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HAGUE INTERNATIONAL TRIBUNALS INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

The Contribution of the Eichmann Trial to International Law

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Abstract
The trial of Adolf Eichmann was poorly received by many contemporary observers, who felt that it bent the law beyond recognition in several key areas. With the renaissance of international criminal law in recent decades, the handling of difficult issues by the District Court of Jerusalem and the Supreme Court has been shown to fare rather well. The understanding of the relationship between crimes against humanity and genocide by the Israeli courts, and their response to the charge of retroactive criminality, to the consequences of the kidnapping, and to claims that the tribunal lacked impartiality, have also stood the test of time. Perhaps most important of all, the Eichmann decisions actually moved the law forward on the question of universal jurisdiction, effectively setting aside the narrow jurisdictional frame set by the 1948 Genocide Convention. Critics at the time of the judgments, possibly influenced by the famous but harsh commentary of Hannah Arendt, were much too negative in their assessments.

Key words
Eichmann; universal jurisdiction; retroactivity; crimes against humanity; *male captus bene detentus*

1. INTRODUCTION

The Eichmann trial is important in the history of international criminal law for several reasons. *Eichmann* is the first reported judgment based upon the provisions of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide. It was the first conviction for crimes against humanity committed in peacetime. Although universal jurisdiction had long been accepted and exercised with respect to certain types of international or transnational crimes, such as piracy, this was its first use for an atrocity crime. The trial addressed other difficult issues that have vexed national and international judges to this day, such as exercise of jurisdiction

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where the accused person has been brought before the court unlawfully, and the prosecution of offences not codified at the time they were perpetrated.

At the time, the Eichmann trial was very controversial and it has remained so to the present day. Hannah Arendt's famous articles in the *New Yorker*,[1] subsequently published as *Eichmann in Jerusalem: The Banality of Evil*,[2] have made sure of this. During the proceedings in 1961, there were scathing media attacks. '[E]verything connected with the proceedings against Eichmann is tainted with lawlessness . . . To try him according to the forms of law is to make a mockery of law,' said an editorial in the *Washington Post*.[3] Even the trial court 'perceived itself to be labouring' under a 'spectre of juridical illegitimacy'.[4] Within the international legal community, many contemporary observers were uneasy about the trial. There was a widespread sense that although Eichmann was entitled to little sympathy, the Israeli justice system had strained many basic principles. Many saw it is as more of a 'high grade lynching party', to reprise the words used by Chief Justice Harlan Fiske Stone of the United States Supreme Court to describe the Nuremberg trial, rather than as a seminal event in international justice.[5] One of the major assessments was by British academic Sir James Fawcett in the 1962 edition of the *British Yearbook of International Law*. 'Eichmann was tried and condemned at the limits of justice', he wrote.[6] Fawcett said the trial had produced "doubts and discomfort; doubts as to whether, behind the careful observance by the Israeli courts of the niceties of evidence and procedure, there was not an unacceptable stretching of the law upon the substance of the matter; and whether the judges would have been more than human if they did not carry a burden of prejudice, which must preclude a fair trial'.[7] Professor Fawcett acknowledged that any legal lapses would have to be balanced against 'the enormity of what [Eichmann] had done, and it is this which forbids the conclusion that there was any real miscarriage of justice'.[8] He refused to condemn the trial outright. At the same time he warned that it was the product of unique circumstances and should not be taken as authority for future legal activity.[9]

Others were similarly harsh in their assessment. Writing in the *International and Comparative Law Quarterly*, Dominic Lasok dismissed *Eichmann* as 'a very dangerous precedent' and 'one that may encourage imitation in less meritorious cases'.[10] Another academic commentator, Nicholas Kittrie, cast aspersions

1 H. Arendt, 'A Reporter at Large: Eichmann in Jerusalem - I', *New Yorker*, 16 February 1963, 40; H. Arendt, 'A Reporter at Large: Eichmann in Jerusalem - II', *New Yorker*, 23 February 1963, 40; H. Arendt, 'A Reporter at Large: Eichmann in Jerusalem - III', *New Yorker*, 2 March 1963, 40; H. Arendt, 'A Reporter at Large: Eichmann in Jerusalem - IV', *New Yorker*, 9 March 1963, 48.

2 H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963). For the counterpoint to Arendt's book: J. Robinson, *And the Crooked Shall Be Made Straight: The Eichmann Trial, the Jewish Catastrophe, and Hannah Arendt's Narrative* (1965).

3 *Washington Post*, 27 May 1960, A16, col. 2. For a review of the American press, see D. E. Lipstadt, *The Eichmann Trial* (2011), 24–31.

4 L. Douglas, *The Memory of Judgment* (2001), 121.

5 A. T. Mason, *Harlan Fiske Stone: Pillar of the Law* (1956), 716.

6 J. E. S. Fawcett, 'The Eichmann Case', (1962) 27 *British Yearbook of International Law* 181, at 181.

7 Ibid.

8 Ibid., 181.

9 Ibid., 215.

10 D. Lasok, 'The Eichmann Trial', (1962) 11 *International and Comparative Law Quarterly* 355, at 372–3.

on the trial's value as precedent, both because of the kidnapping and because of Israel's choice that Eichmann be tried before its national courts. 'The defects in the Eichmann case, it is hoped, may possibly serve to stress again the need for a permanent international criminal tribunal', wrote Professor Kittrie.[11] Robert Woetzel criticized the jurisdictional frame, concluding that 'the legal basis of the Eichmann trial can be considered controversial'.[12] Unease about the judgments[13] and their significance has persisted. Writing in 2002, Matthew Lippmann said that they 'contained seeds of dissonance and disarray' that 'continue to haunt and to threaten the integrity of international law and global stability'.[14]

Some were more positive. G. I. A. D. Draper, in *International Affairs*, said Israeli justice could be proud of its achievement, although his article was rather thin in its response to the legal challenges.[15] Judge Michael Musmanno, who was then a member of the Supreme Court of Pennsylvania, but who had sat in several of the American Military Tribunal proceedings, including the *Einsatzgruppen* trial, where he was the president of the chamber, was quite rhapsodic about *Eichmann*:

> It would be emphasizing the obvious to say that the Eichmann trial is one of the most momentous trials of history; one which will never be forgotten. . . . [It] was imperatively necessary. Its omission would have been a gaping chasm in the geography of the human spirit.[16]

A more sober and persuasive defence of the trial and the two judgments was provided by Georg Schwarzenberger, who underscored the 'obvious unwillingness' of both Argentina and Germany to bring Eichmann to justice. Under the circumstances, 'in assuming jurisdiction, the Court made its own contribution to the enforcement of the "dictates of elementary justice" and, thus, of the standard of civilisation'.[17] Schwarzenberger said that 'both the Eichmann Trial and the *Judgment* pass the tests of international law and the standard of civilisation with flying colours'.[18]

Half a century later, we can appreciate just how wrong were the negative evaluations of Professor Fawcett and the other unforgiving critics. Far from standing as isolated decisions located on the boundaries of the law, barely tolerated by jurists

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11 N. N. Kittrie, 'A Post Mortem of the Eichmann Case: The Lessons for International Law', (1964) 55 *Journal of Criminal Law, Criminology, and Police Science* 16, at 28.

12 R. K. Woetzel, *The Nuremberg Trials in International Law, Revised Edition with a Postlude on the Eichmann Trial* (1962), 271. Also: R. K. Woetzel, 'The Eichmann Case in International Law', [1962] *Criminal Law Review* 671.

13 In addition to interlocutory rulings, there were two major judgments. The three-judge panel of the District Court of Jerusalem (Moshe Landau, President; Benjamin Halevi; and Yitzchak Raveh) issued the trial decision on 12 December 1961: *A-G Israel v. Eichmann*, (1961) 45 *Pesakim Mehoziim* 3; reported in English: (1968) 36 ILR 5. The appeal from conviction was dismissed on 29 May 1962 by five judges of the Supreme Court (Yitzchak Olshan, President; Shimon Agranat, Deputy President; Moshe Silberg; Alfred Witkon; Yoel Sussman), sitting as a Court of Criminal Appeal: *Eichmann v. A-G Israel*, [1962] *Piske Din* 2033; reported in English: (1968) 36 ILR 277. Sentenced to death, Eichmann's appeal for clemency to the President was rejected. He was executed by hanging on 31 May 1962.

14 M. Lippmann, 'Genocide: The Trial of Adolf Eichmann, and the Quest for Global Justice' (2002) 8 *Buffalo Human Rights Law Review* 45, at 121. See also M. Lippmann, 'The Trial of Adolf Eichmann, and the Protection of Universal Human Rights under International Law', (1982) 5 *Houston Journal of International Law* 1.

15 G. I. A. D. Draper, 'The Eichmann Trial: A Judicial Precedent', (1962) 38 *International Affairs* 485.

16 M. A. Musmanno, 'The Objections *in limine* to the Eichmann Trial', (1962) 35 *Temple Law Quarterly* 1, at 20.

17 G. Schwarzenberger, 'The Eichmann Judgment: An Essay in Censorial Jurisprudence', (1962) 15 *Current Legal Problems* 248, at 259 (reference omitted).

18 Ibid., 264.

because of outrage at Eichmann's crimes, not to mention sympathy for the Jewish state, something that was surely more pronounced at the time than it is today, the Eichmann judgments represent pioneering analyses of difficult legal issues whose findings have, by and large, been sustained by the case law that has emerged in the modern renaissance of international criminal law. The influence of *Eichmann* has been important, especially in the early decisions of the international criminal tribunals of the late 1990s.[19] At the time they had little else to rely upon.

2. Genocide and ethnic cleansing

Eichmann was charged with breaches of the Nazis and Nazi Collaborators (Punishment) Law.[20] The legislation was adopted in 1950 to provide for retroactive prosecution of international atrocity crimes associated with the Nazi regime and the Second World War. Aside from an undoubted symbolic purpose, the law was intended as a legislative vehicle to deal with Jewish collaborators who had immigrated to Israel. That Nazi fugitives might find themselves in Tel Aviv or Jerusalem, whether by design or compulsion, was probably not even contemplated by the Knesset members at the time of adoption.[21] Three categories of offence were set out: crimes against the Jewish people, crimes against humanity, and war crimes. The first of these, crimes against the Jewish people, closely resembles the accepted international definition of the crime of genocide first set out in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, as the Israeli courts acknowledged.[22] There is only one difference. Whereas the Convention contemplates genocide that is perpetrated against a 'national, ethnical, racial or religious group', the Israeli legislation replaced these words with the expression 'the Jewish people'.

At the same time as it adopted the Nazis and Nazi Collaborators (Punishment) Law, Israel promulgated legislation, but with only prospective application, in order to provide for the prosecution of genocide perpetrated against any 'national, ethnical, racial or religious group'.[23] The two statutes gave effect to obligations imposed by the 1948 Convention. Israel had not participated in the negotiations of the treaty because it only joined the United Nations in May 1949, five months after the Genocide

19 For early references to the *Eichmann* judgments: *Prosecutor v. Tadić*, Decision on the Defence Motion on Jurisdiction, Case No. IT-94-1-T, 10 August 1995, para. 41; *Prosecutor v. Tadić*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, paras. 55, 57; *Prosecutor v. Tadić*, Separate Opinion of Judge Sidhwa on the Defence Motion of Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, p. 88; *Prosecutor v. Erdemović*, Sentencing Judgement, Case No. IT-96-22-T, 29 November 1996, para. 62; *Prosecutor v. Erdemović*, Separate and Dissenting Opinion of Judge Cassese, Case No. IT-96-22-A, 7 October 1997, para. 33; *Prosecutor v. Blaškić*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR108 *bis*, 29 October 1997, para. 38; *Prosecutor v. Furundžija*, Judgement, Case No. IT-95-17/1-T, 10 December 1998, para. 156; *Prosecutor v. Jelisić*, Judgement, Case No. IT-95-10-T, 14 December 1999, para. 68.

