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JURISDICTIONAL QUESTIONS IN INTERNATIONAL LAW: THE EICHMANN CASE

CLS Working Paper Series 2023/07

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JURISDICTIONAL QUESTIONS IN INTERNATIONAL LAW: THE EICHMANN CASE

Alba Grembi*

Abstract

This article explores the legal thought that influenced the 1961 Eichmann case. It argues that the Israeli Courts challenged the prevailing at the time notion that States wishing to prosecute war criminals must first extend an offer of extradition to their own State; and that, by declining to extradite and establishing a firm foundation for trying Eichmann in Israel, they created a robust precedent for domestic courts to exercise universal jurisdiction for serious violations of international (both customary and conventional) law—today recognised as international criminal law. To this end, it examines the contextual background of the case, the implications it engendered, and the legal reasoning employed to secure Eichmann’s conviction. It thus provides a thorough examination of a case that conferred contemporary domestic courts with the authority to prosecute and sentence foreign officials accused of genocide, crimes against humanity and war crimes solely based on their universal condemnation by the international community—without any further connection to these crimes.

Keywords: Eichmann case, Universal Jurisdiction, Genocide, War Crimes, Crimes Against Humanity.

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Introduction

The authority that extends beyond the State sovereignty is determined today by several legal factors, most of which emanate from the principles and rules of conventional and customary international law.¹ This legal international *status quo* has been influenced by a series of unique events that, much like Lorenze's butterfly effect,² continuously affect the theoretical and practical phenomena throughout the thread of time. Evidence proving the presence of such events also rest within this article's first statement, which constitutes the contemporary answer of international law to an important question of legal and practical value: whether States can do anything that is not prohibited by international law or, *vice versa*, if they are explicitly prohibited from what is not allowed under its rules. The answer produced in the 1927 *Lotus* case³ by the Permanent Court of International Justice—addressing this question from the viewpoint of jurisdiction—was that only the absence of a prohibition is required for a regulatory act to be considered as lawful.⁴

This answer differs considerably from today's international consensus.⁵ For example, almost 94 years after *Lotus*, the Higher Regional Court of Koblenz in Germany found legal basis in universal jurisdiction to try a former Syrian secret police officer for aiding and abetting crimes against humanity in Syria. The prosecuted (arrested in Germany) and his crimes lacked previous links to the State, except those emerging from the principles of international law, as enshrined in Section 1 of the German Code of Crimes Against International Law.⁶ Similarly, the Swedish Courts rested on the same basis in their case concerning an Iranian prison officer accused of committing war crimes in Iran.⁷ The ground on which defenders rest to question

¹ See Konstantinos Chatzikonstantinou, Charalabos Apostolidis and Miltiadis Sarigiannidis, *Fundamental Notions in International Law*, vol 1 (Sakkoula 2013) 241.

² Lorenz N Edward, 'Deterministic Nonperiodic Flow' (1963) 20 *Journal of Atmospheric Sciences* 130.

³ *SS Lotus (France v Turkey) (Judgment) 1927 PCIJ Series A No 10 (Lotus case)*;

⁴ See *Lotus case* (n 3) dissenting opinion by M Nyholm at 63; see Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 (1) *The British Yearbook of International Law* 187, 199.

⁵ Krateros M Ioannou, *Public International Law: Jurisdictions in International Law* (Sakkoula 1988) 19-21.

⁶ Case No 1 StE 3/21 (Judgment) (24 February 2021) <<https://www.legal-tools.org/doc/x41x9j/pdf>> accessed 27 October 2023; see also Code of Crimes against International Law 2002, Federal Law Gazette I, 2254, as last amended by Article 1 of the Act of 22 December 2016, Federal Law Gazette I, 3150).

⁷ The Guardian, *War crimes trial of former Iranian official begins in Sweden* (10 August 2021) <<https://www.theguardian.com/world/2021/aug/10/war-crimes-trial-iran-hamid-noury-begins-in-sweden>> accessed 27 October 2023.

judicial authority almost always concerns the lack of jurisdiction to try crimes committed outside a State's territorial jurisdiction. On the other hand, the difference in jurisprudential approach between the said and the *Lotus* case resulted through the effect of a legal precedent that mediated a new doctrine of jurisdiction into the history of contemporary international law: the 1961 *Eichmann* case.

Eichmann famously disrupted the inviolability of State sovereignty by enshrining on it the concept universal jurisdiction—allowing for the adoption of measures necessary to bring international criminals to domestic justice.⁸ In this manner, it caused controversy between two principal doctrines: one highlighting the exercise of universal jurisdiction to avoid impunity for violations against international humanitarian and criminal law by State organs; and, the other stressing the primacy of respect towards sovereign rights and pertinent international law to ensure the maintenance of international peace and security.

The main actors sparking the debate between these doctrines were Israel—a newly formed at the time State—and Argentina, a then non-permanent member of the United Nations Security Council (UNSC). Israel invoked its authority under the concept of universal jurisdiction to prosecute one of the paramount perpetrators of the Jewish genocide; Argentina defended the sovereign rights conferred on States by international law, asking for compensation and that the international community recognized that its territory's violation constituted a threat against international peace and security, the *raison d'être* of the UN. Both States were right.⁹

Through this controversy, the *Eichmann* case prepared the way for domestic courts to steadily extend their jurisprudence towards extraterritorial cases where they previously lacked jurisdiction. In this way, it offered a foundational precedent to try those who commit crimes under international humanitarian and criminal law. This article examines the case's contribution to contemporary understandings of jurisdiction in international law; it addresses the sources that allowed Israeli courts to draw jurisdiction to try Eichmann—a sound legal decision which was upheld by domestic courts therefrom; and, it offers a doctrinal analysis

⁸ See Cabranes, 'Human Rights and Non-Intervention in the Inter-American System' (1967) 65 Michigan Law Review 1147, 1147, 1159–1164 and 1170.

⁹ Argentina's initiative to follow the path of appeal to the UNSC reflected the intention of States to seek solutions that maintain international peace, in line with their commitments under international law. See Article 2 (3) of the Charter of the United Nations (24 October 1945) 1 UNTS XVI (UN Charter); amendments by General Assembly Resolution in UNTS 557, 143/638, 308/892, 119; and, for an analysis concerning this topic see Richard Hiscocks, *The Security Council: A Study in Adolescence* (Free Press 2007) 245.

and a 'law in context' approach, addressing the implications that Eichmann entailed for the interpretation of jurisdictional questions in international law.

In view of the above, the present article first analyses the question over Israel's jurisdiction to enforce its law upon Eichmann while taking into account the precedent of abduction and the violation of a third State's sovereignty (Section 2). Subsequently, it examines the nature of the Israeli courts' jurisdiction, given the various theoretical obstacles that derived from the particular circumstances of the case (Section 3). And, finally, it explores the various principles and notions of international law that, appertaining to the issue at hand, give ground to the exercise of universal jurisdiction (Section 4).

1. The Exercise of Jurisdiction by Israel as a Chance for Constructive Debate

1.1. The Facts of the Case

Born in Germany in 1906 to German citizens, Adolf Eichmann relocated to Austria in 1913, and remained there until he joined the Austrian National Socialist Party. He was transferred back to Germany in 1933 for the purposes of the party, where he was trained under the Austrian Legion and obtained the citizenship of the German State upon joining Gestapo, the secret political police of Nazi Germany.¹⁰ Eichmann played a significant role in implementing the 'Final Solution' to the Jewish question: he orchestrated the identification, assembly, and transportation of Jewish individuals from occupied Europe to their final destinations at Auschwitz and other extermination camps situated within German-occupied Poland.¹¹ Notably, he was accountable for transferring to death camps as well as exterminating an estimated six million Jews.

After the end of WWII, the State of Israel made efforts to locate his whereabouts for a period of at least 15 years. Following the allied invasion of Berlin, he fled from the American patrol that had detained him and sought refuge in Saxony where he worked as a lumberjack under

¹⁰ Hannah Arendt, *Eichmann in Jerusalem: A report on the Banality of Evil* (The Viking Press 1964) 21–34.

