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A POST MORTEM OF THE EICHMANN CASE—THE LESSONS FOR INTERNATIONAL LAW

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"Will the Eichmann case help promote the healthy growth of international law?" Posing this question as delineating the scope of his investigation of the implications of the Eichmann case, Mr. Kittrie seeks to determine how the concepts of international law have been affected by the capture, the trial, and the punishment of Adolph Eichmann.—EDITOR.

Two seconds before midnight, on May 30, 1962, a few short hours after his petition to the President of Israel for clemency was denied, Adolph Eichmann was hanged. Within hours, his body having been cremated pursuant to his own request, the ashes were taken up into the air by a military airplane and were spread upon the Mediterranean. Thus more than two years after his clandestine capture in Argentina and following a four-month televised trial, in which 111 surviving witnesses testified for the prosecution, came an end to the Third Reich's leading expert on the Final Solution to the Jewish Problem. The story of Eichmann's capture, Argentina's protest, the debate in the United Nations, the announcement of the trial, the terrible drama told in the courtroom, Eichmann's lean and precise figure sitting in his glass cage scribbling notes to his German counsel, his defense, his appeal, and his last plea for mercy, were continuously in the world press and on the movie and television screens, making this case one of the best recorded in the annals of world law. During this time it was the personal story of Eichmann and his victims that occupied the limelight. The moral and political implications of the case, the element of historical justice, the legality of the trial in light of the violation of Argentina's sovereignty by Eichmann's captors, Israel's design publicly to record the full tragic story of her people, the story of the total collapse of law and morality in the 20th Century in the center of Europe, Western Germany's role as the democratic successor to Hitler's Nazi empire and the question of the responsibility of her people, all these provided the case with numerous elements of unusual interest. Still, to many observers the trial of Eich-

mann probably consisted of merely one ancient question: "Will justice be done? Will the killer be punished?"

Now that the political and emotional tensions have subsided and the record of the deeds and punishment of Adolph Eichmann can be examined with a more detached historical sense, a very important question still remains to be answered: "Will the Eichmann case help promote the healthy growth of international law?" To answer this question one needs to examine in detail both the factual background and the various concepts of international law which have been affected by the capture, the trial, and the punishment of Adolph Eichmann, the only man to be executed in the 14 year history of the State of Israel.

THE LEGALITY OF EICHMANN'S CAPTURE

Eichmann was apparently apprehended in Argentina, where he was living under a disguise, by special agents of the Israeli authorities. The Israeli government subsequently subscribed to conflicting versions as to the official role of the government in this capture, stating at one time that government agents participated in his pursuit and capture from the very beginning and stressing later that Eichmann was captured by "volunteers," members of a private group,¹ and was then flown to Israel where he was officially surrendered to the authorities. There was no extradition treaty between Argentina and Israel at the time of the abduction. In the absence of such treaty the two governments could have nevertheless negotiated Eichmann's sur-

¹ N.Y. Times, May 29, 1960, §1, p. 3, col. 1.

render to Israel for trial.² Moreover, as Eichmann had reputedly entered Argentina under false credentials, that country could have expelled him as an illegal alien.³ But whether the government of Argentina would have been willing to undertake such action is highly questionable in light of internal political conditions: the strong influence exerted by rightist elements, the precarious balance of political power, and the past experience of providing refuge to Nazi and Fascist functionaries.

Argentina lodged an official complaint with the United Nations Security Council stating that the forcible abduction of Adolph Eichmann was a clear violation of international law and an invasion of its sovereignty. However, after Israel made its apology the matter was declared closed in a joint communique issued by the two nations on August 3, 1960.⁴ The failure of the United Nations and Argentina to insist upon Eichmann's return thus seemed technically to cure the illegality of the capture. As an individual Eichmann had no standing in international law, and whatever rights he possessed had to be enforced on his behalf by an aggrieved nation. The desire to avoid the embarrassing situation which the possession of Eichmann's person would have posed and the reluctance to awaken past memories kept the governments of Argentina (within whose boundaries he was found), Austria (of which he was a naturalized citizen), and Germany (whose Third Reich he served) from making a claim for or on behalf of Eichmann. Since all concerned nations waived their right to Eichmann, Israel appeared free, within the framework of its own law, to pursue with regard to him a conduct of its own choice.

² Although every sovereign country has the power to grant or deny extradition, most countries have executed treaties which set forth the particular offenses for which extradition will be granted. See, Comment, 43 MINN. L.R. 587 (1959). For a complete discussion of the subject see GARCIA-MORA, *INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT* (1956); Garcia-Mora, *The Present Status of Political Offenses in the Law of Extradition and Asylum*, 14 U. PITT. L. REV. 371 (1953). The view has been expressed that the grant by any country of asylum to a person accused of a major crime of this type and the prevention of his prosecution is contrary to the nation's obligation under international law. 2 OPPENHEIM & LAUTERPACHT, *INTERNATIONAL LAW* 588, n.4 (7th ed. 1952). In 1864 the United States sent one Arguelles to Spain without benefit of a treaty, relying on comity and general principles of international law. See 1 MOORE, *TREATISE ON EXTRADITION AND INTERSTATE RENDITION* 33-35 (1891).

³ Eichmann's basic identification paper was a stateless identity card issued by the Vatican in 1947 under a false name. See Baade, *The Eichmann Trial: Some Legal Aspects*, 1961 DUKE L.J. 400, 410.

⁴ N.Y. Times, Aug. 4, 1960, §1, p. 1, col. 5.

It is generally agreed, despite occasionally heard opposition, that "once a prisoner is within the physical control of a particular court and properly charged, according to the law of almost every nation, he may be tried by that court regardless of the manner by which he was brought before it."⁵ The question of jurisdiction of a national court following seizure or arrest in violation of international law is one which has continued to bother international lawyers despite a long tradition of judicial approval of the practice.⁶ Since the 17th Century a great number of decisions of the highest English and American courts have held that a court's jurisdiction to condemn or forfeit a ship brought within reach of its process is not affected by the fact that the ship was seized within the territorial waters of another state and hence in violation of international law. Likewise, English and American prize courts have held that captures made in violation of neutral territorial waters will be restored only upon the demand of the neutral state. As against an individual enemy or neutral claimant, such captures are regarded as valid.⁷ In a leading English case, Sir W. Scott reiterated that it was "a known principle" of his court that "the privilege of territory will not itself enure to the protection of property, unless the State from which that protection is due, steps forward to assert the right."⁸ This same philosophy was subscribed to by the United States Supreme Court as far back as 1815.⁹ In the case of *The Richmond*¹⁰

⁵ Leavy, *The Eichmann Trial and the Role of Law*, 48 A.B.A.J. 820, 822 (1962); Baade, *The Eichmann Trial: Some Legal Aspects*, 1961 DUKE L.J. 400; Green, *The Eichmann Case*, 23 MOD. L. REV. 507 (1960).

