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D. Lasok

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THE EICHMANN TRIAL

By

D. LASOK *

The Att.-Gen. of the Government of Israel v. *Adolf, the son of Karl Adolf Eichmann*

THE trial of Adolf Eichmann will go down in history as a trial without precedent not only because of the enormity of the charges but mainly because it is likely to perpetuate and deepen the controversy provoked by the Nuremberg War Crimes Tribunal.[1] Reference had already been made to Eichmann at Nuremberg [2] and the account of his activities recorded in a two-volume report of the Polish War Crimes Commission.[3] But the drama unfolded with his seizure by Israeli agents and abduction from Argentina in May 1960. From the reaction of the Argentinian government to this obvious act of violation of Argentina's sovereignty one might have expected a repetition of the *Jacob-Salomon Case* [4] in reverse, but history did not repeat itself and Eichmann had no alternative but to go into the glass cage provided for him at the Jerusalem court.

Israel made atonement to Argentina, the Security Council [5] absolved Israel from any blame for the incident and gave blessing to the trial by expressing "universal condemnation of the persecution of the Jews by the Nazis." The circumstances of his apprehension and Eichmann's enforced consent to stand trial when in the hands of his captors provided only an argument, albeit unsuccessful, to challenge the jurisdiction of the court.[6] Indeed, no

* Lecturer in Law, University of Exeter.

1 See the great mass of literature listed by R. K. Woetzel, *The Nuremberg Trials in International Law* (London, 1960), pp. 254–276.

2 *The Nuremberg Judgment*, 2nd citation. *The Trial of German Major War Criminals* (H.M.S.O. London), II, pp. 365, 366, 417; III, pp. 218, 277, 278, 280, 281; VI, p. 91; VIII, pp. 136–137; XI, pp. 257, 264, 268, 269, 288, 348, 349, 350; XVIII, pp. 225, 238, 332; XX, pp. 175, 176, 390, 398, 402; XXII, pp. 76, 153, 361, 464.

3 *Biuletyn Glownej Komisji Badania Zbrodni Hitlerowskich w Polsce*, Vols. XII and XIII; *Zbrodnie Adolfa Eichmanna*, (Warsaw, 1960).

4 In 1935 Jacob-Salomon, an ex-German Jew living in Switzerland, was kidnapped by Nazi agents and abducted to Germany but the Swiss Government obtained his release.

5 By resolution of June 23, 1960.

6 *Cf.* F. Morgenstern, "Jurisdiction in Seizures Effected in Violation of International Law" (1952) 29 B.Y.B.Int.Law p. 265 *et seq.*; L. C. Green, "The Eichmann Case" (1960) 23 M.L.R. 507 *et seq.*

matter how underhand the behaviour of the Israeli government may appear to have been in this matter, the court could not divest itself of the jurisdiction to try the accused. As far as the court was concerned, his consent or otherwise, as well as the mode of securing the arraignment of the accused on criminal charges, was immaterial,[7] and the breach of international law committed by order of the Executive could not invalidate the trial. There is, of course, nothing to prevent Eichmann pursuing his civil remedies against his captors.

The Indictment

The indictment against Eichmann contained fifteen charges in all: four described as crimes against the Jewish people, seven as crimes against humanity, one as a war crime and three as membership of hostile organisations.[8] Twelve of these charges carry the death penalty[9] under the Nazi Collaborators (Punishment) Law, enacted by the Israeli Parliament in 1950.[10]

In brief, Eichmann was accused of being instrumental, in conspiracy with others, in the extermination of millions of Jews, in creating murderous conditions for millions and in devising measures to sterilise Jews, as well as having committed similar crimes against Poles, Yugoslavs, Czechs and Gipsies.

The indictment seems to reveal some fundamental difficulties which had to be overcome in order to present a full and complete list of crimes. Thus we have a combination of crimes against Israeli municipal law and crimes against international law, the latter leaning heavily on the Nuremberg trials.

In particular " crimes against the Jewish people " and " membership of hostile organisations " require some comment. The former could be classified as crimes against humanity, or war crimes, and thus merged with the other counts under these heads, but, of course, the crushing psychological effect would then have

[7] *R.* v. *O.C. Depôt Battalion, R.A.S.C., Colchester, Ex p. Elliott* [1949] 1 All E.R. 373 following *Ex p. Scott*, 9 B. & C. 446 and *Sinclair* v. *H.M. Advocate* (1890) 12 R. (Ct. of Sess.) 38; *Kerr* v. *Illinois* (1886) 119 U.S. 436; *Ex p. Johnson* (1897) 167 U.S. 120; *U.S.* v. *Insull et al.*, 8 F.Supp. 310; *Annual Digest* (1933–1934), Case No. 75; *Ex p. Lopez*, 6 F.Supp. 342; *Annual Digest* (1933–1934), Case No. 76.

[8] *i.e.*, S.S. (Nazi party troops); S.D. (security service); Gestapo (secret police).

[9] There is no death penalty in Israel except under the law of 1950.

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

been lost, the desire for retribution remaining unsatisfied. The planned extermination of Jews and other nationals undoubtedly stirred the conscience of the world and led to the Genocide Convention, ratified by Israel in 1951. Yet to draft the indictment in the terms of the Convention would have undermined the jurisdiction of the Israeli court, at least as far as such crimes were concerned, for the Convention (article 6) reserves jurisdiction either for an international tribunal or for the courts of the country where the crimes were committed.