¹¹ See Michael Berenbaum, 'Adolf Eichmann', *Encyclopedia Britannica* (2020) <<https://www.britannica.com/biography/Adolf-Eichmann>> accessed 27 October 2023; Helena Gluzman, 'On Universal Jurisdiction: Birth, Life and a Near-Death Experience?' (2009) *Bocconi School of Law Student-Edited Papers* 1, 7.

the name Otto Heninger.¹² Assisted by former SS members, he was relocated and established himself in Argentina until 1960.¹³ In May of the same year, he was discovered and secretly transported by Israeli agents to Israel.

Eichmann's arrest was announced on 23 May 1960 on the initiative of the Israeli Prime Minister David Ben-Gurion, indicating that he had been apprehended and transported by the Israeli secret services—which entailed that Israel had clandestinely carried out an operation on foreign territory.¹⁴ The sequence of events resulted in the disclosure of Eichmann's country of residence, triggering Argentina's reaction—Foreign Minister Diogene Taboada officially conveyed the State's displeasure towards Israel for the violation of its sovereignty; in addition, it requested a factual description concerning the arrest of Eichmann in its territory, Argentina issued a warning on 1 June that if the operation had been carried out by secret services, i.e., state organs of Israel, the event would be considered a *jure imperii* act, which violated international law and could incite countermeasures. On 3 June, Israel claimed that volunteers, who had been searching for the detainee since the end of WWII, had made the arrest;¹⁵ Eichmann's statement,¹⁶ which evidenced his surrender and agreement of transfer to Israel, was used to emphasize the moral cause of the abduction, namely: the necessity to bring Eichmann to justice under the charges of crimes against humanity and genocide against the Jewish population.¹⁷ In this vein, Israel also conveyed its remorse regarding the breach of Argentine law and its international rights.

Argentina was dissatisfied with the explanations provided and sent its response to Israeli Ambassador Aryah Levavi—demanding adequate compensation and punishment of the volunteers who had violated its laws; and, the return of Eichmann on Argentina.¹⁸ It was

¹² Eike Frenzel, *Mein Nachbar, der Massenmörder* (Der Spiegel 2010) <<https://www.spiegel.de/geschichte/untergetauchter-kriegsverbrecher-a-946564.html>> accessed 27 October 2023.

¹³ Matthew Lippman, 'Genocide: The Trial of Adolf Eichmann and the Quest for Global Justice' (2002) 8 Buffalo Human Rights Law Review 45, 53.

¹⁴ Hans W Baade, 'The Eichmann Trial: Some Legal Aspects' (1961) 1961 Duke Law Journal 400.

¹⁵ Yitzhak Oron, *Middle East Record*, vol. 1 (1960) 282.

¹⁶ *Ibid* 283

¹⁷ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) art VI.

¹⁸ The international field had previously faced similar cases, but the actions of the States of which sovereignty had been violated led to the return of the abductee and the punishment of the kidnappers. Examples of such cases are the *Vincenti* case (United Kingdom V United States) (1920), in which the US was forced to return the abductee to the United Kingdom and punish his captors, but also the *Jacob*

estimated that he would remain there until an international tribunal was established with genuine jurisdiction on the charges of crimes against humanity and genocide. An alternative solution, according to Argentina, would be to extradite him to Germany, where the alleged crimes were committed.¹⁹

On 10th June 1960, Argentina's warning against Israel was materialized, bringing the issue of universal jurisdiction for the first time in the premises of the United Nations Security Council (UNSC) emergency meeting. This was in accordance with Article 34 of the Charter, which provides the Council with the jurisdiction to consider any matter endangering international peace and security. The case's factual presentation and the defence of the two nations' perspectives were conducted by Dr Mario Amadeo, Argentina's Ambassador to the United Nations, and Golda Meir, Israel's Minister of Foreign Affairs.

1.2. *The Security Council Emergency Meeting*

As previously stated, the UNSC's debate on universal jurisdiction on 15 June 1960 was the first of its kind after the Nuremberg trials.²⁰ The Security Council was then faced with a dilemma on whether to acknowledge the violation of Argentine sovereignty or recognize the right of Israel to detain and prosecute an international criminal of such status,²¹ thereby acknowledging the universal jurisdiction of national courts.

Argentina based its arguments on the violation of international rules: by acting unlawfully on a third State's territory, Israel had violated its sovereignty and exercised jurisdiction over one of its residents.²² Dr Amadeo claimed it was his State's duty to defend human rights, which it was committed to ensure by protecting not merely its own citizens, but also those who sought refuge in its territory, including Jewish men and women.²³ He rightly argued that protecting human rights is not something a State can decide to do after a right has been violated, based on the nationality and status of those residing in its territory; instead, it is an obligation that all States should respect and strive to ensure from the outset. Therefore, Israel had obstructed

case, where the actions of Switzerland brought the same results (Switzerland V Germany) (1935); see Green, 'The Eichmann Case' (1960) 23 *The Modern Law Review* 507, 510.

¹⁹ See S Liskofsky, 'The Eichmann Case' (1961) 62 *American Jewish Yearbook* 199.

²⁰ See, Charter of the International Military Tribunal-Annex to the Agreement for the Prosecution and Punishment of the Major war criminals of the European Axis (adopted 8 August 1945) 82 UNTS 279 (Nuremberg Charter) art 6.

²¹ Lippman (n 13) 59.

²² Liskofsky (n 19) 201-202.

²³ UN Doc S/PV 865 (1960) 7-8.

Argentina's duty to protect its residents and, therefore, had to make amends upon the return of the abductee. The ambassador also stressed that such acts establish a precedent for other nations, resulting in future challenges to sovereignty and ultimately transforming international relations into an area governed by the 'law of the jungle.'²⁴ Israel's actions, whether undertaken by State organs or citizens acting voluntarily, posed a risk to the security established between the States, and thus a danger to international peace and security—the UN's fundamental concern and central objective as stated in its Charter.

Regarding Israel's jurisdiction to prosecute Eichmann, Dr Amadeo questioned the extent to which this State's pursuit of 'historic' justice justifies violating the rules of international law; this is especially so when it comes to holding liable those individuals whose crimes were directed at civilians that only Israel considered as representing. He added that his country objected to this jurisdiction, referencing Article VI of the Convention on the Prevention and Suppression of the Crime of Genocide—specifying that the State having jurisdiction to prosecute a criminal based on this charge is the one in whose territory the crime was committed.²⁵ Germany was this country, and thus the only competent State to try the criminal in question; Israel was unable to exercise jurisdiction in this case, as it was inexistent at the time the Nazi regime violated the principles of international law.

On the contrary, Israeli Foreign Minister Golda Meier emphasized the unique and extraordinary nature of the case at hand. This unique nature, she argued, lied in the need for a fair trial against Eichmann, the international criminal bearing responsibility for those who perished during WWII.²⁶ Israel's jurisdiction was based on its purpose to represent the six million Jews who lost their lives when the Final Solution was materialized. The majority of survivors and the relatives of those who perished during the mass extermination resided on its territory—and their conscience was affected and sought justice.²⁷ She also commented that Eichmann had been free for approximately fifteen years following the Allied invasion of Germany, questioning whether this also constituted a breach of 'violation of the sovereignty of

²⁴Ibid; see also Amnesty International, *Eichmann Supreme Court: 50 Years on, Its Significance Today*, vol 43 (2012); the view of Karl Jaspers, who concluded 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, characterizes the controversy enveloping the case. See Karl Jaspers, 'Who Should Have Tried Eichmann?' (2006) 4 (4) *Journal of International Criminal Justice* 853, 854.

²⁵UN Doc S/4334 (1960) at 26.

²⁶ UN Doc S/PV 866 (1960) at 4; see also Lippman (n 13) 61.

