literal sense of enemies in war rather than anti-social persons. Radin, *International Crimes*, 32 IOWA L. REV. 33, 41-42 (1946). Dickinson finds it reasonably clear that the term *hostes humani generis* is used by common-law courts as an invective rather than as a definition, and that *universal* hostility, or intention to plunder without discrimination, are not necessary elements of the crime. Dickinson, *supra* note 62, at 352.



to depend in large part on whether this view of piracy, and the analogies drawn from it, can be sustained.

## B. WAR CRIMES

It has been strongly argued that the origins of jurisdiction over the war criminal must be sought in the ancient practice of brigandage, and that jurists through the ages have assimilated the brigand with the pirate. The acts of both brigand and pirate are said to be very similar not only in their practical consequences, but also in the conditions that permit their accomplishment, for only where effective governmental and judicial control are lacking can there be occasion for free-booting on either land or sea. Violators of the modern rules of warfare are, it is urged, analogous to the war brigands of the past, and all states have an interest in their annihilation.<sup>70</sup> The crucial question is whether this common interest has sufficiently asserted itself in international law to endow a country with jurisdiction irrespective either of the victim's nationality, of the time that country entered the war, if at all, or of the place where the outrages occurred. More specifically, it must be asked whether precedents derived from piracy or other sources were in point when the district court found Eichmann guilty of a war crime "in that . . . he caused the ill-treatment, deportation and murder of Jewish inhabitants of the states occupied by Germany and other Axis states."<sup>71</sup>

An affirmative answer meets with two initial criticisms. First, it is evident that pirates and marauders had, by definition, cut all ties of allegiance with sovereign states. They acted, in Mr. Justice Story's words, "without . . . any pretence of public authority."<sup>72</sup> But the enormity of the mass murder for which Eichmann was held partially responsible could not have been, and was not, accomplished without the active collaboration of state organs and leaders; therefore, it is said that parallels between pirates, brigands, and war criminals lose their force.<sup>73</sup> This argument, however, clouds over the severe restrictions that the plea of "Act of State" has undergone in recent years. Only bare mention of these may be made here, but their effect is to establish a condition precedent

---

70. Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CALIF. L. REV. 177 *passim* (1945).

71. Indictment, count 8, Attorney Gen. of Israel v. Adolph, the Son of Karl Adolph Eichmann, District Court of Jerusalem, Crim. Cas. 40/61 (unofficial translation of the transcript on file in the New York Public Library); *accord*, Judgment No. 244(8).

72. *Harmony v. United States*, 43 U.S. (2 How.) 210, 232 (1844).

73. ROGAT, *THE EICHMANN TRIAL AND THE RULE OF LAW* 30-31 (1961).

to the applicability of that doctrine. The International Military Tribunal at Nuremberg held that "he who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law."<sup>74</sup> The individual war criminal can, therefore, no longer claim exemption from the traditional liability of the brigand merely by reason of his having acted on behalf of a sovereign.

The second criticism is that while "there was no alternative to authorizing any state to punish piracy at a time when international institutions . . . and hopes for international tribunals were not developed," the plausibility of international trials of *hostes humani generis* has sufficiently increased to invalidate the suggested assimilation of war criminals to pirates for jurisdictional purposes.<sup>75</sup> In other words, it is urged that sufficient solidarity has developed among the community of nations since the days when piracy ceased to be a universal menace that war criminals "whose offences have no particular geographic location"<sup>76</sup> should be tried not by any one state that chanced to acquire custody, but by a composite tribunal representing all states whose soldiers or citizens had suffered injury. This view is as salutary as it is infeasible. The International War Crimes Tribunals dissolved more than a decade ago, and repeated efforts by the United Nations General Assembly and special United Nations committees to revive them have failed.<sup>77</sup> Substantive progress in establishing an International

---

74. INTERNATIONAL MILITARY TRIBUNAL, VOL. 1, TRIAL OF THE MAJOR WAR CRIMINALS 223 (1947). The court in the *Eichmann* case recognized that this circumscription of the "Act of State" doctrine has had weighty opponents. For a review of the various arguments, see WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 68-76 (1960).

75. ROGAT, THE EICHMANN TRIAL AND THE RULE OF LAW 30-31 (1961). Telford Taylor, Associate Trial Counsel for the United States at Nuremberg, suggested that once the charges had been drawn up and supported, Israel could either have laid them before the West German Government with an invitation to try Eichmann or before the United Nations in the hope that a special international tribunal might be created to judge Eichmann according to the principles laid down at Nuremberg. Taylor, *Large Questions in the Eichmann Case*, N.Y. Times, Jan. 22, 1961, § 6 (Magazine) p. 11. It is submitted that West Germany would, had the occasion been presented to it, have avoided the embarrassments of trying Eichmann in its own courts at all events. See note 16 *supra*. The second suggestion, while most felicitous in theory, is indeed only a hope and one built on the most slender legal and political foundations.

76. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 1, 59 Stat. 1544, 82 U.N.T.S. 279, 282.

77. E.g., Draft Statute for an International Criminal Court prepared in 1951 by a U.N. Committee on International Criminal Jurisdiction.

Criminal Court is as yet limited to proposals in optimistic articles. Indeed, the praiseworthy suggestion that Eichmann be tried by a bench presided over by an Israeli, but otherwise comprising judges from countries that had suffered Nazi occupation, met with bitter criticism in the Israeli press.<sup>78</sup> Absent an international penal tribunal, the ideal that representatives of all peoples have the duty and privilege to punish offenses such as war crimes that are, in essence, affronts to all mankind can only find fruition in the acceptance of universal jurisdiction.

Recognition of universal jurisdiction has never been widespread; the duty is only faintly recognized, and the privilege rarely exercised. In the earlier part of this century, it was a common view that any means of international enforcement of the laws of war would "shatter the stability of those laws and offend state dignity more than will dependence on national responsibility."<sup>79</sup> In line with this view, the Treaty of Versailles provided that: "Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power."<sup>80</sup> War crimes were regarded as the exclusive concern of those states whose nationals had been the victims and were justiciable according to their municipal law alone. The characterization of infractions of the laws of war as "war crimes" has been criticized on the ground that the term suggests an offense against the law of nations.<sup>81</sup>

With the end of the First World War, there began a movement for an effective and permanent criminal procedure in international relations. It was reflected in the ill-fated proposal of the Hague Advisory Committee of Jurists to the League of Nations for the establishment of a High Tribunal for war crimes.<sup>82</sup> A similar recom-

---

U.N. Doc. No. A/AC 48/4 (1951) [reprinted in 46 AM. J. INT'L L. SUPP. 1 (1952)].