20 Nazis and Nazi Collaborators (Punishment) Law, Laws of the State of Israel 4, p. 154 (1950), Section I(a). The legislation was published in *Yearbook on Human Rights for 1950* (1952), at 163.

21 L. Douglas, *The Memory of Judgment* (2001), 117.

22 *A-G Israel v. Eichmann* (District Court), *supra* note 13, para. 26; *Eichmann v. A-G Israel* (Supreme Court), *supra* note 13, para. 10.

23 The Crime of Genocide (Prevention and Punishment) Law, Laws of the State of Israel 4, at 101 (1950).

Convention was adopted by the General Assembly.[24] It signed the Convention on 17 August 1949, completing the process with ratification on 9 March 1950, making it one of the twenty states whose participation was necessary for the Convention to enter into force.

In 1951, the International Court of Justice issued an important Advisory Opinion dealing with the Genocide Convention.[25] However, the ruling dealt with the entry into force of the Convention and the permissibility of reservations rather than with the concrete application of the concept of genocide in a criminal prosecution. During the 1950s, there were prosecutions under the Nazis and Nazi Collaborators (Punishment) Law, but none that was so reported as to constitute a useful legal precedent. Thus, the judges in *Eichmann* were the first to consider the definition of the crime of genocide, the appropriate jurisdiction for its prosecution, and related issues. With one exception,[26] commentators on the judgments at the time did not seem to appreciate the importance of this. Yet *Eichmann* remained the only significant judicial application of the Genocide Convention until the late 1990s, when rulings of the United Nations International Criminal Tribunals began to appear.

Since the mid-1990s, with the establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda, as well as the International Criminal Court, there has been an explosion of litigation concerning the crime of genocide. In addition to pronouncements of the international criminal tribunals,[27] important decisions have been issued in recent years by the International Court of Justice,[28] the European Court of Human Rights,[29] and several national courts. The definition that appears in the 1948 Convention was also interpreted in an important fact-finding report of the United Nations.[30] New international institutions have been established, notably the United Nations Special Adviser for the Prevention of Genocide, and they have made their own contribution to our evolving understanding of the law. Probably more academic literature was been published on the Genocide Convention in the first decade of this century than in the previous fifty years.

In some parts of the world it is now a crime to dispute whether the Holocaust or Shoah should be described with the word 'genocide', but of course the word was not even used in the judgment of the International Military Tribunal of 30 September and 1 October 1946. The legal framework for the great trial of the Nazi leaders, adopted at the London Conference in August 1945, employs the term 'crimes against humanity' to describe the atrocities perpetrated against the Jews of Europe. The concept of crimes against humanity was broad enough to cover not only the physical destruction of a national, ethnic, racial, or religious group (as 'extermination') but

24 Admission of Israel to membership in the United Nations, UN Doc. A/RES/273 (III).
25 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, [1951] ICJ Rep. 14.
26 M. A. Musmanno, 'The Objections *in Limine* to the Eichmann Trial', (1962) 35 *Temple Law Quarterly* 1, at 22.
27 The leading case is *Prosecutor v. Krstić*, Judgement, Case No. IT-98-33-A, 19 April 2004.
28 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 February 2007, [2007] ICJ Rep. 43.
29 *Jorgić v. Germany* (App. No. 74613/01), Judgment, 12 July 2007.
30 Report of the International Commission of Inquiry on Darfur to the Secretary-General, Pursuant to Security Council Resolution 1564 (2004) of 18 September 2004, UN Doc. S/2005/60, paras. 489–506.

also a range of other forms of discriminatory attack directed at such groups (as 'persecution'). In the *Eichmann* judgment, the District Court explained that 'the crime of "genocide" is nothing but the gravest type of "crime against humanity"'.[31]

The word 'genocide' was first employed by Raphael Lemkin in his influential book *Axis Rule in Occupied Europe*, published in November 1944.[32] When the Nuremberg judgment was issued, Raphael Lemkin was outraged at the exclusion of what he called 'peacetime genocide'[33] because the International Military Tribunal confirmed that crimes against humanity were restricted to acts perpetrated in association with aggressive war. The judges did not employ the term 'genocide', although it is evident from Lemkin's reaction that he understood the concept as a cognate of crimes against humanity, for which the majority of the Nazi defendants were convicted. Lemkin returned to New York from Nuremberg and immediately began a campaign within the United Nations General Assembly that led to the adoption of the Genocide Convention two years later. When the Cuban delegate, Ernesto Dihigo, rose in the Sixth Committee of the General Assembly in November 1946 to propose a resolution recognizing genocide as a crime under international law, he explained that the purpose was to rectify a shortcoming of the Nuremberg judgment, namely its failure to acknowledge the criminality of acts perpetrated before the outbreak of the Second World War.[34]

Adopted on 9 December 1948, the Convention on the Prevention and Punishment of the Crime of Genocide declared:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.[35]

Compared with crimes against humanity, as set out in Article VI(c) of the Charter of the International Military Tribunal, genocide was defined both more broadly and more narrowly. Broadly, because Article 1 of the Convention confirmed that genocide was punishable 'whether committed in time of peace or in time of war'. Narrowly, in that it was not intended to encompass forms of persecution and atrocity falling short of physical destruction, nor did it apply to groups defined by criteria

31 *A-G Israel v. Eichmann* (District Court), *supra* note 13, para. 23.
32 R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (1944).
33 H. T. King Jr 'Origins of the Genocide Convention', (2008) 40 *Case Western Reserve Journal of International Law* 13, at 13.
34 UN Doc. A/C.6/SR.22. The draft resolution (UN Doc. A/BUR.50), after some amendment, was adopted unanimously by the General Assembly on 11 December 1946 (UN Doc. A/RES/96(I)). For the history of the resolution, see UN Doc. E/621.
35 1951 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, Art. 2.

other than race, ethnicity, nationality, or religion. A Syrian proposal to extend the definition of genocide to include 'measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment' was rejected by the drafters of the Convention.[36]

By the 1990s, it was beyond dispute that crimes against humanity could also be perpetrated in peacetime. Thus, for many modern conflicts, either term – genocide or crimes against humanity – may be a propos. Because crimes against humanity clearly extend to forms of persecution and deportation other than physical extermination, it is the appropriate description for situations of what are often called 'ethnic cleansing'. However, campaigners often insist on the label 'genocide' because of a perceived stigma and potency that they seem to think is lacking with respect to crimes against humanity. The debate about use of the 'g-word' rages over campaigns of ethnic persecution in Sudan and Bosnia, as well as over many historic cases, including the Turkish attacks on Armenians in 1915.

The District Court of Jerusalem was the first judicial body to distinguish genocide and crimes against humanity. Under the Nazis and Nazi Collaborators (Punishment) Law, Eichmann was prosecuted for both genocide and crimes against humanity. To the Israeli court, drawing the line between physical extermination, which seemed required by the definition of genocide, and deportation or persecution, which were acts of crimes against humanity, seemed an important issue. The District Court of Jerusalem discussed the evolution of Nazi policy, noting how the beginning of the war against the Soviet Union in June 1941 was accompanied by a policy shift to

> the third and final stage in the persecution of the Jews within the area of German influence, namely the stage of total extermination. From then onwards, all German actions against Jews in their places of abode, and their deportation to the east, were aimed towards extermination, which was by now regarded by all German authorities dealing with Jewish affairs as the Final Solution of the Jewish Question.[37]

The Court concluded that the order for extermination was given by Hitler himself at about the time of the invasion of the Soviet Union, although it admitted that his instructions may never have been put in writing. Implementation of the final solution, 'in the sense of total extermination', the Court noted, was 'to a certain extent connected with the stoppage of emigration of Jews from territories under German influence'.[38]

In its conclusions, the District Court considered various acts in which Eichmann was involved that were perpetrated prior to the 1941 invasion. This was the 'second stage' of the Nazi attacks on Jews, beginning with the outbreak of the Second World War and ending in mid-1941. It included various expulsions and deportations 'organized by the Accused in complete disregard for the health and lives of the deported Jews'.[39] The judges were convinced that 'many Jews died as a result of the expulsions' and that 'there was cruelty which bordered on premeditated malice, and we have

36 UN Doc. A/C.6/234. Cited in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), supra* note 28, at para. 190.

37 *A-G Israel* v. *Eichmann* (District Court), *supra* note 13, para. 79.

38 Ibid., at para. 80.

39 Ibid., at para 72.

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weighted carefully whether or not the Accused foresaw the murderous consequences of these deportations, and this was what he wished'.[40]

> However, a doubt remained in our minds as to whether there was that intentional aim to exterminate which is required for the proof of a crime against the Jewish People, and we shall, therefore, deal with these inhuman acts as being crimes against humanity.[41]

The final verdict stated:

> (1) We, therefore, convict the Accused, pursuant to the first count of the indictment, of a crime against the Jewish People, an offence under Section 1(a)(1) of the Nazis and Nazi Collaborators (Punishment) Law 5710–1950, in that during the period from August 1941 to May 1945, in Germany, in the territories of the Axis States, in the areas which were occupied by Germany and by the Axis States, and in the areas which were subject to the authority of Germany and the Axis States, he, together with others, caused the deaths of millions of Jews, with the purpose of implementing the plan which was known as the 'Final Solution of the Jewish Question,' with intent to exterminate the Jewish People.
>
> We acquit the Accused of a crime against the Jewish People, by reason of the acts attributed to him in this count of the indictment during the period until August 1941. The criminal acts of the Accused until that time (see sections 185, 186 above) will be included in the conviction for crimes against humanity, under paragraph (5) of the conviction, as set out below.[42]

This was a cautious conclusion, and the temptation may have been great to associate Eichmann with an extermination policy from the beginning of the war, possibly even prior to it. Perhaps the judges saw this as more of a technical distinction, and attached no great consequence to describing the acts as crimes against humanity rather than genocide. In any event, they drew a bright line between these two categories of international crime by which acts of persecution not linked to a policy of physical extermination were viewed as crimes against humanity.

When genocide prosecutions resumed more than three decades later, in the context of the breakup of the former Yugoslavia, the distinction between genocide and crimes against humanity took on considerable importance. In 1993, Bosnia and Herzegovina filed a claim in the International Court of Justice, against what was then the Federal Republic of Yugoslavia and is today Serbia, charging genocide for what was then being described as 'ethnic cleansing'. Bosnia's lawyers argued for a more expansive interpretation of genocide than the one endorsed by the District Court in *Eichmann.* This was not just a matter of semantics, because the Court's jurisdiction was rooted in the Genocide Convention. If the acts were recognized as crimes against humanity rather than genocide, the International Court of Justice was without jurisdiction to make a ruling on the merits of the complaint.

Fourteen years elapsed before a final judgment was issued in that case. Meanwhile, in a series of prosecutions directed at Serbs before the International Criminal Tribunal for the former Yugoslavia dealing with the conduct of the campaigns of persecution and ethnic cleansing, the judges fairly consistently rejected charges of

40 Idid., at para 186.
41 Ibid., at para. 186.
42 Ibid., at para. 244(1). Also paras. 244(2) and (3).

genocide.[43] There was one exception: the systematic murder of thousands of Bosniac men and boys at Srebrenica in mid-July 1995.[44] When the International Court of Justice finally addressed the matter in 2007, it essentially followed the approach taken at the International Criminal Tribunal for the former Yugoslavia:

> As the [International Criminal Tribunal for the former Yugoslavia] has observed, while 'there are obvious similarities between a genocidal policy and the policy commonly known as "ethnic cleansing"' (Krstić, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 562), yet '[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.' (Stakić, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519.)[45]

In his separate opinion, Judge Ad Hoc Kreća referred to the judgment of the District Court of Jerusalem in *Eichmann*, noting its 'subtle legal explanation of the difference between "ethnic cleansing" and genocide'.[46]

In one of the last prosecutions at the International Criminal Tribunal for the former Yugoslavia, involving Bosnian Serb leader Radovan Karadžić, the Prosecutor insisted on making one final effort to brand the Serb persecutions of Bosniacs and Croats with the label genocide. The charge was rejected by the Trial Chamber following the completion of the prosecution case, in an oral interlocutory ruling issued on 11 June 2012. With abundant authority to rely on, including the 2007 judgment of the International Court of Justice, it is intriguing that the judges of the Yugoslavia Tribunal returned to the first precedent of them all:

> in the *Eichmann* case in Israel in 1961, Eichmann was acquitted of genocide for acts which took place before 1941 because the court found that up until that time the Germans were intent on displacing and expelling the Jews, but after the invasion – the attack by [*sic*] the Soviet Union in 1941 – their programme changed and they became intent on destruction and killing and not allowing displacement. And therefore, Eichmann was convicted of genocide only for those acts which were directed as destroying the group and not displacing it.[47]

The trial of Karadžić proceeds, but subsequent to this ruling he can be convicted of crimes against humanity but not genocide for various acts of persecution and deportation perpetrated in Bosnia and Herzegovina during the three-year conflict. A genocide charge remains for the July 1995 Srebrenica massacre.

