

WORLD LAW

THE EICHMANN TRIAL: SOME LEGAL ASPECTS

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INTRODUCTION

ON May 23, 1960, Prime Minister David Ben Gurion of Israel announced in the Knesseth (Israel's Parliament) that Adolf Eichmann had been found. Eichmann, had, in fact, been living under an assumed name in Argentina and had been brought to Israel without the knowledge or consent of the Government of Argentina. The circumstances of his "transportation" to Israel are not fully known, but it seems that he was apprehended by an Israeli commando squad in Suarez on the outskirts of Buenos Aires on May 11, kept under lock and key in a private house for some nine days, and spirited away to Israel on an El Al plane that had brought Israel's Minister of Security, Abba Eban, to Argentina on May 20. The ostensible purpose of Mr. Eban's visit was to represent Israel at Argentina's Independence Day celebrations. On May 21, 1960, the El Al plane returned to Israel with Eichmann, but without Mr. Eban.¹

In Israel, Mr. Eichmann was charged with "crimes against the Jewish people" and "crimes against humanity" under the Nazis and Nazi Collaborators (Punishment) Law of August 1, 1950. He is presently being tried under these charges by the District Court of Jerusalem.

The purpose of this paper is to discuss the legality of the Eichmann trial under Israeli law and under international law. While this dis-

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¹ This account is based on CLARKE, EICHMANN, THE MAN AND HIS CRIMES 146-149 (1960). For legal discussion, see Green, *The Eichmann Case*, 23 MODERN L. REV. 507 (1960); Note, 46 CORNELL L.Q. 326 (1961); Silving, *In Re Eichmann: A Dilemma of Law and Morality*, 55 AM. J. INT'L L. 307 (1961). See also Rousseau, *Cronique des Faits Internationaux*, 64 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 771, 772-786 (1961).

cussion necessarily has to proceed from the assumption that the factual allegations of the prosecution are substantially correct and susceptible to legal proof, no opinion is expressed as to the facts. It need hardly be added that this would be highly improper at the present time.

I

THE LEGALITY OF THE EICHMANN TRIAL UNDER ISRAELI LAW

Adolf Eichmann is being tried under the Nazis and Nazi Collaborators (Punishment) Law, which was adopted by the Knesseth on August 1, 1950.² Section one of this Law provides that any person who has "done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against the Jewish people" or an "act constituting a crime against humanity" or "an act constituting a war crime" is liable to the death penalty. All three crimes are more closely defined in section 1(b).³ While according to section seven of the Law, the general provisions of the Penal Code apply to offenses under the Law, section eight expressly excludes the applicability of sections sixteen to nineteen of the Penal Code, which relate to the defense of the exercise of judicial function, constraint, necessity, and justification.⁴ Nevertheless, section eleven provides that under special circumstances, facts that but for section eight would have been valid defenses may be taken into account by way of mitigation of punishment. But even then, a minimum punishment of imprisonment for ten years is mandatory for section one offenses.

² Nazis and Nazi Collaborators (Punishment) Law, 5710-1950. English text in STATE OF ISRAEL, GOVERNMENT YEARBOOK 5712 (1951/52) 189 [reprinted in UNITED NATIONS, YEARBOOK ON HUMAN RIGHTS FOR 1950 163 (1952).]

³ Crimes against the Jewish people are there defined as "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 groups;
- (6) destroying or desecrating Jewish religious or cultural assets or values;
- (7) inciting to hatred of Jews."

Crimes against humanity are defined as "murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds." *Op. cit. supra* note 2, at 189.

⁴ UNITED NATIONS, YEARBOOK ON HUMAN RIGHTS FOR 1950 164 n.1 (1952).

No prescription runs for section one offenses, and "the Court may deviate from the rules of evidence if it is satisfied that this will promote the ascertainment of truth and the just trial of the case" under section 15(a).

In a decision of March 23, 1953, the District Court of Tel Aviv had this to say of the 1950 law:⁵

. . . this law is fundamentally different in its characteristics, in the legal and moral principles underlying it and in its spirit, from all other criminal enactments usually found on the Statute books. The Law is retroactive and extraterritorial and its object, *inter alia*, is to provide a basis for the punishment of crimes which are not comprised within the criminal law of Israel, being the special consequence of the Nazi regime and its persecutions. . . .

In other words, the Nazis and Nazi Collaborators (Punishment) Law is highly unusual; it is retroactive and extraterritorial in effect. Add to that the fact that Eichmann was forcibly abducted from Argentina to be tried under this unusual, retroactive, and extraterritorial law, and you have, in a nutshell, the main legal issues presented. They are:

- (1) Can Israel try Eichmann, although he was forcibly abducted from Argentina?
- (2) Can Israel try Eichmann for acts committed before May 8, 1945, under a statute enacted in 1950?
- (3) Can Israel try Eichmann, who is not a national of Israel, for offenses alleged to have been committed outside Israel against persons who were not nationals of Israel at the time of the commission of these offenses?

At the present, we are dealing with these questions on the level of Israeli internal law. On this level, questions (2) and (3), relating to retroactivity and extraterritorial application, require but little discussion. Israel does not as yet have a written constitution including a bill of rights, but only some organic acts dealing with the establishment and functions of the Knesseth, the President's office, and the Cabinet.⁶ The chief organ of state is the Knesseth; its will is supreme. There is no

⁵ Honigmann v. Attorney General, [1951] Int. Law Rep. 542, 543 (District Court Tel Aviv 1953). For further cases under the 1950 law, see *id.* at 538-42 and Editor's Note, 542.

⁶ See generally RACKMAN, ISRAEL'S EMERGING CONSTITUTION 1948-1951 (1955). English translations of the pertinent texts can be found in 2 PEASLEE, CONSTITUTIONS OF NATIONS 471-76 (2d ed. 1956).

judicial review of the constitutionality of legislation,⁷ and as a matter of the internal law of Israel, the 1950 Law is binding upon Israeli courts. They cannot but apply it in all cases coming properly before them.

But is the *Eichmann* case properly before the District Court of Jerusalem? Here, we deal with question (1): can criminal jurisdiction be obtained through the forcible abduction of the accused from a foreign jurisdiction, in violation at least of the law of that latter jurisdiction? Again, this question will, at this point, have to be discussed as one of Israeli law.