The charge of membership of hostile organisations appears somewhat puzzling [11] in the present trial. Each of the three counts involving those charges was accompanied by the following rider: " This organisation was declared a criminal organisation by judgment of the International Military Tribunal dated October 1, 1946, in accordance with article 9 of the Charter of the Tribunal annexed to the Four-Power Agreement of August 8, 1945, concerning the trial of the four major war criminals." The Nuremberg indictment embraced a wider range of criminal organisations,[12] and the Tribunal was at pains to differentiate between them for the purpose of establishing criminal conspiracy. There was no unanimity [13] among the judges and this part of the Nuremberg law seems least satisfactory in so far as the principle of individual responsibility for crimes can hardly be vindicated in all cases and beyond reasonable doubt by reference to membership of large organisations, in spite of the fact that the leadership was involved in illicit activities.

Perhaps it was the realisation that the Eichmann trial was without precedent, and the conviction that crimes against international law must, in the absence of a Code of International Penal Law and an International Criminal Court, find their way into the municipal systems of law, that were the motives which inspired the draftsmen of the indictment. The latter idea seems to gleam through the arguments of the Attorney-General, and if this school of thought can be further elaborated in terms of municipal law it might initiate an interesting development in the prosecution of crimes against international law.

[11] Woetzel, *op. cit.*, p. 190 *et seq.*, *cf.* P. Cutler, " The Eichmann Trial " (1961) 4 *The Canadian Bar Journal*, pp. 366–367.

[12] *i.e.*, Leadership Corps of the Nazi Party, Gestapo, S.D., S.A., S.S., Reich Cabinet, General Staff and High Command of German Armed Forces.

[13] The Soviet Russian judge dissenting in the matter of the Reich Cabinet and the General Staff and High Command: *cf.* Woetzel, *op. cit.*, p. 199.

The Case for the Prosecution

The Attorney-General, Mr. Gideon Hausner, opening for the prosecution, described Eichmann as " a new style murderer—one who carries out killings from his desk." With the exception of one murder the crimes were committed " over the telephone, by signing an order, by writing a note."

He accused Eichmann, the Head of the Central Office for Jewish Affairs, of being right in the centre of the enormous extermination process carried out in a business-like manner. He described in great details the techniques employed by the Nazi machine, all leading to one end: that of isolating the Jews from the rest of the community, labelling them, and destroying them systematically, without sparing untold sufferings and maximum degradation. The holocaust spread all over occupied Europe, and Eichmann, according to the prosecution, was dashing from place to place controlling his agencies and supervising their work.

Before the witnesses for the prosecution were called a tape recorder was used to play over a statement made by Eichmann on May 26, 1960, to his interrogators. Extracts from this statement purported to portray Eichmann's personal history and the history of exterminations. The notorious Wansee Conference,[14] where the decision upon " the final solution of the Jewish problem " was taken by Nazi leaders, including Eichmann, was said to be the turning point in his career as the chief exterminator of the Jews.

To emphasise Eichmann's role the Attorney-General read from statements made by Nazi criminals in their death cells. Among them Dietrich Wisliceny,[15] once Eichmann's aide, described him as " a decisive and extremely important factor in the extermination of Jews," and Rudolf Hoess,[16] the commandant of the Auschwitz camp, where some four million people are said to have perished, regarded Eichmann as " a man always full of life and new plans obsessed with the final solution of the Jewish problem."

This was further reinforced by an American witness, Mr. Justice Musmanno, who recalled that Schellenburg, a Nazi intelligence chief, told him that Eichmann was subordinate only to Hitler, Himmler and Heydrich.[17]

Apart from showing that Eichmann was in charge of the physical extermination of Jews, the prosecution endeavoured to

[14] Held in January 1942 in a Berlin suburb, where, according to the prosecution, the Nazi leaders decided to exterminate eleven million European Jews, including 330,000 British Jews.

[15] Executed in Czechoslovakia in 1946.

[16] Executed in Poland in 1947.

[17] This information was obtained by the witness in his capacity of a judge at war-crimes trials in Germany.

prove, by means of documents, that Eichmann also had full control over the theft of Jewish property, which was collected all over Europe and transported to the Reich.

The procession of witnesses was interspersed with documents all designed to show the scale of the operation of the final solution and the managerial role played by Eichmann. The prosecution called country by country in this grim death roll, and tried to link the name of Eichmann with each operation, in order to present a complete picture, dominated by the accused.

One witness described the only case of murder allegedly committed by Eichmann with his own hands. He told the court that, when he worked in Eichmann's garden in Budapest, he saw a Jewish boy, accused of stealing cherries, taken to a tool shed. There he was beaten to death by the accused and his bodyguard, Slavik. This Eichmann denied, and so did Slavik, who sent from Austria an affidavit to that effect.

At the close of their case the prosecution put in evidence an alleged confession of Eichmann to a Dutch journalist, Sassen, in Argentina. The admissibility of this document was contested by the defence and the court resolved to accept parts in Eichmann's own handwriting as well as those to which the handwritten sections related.

In his final speech the Attorney-General asked the court to find the accused guilty of crimes for which, as he had stated in his opening address, " there was no atonement, no forgiveness, no forgetting."

Eichmann's Defence

At the very beginning of the trial Dr. Robert Servatius, the German lawyer who defended Eichmann, made two formidable submissions:

(a) that the court was incompetent because of prejudice, and
(b) that the court lacked jurisdiction to try this case.

Elaborating those points, he argued that Eichmann could not obtain a fair trial in view of the natural prejudice of the people, whilst the publicity ensured by press coverage and television cameras was designed to produce a show trial, the world being the spectators. Eichmann was already condemned by the Israeli Press, and pre-judged by one of his judges.[18]

The accused, having no financial resources, could not properly

[18] Mr. Justice Halevi was reported to have likened Eichmann to Satan in a judgment for libel concerning the extermination of Hungarian Jews.

defend himself, and no witness would come along on his behalf for fear of being arrested and prosecuted on similar charges.