There has been much pressure upon judges to adopt an expansive interpretation of the definition of genocide, by which crimes falling short of physical extermination would be subsumed within it. Indeed, judicial authority exists for

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43 *Prosecutor v. Jelisić*, Judgement, Case No. IT-95-10-T, 14 December 1999; *Prosecutor v. Jelisić*, Judgement, Case No. IT-95-10-A, 5 July 2001; *Prosecutor v. Sikirica et al.*, Judgement on Defence Motions to Acquit, Case No. IT-95-8-T, 3 September 2001; *Prosecutor v. Stakić*, Decision on Rule 98 *bis* Motion for Judgement of Acquittal, Case No. IT-97-24-T, 31 October 2002; *Prosecutor v. Stakić*, Judgement, Case No. IT-97-24-T, 31 July 2003; *Prosecutor v. Brđanin*, Judgement, Case No. IT-99-36-T, 1 September 2004.

44 *Prosecutor v. Krstić*, Judgement, Case No. IT-98-33-T, 2 August 2001; *Prosecutor v. Krstić*, Judgement, Case No. IT-98-33-A, 19 April 2004; *Prosecutor* v. *Popović et al.*, Judgement, Case No. IT-05-88-T, 10 June 2010.

45 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), supra* note 28, at para. 190.

46 Ibid., para. 105 (Separate Opinion of Judge Ad Hoc Kreća).

47 *Prosecutor v. Karadzić*, Transcript of Ruling on Application Pursuant to Rule 98 *bis*, Case No. IT-95-5/18-T, 11 June 2012, 28571–2.

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a broader construction, but it remains isolated.[48] By and large, the approach taken by the District Court of Jerusalem (the Supreme Court did not address the issue) to interpretation of the definition of genocide set out in Article 2 of the 1948 Convention has reverberated through the case law until the present day.

3. Crimes against humanity in peacetime

The Nazis and Nazi Collaborators (Punishment) Law distinguished between three categories of crime depending on their temporal scope. While war crimes could only be committed 'during the period of the Second World War', both 'crimes against the Jewish people' and 'crimes against humanity' were punishable 'during the period of the Nazi regime'. Thus, the legislation contemplated a six-year period of peacetime, from January 1933 to August 1939. Article 1 of the 1948 Convention recognized that genocide (and, therefore, 'crimes against the Jewish people') could be committed in time of peace. However, that crimes against humanity could take place in peacetime was rather more debatable. Indeed, it has been one of the great controversies of international criminal law for many decades.

The Charter of the International Military Tribunal made crimes against humanity punishable 'before or during the war', but there was nevertheless a requirement of a link or nexus with the conflict. The London Conference that established the legal basis of the Nuremberg trial very deliberately excluded crimes against humanity perpetrated in peacetime, absent a link to armed conflict, out of concern that the four Allied powers establishing the International Military Tribunal might themselves be accused of such atrocities. The American representative, Robert Jackson, was the most candid of the delegates to the London Conference in explaining why crimes against humanity committed without a link to aggressive war should be excluded from the Tribunal's jurisdiction:

> [O]rdinarily we do not consider that the acts of a government toward its own citizens warrant our interference. We have some regrettable circumstances at times in our own country in which minorities are unfairly treated. We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state.[49]

The narrow scope of crimes against humanity set out in Article VI(c) of the Charter of the International Military Tribunal was confirmed in the judgment delivered on 30 September and 1 October 1946.[50]

48 *Prosecutor v. Krstić*, Partial Dissenting Opinion of Judge Shahabuddeen, Case No. IT-98-33-A, 19 April 2004; *Prosecutor v. Blagojević et al.*, Judgement, Case No. IT-02-60-T, 17 January 2005.

49 *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (1949), 333.

50 *France et al. v. Goering et al.*, (1948) 22 IMT 411, at 498.

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The Israeli criminalization of crimes against humanity in peacetime, and without any link to armed conflict, was not entirely an innovation. Control Council Law No. 10, adopted by the four occupying powers in Germany in December 1945 as a basis for prosecutions before national military tribunals,[51] also did not contain the nexus between crimes against humanity and armed conflict that featured in the legislation it was modelled upon, namely Article VI(c) of the Charter of the International Military Tribunal. Over the years, reference has frequently been made to Control Council Law No. 10 as evidence either of the absence of a nexus or of its disappearance. For example, in its first judgment, the Extraordinary Chambers of the Courts of Cambodia upheld the legality of a conviction for crimes against humanity in the absence of a nexus with armed conflict with reference to Control Council Law No. 10, amongst other authorities.[52] Ruling on his entitlement to investigate disappearances as a crime against humanity committed in Spain in the early 1940s following the Civil War, Judge Baltasar Garzón similarly invoked Control Council Law No. 10.[53]

But it has always seemed implausible that the four Allied powers who crafted the definition of crimes against humanity in the Charter of the International Military Tribunal in August 1945, insisting upon the nexus with armed conflict for reasons that are credible and easy to understand, albeit objectionable, would have suddenly changed their mind in December of the same year when they enacted Control Council Law No. 10. There is actually a simple explanation: they understood the Charter of the International Military Tribunal to be international law and therefore applicable to them as well as to the Nazis, whereas they viewed Control Council Law No. 10 as domestic legislation in force only with respect to Germany.

There was considerable debate about the issue in the subsequent proceedings held at Nuremberg by American military tribunals pursuant to Control Council Law No. 10. On several occasions the prosecution argued unsuccessfully that crimes against humanity did not require a nexus to armed conflict.[54] In two of the trials, the judges appeared receptive to the argument that crimes against humanity required no nexus with armed conflict. In the *Justice* case, an argument that peacetime crimes against humanity violated the rule against retroactive criminal prosecution was dismissed. The issue of the nexus with armed conflict was not directly addressed in the ruling. The prosecution indicated that it had not charged pre-1939 offences independently, and the judges demurred, indicating that they directed their 'consideration to the

51 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, *Official Gazette of the Control Council for Germany*, No. 3, 31 January 1946, at 50–5.

52 *Kaing Guek Eav alias Duch*, Case File 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010, para. 291.

53 Auto, Diligencias Previas Proc. Abreviado 399/2006 V, Juzgado Central de lo Penal n° 5, Audiencia Nacional, 17 October 2008, at 21.

54 *United States of America v. Pohl et al.*, Opinion and Judgment, (1950) 5 TWC 958, at 991–2; *United States of America v. Flick et al.*, Opinion and Judgment, (1952) 6 TWC 1181, at 1212–13; *United States of America v. von Weizsaecker et al.* ('the *Ministries* case'), Order Dismissing Count Four, (1952) 13 TWC 112, at 117. See the discussion in K. J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011), 234–42.

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issue of guilt or innocence after the outbreak of the war in accordance with the specific limitations of time set forth in counts two, three and four of the indictment'.[55] Count one of the indictment alleged a 'common design and conspiracy' dating from January 1933,[56] but none of the accused was convicted on that charge. Similarly, in the *Einsatzgruppen* case, the military tribunal spoke in general terms about crimes against humanity being 'not restricted to events of war'.[57] However, the case concerned the activities of brutal SS units that followed the invading Nazi armies into the Soviet Union. The debate about peacetime crimes against humanity was not relevant to the charges.[58]

Consequently, although the text of Control Council Law No. 10 appears to contemplate crimes against humanity outside the context of armed conflict, the case law of the American military tribunals does not provide much in the way of confirmation for such a legal development. As Kevin John Heller has explained, after thorough analysis of the law and the decisions, '[i]t is thus an open question to what extent the [Nuremberg Military Tribunals] support the elimination of the nexus from the customary definition of crimes against humanity'.[59] Certainly, none of the defendants in the trials of the American military tribunals held in the Nuremberg courtroom pursuant to Control Council Law No. 10 was convicted of crimes against humanity for an act perpetrated prior to September 1939.

The most celebrated pronouncement on the topic is in the decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia on a challenge to jurisdiction pressed by its first active defendant, Dusko Tadić. The issue was hardly important in determining the outcome, because the indictment concerned acts perpetrated during the armed conflict; indeed, Tadić was also charged with war crimes for the same acts. The Appeals Chamber, presided over by Antonio Cassese, spoke of the 'obsolescence' of the nexus,[60] and held that 'customary international law no longer requires any nexus between crimes against humanity and armed conflict'.[61] The words suggested that the nexus had been part of customary law at some earlier moment in time. Professor Cassese, writing in the *Journal of International Criminal Justice* several years after the *Tadić* jurisdictional decision, criticized a Chamber of the European Court of Human Rights for assuming that there was no nexus between crimes against humanity and armed conflict in the late 1940s. He said it was 'only later, in the late 1960s, that a general rule gradually began to evolve, prohibiting crimes against humanity even when committed in time of peace', and

55 *United States of America v. Alstötter et al.* ('the *Justice* case'), Opinion and Judgment, (1951) 3 TWC 954, at 985.
56 *United States of America v. Alstötter et al.* ('the *Justice* case'), Indictment, (1951) 3 TWC 15, at 17.
57 *United States of America v. Ohlendorf et al.* ('the *Einsatzgruppen* case'), Opinion and Judgment, (1951) 4 TWC 411, at 496–500.
58 *United States of America v. Ohlendorf et al.* ('the *Einsatzgruppen* case'), Indictment, (1951) 4 TWC 13.
59 Heller, *supra* note 54, at 383.
60 *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 140.
61 Ibid., para. 78. See also the discussion in the Trial Chamber: *Prosecutor v. Tadić*, Decision on the Defence Motion on Jurisdiction, Case No. IT-94-1-T, 10 August 1995, paras. 78–83.

that the rule became crystallized and 'indisputable' with the 1995 decision of the Appeals Chamber.[62]

Eichmann was convicted of crimes against humanity pursuant to a provision that did not require a nexus with armed conflict and with respect to acts perpetrated prior to September 1939. Here is the relevant passage in the judgment of the District Court of Jerusalem:

> 184. With regard to the period up to the outbreak of war, the acts specified in section (d) of the third count were not yet part of the programme for the Final Solution by way of complete physical extermination. Accordingly, we have to consider separately each of these series of acts – for example, the events of the Crystal Night. If so, there is, in our view, grounds for saying that the mass acts of violence, committed by the National Socialist regime up to the outbreak of the War, as for instance the dispatch of thousands of Jews to concentration camps, were already committed with intent to destroy the Jewish People in part, and therefore they already come within the definition of 'crime against the Jewish People,' within the meaning of Section 1(a)(1) of the Nazis and Nazi Collaborators (Punishment) Law; for it was clear from the outset to those who sent the Jews to the concentration camps because of their being Jews, that the prisoners would be placed there in such living conditions as would cause many of them to die – and this was the purpose of those who sent them there.
>
> But there is no need for us to decide this question finally, because, in our view, it has not been proved that, until his transfer to Vienna in 1938, the Accused had already taken an active part in the mass persecutions mentioned in section (d) of the third count. We have explained above (in section 62) that up to that date the Accused was engaged in intelligence work and not on executive measures. We have also found that it has not been proved that the Accused participated in the organization of the Crystal Night in Austria (Section 64).
>
> 185. With regard to the activity of the Accused in the Central Office for Emigration in Vienna, Prague and Berlin, designed to bring about the forced emigration of Jews, we have found that here the Accused exerted pressure and used threats of terror (Section 65). Amongst other things, he also threatened to send Jews to a concentration camps if emigration were not speeded up as he wanted. We have come to the conclusion that these threats do not amount to active participation in dispatching Jews to concentration camps or in what occurred inside these camps. The organization of forced emigration itself was not yet accompanied by intent to destroy the Jewish People, but there is no doubt that in the circumstances that have been described these were acts of expulsion of a civilian population which fall within the definition of 'crime against humanity'.[63]

Paragraph 65 of the decision, to which paragraph 185 refers, makes clear that these were acts perpetrated prior to September 1939. Consequently, *Eichmann* stands as the first conviction for crimes against humanity committed without a formal link to armed conflict. Indeed, Eichmann's acts in early 1939 remain, to this day, the earliest to underpin a conviction for crimes against humanity by any tribunal, national or international.