⁶ One clear exception is provided by the case of *In re Jolis*, France, Tribunal Correctionnel de' Avesnes, July 22, 1933, Annual Digest 1933-1934 at 191 (1940). In this case a Belgian subject was kidnapped by French officials on Belgian territory and was taken to France for trial. The French Tribunal held: "The arrest, effected by French officers on foreign territory, could have no legal effect whatsoever and was completely null and void. This nullity being of a public nature, the judge must take judicial notice thereof . . . all that followed thereon must therefore be annulled." *Id.* at 191.

⁷ *The Eliza Ann*, 1 Dods 244, 165 Eng. Rep. 1298 (1813); *The Valeria*, 1 A.C. 477 (1921); *The Sir William Peel*, 72 U.S. (5 Wall.) 517 (1866); *The Florida*, 101 U.S. 37, 42 (1879).

⁸ *The Purissima Conception*, 6 C. Rob. 45, 47, 165 Eng. Rep. 844, 845 (1805).

⁹ It should be emphasized that the Anglo-American rule differs from that of the leading European countries. GARNER, *PRIZE LAW DURING THE WORLD WAR* (1927), reports that the prize tribunals of France, Germany and Italy consider a capture made in violation of neutral territorial waters as "absolutely illegal irrespective of whether . . . the neutral power intervenes or not." *Id.* at 227.

¹⁰ 13 U.S. (9 Cr.) 102 (1815).

an American vessel was seized by a United States man-of-war in the territorial waters of East Florida then belonging to Spain, and was forfeited to the United States for the violation of the Non-Inter-course Act of 1809. Delivering the opinion of the United States Supreme Court, in which the sentence of condemnation was affirmed, Chief Justice Marshall said:

"The seizure of an American vessel within the territorial jurisdiction of a foreign power, is certainly an offence against that power, which must be adjusted between the two governments. This court can take no cognizance of it; and the majority of the court is of opinion, that the law does not connect that trespass, if it be one, within the subsequent seizure by the civil authority, under the process of the district court, so as to annul the proceedings of that court against the vessel."¹¹

Interestingly enough the strongest opposition to this interpretation of international law in our domestic law was voiced in the United States in the middle 1930's, as a direct result of some of the illegal kidnappings by Nazi agents in countries adjoining the Third Reich. In an article published in 1935, Lawrence Preuss recited the details of several kidnappings by Nazi agents on Swiss and Czech territory. The author then maintained that there is an obligation on the part of the kidnaping state to restore a prisoner to the asylum state and to punish the offending officers.¹² In another leading article published a year earlier, Professor Edwin Dickinson argued against the jurisdiction of national courts over persons illegally seized. Said he: "If there is no national competence, obviously there can be no competence in the courts, which are only an arm of the national power. To hold otherwise, it may be urged, would go far to defeat the purpose and nullify the efficacy of international law."¹³

Despite the arguments that "surely it is a scholastic subtlety which would distinguish the com-

¹¹ *Id.* at 103.

¹² "When a fugitive has been kidnaped by private persons, and, having been brought by force to the territory of a foreign state, is there arrested, there appears to be no obligation to release the prisoner. International responsibility is incurred only through official complicity. *A fortiori*, there is no obligation to surrender the prisoner when officials of the state of asylum have participated in the irregular seizure or arrest." Preuss, *Kidnaping of Fugitives from Justice on Foreign Territory*, 29 AM. J. INT'L L. 502, 507 (1935).

¹³ Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231 (1934).

petence of the nation and the competence of the court through which the nation acts,"¹⁴ the American courts have not been willing to condition their jurisdiction on whether a person standing trial was brought within the court's jurisdiction legally.¹⁵ The United States Supreme Court in *Frisbie v. Collins* stated:

"This Court has never departed from the rule announced in *Ker v. Illinois* . . . that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction' Due process of law is satisfied when one present in court is convicted of a crime after having been fairly apprized of the charges against him and after a fair trial in accordance with Constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."¹⁶

Apparently there is nothing in international law that would prohibit an exercise of national jurisdiction following an illegal capture. In its final judgment the Israeli court in the Eichmann case discussed British and American decisions relating to this issue and indicated that Palestinian case law, which constitutes precedent for Israel, has adopted the unequivocal American view that a court may not inquire into the manner by which a prisoner was brought before it.¹⁷ Although legally the Israeli court's authority over Eichmann could

¹⁴ *Id.* at 236.

¹⁵ But see, *The Mazel Tov* case, *Cook v. United States*, 288 U.S. 102 (1933), as a possible indication of a new trend holding that seizure in violation of a specific international treaty rather than a general rule of international law was invalid. It should be noted that in other areas of criminal law we have long adhered to the maxim of "ex injuria jus non citur" out of which grew the principle that one should not be permitted to benefit from the "fruit of the poisonous tree." See *Elkins v. United States*, 364 U.S. 206 (1960); *Mapp v. Ohio*, 367 U.S. 643 (1961). A survey of state cases in this area is provided by Scott, *Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud*, 37 MINN. L.R. 91 (1953). After reporting that most states permit trial of kidnapped persons, Scott concludes: "This is inconsistent with the views of at least some of these states as to analogous situations in the fields of criminal and civil procedure." *Id.* at 107. See also Garcia-Mora, *Criminal Jurisdiction of a State over Fugitives Brought From a Foreign Country by Force or Fraud: A Comparative Study*, 32 IND. L.J. 427 (1957).

¹⁶ *Frisbie v. Collins*, 342 U.S. 519, 522 (1952); *Ker v. Illinois*, 119 U.S. 436, 444 (1886).

¹⁷ *Attorney General v. Adolph Eichmann*, Crim. Case 40/61, Jerusalem District Court, passage 7 (hereinafter cited as Trial Judgment, with passage number following).

not be challenged, a bad taste of justice achieved through an unlawful act still remained with those who firmly believe that the future of the world depends upon nations conforming in all instances with higher rules of international conduct.¹⁸ Others less sensitive to procedural proprieties have argued that the abduction was justified by the nature and extent of the crimes charged and by the impossibility of extradition of Nazis from Argentina. Indeed, they assert that in some extreme situations the strict standards of positive law must yield to the natural and the moral law,¹⁹ and that the situation in this case called for a law akin to the natural law of self-defense.²⁰

Reviewing the inability of international law effectively to curtail the practice of illegal kidnappings, one must draw the conclusion that the Eichmann case has called new attention to a very important deficiency in the law. Both international law and order and individual justice make it inadvisable to continue the present rule of international law which makes a person's fate completely dependent upon the political and judicial considerations of the nation from which he was illegally captured. Clearly, the practice of kidnaping can be curbed only if the kidnaping nation will not be permitted to benefit from the fruits of its crime. A captive's return, however, is not always practicable. In cases where the captive's nation is unwilling to accept him back or generally in cases where the crime charged was one recognized in international law, it would appear preferable to provide for the prisoner's trial by an international tribunal. Another remedy, which would provide only a partial answer, would be the institution of an international writ of habeas corpus, proposed in recent years.²¹ But such writ would merely permit

an opportunity to question the legality of the captive's detention; it would provide no tribunal for his trial after his release from the jurisdiction wrongfully detaining him. Since it is self-evident that to permit a nation to obtain custody over a person through an illegal act and thereupon to proceed to try him under its own laws, without any form of international supervision, does not appear to further the interests of an international rule of law, we must hope for early reforms in this area.²²

THE JURISDICTION OF ISRAEL'S COURT TO TRY EICHMANN

To lawyers and students of international law, one of the most interesting aspects of the Eichmann case was the question of the jurisdiction of the Israeli court to try him for crimes committed outside the State of Israel and, indeed, before the state came into being. The question of jurisdiction can be divided into two separate phases: the first concerns the retroactive nature of Israel's 1950 law which provides for the punishment of Nazis and Nazi collaborators;²³ the second relates to the extraterritorial jurisdiction of the Israeli courts to try a person for crimes committed outside the national boundaries.