78. Jerusalem Post, June 3, 1960.

79. Colby, *War Crimes and Their Punishment*, 8 MINN. L. REV. 40, 46 (1923); accord, Garner, *Punishment of Offenders Against the Laws and Customs of War*, 14 AM. J. INT'L L. 70 (1920).

80. Treaty of Peace Between the Allied and Associated Powers and Germany, June 28, 1919, art. 229 [reprinted in [1919] 13 FOREIGN REL. U.S. 379 (1947)]. Similarly, by the Moscow Declaration on Atrocities of 1943, those responsible were to be "sent back to the countries in which their abominable deeds were done in order that they may be judged and punished." Declaration of German Atrocities, November 1, 1943 [reprinted in 9 DEP'T STATE BULL. 310, 311 (1943)]. Criminals whose offenses had no particular geographical location would, however, be tried by a joint decision of the Allied Governments.

81. See Manner, *The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War*, 37 AM. J. INT'L L. 407, 415 (1943).

82. *Id.* at 429. The proposal was rejected mainly on the grounds that

mentation was made by the Commission on the Responsibility of the Authors of the War to the Paris Peace Conference. The latter proposal was not adopted largely as a result of the objections of the American representatives who could not discern the existence of any international penal law upon which an indictment could be based. Yet the aspiration behind these thwarted measures—that there should be a universal jurisdiction over crimes that by their nature transcended national boundaries—was not stifled. British jurists consistently maintained that the incorporation of the conventional Hague Regulations into the municipal legislation of almost all countries did not affect the essential *international* legal character of these norms,<sup>83</sup> and two decades later, Professor Glueck was able to assert that, in the absence of domestic legislation, the common law of nations itself attaches punishments to deeds violative of the rules of legal warfare.<sup>84</sup>

This new concept of a war crime as a violation of international law, which might or might not also be a violation of a particular state's municipal law, inevitably tended to diminish the importance of traditional principles of jurisdiction. If a war criminal is prosecuted in substance for a breach of international law, then it is far more defensible for a state not directly affected by his actions nevertheless to assert the principle of universality in justification of that law. In the Second World War there was little need for such a departure. Legislation dealing with war crimes, while mainly purporting to protect the national interest, expressly or by implication was extended to cover the interests of allies. There was general agreement that neutral states could also try war criminals.<sup>85</sup> In a virtually global conflict, therefore, jurisdiction over the violators of the laws of war could on almost all occasions be postulated on uncontroversial territorial or protective principles.

---

in the absence of international penal legislation, the law of nations knew no crimes that could be tried by a high tribunal. *But cf.* Schick, *International Criminal Law—Facts and Illusions*, 11 MODERN L. REV. 291, 305 (1948), who regards an international court as the prerequisite for the creation of international criminal law.

83. See Carnegie Endowment for International Peace, *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. INT'L L. 95, 116–25 (1920), incorporating almost verbatim the suggestions of the British delegates; Manner, *supra* note 81, at 414, 426–27.

84. Glueck, *By What Tribunal Shall War Offenders Be Tried?*, 56 HARV. L. REV. 1059–86 (1943).

85. Roling, *The Law of War and the National Jurisdiction Since 1945*, 100 RECUEIL DES COURS 323, 357 (1960). U.S. ARMY, MANUAL ON THE LAW OF LAND WARFARE No. 27–10, para. 10 (1956), provides: "The jurisdiction of the United States military tribunals in connection with war crimes is not limited to offences committed against nationals of the Unit-

Of these instances of universal jurisdiction, a few may be enumerated to show that neither the nationality of the victim or the accused nor the place of the crime were invariably regarded as crucial jurisdictional factors. Field Marshal Kesselring and Generals von Mackensen and Malezer, for example, were convicted by a British court for acts committed in Italy against Italians.<sup>86</sup> Australian courts sentenced Japanese nationals for outrages committed outside Australia on Indians and Chinese. Josef Remmele was convicted by a United States court for violations of the laws of war directed against Czechoslovak and Russian nationals, who could not be deemed American allies since America had yet to enter the war at the time of their commission.<sup>87</sup> In the *Zyklon B* case, tried before a British Military Court, those killed by poison gas supplied by the accused included nationals from almost all of the occupied countries, but it was not alleged that any British subjects were among the victims.<sup>88</sup> It has been argued that all such cases were decided according to the principle of "expanded protection," which extends to allies, co-belligerents, and stateless persons. Lord Wright, Chairman of the United Nations War Crimes Commission, however, stressed that they could be explained only as applications of the principle of world law.<sup>89</sup> This is a view shared by many scholars,<sup>90</sup> furthermore, it is the one incorporated in the four Geneva Conventions of 1949 dealing with various aspects of the laws of war.<sup>91</sup> These provide that all High Contracting Par-

---

ed States but extends also to all offences of this nature committed against nationals of allies and of cobelligerents and stateless persons."

86. KNIERIEM, *THE NUREMBERG TRIALS* 82 (1959).

87. U.N. WAR CRIMES COMM., VOL. 15, *LAW REPORTS OF TRIALS OF WAR CRIMINALS* 44 (1949).

88. *Id.* VOL. 1, at 93.

89. KNIERIEM, *op. cit. supra* note 86, at 82.

90. "In relation to unprotected persons, such as spies and war criminals, however, the territorial authority of the detaining power is limited under international customary law, only by the minimum standard of civilization, embodied in the Hague Regulations of 1907 on Land Warfare." I SCHWARZENBERGER, *INTERNATIONAL LAW* 191 (3d ed. 1957). Cowles uses the approach suggested by the "*Lotus*" case to come to a similar conclusion. Cowles, *supra* note 70, at 218; accord, GLUECK, *WAR CRIMINALS: THEIR PROSECUTION AND PUNISHMENT* 89, 99, 102 (1944); GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 14 *passim* (1959); Brand, *War Crimes Trials and the Law of War*, 26 *BRIT. YB. INT'L L.* 414 (1949); Musmanno, *The Objections in Limine to the Eichmann Trial*, 35 *TEMP. L.Q.* 1 *passim* (1961).