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62 A. Cassese, 'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: The *Kolk and Kislyiy v. Estonia* Case before the ECHR', (2006) 4 *Journal of International Criminal Justice* 410, at 413.

63 *A-G Israel v. Eichmann* (District Court), *supra* note 13.

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This observation is all the more significant in that *Eichmann* is a judgment whose dependence upon international law is unquestioned, given that the Israeli court was exercising universal jurisdiction. The American military tribunals, on the other hand, were enforcing law as an occupying army acting in an exercise of territorial jurisdiction. Their claim to be genuinely international tribunals is subject to caution, and uncertainty about their status has often been reflected in case law.[64] This only enhances the significance of *Eichmann*, although it should be noted that the judgment does not appear to have been relied upon subsequently as authority for the disappearance or absence of the nexus between crimes against humanity and armed conflict.

4. *Nullum crimen sine lege*

Before the International Military Tribunal, the Nazi defendants raised the objection that they were being charged with offences that did not exist in criminal law at the time of their alleged perpetration. The challenge focused on crimes against peace rather than crimes against humanity,[65] and was largely based upon a legal opinion prepared by Carl Schmitt.[66] There were similar unsuccessful attacks on the legitimacy of the subsequent proceedings held before the American military tribunals.[67] Eichmann, predictably, returned to the same arguments. It was common ground that the Nazis and Nazi Collaborators (Punishment) Law was both retroactive and extraterritorial, a point confirmed as early as 1953.[68]

The District Court began by citing an early decision of the Supreme Court of Israel dealing with legislation unrelated to the *Eichmann* case. In that ruling, the Court had rejected a challenge to a criminal statute with retroactive effect, noting that the rule against *ex post facto* prosecutions did not apply where the prohibition was foreseeable to the perpetrator. For the District Court, the Nazi acts

> constituted crimes under the laws of all civilised nations, including the German people, before and after the Nazi regime, while the 'law' and criminal decrees of Hitler and his regime are not laws, and have been set aside with retroactive effect even by the German courts themselves.[69]

The judges observed that the

> extensive measures taken by the Nazis to efface the traces of their crimes, such as the disinterment of the dead bodies of the murdered and their cremation into ashes, or the destruction of the Gestapo archives before the collapse of the Reich, clearly prove that the Nazis knew well the criminal character of their enormities.[70]

64 Heller, *supra* note 54, at 375–77.
65 Motion adopted by all Defense Counsel, 19 November 1945, (1947) 1 IMT 168.
66 C. Schmitt, 'Das internationalrechtliche Verbrechen des Angriffskrieges und der Grundsatz *"Nullum crimine, nulla poena sine lege"*', published in English as 'The International Crime of the War of Aggression and the Principle "*Nullum crimen, nulla poena sine lege*"', in C. Schmitt, *Writings on War* (2011), at 123–97.
67 E.g., *United States of America v. Alstötter et al.* ('the *Justice* case'), (1951) 3 TWC 954, at 974 ff.
68 *Honigmann v. Attorney-General*, [1951] ILR 542, at 543 (District Court of Tel Aviv).
69 *A-G Israel v. Eichmann* (District Court), *supra* note 13, para. 7.
70 Ibid.

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The District Court went on to cite the famous pronouncement of the International Military Tribunal that 'the maxim nullum crimen sine lege is not a limitation of sovereignty, but it is in general a principle of justice'.[71] It also invoked a number of precedents of postwar European courts, including those of Germany. Furthermore, it cited pronouncements by the United States Military Tribunals in the subsequent proceedings.

Unfortunately, the Supreme Court of Israel recast the issue by declaring that the principle *nullum crimen sine lege* 'insofar as it negates penal legislation with retroactive effect, has not yet become a rule of customary international law'.[72] The Court proceeded to discuss provisions of constitutional law, or their absence in the case of the United Kingdom, on the subject of retroactive criminal legislation. In effect, it was reasoning with regard to comparative constitutional law rather than customary international law. A proper international-law analysis might have begun with Article 11(2) of the Universal Declaration of Human Rights, which affirms the *nullum crimen* principle:

> 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.[73]

There was much discussion of the Nuremberg trial when Article 11(2) was being drafted by the Third Committee of the United Nations General Assembly in 1948. Many delegates insisted that the provision should not be interpreted in such a way as to challenge the legitimacy of the proceedings before the International Military Tribunal.[74] A fair reading of the debates leads to the conclusion that the prosecution of Nazis for war crimes, crimes against humanity, and genocide is in no way incompatible with the *nullum crimen* rule, as set out in the Universal Declaration.

The Universal Declaration of Human Rights is widely viewed as a codification of customary international law.[75] The circumstances of its drafting confirm this role, as do the constant references to this seminal instrument in treaties, General Assembly resolutions, and other sources of law, be they 'hard' or 'soft'. At the time of the *Eichmann* judgments, some academic commentators tried to dismiss the argument about retroactivity by contending that the Universal Declaration of Human Rights was 'not binding',[76] a claim that was similar, although not identical, to the approach of the Supreme Court. Dismissing the Universal Declaration of Human Rights in this way woefully understates its legal significance. In any event, all of this was entirely

71 Ibid., at para. 27.
72 *Eichmann v. A-G Israel* (Supreme Court), *supra* note 13, para. 8.
73 UN Doc. A/RES/217A (III).
74 See, e.g., UN Doc. A/C.3/SR.115 and UN Doc. A/C.3/SR.116
75 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 16, at 76 (Separate Opinion of Vice-President Ammoun); *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment of 24 May 1980, [1980] ICJ Rep. 3, para. 91.
76 See L. C. Green, 'The Maxim *Nullum Crimen sine Lege* and the Eichmann Trial', (1962) 38 *British Yearbook of International Law* 457, at 458.

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gratuitous and unnecessary because Article 11(2) of the Universal Declaration does not impeach the validity of the *Eichmann* prosecution. The better view, then, was that taken by the District Court, one that was itself rooted in the profound and eternal words of the International Military Tribunal.

Defendants at modern-day international criminal tribunals, for Rwanda, the former Yugoslavia, Sierra Leone, and Cambodia, continue to raise objections based upon retroactivity. They have been no more successful than their Nazi predecessors. The flexible approach to legislation concerning serious crimes that is given retroactive effect is also confirmed in the case law of bodies like the European Court of Human Rights. The Strasbourg Court has taken the view that there is no breach of the principle of legality providing that the law is foreseeable and accessible. In addition to rejecting challenges concerning prosecutions for World War Two-era crimes,[77] the Court has also refused to intervene when other offences involving attacks on human dignity, such as rape, are concerned.[78] Today's judges take an approach that is broadly comparable to that of the Israeli courts in *Eichmann*.

With respect to retroactivity, *Eichmann* is also an important precedent because it represents the earliest conviction for the crime of genocide (prosecuted as 'crimes against the Jewish people') as defined in the 1948 Convention. Nazi defendants elsewhere were generally prosecuted for crimes against humanity. A few postwar Polish prosecutions employed the term 'genocide', but this was prior to the 1948 codification and the precise definition of the offence is not clear. Probably genocide was being used by the Polish courts more or less as a synonym for crimes against humanity using nomenclature inspired by Lemkin's 1944 book.[79] *Eichmann*, then, constitutes a precedent for the criminalization of genocide not only prior to the adoption of the definition in the Convention, on 9 December 1948, and to recognition of genocide as an international crime by the United Nations General Assembly, on 11 December 1946,[80] but even before the word itself first appeared in *Axis Rule in Occupied Europe*, in November 1944.[81]

To non-specialists, the proposition that Eichmann committed genocide during the Second World War must seem uncontroversial. Yet the argument that the principle of legality is violated by using the term 'genocide' to describe acts prior to adoption of the Convention in 1948 retains its salience, albeit in another context. In 2003 in the United Kingdom, a draft answer to a Parliamentary Question said that

> the government's legal advisors have said that the 1948 UN Convention on genocide, which is in any event not retrospective in application, was drafted in response to the

77 *Kononov v. Latvia*, No. 36376/04 [GC], Judgment, 17 May 2010. See also *Korbely v. Hungary*, No. 9174/02 [GC], Judgment, 19 September 2008; *Kolk and Kislyiy v. Estonia*, No. 23052/04, Decision, 17 January 2006.

78 *CR v. United Kingdom*, Ser. A, No. 335-B, para. 41; *SW v. United Kingdom*, Ser. A, No. 335-B, para. 36.

79 *Poland v. Greiser*, (1948) 13 LRTWC 70 (Supreme National Tribunal of Poland); *Poland v. Goeth*, (1946) 7 LRTWC 4 (Supreme National Tribunal of Poland); *Poland v. Hoess*, (1948) 7 LRTWC 11 (Supreme National Tribunal of Poland).

80 UN Doc. A/RES/96 (I).

81 R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (1944).

> holocaust and whilst the term can be applied to tragedies that occurred subsequent to the holocaust, such as Rwanda, it cannot be applied retrospectively'.[82]

The issue returned on 7 June 2006, when government spokesman Geoff Hoon replied to a parliamentary inquiry:

> The fact is that the legal offence of genocide had not been named or defined at the time that the actual atrocities were committed. The UN Convention on Genocide came into force in 1948 so it was not possible at the time of the events that we are considering legally to label the massacres as genocide within the terms of the convention.[83]

The British government was not talking about the Holocaust. The reference, obviously, was to the attacks on the Armenians that took place in Ottoman Turkey in 1915. But if it is acceptable to convict Eichmann of genocide perpetrated in 1941, why should the term not also apply to those responsible for the Armenian atrocities?

5. *Mala captus bene detentus*

One of the most contentious issues in the *Eichmann* case is the way in which the accused was brought before the Court. Eichmann's abduction was condemned by the United Nations Security Council,[84] although subsequently Argentina and Israel issued a statement indicating that their dispute had been resolved.[85] A sour taste has remained, however. When the United Nations Sub-Committee on the Prevention of Discrimination and the Protection of Minorities was debating what has come to be known as the 'Whitaker Report' on genocide, in the 1980s, one member said that all references to the *Eichmann* trial should be removed because of the circumstances of his abduction.[86] This is an extreme position, however, and many, then and now, would be comfortable with the opinion of Karl Jaspers that 'the arrest of Eichmann in Argentina was contrary to international law, although it was no doubt warranted from a moral and political point of view'.[87]

Eichmann contended that the Court had no jurisdiction to try him because it 'ought not to lend its support to an illegal act of the State'.[88] The District Court made an interlocutory ruling rejecting Eichmann's objection,[89] but returned to the issue in its final judgment.[90] It may have painted a somewhat too unequivocal view of the

82 'Parliamentary Question Background Document Relating to a Written Question from Lord Buffen Tabled on 23 January 2001 – Draft response for Baroness Scotland', cited in Geoffrey Robertson, *Was There an Armenian Genocide?*, 9 October 2009, para. 65

83 Hansard, 7 June 2006, Col. 136WH.

84 Question relating to the case of Adolf Eichmann, UN Doc. S/RES/138 (1960); UN Doc. S/PV.865–868 (1960).

85 See C. Rousseau, 'Chronique des faits internationaux: Argentine et Israel: Affaire Eichmann; Arrestation et enlèvement en territoire argentin par des agents du Gouvernement israélien d'un ressortissant allemand recherché pour crimes de guerre', (1960) 64 *Revue générale de droit international public* 772; H. Silving, 'In Re Eichmann: A Dilemma of Law and Morality', (1961) 55 *American Journal of International Law* 307; M. Lippmann, 'The Trial of Adolf Eichmann and the Protection of Universal Human Rights under International Law', (1982) 5 *Houston Journal of International Law* 1, at 7–11.