The secular⁸ law of Israel consists of three historical strata: Ottoman legislation up to the fall of the Ottoman Empire, British legislation for Palestine during the mandate period, and Israeli legislation since 1948.⁹ Only the latter two sources come into play in the *Eichmann* case. The law under which he is being prosecuted was enacted by Israel in 1950; for general principles, it refers to the Penal Code, enacted in 1936. Criminal procedure is largely based on English law, introduced for this purpose during the mandate period.¹⁰ And so-called gaps in the law are still filled, in accordance with article forty-six of the Palestine Order-in-Council of August 10, 1922, by "the substance of the common law, and the doctrines of equity in force in England." More particularly, under the same provision, the courts of Israel have "the same powers vested in . . . courts of justice . . . in England."¹¹

This latter clause, never repealed, seems decisive of the issue. It has been held in England that English courts "have no power to go into the question, once a prisoner is in lawful custody in this country, of the

⁷ RACKMAN, *op. cit. supra* note 6, at 169; Samuel, *Control of the Executive in Israel*, 53 S.A.L.J. 171, 177 (1956). Cf. *Amsterdam v. Minister of Finance*, [1952] Int. Law Rep. 229, 232 (Supreme Court of Israel, sitting as High Court of Justice, 1952): "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 restrictions imposed by the principle of territorial sovereignty."

⁸ Family relations and successions are still substantially governed by religious laws. See Laufer, *Marital Law in Transition: The Problem in Israel*, 9 BUFFALO L. REV. 321 (1960); SCHEFTELOWITZ, *THE JEWISH LAW OF FAMILY AND INHERITANCE AND ITS APPLICATION IN PALESTINE* (1947).

⁹ See Samuel, *op. cit. supra* note 7, at 174-75; Jacobson, *The Legal System of Israel*, 40 A.B.A.J. 1067 (1954).

¹⁰ See Bentwich, *The Migration of the Common Law: Israel*, 76 L.Q. REV. 64, 65-66 (1960).

¹¹ Sec. 46, cited by Jacobson, *op. cit. supra* note 9, at 1067.

circumstances in which he may have been brought here."¹² The same principle of *male captus, bene detentus* has, incidentally, also been recognized by well over twenty states of the United States¹³ and by the United States Supreme Court in a long line of cases.¹⁴ In 1952, Mr. Justice Black said for a unanimous Supreme Court:¹⁵

[D]ue process of law is satisfied when one present in court is convicted of crime after having been fairly apprised 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.

It should be added, however, that Professor Austin W. Scott, Jr. has ably argued that the principle of discouraging police illegality that precludes the receivability of evidence obtained in violation of rights protected against state action by the Fourteenth Amendment should be extended to cases of kidnapping of fugitives from justice across state lines.¹⁶ But the persuasiveness of this argument is limited to the United States constitutional system, and at least until there is a widespread reversal of the impressive line of cases holding that force or fraud in capture do not vitiate criminal jurisdiction, the courts of Israel will be on safe ground in following the principle *male captus, bene detentus*. Judging from newspaper reports, the District Court of Jerusalem would appear to have so decided on a preliminary objection to its jurisdiction,

¹² Lord Goddard, C.J., in *Ex Parte Elliott*, [1949] 1 ALL E.R. 373, 377-78 (K.B.). See also *Ex Parte Susannah Scott*, 9 B & C 446, 109 E.R. 166, 167 (K.B. 1829). This rule was received into the law of Palestine during the Mandate period. *Afounh v. Attorney-General*, [1941-1942] Annual Digest and Reports of Public International Law Cases 327, 328, citing *Ex Parte Scott* (Supreme Court of Palestine, sitting as Court of Criminal Appeal, 1942); cf. *Yousef Said Abu Dourrah v. Attorney-General*, *id.* 331, 332 (same court, 1941).

¹³ See the authorities collected in Note, 165 A.L.R. 947 (1946), and in Scott, *Criminal Jurisdiction of a State Over a Defendant Based on Presence Secured by Force or Fraud*, 37 MINN. L. REV. 91, 100 n.39 (1953). Cf. 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).

¹⁴ *Ker v. Illinois*, 119 U.S. 436 (1886); *Mahon v. Justice*, 127 U.S. 700 (1888); see *Lascelles v. Georgia*, 148 U.S. 537, 543 (1893); *In re Johnson*, 167 U.S. 120, 125-27 (1897). See Fairman, *Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678 (1953).

¹⁵ *Frisbee v. Collins*, 342 U.S. 519, 522 (1952). American authority would appear to be highly persuasive in Israel. See Gorney, *American Precedent in the Supreme Court of Israel*, 68 HARV. L. REV. 1194 (1955).

¹⁶ Scott, *op. cit. supra* note 13, at 97-98; 101-07.

and while this ruling might be challenged on appeal, it seems to be amply supported by precedent.

In conclusion, it is submitted that under the law of Israel, the District Court of Jerusalem has jurisdiction to try Adolf Eichmann for offenses under the Nazis and Nazi Collaborators (Punishment) Law of 1950, and to sentence him in accordance therewith, if the factual allegations of the prosecution are established by competent evidence.

II

THE LEGALITY OF THE EICHMANN TRIAL UNDER INTERNATIONAL LAW

Let us now take up the three questions listed above and try to analyze them according to international law.

A. Can Israel Try Eichmann Although He Was Forcibly Abducted From Argentina?

Under general international law, the territorial integrity of sovereign states is inviolable. If a state, acting through an organ the actions of which are attributable to it, purports to exercise powers in the territory of another state without the latter's consent, it commits an international tort. If Adolf Eichmann was forcibly abducted from Argentina by agents of the State of Israel, this, therefore, constituted an international tort.¹⁷ If, however, Eichmann was forcibly abducted by private individuals acting as bona fide volunteers without the previous knowledge or consent of the Government of Israel, the action of these individuals does not engage the international responsibility of Israel as against Argentina, although it does amount to a violation of the internal law of Argentina. The contrary view was taken by the representative of Argentina in the Security Council, but as rightly pointed out by the Foreign Minister of Israel, it is unfounded in international law.¹⁸

¹⁷ See generally Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231 (1934); Preuss, *Kidnaping of Fugitives from Justice on Foreign Territory*, 29 *id.* 502 (1935); Preuss, *Settlement of the Jacob Kidnaping Case (Switzerland-Germany)*, 30 *id.* 123 (1936); Green, *op. cit. supra* note 1, at 507-10; 1 DAHM, *VÖLKERRECHT* 250-51 (1958); Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 BRIT. YB. INT'L L. 265, 267-274 (1953); *cf.* Case of Jolis, Tribunal correctionnel d'Avesnes, July 22, 1933 [1934] 2 SIREY, JURISPRUDENCE 103 with note Rousseau.