91. Geneva Convention for the Amelioration of the Wounded and Sick in the Field, Aug. 12, 1949, [1955] 3 U.S.T. & O.I.A. 3146, T.I.A.S. No. 3362; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, [1955] 3 U.S.T. & O.I.A. 3250, T.I.A.S. No. 3363; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949,

ties, including any that may be neutral to a conflict, are under the obligation to punish breaches of the Conventions regardless of the customary jurisdictional criteria. No State may waive, or withdraw from, this duty to punish war criminals even though its jurisdiction is based on custody alone.

The court in the *Eichmann* case, in looking to these Conventions as clear evidence of the applicability of the universality principle to the war crime charged, thus added new substance to the prophecies of Quincy Wright, who wrote in 1945:

Prosecutions under universal law would have the disadvantage from the juridical point of view of resting upon a controversial legal foundation. Such trials would look towards the future rather than to the immediate past but it is believed that sufficient legal materials exist to nullify the suggestion that they would rest upon *ex post facto* law. Such trials would be the most satisfactory in reaching all the war criminals, in vindicating the rule of law, in deterring future war crimes, in satisfying demands for retribution, and in preventing further danger from the war criminals. Such trials would assert that the community of nations, which the Dumbarton Oaks Proposals seek to organize, already exists, and would demonstrate by acts louder than words that human rights can be vindicated and inhuman offences can be punished.<sup>92</sup>

### C. CRIMES AGAINST HUMANITY

The relationship between war crimes, whose jurisdictional aspects have been outlined above, and crimes against humanity is an extremely close one.<sup>93</sup> It is clear that both classes of crime may be constituted by the same offense and that both are most likely to be committed in time of war. A clear delineation can be made in two important respects. First, war crimes may consist of mere isolated offenses, whereas crimes against humanity to be punishable as such must be carried out on a major scale and under governmental organization.<sup>94</sup> Second, the laws and usages of war as laid down in the various Hague Conventions cannot be invoked by or in favor of the co-nationals of those accused of their violation, whereas crimes against humanity owe their very origin to the neces-

[1955] 3 U.S.T. & O.I.A. 3418, T.I.A.S. No. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, [1955] 3 U.S.T. & O.I.A. 3616, T.I.A.S. No. 3365.

Rolling suggests, however, that the object of the Conventions was to provide for the obligation of neutrals to extradite war criminals. Rolling, *supra* note 85, at 362.

92. Wright, *War Criminals*, 39 AM. J. INT'L L. 257, 285 (1945).

93. Biddle, *The Nurnberg Trial*, 91 PROCEEDINGS AM. PHILOSOPHICAL SOC'Y 294, 301 (1947); see KIRCHHEIMER, *POLITICAL JUSTICE* 326-27 (1961).

94. Wright, *Foreword* to U.N. WAR CRIMES COMM., VOL. 15, LAW REPORTS OF TRIALS OF WAR CRIMINALS XIV (1949).

sity of giving groups basic humanitarian protection from the governmental acts of *their own* States.

Moreover, there is a basic difference of approach to the two crimes. Proceedings over war criminals have some measure of precedent in earliest recorded history, and one may properly agree with Lord Wright's assertion that "the rules of war are law in the fullest sense. The crimes and the punishments are established."<sup>95</sup> When considering questions of jurisdiction over war crimes, therefore, inquiries may start from the fact that such crimes are both violations of international law and punishable according to the municipal law of all countries. It may be doubted, however, whether crimes against humanity were criminal under international law at all before they were declared to be so by the Charter of the International Military Tribunal agreed upon in 1945. If they were newly defined in that document, it must further be asked whether their recent evolution can be accepted and their content applied by courts looking to customary and conventional international law and not deriving their authority from the Charter or other special *ad hoc* enactments.<sup>96</sup> Once such doubts are resolved and crimes against humanity are seen to rest on firm juridical foundations, then jurisdiction over them poses few theoretical problems. For example, a crime against humanity, once proved, can be punished by any court acting in the name of humanity. In such an instance, the competence of the detaining power to do as it wishes with those it finds guilty can only be limited by the minimum standards of civilization, and not by abstruse principles of extraterritorial jurisdiction.

It is relevant, therefore, to ask whether crimes against humanity are recognized by international law. The search for this answer was conducted with considerable misgivings by Dr. Goodhart, who was in other respects a staunch upholder of the legality of the Nuremberg trials.<sup>97</sup> Since it is virtually a truism that international law is

---

95. Wright, *War Crimes Under International Law*, 62 L.Q. REV. 40, 44 (1946).

96. One should bear in mind the doubts expressed as to the precedent value of the Nuremberg trials. Mr. Justice Jackson, Chief Prosecutor for the United States at Nuremberg, said: "One of the reasons this was a military tribunal, instead of an ordinary court of law, was in order to avoid the precedent-creating effect of what is done here on our own law and the precedent control which would exist if this were an ordinary judicial body." INTERNATIONAL MILITARY COURT, VOL. 3, TRIAL OF THE MAJOR WAR CRIMINALS 543 (1947); accord, Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, 1 INT'L L.Q. 153 (1947).

97. Goodhart, *The Legality of the Nuremberg Trials*, 58 JURID. REV. 1, 15-17 (1946). Goodhart does not doubt that those counts of the in-

not, as a rule, concerned with the treatment that a State metes out to its own nationals, he found it difficult to conceive how such treatment, however brutal, could constitute an international crime. He saw a solution, however, in the fact that a State's internal affairs "may be of such a special nature as to affect the international community, either morally or materially, and thus become matters of international concern."<sup>98</sup> This was also a solution that the Military Court in the *Justice Case* found to be necessitated by "the force of circumstance, the grim fact of world-wide interdependence, and the moral pressure of public opinion . . .,"<sup>99</sup> and it was one that the majority of German lawyers did not regard as involving retroactive legislation for its implementation.<sup>100</sup>

It must be asked, in view of this acquiescence, how the punishment of crimes against humanity could avoid violating the maxim *nullum crimen, nulla poena, sine lege*,<sup>101</sup> for it is accepted that these crimes had never been punished before and that the trials of those responsible for them were novel proceedings.<sup>102</sup> The only possible answer was somewhat histrionically expressed by the Chief British Prosecutor at Nuremberg: "The right of humanitarian intervention on behalf of the rights of man trampled upon by a State in a manner shocking the sense of mankind has long been considered to form a part of the law of nations. Here, too, the Charter merely develops a preexisting principle."<sup>103</sup> This principle was frequently applied (for motives often tinged with politics) in the late nineteenth and early twentieth centuries, as, for example, in the case of the massacre of Christians in Armenia and Crete under the Ottoman Empire from 1891 to 1896, and of Jews in Tsarist Russia from 1882 to 1903.<sup>104</sup> But it first achieved substantive form in the preamble to Hague Convention IV in 1907, where it was stated that in situations not covered by the provisions of the Convention, "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of

---

dictment alleging crimes against peace and war crimes were in accordance with existing international law.