86 UN Doc. E/CN.4/Sub.2/SR.822, para. 15.

87 K. Jaspers, 'Who Should Have Tried Eichmann?', (2006) 4 *Journal of International Criminal Justice* 853, at 854.

88 *A-G Israel v. Eichmann* (District Court), *supra* note 13, para. 40.

89 An English translation of the decision of 17 April 1961 is reproduced in S. Rosenne, ed., *6,000,000 Accusers; The Opening of the Eichmann Trial* (1961), 303–5.

90 *A-G Israel v. Eichmann* (District Court), *supra* note 13, para. 41.

case law on the subject, referring to precedents from the courts of the United States, primarily, and a few from Britain affirming the *male captus bene detentus* principle by which the circumstances of a suspect's arrest do not compromise the jurisdiction of the trial court. The District Court also attached considerable importance to the settlement reached by Israel and Argentina, insisting that the accused could no longer invoke a breach given that 'Argentina had forgiven Israel for that violation of her sovereignty, so that there no longer subsisted any violation of international law'. Eichmann could not therefore invoke rights that Argentina had waived.[91] As the District Court noted:

> there can be no escaping the conclusion that the violation of international law through the mode of the bringing of the accused into the territory of the country pertains to the international level, namely the relations between the two countries concerned only, and must find its solution at such level.[92]

Case law of domestic courts was and remains divided on whether jurisdiction may be exercised when an accused has been kidnapped by law-enforcement agents of a foreign state or by freelance bounty hunters.[93] Thirty-five years after Eichmann was snatched by Mossad agents, a similar issue presented itself to the International Criminal Tribunal for the former Yugoslavia. Dragan Nikolić, against whom an indictment by the Tribunal had been issued, was kidnapped inside Serbia and then taken to Bosnia and Herzegovina, where he was handed over to the custody of the Stabilization Force in Bosnia and Herzegovina, which in turn delivered him to the United Nations Tribunal.

When Nikolić challenged the jurisdiction of the Tribunal, the Trial Chamber reviewed the case law of various national courts, noting that a 'classic example of a decision close to the application of the principle of *male captus, bene detentus* is the case of *Eichmann*'.[94] Unlike the District Court, however, it found national practice to be 'rather diverse',[95] although it rejected the motion and upheld the jurisdiction of the Tribunal. The Appeals Chamber also acknowledged the varying approaches of domestic courts, but turned to decisions involving 'the same kinds of crimes as those falling within the jurisdiction of the International Tribunal'.[96] There were two relevant cases, one of them being *Eichmann.* The other was the French *Barbie* case.[97] The Appeals Chamber noted that the Israeli courts had decided to exercise jurisdiction over Eichmann because he was 'a fugitive from justice'

91 Ibid., at para. 44.
92 Ibid., at para. 50.
93 Pro: *United States v. Alvarez-Machain*, 504 US 655 (1992); contra: *R. v. Horseferry Road Magistrates' Court, Ex parte Bennett*, [1994] 1 AC 42.
94 *Prosecutor v. Nikolić*, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Case No. IT-94-2-PT, 9 October 2002, para. 84. See J. Sloan, '*Prosecutor* v. *Dragan Nikolic*: Decision on Defence Motion for Illegal Capture', (2003) 16 *Leiden Journal of International Law* 541; A. Sridhar, 'Note: The International Criminal Tribunal for the Former Yugoslavia's Response to the Problem of Transnational Abduction', (2006) 42 *Stanford Journal of International Law* 343.
95 Ibid., at para. 94.
96 *Prosecutor v. Nikolić*, Decision on Interlocutory Appeal Concerning Legality of Arrest, Case No. IT-94-2-AR73, 5 June 2003, para. 23.
97 Barbie, Cour de cassation, Chambre criminelle, 6 October 1983, 83–93.194; English translation in (1978) 78 ILR 126.

who was charged with 'crimes of a universal character . . . condemned publicly by the civilized world'.[98] Moreover, because Argentina had condemned the violation of sovereignty and waived its claims, no violation of international law could be sustained.[99] It found that the nature of the offence was also relevant to the acceptance of jurisdiction over Klaus Barbie by French courts, despite his abduction.

Thus, although it was difficult to generalize given the inconsistency of state practice, the Appeals Chamber identified two principles:

> [I]n cases of crimes such as genocide, crimes against humanity and war crimes which are universally condemned and recognized as such ('Universally Condemned Offences'), courts seem to find that in the special character of these offences and, arguably, in their seriousness, a good reason for not setting aside jurisdiction. Second, absent a complaint by the State whose sovereignty has been breached or in the event of a diplomatic resolution of the breach, it is easier for courts to assert their jurisdiction.[100]

Although it followed the *Eichmann* precedent, it took the point one step further by insisting that it could not decline jurisdiction given the nature of the offences.[101] There had been debate as to whether there had been any complicity of the Stabilization Force in Bosnia and Herzegovina in the abduction; the Appeals Chamber said jurisdiction should be exercised even if this had been the case. Eventually, Nikolić was convicted and sentenced to twenty years' detention.[102]

The Appeals Chamber did not allude to its first consideration of *Eichmann*, in the 1995 *Tadić* jurisdictional decision. Of course, *Tadić* did not raise a *mala captus bene detentus* issue, but it did concern the argument about standing. When Tadić objected to the manner in which the Tribunal was created, by Security Council resolution, the Trial Chamber cited *Eichmann* as authority for the proposition that to the extent that the establishment of the Tribunal raised an issue of state sovereignty, an individual lacked the legal interest to contest the matter:

> The right to plead violation of the sovereignty of a State is the exclusive right of that State. Only a sovereign State may raise the plea or waive it, and the accused has no right to take over the rights of that State.[103]

The Appeals Chamber disagreed. Referring to several cases, including *Eichmann*, it said:

> Authoritative as they may be, those pronouncements do not carry, in the field of international law, the weight which they may bring to bear upon national judiciaries. Dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, this concept recently has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of

98 *Prosecutor v. Nikolić*, Decision on Interlocutory Appeal Concerning Legality of Arrest, Case No. IT-94-2-AR73, 5 June 2003, referring to *A-G Israel v. Eichmann* (Supreme Court), *supra* note 13, para. 12.

99 *Prosecutor v. Nikolić*, Decision on Interlocutory Appeal Concerning Legality of Arrest, Case No. IT-94-2-AR73, 5 June 2003, para. 23.

100 Ibid., at para. 24.

101 Ibid., at para. 26. See also the brief discussion in *Prosecutor v. Milosević*, Decision on Preliminary Motions, Case No. IT-02-54-PT, 8 November 2001, paras. 48–51.

102 *Prosecutor v. Nikolić*, Judgement on Sentencing Appeal, Case No. IT-94-2-A, 4 February 2005.

103 *Prosecutor v. Tadić*, Decision on the Defence Motion on Jurisdiction, Case No. IT-94-1-T, 10 August 1995, para. 41.

> human rights. Whatever the situation in domestic litigation, the traditional doctrine upheld and acted upon by the Trial Chamber is not reconcilable, in this International Tribunal, with the view that an accused, being entitled to a full defence, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on violation of State sovereignty. To bar an accused from raising such a plea is tantamount to deciding that, in this day and age, an international court could not, in a criminal matter where the liberty of an accused is at stake, examine a plea raising the issue of violation of State sovereignty. Such a startling conclusion would imply a contradiction in terms which this Chamber feels it is its duty to refute and lay to rest.[104]

Yet two paragraphs later, the Appeals Chamber insisted that 'the right to plead State sovereignty does not mean, of course, that his plea must be favorably received' and it endorsed *Eichmann* in support of the importance of prosecuting international crimes.[105] Here it was reasoning along the same lines as the first of the arguments sustained by the Appeals Chamber in *Nikolić*. It is an exaggeration to suggest that in *Nikolić* the Appeals Chamber contradicted the position it took in *Tadić*.[106]

Both *Eichmann* and *Nikolić* were isolated cases. But confronted with a more systematic practice of abductions, courts might be more inclined to reject the *mala captus* argument and refuse to exercise jurisdiction in order to sanction flagrant violations of the human rights of suspects by law-enforcement authorities. In recent years, illegal rendition of suspects, often with the connivance of the authorities of the state where the person is detained, has not been such an unusual event in the 'war on terror'. Individuals have been abducted to secret detention centres in Poland and Romania, or to relatively more public places like Guantánamo Bay. To the argument that there is a judicial principle denying jurisdiction in order to discourage kidnapping à *la Eichmann*, it may be answered that that this may only drive the practice of illegal rendition even further into the shadows.

One of the men responsible for the terrorist attacks on the American embassies in Nairobi and Dar es Salaam in 1998 was apprehended in South Africa and deported to New York to stand trial before all judicial proceedings had been exhausted. In particular, the suspect had not had the opportunity to insist upon assurances that capital punishment would not be imposed were he to be extradited. The Constitutional Court of South Africa concluded that '[t]he handing over of Mohamed to the United States government agents for removal by them to the United States was unlawful'.[107] The trial judge in the United States informed the jury about the South African court's conclusion, information that probably influenced its decision to reject capital punishment as an appropriate sanction. The trial judge had even

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104 *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 55.

105 Ibid., at para. 57.

106 For this position, see J. Sloan, 'Prosecutor *v.* Dragan Nikolić (Decision of the Interlocutory Appeal Concerning Legality of Arrest), Case No. IT-94-2-AR73, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, 5 June 2003', (2005) 4 *Law and Practice of International Courts and Tribunals* 491, at 495.

107 *Mohammed and Dalvie v. The President of the Republic of South Africa and Others*, CCT 17/01, 2001 (3) SA 893 CC, paras. 68, 74.

authorized the American legal-aid system to support the litigation before the South African Constitutional Court on behalf of the defendant.[108]

An accused person brought unlawfully into a jurisdiction is not bereft of rights, as the Mohamed case shows. Some courts may be prepared to entertain applications to decline jurisdiction under the circumstances, especially when offences of lesser seriousness are involved. But it cannot be said that the stance taken by the courts in *Eichmann* was unusual, or that it reflected an extreme view that is now outdated. Speaking at Chatham House in 2006, the High Commissioner for Human Rights, Louise Arbour, referred to *Eichmann* when she discussed what she called the 'erosion' of the *mala captus bene detentus* principle. Yet, she conceded, '[r]easonable people may disagree about the appropriate framework that should govern the apprehension and transfer to trial of an international terrorist suspect, war criminal or torturer'.[109]

Were a case similar to *Eichmann* to arise today, there would surely be complaints to international human rights bodies that did not exist in 1960. Israel would undoubtedly be condemned for the abduction. But it seems unlikely they would urge release of a prisoner as an appropriate remedy, especially for an atrocity crime that itself constituted the most profound attack on human dignity.[110] Indeed, today there would also be many voices clamouring that the imperatives of bringing alleged perpetrators of atrocities to book invariably outweigh concerns with procedural human rights, especially if the state where the kidnapping had taken place might have been providing a safe haven from justice. The point here is not to attempt to resolve the debate, or to suggest that the positions are clearer than they may be, but only to observe that the approach taken in *Eichmann* is not inconsistent with our contemporary understanding.