The legal literature dealing with the Eichmann trial revolves primarily around these points. Both the opinion of the District Court which tried Eichmann and the Supreme Court of Israel which heard the appeal devoted considerable space to the question of jurisdiction.²⁴ It should be stated at the outset, however, that the question of jurisdiction was never properly before the Israeli courts. Israel does not have a written constitution. Since Israel's courts conform generally to the British judicial tradition, the American concept of

¹⁸ Woetzel, *The Eichmann Case in International Law*, 1962 CRIM. L. REV. (N.Y.) 671 (1962); Cardozo, *When Extradition Fails, Is Abduction the Solution*, 55 AM. J. INT'L L. 127 (1961).

¹⁹ Schwarzenberger, *The Eichmann Judgment*, 1962 CURRENT LEGAL PROBLEMS 248, 249, asserts that one must "avoid the traps of the sterile variety of positivism and an eclectic identification of natural law with positive law" in order "to cope above board with the major issues on the appropriate legal and ethical levels."

²⁰ Silving, *In Re Eichmann: A Dilemma of Law and Morality*, 55 AM. J. INT'L L. 307 (1961). In support of the position that a court need not inquire into the circumstances of the apprehension of a person held on a criminal charge, it was observed that "in criminal cases the interest of the public overrides that which is, after all, a mere privilege from arrest." In *Re Johnson*, 167 U.S. 120 (1897) (per Brown, J.).

²¹ Kutner, *A Proposal for a United Nations Writ of*

Habeas Corpus and an International Court of Human Rights, 28 TUL. L. REV. 417 (1954). See also Katz, *The Role of Law in International Affairs as Illustrated by the Eichmann Case*, 84 N.J.L.J. No. 2, p. 1 (1961), suggesting the right of an individual to sue for his release in the International Court of Justice. Also of interest is the draft statute for an International Court of Human Rights proposed by Australia in 1948. U.N. Doc. N/CN.4/AC.1127 (May 10, 1948).

²² Scott, *supra* note 15, at 107, calls similarly for a rule of procedure in our domestic law "which would forbid courts to try accused persons who have been subjected to [this] type of lawless treatment." See also Garcia-Mora, *supra* note 2, at 449 (1953): "one can entertain the hope that the courts will reconsider . . . and [will] finally recognize the unsoundness of their position."

²³ 4 Israel Law 154 (5710-1949/50).

²⁴ Trial Judgment 7-11.

judicial review is unknown. Consequently, once Israel's legislature has enacted statutes authorizing the courts to try and punish certain offenses, it is beyond the power of the courts to question the validity of such legislation.²⁵ Lacking the power to overturn the law under which Eichmann was to be tried, the Israeli court, nevertheless, dealt with the issue quite directly, realizing that the manner of its resolution of the jurisdictional issue will have a bearing not only upon world opinion but also upon the development of Israel's domestic law and the growth of international law.

Counsel for Adolph Eichmann argued that the crimes committed by the defendant preceded the establishment of the State of Israel and consequently the statutes under which Eichmann was tried were not only retroactive but, also, the acts of a state which was non-existent at the time of the crime. The Nazi and Nazi Collaborators Law was therefore, strictly speaking, an *ex post facto* law. Furthermore, the crimes committed by Eichmann were not committed on the territory of Israel. The victims were not citizens of the State of Israel or its predecessor, the Palestinian Mandate Government. What, therefore, was the court's authority for this trial?

Validity of Retroactive Legislation

The statute under which Eichmann was tried was similar in scope to the provisions of the multi-national agreement establishing the International Military Tribunal at Nuremberg.²⁶ In both instances, punishment was authorized for crimes hitherto ill-defined in international law: "war crime," "crime against humanity," "crime against peace."²⁷ In both instances, the specific

²⁵ Leavy, *supra* note 5, at 822. Said the Supreme Court of Israel in an earlier case: "Provided the legislative authority has clearly demonstrated its intention that the law which it has enacted shall have extraterritorial effect, the local court will have to . . . ignore completely the restriction imposed by the principle of territorial sovereignty." *Amsterdam v. Minister of Finance*, (1952) Int. Law. Rep. 229, 232.

²⁶ Agreement between the United Kingdom, the United States, France and the USSR, Aug. 8, 1945. *Trial of War Criminals*, Document, U.S. Dep't of State, Pub. 2420, pp. 13-15 (1945).

²⁷ The precise definition of these crimes in international law is of recent origin. Cowles in *Universality of Jurisdiction Over War Crimes*, 33 CALIF. L. REV. 177, 181 (1945), advances the argument that what is now called a "war crime" is the same type of offense as was formerly styled an act of brigandage. He asserts further that the term "war crime" was first used by Oppenheim in 1906, in 2 OPPENHEIM, INTERNATIONAL LAW 263. While Oppenheim, indeed, complained in 1906 that other writers of the Law of Nations have

laws under which the culprits were tried were not in effect at the time the crimes were committed. The Nuremberg court and, subsequently, the United Nations General Assembly in its affirmation of the charter and judgment of the tribunal gave broad international recognition to the legality of such *ex post facto* legislation.²⁸ A substantial school of legal scholars subscribes to the view that a penal statute need not be condemned merely because of its retroactive effect, as long as the crime penalized was obviously and undeniably prohibited under the laws of most civilized nations.