98. *Id.* at 16.

99. *United States v. Josef Altstoetter in NUERNBERG MILITARY TRIBUNALS*, VOL. 3, TRIALS OF WAR CRIMINALS 979 (1951).

100. Baade, *The Eichmann Trial: Some Legal Aspects*, 1961 DUKE L.J. 400, 414.

101. No crime, no punishment, without law.

102. Brand, *Crimes Against Humanity and the Nurnberg Trials*, 28 ORE. L. REV. 93, 107 (1949).

103. *Id.* at 109.

104. See generally STOWELL, INTERVENTION IN INTERNATIONAL LAW 71-82 (1921); Winfield, *The History of Intervention in International Law*, 3 BRIT. YB. INT'L L. 130 (1923).



nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."<sup>105</sup> It was a matter for dispute whether this part of the preamble, known as the de Martens clause, could be regarded as a source of positive treaty law or was merely a declaration of benign concern for the oppressed, but in many post-war judgments it was seen in the former light. The Dutch Court of Cassation, for example, held in rejecting the ex post facto argument that the clause "expressly prescribes subjection to the laws of humanity."<sup>106</sup>

There remain, of course, limitations upon the conceptual scope of crimes against humanity. The atrocities must be so incomprehensibly wanton as to exclude the possibility of their being condoned by any society of sane individuals, and "they can only come within the purview of this basic code of humanity because the State involved, owing to indifference, impotency or complicity, has been unable or has refused to halt the crimes and punish the criminals."<sup>107</sup> The Nuremberg tribunals, in fulfilling these conditions, did not punish for crimes too nebulous to be subject to penal sanctions nor give them a character they did not have before. Rather, as Badin points out,<sup>108</sup> they created a new "jurisdiction" by trying acts that would previously have been justiciable only by German courts. This was an unprecedented procedure, but it was far from unjustified. While the experience of the past must be looked to for whatever justification and precedent it can provide for trying crimes against humanity, the major criterion in assessing the legality of such trials must be whether they violated accepted standards of right conduct, not the existence of precedents. It would seem that both the Nuremberg proceedings and the *Eichmann* case fully satisfied this criterion.

#### D. GENOCIDE

The preceding section on the nature of crimes against humanity serves as an excellent introduction to a discussion of the crime of genocide and of the soundness of the District Court of Jerusalem's conclusion that it had jurisdiction based on the universality principle to try Eichmann for "crimes against the Jewish people."<sup>109</sup> It is believed that the principle of universality was inapplicable to the charges here considered and that the precedents that the

---

105. [1907] 2 FOREIGN REL. U.S. 1205 (1910).

106. Roling, *supra* note 85, at 350-53.

107. Taylor, *The Nuremberg War Crimes Trials*, 450 INT'L CONC. 243, 343 (1949).

108. Radin, *supra* note 69, at 42-44.

109. Judgment No. 17-25.

court used to support its conclusion actually provide authority for a contrary conclusion.

Since the court saw in a crime against the Jewish people "which constitutes the crime of 'genocide' " nothing but the gravest species of crime against humanity,<sup>110</sup> it may be asked why the formulation of the crime of genocide was necessary at all. In many respects crimes against humanity and genocide do, in fact, correspond completely with each other, but they are by no means identical. One difference is conceptual. As Article II of the Convention for the Prevention and Punishment of Genocide makes clear, genocide is directed against group entities, whether national, ethnical, racial, or religious.<sup>111</sup> Its scope is, as a result, already narrower than that of crimes that, in a loose sense, are directed against entire humanity, and it is further restricted by the absence of political and cultural groups from the ambit of its definition.

A second possible difference arose from the provision of the Charter of the International Military Tribunal whereby an act, to be punishable as a crime against humanity, must have been committed in execution of, or in connection with, any crime within the Tribunal's jurisdiction, that is, a crime against peace or a war crime.<sup>112</sup> The Tribunal was thus precluded from trying crimes committed in Germany against Germans before the outbreak of hostilities, a decision that appeared to Stimson "to involve a reduction of the meaning of crimes against humanity to a point where they become practically synonymous with war crimes."<sup>113</sup> This restrictive proviso of the Charter was absent from Control Council Law No. 10.<sup>114</sup> In spite of this omission, the tribunals that applied that law were divided as to whether they should follow the ruling of the International Military Tribunal;<sup>115</sup> as a result, the view became feasible that "genocide is different from crimes against humanity in that, to prove it, no connection with war need be shown . . . ."<sup>116</sup>

---

110. Judgment No. 26.

111. U.N. GEN. ASS. OFF. REC. 3d Sess., Annex 174 (A/810) (1948).

112. INTERNATIONAL MILITARY TRIBUNAL, VOL. 1, TRIAL OF THE MAJOR WAR CRIMINALS 11 (1947).

113. Stimson, *The Nuremberg Trial: Landmark in Law*, 25 FOREIGN AFFAIRS 179, 187 (1947).

114. NUERNBERG MILITARY TRIBUNALS, VOL. 1, TRIALS OF WAR CRIMINALS XVII (1951).

115. See Judgment No. 29, which mentions two American military tribunals as following and two as rejecting the interpretation of the International Military Tribunal. The district court thought the latter view, "which conforms to the letter of the law" (i.e., Control Council Law No. 10) to be the correct one.