Answering this submission, the Attorney-General pointed out that no one can be genuinely neutral in a matter but that a judge by virtue of his training and his office can discipline himself to such an extent as to exclude his personal and national pain and to conduct a fair trial on the basis of the evidence before the court. This indeed is an elementary feature of criminal proceedings in which no one can expect absolute neutrality, but fairness and justice according to law.[19]

To ensure a fair trial Eichmann was allowed to choose his own counsel, and the Government of Israel offered financial assistance towards his costs. An Israeli lawyer was to advise the defence on matters of procedure, and the Attorney-General declared that he would be prepared to admit in evidence depositions of witnesses, if such persons could be cross-examined before a German magistrate as to the authenticity of their statements.

The court without hesitation overruled the submission as well as the attack on its jurisdiction to try Eichmann. The question of jurisdiction, to which we have already alluded in connection with Eichmann's apprehension, seems to have constituted the backbone of the defence. Indeed, the latter followed the familiar pattern of arguing the formal points and, in the event of these failing, then falling back on substantive defence.

The defence submissions were as follows.

Dr. Servatius contended that the court lacked jurisdiction from the point of view both of international law and of Israeli domestic law. Since the seizure and abduction of the accused constituted a breach of international law, the State of Israel, in accordance with the maxim *ex injuria non oritur jus*, had no right to put him on trial. The proceedings were tainted with illegality and the court ought not to sanction the breach of law involved or the use of force employed by the Israeli agents in securing Eichmann's arraignment.

The Security Council resolution did not specifically decree that Eichmann ought to be tried in Israel and the accused himself did not submit of his own volition, although he was alleged to have made a declaration to that effect to his captors. True, Argentina no longer insisted on his return but there was still a possibility that Germany [20] might intervene on behalf of her citizen and without

[19] *Cf.* A. L. Goodhart, "Questions and Answers concerning the Nuremberg Trials" (1947) 1 L.Q.R. 527.

[20] Far from requesting Eichmann's surrender, the West German authorities expressed their willingness to co-operate with the Israel authorities.

Germany's consent Israel's action would only perpetuate the original illegality.

The Nazi Collaborators (Punishment) Act, 1950, was an irregular piece of legislation because it contravened international law as well as natural justice, embodied in the principle *nullum crimen sine lege*. It was invalid under international law because it provided for the punishment of acts which were carried out before the foundation of the State of Israel in 1948, outside the territory of the present State of Israel, and which were perpetrated against people who were not citizens of Israel. Compared with the London Charter of 1945, drawn up by the War Crimes Commission of seventeen allied nations, the Act was without international sanction and, as a unilateral measure, it was merely an act of vengeance. In brief the court was invited to disregard the law of 1950 because of its extra-territorial and retrospective nature.

Eichmann's substantive defence was that he was not in charge of the " final solution "; that he was free from personal guilt; that he was unfortunate in having to take orders from an inhuman régime; and that, anyway, it was wrong to try him for crimes committed by the Nazi machinery of extermination, which was nothing but a State institution for which only the German State could be made responsible. Whatever Eichmann did was done in strict compliance with superior orders sanctioned by Hitler himself. The responsibility lay with the State of which he was a servant, so that it was the present State of Germany,[21] as the successor of the Nazi régime, which should make appropriate atonement.

The defence presented only one witness—the accused, who denied that he was the head of the Central Office of Jewish emigration or that he had anything to do with the extermination camps and the confiscation of Jewish property. In the light of his own evidence Eichmann appeared as a complete blank, a robot in the service of the Nazi bureaucracy, a little cog in the State machine performing diligently the function assigned to him. Under cross-examination he proved himself a past master of evasion, rarely answering a question and often changing the subject altogether. Confronted with documents, he claimed they were full of errors. Even a document emanating from the Nazi Foreign Office, which described him as being in charge of Jewish affairs, was dismissed by Eichmann on the same ground. Although capable of reproducing a great mass of details his memory faltered when events pointing to the role he was accused of having played were related. Even the

[21] It is not quite clear whether the defence referred to West Germany or to Germany as a whole, although so far only the Bonn Government has provided for compensation of the victims of Nazi tyranny.

phrase "final solution" had a different meaning to him: he thought it meant finding a home for millions of Jews in Madagascar.

However, he admitted at the end that he was not merely the transport officer he persistently claimed he was, but was also in charge of the disposal of Jewish property, and that he was involved in the negotiation of an agreement with the government of Bulgaria in the matter of deportation of Jews from that country. But he repudiated responsibility for the "death march" of the Hungarian Jews and denied that in the infamous offer to barter Jewish lives for army lorries he held himself out as the man who could halt the mills of Auschwitz.[22]

Finally, in his own words, Eichmann considered himself "guilty from a human point of view" of complicity in the mass slaughter of the Jews, but "not guilty from a legal point of view."

At no stage of the proceedings was it suggested that Eichmann acted under duress, though this seems to be implied in the plea of superior orders and in the frequent references to the "inhuman régime." However, his personal history [23] shows no evidence of a lack of moral choice during his career although the more deeply involved he became the less acute must have become his moral judgment. Devoid of conscience and free from religion, Eichmann, in the light of his own evidence, appeared as a man totally sublimated to his mission rather than a blind sword in a murderous hand.