²⁷ Ibid 6.

the spirit of man and of humanity's conception of justice.²⁸ She also considered whether the Security Council has a responsibility to address the issue as a threat to international peace and security: the actual threat to international peace would emerge from 'Eichmann's freedom to spread the poison of his twisted soul to a new generation.'²⁹ On the other hand, in response to Argentina's claims of human right abuses, she argued that Eichmann had denied his right to protection by concealing his presence in Argentina and not seeking asylum. She eventually asserted that Israel had sufficiently atoned for the infringement of Argentine sovereignty by apologising twice.³⁰

Of those expressing their views at the meeting, note should be made of the United States representative, Henry Cabot Lodge, proposing to insert two amendments in a preambular paragraph on the Council's resolution—declaring that the States were 'mindful of the universal condemnation of the persecution of the Jews under the Nazis and of the concern of people in all countries that Eichmann should be brought to appropriate justice for the crimes of which he is accused.'³¹ The said amendments, aiming to balance the Parties' interests and reflect a conciliatory tone, received Argentina's unreserved approval.³² He also opined that 'the expression of views by the Security Council' in addition to the statement 'of the Foreign Minister of Israel making apology' should be considered as adequate reparations.

Representative of Ceylon Claude Korea supported Argentina's stance by contending that the violation of a State's sovereignty causes a sense of insecurity, is a threat to peace, and sets the groundwork for future breaches. Mr. Korea maintained that the flouting of international principles cannot be predicated on the pretext of rectifying historical injustices, as it would enable similar acts and assertions by other countries.³³ The Soviet representative, Arkady Sobolev, asserted that Argentina's failure to arrest and extradite Eichmann infringed upon international policy, agreements and United Nations resolutions.³⁴ Sobolev further observed that the Allied Powers had also failed to fulfil their commitments to prosecute Nazi war criminals, compounding the same mistake.³⁵ Finally, the representatives from Italy, Ecuador,

²⁸ Ibid 8.

²⁹ Ibid 9–10.

³⁰ Ibid 10.

³¹ Ibid 15.

³² UN Doc S/PV 868 (1960) at 9; see also Lippman (n 13) 63.

³³ See *ibid* 1–6.

³⁴ UN Doc S/PV 866, at 11–12.

³⁵ *Ibid* 12.

and France expressed comprehension towards Argentina while highlighting the exceptional circumstances of the case.³⁶

1.3. The UNSC Resolution and Following Events

Resolution 138 of 23 June 1960 by the Security Council³⁷ declared the violation of Argentine sovereignty on behalf of Israel and described it as a 'serious incident'; repeating this incident would thus create a threat to international peace and security. It mandated that adequate compensation be paid to Argentina in line with the Charter's provisions—excepting Eichmann's extradition from the compensation terms. The Resolution was passed with eight Parties voting in favour and the Soviet Union and Poland abstaining.

The Resolution possessed political significance and demonstrated the Council's symbolic support of Israel. Omitting Eichmann's extradition to Argentina from the definition of adequate compensation reflects Israel's desire for a judicial procedure that promotes moral edification for future generations. The latter was expected to instil respect within the new generation of Israelis for their European predecessors whilst also highlighting to the world's nations the imperative to prevent the recurrence of tacit tolerance towards extremist beliefs, racism, antisemitism, fascism and totalitarianism—all of which were observed before the outbreak of WWII.³⁸ Israel's key triumph in securing this decision was the Council's symbolic recognition of its role as a representative of the Jewish people, who had been massacred, poisoned and suffered gravely under Hitler's extremists. It was a fact that was not given due prominence in the Nuremberg trials, where the attention was mainly directed towards the German Nazis and their collaborators' aggression, rather than the Jewish genocide itself.³⁹

Israel's relations with Argentina were restored with a joint communique on 4 August of the same year, following a proclamation of the Israeli ambassador to Argentina Arielevi as *persona non grata*.⁴⁰ This declaration was based on Israel's refusal to offer additional compensation from what had already been offered during the conference—the regrets expressed for the violation of Argentina's sovereignty. Through the 4 August statement, the latter waived its demands for further compensation, announcing the restoration of relations between the two States. The governments agreed to consider as 'closed the incident that

³⁶ See UN Doc S/PV 867 (1960) 3, 8 and 10; see also Liskofsky (n 19) 202–203.

³⁷ UNSC Res 138 (23 June 1960) on Questions Relating to the Case of Adolf Eichmann.

³⁸ Lippman (n 13) 65.

³⁹ See *ibid* 66–69.

⁴⁰ Edy Kaufman, Yoram Shapiro and Joe Barroni, *Israel-Latin America Relations* (1st edn, Routledge 1979) 97.

arose' out of Israel's action (which infringed Argentina's fundamental rights) and proclaimed their aspirations that the traditionally friendly relations between the two countries would be restored.⁴¹ The appointment of the new Israeli Ambassador Joseph Avidar to Argentina, and Rogelio Iristani as an Ambassador of Argentina to Israel (on 17 October 1960) reestablished their diplomatic relations.⁴²

The aforementioned evidences that the majority of UNSC members affirmed Israel's universal jurisdiction: perpetrators of grave crimes, including genocide (who had gravely exposed the very nature of human conscience) could no longer rely on the lack of extraterritorial jurisdiction to escape punishment. This precedent made it clear that the violation of *jus cogens* norms—such as human dignity and the principles of humanity—provide a sufficient (ethical and) legal ground for States to accept controversial concepts that have not yet been established in international law; it also proves that issues are that not addressed in an analogous evolving approach—and considering the special circumstances of each case—are likely to continue causing adverse effects on other subjects in international law: an example can be found in the effects of the inability to engage in a discussion within the UNSC regarding the annexation of Crimea.⁴³

2. Eichmann under Israeli Jurisdiction: Ethical Obligations and Legal Obstacles

The adoption of the Security Council's resolution led to the closure of the matter concerning Israel's exercise of sovereign powers in the territory of a third State within the instrument's premises. However, it raised questions in legal scholarship about the compatibility of Eichmann's trial under Israeli laws with the hitherto formulated international law rules. It is important to note that these rules offer to this day limited opportunities for States to extend their sovereign powers in the territory and nationals of a third State.⁴⁴

⁴¹ See Lippman (n 13) 64.

⁴² Oron (n 15) 283.

⁴³ See Michelle Nichols, 'Russia, Backed by China, Casts 14th U.N. veto on Syria to Block Cross-Border Aid' (Reuters, 20 December 2019) <<https://www.reuters.com/article/us-syria-security-un-idUSKBN1YO23V>> accessed 27 October 2023; UN Security Council action on Crimea referendum blocked (UN News 15 March 2014) <<https://news.un.org/en/story/2014/03/464002-un-security-council-action-crimea-referendum-blocked>> accessed 27 October 2023; Dumitru Minzarari, 'The Russian Military Escalation Around Ukraine's Donbas' (2021) 27 *Stiftung, Wissenschaft und Politik* 1; Graham Melling and Anne Dennett, 'The Security Council Veto and Syria: Responding to Mass Atrocities Through the "Uniting for Peace" (2017) 57 Resolution' *Indian Journal of International Law* 285.

⁴⁴ Ioannou (n 3) 28.

Hence, it is imperative that national courts refrain from arbitrarily asserting their jurisdiction in such instances. A substantive link that justifies the inherent interest of a State to submit a case to court must always be⁴⁵ present—this pertains to the restricted capacity of states to exert their sovereign powers within the territory of third states, which is categorically prohibited under international law. On the other hand, preventability has also its limits: it may be displaced in specific circumstances, such as in the case of a ratified agreement between States. Jurisdiction may also be effectively exercised—subject to certain conditions—in the case of *jure gestionis* acts, i.e., non-governmental acts which enable the State to exercise administrative powers in the territory of a third State.⁴⁶ Be that as it may, among independent States, respect for territorial sovereignty is one of the most essential foundations of international relations.⁴⁷

2.1. Previous Agreements and Domestic Law Supporting Israel's Jurisdiction over Eichmann

According to established international law and practice, the creation of a contractual obligation that binds States in their relations with third parties may also take the form of a verbal commitment. States may derive jurisdiction from these commitments to establish certain conduct.⁴⁸ The Permanent Court of International Justice upheld this implicit manner of State commitment (which derives from customary international law) in 1933, during the Norway-Denmark dispute over the legal status of Eastern Greenland: thereon, a statement issued by the Norwegian Minister for Foreign Affairs was considered adequate to confirm his government's acceptance of Danish sovereignty over Eastern Greenland.⁴⁹

In light of the aforementioned, it could be argued that Argentina's declaration of intent following the conclusion of WWII—to extradite any Nazi criminal found on its territory to a competent State that was willing to conduct a trial—was legally binding on its government at the time of Eichmann's capture.⁵⁰ The Israeli courts' jurisdiction in the trial of Eichmann, founded on

⁴⁵ Roger O'Keefe, 'Universal Jurisdiction: Clarifying Basic Concepts' (2004) 2 *Journal of International Justice* 735, 743.