116. U.N. WAR CRIMES COMM., VOL. 15, LAW REPORTS OF TRIALS OF

These were some of the considerations that led Lemkin to define genocide as the planned destruction of a nation or ethnic group,<sup>117</sup> and to sponsor a resolution, adopted by the General Assembly in 1946,<sup>118</sup> that denoted genocide as a crime under international law and that invited member states to enact legislation for its prevention and punishment. These considerations also led to the drafting of the Convention for the Prevention and Punishment of Genocide whereby, in 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 . . . ."<sup>119</sup> The district court held that "genocide has been recognized as a crime under international law in the full legal meaning of this term, and at that *ex tunc*."<sup>120</sup> The court felt that the effect of the language of Article I was to establish that the crime of genocide had already been a part of international customary law at the time that it was first committed by the Nazis; this view was said to have received further indorsement in the Advisory Opinion of the International Court of Justice in the *Reservations to the Genocide Convention* case.<sup>121</sup> It followed from all these factors, the court in the *Eichmann* case asserted, that "in the light of the acknowledged principles of international law . . . jurisdiction to try such crimes is universal."<sup>122</sup>

The court's efforts to set up a customary basis for the Genocide Convention, rather than relying solely on its provisions, were necessitated by Article VI of the Convention, which states:

Persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.<sup>123</sup>

---

WAR CRIMINALS 138 (1949); *accord*, 2 DROST, *THE CRIME OF STATE* 186 (1959).

117. LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79-95 *passim* (1944).

118. U.N. GEN. ASS. OFF. REC. 1st Sess., 2d Pt., Plenary (Journal No. 75, pp. 945-46) (A/64/Add. 1) (1946).

119. U.N. GEN. ASS. OFF. REC. 3d Sess., Annex 174 (A/810) (1948) [reprinted in 2 DROST, *THE CRIME OF STATE* 76 (1959)].

120. Judgment No. 19; see *id.* No. 21.

121. [1951] Int'l L. Reps. 364, 370 (No. 118) (advisory opinion) (Lauterpacht ed. 1957):

[T]he principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. . . . In such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'etre* of the convention.

122. Judgment No. 19.

123. U.N. GEN. ASS. OFF. REC. 3d Sess., Annex 175 (A/810) (1948).

Defense counsel relied squarely upon the meaning that this article appears to have on its face, arguing that universal jurisdiction over genocide was clearly excluded by it.<sup>124</sup> The court rejected this contention by saying that Article VI was "a purely pragmatic provision, and does not presume to confirm a subsisting principle";<sup>125</sup> the court's exercise of universal jurisdiction derived "from the basic nature of the crime of genocide as a crime of utmost gravity under international law."<sup>126</sup>

Issue will not be taken on whether genocide was in fact a crime under international law before it was agreed to be such in 1948, nor on whether States that did not ratify the Convention would nevertheless be bound by its terms. There was considerable disagreement on these matters among the delegates to the General Assembly, and Article I, quoted in part above, is said to have been retained "mainly to avoid the difficult problem of whether Genocide was or was not already a crime under international law."<sup>127</sup> At Nuremberg, the indictment specifically mentioned and explained the meaning of genocide,<sup>128</sup> but the judgment did not. The 1946 Resolution that affirmed its criminality was, like resolutions in general, not binding or mandatory but merely a recommendation; the virtual repetition by Article I of the terms of that resolution could only reinforce doubts as to any affirmative force the latter might command. It was indeed stated that "the national courts could not punish genocide on the basis of the Assembly Resolution. Why otherwise would the Assembly envisage the conclusion of a convention?"<sup>129</sup> The court's reliance on the customary bases of the crime is therefore both misplaced and controversial.

Even if one accepts the customary bases of the crime of genocide

124. Judgment No. 20.

125. Judgment No. 22.

126. Judgment No. 25.

127. ROBINSON, *THE GENOCIDE CONVENTION* 56 (1960).

128. Count 3(a):

They conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others.

INTERNATIONAL MILITARY TRIBUNAL, VOL. 1, TRIAL OF THE MAJOR WAR CRIMINALS 43-44 (1947).

129. 2 DROST, *op. cit.* *supra* note 116, at 36. In the Sixth Committee, the British delegate wondered why those who supported a convention argued that one was necessary to establish the illegality of genocide since in his view genocide had been illegal since the Nuremberg Trials. The United States delegate answered that this overlooked the necessity of provisions for detailed definition and enforcement, and that in any case, the Nuremberg judgment did not cover genocide committed in time of peace. U.N. GEN. ASS. OFF. REC. 3d Sess., 6th Comm. 4 (A/C.6/SR.63) (1948).

*arguendo*, the court's inability to "deduce any tendency" against the universality principle amongst the parties to the Convention itself discloses remarkable judicial myopia. Oppenheim states that it is "a well-established rule in the practice of international tribunals that so-called preparatory work (*travaux préparatoires*) . . . may be resorted to for the purpose of interpreting controversial provisions of a treaty . . . . The deliberation and publicity accompanying the successive stages of the negotiation and conclusion of treaties are such as to render this kind of evidence of particular value."<sup>130</sup> The *travaux préparatoires* of the Genocide Convention are divisible into three major stages: the first draft, which the Economic and Social Council had instructed the Secretary General to draw up with the assistance of experts;<sup>131</sup> the second draft, prepared by an *ad hoc* committee of that Council; and the studies and discussions of the Sixth (Legal) Committee of the General Assembly, which resulted in the final text.<sup>132</sup> Even a brief examination of these proceedings will show that while Article VI was *not* intended to restrict jurisdiction to the narrow territorial principle, which *prima facie* it seems to prescribe,<sup>133</sup> a large majority of delegates were consistently opposed to the suggestion that universal jurisdiction over genocide be sanctioned by the Convention.

Lemkin had urged that "the criminal courts of all signatory countries should be enabled to pass judgment upon persons who committed genocide wherever they were apprehended."<sup>134</sup> The Secretariat and its consultants believed that the General Assembly had, in its original resolution, favored similar universality of repression. Thus, by Article VII of its draft, the parties pledged themselves "to punish any offender . . . within any territory un-

---

130. OPPENHEIM, INTERNATIONAL LAW 957-58 (8th ed. 1955).

131. Those invited to assist the Secretariat's own experts were Professors de Vabres, Pella, and Lemkin.

132. For an excellent summary of the preparatory work on the Convention, see ROBINSON, THE GENOCIDE CONVENTION 17-28 (1960).

