Judgment

1. The Appellant, Adolf Eichmann, was found guilty by the District Court of Jerusalem of offences of the most extreme gravity against the Nazis and Nazi Collaborators (Punishment) Law 5710-1950 (hereinafter - "the Law") and was sentenced to death. These offences may be divided into four groups: Group One: Crimes against the Jewish People, contrary to Section I(a) (1) of the Law;Group Two: Crimes against Humanity, contrary to Section 1(a) (2);Group Three: War Crimes, contrary to Section 1(a) (3);

Group Four: Membership of Hostile Organizations, contrary to Section 3.

2. The acts constituting these offences, which the Court attributed to the Appellant, have been specified in paragraph 244 of the Judgment.

The acts belonging to Group One are:

(1) That during the period from August 1941 to May 1945, in Germany, in the territories of 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;

(2) that during that period and in the same places he, together with others, subjected millions of Jews to living conditions which were likely to bring about their physical destruction, in order to implement the said plan, with intent to exterminate the Jewish People;

(3) that during that period and in the same places he, together with others, caused grave bodily and mental harm to millions of Jews, with intent to exterminate the Jewish People;

(4) that during the years 1943 and 1944 he, together with others, "took measures to prevent births among Jews, by directing that births be banned and pregnancies terminated among Jewish women in the Therezin Ghetto, with intent to exterminate the Jewish People."

The acts constituting the crimes in Group Two are as follows:

(5) that during the period from August 1941 to May 1945 "he, together with others, caused in the places mentioned in Clause (1), the murder, extermination, enslavement, starvation and deportation of the Jewish civilian population;"

(6) that during the period from December 1939 to March 1941 "he, together with others, caused the deportation of Jews to Nisko, and the deportation of Jews from the areas in the East annexed to the Reich, and from the Reich area proper, into the German-occupied area in the East, and to France;"

(7) that in carrying out the above-mentioned activities he persecuted Jews on national, racial, religious and political grounds;"

(8) that during the period from March 1938 to May 1945 in the places mentioned above "he, together with others, caused the plunder of the property of millions of Jews through mass terror, linked with the murder, destruction, starvation and deportation of those Jews;"

(9) that "during the years 1940-1942 he, together with others, caused the expulsion of hundreds of thousands of Poles from their homes;"

(10) that in 1941, he, together with others, caused "the expulsion of more than fourteen thousand Slovenes from their homes;

(11) that during World War II he, together with others, caused the expulsion of "tens of thousands of Gypsies from Germany and German-occupied areas and their transportation to the German-occupied areas in the East;"

(12) that in 1942 "he, together with others, caused the expulsion of 93 children of the Czech village Lidice."

The acts comprised in Group Three of the crimes are:

That "he committed the acts of persecution, expulsion and murder mentioned in Counts 1-7, so far as these were done during World War II, against Jews from among the populations of the countries occupied by the Germans and by the other Axis States."

The acts comprised in Group Four are:

That as from May 1940 he was "a member of three Nazi police organizations which were declared criminal organizations by the International Military Tribunal which tried the major war criminals, and as a member of such organizations he took part in acts declared criminal in Article 6 of the London Charter of 8 August 1945."

3. The Appellant has appealed to this Court against both the conviction and the sentence.

4. The oral and written contentions of learned Counsel who supported the appeal, Dr. Servatius, may, insofar as they are directed against the conviction, be divided under two categories:

(1) Purely legal contentions, the principal object of which is to undermine the basis of the jurisdiction of a court in Israel to try the Appellant for the crimes in question.

(2) Factual contentions of which the object is, in essence, to invalidate the finding of the District Court that there was no foundation for the defence of the Appellant that he played the part of a `small cog' in the machine of Nazi destruction, that in all the above-mentioned activities he functioned as a junior official, and one without any initiative of his own, and that nothing but the compulsion of an order and blind obedience to a command from above guided him in the performance of his task through all its stages.

With reference to these contentions, Counsel for the Appellant has asked this Court for leave to produce new evidence at the stage of the appeal. At the conclusion of his argument we decided to refuse this application, and the reasons for our decision will be set out below.

5. The District Court has, in its Judgment, dealt with both categories of contentions in an exhaustive, profound and most convincing manner. We should say at once that we fully concur, without hesitation or reserve, in all its conclusions and reasons, because they are fully supported by copious judicial precedents that were cited in the Judgment and by the substantial proof culled and abstracted out of the monumental mass of evidence produced to the Court.

Moreover, we are in duty bound to state that, were it not for the grave outcome of the decision of the Court constituting the subject of the Appeal, we would have seen no need whatever to formulate our opinion separately and in our own language - as we contemplate doing - for the conclusions of the District Court rest on solid foundations. Nor is it superfluous for us to take this opportunity and to express our appreciation of the immense effort expended by the learned Judges, who tried the case in the lower Court, in the actual conduct of the arduous and wearying proceedings before them. As to the contribution made to this responsible task by the Attorney General and his assistants on the one hand, and Counsel for the Defence on the other, appropriate and significant observations have already been embodied in the Judgment of the District Court, and we can do no more than associate ourselves with them.

6. Most of the legal contentions of Counsel for the Appellant concentrate on the argument that the District Court, in assuming jurisdiction to try the Appellant, acted contrary to the principles of international law. These contentions are as follows:

(1) The Law of 1950, which is the only source of the jurisdiction of the Court in this case, constitutes ex post facto penal legislation, which established as offences acts that were committed before the State of Israel came into existence; therefore, the validity of this Law is limited to citizens of Israel alone.