⁴⁶ Ioannou (n 3) 108.

⁴⁷ Chatzikonstantinou (n 1) 147.

⁴⁸ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 3; see also Jean D'Aspremont, 'The International Court of Justice and Tacit Conventionality' (2015) 2 *Questions of International Law* 3, 4.

⁴⁹ The statement is known as the Ihlen declaration; see *Legal Status of Western Greenland (Norway v Denmark)* (Judgement) 1933 PICJ Series A/B 43, 191.

⁵⁰ Green (n 18) 510.

Argentina's declaration, was lawful to the extent that Israel still retained the jurisdiction to adjudicate cases involving WWII crimes, at a time when the other States lacked similar legal provisions.⁵¹ Israel was the singular state capable of conducting a fair trial of Nazi perpetrators and their accomplices, owing to its exclusive efforts of locating and bringing them to justice in preceding years.

The Israeli law applicable in the Eichmann case had its historical source in the Palestinian Penal Code of 1936; the latter drew its origins from English law—established during the colonial period.⁵² The Israeli courts' decision in this case, therefore, relied on the analogy of English courts' jurisdiction in trying criminal cases under English law. The same holds for Article 46 of the Palestine Order-in-Council of 10 August 1922.⁵³ It could be then argued that Israel had jurisdiction to try the accused due to this resemblance with English law, which recognised the principle of *male captus bene detentus*.⁵⁴ Additionally, jurisdiction could also be based on German law, specifically the Weimar Constitution that prohibited crimes against human life in Germany, where the Jews represented by Israel had resided prior to the establishment of the Nazi regime.⁵⁵

⁵¹ Baade (n 14) 402.

⁵² An Ordinance to Provide a General Penal Code for Palestine 1936, 633, Ch II, s 4; see for an analysis Mustafa H Abdelbaqi, *Introduction to the Palestinian Criminal Justice System* (edn Iuscrim, Freiburg 2006).

⁵³ Article 46 stipulates that '[t]he jurisdiction of the Civil Courts shall be exercised in conformity with [...] powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date.' See also Baade (n 14) 403.

⁵⁴ Izes, 'Drawing Lines in the Sand: When State Sanctioned Abductions of War Criminals Should be Permitted', 1 *Columbia Journal of Law and Social Problems* (1997) 1, at 21; see *Attorney-General of the Government of Israel v Adolf Eichmann* 1961/04 [1961] 36 ILR 18 (Dist. Ct Judgement) 57–58. This principle is generally reflected in other national courts' jurisprudence, such as the English courts, from which the Israeli courts drew jurisdiction, and the Supreme Court of the United States, which have accepted it in a number of cases. It has also been recently certified by the German regional Court in Wiesbaden, which convicted Ali Bashar Ahmad Zebari to life imprisonment for the rape and murder of Susanna Feldmann in Germany; See Rohan Sinha, 'No protest, no problem: German Court Confirms Male Captus, Bene Detentus Rule' (GPIL, 1 May 2020) <<https://gpil.jura.uni-bonn.de/2020/05/no-protest-no-problem-german-court-confirms-male-captus-bene-detentus-rule/>> accessed 27 October 2023.

⁵⁵ See Robert Poll, 'The Weimar Constitution: Germany's first Democratic Constitution, its Collapse, and the Lessons for Today' (2020) Konrad Adenauer Stiftung 1, 4; see also Eberhard Eichenhofer,

Thus, Israel had a legal basis to exercise jurisdiction over Eichmann, even after his abduction from a foreign state (if the above arguments are deemed admissible). It is important to note, however, that the use of this case by a State to exceed the jurisdiction line defined by modern principles of international law should be rejected since it counteracts with the object of the United Nations and *civitas gentium* in general. Indeed, the exercise of jurisdiction on the territory of third States to enforce domestic and/or international law has been largely avoided since *Eichmann*—which highlights the need to consider the specific circumstances of the case. In general, the primacy of territorial integrity takes precedence over the necessity to enforce the law extraterritorially.

2.2. *Essential Questions of Retroactivity*

Eichmann was indicted mainly under the Nazi and Nazi Collaborators (Punishment) Law adopted by the Knesset on 1 August 1950.⁵⁶ The first Article of this law condemns any act directed against the Jews and humanity and is unique in its proclamation of retroactivity and extraterritoriality—which makes it a solid basis for criticism. The questions emerging from this aspect appertain to the fairness of a trial based on this law, as the criminal acts in question predate its enactment; and, the assumption that the committed crimes were not punishable, as they were not part of statutory law during the time of their commission.

2.2.1. *Nullum Crimen, Nulla Poena Sine Praevia Lege Poenali*

There can be no crime or punishment without a pre-existing penal law that applies to it.⁵⁷ Therefore, individuals cannot be arrested or prosecuted for crimes referred to in subsequent criminal laws that did not exist at the time of the crime's commission.⁵⁸ Since the crimes in

'Soziale Grundrechte – in Weimar Ersonnen und im Vereinten Deutschland zu Vollenden!' (2009) Friedrich-Ebert-Stiftung 191, 196–197.

⁵⁶ He faced 15 charges, 12 of which carried the death penalty under the law; see D Lasok, 'The Eichmann Trial' (1962) 11 *The International and Comparative Law Quarterly* 355, at 355; Nazi and Nazi Collaborators (Punishment) Law 1950, 5710-1950; see also Roman Boed, 'The Effect of the Domestic Amnesty on the Ability of foreign States to Prosecute Alleged perpetrators of Serious Human Rights Violations' (2000) 33 *Cornel International Law Journal* 297, 306–307.

⁵⁷ See Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art 22.

⁵⁸ John K T Chao, 'Individual Responsibility in International Law for the Crimes Against Humanity: The Attorney General of The Government of Israel Vs Eichmann', (2006) 24 *Chinese (Taiwan) Yearbook of International Law* 43, at 54.

question were committed before the enactment of the law under which Eichmann was tried, a legal loophole appeared to favour his acquittal.

Nonetheless, this rule did not constitute a general principle of international law at the time but merely a legal choice of States, considering the circumstances and needs that governed their legislative decisions. Evidence supporting this can be found in posterior domestic law and jurisprudence instances—regarding war crime or crime against humanity charges—with retroactive effect, which have not been disputed internationally.⁵⁹ The prohibition of such crimes reflects the principles of humanity, which is not subject to the *nullum crimen* principle; in terms of genocide, it is crucial to note that part of the international literature considers that the Genocide Convention enshrined principles that had already formed customary international law (thus preceding the Convention and the *Eichmann* case *per se*). This has been implicitly verified by the ICJ in the *Reservations* case, where it was decided that principles underlying the Convention were binding upon States regardless of their ratification status.⁶⁰

It follows that the Nazi and Nazi Collaborators (Punishment) Law's principles aligned with the rules and principles of the law of nations: this authorized the Israeli courts' ruling to impose the death penalty on Eichmann. These principles engender individual responsibility for the concerned crimes and hold universal character.⁶¹ Each State has the right to prosecute and penalise acts that violate international criminal law—and this includes cases preceded by abduction, insofar as the State 'whose sovereignty has been breached' does not raise a complaint or 'in the event of a diplomatic resolution of the breach.'⁶²

⁵⁹ See *War Crimes Act of 1945* [1945] Australia Act No. 48 amended by the *War Crimes Amendment Act* [1988] Australia, Act No. 3; *War Crimes Amendment* [1999] Australia, Act 1999 No. 174; and the *Law and Justice Legislation Amendment (application of Criminal Code)* Australia, Act No. 24 [2001]; see *Crimes Against Humanity and War Crimes Act* [2000] Canada C.S. 2000 c. 24; See *Polyukhovich v. Commonwealth of Australia* [1991] 172 CLR 501.