¹⁸ See statements by Dr. Amadeo (Argentina), and Mrs. Meir (Israel), U.N. Doc. No. S/PV. 865, par. 24, at 5, and No. S/PV. 866, para. 41, at 9. *Cf.* Meron,

We are, then, faced with a question of fact. Were Eichmann's abductors bona fide volunteers acting without the previous knowledge or consent of the Government of Israel, or were they agents of the Government of Israel? The evidence would appear to point very strongly in the latter direction. Let us therefore assume, for the sake of argument, that Eichmann was, in fact, forcibly abducted by agents of the Government of Israel, acting on Argentinian territory without the consent of Argentina. This abduction constituted an international tort. What were its consequences?

Every state that commits an international tort against another state is bound by customary international law to make reparation therefor.¹⁹ While there is great uncertainty in international law as to the form of reparation,²⁰ it seems well established by state practice that the state on whose territory a purported fugitive from justice has been forcibly abducted by agents of another state can demand of the latter the return of the person abducted, and the disciplinary or criminal punishment of the abductors.²¹ A parallel to this right to the return of the person abducted, who does not have to be a national of the state of asylum, exists in international prize law: enemy vessels seized by a belligerent within neutral territorial waters must be restored to their owners on the application of the neutral power concerned.²²

Argentina could, then, demand from Israel the return of Eichmann—unless there is a valid reason for Israel to reject such a demand. The Government of Argentina had near the end of World War II announced its willingness to surrender for trial any Axis or Fascist war criminals seeking asylum within its territory.²³ If we assume that this general obligation undertaken in exchange for membership in the United Nations still subsisted when the State of Israel was established, it might be argued that Argentina was at least under an inchoate duty

International Responsibility of States for Unauthorized Acts of Their Officials, 33 BRIT. YB. INT'L L. 84 (1958).

¹⁹ See 1 SCHWARZENBERGER, *INTERNATIONAL LAW* 562-64 (3d ed. 1957); Chorzów Factory (Jurisdiction), P.C.I.J., ser. A, No. 9 at 21 (Germany v. Poland, 1927); Corfu Channel Chase, Great Britain v. Albania, [1949] I.C.J. REP. 4, 23.

²⁰ See generally Baade, *Indonesian Nationalization Measures Before Foreign Courts—A Reply*, 54 AM. J. INT'L L. 801, 814-30 (1960), and authorities there cited.

²¹ See the authorities cited *supra* note 17, particularly the *Jacob* and *Jolis* cases; 2 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 309-12, 320 (1942). Cf. Guillermo Colunje (Panama) v. United States, 6 R.I.A.A. 342 (Claims Commission, United States-Panama, 1933).

²² COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 521-23 (4th ed. 1959).

²³ Green, *op. cit. supra* note 1, at 510.

to extradite Eichmann to Israel. For Argentina had, in principle, agreed that war criminals should be punished, and its own penal legislation precludes the prosecution of Eichmann for acts alleged to have been committed before May 8, 1945.²⁴ The proper forum for those offenses would be a state that still has legislation enabling its courts to punish World War II war crimes as such; and so far as can be ascertained, Israel is the only state in the world that has such legislation.²⁵ Therefore, even if Israel could not demand the extradition of Eichmann as of right, Eichmann's trial in Israel is in harmony with Argentina's legal obligations toward the United Nations.

This line of argument is rather tenuous. But a decision on its merits is unnecessary in the instant case, for while Argentina did, indeed, assert that Israel was obliged to make reparation by way of return of Eichmann to the custody of Argentina, the Eichmann dispute between Israel and Argentina was settled in a different manner. Argentina, feeling that reparation was not forthcoming through direct negotiations with Israel, brought the *Eichmann* case before the United Nations Security Council. It presented a draft resolution requesting the Government of Israel to "make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law."²⁶ The Security Council debated the *Eichmann* case on June 22 and 23, 1960, and adopted a resolution incorporating the operative paragraph as requested,²⁷ but not until after it had been strongly—and in the end, successfully—suggested that Argentina should not insist on the return of Eichmann, but accept a public apology instead.²⁸ The latter, incidentally, was more than appropriate even if the abductors had not been

²⁴ Subject to minor exceptions not here material, Argentinian penal law only applies to offenses committed on Argentinian territory. Penal Code of 1921, Art. 1; MEDIANO, JIMINEZ DE ASÚA, and PECO, eds., *LEYES PENALES COMENTADAS* 39 (1946). See 1 SOLER, *DERECHO PENAL ARGENTINO* 163-164 (1945); 1 NUÑEZ, *DERECHO PENAL ARGENTINO* 186 (1959). The Genocide Convention has been enacted into Argentinian penal law by Law No. 14,467 of September 23, 1958; but in accordance with Art. 18 of the Constitution of 1853, it is prospective in operation only.

²⁵ *I.e.*, the Nazis and Nazi Collaborators (Punishment) Law of August 1, 1950, notes 1 and 2 *supra*.

²⁶ See U.N. Doc. No. S/PV. 865, and Anon., *Security Council Acts on Argentina's Complaint Against Israel*, 7 UNITED NATIONS REVIEW No. 2, 14 (1960).

²⁷ U.N. Doc. No. S/4349, reprinted *id.* at 15.