Eichmann's substantive defence was thus reduced to a demurrer. Yet, in spite of the Nazi legislation in Germany and occupied countries,[24] which, in effect, denied the legal personality of the Jews and others, there seems to have been no positive enactment authorising the exterminations. The Wansee Conference of January 1942, attended by Eichmann at which Nazi leaders agreed upon the "final solution," cannot be said to have been sanctioned by law unless, of course, Hitler's word is to be taken to be the law. Whatever the position of the law in Hitler's days Nazi activities in this field were nothing but arbitrary, illegal acts condoned by the German administration of justice, and today Nazi laws are regarded as "incorrect laws and no longer valid." [25] Needless to add, the treatment of non-Germans, falling very much below the minimum

[22] *Cf.* A. Weissberg, *Advocate for the Devil* (London, 1956), p. 73.

[23] *Cf.* C. Clarke, *Eichmann* (London, 1960).

[24] R. Lemkin, *Axis Rule on Occupied Europe* (Washington, 1944). K. M. Pospieszalski, *Polska pod Prawem Niemieckim (1939–1945)* (Poznan, 1946).

[25] According to a judgment of the District Court in Nuremberg in 1950 quoted by the Attorney-General.

Cf. art. II (c) of Law No. 10 of December 25, 1945; *Military Gazette*, British Edition No. 5, p. 46.

standard of behaviour in international law, constituted a series of international delinquencies.

Not a single item of Eichmann's defence passed unchallenged by the prosecution:

The Attorney-General claimed that the Israeli court had to do what could not be done at Nuremberg, that is, simply to try the indictment against Eichmann that had been laid down by the War Crimes Tribunal.[26] Israel had a right and a duty to try the case as no other country, including Germany, was anxious to do so. The lack of an international penal tribunal or the incompetence of the International Court of Justice at the Hague should not negative the necessity of doing justice in this case. It was only right and proper that Eichmann was to be tried in Israel as he was accused of crimes against potential citizens of Israel, the State of Israel being in the making since the Balfour Declaration of 1917.

The prosecution contended that internationally the jurisdiction of the court could not be challenged effectively as it was doing its duty of trying an enemy of the human race. Nazi criminals had made themselves *hostes humani generis* and, according to custom, " everyone who catches them is competent to try them like pirates, slave traders and white slavers."

The plea that the legislation under which the accused was tried was retroactive—a plea which failed at Nuremberg—could not be upheld in Jerusalem. The Nuremberg law confirmed that the principle *nullum crimen sine lege* could not be regarded as a rule of international law.[27] As for the municipal systems of law, this principle is by no means universal[28] and, where it is applied, it is accompanied by exceptions. Israel is, therefore, in quite reputable company, since laws to punish Nazi crimes *ex post facto* have been enacted in several countries.[29] The Attorney-General argued that Nazi Germany, by its very attitude to law, abdicated from the rule of law and, by a series of unprecedented crimes, created a vacuum which mankind had to fill in order to see that the perpetrators of most heinous crimes should not go unpunished.

The plea of extraterritoriality of the law of 1950 was similarly opposed. Here again, Israel is in quite good company.[30] The

[26] Eichmann *could* have been tried *in absentia*, as was Martin Bormann.
[27] *Contra* H. A. Smith, *The Crisis of the Law of Nations* (1947), p. 46 *et seq.*
[28] J. Stone, *Legal Controls of International Conflict* (1954), p. 368; H. Kelsen, *Peace through Law* (1944), p. 87.
[29] Australia, Austria, Belgium, Bulgaria, Canada, Czechoslovakia, Denmark, France, Greece, Holland, Hungary, Italy, Luxembourg, Norway, Poland, Rumania, U.S.A., Yugoslavia; *cf.* trials in the British zone of occupation under the Royal Warrant of June 14, 1945: Viscount Maugham, *U.N.O. and War Crimes* (1951), p. 20 *et seq.*
[30] Austria, Brazil, Czechoslovakia, Denmark, Finland, France, Germany, Holland, Italy, Switzerland, U.S.S.R.

Attorney-General reminded the court that an English court felt perfectly competent to try and convict one William Joyce [31] for his crimes committed over the German radio during the last war. The defence submission, concluded the Attorney-General, that the court had no power to pass judgment on crimes committed outside the territory of Israel was inapplicable in modern conditions, particularly in view of the Universal Declaration of Human Rights adopted by the United Nations, and the Genocide Convention of 1948.

The defences of act of State and superior orders were also refuted by the prosecution, the former as a defence of lawlessness, the latter as incompatible with the modern concept of law embodied in the London Charter.

Reflecting on the arguments adduced by the prosecution, one cannot help observing that their weakest point was perhaps the assertion of a retrospective existence of the State of Israel going back as far as the Balfour Declaration. Even if one could accept this fiction, there is no doubt that only a small proportion of European Jews would have forsaken the countries they had rightly regarded as their home for generations to go to Israel. The right of the Jewish State to avenge the exterminated Jewry must rest solely on a moral claim.

But the plea that the Israeli law of 1950 must be regarded as invalid because it offends against the principle of territoriality of criminal law can hardly be sustained. In spite of the Genocide Convention, 1948 (article 6) being still tied down to territorial jurisdictions, the Nuremberg law quite clearly confirmed the rule that "States may establish tribunals for the punishment of persons guilty of war crimes if the perpetrators fall into their hands." [32] Presumably the same applies to all crimes governed by the principle of universality, such as piracy and, probably, crimes against humanity.