⁶⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) 1951 <<https://www.icj-cij.org/public/files/case-related/12/012-19510528-ADV-01-00-EN.pdf>> accessed 28 July 2021 [23]; see also William A Schabas, 'Retroactive Application of the Genocide Convention' (2010) 4 University of St. Thomas Journal of Law and Public Policy 36, 39.

⁶¹ *Attorney-General of the Government of Israel v. Adolf Eichmann* [1961] 36 ILR 277 (Supr. Ct Judgment).

⁶² See this opinion in the Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Nikolic* (Appeals Chamber) IT-94-2-AR73 (5 June 2003) 24.

The Supreme Court determined that jurisdiction over Eichmann was valid due to his status as a ‘fugitive from justice’ and his responsibility for ‘crimes of a universal character [...] condemned publicly by the civilized world.’⁶³ This rationale was also adopted by the International Criminal Tribunal for the Former Yugoslavia in the *Dragan Nikolic* case: dealing with a case of abduction for purposes of prosecution,⁶⁴ the Appeals Chamber referred to the precedent set by *Eichmann* to refuse declining jurisdiction on this basis. It also specified that the seriousness of ‘cases of crimes such as genocide, crimes against humanity and war crimes’ constituted ‘a good reason for not setting aside jurisdiction.’⁶⁵

The Supreme Court also enumerated three reasons that led it to consider these crimes as universal: they constitute acts that (i) damage vital international interests; (ii) impair the foundations and security of the international community; and (iii) violate universal moral values and humanitarian principles that are at the root of the systems of criminal law adopted by civilized nations.⁶⁶ Therefore, the *nullum crimen* principle could not provide safeguards for the concerned crimes as their prohibition was based on humanitarian and customary grounds. What is more, Eichmann’s acquittal in this matter would be significantly disproportionate to the overall effort to penalise crimes against the fundamental principle of humanity during peace and wartime—and this was only a short time after similar punishments had been imposed on his collaborators during the Nuremberg Trials.⁶⁷

In principle, the judiciary must consider the particularities of each case and the respective rules to be adopted, enacted or implemented when forming new case law. This process informs the domestic legal system with notions that may emanate, *inter alia*, from general principles and customary international law. Accordingly, the crimes committed need not be formally recognized by the individual State prior to or during their commission. In this author’s view, such recognition may be manifested through the principles of the international community or/and implied by the State’s reaction to their commission: distorting facts and concealing the crime is, for instance, a good indicator of acknowledging an act’s seriousness (and, therefore, its illegality). In this context, the law on the punishment of grave crimes can be applied retroactively: its implementation into national law is merely an act of formal

⁶³ Ibid 23; see Supr. Ct Judgment (n 61) 306.

⁶⁴ Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Nikolic* (Trial Chamber) IT-94-2-PT (9 October 2002) 84.

⁶⁵ See *Nicolic* case (n 62) 23–26.

⁶⁶ Supr. Ct Judgment (n 61) 291.

⁶⁷ See Leila Nadya Sadat, ‘Exile, Amnesty and International Law’ (2006) 81 (3) *Notre Dame Law Review* 955.

recognition of these principles' and rules' effect upon this law—and, as an extent, the criminal's conduct.

2.2.2. Principles of International Human Rights and Humanitarian Law

The notion of respecting human rights (affecting the international field since 1948 with the adoption of the Universal Declaration of Human Rights⁶⁸) was primarily enshrined within the Nuremberg Charter. The Charter recognizes certain acts that allow for retroactive punishment of violations of these rights.⁶⁹ It has been firmly established that, even though the Human Rights Declaration confirms the *nullum crimen* principle, this confirmation did not create any legal barriers to the conviction of Nazi criminals during the Nuremberg trials; nor did, as demonstrated above, the conviction of genocide, crimes against humanity, and war crimes run counter to the said principle.⁷⁰ There are, after all, other conventions with a rudimentary retroactive character—as they codify customary international law—including the European Convention on Human Rights⁷¹ and the four Geneva Conventions of 1949.⁷² Consequently,

⁶⁸ Universal Declaration of Human Rights 1948, 217 UNGA Res A (III) (UDHR).

⁶⁹ Charter of the International Military Tribunal-Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (adopted 8 August 1945) 82 UNTS 279 (Nuremberg Charter) art 6(c).

⁷⁰ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR); this fact may be verified by resort to the debates concerning the drafting of Article 11(2) of the Declaration; William A Schabas and Oc Mria, 'The Contribution of the Eichmann Trial to International Law' (2013) 26 *Leiden Journal of International Law* 667, 681.

⁷¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR); Punishment for violating the prohibition of war crimes, crimes against peace and against humanity is also provided for in the law concerning the Punishment of Persons Guilty for War Crimes, Crimes Against Peace and Against Humanity 1945, Control Council for Germany Law No.10 <<https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2134&context=ils>> accessed 27 October 2023; see Boed (n 56) 3.

⁷² Geneva Convention (I) for The Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GCI); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85(GCII); 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GCIII); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV).

the argument that jurisdiction should be rejected on the basis of retroactivity claims regarding human rights and humanitarian law violations is unfounded.

Nazi policies were subject to criminal punishment to the extent that, failing to respect the rights of the citizens of other States, they contravened basic human principles that the international community had aimed to protect—even during times of armed conflict. The treaties of Versailles and Sevres (both adopted after World War I) offer indisputable evidence in this regard: the former refers to the ‘supreme offence against international morality and the sanctity of treaties’, indicating an intention of the parties for a retroactive application of the treaty; and the latter stipulates prosecution of ‘the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on the 1st August, 1914.’⁷³ Both treaties refer to the violation of existing humanitarian rules that prohibited these acts, based in customary international law norms.

On the other hand, evidence of the international community’s attempt to protect these principles before the two World Wars existed through the Hague Conventions of 1899 and 1907. A distinctive paradigm to this end may be found in the preamble of the 1899 Hague Convention (IV)⁷⁴ which declares that in cases not enveloped by the Convention:

populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.⁷⁵

The Martens Clause (as the above paragraph is known) was included in the denunciation clauses of the four Geneva Conventions of 1949⁷⁶ and used in the Nuremberg trials to emphasize the unlawful nature of the crimes under consideration. In the *Alstötter* case, for example, the clause proved that the exile of inhabitants of the occupied territories was prohibited under customary humanitarian law; the Krupp case saw the US Military Tribunal recognising evidence of reference to belligerent occupation in both the wording of the Clause

⁷³ See, Treaty of Peace between the Allied and Associated Powers and Germany (adopted 28 June 1919, entered into force 10 January 2020) 225 Consol. T.S. 482 (Treaty of Versailles) art 227; Treaty of Peace Between the Allied and Associated Powers and Turkey (adopted 10 August 1920) UKTS 11 (Treaty of Sevres) art 230.

⁷⁴ Theodor Meron, ‘The Martens Clause: Principles of Humanity and Dictate of Public Conscience’ (2000) 94 *American Journal of International Law* 78.

⁷⁵ Hague Convention (IV) Regarding the Laws and Customs of War on Land (1907) 205 CTS 277, Preamble.