6. Universal jurisdiction

Returning to New York City from Nuremberg after delivery of the judgment of the International Military Tribunal, Raphael Lemkin went to work within the United Nations General Assembly, then meeting in the second part of its first session in October 1946, to correct what he considered to be the shortcomings of the Nuremberg precedent, as discussed above. Besides eliminating the war nexus with crimes against humanity, he had another objective: recognition of genocide as an international crime over which states could exercise universal jurisdiction; that is, without regard to whether the crime had been committed on their territory or by their citizens.

The draft resolution submitted by India, Cuba, and Panama, but prepared by Lemkin, read as follows:

108 Ibid., at para. 71, note 59.

109 Address by Louise Arbour, UN High Commissioner for Human Rights at Chatham House and the British Institute of International and Comparative Law, 15 February 2006.

110 See, e.g., *Klaus Altmann (Barbie) v. France*, No. 10689/83, Commission Decision of 4 July 1984, Decisions and Reports 37, at 225; *Illich Sanchez Ramirez v. France*, No 28780/95, Commission Decision of 24 June 1996, Decisions and Reports 86, at 155; *Öcalan v. Turkey*, No. 46221/99, Sections 86–92 12 March 2003; *Öcalan v. Turkey* [GC], No. 46221/99, Sections 83–90, ECHR 2005-IV.

> *Whereas* the punishment of the very serious crime of genocide when committed in time of peace lies within the exclusive territorial jurisdiction of the judiciary of every State concerned, while crimes of a relatively lesser importance such as piracy, trade in women, children, drugs, obscene publications are declared as international crimes and have been made matters of international concern . . .[111]

In other words, the resolution would have legitimized the exercise of universal jurisdiction over genocide, something that was not yet acceptable under international law, as Lemkin saw it, because the crime was 'within the exclusive territorial jurisdiction of the judiciary of every State concerned'.

Lemkin's universal-jurisdiction language did not survive the negotiations of the text of General Assembly Resolution 96(I). The *travaux préparatoires* are not complete enough to indicate where the problems with this lay. But the omission of Lemkin's proposal on universal jurisdiction was no oversight, as became evident two years later when the text of the draft Genocide Convention was being debated. The two superpowers were quite strongly opposed to the notion.[112] Each was probably afraid of being on the receiving end of universal jurisdiction exercised by the other. The Soviets contended that no exception be made to the principle of territorial jurisdiction, insisting that this alone was compatible with respect for national sovereignty.[113] In the General Assembly discussions, the United States delegate said that '[t]he principle of universal punishment was one of the most dangerous and unacceptable of principles'.[114] An Iranian proposal of explicit recognition of universal jurisdiction within the Convention was decisively defeated, with six in favour, twenty-nine opposed, and ten abstentions.[115] The General Assembly finally reached agreement on what became Article 6 of the Convention:

> Persons charged with genocide or any of the other acts enumerated in article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Eichmann relied on the General Assembly debates and on the text of Article 6 of the Convention when he challenged the Jerusalem Court's jurisdiction:

> if the United Nations has failed to support universal jurisdiction for each country to try a crime of genocide committed outside its boundaries, but has expressly provided that, in the absence of an international criminal tribunal, those accused of this crime shall be tried by 'a competent tribunal of the State in the territory of which the act was committed', how, it is asked, may Israel try the accused for a crime that constitutes 'genocide'?[116]

Dismissing his argument, the District Court recalled the words of the International Court of Justice. In its 1951 Advisory Opinion, the World Court had declared that 'the principles underlying the Convention are principles which are recognized by

111 UN Doc. A/BUR/50.
112 United States: UN Doc. E/623, Art. V; Soviet Union: UN Doc. E/AC.25/7.
113 UN Doc. E/AC.25/SR.7, at 3–4.
114 UN Doc. A/C.6/SR.100.
115 Ibid.
116 *A-G Israel v. Eichmann* (District Court), *supra* note 13, para. 20.

civilized nations as binding on all states, even without any conventional obligation'. For the District Court, there was an important distinction between such principles, which applied even prior to adoption of Resolution 96(I) in 1946, and Article 6 of the Convention, 'which comprises a special provision undertaken by the contracting parties with regard to the trial of crimes that may be committed in the future'.[117]

As they had done with *nullum crimen sine lege*, the Israeli judges were navigating in the legal twilight zone of retroactive application of general principles of law, or of rules of customary international law, both of them valid as normative sources of international law even in the absence of a treaty text.[118] Here, uncomfortably, there was a treaty text that actually inferred the contrary. It was an implication only, because the rejection of universal jurisdiction was not apparent from a literal reading of Article 6 the Genocide Convention. One needed to pry open the negotiating history to understand the widespread resistance to the concept.

Conscious of the shortcomings of a purely literal interpretative approach, the District Court attempted to demonstrate that the drafters of Article 6 of the Convention had not intended to confine the prosecution of genocide to the territorial state. The Court cited a statement in the report of the Sixth Committee of the General Assembly, saying that Article 6 was not meant to limit the right of states to try their own nationals for acts committed outside the state. Turning to commentaries on the Convention,[119] the Court said that Article 6 imposed a duty of punishment, but did not impinge upon jurisdictional rules in criminal matters applicable within different states. According to the Court, territorial jurisdiction was nothing more than a 'compulsory minimum', a conservative compromise that could be contrasted with the more exigent provisions of the Geneva Conventions, which imposed a rule of compulsory universal jurisdiction.[120] It held:

> It is the consensus of opinion that the absence from this Convention of a provision establishing the principle of universality (together with the failure to constitute an international criminal tribunal) is a grave defect in the Convention, which is likely to weaken the joint effort for the prevention of the commission of this abhorrent crime and punishment therefor, but there is nothing in this defect to lead us to deduce any rule against the principle of universality of jurisdiction with respect to the crime in question. It is clear that the reference in Article VI to territorial jurisdiction, apart from the jurisdiction of the non-existent international tribunal, is not exhaustive.[121]

Thus, the District Court took the view that Article 6 of the Genocide Convention is permissive of territorial jurisdiction, but that it does not prevent universal jurisdiction. The Supreme Court echoed this pronouncement with the briefest of comments.[122]

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117 Ibid., at para. 22.
118 1945 Statute of the International Court of Justice, 33 UNTS 993, Art. 38(1)(b) and (c).
119 N. Robinson, *The Genocide Convention: A Commentary* (1960), 84; P. N. Drost, *Genocide, United Nations Legislation on International Criminal Law* (1959), 101–2.
120 *Eichmann v. A-G Israel* (District Court), *supra* note 13, paras. 24–25.
121 Ibid., at para. 25.
122 *Eichmann v. A-G Israel* (Supreme Court), *supra* note 13, para. 12(e).

At first blush this view does not seem illogical, except that it makes very little sense to codify in a treaty the right of a sovereign state to exercise jurisdiction over a crime committed on its territory if the intent is to enact a broader permissive norm. Ultimately, it is a completely contrived explanation that transforms Article 6 into a superfluous provision as well as one that is totally inconsistent with its negotiating history. Referring to paragraph 25 of the judgment at first instance, one writer said 'the court's inability to "deduce any tendency" against the universality principle amongst the parties to the Convention itself discloses remarkable judicial myopia'.[123]

Supporters of Israel in the legal community raised the argument that Eichmann himself was not entitled to complain about the exercise of jurisdiction by Israel. That right, they said, could only be invoked by Germany, his state of nationality.[124] In support of the claim that in the absence of objection no prohibitive rule of international law could be presumed, the *Lotus* case of the Permanent Court of International Justice was invoked.[125] The judges preferred the higher ground, arguing that Israel was entitled to prosecute on the basis of principle.

Professor Fawcett asserted in his article on the *Eichmann* trial that 'Article VI is not easy to interpret'.[126] There is certainly a good case to be made that Article 6 of the Genocide Convention is not an exhaustive statement of jurisdiction over genocide. The drafting history shows an intent not to exclude jurisdiction by a state over its own nationals for crimes committed outside its territory, lending support to the view that Article 6 is not an exhaustive enumeration.[127] But if so-called active-personality jurisdiction may be exercised over genocide even if it is not set out explicitly in the Convention, why did the drafters of the treaty even bother to codify territorial jurisdiction? The drafting history of the Convention leaves the clear impression that in specifying the two options, of territorial jurisdiction and the jurisdiction of a yet-to-be-created international criminal court, the General Assembly also affirmed that universal jurisdiction was not an option. At the time of the Eichmann trial and with reference to the *travaux préparatoires* of the Convention, A.R. Carnegie confirmed 'that there is no unanimity as to the existence of a universal jurisdiction over genocide in customary international law' and that 'it is unsafe to assume the existence of any right to exercise a wide-ranging jurisdiction over genocide'.[128]

The Court's comment that the omission of universal jurisdiction from Article 6 of the Convention is a 'grave omission' presents some interest. But if, as the Court concluded, Article 6 does not exclude universal jurisdiction, then the only purpose that would be served by incorporating it would be to make it mandatory. This is the principle *aut dedere aut judicare*. The drafting history does not indicate that states seriously contemplated such an obligation, which would require them to prosecute

123 V. E. Treves, 'Judicial Aspects of the Eichmann Case', (1963) 47 *Minnesota Law Review* 557, at 584.
124 L. C. Green, 'The Eichmann Case', (1960) 23 *Modern Law Review* 507, at 512.
125 *S.S. 'Lotus'*, Judgment, Series A, No. 10.
126 J. E. S. Fawcett, 'The Eichmann Case', (1962) 27 *British Yearbook of International Law* 181, at 205.
127 UN Doc. A/760, para. 24.
128 A. R. Carnegie, 'Jurisdiction over Violations of the Laws and Customs of War', (1963) 39 *British Yearbook of International Law* 402, at 409.

perpetrators of genocide found within their jurisdiction, regardless of where the crime was committed or the nationality of the offender. The Iranian resolution in the Sixth Committee of the General Assembly, which was so massively defeated, was intended only to authorize the exercise of universal jurisdiction, not to require it. Lemkin's 1946 draft of what became General Assembly Resolution 96(I) was along similar lines.

Even if the argument that Article 6 of the Convention is not exhaustive is accepted, because the provision does not expressly authorize universal jurisdiction, it still remains necessary to find a basis for universal jurisdiction over genocide. There are three possible sources under international law: treaty, custom, and general principles of law recognized by civilized nations.[129] When the District Court cited the Advisory Opinion of the International Court of Justice, it referred to a discussion that rooted the prohibition of genocide in 'principles which are recognized by civilized nations as binding on all States, even without any conventional obligation'. The question that arises is whether this reference in the Advisory Opinion is to custom or to general principles. The language used in the reference taken from the Advisory Opinion suggests general principles, but it is not uncommon to think that the International Court of Justice based its conclusion on customary law. This was the view of the District Court.[130] The Supreme Court, on the other hand, set the discussion within the context of general principles, which it described as 'a common denominator for the judicial systems of numerous countries'.[131]

Customary law requires evidence of state practice and of a subjective recognition of the existence of a binding rule of international law. Obviously *Eichmann* was the first prosecution ever for genocide pursuant to universal jurisdiction, so neither of these two components of custom was at all evident. Often, evidence of custom will be drawn from debates in the General Assembly and from the negotiation of international treaties, because this is where the opinions of states about their legal obligations are particularly visible. From this standpoint, the rejection by the General Assembly of universal jurisdiction over genocide in the 1948 session is a relevant fact that challenges the existence of a custom favouring universal jurisdiction.