(2) The offences for which the Appellant was tried are in the nature of `extra-territorial offences,' that is to say, offences that were committed outside the territory of Israel by a citizen of a foreign state; and even though the above- mentioned Law confers jurisdiction in respect of such offences, it conflicts, in so doing, with the principle of territorial sovereignty, which postulates that only the country within whose territory the offence was committed, or to which the offender belongs - in this case, Germany - has jurisdiction to punish therefor.

(3) The acts constituting the offence of which the Appellant was convicted were, at the time of their commission, acts of state.

(4) The Appellant was brought to Israeli territory, to be tried for the offences in question, unwillingly and without the consent of the country in which he resided, through agents of the State of Israel who acted on the orders of their government.

(5) The Judges of the District Court, being Jews and feeling a sense of affinity with the victims of the plan of extermination and Nazi persecution, were psychologically incapable of giving the Appellant an objective trial.

7. We reject all these contentions.

A brief reply to the first two of these - and we shall deal with each separately - will be found in paragraph 10 of the Judgment:

"The Court has to give effect to a law of the Knesset, and we cannot entertain the contention that such a law conflicts with the principles of international law."

In the submission of Counsel for the Appellant this reply is mistaken, for - he argues - where there is such a conflict it is imperative to give preference to the principles of international law. We do not agree with this view. According to the law of Israel, which is identical on this point with English law, the relationship between municipal law and international law is governed by the following rules:

(1) The principle in question becomes incorporated into the municipal law and a part of that law only after it has achieved general international recognition. "The municipal courts of a particular state" said Mr. Justice Dunkelblum in Motion 41/49 (Shimshon Ltd. v. Attorney General, 4 Pesakim, vol. 4, p. 143, pp. 145, 146)

"will recognize the principles of international law and will decide in accordance with those principles only if they have been agreed to by all other civilized peoples, so that it is a necessary assumption that such principles have also been accepted by that state. A principle of international law must therefore be established by sufficient proof to justify the conclusion...that it is recognized and well known by the majority of states."

(See also judgment of Lord Alverstone in West Rand Gold Mining Co. v. Rex (1905) 2 K.B. 391, 406-7; and that of Lord Macmillan in The Cristina (1938) 1 All E.R. 719, 725).

(2) This, however, only applies where there is no conflict between the provisions of municipal law and a rule of international law. But where such a conflict does exist, it is the duty of the court to give preference to and apply the laws of the local legislature (see Israeli and English precedents mentioned in paragraph 10 of the Judgment). True, the presumption must be that the legislature strives to adjust its laws to the principles of international law which have received general recognition. But where a contrary intention clearly emerges from the statute itself, that presumption loses its force, and the court is enjoined to disregard it.

(3) On the other hand, in view of the above-mentioned presumption, a local statutory provision, which is open to equivocal construction and whose content does not demand another construction, must be construed in accordance with the rules of public international law. (Amsterdam v. Minister of Finance, Piske Din, vol. 6, pp. 945, 966; Lauterpacht-Oppenheim, 8th edition, vol. 1, p. 41, para. 21a). It should be noted that this rule of construction has no relevance to this case, since the nature of the law in question as one which established extra-territorial offences with retroactive effect is

not in doubt. It follows from the second rule that even if Counsel for the Appellant was right in contending that the character of the law as described above is repugnant to international law, even then this contention cannot avail him.

8. We reach the same conclusion also in accordance with the first rule. For the sake of convenience, we shall state the grounds of our conclusions separately in respect of each of the two above-mentioned contentions of Counsel for the Appellant. As to the first contention, the reply must be that the principle nullum crimen sine lege, nulla poena sine lege, insofar as it negates penal legislation with retroactive effect, has not yet become a rule of customary international law:

"There is no rule of general customary international law forbidding the enactment of norms with retrospective force, so called ex post facto laws" (Kelsen, Peace through Law (1944) p. 87).

"There is clearly no principle of international law embodying the maxim against retroactivity of criminal law" (Julius Stone, Legal Controls of International Conflict (1959) p. 369).

It is true that in many countries the above-mentioned principle has been embodied in the constitution of the state or in its criminal code, because of the considerable moral value inherent in it, and in such countries the court may not depart from it by one iota. (See Cr.A. 53/54: Eshed, Merkaz Zmani L'tahbura v. Attorney General, Piske Din, vol. 8, pp. 785, 819, 830-832.) But this state of affairs is not universal. Thus, in the United Kingdom, a country whose system of law and justice is universally recognized as being of a high standard, there is no constitutional limitation of the power of the legislature to enact its criminal laws with retrospective effect, and should it do so, the court will have no power to invalidate them (C.K. Allen, Law in the Making, 5th ed., p. 444). True, in those countries, too, there is widespread recognition of the moral value of the principle inherent in the above-mentioned maxim. But that recognition has become legally effective only to the extent that that maxim constitutes a rule of the interpretation of statutes. That is to say: Where there is a doubt as to the intention of the legislature, the court is directed not to construe the criminal statute under its consideration so as to include within its purview an act that was committed prior to its enactment. (Queen v. Griffiths (1891) 2 Q.B. 145, 148; Allen ibid., pp. 443-444). Similarly, the British Parliament usually avoids passing a criminal statute with retroactive effect, and it will do so only in an exceptional case where the object of salus populi impels the taking of this course, as stated by Willes J. in Phillips v. Eyre (L.R. 6 Q.B. 1, 25) which is cited in paragraph 7 of the Judgment.