⁷⁶ GCI Art. 63; GCII GC II Art. 62; GC III Art. 142; GC IV Art. 158.

and the debates at the time.⁷⁷ Therefore, it is impossible to claim that the respective acts were not legally prohibited at the time of Eichmann's commission, as they contravened principles of humanity and established custom. The District Court of Jerusalem finding that the Nazi and Nazi Collaborators (Punishment) Law reflects general principles of the law of nations was thus based on the time's (international) legal reality. Again, the attempts of the Nazis and their collaborators to conceal their actions through tactics like cremation of corpses and destroying evidence demonstrated their understanding that such acts violated these established rules.⁷⁸

Therefore, the retroactive charge imposed by Israeli courts did not breach international law.⁷⁹ It aligned with international standards, as exemplified the Weimar Constitution *per se*. Furthermore, since the absence of safeguarding human rights and compliance with humanitarian law regulations by a State does not absolve personal criminal responsibility, he could not evade conviction merely on the basis of obeying orders.⁸⁰ Today, it is widely agreed that military personnel must not follow superior orders which are manifestly unlawful under international humanitarian law.⁸¹

2.3. *Israel's Genuine Link with Jewish Victims of the Holocaust*

Under international law, for a state to have jurisdiction over a criminal and be able to take measures against them, there must be a clear association between the state and the criminal's act: a *genuine* link between the concerned State and the accused is necessary to provide legitimacy to the trial. According to the traditional view, a link between Israel Eichmann was to be sought, among others, on the principles of territoriality, nationality and 'passive' personality,⁸² which enacts jurisdiction on the basis of the victim's nationality. In the two latter cases, as with the principle of universality discussed below, it is acknowledged that the crime

⁷⁷ Ibid 80; see also *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 AJIL 172, 622 and 958-59; at 622.

⁷⁸ Dist. Ct (n 54) 22-23 and 283; Lippman (n 13) 112 and 113.

⁷⁹ See Dr J Kermisch, 'Eichmann's Role in the Destruction of Jews' *Yad Vashem-Remembrance Authority for the Disaster and Heroism* (Jerusalem, 1961) 19.

⁸⁰ Lippman (n 13) 113–115.

⁸¹ See Rule 154, Jean Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol 2 (Cambridge University Press 2009).

⁸² See also Iain Cameron, 'International Criminal Jurisdiction, Protective Principle', *Max Plank Encyclopedias of International Law* (2007) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1902?prd=EPIL>> accessed 27 October 2023.

may have been committed in a foreign State's territory.⁸³ However, Israel's link to the Jewish victims of the Holocaust was challenged predominantly and legitimately due to this State's status before and during WWII.⁸⁴ Namely, as jurisdiction is defined by strictly territorial terms,⁸⁵ Israel's ability to support the violation of its law was questioned because it did not exist as a state with a specified territory during the time of the said crimes' commission. Therefore, the *Eichmann* case relied primarily on moral connections, resulting in Israel's jurisdiction over the criminal being heavily contested.

2.3.1. The Nationality Principle

According to Argentina's perspective as mentioned above, the State that had the authority to take over the *Eichmann* trial was Germany; this was based primarily on the nationality link: the accused was a German citizen. Despite acquiring Austrian citizenship during his 23-year stay in Austria, Eichmann lost his German citizenship as per Article 25 of the German Citizenship Act of 1913. However, his decision to return to Germany and voluntarily join German organs led to his reacquisition of German nationality under Articles 14 and 15 of the same law.⁸⁶ As a German citizen, therefore, Eichmann had the right to seek diplomatic protection from his State. However, diplomatic protection could be denied due to the individual's separation from the State upon leaving its territory and obtaining a false identity as a stateless person—suggesting a deliberate renunciation of Eichmann's ties with Germany and a lack of eligibility for invoking the right of diplomatic protection.⁸⁷

The sole requirement that international law places between States and individuals holding their nationality is the existence of a *genuine* link. This principle was aptly exemplified in the *Nottebohm* case of 1955,⁸⁸ where the ICJ established that the purchase of citizenship with

⁸³ Ioannou (n 3) 24; see, for example, *The Commander's Handbook on the Law of Naval Operations* [1995] NOW 1-14M. This Handbook recognizes the following types of jurisdiction: territorial (para. 3.11.1.1), nationality (para. 3.11.1.2), passive personality (para. 3.11.1.3), protective (para. 3.11.1.4), and universal (para. 3.11.1.5)

⁸⁴ Marion Mushkat, 'The Problems of the Eichmann Trial' *Yad Vashem* (1961) <https://www.yadvashem.org/yv/pdf-drupal/en/eichmann-trial/problems_of_eichmann_trial.pdf> accessed 27 October 2023.

⁸⁵ O'Keefe (n 45) 739.

⁸⁶ *German Nationality Act* [1913] Federal Law Gazette III 102-1, sections 14-15.

⁸⁷ Baade (n 14) at 407.

⁸⁸ *Nottebohm Case (Lichtenstein v Guatemala)* (Second Phase) [1955] I.C.J. Rep 18.

monetary means did not demonstrate a genuine link between the State and the person obtaining said citizenship.⁸⁹

Be that as it may, the German courts were also reluctant to conduct a comparable trial, as West Germany refrained from expressing an interest in the case.⁹⁰ The absence of an agreement obligating Israel to extradite Eichmann to Germany facilitated the convergence between the two countries on Israeli jurisdiction. Contrary to the *Eichmann* case, there were occasions—such as the case of Advocate General of Hesse Fritz Bauer—where individual initiatives were taken to initiate the extradition process that were declined by Bonn.⁹¹ With this, Germany's desire to allow for a trial in Israel was also formally established by the offer of assistance in conducting the trial and the submission of documented evidence by the German leadership.⁹²

2.3.2. *The Passive Nationality and Territoriality Principles*

Prime Minister Ben Gurion expressed, through his letter to the President of the World Jewish Congress (Nahum Goldmann) on 2 June 1960, the opinion that the jurisdiction of Israeli courts emerged out of the necessity for legal representation of the Jewish victims of the Holocaust, most of whose relatives and survivors resided in Israel. He also affirmed his conviction regarding the 'fulfilment of historical justice' achieved by bringing Eichmann to trial before Israeli courts, which constituted the mere adjudicative body enjoying jurisdiction to represent the sovereign Jewish State. Thus, the role of his State's courts was to emphasize the specific and exceptional nature of the Nazi violence towards Jewish people in the past; the importance of crimes against the entire human race would also be regarded thereon.⁹³

The passive personality link was founded on the Jews residing in Palestine and the millions of Jewish victims, for whose extermination Eichmann was criminally accountable. Nevertheless, Israel's lack of territory and sovereignty during the commission of the crimes could have invalidated its claim regarding the extension of sovereignty to its citizens: Eichmann's lawyer, Robert Servatius, argued that jurisdiction was determined by the principle of territoriality. In this particular case, Israel lacked a 'recognised linking point' that could grant it the international jurisdiction necessary to adjudicate. Most of the Jews involved were citizens of foreign States,

⁸⁹ Chatzikonstantinou (n 1) 137.

⁹⁰ Lippman (n 13) 110.

⁹¹ Ibid 53, quoting Zvi Aharoni and Wilhelm Dietl, *Operation Eichmann Pursuit and Capture* (J Wiley 1997) 44.

⁹² Baade, (n 14) 410.

⁹³ Liskofsky (n 19) 208.

primarily Germany.⁹⁴ As a result, Israel had exceeded its jurisdiction under international law, which allowed for an assertion of the States' sovereign rights flowing from the material 'existence' of a State and its establishment in a specific territory.