hitherto not "systematically treated the question of war crimes," he nevertheless treated these crimes as domestic rather than international in nature, concluding that the "belligerent can and actually must in the interest of his own safety punish these acts" which are "termed war crimes whatever may be the motive, the purpose, and the moral character of the respective act." *Id.* at 264. More specific and earlier acknowledgment of the existence of rules of conduct in warfare, the violation of which would constitute a "war crime," is given by HALL, INTERNATIONAL LAW (4th ed. 1895). Hall recognizes the right of nations to punish for "breach of universally acknowledged laws" of war. *Id.* at §135. A similar position was taken by HOLLAND, THE LAW AND CUSTOMS OF WAR ON LAND, Nos. 117-18 (1904). Schwarzenberger, *The Judgment at Nuremberg*, 2 YEARBOOK OF WORLD AFFAIRS at 94-96 (1948), asserts that the recognition of war crimes is far from new and cites even medieval precedents, dating back to 1268. See also GOULD, AN INTRODUCTION TO INTERNATIONAL LAW 666 (1957). It should be noted, also, that the war standards established by the 4th Hague Convention call for compensation rather than criminal penalties for the violators. HAGUE REGULATIONS RESPECTING THE LAW AND CUSTOMS OF WAR ON LAND, Hague, Oct. 18, 1907. It is only in the post World War II period that Oppenheim gives recognition to the status of war crimes in international law, finally asserting that "the notion of war crimes is based on the view that states and their organs are subject to criminal responsibility under International Law." 2 OPPENHEIM & LAUTERPACHT, INTERNATIONAL LAW 567 (7th ed., 1952). It was the charter of the International Military Tribunal at Nuremberg that officially defined the meaning of "war crimes" ("violations of the law or customs of war") and added to them as violations of international law "crimes against humanity" ("murder, extermination, enslavement, deportation . . . before or during the war . . . whether or not in violation of the domestic law of the country where perpetrated") and "crimes against peace" ("planning . . . or waging of a war of aggression, or a war in violation of international treaties . . . or assurances"). See *Trial of the War Criminals*, U.S. Dep't of State, Pub. 2420, pp. 15, 16 (1945). The Israeli Nazi Punishment Law (4 Israel Law 154 (5710-1949/50)) under which Eichmann was tried did not encompass "crimes against peace" but recognized instead "crimes against the Jewish people" which in the pattern of the U.N.'s Genocide Convention (U.N. Doc. A/810, p. 174) consist of acts committed with "intent to destroy the Jewish people in whole or in part."

²⁸ U.N. Gen. Ass. Off. Rec. 1st Sess., 2nd pt., Plenary 1144 (A/236) (1946).

It is the rationale of this position that in such cases "the law is retroactive in form, not in substance,"²⁹ and the punishment is not therefore, liberally speaking, retroactive.³⁰ The validity of the law has also been defended on the ground that the terrible crimes of the Nazis required unusual penal provisions, "for no sane legislator *could* have contemplated such crime to be even possible and no tribunal could have been provided for its adjudication in advance."³¹ A compelling defense of the justice meted out at the Nuremberg Trial states:

"[I]f the act was a heinous violation of international law; if it was recognizable as such to the individual; if he could reasonably be expected to know that it was punishable; and if he intended to do the thing he did which was in violation of his duties and obligations under international law . . . there could be no violation of the maxim *nullum crimen nulla poena* in such a case."³²

The Israeli court, in a like vein, had this to say with regard to the retroactive provisions of its law:

"The Israel legislature embodied into domestic law what have long been crimes under the law of all civilized nations, including the German people . . . it cannot be said that the perpetrators of the crimes defined in the law in question 'could not have a mens rea because they did not know and could not know that what they were doing was a criminal act,' [and furthermore:] There is [not] any taint of *ex post facto*ism in the law of murder."³³

It needs to be stressed that there is in actuality no binding prohibition in international law against retroactive criminal statutes in domestic law. The Universal Declaration of Human Rights has taken the first step in this direction, but its provisions are not self-executing and must await future legislation by the individual states for effectua-

²⁹ Baade, *supra* note 3, at 412, 413.

³⁰ See the German concurring position in Jescheck, *Die Verantwortlichkeit Der Staatorgane Nach Völkerstrafrecht; eine Studie Zu Den Nürnberger Prozessen* 373 (1952). See also Schwarzenberger, *The Eichmann Judgment*, *supra* note 19, at 258: "a sovereign state could hardly have better reason for passing retroactive legislation than the revindication of the minimum requirements of civilization, nor can any court exercise jurisdiction on any worthier ground."

³¹ Silving, *supra* note 20, at 336.

³² WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* 115, 116 (1960).

³³ Trial Judgment 7.

tion.³⁴ A nation enacting *ex post facto* laws will therefore not be in violation of positive international law, despite the fact that it may be condemned by world public opinion. Whether an international law statute, which the Nuremberg Charter may have been, providing retroactive penalties is illegal may be another question. It is noteworthy that regardless of its multi-national character, the Nuremberg Tribunal was established by the occupation forces then exercising sovereignty over Germany, and its jurisdiction indeed was claimed under both international law and domestic law. The Israeli court was, on the other hand, merely exercising its powers under domestic law. In both instances the tribunals were looking to the legal principles of other civilized nations and to international law for justification, moral support, permissive authority, and precedent. It is in this light that the retroactive jurisdiction of the Nuremberg and Eichmann tribunals must be judged.

The Nuremberg Charter claimed to derive permissive authority from the General Pact for the Renunciation of War, popularly known as the Kellogg-Briand Pact, which was signed at Paris on August 27, 1928, and prohibited resort to war.³⁵ Yet the Pact failed to proscribe criminal penalties for its violators.³⁶ The Israeli court, similarly, based much of its claim for authority upon international enactments and precedent which, although dating prior to the adoption of the Israeli law, were nevertheless not effectuated until after

³⁴ Article 11(2) of the Universal Declaration of Human Rights, approved Dec. 10, 1948, by the U.N. General Assembly, endorsed the principle of *nullum crimen nulla poena*: "No one shall be held guilty of any penal offense, on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed." U.N., *YEARBOOK ON HUMAN RIGHTS FOR 1948*, pp. 457, 467 (1950). A similar clause was inserted in Article 13 of the Draft Covenant of Civil and Political Rights of the Commission on Human Rights of the U.N. U.N., *YEARBOOK ON HUMAN RIGHTS FOR 1952*, pp. 424, 427 (1954).

³⁵ Lauterpacht, *The Pact of Paris and the Budapest Articles of Interpretation*, 20 *TRANSACTIONS OF THE GROTIUS SOC'Y* 178 (1935).

³⁶ A strong argument against deriving criminal penalties from the Paris Pact is advanced by Schick, *International Criminal Law—Facts and Illusions*, 11 *MOD. L. REV.* 290 (1948). Schick says: "None of the various non-aggression treaties concluded in the period between the two World Wars permits the interpretation that the perpetrators of an aggressive war may be exposed to criminal prosecution . . . Far from creating an international criminal law the Pact of Paris was not even intended to provide for penal sanctions against an alleged aggressor state." *Id.* at 293.

the crimes were committed. Indeed, it is interesting to note that the acts with which Adolph Eichmann was charged may fall within the prohibition of positive international law as it is now recognized. "War crime" and "crime against humanity" have been specifically defined in the Charter annexed to the August 8, 1945, Agreement made in London among the United Kingdom, the United States, France, and the USSR establishing the International Military Tribunal at Nuremberg.³⁷ The principles of law embodied in the Charter and in the judgment of the Tribunal were affirmed as international law by a unanimous resolution of the United Nations General Assembly on December 11, 1946.³⁸ Eichmann's terrible record of violence and atrocities also falls within the definition of genocide as contained in the United Nations Resolution on the Prevention and Punishment of the Crime of Genocide and in the text of the Convention adopted by the General Assembly on December 9, 1948.³⁹

The Israeli court indicated that following World War II several nations affected by the aggression and atrocities of the Third Reich enacted statutes similar to Israel's Nazi law.⁴⁰ Yet the fact that international law now contains sufficient positive provisions to penalize similar conduct in the future, does not fully answer the question as to the legality of the retroactive laws pertaining to deeds committed in the past. Despite the Jerusalem District Court's reiteration that there is not "any taint of *ex post facto*-ism in the law of murder," still, the fear remains of abuses that could be made in the name of international law. There is always the fear that a victorious nation or group of nations will join together to define as criminal conduct such activities as they consider contrary to their own

³⁷ The London agreement and the Nuremberg trial relied greatly on an interpretation which sees in the Pact of Paris authority for individual criminal responsibility for aggressive war. See Schick, *supra* note 36, at 294, 295. Justice Jackson in his opening speech before the Nuremberg tribunal clearly sets forth the construction according to which a war in violation of the Pact is illegal in international law and that those who plan and wage such war are, therefore, committing a crime. H.M. STATIONARY OFFICE, *THE TRIAL OF GERMAN MAJOR WAR CRIMINALS, OPENING SPEECHES OF THE CHIEF PROSECUTORS* (1946).