Therefore, if it is the contention of Counsel for the Appellant that we must apply international law as it is, and not as it ought to be from the moral point of view, then we must reply that precisely from a legal point of view there exists no such rule of international law; it follows necessarily that the above-mentioned principle cannot be deemed to be part of the Israel municipal law by virtue of international law, but that the extent of its application in this country is the same as in England.

As to the ethical aspect of the principle, it may be agreed that one's sense of justice generally recoils from punishing a person for an act committed by him which, at the time of its commission, had not yet been prohibited by law, and in respect of which he

could not have known, therefore, that he would become criminally liable. But that appraisal cannot be deemed to apply to the odious crimes of the type attributed to the Appellant, and all the more so when we deal with crimes of the scope and dimensions described in the Judgment. In such a case, the above-mentioned maxim loses its moral value and is devoid of any ethical foundation. One's sense of justice must necessarily recoil even more from not punishing one who participated in such outrages, for he could not contend - even as it was impossible for the Appellant successfully to argue about his share in the implementation of the `Final Solution' - that, at the time of his actions, he was not aware that he was violating deeply-rooted universal moral values. What Stone wrote (ibid., pp. 369-370) in repudiating the relevance of the ethical content of the principle of nulla poena to the parallel crimes of which the major war criminals were convicted in Nuremberg is also apposite here: "...the ethical import of the maxim is confronted by the countervailing ethical principles supporting the courts and sentences. Killing, maiming, torturing and humiliating innocent people are acts condemned by the value-judgments of all civilized men, and punishable by every civilized municipal legal system.... All this was known to the accused when they acted, though they hoped, no doubt, to be protected by the law of a victorious Nazi state from punishment. If, then, the rules applied at Nuremberg were not previously rules of positive international law, they were at least rules of positive ethics accepted by civilized men everywhere, to which the accused could properly be held in the forum of ethics."

Therefore, in the absence of a positive rule of international law prohibiting criminal legislation with retroactive effect, and in the absence also of a moral justification for preventing the application of such legislation to the offences which are the subject of this Appeal, it follows that the second part of the contention of Counsel for the Appellant - namely, that the State of Israel was not in existence at the time of the commission of the offences and its competence to impose punishment therefor is limited to its own citizens - is equally unfounded. We shall yet see in what follows that the crimes of which the Appellant was convicted must be seen as having constituted, since `time immemorial,' a part of international law and that, viewed from this aspect, the enactment of the Law of 1950 was not in any way in conflict with the maxim nulla poena, nor did it violate the principle inherent in it. Here we have confined ourselves to the rejection of the `international' submission of Counsel for the Appellant, on the strength of the first rule, mentioned in the preceding paragraph, which governs the relationship between local municipal law and the provisions of international law. As already stated, this rule postulates that the above- mentioned principle is not deemed to be embodied in municipal law by virtue of international law, and the District Court therefore was not enjoined to pay heed to it.

This ground in itself is an adequate reply to the first contention of Counsel for the Appellant.

9. The same applies to the second contention as well. It will be recalled that according to that contention the enactment of a criminal law applicable to an act committed in a foreign country by a foreign national conflicts with the principle of territorial sovereignty. But here, too, we must hold that there is no such rule in customary international law, and that to this day it has not won universal international recognition. This is established by the judgment of the Permanent Court of International Justice in the Lotus case (P.C.I.J. Series No. 10, 1927). In that case, the

judges of the majority recognized the competence of the State of Turkey to enact a criminal statute extending to the negligent conduct of a French citizen while on duty as Officer-of-the-Watch of a French ship, at the time of her collision on the high seas - and therefore outside Turkey's territorial waters - with a ship flying the Turkish flag. The collision caused the sinking of the Turkish ship and also the death of eight of her passengers who were of Turkish nationality. It was held in that case that the principle of territorial sovereignty merely requires that a state exercise its power to punish within its own borders, not outside them; that subject to this restriction every state may exercise a wide discretion as to the application of its laws and the jurisdiction of its courts in respect of acts committed outside the state; and that only insofar as it is possible to point to a specific rule prohibiting the exercise of this discretion - a rule agreed upon by international treaty - is a state prevented from exercising it. That view was based on the following two grounds: (1) It is precisely the conception of state sovereignty which demands the preclusion of any presumption that there is a restriction on its independence; (2) even if it is true that the principle of the territorial character of criminal law is firmly established in various states, it is no less true 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.

As to the first ground, it was stated in the Judgment (ibid., p. 18):

"Restrictions upon the independence of states cannot ... be presumed."

As to the second ground, it was stated (ibid., p. 30):

"Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the state which adopts them, and they do so in ways which vary from state to state. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty."

The view based on these two grounds was expressed in the following terms (p. 18, 19):

"Now the first and foremost restriction imposed by international law upon a state is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory state. In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

"It does not, however, follow that international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to states to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside its territory, and if, as an exception to their general prohibitionof another, it allowed states to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that states may not

extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every state remains free to adopt the principles which it regards as best and most suitable."