In the absence of an express prohibition under international law, the Permanent Court of International Justice found [33] that there is nothing inherently illegal in States extending the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory. International law does not restrict sovereign States to exercising jurisdiction in their own territory in respect of any case which relates to acts which have taken place abroad and in which they cannot rely on some permissive rule of international law.[34] As we have observed earlier,

[31] *Joyce* v. *Director of Public Prosecutions* [1946] A.C. 347.
[32] *International Military Tribunal*, Vol. I, p. 970.
[33] *The Lotus Case*, 1927. P.C.I.J., Ser. A. No. 9.
[34] *Ibid.*

Israel is not alone in taking advantage of her freedom " to adopt the principles which the State regards as best and most suitable," [35] although for obvious reasons she cannot claim the benefit of precedents established by other countries.[36]

As for the extension of the traditional concept of the *hostis humani generis*, and the prosecution of such persons under the universal principle, this appears to be of recent origin. Although the definition of piracy shrank in the terms of article 16 of the High Seas Convention, 1958, States have undertaken to prosecute offenders under the Geneva Conventions, 1949 [37] irrespective of where and by whom the crimes were committed.

The plea of retroactivity did not save the Nazi leaders at Nuremberg, but what should be borne in mind is that the Charter of the Nuremberg Tribunal is " retroactive only in so far as it established individual criminal responsibility for acts which at the time they were committed constituted violations of international law, but for which this law provided only collective responsibility." [38] The Charter is regarded as declaratory [39] of rules of international law, as it gave expression and sanction to perennial precepts of justice and humanity. If the principle *nullum crimen sine lege* does not apply in international law, it would seem that it can be equally disregarded by municipal courts administering international law.

In the province of municipal law the principle *nullum crimen sine lege* is often enshrined in written constitutions as a guarantee against the abuse of power through retrospective legislation. Under the Constitution of the United States, for example, Article 1, sections 9 and 10 forbid the passing of *ex post facto* laws. But there is no express provision against retroactivity of penal laws in Britain, and courts in common law countries would not refuse to apply retrospective laws, if expressly stipulated by Parliament.[40] Derived from a concept of natural justice, the principle *nullum*

[35] *Ibid.*

[36] *e.g.*, the trial of Rudolph Hoess in Poland, in 1947, for crimes committed in Poland chiefly against Polish nationals.

[37] *Cf.* The Geneva Conventions Act, 1957, 5 & 6 Eliz. 2, c. 52.
(Conventions relating to: (1) the amelioration of the condition of the wounded and sick in armed forces in the field; (2) the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea; (3) the treatment of prisoners of war; (4) the protection of civilian persons in time of war.)

[38] H. Kelsen, " Will the Judgment of the Nuremberg Trial Constitute a Precedent in International Law? " (1947) I.L.Q. 165.

[39] *International Military Tribunal*, Vol. XXII, pp. 461, 463–464; *U.S.* v. *Von List, International Military Tribunal*, Vol. XXII, pp. 461–462; G. Schwarzenberger, " The Judgment of Nuremberg " (1948) *Y.B. of World Affairs*, 116 and 122; *contra*, Viscount Maugham, *op. cit.*, p. 51.

[40] *Cf.* Denman J. in *R.* v. *Griffiths* [1891] 2 Q.B. 145, at 148; Willis J. in *Phillips* v. *Eyre* (1871) L.R. 6 Q.B. 1, at 25.

crimen sine lege should operate to ensure a fair trial and to protect those who come to court with clean hands and a clear conscience.

Quite apart from the preceding considerations it was clearly too much to ask the Jerusalem court to disregard its law, bearing in mind that the court was not sitting in the capacity of a constitutional tribunal competent to decide whether an Act of Parliament should be declared *ultra vires*.[41]

The lesson of Nuremberg is that crimes, even though sanctioned by a political order of a sovereign State, cannot go unpunished if they have shocked the conscience of the world. Indeed, since certain Nazi activities, apart from being internationally illegal, were morally objectionable, and since the perpetrators were certainly aware of their immoral character, there was no room for the plea that under their own laws the Nazis were immune from punishment. *A fortiori*, Eichmann could hardly expect compassion from the Jerusalem court administering a mixture of international and Israeli municipal law.

The plea of the act of State was expressly excluded by the London Charter (article 7), and this transformation from collective to individual responsibility has been generally approved.[42] The organic doctrine exalting the separate personality of the State wears thin, and it is being realised more and more that States are merely forms of organisation, and that crimes against international law are committed by men, not by abstract entities. Thus it is only by punishing individuals, who commit such crimes, that the law can be vindicated. Eichmann's defence that the machinery of extermination was a State institution and that the State alone can atone sounds, therefore, rather old-fashioned. Society collectively can make reparations, but punishment must be meted out to those individuals who worked the machinery of extermination with murderous zeal and efficiency.

Eichmann could not shelter behind the ephemeral body of the Nazi State or behind superior orders, as the rule that a subordinate must only obey lawful orders is gaining ground.[43] A subordinate may be placed in an extremely difficult position if he serves an inhuman régime, but, as long as he has a moral choice,[44] he must be responsible for his crimes. The defence of superior orders was

[41] *Cf. Mortensen* v. *Peters*, 1906, 14 S.L.T. 227; *Croft* v. *Dunphy* [1933] A.C. 156, at 164.

[42] H. Kelsen, *Peace through Law*, p. 99; G. Dahm, *Zur Problematik des Voelkerstrafrechts* (1956), p. 42.

[43] *Cf. British Manual of Military Law*, amend. 34, but see Viscount Maugham, *op. cit.*, pp. 45–49.