³⁸ U.N. Gen. Ass. Off. Rec. 1st Sess., 2nd pt., Plenary 1144 (A/236) (1946).

³⁹ U.N. Doc. A/810, p. 174. For a discussion of this subject as well as a general review of the need for the growth of international law in the area of protection of the rights of individuals, see JESSUP, *A MODERN LAW OF NATIONS* 92, 101, 103 (1950).

⁴⁰ Trial Judgment 37.

interests. There is always the fear that the winner may not be a nation with "right motives" but one with "wrong motives." The only solution is apparently in the drafting of an international code under which, and only under which, punishment is to be meted out—whether by domestic or international tribunals. Possibly for the future, one of the more interesting aspects of the Eichmann trial will be the fact of his trial, by a domestic court and under a domestic law, for conduct which at the time of the trial had already become prohibited by positive international law.⁴¹

Extraterritoriality of Legislation

Shortly after Eichmann's capture, Brigadier General Telford Taylor, who previously served as a chief prosecutor at Nuremberg, voiced his concern that trying Eichmann in Israel, rather than in Germany, would be contrary to the traditions of the law. It was General Taylor's position that under the generally accepted principles of law a man is entitled to be tried where his offense is charged to have been committed, and he proceeded further to substantiate his view by arguing that: "This right is guaranteed in the 6th Amendment to the Constitution and its origin antedates the Magna Carta where it is also to be found."⁴² Other writers have also concerned themselves with the question of Israel's jurisdiction to try Eichmann for crimes committed elsewhere, since the jurisdiction of nations is limited in most cases to crimes committed within their national boundaries. Several exceptions have, however, been recognized.⁴³ Nations, under a theory described as the "principle of active personality" or "nationality principle," often assume jurisdiction over criminal acts performed by their nationals in foreign countries.⁴⁴ Likewise, the right of national jurisdiction has been recognized, under a theory described as the "principle of passive personality," in cases where crimes, although committed outside

⁴¹ For an analysis of the Nuremberg trial as precedent for the future see GLUECK, *THE NUREMBERG TRIAL AND AGGRESSIVE WAR* 99 (1946).

⁴² Taylor, *Large Questions in the Eichmann Case*, N.Y. Times Magazine 11, 22 (Jan. 22, 1961).

⁴³ For a discussion of the various principles see Pella, *Towards an International Criminal Court*, 41 AM. J. INT'L L. 37, 46 (1950); and Comment, 46 CORNELL L.Q. 326, 329-30 (1961). See also Robinson, *Eichmann and the Question of Jurisdiction*, 30 COMMENTARY 1 (1960).

⁴⁴ See *Chandler v. United States*, 171 F. 2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949), involving an American broadcasting abroad for the enemy.

the national territory, affected citizens of the trying nation.⁴⁵ Also given recognition is the "principle of real protection" or "protective theory," permitting national jurisdiction in cases of crimes committed abroad against the most essential interests of the state.⁴⁶ None of these specific exceptions applies in the case of Eichmann. The crimes were committed outside the territory of Israel, and, strictly speaking, the vital interests of the State of Israel, not being yet in existence, could not have been directly at stake.

Eichmann's counsel argued this point. He reiterated that there was absent a linking point between the crimes and Israel because territoriality was the only true basis of jurisdiction. The Israeli trial court responded vigorously to the suggestion that jurisdiction lay only in the countries of Europe where the crimes were committed. Considering this argument as absurd, the court stated bitterly:

"In other words, eighteen nations do have the right to punish the accused for the murder of Jews who resided in their territories, but the nation of those who were murdered has no right to inflict such punishment because those persons were not exterminated on its territory."⁴⁷

The court could not understand anybody's failing to see the connection between Israel and the Nazi holocaust. "The connection between the State of Israel and the Jewish people needs no explanation," the court concluded.⁴⁸

Whether or not Israel's extraterritorial Nazi Punishment Law conforms with the standards of American constitutional law, its provisions are not contrary to the general legal practices in the world. There appears to exist no rule of international law governing the penal jurisdiction of national courts. In the now classical *Lotus* case the question of jurisdiction came up before the Permanent Court of International Justice.⁴⁹ That case developed from a collision between the French steamship *Lotus* and the Turkish freighter *Boz-*

Kourt, on the high seas. The *Boz-Kourt* was sunk and eight Turkish nationals perished. After attending to the safety of the survivors, the *Lotus* continued her voyage to Constantinople. Turkey apprehended the officer on the watch on the *Lotus* at the time of the collision and tried him for involuntary manslaughter. Following the officer's conviction the French and Turkish governments submitted the question of Turkey's jurisdiction to the World Court. Holding in favor of Turkey, the court concluded that:

"International law does not prevent states from exercising jurisdiction in their own territory in cases involving acts committed abroad, where there can be no reliance on some permissive rule of international law."⁵⁰

The court also went on to say that, where there is no prohibitive rule of international law, "every state remains free to adopt the principles which it regards as best and most suitable."⁵¹

There is, however, no total silence in international law and practice with regard to the extension of jurisdiction beyond the territorial boundaries. Indeed, the special nature of the crimes charged against Eichmann possibly permits the raising of the international law principle of universality of jurisdiction. International law has long recognized certain crimes as being universally reprehensible and has marked the offenders as *hostes generis humani* (enemies of the human race) and subject to trial any place. Piracy has been accorded this special status, both because piracy is everywhere made a crime and because piracy is often committed on the high seas over which no nation has jurisdiction. The punishment of brigands, likewise, has been said to come within the rule of universality. Grotius specifically expressed the view that the power to punish such persons was derived from the law of nations:

"The fact must also be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever."⁵²

Could the same principle be extended to other

⁴⁵ Comment, 46 CORNELL L.Q. 326, 329 (1961).

⁴⁶ National jurisdiction is recognized in cases of crimes committed abroad by aliens "against the security, territorial integrity, or political independence of the state" by the *Draft Convention on Jurisdiction with Respect to Crimes*, art. 7, HARVARD RESEARCH IN INTERNATIONAL LAW, AM. J. INT'L L. 435, 440 (Spec. Supp. 1935). See *United States ex rel. Majka v. Palmer*, 67 F. 2d 146 (7th Cir. 1933), involving perjury committed before American consul abroad.