Also:

"This discretion left to states by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other states; it is in order to remedy the difficulties resulting from such variety that efforts have been made for many years past...to prepare conventions the effect of which would be precisely to limit the discretion at present left to states in this respect by international law..."

And finally:

"In these circumstances, all that can be required of a state is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."

It is worthy of note that in the same case the Permanent Court of International Justice declared the criminal jurisdiction of the State of Turkey valid on another, rather more restricted, ground, namely, that the actual damage caused by the negligent act of the French ship occurred in the ship that was flying the Turkish flag. In other words, the resultant damage which constituted an essential element in the offence under Turkish law occurred in a place which was deemed to be Turkish territory. Hence the principle of territorial sovereignty was upheld (ibid., pp. 23, 25). There are some who hold that this ground, which relates to the special facts of the case in question, and which was also supported in principle by the minority judge, Judge Moore (ibid., p. 65), is the `precise' ground that guided the court in the above-mentioned decision (cf. Lauterpacht- Oppenheim ibid., vol. 1, p. 334, and note 1). On the other hand, many authorities in this field of law take the view that it is the wide ground relied upon by the court, as set out above, which correctly and positively reflects international law in this matter (see articles by Schwarzenberger in Current Legal Problems 1950, pp. 265-266; Green, in Modern Law Review, vol. 23 (1960), p. 513; Mac- Gibbon in the British Yearbook of International Law (1954) pp. 184-185; W.B. Cowles in the California Law Review (1945), vol. 33, pp. 178-181). As against these there are international jurists who do not agree with that approach (such as the minority judges in the Lotus case), or at least do not view it with favour de lege ferenda (see W.W. Cook in Logical and Legal Bases of the Conflict of Laws, p. 77).

We have no intention of dealing extensively with the above- mentioned divided opinion, or of associating ourselves with any one of them. Our only object in setting forth these views, including the majority view in the Lotus case, is to point to the fact that on the question of the jurisdiction of a state to punish persons who are not its nationals for acts committed beyond its borders, there is as yet no international accord. In the words of Cook (ibid.):

"...that there is not at present any general agreement on such rule of international law seems reasonably clear."

Thus also Helen Silving in her article (American Journal of International Law, vol. 55, pp. 321-322, note 45):

"The question...of the extent to which territorial jurisdiction may deviate from territorial sovereignty has not been uniformly answered in time or in space."

Attention may also be drawn to the statement of Mac-Gibbon, in his above article (ibid., p. 184):

"The difficulties of a plaintiff state in its search for a prohibitive rule in such circumstances are not merely the result of the unfettered independence of the defendant state but are inherent in the unsettled state of the law which such a situation presupposes."

It follows that in the absence of general agreement as to the existence of the rule of international law, upon which Counsel for the Appellant relied, there is no escape from the conclusion that it cannot be deemed to be embodied in Israel municipal law, and therefore on that ground, too, his second contention fails. We are fortified in this opinion by the reply of the Privy Council to the contention that the enforcement of a punitive sanction - the seizure of a boat belonging to a foreign national - by the Mandatory Government for an act committed outside the territorial waters of Palestine, constituted a violation of the principles of international law. In rejecting this contention, the judges based themselves, inter alia, on the following ground:

"There is room for much discussion within what limits a state may for the purpose of enforcing its revenue or police or sanitary law claim to exercise jurisdiction on the sea outside its territorial water. It has not been established that such a general agreement exists on this subject as to satisfy the test laid down by Lord Alverstone... Their Lordships, therefore, could not in any event conclude that any principle of international law had been violated" (Naim Molvan v. Attorney General for Palestine (1948 A.C. 351, 369).

We should add that even if Counsel for the Appellant were right in his view that international law prohibits a state from trying a foreign national for an act committed outside its borders, this would not avail his client in any way. The reason for this is that, according to the theory of international law, in the absence of an international treaty which vests rights in an individual, that law only recognizes the rights of a state; in other words, assuming that there is such a prohibition in international law, the violation of it is deemed to be a violation of the rights of the state to which the accused belongs, and not a violation of his own rights (vide Green in his article op. cit., ibid. p. 512). Thus in the Molvan case the Privy Council (as an additional reason for its decision) also found that it was not open to the owner of the ship - for reasons which are no concern of ours here - to claim

"the protection of any state nor could any state claim that any principle of international law was broken by her seizure" (ibid., p. 370).

It should be noted - and we shall yet revert to this fact with reference to another contention of Counsel for the Appellant - that, according to his own words, his application to the Government of Western Germany to claim its right to try the Appellant in Germany, was refused.

10. We have thus far stated our reasons for dismissing the first two contentions of Counsel for the Appellant on the strength of the rules that determine the relationship between Israel municipal law and international law. Our principal object was to make it clear - and this is a negative approach that there was no prohibition whatever by international law of the enactment of the Law of 1950, either because it created ex post facto offences or because such offences are of an extra-territorial character. However, we too, like the District Court, do not content ourselves with this solution, but have undertaken the task of showing that these contentions are unjustifiable also from a positive approach, namely that, when enacting the Law in question, the Knesset only sought to apply the principles of international law and to realize its objectives. The two propositions on which we propose to base ourselves will therefore be as follows:

(1) The crimes created by the Law and of which the Appellant was convicted must be deemed today to have always borne the stamp of international crimes, banned by international law and entailing individual criminal liability;

(2) It is the particular universal character of these crimes that vests in each state the power to try and punish anyone who assisted in their commission. But before we substantiate these propositions, and in order to lighten our task on this point, we must make a few observations on the four categories of the offences in question, and especially on the inter-relation between them.