[44] *International Military Tribunal*, Vol. XXII, p. 466, and *U.S.* v. *Ohlendorf*, *op. cit.*, Vol. IV, pp. 470–471; *U.S.* v. *Greifelt*, No. 8, *Trials of War Criminals*, Vol. V, pp. 153–154; *cf.* Schwarzenberger, *op. cit.*, p. 118.

rejected in advance by the London Charter, since the very essence of the Charter is that individuals have international duties which transcend the national obligation of obedience imposed by the individual State.[45] Even German courts, functioning in an atmosphere of reverence towards superior orders, did not excuse crimes committed in obedience to orders.[46]

Eichmann could hardly claim immunity because of his fidelity to superior orders, nor could he expect such orders to constitute a mitigating factor [47] in his case. The defence of tyranny [48] embodied in the plea cannot come to succour one who was said to be subordinate in the execution of the "final solution" only to Heydrich, Himmler and Hitler.[49]

The Judgment

In their learned and elaborate judgment [50] the court examined all the pleas advanced by the defence and substantiated their conclusions by reference to a great mass of precedents and learned texts. They rejected the submission that the court had no jurisdiction and refuted the contention that Eichmann's illegal seizure and abduction affected the competence of the court to try him.

In the words of sections 6 and 7 of the Criminal Law Ordinance, 1936, the jurisdiction of Israeli courts extended to acts done in whole or in part within the boundaries of the State, but section 3 (b) provided that "nothing in the Ordinance shall derogate from the liability of any persons to be tried and punished for any offence according to the provisions of the law on the jurisdiction of the Israeli courts with respect to acts done outside the usual jurisdiction of these courts." Israeli courts derive jurisdiction in respect of extraterritorial offences from the express provisions of the Criminal Amendment (Foreign Offences) Act, 1955, and the Nazi Collaborators (Punishment) Act, 1950.

As far as international law is concerned, Israeli law follows broadly the British system,[51] recognising certain rules of customary

[45] F. Morgenstern, "Judicial Practice and Supremacy of International Law" (1950) Brit. Year Book Int.L. 42, quot. Cmd. 6964 (1946), p. 42.

[46] *German Military Code*, art. 47, §2. *Cf. The Dover Castle*, *Annual Digest of Public International Law Cases, 1923–1924*, Case No. 231.

[47] The London Charter, art. 8.

[48] A. L. Goodhart, "Questions and Answers concerning the Nuremberg Trials" (1947) L.Q.Rev. 527.

[49] *International Military Tribunal*, Vol. XXII, p. 153.

[50] References to the findings of the court have been taken from an unofficial translation of the judgment (thereafter quoted as *The Judgment*), District Court of Jerusalem, Criminal Case No. 40/61.

[51] Oppenheim's *International Law* (ed. by Lauterpacht) (8th ed., 1955). Vol. I, p. 39, § 21a.

international law *per se* as part of the law of the land, and acknowledging the supremacy of statute [52] law when in conflict with international law. The court had, therefore, no option but to give effect to the 1950 Act as intended by the legislature and could not entertain any argument as to its validity.

The power of the Israeli State to enact the law in question is based on the universal character of the crimes listed in the indictment as well as on their specific character as being designed to exterminate the Jewish people. The court concluded that the jurisdiction of the *forum deprehensionis* was founded upon ancient and modern authority,[53] whilst the right of the State of Israel to punish the offenders is clearly derived from the protective principle, that is, the right of the State to preserve its own existence.[54] In the latter respect the court enlarged on the doctrine of the " linking point " which enables the State to prosecute offences committed abroad and resolved that " a crime intended to exterminate the Jewish people presented the necessary connection with the State of Israel." [55]

The court conceded that " the violation of International Law through the mode of the bringing of the accused into Israeli territory pertains to the international level, namely the relations between the two countries concerned " [56] but, relying on Anglo-American precedents and writings, observed that " it is an established rule of law that a person standing trial for an offence against the laws of the land may not oppose his being tried by reason of the illegality of his arrest or of the means whereby he was brought to the jurisdiction." [57]

The court was of the conviction that the Israeli law of 1950 was not repugnant to the ideals of natural justice and equity or inconsistent with positive law. Although retroactive, it did not create new crimes but merely provided a legal basis for the punishment of individuals responsible for the commission of what must

[52] *Ibid.*, p. 41; *Croft* v. *Dunphy* [1933] A.C. 156, at 164; *Mortensen* v. *Peters* *op. cit.*

[53] *Corpus Juris Civilis*, C. 3, 15; H. Grotius, *De Jure Belli ac Pacis* (1625), Book II, Chap. 20. De poenis; E. Vattel, *Le Droit de Gens* (1758), Book I, Chap. 19, §§ 232–233; W. Blackstone, *Commentaries on the Laws of England*, Book IV, Chap. 5, p. 68; H. Wheaton, *Elements of International Law* (5th English ed. 1916), p. 104; C. C. Hyde, *International Law* (2nd ed. 1947), Vol. I. p. 804; W. B. Cowles, " Universality of Jurisdiction over War Crimes " (1945) 33 *California Law Review* 177; H. Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), p. 136; S. Glaser, *Infraction Internationale* (1957), pp. 31 and 69.

[54] Oppenheim, *op. cit.*, Vol. I. p. 333; Dahm, *op. cit.*, p. 28; *Joyce* v. *D.P.P.* [1946] A.C. 347, 372.

[55] *The Judgment*, s. 34.

[56] *Ibid.*, s. 50.

[57] *Ibid.*, s. 41.

have been known to them to be crimes. That they were fully aware of the legal nature of their activities was obvious, not only from the nature of their acts, but also from their endeavours first to disguise and cover up their deeds [58] and then to destroy the evidence by burning the bodies of the victims and disposing of the records and documents.