133. On its face, Article VI is obviously open to interpretation so completely excluding extraterritorial jurisdiction that a criminal fleeing to his country after the crime could not be punished under the nationality principle, and were he not extradited, he would also be beyond the grasp of the country where the acts of genocide were actually committed. Since in fact states do not normally extradite their own nationals, there was the appearance of a major loophole. The Sixth Committee, after long debate, did not find it necessary to amend the draft article, but did agree to include in its report a statement that Article VI "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. NO. A/C6/S.R.134/5 (1948); see 2 DROST, THE CRIME OF STATE 101 (1959).

134. Lemkin, *Genocide: A New International Crime: Punishment and Prevention*, 17 REV. INT'L DROIT PENAL 360, 368 (1946).

der their jurisdiction, irrespective of the nationality of the offender or of the place where the offense has been committed." There was immediate opposition to this provision on a number of grounds. It was said that it might be used as a pretext for political retribution against foreigners; that non-signatory States would be unwillingly affected by it; and that it clearly ran counter to established territorial and nationality principles. The *ad hoc* committee seemed impressed by these arguments, and by four votes to two, with one abstention, voted against the inclusion of the universality principle in its own draft. While this revised draft, unlike that of the Secretariat, explicitly stated that genocide was a crime under international law, analogies to the jurisdictional attributes of other *delicta juris gentium* were rejected on the ground that genocide is, by the nature of the crime, prone to political implications that are especially likely to be far-reaching in the trials of heads of state or high officials. The discussions in the Sixth Committee followed similar lines, and it became clear from them that the Convention's ratification would be endangered by the insertion of any but the most conservative jurisdictional provisions. Even the moderate amendment proposing that, under the Convention, jurisdiction be universal if the country where the crime was committed made no request for extradition was defeated by twenty-nine votes to six, with ten abstentions.<sup>135</sup> It follows, therefore, that action against genocide committed *outside* the territories of the contracting parties can only be taken by the organs of the United Nations in the exercise of their general and prescribed competence; while by Article VIII any such party may call for the United Nations' intervention to prevent and suppress genocide, it would seem that non-signatories cannot be bound by this concession of power.<sup>136</sup>

Both the formula actually used in Article VI and the labors that led to its adoption witness the heavily preponderant view that universal jurisdiction could have no place in the Convention. In the *Eichmann* case, the court refused to assume "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

---

135. This resume draws on 2 DROST, *THE CRIME OF STATE* 47-48, 65-66 (1959).

136. The Polish representative pointed out in the Sixth Committee that if genocide were not yet recognized as a crime under international law, the proposed convention could not make it a crime for those states that did not ratify the instrument since the convention would only be law among its signatories. U.N. GEN. ASS. OFF. REC. 3d Sess., 6th Comm. 45 (A/C.6/S.R.63) (1948); *accord*, 2 DROST, *THE CRIME OF STATE* 78 (1959).

had been perpetrated in the past."<sup>137</sup> While adding that "the significance and relevance of the treaty to this case is in the confirmation of the international nature of the crime,"<sup>138</sup> it did not acknowledge that the debates on the jurisdictional aspects of the various drafts might have an equal bearing. To ignore a conventional delineation of jurisdiction in favor of a prior customary rule may be justified on occasion, but no amount of subtle reasoning will provide such a justification where the custom, however permissive, is as ill-defined as that relating to jurisdiction over genocide. As has been seen, it is most doubtful whether the crime itself was known to international law before the Resolution of 1946. Even if one assumes that it was, no authoritative opinions as to the principles of jurisdiction governing it were heard until the preparatory work began on the Convention, and when finally given, the great majority of these opinions were strongly against admitting universal jurisdiction in any instance of genocide. It is difficult to see how appeal to "the basic nature of the crime of genocide as a crime of utmost gravity under international law"<sup>139</sup> could suffice to outweigh these considerations. The gravity of genocide has never been disputed; neither, now, can its criminality under the law of nations. But to deduce universality of jurisdiction from such premises is faulty logic of major proportions.

### III. THE PROTECTIVE PRINCIPLE

The court in the *Eichmann* case phrased the protective principle as follows: "The State of Israel's 'right to punish' the accused derives . . . from . . . a specific or national source which gives the victim nation the right to try any who assault their [*sic*] existence."<sup>140</sup> It has been appropriately written that "Israel's right and interest to try Eichmann, as existing at the crucial time, are distinguishable from any of the traditional jurisdictional claims or legal interests of any state in any trial."<sup>141</sup> Of course, it does not follow that Israel's extraordinary moral and historical claims, or the quite unprecedented factual situation that underlies them, can of themselves preclude the lawyer's censure of the conduct of the trial or the content of the judgment.

---

137. Judgment No. 22.

138. Judgment No. 25.

139. *Ibid.*; see text accompanying note 128 *supra*.

140. Judgment No. 30. For examples of the protective principle in Israeli legislation, see Meron, *Public International Law Problems of the Jurisdiction of the State of Israel*, 88 JOURNAL DU DROIT INTERNATIONAL 1050-52 (1961).

141. Silving, *In re Eichmann: A Dilemma of Law and Morality*, 55 AM. J. INT'L L. 307, 331 (1961).

Any treatment of the universality principle as it applies in a concrete situation raises the problem of what the applicable rules of international law are and, should they be found wanting in authorizing desired state action, what modifications of existing rules or formulations of new ones will be rationally feasible for dealing with the situation. However, the protective principle must be seen in another perspective, for its existence is not in question. Indeed, its early appearance, widespread adoption, and virtually uniform application to particular crimes have led to "almost universal approval" of it.<sup>142</sup> Difficulties lie not in establishing what the principle is, but in assessing whether its scope and contours warranted its application to the facts of the *Eichmann* case.

The protective principle was not, as Brierly contended,<sup>143</sup> the juridical by-product of the aggressive nationalism launched by the French Revolution since it had already found a place in the legislation of the Italian city-states of the fifteenth and sixteenth centuries. But it doubtless received impetus from theories emphasizing the absolute sovereignty of independent states, for its essence lies in each state's right under international law to defend the security of its frontiers and its basic institutions, such as the integrity of its currency and credit. As states became increasingly lax in punishing acts committed on their territory prejudicial to the essential interests of other states, especially if they benefited from such omissions, numerous exceptions to the territorial principle were claimed and acted upon.<sup>144</sup> Jurisdiction based on the threatened interest rather than on the place of the crime or the nationality of the criminal was apparently so necessary that by the late nineteenth century the United States and Great Britain were alone in not asserting it.<sup>145</sup> The rift between the practice of the United

---

142. Harvard Research in International Law, *Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. SUPP. 435, 551 (1935). See generally *id.* at 543-61.