The definitions in the Law of these offences have been clearly explained by the District Court in paragraph 16 of its Judgment. It was there explained in the light of a detailed comparative analysis that the sources of these definitions are to be found in international documents that define the corresponding crimes (`Genocide' - corresponding to a `crime against the Jewish People' - in the Convention adopted by the United Nations Assembly on 9.12.1948; `Crime against Humanity' and `War Crime' - in the Nuremberg Tribunal Charter of 8.8.45, and also in Law No. 10 of the Control Commission of Germany of 20.12.45; the local offence of `Membership of a Hostile Organization' was defined by reference to the pronouncement on `Hostile Organizations,' embodied in the Judgment of the above-mentioned Tribunal). We do not intend to repeat the explanatory and comparative observations made there, but only to make it clear that the local category of a `Crime against Humanity' - which includes the murder, extermination, starving and deportation of a civilian population, on the one hand, and the persecution on national, racial, religious or political grounds on the other - may be seen as extending also to the three other categories, as these were proved in the proceedings in this case.

(1) Thus, the category of `Crime against the Jewish People' is, as held by the District Court in paragraph 26 of its Judgment, nothing but "the gravest type of crime against humanity." It is true that there are certain differences between them as, for example, in the case of the first offence, which requires a specific criminal intent. But these are not differences material to our case.

(2) The category of a `War Crime' comprises, in essence, the acts which are prohibited by the laws and customs of war. This category, therefore, only covers acts committed in time of war, while the category of a `Crime against Humanity' also comprises - according to the simple meaning of the definition in the Law - inhuman acts that were committed during the Nazi period that preceded the outbreak of the War (1.9.1939). We attach no practical importance to this distinction, even as we attach no such importance to the finding of the Nuremberg Tribunal that for the purpose of a conviction for the offence of a `Crime against Humanity' as defined in Article 6 (c) of the Charter, it was necessary to prove that it was committed in connection with one of the two other offences therein defined (a `Crime against Peace' or a `War Crime'). The reason for our disregard of these distinctions is that, as emerges from the Judgment of the District Court, the outrages attributed to the Appellant in the Counts on which he was convicted were perpetrated, for the most part, during the War and in connection with the War. It will be noted - and the Court has dwelt on this fact in paragraph 29 of its Judgment - that, according to the Judgment of the Nuremberg Tribunal, Hitler's invasion of Austria also constitutes `crimes within the jurisdiction of the Court,' in the sense of Article 6 (c) of the Charter - in other words, a `Crime against Peace' (see also the article by Egon Schwelb on "Crimes against Humanity" in the British Yearbook of International Law (1946) pp. 189-205). There is yet another distinction between the two types of crimes: While the acts comprised in the `Crime against Humanity' are limited to acts of murder etc. that were perpetrated among the civilian population, this limitation does not necessarily apply also to the acts comprised in the `War Crimes' category (ibid., p. 190). On the other hand, it is clear that many of the acts included in the one category overlap those in the other category, even though it is not imperative that they should all be identical (ibid., pp. 188, 191).

Be that as it may, this distinction, too, loses its force in this Appeal, since the Court found (paragraph 206 of its Judgment) that
"all acts of persecution, deportation and murder in which the Accused took part, as we have found in discussing Crimes against the Jewish People and against Humanity, also constitute War Crimes within the meaning of Section 1(a)(3) of the Law, as far as they were committed during World War II, and the Jews, who were the victims of these acts, belonged to the population of the countries conquered by the Germans and the other Axis States."

(3) As to the fourth category - `Membership of a Hostile Organization' - the Court did not, for the purpose of the conviction, content itself with the fact that the Appellant was a member of the Nazi organizations in question, but also based the conviction on the additional fact that, as such, the Appellant participated in a criminal operation which was expressly pronounced by the Nuremberg Tribunal to be a crime within the meaning of the Charter, that is, the crime of the extermination of Jews during the war years (paragraphs 214, 215).

All this goes to show that the above-mentioned categories of crimes, especially the first three, are interdependent, and we may, therefore, for the purpose of our reasoning at this stage, group them within the inclusive category of `Crimes against Humanity.' It must be emphasized that they are all crimes that demand mens rea on the part of the perpetrator.

11. The first proposition. Our view that the crimes in question must be seen today as crimes which in the past, too, were banned by the Law of Nations and entailed individual criminal liability, is based upon the following reasons:

(a) As is well known, the rules of the Law of Nations are not derived solely from international treaties and from crystallized international usage. In the absence of a supreme legislative authority and international codes, the process of its evolution resembles that of the common law; in other words, its rules are fashioned piecemeal, by analogy with the rules embedded in treaties and custom, on the basis of "general principles of law recognized by civilized nations," and in the light of the vital international needs that impel towards an immediate solution. A principle which constitutes a common denominator for the judicial systems of numerous countries must clearly be regarded as a "general principle of law recognized by civilized nations." This is not the place to deal exhaustively with this wide theme; to elucidate our view we confine ourselves here to citing a few excerpts from the writings of eminent international jurists, these being themselves an important auxiliary source of the principles inherent in the law of nations. When international tribunals are confronted with a `novel case,' wrote Lauterpacht in his Functions of Law in the International Community:

"They may proceed either by analogy with specific rules of international law, or by recourse to general principles of international law...(or) by shaping a legal rule through the process of judicial reconciliation of conflicting legal claims entitled to protection by law...(or) by a consideration of the larger needs of the international community."