The court quoted with approval from the Nuremberg Judgment [59] that " the maxim *nullum crimen sine lege* is not a limitation of jurisdiction, but it is, in general, a principle of justice " as well as from the Judgment against the Operation Groups [60] (*Einsatzgruppen Case*) that " there is no taint of *ex-post-facto*-ism in the law of murder " and added that " the accused cannot complain that he is being tried by a court which did not exist when he committed the act." [61]

In a judgment of the German Supreme Federal Tribunal quoted by the court, " the expulsions of the Jews, the object of which was the death of the deportees, were a continuous crime," [62] and in another judgment concerning the responsibility for the murder of mentally deranged persons [63] on Hitler's order the same Tribunal intimated that in 1940, at the latest, it was quite impossible to be unaware of the criminal activities pursued by the Nazi régime.

The court categorically rejected the submission that whatever the accused did in his official capacity should be classified as acts of State, for the extermination of helpless people can never be regarded as compatible with the concept of a State governed by law. Its reaction to the defence of superior orders was similar.

Discussing the defence of the act of State the court disassociated itself from Kelsenian [64] theories and resolved that " under International Law Germany bears not only moral, but also legal responsibility for all the crimes that were committed as its own ' Acts of State ' including the crimes attributed to the accused." [65] The court thought, moreover, " that the responsibility of the State

[58] Deportations from Western Europe were made under the guise of " resettlement " and the extermination camps and ghettos were organised in Eastern Europe.

[59] *The Judgment*, s. 27.

[60] *Ibid.*, s. 26.

[61] *Ibid.*, s. 37, quot. A. L. Goodhart, " The Legality of the Nuremberg Trial " (1946, April) *Juridical Review*, 8.

[62] *The Judgment*, s. 27, quot. 1 St/R 563/51.

[63] *Ibid.*, s. 27, quot. 1 St/R 304/60.

[64] *The Judgment*, s. 28, quot. H. Kelsen, " Collective and Individual Responsibility in International Law with particular regard to the Punishment of War Criminals " (1943) 33 *California Law Review*, 530 *et seq.*; H. Kelsen, *Peace through Law* (1944), p. 71 *et seq.*; H. Kelsen, *Principles of International Law* (1952), p. 235 *et seq.*

[65] *The Judgment*, s. 28.

does not detract one iota from the personal responsibility of the accused for his acts." [66]

As for superior orders, these cannot be pleaded [67] in the defence under either section 8 of the Nazi Collaborators (Punishment) Law, 1950, or section 19 (*b*) of the Criminal Law Ordinance, 1936, or section 8 of the London Charter, and the court found no reason for regarding such orders as a mitigating factor in this particular case.

Eichmann was found guilty on all fifteen counts of the indictment,[68] that is, crimes against the Jewish people, crimes against humanity, war crimes and membership of hostile organisations. Although he was not found directly in charge of the "final solution" the court rejected his claim that he was only a transport expert and branded him as one who "was not a puppet in the hand of others, but one of those who pulled the strings." [69]

Therefore his participation in the actual extermination operations was considered only of a secondary importance "because the legal and moral responsibility of him who delivers the victim to his death is no smaller, and may even be greater, than the liability of him who does the victim to death. . . ." [70]

In particular Eichmann was convicted as follows:

(a) on the first and second counts, in which he was accused of being concerned in causing the slaughter of millions of Jews and of placing millions in conditions calculated to cause their death;

(b) on the third count, that of causing sufferings to the Jews by "enslaving, starving and persecuting them" but only in respect of offences committed after August 1941;

(c) on the fourth count for sterilisation and birth prevention measures only in the Theresienstadt camp and not elsewhere as stated in the charge sheet;

(d) on the fifth and sixth counts, which dealt with the same offences as in the previous counts but were classified as crimes against humanity and thus embraced others than Jews;

(e) on the seventh count, of plundering Jewish property;

[66] *Ibid.*, quot. Oppenheim, Vol. I, § 156 (b), p. 352; § 153 (a), p. 341. The plea of superior orders was excluded even under the *Military Criminal Code* (s. 47 (2)) in force in Nazi Germany.

[67] *The Judgment*, ss. 216, 218.

[68] The first three groups of crimes carry the death penalty under the Nazi Collaborators (Punishment) Law, 1950.

[69] *The Judgment*, s. 180.

[70] *Ibid.*, s. 141.

(f) on the eighth count, of war crimes, that is, persecution of the Jewish people in Germany and the German occupied countries;

(g) on the ninth count, of a crime against humanity involved in the deportation of more than half a million Poles;

(h) on the tenth count, concerning the deportation of Slovenes.

Charges of murder of thousands of gipsies and some ninety children of Lidice, included in counts eleven and twelve, were not proved, but the accused was concerned in their evacuation and thus guilty of another crime against humanity. Finally, as a member of the S.S., the S.D. and the Gestapo he was found guilty of the membership of hostile organisations but only as from May 1940.

Eichmann was acquitted of crimes against the Jews perpetrated before the outbreak of the war and of the specific charge that he personally murdered a Jewish boy in Budapest. He was, however, found responsible for the introduction of gas [71] as a means of mass slaughter, the efficiency of which had previously been tested at Auschwitz by Hoess, his deputy.

After the judgment, but before passing the sentence, the court heard the final address of both the prosecution and the defence as well as a speech of the accused. The prosecution demanded death, the highest punishment under Israeli law, and claimed that this was mandatory under the law of 1950. The defence appealed for leniency on the ground that the accused was caught up in the psychology of the men around him, that he was merely executing orders and that what happened to Eichmann could have happened to anyone. Being a German the sentence should follow German law.[72]

In his final speech Eichmann adopted the tone of an accuser rather than an accused. He protested his innocence, blaming others for his own acts, particularly his superiors who, he claimed, abused his loyalty. He accused the witnesses of being biased and untruthful and reiterated his previous contention that he neither killed nor ordered killings, that he was a victim of misconception and merciless fate.