²⁸ See especially U.N. Doc. No. S/PV. 868, para. 30131, at 7-8 (USSR); *id.*, para. 33-36, at 8 (U.K.); *cf.* 7 UNITED NATIONS REVIEW No. 2, 14 (1960). Argentina nevertheless repeatedly demanded the return of Eichmann in June and July, 1960, but on August 3, 1960, both governments published a brief announcement stating that they regarded the incident as closed. Rousseau, *op. cit. supra* note 1, at 781-782.

agents of Israel at the time of the forcible abduction; for the subsequent approval of the abduction by members of the Israeli Government was undoubtedly an unfriendly act towards Argentina.²⁹

In conclusion, it is submitted that even if Eichmann were, in fact, forcibly abducted by agents of the Government of Israel acting on the territory of Argentina without the latter's consent, this would no longer vitiate the legality of Eichmann's trial by Israel. The claim to have Eichmann returned was Argentina's alone to make or to renounce. By settling for a public apology, Argentina has validly renounced any claim for the return of Eichmann. The at least rather strong possibility that an international tort was committed by the abduction of Eichmann from Argentina will, therefore, no longer affect the legality of the trial of Eichmann by an Israeli court.

B. Can Israel Try Eichmann for Acts Committed Before 1945 Under a Statute Enacted in 1950?

Objections against Eichmann's subjection to retroactive penal legislation can be raised (1) by the state entitled under international law to protect him; (2) possibly by Eichmann himself.

1. *Claims by the state of Eichmann's nationality*

a. *Procedural aspects.* Which state is entitled to protect Eichmann under international law? The general rule is that the state of which an individual is a national is entitled to protect him against acts violative of international law. As the Permanent Court of International Justice stated, "by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law."³⁰

Eichmann was born of German parents in Germany in 1906. However, around 1910, his family moved to Linz, in Austria; and it seems reasonable to assume that Adolf Eichmann acquired Austrian nationality by naturalization. At any rate, he joined the Austrian Nazi party, and even after coming to Germany in 1933, he first saw service in the Austrian Nazi legion then being trained in Bavaria.³¹ If Adolf Eichmann acquired Austrian nationality by naturalization, he thereby lost

²⁹ See the statement of Sir Claude Corea of Ceylon, U.N. Doc. No. S/PV. 868, para. 10, at 3.

³⁰ *Mavrommatis Jerusalem Concessions*. P.C.I.J., ser. A, No. 2, at 12 (Greece v. Great Britain, 1924).

³¹ See Clarke, *op. cit. supra* note 1, at 3-25.

his German nationality under section twenty-five of the German Nationality Act of 1913.³² He probably re-acquired German nationality by individual naturalization or, in accordance with article fourteen or fifteen of the Nationality Act, by becoming a Prussian or German state servant³³ (the Gestapo was originally a Prussian, not a Reich organization). In either event, he lost his Austrian nationality.³⁴

Eichmann is, then, a German national by naturalization. Since 1945, he has been mostly resident outside Germany, as a fugitive from justice, and under an assumed name. His basic identification paper seems to be a stateless person's identity card, issued by the Vatican in 1947 to "Richard Klementz."³⁵ While his application for such an identity paper is not sufficient ground for the loss of German nationality,³⁶ there nevertheless is the question whether in view of Eichmann's own dissociation from Germany, the Federal Republic of Germany (the only state with which Israel maintains official relations),³⁷ is entitled to protect him. The International Court of Justice has stated in the *Nottebohm* case that mere formal nationality is not a sufficient link for the exercise of international protection, but that nationality for this purpose has to be "real and effective, as the exact juridical expression of a social fact."³⁸ It would seem that under this test, the Federal Republic

³² See SCHÄTZEL, *DAS DEUTSCHE STAATSANGEHÖRIGKEITSRECHT* 213-19 (2d ed. 1958). This would also be the case if Eichmann acquired Austrian nationality through the naturalization of his father. Sec. 25, par. 1 of the Nationality Act of 1913; SCHÄTZEL, *op. cit. supra*, at 218.

³³ *Id.* at 172-82. Automatic naturalization by appointment to the Reich civil service or a state civil service was abolished by Sec. 26 of the Civil Service Act of January 26, 1937. *Id.* at 174, 180. Subsequent to the Reorganization Act of January 30, 1934, there was no more state civil service. *Id.* at 180. Austrian Nazis who came to Germany before 1938 apparently usually acquired German nationality by individual naturalization. *Id.* at 356.

³⁴ Sec. 10 of the Austrian Nationality Act of 1925; see generally Seidl-Hohenveldern, *Die österreichische Staatsbürgerschaft von 1938 bis heute*, 6 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 21 (1955); ADAMOVICH, *HANDBUCH DES ÖSTERREICHISCHEN VERFASSUNGSRECHTS* 413-28 (5th ed. SPANNER 1957); LIEHR, *DAS ÖSTERREICHISCHE STAATSANGEHÖRIGKEITSRECHT* (1950).

³⁵ CLARKE, *op. cit. supra* note 1, at 132-33.

³⁶ According to Sec. 23 of the Nationality Act of 1913, German nationality can be renounced. Renunciation, however, becomes effective only with the receipt of a document of release. See SCHÄTZEL, *op. cit. supra* note 32, at 206.

³⁷ As to the legal status of Germany see generally MARSCHALL VON BIEBERSTEIN, *ZUM PROBLEM DER VÖLKERRECHTLICHEN ANERKENNUNG DER BEIDEN DEUTSCHEN REGIERUNGEN* (1959); Pinto, *The International Status of the German Democratic Republic*, 86 *JOURNAL DU DROIT INTERNATIONAL* (Clunet) 313 (1959).

³⁸ *Nottebohm Case*, [1955] I.C.J. REP. 4, 28 (*Liechtenstein v. Guatemala*).

of Germany is not entitled to exercise its right of diplomatic protection over Adolf Eichmann.