The District Court also took the view that it was entitled to exercise jurisdiction under the 'protective principle', 'which gives the victim nation the right to try any who assault its existence'.[132] The Court cited Hugo Grotius and other authorities:

> All this applies to the crime of genocide (including the 'crime against the Jewish people') which, although committed by the killing of individuals, was intended to exterminate the nation as a group. . . . The State of Israel, the sovereign State of the Jewish people, performs through its legislation the task of carrying into effect the right of the Jewish people to punish the criminals who killed its sons with intent to put an end to the survival of this people. We are convinced that this power conforms to the subsisting principles of nations.[133]

129 Statute of the International Court of Justice, *supra* note 118, Art. 38(1).
130 *A-G Israel v. Eichmann* (District Court), *supra* note 13, para. 21.
131 *Eichmann v. A-G Israel* (Supreme Court), *supra* note 13, para. 10.
132 *A-G Israel v. Eichmann* (District Court), *supra* note 13, para. 30.
133 Ibid., at para. 38.

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On appeal, the Supreme Court of Israel, while noting full agreement with the District Court on the protective principle of jurisdiction, insisted upon the universal-jurisdiction argument, as this applied not only to Jews, in whose name Israel claimed to exercise protective jurisdiction, but also to Poles, Slovenes, Czechs, and Gypsies.[134]

There has been some suggestion that Israel was exercising a form of passive-personality jurisdiction rather than universal jurisdiction as such. The narrowing of the genocide definition to 'the Jewish people', rather than to 'national, ethnical, racial and religious groups' in a general sense, may imply such a result. The District Court of Jerusalem explored the passive personality jurisdiction option as well as universality. However, the Court of Appeal made it clear that the basis of jurisdiction was universality rather than a claim that Israel was entitled to act on behalf of all Jews. Writing at the time, Theodor Meron explained that 'the passive personality element of jurisdiction over this crime is more apparent than real. The view may be held that in substance the principle underlying this provision is that of universality'.[135]

The pronouncements on universal jurisdiction in *Eichmann* are probably the most influential finding of the judgments. The legal reasoning was flimsy, defying clear evidence of the views of states, and yet it was almost immediately accepted as a precedent in international law. This is an astonishing feature of the development of the law of nations. Less than fifteen years earlier, in the United Nations General Assembly, the entire concept of universal jurisdiction for genocide had been rejected by an overwhelming majority. An eloquent decision in a deserving case issued by three judges in an ancient, obscure language was enough to reverse this.

The *Eichmann* precedent on universal jurisdiction stands essentially unchallenged to this day. It has been affirmed in United Nations reports,[136] in the academic literature,[137] and in case law of international criminal tribunals.[138] Recently, the European Court of Human Rights rejected a challenge by a Serb being prosecuted in Germany for genocide under a form of universal jurisdiction. According to the Chamber of the Court:

> In determining whether the domestic courts' interpretation of the applicable rules and provisions of public international law on jurisdiction was reasonable, the Court is in particular required to examine their interpretation of Article VI of the Genocide Convention. It observes, as was also noted by the domestic courts (see, in particular, paragraph 20 above), that the Contracting Parties to the Genocide Convention, despite proposals in earlier drafts to that effect, had not agreed to codify the principle of

134 *Eichmann v. A-G Israel* (Supreme Court), *supra* note 13, para. 12 in fine. The approach of the Israeli courts in *Eichmann* was followed by the United States courts in *Demjanjuk*, although the specific issue raised by the exclusion of universal jurisdiction in Art. 6 was apparently not considered. See *In the Matter of the Extradition of John Demjanjuk*, 612 F.Supp. 544 (D.C. Ohio 1985), at 554–8.

135 T. Meron, 'Public International Law Problems of the Jurisdiction of the State of Israel', (1961) 88 *Journal du droit international* 986, at 1058 (reference omitted).

136 Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674, Annex, at p. 13.

137 T. Meron, 'International Criminalization of Internal Atrocities', (1995) 89 *American Journal of International Law* 554, at 570; B. Stern, 'La compétence universelle en France: Le cas des crimes commis en ex-Yougoslavie et au Rwanda', (1997) 40 *German Yearbook of International Law* 280, at 286–7.

138 *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 62. See also *Prosecutor v. Furundžija*, Judgement, Case No. IT-95-17/1-T, 10 December 1998, para. 1w56.

> universal jurisdiction over genocide for the domestic courts of all Contracting States in that Article (compare paragraphs 20 and 54 above). However, pursuant to Article I of the Genocide Convention, the Contracting Parties were under an erga omnes obligation to prevent and punish genocide, the prohibition of which forms part of the jus cogens. In view of this, the national courts' reasoning that the purpose of the Genocide Convention, as expressed notably in that Article, did not exclude jurisdiction for the punishment of genocide by States whose laws establish extraterritoriality in this respect must be considered as reasonable (and indeed convincing). Having thus reached a reasonable and unequivocal interpretation of Article VI of the Genocide Convention in accordance with the aim of that Convention, there was no need, in interpreting the said Convention, to have recourse to the preparatory documents, which play only a subsidiary role in the interpretation of public international law (see Articles 31 § 1 and 32 of the Vienna Convention on the Law of Treaties of 23 May 1969).[139]

This is essentially the same reasoning as that of the District Court in *Eichmann*, although the European Court of Human Rights does not cite the precedent.

Universal jurisdiction is a subject that generates more heat than light. In practice, it is rarely exercised, be it for genocide or other international crimes. The isolated examples provided since 1961 have almost invariably involved states with a particular interest in the offender, generally because of historic ties with the location of the crime. Canada is one of the poster children for universal jurisdiction, which it has exercised in the past for Nazis and now employs for Rwandan *génocidaires*. But its legislation requires as a precondition for exercise of jurisdiction that the accused person be present in Canada after the alleged offence was committed.[140] Nor has Israel shown the slightest interest in prosecuting genocide cases under universal jurisdiction other than those resulting from Hitler's campaign to destroy the Jews of Europe.

7. Fairness of the proceedings

Various charges have been made as to the fairness of the proceedings. There can be no question, of course, of Eichmann's guilt, which he himself admitted:

> [I] saw in the murder of Jews, in the extermination of the Jews one of the most hideous crimes in the history of mankind . . . Already then I saw in this violent solution of the Jewish problem something illegal, something hideous and heinous . . . For my work in assisting this programme I am guilty. This is quite clear. To this extent I certainly cannot abdicate from responsibility and I could not attempt to do this, because in legal terms I am certainly guilty of being an accomplice to this. This I see clearly myself and I accept this.[141]

Eichmann may have been banal, but he was also evil. Eichmann may have been a desk murderer, but he was more than a cog in the machine, an impression that seems to have been created by Hannah Arendt's legendary report. Perhaps his role in the Holocaust was exaggerated, yet his ferocious racism cannot be dismissed, as

139 *Jorgić v. Germany* (App. No. 74613/01), Judgment, 12 July 2007, para. 68.
140 *Crimes against Humanity and War Crimes Act*, S.C. 2000, c. 24, s. 8(b).
141 Transcript, Sess. 95, pp. V-1, W-1; Sess. 11, p. F-1. Cited in L. C. Green, 'Legal Issues of the Eichmann Trial', (1962) 37 *Tulane Law Review* 641, at 658.

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one of the prosecutors, Gabriel Bach, has continued to explain. His remarks were published at the insistence of Antonio Cassese in the *International Journal of Criminal Justice*.[142]

Certainly the trial was not without its flaws. But while Eichmann raised a number of objections to the proceedings, his counsel, Robert Servatius, was on the whole satisfied with the administration of justice in the case.[143] 'There is broad consensus in the vast amount of legal literature on the case, and particularly in the English and the German literature, that Eichmann had a fair trial', writes Kai Ambos.[144]

One issue of concern at the time was the availability of defence witnesses. Eichmann argued that they should be given a safe conduct, failing which they would refuse to travel to Israel out of concern they would themselves be arrested and charged with war crimes. Some of them had provided affidavit evidence at proceedings in Germany in the 1940s that the Prosecutor sought to introduce in evidence. Eichmann's counsel insisted upon his right to cross-examine, but the Attorney-General would not give them a safe conduct.[145] Nevertheless, the refusal to allow witnesses to travel to Jerusalem with a safe conduct continues to be raised by critics of the trial.[146] According to Hannah Yablonka, this 'was the only deviation of which everyone who wrote about the trial, whether in favour or against, disapproved'.[147] It should be borne in mind that in national proceedings for ordinary crimes there is no general principle that defence witnesses who may be suspected of complicity or of responsibility for other crimes enjoy immunity from prosecution if they emerge from hiding in order to testify. An argument that this amounted to denial of a fair trial would get short shrift in most jurisdictions. Moreover, in Eichmann's case, it has never been demonstrated that the affidavit evidence and the absence of testimony on behalf of the defence, for whatever reason, significantly distorted the evidentiary picture presented in the course of the trial.

Something similar arose recently before the International Criminal Tribunal for Rwanda in the context of proceedings to transfer jurisdiction over indicted suspects from the United Nations Tribunal to the national courts of Rwanda. Rwanda had enacted legislation facilitating travel by witnesses to Rwanda under guarantees of immunity from search, seizure, arrest, or detention during their stay in Rwanda.[148] Alternatively, the possibility of testifying by video-link, a mechanism that has been employed frequently by the International Tribunals, was also proposed. Video-link

142 G. Bach, 'Eichmann: Is Evil so Banal?', (2009) 7 *Journal of International Criminal Justice* 645.

143 Woetzel, *The Nuremberg Trials*, *supra* note 12, at 249. On Servatius, see C. Burchard, 'Servatius, Robert', in A. Cassese et al. (eds.), *Oxford Companion to International Criminal Justice* (2009), 512–13.

144 K. Ambos, 'Some Considerations on the Eichmann Case', in K. Ambos et al. (eds.), *Eichmann in Jerusalem: 50 Years After* (2012), 123, at 125. Along similar lines, see G. J. Bass, 'The Adolf Eichmann Case: Universal and National Jurisdiction', in S. Macedo, *Universal Jurisdiction, National Courts and the Prosecution of Serious Crimes under International Law* (2004), 77, at 89

145 Green, supra note 141, at 655–7.

146 R. B. Birn, 'Fifty Years After: A Critical Look at the Eichmann Trial', (2011) 44 *Case Western Reserve Journal of International Law* 443.

147 H. Yablonka, *The State of Israel vs. Adolf Eichmann* (2004), 237.

148 Organic Law Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States, Official Gazette of the Republic of Rwanda, Year 46, Special issue of 19 March 2007, Art. 14.

was obviously not an option in 1961. The Israeli court might have agreed to sit abroad so that the witnesses could be heard *viva voce*. The problem was addressed by requesting through diplomatic channels that a German examining magistrate question witnesses who would not travel to Israel, usually with representatives of the parties being present.[149]

At the International Criminal Tribunal for Rwanda, the Appeals Chamber initially found that the domestic legal framework was not adequate to address the problem of availability of defence witnesses. It said that Rwanda's grant of immunity to witnesses who travelled from abroad to testify would not resolve problems of fairness because some witnesses would still be afraid to go to Rwanda, despite the guarantees.[150] As for the possibility of video-link depositions, the Appeals Chamber said this was not

> a completely satisfactory solution with respect to the testimony of witnesses residing outside Rwanda, given that it is preferable to hear direct witness testimony, and that it would be a violation of the principle of equality of arms if the majority of Defence witnesses would testify by video-link while the majority of Prosecution witnesses would testify in person.[151]

Eventually, the Appeals Chamber changed its position after Rwanda had enacted further legislative measures.[152]

There were also charges that the Prosecutor misbehaved, and that the general environment in Israel was not conducive to fair justice. For example, Prosecutor Hausner was said to have told reporters that he considered Eichmann to be a liar.[153] A bill was proposed in the Knesset aimed at prohibiting any Israeli lawyer from assisting the Eichmann defence. The bill was not adopted. But when an Israeli provided advice to Eichmann's counsel, Robert Servatius, he was attacked in the media.[154] Hannah Arendt chided the Prosecutor, Gideon Hausner, when he wrote that Eichmann could not be defended by an Israeli lawyer because 'national emotions' would conflict with 'professional duties'.[155]

Objections have also been made because one of the three judges of the District Court of Jerusalem, Benjamin Halevi, had earlier ruled on Holocaust-related issues, including the personal role of Eichmann in the celebrated libel trial initiated by Rudolf Kastner.[156] Although some may have felt this should have provoked his recusal in the Eichmann trial, it would be like disqualifying a judge at the International

149 Green, *supra* note 141, at 662.

150 *Prosecutor v. Hategekimana*, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11 *bis*, Case No. ICTR-00-55B-R11 *bis*, 4 December 2008, para. 24.