⁴⁷ Trial Judgment 34.

⁴⁸ *Ibid.*

⁴⁹ P.C.I.J., ser. A., No. 10 (1927). Also in 2 HUDSON, WORLD COURT REPORTS 23.

⁵⁰ *Id.* at 19.

⁵¹ *Id.* at 20.

⁵² GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES [1646] 504 (Carnegie trans. 1925).

crimes which are generally recognized? Could the principle be extended whenever a crime is committed in a territory or a country where no adequate judicial system is in existence—as was the case with Nazi Germany?⁵³

In 1926 the Rumanian jurist, Vespasian Pella, argued:

“Absolute piracy (*piracy jure gentium*) is regarded today as an offense of a special character because it is *punishable wherever encountered*. We already see here in embryo the principle—which in future social relations, will become the practice—of penalising throughout the world violations of laws which are common in every country.”⁵⁴

Several years later, in 1933, Raphael Lemkin, author of the now accepted Genocide Convention, submitted a proposal to the International Conference for Unification of Criminal Law which would have made it a crime under the law of nations (*delictum juris gentium*) to exterminate racial, religious, or social collectivities. The crime was to be punishable irrespective of the place in which the crime was committed and irrespective of the nationality of the criminal.⁵⁵ Despite the rejection of the proposal at that time, it served to highlight the future trend.

The present scope of universality of jurisdiction in international law is uncertain. It should be noted, however, that some writers have argued that states now have the right to try aliens for other crimes similar to piracy committed outside their territory, and these crimes have been described to include slave trade; traffic in women, children, narcotics, and pornographic literature; abuses of radio; and destruction of submarine cables.⁵⁶ Likewise, attention should be given to the 1951 advisory opinion of the International Court which stated that the right to try an individual for a crime against humanity was universal and could be exercised by any nation in whose custody an accused rested.⁵⁷

⁵³ See, on this particular question, Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CALIF. L. REV. 177 (1945).

⁵⁴ Reply of Roumania (drafted by M. Pella) Nov. 20, 1926, to Questionnaire No. 6, propounded by the League of Nations Committee of Experts for the Progressive Codification of International Law, League of Nations Doc. No. c. 196.M. 70, 1927 V., at 202 (1927).

⁵⁵ Lemkin, *Genocide as a Crime Under International Law*, 41 AM. J. INT'L L. 145, 146 (1947).

⁵⁶ WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* 64 (1960); Pella, *supra* note 43, at 54.

⁵⁷ Trial Judgment 18. Advisory opinion of Inter-

There appears to be no compelling argument against extending the concept of universality as such. The Israeli court, in passing judgment on Eichmann, made the interesting observation that the territorial principle is by no means the only basis of jurisdiction and that indeed it is only a compulsory minimum.⁵⁸ The conclusion seems valid that:

“[T]he notion that states may punish only offenses actually or at least constructively committed on their territories is merely a rule of Anglo-American internal criminal law, which again, of course, is subject to many exceptions . . . [V]irtually all systems of criminal law reach much further.”⁵⁹

Yet it would be dangerous for the healthy growth of international law to delegate to each nation the authority to extend the rule of universality as it may see fit. If universality of jurisdiction is to expand, it is best that it does so through the establishment of pre-agreed international standards.

In asserting jurisdiction over Eichmann's crime, Israel was, in fact, not merely arguing for the extension of the rule of universality, but also claiming to have derived its right, at least in part, from its special relationship to a large portion of the victims—those of the Jewish heritage. Israel's court stressed that Israel's right to represent Jews who had no nationality or who were the victims of Nazi oppression was recognized by the Federal Republic of Germany in the 1952 Reparation Agreement between Israel and West Germany.⁶⁰ The court, in its judgment, compared the special relationship between the victims and the State of Israel to the relationship between the root and branch of a tree and its trunk.⁶¹ Indeed, one of the subtle thrusts of the judgment seems to be the assertion of Israel's sovereignty and right to protect the legal rights of Jewish people wherever they may be found.⁶²

This emphasis on a special right of jurisdiction, based on the racial or religious affiliation of the victims, may require careful analysis. At least one leading commentator had expressed concern, even before the trial, because Eichmann's trial was to be

national Court of Justice with regard to the reservations to the Genocide Convention, May 28, 1951.

⁵⁸ Trial Judgment 25.

⁵⁹ Baade, *The Eichmann Trial: Some Legal Aspects*, 1961 DUKE L.J. 400, 416.

⁶⁰ Agreement between Israel and the German Federal Republic, Sept. 10, 1952 (Document, Jerusalem, 1953).

⁶¹ Trial Judgment 35.

⁶² Leavy, *supra* note 5, at 824.

under a law specifically penalizing "crimes against the Jewish people." Said General Taylor:

"[T]o proscribe the murder of Jews as a crime against Jews carries the dangerous implication that it is not a crime against non Jews. . . . Nuremberg was based on the proposition that atrocities against Jews and non Jews are equally crimes against world laws. . . . [T]o define a crime in terms of the religion or nationality of the victim, instead of the nature of the criminal act, is wholly out of keeping with the needs of the times and trend of modern law."⁶³

The explanation has been offered, in partial answer to this argument, that in referring to "crimes against the Jewish people" the Israeli law was merely classifying the object of the crime, similar to the way a statute book may divide offenses according to whether they are "crimes against property" or "crimes against a person."⁶⁴ Furthermore, such legal classification is not intended to imply that only the object of the crime is entitled to relief, for in all criminal cases it is obviously the whole society that is entitled to relief. Yet the question remains whether such differentiation between the objects of international crimes serves a valid purpose and is at all necessary. The assertion of Israel's sovereignty over the Jewish people was designed to end "the curse of dispersion and the want of sovereignty of the people of Israel, upon whom any criminal could commit his outrages without fear of being punished by the people outraged."⁶⁵ But despite this laudable purpose, this assertion—if giving rise to similar assertions by other nations over expatriated nationals, their descendants, and other specially designated groups—may nevertheless pose a number of problems in the conduct and the development of international law.⁶⁶

THE INDIVIDUAL'S RESPONSIBILITY IN INTERNATIONAL LAW

It has long been recognized that the individual is not generally subject to international law. Inter-

national law pertains to the rights and duties of nations or sovereigns, and it is only through the sovereign that the individual becomes indirectly involved. The traditionalists have argued that "Individuals alone being subjects of criminal law . . . and international law prescribing no sanctions for individual offenders, these last cannot be subjected to an international jurisdiction."⁶⁷ Yet both in the Nuremberg Tribunal and in the Eichmann case individuals were on trial for what was commonly described as violations of international law. At Nuremberg a multi-national tribunal was asserting its jurisdiction under international law. In the Jerusalem courtroom it was a national tribunal dispensing domestic justice according to a law described to have been derived from the provisions of the law of nations. In both instances the motivators or active participants in the Third Reich's national policy were put on trial as individuals. But the trial of an individual for acts authorized, ordered, or sanctioned by his government has been described as a practice that may raise havoc in the orderly future conduct of governmental business. Should an individual be held responsible for acts performed in the service of his nation? It was the argument of Adolph Eichmann that:

"[M]y honor is loyalty. . . . [T]he question of conscience is a matter for the head of state, the sovereign. . . . [T]he head of my state ordered deportations, and the part I played in these de-

⁶⁷ Pella, *supra* note 43, at 40. For a discussion of individual responsibility under international law, see *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, U.N. Doc. A/CN. 4/1 Rev. 1, Feb. 10, 1949, pp. 19-22. It is worth noting, also, that in 1944 Prof. Hans Kelsen published in the annex to his book, *PEACE THROUGH LAW*, a draft of a proposed *Treaty Stipulation Establishing Individual Responsibility for Violations of International Law*. See, furthermore, Schick, *International Criminal Law—Facts and Illusions*, 11 *MOD. L. REV.* 290 (1948), to the effect that the first significant attempts were made only at the end of the First World War to create individual criminal responsibility under international law for "political offenses." It is interesting to note, also, that in the post civil war period the United States Supreme Court had before it several cases involving what may be described as war crimes, and the Court consistently adhered to the opinion that it is a principle of public international law that domestic courts have no jurisdiction to try enemy persons for acts committed during and as part of belligerent operations, even though alleged to have been committed in violation of the laws of war. *Ford v. Surget*, 97 U.S. 594 (1878); *Coleman v. Tennessee*, 97 U.S. 509 (1878); *Dow v. Johnson*, 100 U.S. 158 (1879); *Freeland v. Williams*, 131 U.S. 405 (1889). See Finch, *Jurisdiction of Local Courts to Try Enemy Persons for War Crimes*, 14 *AM. J. INT'L L.* 218 (1920).

⁶³ Taylor, *Large Questions in the Eichmann Case*, *N.Y. Times Magazine* 11, 22 (Jan. 22, 1961).

⁶⁴ Interestingly enough, the earlier draft of Israel's Nazi Punishment Law dealt only with "war crime" and "crime against humanity." The language in the present law which deals with "crime against the Jewish people" is much akin to the language in the Genocide Convention. See *Trial Judgment* 16, 17, 33.

⁶⁵ *Trial Judgment* 35.

⁶⁶ Katz, *The Role of Law in International Affairs as Illustrated by the Eichmann Case*, 84 *N.J.L.J.* 1 (1961).

portations emanated from the Master at the top."⁶⁸

Eichmann's counsel likewise argued that under the theory of "act of state"⁶⁹ only the sovereign should be held liable for the acts of his nationals in carrying out state policy.⁷⁰ He stressed the pragmatic plight of the individual enmeshed in the mission of his country. Said Dr. Robert Servatius:

"The basic principle of every state is loyalty to and confidence in the leadership. The deed is dumb and obedience is blind. These are the virtues on which alone a state can build its foundations."⁷¹

The Eichmann case will apparently serve further to establish the responsibility of the individual in international criminal law. For centuries scholars and legal tribunals have wrestled with the plea of superior orders. Only in this century has the law of nations come firmly to reject this defense, particularly in instances where the orders were manifestly unlawful and especially in cases of high ranking officers who had time to reflect upon the legality of orders given them.⁷² Obviously, there is a need for the extension of international criminal

law to individuals. The Nuremberg Tribunal correctly observed:

"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. . . . The principle of international law which, under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law."⁷³

But however desirable it may be to see the ushering in of a system of international law which would protect the individual against the injustices of foreign powers as well as of his own sovereign, it is dubious whether this can be properly accomplished by permitting one nation to sit in judgment in an ad hoc fashion on actions performed under the authority of another nation. If certain rights of individuals are to be protected and certain standards of national conduct are to be enforced, it is essential that these rights and standards be clearly and positively defined by the international community, to make certain that political interests and national prejudices do not take the place of international law.

⁶⁸ Attorney General v. Adolph Eichmann, crim. case 40/61, Jerusalem District Court, transcript 7.7.61; Session 88 I 1.

⁶⁹ Kelsen, *Collective and Individual Responsibility in International Law With Particular Regard to the Punishment of War Criminals*, 33 CALIF. L. REV. 530 (1943).

⁷⁰ Possibly one of the earliest recognitions given by positive international law to individual responsibility for war crimes was incorporated in the post World War I Versailles Treaty. Although recent legal writings have somehow overlooked the Versailles Treaty, and the Nuremberg and Eichmann Tribunals also failed to refer to it, this treaty should be noted for its prescription of penalties for war crimes. By Article 227, the Allied Powers arraigned William II, the former German Emperor, for "a supreme offence against international morality and the sanctity of treaties." The Kaiser was to be tried by a special tribunal to be guided by "the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality." This indeed was to be a forerunner of the Nuremberg "crime against peace." The trial did not take place, since William II fled to the Netherlands. In addition, Article 228 of the treaty provided that "The German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war," and Germany further agreed to surrender all persons charged with having committed such acts. See Report of the Commission of the Versailles Conference, 14 AM. J. INT'L L. 95 (1920).

⁷¹ Trial Judgment 216.

⁷² In 1906 Oppenheim wrote that "violation of rules regarding warfare are war crimes only when committed without an order of the belligerent Government concerned." See 2 OPPENHEIM, INTERNATIONAL LAW 264 (1906).

CONCLUSIONS

The majority of legal commentators on the Eichmann case have upheld the right of the State of Israel, in conformity with international law, to try the kidnaped Adolph Eichmann in an Israeli court under an admittedly extra-territorial and retroactive Israeli law.⁷⁴ Most writers go no further in the review of the case, considering the legal matter closed upon the determination of legality.⁷⁵ But the unfortunate truth appears to be that the legality of the Eichmann case is not derived from

⁷³ Leavy, *The Eichmann Trial, Report from Jerusalem*, 37 CALIF. B.J. 243, 246 (1962).

⁷⁴ For a strong argument against the legality of the trial, see Wechsler, *Adolph Eichmann . . . and the Law*, 19 N.Y. COUNTY L.B. BULL. 101 (1962). While upholding Israel's jurisdiction, some commentators expressed criticism of the trial's failure to comply with certain recognized procedural standards. The complaint has been heard that the court was not an unbiased one, due to the pre-trial pronouncement of Eichmann's guilt by one of the judges. The further complaint has been made that holding the trial in Israel not only meant trial in a hostile jurisdiction, but also deprived the defendant from producing witnesses of his choice. See, also, Cardozo, *When Extradition Fails, Is Abduction the Solution?* 55 AM. J. INT'L L. 127 (1961).