The court, mindful of the fact that there is no punishment to fit

[71] *Cf. Biuletyn Glownej Komisji Balania Zbrodni Hitlerowskich w Polsce*, *op. cit.*, Vol. XIII, p. 130 *et seq.*; J. Sehn, *Auschwitz-Birkenau Concentration Camp* (Warsaw, 1961), p. 100.

[72] There is no death penalty in West Germany.

the crimes charged in the indictment,[73] sentenced Eichmann to death in consideration that "for the punishment of the accused and the deterrence of others the maximum punishment authorised by law had to be imposed."

Conclusions

The trial of Adolf Eichmann can be described as a trial by documents and circumstantial evidence. The survivors of the holocaust gave a blood-curdling testimony of atrocities and sufferings in order to build up a general picture of the "final solution" rather than establish the personal guilt of the accused. It was only against this background, and in the light of documentary evidence, that the sinister figure of the accused assumed realistic features as one of the executors of the "final solution." Bearing in mind the psychological climate and the place of the trial it is quite impossible to judge objectively whether or not the rules of evidence governing hearsay and relevance were infringed. The proceedings came very close to an English trial, but the nature of the crimes involved and the role filled by one particular person in the running of the machinery of extermination must by necessity invoke doubts which emerge in all marginal cases. Yet the dignity and restraint of the court and the desire to do justice which dominated all stages of the proceedings must be put on record because these are uncommon features of show trials.

This trial established in a dramatic show of purpose the claim of the young Israeli State to represent World Jewry.[74] The heir and successor to the exterminated and the leader of the living has demonstrated its power and determination to avenge and to protect them. The experience under Nazism, recorded in the proceedings, must have produced yet another argument for the creation of the Jewish State and, perhaps indirectly, a support for the right of self-determination which has hardly any place in positive international law.

In spite of the fairness of the proceedings, the trial constitutes, in the author's submission, a very dangerous precedent. When a man is spirited away from the protection of a sovereign State and put on trial by his captors for crimes which he allegedly committed in some other country or countries, against people who were related

[73] *Cf.* V. Gollancz, *The Case of Adolf Eichmann* (London, 1961), p. 57: "... For a court of three mortal judges to award death to such a man, on the ground of compensatory justice, is to trivialise, in a manner most grievous, the crucifixion of a whole people."

[74] This seems to have been recognised in the Agreement between Israel and the German Federal Republic of 1952 on the compensation of the Jewish victims of Nazi oppression.

only by bonds of race or religion to the country in which he is tried, such country not even having been in existence when the crimes were committed, all formal barriers separating arbitrariness from administration of justice appear to be broken. Legal formalism embodied in the strictness of the procedure, and the observance of the ritual of the criminal trial, form, no doubt, the strongest safeguard against miscarriage of justice, yet, paradoxically enough, formal objections to the jurisdiction of the court had to be overruled by an overriding desire of doing justice in this case. There is no uniform practice [75] regarding the contention that illegal seizure of an accused in violation of the territorial sovereignty of a State deprives the captors of the power of trying him, though their right to do so in normal circumstances may not be in doubt. Regard must be had to the danger of notorious criminals escaping retribution simply because of an irregularity in their apprehension. But, where convictions are quashed [76] for a defect in the indictment or any breach of the rules of evidence or procedure, there is always a possibility of retrial in municipal courts. The absence of such a possibility must not be disregarded when considering the predicament of the court in international cases.

Having no exact precedent either in the Nuremberg trial or in the trials of Nazi criminals by individual States, the decision of the Jerusalem court seems to rest on a synthesis of international and national precedents—a product of judicial distillation clothed in the erudite form of the judgment. This has created a precedent, albeit a dangerous one that may encourage imitation in less meritorious cases. Yet, with no guidance from the international community and conscious of the unsatisfactory trials of war criminals in Germany,[77] Israel had to act in order to discharge the enormous burden assumed as soon as Eichmann had been tracked down.

As in the case of the Nuremberg trials, jurists will not be unanimous in their appraisal of Eichmann's trial and the legal bases on which it was conducted. This trial has further exposed one of the

[75] *Cf.* note 7 *supra*; and *contra*: *Vaccaro* v. *Collier*, 51 F. (2d) 17, *Annual Digest 1929–1930*, Case No. 180; *Villareal* v. *Hammond*, 74 F. (2d) 503, *Annual Digest 1933–1934*, Case No. 143; *Re Jolis* (Sirey, 1934), Vol. II, p. 105, *Annual Digest 1933–1934*, Case No. 77; see other examples, Morgenstern, *op. cit.*, p. 265 *et seq.*

[76] *Cf. Crane* v. *D.P.P.* [1921] 2 A.C. 299.

[77] (a) On Leipzig Trials, G. Schwarzenberger, *International Law and Totalitarian Lawlessness* (London, 1943), Appendix I, pp. 111–147; C. Mullins, *The Leipzig Trials* (London, 1921).

(b) On post World War II position, F. Honig, "Criminal Justice in Germany Today" (1951) *The Year Book of World Affairs* 131 *et seq.*

chief defects of the present system of international law, namely, the absence of an International Criminal Tribunal, and has reminded the world that something must be done in order to avoid international justice remaining in the hands of victorious nations or individual States acting like international " vigilantes."