And he added:

"It happens frequently that when an international tribunal is confronted with a seemingly novel situation, although there is no rule of international law directly applicable to the case before the court, international law regulates expressly some similar situation. It is to these rules that the tribunal has recourse in dealing with a case primae impressionis."

Stone, too, wrote (op. cit., p. 369):

"...International law resembles an uncodified common law system...development is rather from case to case, though as much on the customary as on the judicial level."

(See, in the same sense, Woetzel in Nuremberg Trials in International Law, p. 115.)

All this means that customary international law is never stagnant, but is rather in a process of constant growth, as Sheldon Glueck stressed (in his article in the Harvard Law Review, vol. 59, p. 414):

"... Customary international law...is as obviously subject to growth as has been the law of any other developing legal order, by the crystallization of generally prevailing opinion and practice into law under the impact of common consent and and the demands of general world security."

And on p. 418:

"Every recognition of custom as evidence of law must have a beginning some time."

Noteworthy, too, is the explanation by that author (op. cit., p. 110) that a general rule of law recognized by the civilized nations does not simply mean:

"private law `writ large.' It means that where a legal principle is so generally accepted by various nations as to be a common denominator of practically all civilized systems, it is justifiably applicable also by an international tribunal."

In view of the resemblance between the nature of common law and that of customary international law, it would be pertinent to quote here the famous dictum of Holmes (in his book The Common Law, p. 1):

"the life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious...have had a good deal more to do than the syllogism in determining the rules by which men should be governed."

Compare the state of Lord Wright (in his introduction to his book History of the United Nations War Crimes Commission (1948), p. 8):

"International law...has grown and developed from the workings of the moral impulses and needs of mankind by a sort of instinctive growth, as well as by edicts or decrees or authoritative pronouncements... Indeed, it is itself a body of customary law. Its dictates take shape and definition particularly when acted upon and recognized by the common consensus of mankind and are administered and enforced by competent courts."

Finally, what has been said above applied with even greater force to the criminal branch of international law which, it is universally admitted, is as yet at the initial - one might even say `primitive' - stage of its development. Here, too, Glueck has aptly described the position when he wrote (see his above-mentioned article, pp. 416-418):

"In the international field...as in the domestic, part of the system of prohibitions implemented by penal sanctions consists of customary or common law...

"During the early stage (or a particularly disturbed stage) of any system of law - and international law is still in a relatively undeveloped state - the courts must rely a great deal upon non-legislative law, and thereby run the risk of an accusation that they are indulging in legislation under the guise of decision, and are doing so ex post facto. Whenever an English common-law court for the first time held that some act not previously declared by Parliament to be a crime was a punishable offence for which the doer of that act was now prosecuted and held liable, or whenever even a court, for the first time more specifically than theretofore defined the constituents of a crime and applied that definition to a new case, the court in one sense `made law.' Yet, fundamentally, it thereby did no violence to the technique of law enforcement or the requirements of man-made justice, unless it acted most unreasonably and arbitrarily....

"It is true that the command which the accused was held to have violated did not come directly and specifically from the legislature or sovereign; but since the prohibition represented the consensus of the people as contained in customary usage, it contained enough of the imperative element to warn its prospective violators, to impel judges to recognize it as an existing part of the law of the land and to hold its violators guilty of a crime. So it is with modern international common law ..."

(b) When we come to consider - with reference to the crimes with which we are here concerned - how the method explained in the excerpts set out above actually works in practice, it becomes essential to dwell first on the features which identify crimes that have long been recognized by customary international law. On doing so, we shall find that these include, among others, the following features: They constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate universal moral values and humanitarian principles which are at the root of the systems of criminal law adopted by civilized nations. The underlying principle in international law that governs such crimes is that the individual who has committed any of them and who, at the time of his act, may be presumed to have had a thorough understanding of its heinous nature, must account in law for his behaviour. It is true that international law does not establish explicit and graduated criminal sanctions; that there is not as yet in existence either an International Criminal Court, or international machinery for the imposition of punishment. But, for the time being, international law surmounts these difficulties - which themselves reflect its present low stage of development - by authorizing the countries of the world to mete out punishment for the violation of its provisions. This they do by enforcing these provisions either directly or by virtue of the municipal legislation which has adopted and integrated them. Let us explain this by three illustrations:

(1) The classic example of a `customary' international crime, also mentioned by the District Court, is that of piracy jure gentium. A person who committed this crime, said Judge Moore in his dissenting judgment in the Lotus case (p. 70),

"is treated as an outlaw, as the enemy of all mankind - hostis humani generis - whom any nation may in the interest of all capture and punish. Wheaton defines piracy by law of nations as murder or robbery committed on the high seas by persons acting in defiance of all law, and acknowledging obedience to no flag whatsoever."

In the report submitted to the League of Nations by the Committee for the Progressive Codification of International Law, the emphasis was placed on the interests of world trade which are endangered by that offence:

"It constitutes a crime against the security of commerce on the high seas."

(Quoted from The Law of Nations by Briggs, 2nd edition, p. 390.)