The District Court of Jerusalem ultimately found a genuine link between the extermination of the Jews and Israel: the Declaration of the Establishment of the State of Israel,⁹⁵ from which it emerged as the birthplace of the Jewish nation. International recognition further attested to the bond between the Jewish people and Israel during the United Nations General Assembly of 1948—where it was expressed that the establishment of the Israeli State reflected the 'natural right of the Jewish people to be masters of their own fate, like all other nations in their own sovereign State.'⁹⁶ Upon the international society's acknowledgement of its ability to represent the Jews, Israel created a connection with Eichmann. Additionally, Jewish individuals living in Palestine during the war participated in the allied effort to liberate Europe from Nazism and collaborated with other nations in holding those responsible accountable during the Nuremberg trials.⁹⁷ The authority of Israel was further reinforced by the fact that, as determined by the District Court, half of its populace were Jewish survivors who escaped the disastrous schemes of the Third Reich, as well as family members of those who perished.⁹⁸

In this sense, Israel's priority to protect its national interests validated its jurisdiction, which it had the right to assert against those who insisted on the absence of a genuine link. Eichmann himself had contradicted the same interests by attempting to eradicate the Jewish population residing in Palestinian territory. To deny the right of Israel to prosecute the accused—whose actions had caused annihilation, moral collapse and loss not only among the Jews of Palestine but also the Jewish community around the world—dangerous deviation in a post-war society claiming to follow established customs and the principles of humanity.⁹⁹ The establishment of the State of Israel enabled the Jews residing in Palestine at the time to implement a criminal law to prosecute those who infringed upon their honour and dignity. This was previously hindered by the absence of a sovereign entity with such jurisdiction prior to the war.¹⁰⁰

⁹⁴ See Dist. Ct. Judgment (n 54) 50, 53-54.

⁹⁵ *The Declaration of the Establishment of the State of Israel* [1949] Tel Aviv 5 Iyar 5708.

⁹⁶ Dist. Ct Judgment (n 54) at 52; see also Lippman (n 13) 107–108.

⁹⁷ Sara Reguer, 'Palestine and Nazi Germany' in Francis R. Nicosia (eds), *The Third Reich and the Palestine Question* (Texas University Press 1985) 319.

⁹⁸ Dist. Ct Judgment (n 54) 50, 53-54.

⁹⁹ *Ibid* 54; see also para. 35.

¹⁰⁰ *Ibid* 56.

The Supreme Court confirmed the District Court's opinion, referring to the *Lotus* case and stating that the concept of State sovereignty 'demands the preclusion of any presumption that there is a restriction on its independence'. It went on to state that the fact that 'principle of the territorial character of criminal law is firmly established in various states' does not contradict the case that 'in almost all such States criminal jurisdiction has been extended, in ways that vary from State to State, so as to embrace offences committed outside its territory'.¹⁰¹ Therefore, the particular circumstances allowing for jurisdiction in this case are not based on its territorial elements but on its connection with the millions of victims of the Final Solution; such a fact had offered the ground to States in the past to extend their criminal jurisdiction to the administration of justice in third States. The State of Israel, as an expression of the Jewish community's desire to acquire the territorial sovereignty enjoyed by all human beings, thus enjoyed a genuine link with *Eichmann*.

3. On Universal Jurisdiction

As this article has shown, Israel's ability to conduct a fair trial was widely disputed for reasons ranging from the conditions of Eichmann's withdrawal from Argentina to the jurisdiction of the courts of Israel to conduct a trial without holding a genuine link. These objections represent a fundamental question within the time's international theory: the limits of universal jurisdiction that Israel used, to pave the way for the prosecution and conviction of the accused. Indeed, universality as a basis for jurisdiction was generally disputed at the time, a fact which made it a dubious ground for adjudication. However, certain special circumstances allowed for the employment of such jurisdiction by States, insofar as they act as representatives of the international community.

3.1. *Appealing to the Special Circumstances of the Case*

3.1.1. *Hostis Humani Generis*

The principle of universality may be enacted in unique cases including the employment of the concept *hostis humani generis*. Two categories fall within this context in international law: the pirate, who operates without the flag State's consent; and the international criminal.

Eichmann's link to the pirate could provide a basis for jurisdiction—his actions were directed against human life and dignity *per se*. On the other hand, such link implies the need for additional proof concerning the legality of this doubtful parallelism. The crimes of the pirate—acting individually—are committed of his own free will, irrespective of the will of the State of

¹⁰¹ Ibid 57; Supr. Ct Judgment (n 61) 284; see also *Lotus Case* (n 3) 18 and 30.

nationality. Therefore, he also acts without his State's diplomatic protection, while subjecting himself to any other State's jurisdiction: the courts of the arresting State will thus usually exercise jurisdiction, without the jurisdiction of other national courts being excluded.¹⁰² This scope differs from that of Eichmann, who committed his acts as a state organ. It is worth noting that even Hannah Arendt, who was a strong proponent of the theory of universal jurisdiction on the basis of such an analogy, eventually admitted that invoking the pirate theory in the case of Eichmann would not suffice: '[f]or the definition of piracy to apply, it is both factually and legally essential for the pirate to have acted out of private motives.'¹⁰³

The second category concerns those who commit gross violations—war crimes, crimes against humanity and genocide. This criminal, whose acts are condemned because of their unique and atrocious character,¹⁰⁴ may fall under jurisdiction of the courts of the State holding a passive or active link with him; as well as under universal jurisdiction. This means that any State in whose hands the offender may find himself can decide to prosecute or extradite him to any State that is willing to prosecute, in accordance with the principle of *aut dedere aut judicare*.¹⁰⁵ In this instance, the characterization of a person as *hostis humani generis* under international criminal law draws its roots from the Nuremberg trials.¹⁰⁶ In addition, States had defined crimes against humanity in the Nuremberg Charter's Article 6 (c), as follows:

Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

As this article shows, the crimes against humanity charge was well-founded in the case of Eichmann, whose decisions allegedly shaped the architecture of Hitler's Final Solution.¹⁰⁷ To this end, Arendt also noted that what should form the trial against Eichmann was a crime

¹⁰² See Chandler P Anderson 'As if for an Act of Piracy', (1922) 16 AJIL 260, 261.

¹⁰³ David Luban, 'A Theory of Crimes Against Humanity', (2004) 24 Yale Journal of International Law 85, 124 [quoting Hannah Arendt, *Eichmann In Jerusalem: A Report on the Banality of Evil* (1965) 423].

¹⁰⁴ See Bardo Fassbender and Anne Peters (ed.), *The Oxford Handbook of the History of International Law* (2012) at 130; see also Sadat (n 71) 1009.

¹⁰⁵ C. Mitchell, *Aut Dedere, aut Judicare: The Extradite or Prosecute Clause in International Law* (OUP 2012), at 301.

¹⁰⁶ Chao (n 58) 51.

¹⁰⁷ For a different aspect see Rut Bettina Birn, 'Fifty Years after: A Critical Look at the Eichmann Trial' (2011) 44 Case Western Reserve Journal of International Law 443.

against all of humanity which 'is in no way limited to the Jews or the Jewish question.'¹⁰⁸ Although some efforts were made to establish Israel's jurisdiction on the basis of the doctrine of passive personality, this was rejected by the Supreme Court, clarifying that jurisdiction was based on the universality principle: the crimes were not limited to the Jews but directed against the whole of humanity.¹⁰⁹ Thus, the Court confirmed that this enacted the special circumstances necessary for the principle of universality to apply.

3.1.2. *The Case of Genocide*

Before *Eichmann*, the exercise of universal jurisdiction to prosecute the crime of genocide had fallen out of favour among States that eventually decided the content of the General Assembly Resolution 96(1), forming the Genocide Convention. In this context, the United States delegate had expressed the view that '[t]he principle of universal punishment was one of the most dangerous and unacceptable of principles.'¹¹⁰ Three years after the adoption of the Convention, the International Court of Justice (ICJ) opined to this end that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on all States, even without any conventional obligation.'

Therefore, the ICJ provided a basis for universal jurisdiction by adding the prohibition of genocide to the list of general principles of international law—or *jus cogens* norms—the violation of which calls all States to find and punish the perpetrators. The District Court of Jerusalem took the opportunity in *Eichmann* to note the important distinction between such principles 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.'¹¹¹ According to the Court, the territorial jurisdiction constituted in this respect a 'compulsory minimum,'¹¹² 'a conservative compromise that could be contrasted with the more exigent provisions of the Geneva Conventions, which imposed a rule of compulsory universal jurisdiction.'¹¹³

3.1.3. *Concluding Remarks*

¹⁰⁸ See Luban (n 103) 152–156, and 223 (quoting Hannah Arendt).