However, it seems doubtful whether link theory developed in the *Nottebohm* case expresses an accepted rule of customary international law.³⁹ Even if it did not, there would still be the fact that the Federal Republic, far from objecting to the exercise of Israel's jurisdiction over Eichmann, has officially welcomed the prosecution of Eichmann by Israel, and has offered its assistance for the obtaining of evidence. Thus, the Federal Republic has attempted to relinquish its possible right to exercise diplomatic protection on behalf of Eichmann. But the difficulty is, as astute counsel for Eichmann have lost no time in finding out, that the public law of the Federal Republic of Germany, as contradistinguished from the public law of probably all other countries,⁴⁰ affords a German national a legal right for diplomatic protection against other states, and that this right is enforceable through proceedings against the Foreign Office before administrative courts.⁴¹

It may well be doubted, however, whether an attempt to obtain an administrative court decision ordering the Federal Government to intercede on behalf of Eichmann would in the end be successful. For one thing, the "link" theory would arise again, this time on the level of German administrative law. It may well be held that as a matter of German administrative law, Eichmann has, by obtaining a stateless person's passport in 1947, and by never registering with a consular or diplomatic agency of the Federal Republic, forfeited (*verwirkt*) his claim to diplomatic protection.⁴² Even if this conclusion is avoided, the claim to protection is, as Wilhelm Karl Geck has shown in his incisive study, merely an entitlement to an objective determination whether, under consideration of all the circumstances, including the interests of the nation as a whole and the present state of diplomatic relations, the right of protection should be exercised.⁴³ The exercise of the right is

³⁹ For criticism, see Goldschmidt, *Recent Applications of Domestic Nationality Laws by International Tribunals*, 28 *FORDHAM L. REV.* 689, 689-702 (1960); Kunz, *The Nottebohm Judgment*, 54 *AM. J. INT'L L.* 536 (1960).

⁴⁰ See DOEHRING, *DIE PFLICHT DES STAATES ZUR GEWÄHRUNG DIPLOMATISCHEN SCHUTZES* (1960).

⁴¹ See Geck, *Der Anspruch des Staatsbürgers auf Schutz gegenüber dem Ausland nach deutschem Recht*, 17 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT* 476 (1957).

⁴² With respect to *Verwirkung* in German administrative law, see 1 FORSTHOFF, *LEHRBUCH DES VERWALTUNGSRECHTS* 157-58 (7th ed. 1958).

⁴³ Geck, *op. cit. supra* note 41, at 517-18, 529.

still discretionary, but the discretion of the Government is subject to review. The minimum requirement for an entitlement to protection is that international law has, in fact, been violated.⁴⁴ This brings us to the substantive question: can Israel try Eichmann for acts committed before 1945 under a statute enacted in 1950?

b. *Substantive aspects.* The maxim *nulla poena sine lege* is not a rule of general international law.⁴⁵ While most states—including the Soviet Union since 1958—have adopted the principle that acts or omissions can be punished only if already punishable at the time of their commission,⁴⁶ there are still substantial exceptions from this principle. For one thing, some states, such as Denmark, specifically authorize the analogous application of penal statutes to situations not expressly dealt with therein.⁴⁷ Secondly, where criminal law is customary, *i.e.*, judge-made, it necessarily is retroactive whenever a new crime is created by judicial decision,⁴⁸ unless the decision is made prospective only.⁴⁹ Thirdly, even in states with an entirely codified criminal law, judicial decisions on previously doubtful questions, or reversals of previous precedents, are retroactive.⁵⁰ Finally, a number of states have enacted expressly retroactive criminal statutes to deal with collaborators after World War II.⁵¹

⁴⁴ *Id.* at 518 n.188.

⁴⁵ Compare the Danzig Legislative Decrees Case, P.C.I.J., ser. A/B, No. 65, at 54-57, where the argument advanced by the Danzig opposition parties that *nulla poena sine lege* was a standard of international law (P.C.I.J. ser. C, No. 77, 120 at 140) seems to have been rejected by implication. See also DAHM, ZUR PROBLEMATIK DES VÖLKERSTRAFRECHTS 55-65, especially 63 (1956).

⁴⁶ See, *e.g.*, Baade, *Intertemporales, Völkerrecht*, 7 JAHRBUCH FÜR INTERNATIONALES RECHT 229, 234-35 (1958), and authorities there cited.

⁴⁷ Art. 1, §1 of the Danish penal code provides: "Actions cannot be punished unless their criminal character has been established by statute, or unless they are the substantial equivalent of actions so provided for." French text in 1 ANCEL, LES CODES PÉNAUX EUROPÉENS 329 (1956). See MARCUS, DAS STRAFRECHT DÄNEMARKS 85-87 (1955).

⁴⁸ *Rex v. Manley*, [1933] 1 K.B. 529 (C.C.A. 1932), for instance, seemingly created a new common law misdemeanor. Stallybrass, *Public Mischief*, 49 L.Q. REV. 183 (1933); Note, 5 C.A.M.B. L.J. 263, 264. *But see* Board of Trade v. Owen, [1957] 1 ALL E.R. 411, 421 (H.L.); Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, especially 178-80 (1937); GLANVILLE WILLIAMS, CRIMINAL LAW, GENERAL PART 450 (1953).

⁴⁹ See Note, *Limitation of Judicial Decisions to Prospective Operation*, 46 IOWA L. REV. 600, 607-09 (1961), and authorities there cited.

⁵⁰ See, *e.g.*, with respect to Germany, SCHÖNKE, STRAFGESETZBUCH, KOMMENTAR 45 (9th ed. SCHRÖDER 1959).

⁵¹ See, *e.g.*, with respect to Denmark, Hurwitz, *Dänemark 1942-1948*, 63 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 131, 132-35 (1951); MARCUS, *op. cit. supra* note 47, at 81.

Nevertheless, several international conventions and declarations, such as the 1949 Red Cross conventions,⁵² the Universal Declaration of Human Rights,⁵³ the Draft Covenant of Civil and Political Rights,⁵⁴ and the European Convention on Human Rights and Fundamental Freedoms,⁵⁵ in principle proscribe retroactive criminal statutes. While these conventions and declarations do not afford a sufficient basis for the assertion that international law prohibits retroactive penal laws, they nevertheless lend support to the theory that states are not permitted to subject aliens to criminal prosecution on the basis of criminal statutes making punishable that which could not reasonably have been expected to be illegal at the time of its commission.⁵⁶

It would seem that little argument is needed to show that such a rule—if it exists—is not violated by the prosecution of Eichmann under the 1950 Law. The District Court of Tel Aviv has described this law as “retroactive.”⁵⁷ But at least in those portions that form the *gravamen* of the charges against Eichmann, the law is retroactive in form, not in

⁵² Convention Relative to the Treatment of Prisoners of War of August 12, 1949, Art. 99(1), 6 U.S.T. 3317, 3392; Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, Art. 67, 6 U.S.T. 3517, 3560.