Again, Robert Lansing (who was the American Secretary of State during World War I), in his notes in the American Journal of International Law (1921), p. 25, alluded to the universal character of this crime (a "crime against the world") and compared it with the slave-trade ("which is a crime against humanity").

Important, too, are the remarks of Kelsen in his book General Theory of Law and State (pp. 344-345) on the principle of the individual responsibility borne by the perpetrator of this offence, and the way in which international law attains the object of punishing therefor:

"The sanction provided against piracy is not directed against a state and, in particular, not against the state of which the pirate is a citizen. The sanction is directed against a pirate as an individual who has violated international law. This sanction of international law is executed according to the principle of individual responsibility."

Also:

"The sanction itself, however, need not be determined by the international legal order; it may be specified by the national legal order which international law delegates to this end."

(2) As an example of customary international law, an instructive case came before an American court in 1784 in which a person was tried for threatening to assault the secretary of the French Diplomatic Mission (Respublica v. De Longchamps, 1 Dallas 110). In sentencing him to a fine and imprisonment for this offence, Chief Justice McKean of Pennsylvania said:

"The first crime in the indictment is an infraction of the law of nations. This law, in its full extent is part of the law of this state, and is to be collected from the practice of different nations and authority of writers. The person of a public minister is sacred and inviolable. Whoever offers any violence to him not only affronts the sovereign he represents, but also hurts the common safety and well- being of nations: - he is guilty of a crime against the whole world ... You then have been guilty of an atrocious violation of the law of nations."

(3) The last example - one which has closer relevance to our case - is that of a `war crime' in the conventional sense. It will be recalled that the reference here is to the group of acts, committed by members of the armed forces of the enemy, which are contrary to the `laws and customs of war.' These acts are seen as constituting, in essence, international crimes; they entail the violation of the provisions of customary international law which preceded the Geneva Conventions of 1907 and subsequent Conventions, whereas such Conventions merely `declared' the rules of warfare, as dictated by recognized humanitarian principles. Those crimes entail individual criminal responsibility because they undermine the foundations of international society and are repugnant to the conscience of civilized nations. When the belligerent state punishes for such acts, it does so not only because persons who were its nationals - be they soldiers taken prisoner by the enemy or members of the civilian population - suffered bodily harm or material damage, but also, and principally, because they involve the perpetration of an international crime in the avoidance of which all the nations of the world are interested. An article by Lauterpacht, "Law of Nations and Punishment of War Crimes" (British Yearbook of International Law, 1944, vol. 21, p. 64) lends support to the above description of crimes of this type:

"War criminals are punished, fundamentally for breaches of international law. They become criminal according to the municipal law of the belligerent only if their action

finds no warrant in, and is contrary to, international law. When, therefore, we say that the belligerent inflicts punishment on war criminals for the violation of his municipal law, we are making a statement which is correct only in the sense that the relevant rules of international law are being applied, by adoption or otherwise, as the municipal law of the belligerent. Intrinsically, punishment is inflicted for the violation of international law."

On page 65 he referred to the provision of the Geneva Convention No. IV, 1907, which imposed on the belligerent state that had violated the terms of the Convention, the obligation to pay indemnity for physical and material damage caused by it. That provision, he emphasized, did not exclude the responsibility of the individual to account in law for any violation by him of the rules of war or the customary right of states to punish enemy individuals for the violation of rules of war."

He added (ibid.):

"...the Hague Conventions...formulate and are largely declaratory of the fundamental rules of warfare as directed by generally recognized principles of humanity... In their broad purpose...these international conventions are expressive, in the words of the preamble of Hague Convention No. IV, `of the principles of the law of nations, derived from usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience'."

It was in the spirit of this approach that the United States Supreme Court ruled in ex parte Quirin (1942, 87 L. ed. 3, 12, 13) that the accused were criminally liable for acts contrary to the laws of war on the ground that these laws were always recognized and applied as part of the law of nations:

"from the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War...Congress has...exercised its authority to define and punish offences against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offences which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals."

The Supreme Court reaffirmed this view in re Yamashita (1945, 96 L. ed. 499, 504).

The international character of crimes of this type and the universal interest that sustains the object of imposing punishment for them were also stressed by Cowles in his article "Universality of Jurisdiction over War Crimes" (33 California Law Review 217) in the following words:
"...while the state whose nationals were directly affected has a primary interest, all civilized states have a very real interest in the punishment of war crimes. `The unpunished criminal is itself a menace to the social order.' And an offence against the laws of war, as a violation of the law of nations, is a matter of general interest and concern...war crimes `are offences against the conscience of civilized humanity'."

(c) In view of the characteristic traits of international crimes discussed above, and the organic development of the law of nations - a development that advances from case to case under the impact of the humane sentiments common to civilized nations, and under the pressure of the needs that are vital for the survival of mankind and for ensuring the stability of the world order - it definitely cannot be said that when the Charter of the Nuremberg International Military Tribunal was signed and the categories of `War Crimes' and `Crimes against Humanity' were defined in it, this merely amounted to an act of legislation by the victorious countries. The truth is, as the Tribunal itself said, that the Charter, with all the principles embodied in it, including that of individual responsibility, must be seen as:

"the expression of international law existing at the time of its creation; and to that extent (the Charter) is itself a contribution to international law (IMT (1947) vol. 1, p. 218).