¹⁰⁹ Schabas and Mria (n 70) 692; see also Theodor Meron, 'Public International Law Problems of the Jurisdiction of the State of Israel' (1961) 88 *Journal du Droit International* 986, 1058

¹¹⁰ UN Doc A/C6/SR100 (1951).

¹¹¹ Dist. Ct Judgment (n 54) 22; see also Schabas and Mria (n 70) 689.

¹¹² Dist. Ct Judgment (n 54) 24–25.

¹¹³ Schabas and Mria (n 70) 689.

The Eichmann case, by subjecting these crimes to the perspective of universal jurisdiction, paved way for the creation of an international criminal system capable of adjudicating grave violations without disturbing international peace and security. Indeed, other factors, such as the defendant's perspective, should be also regarded in this process;¹¹⁴ however, this should be placed in the same boat as the necessity to punish grave crimes against international humanitarian, human rights and criminal law—representing the adherence of a just society to the principle of humanity in the face of inhumane acts. These crimes, although different in nature from piracy, are equally abominable (causing the degradation of human dignity) and fall within the special circumstances that give rise to universal jurisdiction;¹¹⁵ thus, they render States responsible for the prosecution or extradition of the accused. States that fail to do so breach their international obligations under international criminal law and under the laws of an international society that that seeks to serve justice from the perspective of all subjects involved.

3.2. Israeli Courts as Representatives of Humanity

While Israel's jurisdiction based on the representation of the Jewish community was generally accepted, it became problematic when the court referred to the charge of crimes against humanity and human dignity. Jurisdiction over cases involving crimes against the principles of the international community lied with international bodies possessing the adjudicative power—such as international courts and tribunals that are specifically responsible for the protection of human rights and principles of international humanitarian law—and did not fall within the purview of individual States. Besides, the initial instances of legal proceedings against Third Reich offenders, focusing on crimes against humanity, were overseen by an international entity: the International Military Tribunal.

Indeed, Eichmann's vile deeds were not exclusively aimed at the Jewish community but included various elements, such as citizenship, mental capacity, sexual orientation, and facial

¹¹⁴ Gluzman (n 11) 10–18.

¹¹⁵ See, for example, Richard van Elst, 'Implementing Universal Jurisdiction Over Grave Breaches of the Geneva Conventions' (2000) 13 (4) *Leiden Journal of International Law* 815; Bernard H Oxman and Brigitte Stern, 'Universal Jurisdiction over Crimes against Humanity under French Law—Grave Breaches of the Geneva Conventions of 1949—Genocide—Torture—Human Rights Violations in Bosnia and Rwanda' (1999) 93 (2) *American Journal of International Law* 525; Roger O'Keefe, 'The Grave Breaches Regime and Universal Jurisdiction' (2009) 7(4) *Journal of International Criminal Justice* 811; Ward Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (2009) 7(4) *Journal of International Criminal Justice* 723.

or skin features. Much of the international literature and press that focused on the case¹¹⁶ argued that adequately representing these groups required the recognition of an international tribunal's jurisdiction rather than a genuine connection with Israel. Therefore, creating an international initiative for such a tribunal would demonstrate the moral obligation to represent all victims of the Nazi regime, not just the Jewish population. A typical example concerns Hannah Arendt: changing her position on Israel's ability to prosecute Eichmann for the relevant offences, Arendt characterised the Holocaust as a new crime, a crime against humanity, the human condition and human dignity.¹¹⁷ Influenced by Karl Jaspers, she held that Israel's courts lacked jurisdiction to prosecute Eichmann; rather, this duty belonged to a tribunal with jurisdiction to try individuals regardless of their nationality.¹¹⁸ She therefore inferred that an international tribunal concerned with humanity at large (rather than the Jewish community) needed to be established.¹¹⁹

The Supreme Court of Israel responded that national courts conducting trials for international crimes do not enforce domestic law; rather, they enforce the reach of international law, acting as agents of the international community.¹²⁰ The Court stressed, in detail, that:

Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed.¹²¹

The above allows for a definite, mainly unprecedented (for that time) interpretation: national courts may exercise universal jurisdiction for grave breaches against international law. This view has been endorsed by posterior international jurisprudence.

¹¹⁶ Liskofsky (n 19) 206-207; J E S Fawcett, 'The Eichmann Case' (1962) 27 *British Yearbook of International Law* 181; Deborah E Lipstadt, *The Eichmann Trial* (Jewish Encounters Series 2011) 24–31; D Lasok, 'The Eichmann Trial' (1962) 11(2) *International and Comparative Law Quarterly* 355.

¹¹⁷ See Luban (n 103) 87.

¹¹⁸ *Ibid* 88.

¹¹⁹ Daniel Maier-Katkin, *The Reception of Hannah Arendt's Eichmann in Jerusalem in the United States 1963-2011* (Journal for Political Thinking 2011) <<http://www.hannaharendt.net/index.php/han/article/view/64/84>> accessed 27 October 2023.

¹²⁰ See Luban (n 102) 124.

¹²¹ *Supr. Ct Judgment* (n 61) 304.

To prevent the State, from enforcing their judicial powers when dealing with crimes that violate the fundamental principle of human dignity would imply that the State is also not obligated to enforce the law in such cases. One could then question the reasons why a State would want to be part of an international community that imposes obligations but excludes national courts from punishing violations against their fundamental common law principles—*inter alia*, this would serve the creation of the ‘law of the jungle’. Instead, in cases concerning crimes such as those being considered, the Supreme Court of Israel rightly stated that territorial considerations cannot affect jurisdiction. This is additionally one of the reasons why claims that prioritize the territorial aspect of jurisdiction have been dismissed.¹²²

Finally, the ruling of the District Court of Jerusalem reflects a more progressive, albeit implicit, stance: it acknowledged that States where persons suspected of such crimes resided, have a duty, not just a right, to exercise jurisdiction to prevent the impunity of grave breaches of international law. As the Court stated:

There is considerable foundation for the view that the grant of asylum by any country to a person accused of a major crime of this type and the prevention of his prosecution constitutes an abuse of the sovereignty of that country contrary to its obligation under international law.¹²³

The Supreme Court also recognized the impact of the Holocaust memory on the judges involved. However, it reiterated the District Court’s position¹²⁴ that this did not hinder their ability to conduct Eichmann’s trial in an impartial, transparent and politically neutral manner.¹²⁵

Conclusion

In summary, it is noteworthy that the Supreme Court of Israel has taken a positive step towards expediting international processes by declining to acknowledge that a State seeking to exercise universal jurisdiction must offer to extradite criminals to their own State before deciding to prosecute.¹²⁶ The Court thus eliminated the requirement of a procedural pattern accompanying the *aut dedere aut judicare* principle, a fact that has been consistently affirmed by international practice and agreements since then.¹²⁷

¹²² Ibid 303.

¹²³ Dist. Ct Judgment (n 54) 74.

¹²⁴ Ibid 277.

¹²⁵ Supr. Ct Judgment (n 61) 319.

¹²⁶ Ibid 302.

¹²⁷ See Amnesty International (n 24) 7.

The case's greatest contribution to international law also extends beyond the issue of jurisdiction: Eichmann's trial redirected the international community's focus from rigid adherence to the status quo towards the development of a dynamic legal system capable of adapting to changing circumstances. The case's impact on international law was therefore foundational to its evolution. The conditions emerging from the case drew their legality from the necessity to consider the special circumstances (which follows international jurisprudence) diverging from initial predictions concerning the law of the 'jungle'. It is this paradigm that has provided modern courts with the authority to try and convict foreign officials accused of crimes against humanity and war crimes—solely relying on the 'intransgressible principles' of international law.¹²⁸ Ultimately, the Eichmann trial represents a significant legal precedent that will likely continue to shape the collaboration between international law and domestic jurisprudence in the depths of the foreseeable time.

¹²⁸ See *Legality Of The Threat Or Use Of Nuclear Weapons* (Advisory Opinion) 1996 <<https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>> accessed 27 October 2023 [79].