151 Ibid., at para. 28. See also, *Prosecutor* v. *Munyakazi*, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11 *bis*, Case No. ICTR-97-36-R11 *bis*, 8 October 2008, para. 42; *Prosecutor v. Kanyarukiga*, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11 *bis*, Case No. ICTR-2002-78-R11 *bis*, 30 October 2008, para. 33.

152 *Prosecutor v. Uwinkindi*, Decision on Uwinkindi's Appeal against Referral of his Case to Rwanda and Related Motions, Case No. ICTR-01-75-AR11 *bis*, 16 December 2011, paras. 57–68. See also *Prosecutor v. Munyagishari*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, Case No. ICTR-2005-89-R11 *bis*, 6 June 2012, 129–135; *Prosecutor v. Uwinkindi*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, Case No. ICTR-2001-75-R11 *bis*, 28 June 2011, 105–8.

153 Y. Rogat, *The Eichmann Trial and the Rule of Law* (1961), 37 n. 46.

154 Ibid.

155 Arendt, *supra* note 2, at 238.

156 *A-G Israel v. Malchiel Gruenwald*, 22 June 1955.

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Criminal Tribunal for the former Yugoslavia who had heard one case because he or she would have adopted a view on the conflict and on some of the personalities involved. This is not a serious ground for recusal and, wisely, Eichmann's attorney, Robert Servatius, did not argue the point.

The most persistent challenge based upon fairness issues concerned the independence and impartiality of the judges themselves. Two decades after the trial had concluded, Matthew Lippmann still contended that 'the presence of three Israeli judges lent credence to Eichmann's claim that he was not being given a fair trial'.[157] In his preliminary motion following the reading of the indictment, Servatius challenged the composition of the Court. He did not question the personal integrity of any of the three judges sitting in the case, but argued that recusal might be warranted because 'of a situation in which a judge himself, or a near relative, was hurt by the acts referred to in the indictment'. He noted that 'the whole of the Jewish people was embroiled in the Holocaust'.[158] Essentially, Servatius was arguing that Eichmann should not be tried before Jewish judges. The argument was rejected:

> [T]he judge, in the exercise of his duties, does not cease to be a man of flesh and blood, and with feelings, but the law requires that he know how to dominate his feelings and his emotions, for otherwise, he would never be capable of judging in a criminal case which gives rise to feelings of horror, for example, in case of treason, assassination or of any other serious crime.[159]

As Leslie Green noted, in his detailed consideration of this issue, '[i]f the argument of the defence on this ground had been conceded, it would have been virtually impossible for war criminals to be tried anywhere'.[160]

A somewhat similar issue was raised at the International Criminal Tribunal for the former Yugoslavia. The Bureau, made up of five senior judges, dismissed as 'frivolous and abuse of process' the challenges by accused Vojislav Šešelj to Judges Schomburg, Mumba, and Agius, members of the Trial Chamber assigned to his case, on grounds of nationality and religion. Šešelj said that the judges possess 'certain personal characteristics which completely preclude them from being impartial'. He said that Germany, of which Judge Schomburg is a national, has 'traditionally been hostile towards Serbia and the Serbian people'. Moreover, he argued that because Germany is a member of the North Atlantic Treaty Organization whose people 'committed aggression against Serbia', Judge Schomburg should be disqualified. Šešelj described Judges Mumba and Agius as 'ardent and zealous Catholics', adding that the Roman Catholic Church had 'contributed to the destruction of Yugoslavia'. The Bureau said 'the nationalities and religions of Judges are, and must be, irrelevant to their ability to hear the cases before them impartially'.[161]

All three of the judges of the District Court had been born in Germany. All three immigrated to Palestine in 1933 following the Nazi takeover. In that sense, they

157 M. Lippmann, 'The Trial of Adolf Eichmann and the Protection of Universal Human Rights under International Law', (1982) 5 *Houston Journal of International Law* 1, at p. 28.
158 Cited in Rosenne, *supra* note 89, at 179.
159 Interlocutory Decision No. 3, cited in P. Papadatos, *The Eichmann Trial* (1964), at 41.
160 Green, *supra* note 141, at 651.
161 *Prosecutor v. Šešelj*, Decision on Motion for Disqualification, Case No. IT-03-67-PT, 10 June 2003.

might be deemed victims of Nazi anti-Semitism, although Servatius's challenge did not rely upon any allegation along these lines. In the 1990s, Thomas Buergenthal voluntarily recused himself from sitting in a case as a member of the United Nations Human Rights Committee concerning a French genocide denier. Buergenthal briefly explained that this was because he was himself a survivor of Auschwitz and Sachsenhausen, and he had lost his father, maternal grandparents, and many other family members to the Nazi Holocaust.[162] That a person in a judicial capacity feels uncertain about their ability to be an impartial judge because of such circumstances does not necessarily lead to a rule of general application, however. If anything, Eichmann probably benefited from the personal circumstances and backgrounds of the judges because they went to great lengths to ensure that the quality of justice was not strained.

Many writers at the time took the view that an international trial would have been preferable. Robert Woetzel wrote that:

> the occasion might have afforded an ideal opportunity to have the law of Nuremberg applied by an international tribunal appointed by the United Nations acting for the international community. . . . By not trying Eichmann before an international court an important opportunity may have been lost for the application of international criminal law in a setting free from taint and prejudice sixteen years following the end of the war and after the passions of conflict had cooled.[163]

Ian Brownlie felt that '[n]o doubt the majority of lawyers would agree with this conclusion'.[164] Telford Taylor, who had led the American military prosecutions at Nuremberg, argued for an international trial in an article in the *New York Times*.[165] Hannah Arendt said that 'insofar as the crime was a crime against humanity, it needed an international tribunal to do justice to it'.[166]

The issue was theoretical, of course, because there was no serious initiative to create an international tribunal. Although pledged in Article 6 of the 1948 Genocide Convention, work on the project by the International Law Commission and a special committee established by the General Assembly was frozen in 1954. The dream of a permanent international criminal tribunal was a casualty of the Cold War. The initiative would only revive, slowly at first, during the 1980s. As Peter Papadatos, one of the observers sent by the International Commission of Jurists, said:

> the trial of Eichmann by a national court – for lack of an international tribunal – appears to be an incomplete step in the prevention and the punishment of genocide on an international scale, a necessary step, however, so long as an international jurisdiction with power to mete out punishment does not exist.[167]

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162 *Faurisson v. France* (CCPR/C/58/D/550/1993), Views under Art. 5, para. 4, of the Optional Protocol, 16 December 1996, App. A. Statement by Mr. Thomas Buergenthal.

163 Woetzel, *The Nuremberg Trials*, *supra* note 12, at 255. See also R. K. Woetzel, 'The Eichmann Case in International Law', (1962) *Criminal Law Review* 671, at 681–67.

164 I. Brownlie, 'Eichmann: A Further Comment', (1962) *Criminal Law Review* 817, at 817.

165 T. Taylor, 'Large Questions in the Eichmann Case', *New York Times Magazine*, 22 January 1961.

166 Arendt, *supra* note 2, at 247.

167 Papadatos, *supra* note 159, at 42.

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The argument that an international trial would have been preferable has a familiar ring in today's debates. With the growth of international justice in the 1990s and 2000s, the choice between national and international jurisdictions has frequently arisen. At the ad hoc international criminal tribunals, for the former Yugoslavia, Rwanda, and Sierra Leone, this issue was resolved by a simple rule giving primacy to the international institution over the national courts. The International Criminal Court, by contrast, is rooted in the principle of complementarity, whereby there is a presumption in favour of the national jurisdiction that can only be dislodged through a finding that it is unwilling or unable to proceed. In practice, the Court has tended to apply the rule narrowly, with the consequence that it tends to assume jurisdiction even when national judicial institutions are perfectly capable of doing the job. For example, it assumed jurisdiction over cases in Uganda despite the lack of any finding that the national courts were inadequate. The Court's intervention was more a question of a division of labour with which the Ugandan authorities were in full agreement.

The choice is not always one that can or should be made through a rigid rule. Important issues of policy are involved for which no single answer is satisfactory. There was great debate in 2004 following the arrest of Saddam Hussein about the appropriate forum for his trial. Despite calls for an international tribunal to undertake the task, the United States insisted on proceedings before the Iraqi High Tribunal.[168] More recently, the issue has returned with respect to trials of Hissène Habré, for whom an internationalized institution is being proposed in place of the ordinary courts of Senegal, and Saif Al-Islam Gaddafi, who would himself prefer to be judged in The Hague by the International Criminal Court rather than by Libyan magistrates. In Rwanda, after initially refusing to transfer cases to the national courts, the International Criminal Tribunal eventually concurred. To be sure, the ability of national judges to deliver a fair trial in the volatile post-conflict context, or as part of a transitional regime, is a daunting test. *Eichmann* stands as a good example that the challenges can be overcome and equitable justice delivered.

8. Conclusion

Speaking to the Barreau de Paris on 2 April 1946, in the midst of the Nuremberg trial, the American prosecutor Robert Jackson said that '[t]he power of precedent, when analysed, is the power of the beaten track'.[169] He was citing the great jurist Benjamin Cardozo. The point, of course, is that precedent must begin somewhere. *Eichmann*

168 See the discussion in M. A. Newton and M. P. Scharf, *Enemy of the State: The Trial and Execution of Saddam Hussein* (2008), 50–60. See also J. E. Alvarez, 'Trying Hussein: Between Hubris and Hegemony', (2004) 2 *Journal of International Criminal Justice* 319; M. C. Bassiouni and M. W. Hanna, 'Ceding the High Ground: The Iraqi High Criminal Court Statute and the Trial of Saddam Hussein', (2006–8) 39 *Case Western Reserve Journal of International Law* 21; R. Goldstone, 'The Trial of Saddam Hussein: What Kind of Court Should Prosecute Saddam Hussein and Others for Human Rights Abuses', (2003–4) 27 *Fordham International Law Journal* 1490; J. Peterson, 'Unpacking Show Trials: Situating the Trial of Saddam Hussein', (2007) 48 *Harvard International Law Journal* 257.

169 J. Q. Barrett, 'Creating an Institutional Precedent at Nuremberg' (available at http://www.stjohns.edu/media/3/2846510b7fec46a492d236544cb03b31.pdf?d=20110402).

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is one of those seminal trials where precedent begins. Many academic writers of the time failed to appreciate this. They were disdainful of the trial, placed in effect on the wrong side of legal history. What subsequent developments have shown to be findings full of insight and perspective were rejected at the time as distortions generated by political pressures.

Writing forty years after the *Eichmann* proceedings, Anita Shapira said, '[t]he judicial aspects of the trial are no longer of importance'.[170] Perhaps this seems true for a historian. But to a lawyer, *Eichmann* should be a landmark, for many reasons. In the development of principles of international criminal law, the two judgments are anything but banal. The impact of the *Eichmann* decisions on the development of international criminal law cannot be overstated. They may well have been the product of unique circumstances, but that can be said about most interesting trials. The unique circumstances in *Eichmann* required original and pioneering decisions. The judges were operating in unfamiliar territory; applying legal instruments and principles for the first time; and under intense scrutiny from lawyers, journalists and philosophers. Their work, by and large, has stood the test of time.

170 A. Shapira, 'The Eichmann Trial: Changing Perspectives', in D. Cesarani (ed.), *After Eichmann: Collective Memory and the Holocaust since 1961* (2005), 18 at 19.