⁵³ Art. 11, § 2: “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.” UNITED NATIONS, YEAR BOOK ON HUMAN RIGHTS FOR 1948 466, 467 (1950).

⁵⁴ Art. 13: “(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

(2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognized by the community of nations.” UNITED NATIONS, YEAR BOOK ON HUMAN RIGHTS FOR 1952 424, 427 (1954).

⁵⁵ Art. 7: “No one shall be held guilty of any criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.” UNITED NATIONS, YEAR BOOK ON HUMAN RIGHTS FOR 1950 420, 421 (1952).

⁵⁶ Compare FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 550-56 (1938).

⁵⁷ See text at note 5, *supra*.

substance. It is true that no *Israeli* law provided for the punishment of crimes against the Jewish people and crimes against humanity before May 8, 1945. But with some exceptions not material in this connection, the acts defined as such crimes were punishable under German law and, where committed outside of Germany, Polish or Soviet law, at the time of their commission. So long as prosecution is limited to acts punishable under German or local law prior to 1945, there is no substantive retroactivity. Until the coming into effect of the Basic Law of the Federal Republic of Germany, German penal law knew the death penalty for offenses against life;⁵⁸ it therefore would seem that with respect to the actual offenses charged, there will also be no danger of a retroactive imposition of a more severe penalty.

The fact that the 1950 Law is not retroactive with respect to the offenses charged is best illustrated by post-World War II war crimes trials in Germany. The definition of crimes against humanity in the 1950 Law, in particular, is virtually taken from the Charter of the International Military Tribunal created by the London Agreement between the United States, the Soviet Union, Great Britain, and France on August 8, 1945.⁵⁹ The same definition was incorporated in Allied Control Council Law No. 10, of December 20, 1945, for the punishment of persons guilty of war crimes, crimes against peace, and crimes against humanity.⁶⁰ Under the latter statute, several persons were tried, convicted, and executed for substantially the same acts now charged against Adolf Eichmann. The most closely analogous trials were conducted by military tribunals set up by the United States within its own zone of occupation pursuant to Control Council Law No. 10.⁶¹ These military

⁵⁸ Art. 102 of the Basic Law of the Federal Republic of Germany (effective as of May 24, 1949) abolishes the death penalty. The death penalty has not, however, been abolished in East Germany. RENNEBERG, in GERATS-LEKSCHAS-RENNEBERG, *LEHRBUCH DES STRAFRECHTS DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK, ALLGEMEINER TEIL* 565-66 (1957).

⁵⁹ Charter of the International Military Tribunal, Annexed to the London Agreement, Art. 6(c), reprinted in 15 *TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG TRIBUNALS* 10, 11. The same similarity exists with respect to the definition of war crimes. Art. 6(b).

⁶⁰ Art. II(c), reprinted *id.* at 23, 24.

⁶¹ These courts were created by Military Government-Germany, United States Zone, Ordinance No. 7, of October 18, 1946. Their decisions are reported in 1-14 *TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS*. For a brief account of these trials, see APPLEMAN, *INTERNATIONAL CRIMES AND MILITARY TRIBUNALS* 139-233 (1954).

tribunals were staffed with American lawyers and judges, including, for instance, Judge Musmanno, now of the Supreme Court of Pennsylvania.

In several cases, the defendants argued that Control Council Law No. 10 was retroactive as applied to them. This defense was rejected by the courts on the theory of substantive nonretroactivity—*i.e.*, the theory that the acts charged, especially crimes against humanity, were punishable under law existing at the time of their commission.⁶²

It might be argued that these decisions are not overly persuasive, because the courts were bound by Control Council Law No. 10, whether retroactive or not, and that the Nuremberg trials are, at least to some extent, tainted with the suspicion of victors' justice. But it should be noted that while German lawyers, on the whole, were and are largely critical of the notion of crimes against peace as applied to acts committed before May 8, 1945,⁶³ they seem in substantial agreement that the punishment of "crimes against humanity" was not, strictly speaking, retroactive. At least, this is the opinion of Professor Hans-Heinrich Jescheck, one of Germany's most eminent authorities on international penal law.⁶⁴

Furthermore, by virtue of enactment by the Occupying Powers, Control Council Law No. 10 was effective as a German statute. Consequently, there was no retroactive imposition of a penalty for an act not punishable under German law, even if committed before May 8, 1945. On balance, therefore, it seems quite clear that at least with respect to the serious offenses against life charged under the law of 1950, there is no substantive retroactivity entailing the possibility of violation of international law.

2. *Eichmann's international human rights*

Eichmann's subjection to the 1950 law is not, then, a violation of rights under customary international law that the Federal Republic of Germany is entitled to protect. But is it a violation of international human rights that Eichmann can claim in his own name, and that Israel has to respect?

⁶² See especially *United States v. Ohlendorf*, 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 411, 459 (1948): "In the main, the defendants in this case are charged with murder. Certainly no one can claim with the slightest pretense at reasoning that there is any taint of *ex post factism* in the law of murder." See also *id.* at 496-500, especially 499.

⁶³ See generally BENTON & GRIMM, eds., NUREMBERG, GERMAN VIEWS OF THE WAR TRIALS (1955).

⁶⁴ JESCHECK, DIE VERANTWORTLICHKEIT DER STAATSORGANE NACH VÖLKERSTRAPRECHT, EINE STUDIE ZU DEN NÜRNBERGER PROZESSEN 373 (1952).

It seems highly doubtful at this time whether there are internationally protected human rights outside of specific treaty rights.⁶⁵ But even if we assume that individuals are, to some extent, subjects of international law and may assert internationally protected human rights on their own behalf, it does not follow that Eichmann's human rights have been violated. Quite to the contrary, the only two instruments designed to afford legal recognition of international human rights, the Draft Covenant of Civil and Political Rights of the United Nations and the European Convention on Fundamental Freedoms, both provide that the prohibition of retroactive penal legislation incorporated in these instruments "shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized" by "civilized nations" or "the community of nations."⁶⁶

Thus, even if international law presently recognizes fundamental human rights that can be asserted by individuals directly in the absence of treaty, the present substantive content of these rights would not preclude the so-called retroactive application of the Law of 1950 to the offenses charged against Adolf Eichmann.