143. BRIERLY, *THE LAW OF NATIONS* 162 (5th ed. 1955); *accord*, DONNEDIEU DE VABRES, *LES PRINCIPES MODERNES DU DROIT PENAL INTERNATIONAL* 86 (1928).

144. Lauterpacht argues that a state is entitled to expect that the exclusiveness of other states' jurisdiction over their own territory will not result, even indirectly, in a serious menace to its existence and safety. If it does so result, then there is a perfectly good ground for intervention. Lauterpacht, *Revolutionary Activities by Private Persons Against Foreign States*, 22 AM. J. INT'L L. 105 (1928).

145. Cook has suggested that the emphasis placed by Anglo-American jurisprudence on the retributive and deterrent aspects of punishment explains in part the common law's stress on the territorial principle. Were punishment seen more as a preventive and reforming expedient, then the place of the crime would assume less importance. Cook, *The Application of the Criminal Law of a County to Acts Committed by Foreigners Outside the Jurisdiction*, 40 W. VA. L. REV. 303, 327 (1934).



States and Great Britain on the one hand and that of all civil law countries on the other substantially closed, resulting in the general acceptance of the protective principle.

The facts that no State will compromise when it thinks its security is threatened and that the existence of any such threat is a matter for subjective assessment have led to repeated abuse of the protective principle.<sup>146</sup> One example of such irresponsibility may be found in the 20 year prison sentence imposed by a French court during the First World War upon the Spanish captain of a Spanish merchantman for correspondence in Spain with the subjects of an enemy power;<sup>147</sup> another lies in the prosecution under the racial purity laws of Hitlerite Germany of a Jewish alien who had extramarital intercourse with a German girl in Czechoslovakia.<sup>148</sup> The possibility of unwarranted applications of the protective principle, however, is not in itself an argument for its retrenchment. Most European governments see in Communism a danger to their peace and safety, yet none will prosecute a Russian for being a Communist behind the Iron Curtain. The reason for this self-denial is neither that Communist beliefs are encouraged by the law of the potential defendant's home state nor even *raison d'etat*, but simply that the principle cannot remain viable unless legislatures and courts restrict its use to specific and important terms of reference. Its vital purpose cannot be fulfilled unless these terms remain fluid and capable of change. A judgment resting on this principle, however, will not accord with international law unless the court's assertion of protective jurisdiction is both necessary and reasonable. It is in this context, simple on its face but often disregarded, that the judgment in the *Eichmann* case must be examined.

Before the Court's decision, at least one commentator had flatly denied the applicability of the protective principle.<sup>149</sup> This view was no doubt based upon defense counsel's argument that the principle was inapplicable because Israel did not exist as a nation at the time Eichmann's criminal acts were committed.<sup>150</sup> This rea-

---

146. JESSUP, *TRANSNATIONAL LAW* 50 (1956); see Garcia-Mora, *Criminal Jurisdiction Over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory*, 19 U. PITT. L. REV. 567, 583-89 (1958).

147. Harvard Research in International Law, *Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. SUPP. 435, 558 (1935).

148. JESSUP, *TRANSNATIONAL LAW* 50 n.37 (1956).

149. ROGAT, *THE EICHMANN TRIAL AND THE RULE OF LAW* 28 (1961).

150. Record, Sess. 114 (14.8), Attorney Gen. of Israel v. Adolph, the Son of Karl Adolph Eichmann, District Court of Jerusalem, Crim. Cas. 40/61 (unofficial translation of the transcript on file in the New York Public Library).

soning discloses a mistaken emphasis. The issue was complicated, but not essentially altered, by the non-existence of Israel as a sovereign State at the time of Eichmann's crimes. The real difficulty related to whether Israel, after attaining independence, could claim that her fundamental interests as existing *at that time* had been so threatened by the *prior* Nazi holocaust as to justify the application of the protective principle. The court asked what "the special connection between the State of Israel and the offence attributed to the accused" was, and "whether this connection is sufficiently close to form a foundation for Israel's right of punishment as against the accused."<sup>151</sup> This marks out with precision the appropriate line of inquiry. Admittedly, it is one that has rarely been followed since the linking point between punisher and punished is normally quite evident. The extent to which the court complied with this criterion will here be reviewed.

A major misconception must be quashed. After Eichmann's capture, both supporters and critics of the impending trial, to lend weight to their various arguments, turned to the passive personality principle, which determines jurisdiction solely by reference to the nationality of those injured by the offense. One of the supporters wrote that Israel "can appeal to the substance of the 'passive nationality principle' on the ground that it shelters more surviving victims of Nazi terror than any other country."<sup>152</sup> The critics, on the other hand, vociferously denied that Israel could assimilate the persecuted Jews to its own nationals to ground more firmly its jurisdiction over Eichmann. With reference to Ben-Gurion's statement that "Israel is the only inheritor of these Jews . . . it is the only Jewish state,"<sup>153</sup> it was said that "by this token all anti-Semitic crimes in the United States cease to be the responsibility of our law enforcement officials and become that of Israel 'volunteers'."<sup>154</sup>

The court very wisely avoided inevitable controversy by leaving untouched the issue of passive personality. Had it not taken this course, it would have been compelled to justify the least tenable theory of extraterritorial jurisdiction, one that "has been more strongly contested than any other type of competence."<sup>155</sup> In-

---

151. Judgment No. 32.

152. Robinson, *Eichmann and the Question of Jurisdiction*, 30 COMMENTARY 1, 3 (1960).

153. Ben-Gurion, *The Eichmann Case as Seen by Ben-Gurion*, N.Y. Times, Dec. 18, 1960, § 6 (Magazine), p. 7.

154. Boston Herald, June 9, 1960; see Taylor, *Large Questions in the Eichmann Case*, N.Y. Times, Jan. 22, 1961, § 6 (Magazine), p. 11.