⁷⁵ An outstanding exception is the searching article of Schwarzenberger, *The Eichmann Judgment*, 1962 CURRENT LEGAL PROBLEMS 248.

the particular compliance of this case with some high and taxing standards of the law, but from the general permissiveness of the applicable international law, under which, apparently, "every independent state, has jurisdiction to punish war criminals in its custody regardless of the nationality of the victim, the time it entered the war, or the place where the offense was committed."⁷⁶

Indeed, even some of the commentators who found the Charter of the Nuremberg Tribunal objectionable on the ground that it penalized political offenses (such as "crime against peace") hitherto not recognized in international law, have not made the same objection to the trial of Eichmann, who was tried and convicted for "crime against humanity" (of which the "crime against Jews" is a mere particularization) and "war crime"—both of which have had a longer history and recognition in international law.⁷⁷

The fact that the trial of Eichmann did not constitute a violation of international law, fails to answer completely the question whether Israel's conduct in this case conforms to the standards of international conduct required to meet the growing needs of a world society striving for a greater degree of order and security through more effective standards of world law. As has been providently pointed out, "the important thing is that the trial and judgment shall not only be but appear to be just and fair, and shall contribute to the growth of law among the nations."⁷⁸

The trial of Eichmann complied with only a part of this admonition. It is undeniable that the actual conduct of Eichmann's public trial complied with a high standard of judicial process and also effectively conveyed this impression to the world community. But while in the long run the case will in most likelihood help fortify the body of international criminal law—through its reiteration of the Nuremberg principles and the reassertion of individual responsibility—it has unfortunately left the impression that this result was partially produced through force. Indeed, the illegal force employed in bringing the accused to trial made it unclear in the mind of the world whether it was "force" or whether it was "justice" which had won in the last analysis. The keen observation

has been made in this connection that "the cause of law is always poorly served by lawless law enforcement."⁷⁹ Clearly, the precedent-setting value of the case, which gives recognition to universally enforced international criminal penalties, suffers from the fact that Eichmann's apprehension and punishment were not accomplished through judicial process only.⁸⁰ In the final analysis, it has been suggested, the trial of Eichmann failed to answer the fear of those who can see the misuse of the name of international law, in future times, by a victorious force which may not necessarily be on the side of justice. But what is feared most, indeed, is the impact of lawless law enforcement on our own morality and judicial institutions rather than that it may provide, in the future, an "excuse" or "precedent" for the "wrong" victor who requires little or any such precedent.

Because of the criticism of the Nuremberg trial as one conducted under the auspices of the victorious powers, it was the hope of many that future international tribunals would be more broadly constituted, in order to alleviate the fear of politically motivated or oriented justice and to lend future judgments wider international scope.⁸¹ Unfortunately, Israel's decision, based on understandable domestic needs, to try Eichmann in its own courts, has not complied with this hope. The absence of an existing international criminal tribunal made it difficult for Israel to do otherwise. Yet it is feared that this unilateral enforcement may considerably weaken the case's role as an effective deterrent against future international criminal behavior.

In bringing the Eichmann case before a domestic rather than an international tribunal, Israel nevertheless acted in accordance with historical practices and may have very well contributed to the joint national-international responsibility for the creation and enforcement of international criminal law. The inability or unwillingness of the inter-

⁷⁹ Wechsler, *supra* note 74, at 102.

⁸⁰ See Cardozo, *supra* note 74, at 135. "We strongly champion the rule of law in world affairs. Consequently, it must be our position that the only acceptable way to deal with fugitive war criminals is through orderly processes of international law and extradition."

⁸¹ Wechsler, *supra* note 74, at 103, has complained that trial in Israel has "an obvious vindictive aspect." See also ROGAT, *THE EICHMANN TRIAL AND THE RULE OF LAW* 41 (1961): "[Israel's] decision that she alone should try Eichmann for crime against Jews rather than having an international tribunal try him for crimes against human beings is precisely the kind of decision that retards efforts to apply the rule of law to the international community."

⁷⁶ Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CALIF. L. REV. 177, 218 (1945).

⁷⁷ Compare Schick, *International Criminal Law—Facts and Illusions*, 11 MOD. L. REV. 290 (1948), with Green, *The Eichmann Case*, 23 MOD. L. REV. 507 (1960).

⁷⁸ Taylor, *supra* note 63, at 25.

national community in the past to adopt an international criminal code and to establish an international criminal tribunal must not, indeed, deter individual nations from adopting and reasonably expanding their own internal legal principles, derived from what is already generally acknowledged among nations. Israel's reliance upon the principle of Nuremberg and the Genocide Convention as authority for its own law may serve as a prime example of a healthy cross influence between national and international law. As the observer for the International Commission of Jurists clearly pointed out:

"The Eichmann trial is an illustration of international penal justice. This justice, which is still in the first phases of its development, or what is often called a 'primitive' state, is administered mainly by states. A state fulfills this task by applying international law either directly or through its body of laws."⁸²

Critics of Nuremberg have argued, and the same argument could be repeated in the Eichmann case, that:

"Before one may expect the creation of an international criminal law as enunciated at Nuremberg it will first be necessary to accept, and to practice without crippling reservations, the principle of compulsory jurisdiction of an international court or agency over States in all their disputes even though these disputes may be claimed to be political in character."⁸³

Pleas for an international criminal code and an international criminal tribunal will continue to be made. Whether the code or tribunal should come first is already subject to disagreement. In response to the claim that without an international criminal code, "real progress in international law and security is impossible," the assertion is made that "in many cases international criminal law can achieve nothing unless there be an international

court to apply it."⁸⁴ Furthermore, the precedent of the World Court may indicate that international accord could more easily be obtained for the establishment of an international criminal tribunal than for the enactment of a comprehensive international criminal code.

The defects in the Eichmann case, it is hoped, may possibly serve to stress again the need for a permanent international criminal tribunal.⁸⁵ The Eichmann case, indeed, furnished an opportunity for the establishment of an ad hoc tribunal in the Nuremberg tradition, but the opportunity was not seized. It is obvious that the only constant means for preventing future misuse of international law will be through the constitution of such an international tribunal, to act within the confines of the best international judicial traditions, and to supervise the healthy development of an international "criminal" rather than "political" international law. This obviously has not come to pass as yet. In the interim, it is quite likely that the historical facts may tend to justify the position of Justice Jackson that we cannot await a perfect international tribunal or legislature,⁸⁶ and that international law must develop, as did the common law, through custom, agreement, and judicial precedent, such as the Nuremberg and Eichmann trials themselves—despite their defects—were intended to provide.

⁸⁴ Pella, *supra* note 43, at 68.

⁸⁵ Even those who challenged Israel's jurisdiction to try Eichmann have stressed "that many of the criticisms concerning the jurisdiction of the tribunal in the Eichmann case could have been avoided through the institution of an international trial." See Woetzel, *The Eichmann Case in International Law*, 1962 CRIM. L. REV. 671, 681 (1962).

⁸⁶ Report of Robert H. Jackson to the President, in *Trial of War Criminals*, Document, U.S. Dept. of State, Pub. 2420, p. 9 (1945). See also observation of Henry L. Stimson that international law is "not a body of authoritative codes or statutes; it is the gradual expression, case by case, of the moral judgments of the civilized world." Stimson, *The Nuremberg Trial: A Landmark in Law*, 25 FOREIGN AFFAIRS 179, 189 (1947).

⁸² Papadatos, *The Eichmann Trial*, Bull. Int'l Comm. of Jurists 13 (no. 14, Oct. 1962).

⁸³ Schick, *supra* note 77, at 305.