It is therefore submitted that Israel can, without violating international law, try Adolf Eichmann for acts alleged to have been committed before May 8, 1945, under the Nazis and Nazi Collaborators (Punishment) Law of August 1, 1950.

⁶⁵ See generally LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1950); VERDROSS & ZEMANEK, *VÖLKERRECHT* 496-99 (4th ed. 1959); DAHM, *op. cit. supra* note 17, 411-44 (1958).

⁶⁶ See notes 54 and 55 *supra*. The European Commission of Human Rights has decided, by resorting to preparatory work, that Art. 7, § 2 of the European Convention is intended to establish that this article does not affect laws for the punishment of war crimes, treason, and collaboration with the enemy, enacted to cope with the extremely exceptional situation existing at the end of World War II, and that it does not envisage any legal or moral condemnation of those laws. *EUROPEAN COMMISSION OF HUMAN RIGHTS, DOCUMENTS AND DECISIONS 1955-1956-1957* 239, 241; see also decision of June 9, 1958, *YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1958-1959* 214, 226. The Commission has also rejected a petition by Rudolf Hess, one of the major war criminals convicted by the International Military Tribunal at Nuremberg, on the alternative grounds that the States which had tried him had not accepted the individual right of petition, and that the Convention did not protect those whose acts were criminal according to the general principles of law recognized by civilized nations. Kerson, *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, 49 *CALIF. L. REV.* 172, 180-81 (1961).

C. Can Israel Try Eichmann, Who Is Not a National of Israel, For Offenses Alleged To Have Been Committed Outside Israel Against Persons Who Were Not Nationals of Israel at the Time of the Commission of These Offenses?

At the outset, we would do well in abandoning any notion of the so-called territoriality of criminal laws.⁶⁷ While it is true, on the choice-of-law level, that every country in the world imposes penal sanctions only on the basis of its own penal law, the 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.⁶⁸ The most that can be said is that every country applies only its own penal law, and every country punishes—subject to exceptions dictated by diplomatic or sovereign immunity—all offenses committed on its own territory. But virtually all systems of criminal law reach much further. First, most or all states, including Great Britain and the United States, punish violations

⁶⁷ "Lotus" Case, P.C.I.J. ser. A, No. 10, at 18-19; 20 (France v. Turkey, 1927): "the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable. . . . Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty."

⁶⁸ For discussion and criticism, see Rotenberg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 TEXAS L. REV. 763 (1960).

of their penal laws by their public officials and armed forces abroad,⁶⁹ treasonable acts by their own nationals, and some offenses against state security even when committed by foreigners abroad.⁷⁰ Secondly, many continental states punish certain offenses committed by their nationals abroad; some, for instance, Germany, go so far as to make their penal codes applicable to virtually all offenses by their own nationals, wherever committed.⁷¹ Nobody earnestly contends that these extensions of the reach of criminal laws to offenses committed abroad are contrary to international law.⁷²

Criminal jurisdiction based on territoriality, nationality, and state protection, then, is manifestly not contrary to public international law. The same is true of criminal jurisdiction based on a permissive or directive rule of international law—*i.e.*, the rule that pirates may and shall be punished wherever apprehended, or treaty-based rules for the prosecution of counterfeiting, white and black slave traffic, traffic in narcotic drugs and in pornographic literature, etc.⁷³ The only question that is seriously open to dispute is whether the general-protective principle—*i.e.*, the punishment of offenses against nationals of the prosecuting state wherever and by whomever committed—and the principle of enforcement by proxy—*i.e.*, the punishment of offenses wherever and by whomever committed, so long as they are punishable both under the *lex loci* and the *lex fori*—are compatible with public international law.

In the instant case, the offenses charged are not alleged to have been committed in Israel, nor by a national of Israel, nor against nationals of Israel, nor against the State of Israel. But there is a permissive, possibly even directive, rule of public international law covering the offenses

⁶⁹ See, *e.g.*, Everett, *Military Jurisdiction Over Civilians*, 1960 DUKE L.J. 366, especially at 382-411.

⁷⁰ See, *e.g.*, Lauterpacht, *Allegiance, Diplomatic Protection and Criminal Jurisdiction Over Aliens*, 9 C.A.M.B. L.J. 330 (1947); *Rocha v. United States*, 288 F.2d 545, 548-50 (9th Cir. 1961). The protective principle of criminal jurisdiction is criticized adversely on policy grounds by Garcia-Mora, *Criminal Jurisdiction Over Foreigners for Treason and Offense Against the Safety of the State Committed Upon Foreign Territory*, 19 U. PITT. L. REV. 567 (1958).

⁷¹ Sec. 3 of the penal code, as last amended by Act of August 4, 1953, [1953] I Bundesgesetzblatt 735; see SCHÖNKE, *op. cit. supra* note 50, at 67-69; MAURACH, *DEUTSCHES STRAFRECHT, ALLGEMEINER TEIL* 93-94 (2d ed. 1958).

⁷² See generally 1 OPPENHEIM, *INTERNATIONAL LAW* 330-33 (8th ed. LAUTERPACHT 1955); DAHM, *op. cit. supra* note 17, at 258-59; VERDROSS & ZEMANEK, *op. cit. supra* note 65, at 248; Harvard Law School, *Research in International Law, Draft Convention on Jurisdiction with Respect to Crime*, Arts. 5-8, with comment, 29 AM. J. INT'L L. Special Supplement 519-63 (1935).