155. Harvard Research in International Law, *Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. SUPP. 435, 579 (1935). See, e.g., the

stead, the war-time sufferings of the Jews were seen as part of the historical chain connecting the crimes charged to those interests of self-preservation that Israel now claimed to protect. It held that:

The "crime against the Jewish people", as defined in the Law [of 1950], constitutes in effect an attempt to exterminate 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.<sup>156</sup>

The criticism that "the Israeli government has no authority to speak for Jews elsewhere or to act in the name of some imaginary Jewish ethnic entity"<sup>157</sup> was thus well met. There is no denying, of course, that the judgment seeks to vindicate the memory of all Jews rather than the people of Israel alone, and that one of the latent purposes of the trial was the expurgation of a decade of Nazi crime. But these were the incidents of showing the "close and definite connection" upon which protective jurisdiction could rest, and were not in themselves bases of decision.

Only the historian and sociologist can assess the precise nature and strength of the links that tie the Jews to Israel. The lawyer must satisfy himself, however, that their importance and durability comply with the requirements of the protective principle. The discussion may thus be closed by noting a number of points that would seem to support an exercise of jurisdiction on the basis of that principle.

The right of the Jewish people to national re-birth was clearly recognized by the Balfour Declaration of November 2, 1917,<sup>158</sup> and affirmed by the Mandate of the League of Nations.<sup>159</sup> On November 29, 1947, the United Nations General Assembly, recognizing the causal relationship between the Jews' statelessness and

---

famous Cutting Incident between Mexico and the United States, where the Anglo-American point of view was cogently presented. Report on Extraterritorial Crime and the Cutting Case, [1887] FOREIGN REL. U.S. 757, 790-93 (1888). Among Continental authorities, both Donnedieu de Vabres and Travers oppose the passive personality principle. DONNEDIEU DE VABRES, *LES PRINCIPES MODERNES DU DROIT PENAL INTERNATIONAL* 129-31 (1922); 2 TRAVERS, *LE DROIT PENAL INTERNATIONAL* 125 (1921). It does not appear in Israeli legislation currently in force. Meron, *Public International Law Problems of the State of Israel*, 88 JOURNAL DU DROIT INTERNATIONAL 986 (1961).

156. Judgment No. 33.

157. Washington Post, May 27, 1960, p. A16, col. 2. *But cf.* Musmanno, *The Objections in Limine to the Eichmann Trial*, 35 TEMP. L.Q. 1, 12 (1961): "The Jewish people constitute an ethnic community, even though scattered over a score of nations."

158. STEIN, *THE BALFOUR DECLARATION* 548-49 (1961).

159. LEAGUE OF NATIONS OFF. J., 3d Ass. 1007 (1922).

their attempted obliteration, passed a resolution calling for the establishment of a Jewish state.<sup>160</sup> Some have seen in this action alone an affirmance of Israel's right to bring Nazi criminals to trial.<sup>161</sup> Their view gained further plausibility when, in 1952, Federal Germany agreed to pay reparations amounting to 800 million dollars to representatives of the State of Israel and world Jewry "in order to facilitate a spiritual purging of unparalleled suffering."<sup>162</sup>

The court's conclusion, therefore, seems well founded that "the Jewish population now residing in the State of Israel, or the Jewish 'Yishuv' which lived in Palestine before the establishment of the State, too, is part of the Jewish people whom the accused sought . . . to exterminate."<sup>163</sup> The links between the accused and the State that tried him were forged by events so overwhelming that to look to history for analogies or to law for precedents is unrewarding. It was necessary to place some reliance on the protective principle because, as has been seen, its favored position under international law contrasts markedly with the juridical quicksands that envelop the universality principle. It was also reasonable, indeed almost imperative, to do so because the law will neither endure nor progress if it cannot be adapted to withstand and overcome the stresses of a violent world. If these premises be accepted, then the court's assertion of protective jurisdiction cannot be decried.

### CONCLUSION

It was Cardozo, writing in the United States Supreme Court, who said: "International law, or the law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the *imprimatur* of a court attests its jural quality."<sup>164</sup> It may be appropriate to end an Article dealing with so contentious a topic on a tremulous note of hesitancy and aspiration. The purpose of this Article has been to view the various questions of jurisdiction raised by the *Eichmann* case as objectively and dispassionately as possible. This purpose was seen from the

---

160. U.N. GEN. ASS. OFF. REC., 2d Sess., Resolutions, No. 181 (II), at 131 (A/519) (1947).

161. *E.g.*, Musmanno, *supra* note 157, at 14. See also Judgment No. 35.

162. Bentwich, *International Aspects of Restitution and Compensation for Victims of the Nazis*, 32 BRIT. YB. INT'L L. 204, 217 (1955).

163. Judgment No. 35.

164. *New Jersey v. Delaware*, 291 U.S. 361, 383 (1934).

outset to be a pretentious one. The myriad emotional pressures evoked by the case reach deep into the very foundations of individual values; thus, the best-intentioned attempts to compensate for them in order to examine the judgment in a truly legal perspective may be doomed before they begin.<sup>165</sup>

Nevertheless, the district court is believed to have been clearly in error only on the issue of genocide. On several others, it doubtless went to the very limit of existing rules of international law. With respect to these, the conclusion that the limit was not overstepped has been reached by way of a number of related premises. These derive from the view of the fundamental nature of international law that "it is the gradual expression, case by case, of the moral judgments, of the civilized world";<sup>166</sup> that these judgments provide the major criteria for the application of its rules; and that its growth cannot be stunted by the scrupulous regard for technicalities that rightly beset the evolution of municipal law. Of course, it is possible to accept these generalizations, but remain doubtful as to the jurisdictional competence of the district court. In this event, one may yet hope that solace will be found in these words of Sir Hartly Shawcross, Chief British Prosecutor at Nuremberg: "If this be an innovation, it is an innovation long overdue—a desirable and beneficent innovation fully consistent with justice, fully consistent with common sense and with the abiding purposes of the law of nations."<sup>167</sup>

---

165.

To illustrate the pressures surrounding the trial, was it in any realistic sense possible for the judges to have decided that Israel lacked jurisdiction, completely apart from the merits of this legal question? Would not such a decision have been completely and violently unacceptable to the community? . . . [I]t is difficult for legality to maintain itself in the interstices of mass hysteria.

ROGAT, *THE EICHMANN TRIAL AND THE RULE OF LAW* 36 (1961).

166. Stimson, *supra* note 113, at 180.

167. INTERNATIONAL MILITARY TRIBUNAL, VOL. 3, TRIAL OF THE MAJOR WAR CRIMINALS 104 (1947).