⁷³ See, *e.g.*, DAHM, *op. cit. supra* note 17, at 257.

alleged to have been committed by Adolf Eichmann. Is it directly applicable here? While the acts charged would constitute the crime of genocide under the Convention on Genocide, which is in force as between all states here concerned, this convention expressly provides in article six that 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 have accepted its jurisdiction."⁷⁴ This excludes the direct applicability of the Genocide Convention. It seems clear, though, that this jurisdictional clause is permissive, not exclusive.⁷⁵ The Crime of Genocide (Prevention and Punishment) Act, adopted by the Knesseth on March 29, 1950, expressly provides that "a person committing outside Israel an act which is an offense under this Act may be prosecuted and punished in Israel as if he had committed the act in Israel."⁷⁶ Nevertheless, this Israeli Act is prospective in operation only and does not extend to acts committed before its coming into force. Thus, the Genocide Convention does not apply because of its jurisdictional limitations, and the Crime of Genocide (Prevention and Punishment) Act does not apply because it is prospective in operation only.

Nevertheless, it should be noted that the Genocide Convention as such, especially its provision in article one that the contracting parties *confirm* "that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish," lends strong support to the contention that Israel has at least an imperfect duty under international law to punish acts constituting genocide, even if committed in the past. Such a duty, or even a permissive rule to the same effect, would suffice to establish the jurisdictional legality of the *Eichmann* trial in public international law.

But even assuming that the Genocide Convention does not expressly or by implication create a rule of international law prescribing or permitting the punishment of acts of genocide committed in World War

⁷⁴ UNITED NATIONS, YEAR BOOK ON HUMAN RIGHTS FOR 1948 484 (1950). For ratifications and accessions, see UNITED NATIONS, STATUS OF MULTILATERAL CONVENTIONS IV-4, 5 (St/Leg/3, Rev. 1). See also Sec. 220a of the German penal code, added by Act of August 8, 1954, [1954] II Bundesgesetzblatt 729; SCHÖNKE, *op. cit.* *supra* note 50, at 806-08.

⁷⁵ ROBINSON, THE GENOCIDE CONVENTION, A COMMENTARY, 82-85 (1960); DROST, GENOCIDE 100-102 (1959).

⁷⁶ Sec. 5. English text in UNITED NATIONS, YEAR BOOK ON HUMAN RIGHTS FOR 1950 163 (1952).

II, there still remains the final question whether Israel's exercise of criminal jurisdiction in the *Eichmann* case constitutes a valid exercise of the principle of criminal law enforcement by proxy. This, of course, depends on the compatibility of that jurisdictional principle with public international law.

The question, briefly, is this: does international law permit a state to punish an alien for an offense committed abroad which is punishable both under the law of the place of commission and under the law of the place of prosecution, provided the punishment imposed does not exceed the penalty incurred in the place of commission? The answer can only be in the affirmative. All states are interested in bringing alleged criminals to justice; no state is interested in harboring fugitives from justice. On the other hand, no state is obliged, in the absence of treaty, to extradite persons who are alleged to have committed offenses abroad; the machinery of extradition is rather cumbersome, to say the least;⁷⁷ even where states are willing, in the absence of treaty, to effect extradition, formal obstacles such as the lack of diplomatic relations may well prevent or delay the delivery of the person accused. While extradition remains cumbersome and of limited applicability, the answer to the dilemma, at least as between states which have little or no formal preadmission procedures for aliens, is criminal law enforcement by proxy.

Many states have adopted this principle,⁷⁸ and at least where there are genuine obstacles to extradition, its compatibility with international law seems recognized by the weight of authority—including the Draft Convention with Respect to Crime, prepared by the Research in International Law of the Harvard Law School in 1935.⁷⁹ In the instant case, the obstacles are real, for while there are official relations between the Federal Republic of Germany and Israel, there are no diplomatic relations, and there is no extradition treaty. Therefore, since Adolf Eichmann cannot readily be extradited by Israel to the Federal Republic of Germany—and since Germany, along with Poland and the Soviet

⁷⁷ See Cardozo, *When Extradition Fails, is Abduction the Solution?* 55 AM. J. INT'L L. 127 (1961), and examples there discussed.

⁷⁸ E.g., Austria, §§ 39-40; Hungary, Art. 4(a); Italy, Art. 10. 1 ANCEL, *op. cit. supra* note 47, at 95, 101; 2 ANCEL, *id.* at 13, 871, 872-73. Further provisions are listed in Harvard Law School, *op. cit. supra* note 72, at 574-73. With respect to Germany, see note 82 *infra*.

⁷⁹ *Op. cit. supra* note 72, Art. 10(a) with comment, 573-85; see also VERDROSS AND ZEMANEK, *op. cit. supra* note 65, at 248; DAHM, *op. cit. supra* note 17, at 258-59.

Union,⁸⁰ by approving of Eichmann's trial by Israel, have, in effect, waived extradition—Eichmann can be tried by proxy in Israel.

Even if the Federal Republic of Germany wanted to—or by Eichmann's action in an administrative tribunal,⁸¹ were compelled to—object to Israel's exercise of penal jurisdiction over Adolf Eichmann, this objection would fail to affect the legality of the Eichman trial under international law. For the Federal Republic of Germany is all but absolutely precluded from raising objections to *any* exercise of criminal jurisdiction by proxy. Section four of the German Penal Code expressly provides that German penal law is applicable to offenses committed by an alien abroad, if these offenses are punishable under the law of the place where they were committed, and if, although extradition is in principle permissible for that particular type of offenses, there is, in fact, no extradition.⁸² If Germany claims jurisdiction to try an Israeli Eichmann for offenses committed in Israel, Germany cannot fairly object to Israel's claim to jurisdiction to try a German Eichmann for offenses committed in Germany.

⁸⁰ See the statements of the representatives of Poland and of the Soviet Union in the Security Council, U.N. Doc. No. S/PV. 867, para. 7, at 2; No. S/PV. 868, par. 54-58, at 11-12 (Poland); *id.* at paras. 30-31, pp. 7-8 (USSR).

⁸¹ See *supra* at notes 41-44. Even if the action was successful, the Federal Republic would in all probability be estopped from exercising its right of diplomatic protection over Eichmann as against Israel, since Israel has, by instituting the criminal trial, changed its position in reliance on Germany's announced decision not to protect. See generally Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, 33 BRIT. YB. INT'L L. 176 (1958).

⁸² Sec. 4, para. 2(3) of the penal code, as last amended by Act of June 11, 1957, [1957] I Bundesgesetzblatt 597; see SCHÖNKE, *op. cit. supra* note 50, at 70-71.