See also the identical view expressed by Court No. III in the American Zone of Germany concerning two of the types of crimes mentioned in Control Commission Law No. 10.

"All of the war crimes and many, if not all, of the crimes against humanity as charged in the indictment...were...(not) violative of pre-existing principles of international law. To the extent to which this is true, C.C. law may be deemed to be a codification, rather than original substantive legislation" (U.S. v. Altstoetter, TWC, vol. 3, p. 966).

It should be added that many of those who voiced criticism of the Charter and the judgment of the International Military Tribunal at Nuremberg directed it against the incorporation into the Charter of the `Crime against Peace,' but not against incorporating the other two categories (see articles by Finch in the Am. Journal of Int. Law, vol. 41 (1947) pp. 22, 23; and Doman in the Columbia Law Review, vol. 60 (1960) p. 413). Insofar as other writers have criticized the incorporation of `Crimes against Humanity' as being contrary to international law de lege lata, they did so on the ground that the punishment of Nazi criminals for the commission of such crimes within Germany and against German citizens imported an excessive interference with the domestic competence of the state (see article by Schick in the same volume of the Am. Journal of Int. Law, pp. 778-779. The reply to this contention is: First, it is possible to draw a direct line to the inclusion of the above crimes in the Charter from the wording of the aforementioned provision of the Geneva Convention No. IV, 1907, which refers to the `Laws of Humanity' and the dictates of `public conscience.' It stands to reason, as Quincy Wright said (see his article, ibid., p. 60), that these words should apply "to atrocities against nationals as well as against aliens." To quote the picturesque language of Friedmann (in his book Legal Theory, 4th ed., p. 316):

"...it is hardly necessary to invoke natural law to condemn the mass slaughter of helpless human beings. Murder is generally taken to be a crime in positive international law."

Second, and most important, the interest in preventing and imposing punishment for acts comprised in the category in question - especially when they are perpetrated on a very large scale - must necessarily extend beyond the borders of the state to which the perpetrators belong, and which passively tolerated or encouraged their outrages;

for such acts can undermine the foundations of the international community as a whole and impair its very stability. Evidence of the manifestation of this international concern before World War I can be found in a series of incidents which occurred during the nineteenth and the beginning of the twentieth centuries and resulted in forceful diplomatic intervention by various countries on the ground of `humanitarian considerations' in respect of the terrible atrocities initiated or directed by certain other countries against whole sections of their own citizens (see a list of these incidents in the above-mentioned case of Altstoetter, pp. 981-982; also in Greenspan's book The Modern Law of Land Warfare (1959) p. 438).

Third, the above criticism affects, at most, the question of criminal jurisdiction, with which we shall yet deal; but it cannot derogate from the character of the above crimes as offences against international law by every standard of civilized humanity.

Fourth, if we are to regard customary international law as a developing progressive system, as we are bound to do, the criticism becomes devoid of value. This is because ever since the International Military Tribunal at Nuremberg decided this question, that decision must necessarily be seen as a judicial act which establishes a `precedent' defining the rule of international law. In any event, it would be unseemly for any other court to disregard such a rule and not to follow it. As Schwelb stated (ibid., p. 212):

"He would be a bold judge of any national, occupation, or military court, who would decline to be guided by the reasoned judgment of a court composed of four eminent members of the legal profession of the four Great Powers, arrived at after a trial, unique in its history, backed by the authority not only of the four signatories, but also of nineteen `adherent' states, always provided that the facts - and the law to be applied - are the same."

Fifth, if there was any doubt as to this appraisal of the Nuremberg Principles as principles that have formed part of customary international law `since time immemorial,' such doubt has been removed by two international documents. We refer to the United Nations Assembly resolution of 11.12.46 which "affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal, and the judgment of the Tribunal," and also to the United Nations Assembly resolution of the same date, No. 96 (1) in which the Assembly "affirms that genocide is a crime under international law."

As to the first document, Woetzel stated in his book, ibid., p. 57):

"this additional endorsement by the United Nations represents further tangible evidence for assuming that the principles of the Charter as well as those in the judgment in the IMT were valid principles of international law, and that their application was justified."

As to both the above-mentioned documents, Sloan said (in his article in the British Yearbook of International Law (1948), p. 24):

"while it must be conceded that the General Assembly cannot enact new law, it has already adopted resolutions declaring what it finds to be an existing rule of

international law. Perhaps the most important of such resolutions have been the affirmation of the Nuremberg principles and the declaration that genocide is an international crime... If fifty-eight nations unanimously agree on a statement of existing law, it would seem that such a declaration would be all but conclusive evidence of such a rule, and agreement by a large majority would have great value in determining what is existing law."

Furthermore, in the wake of Resolution 96 (1) of 11.12.46, the United Nations Assembly unanimously adopted on 9.12.48 the Convention for the Prevention and Punishment of the Crime of Genocide. Article 1 of this document provides that: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law..." As the District Court has shown, on the strength of the Advisory Opinion of the Permanent Court of International Justice dated 28.5.51, the import of this provision is that the principles inherent in the Convention - as distinct from the contractual obligations embodied therein - "had already been part of customary international law at the time of the perpetration of the shocking crimes which led to the United Nations resolution and the drafting of the Convention on crimes of genocide which were perpetrated by the Nazis" (paragraph 2 of the Judgment).

The deduction to be made from the above analysis is that the crimes established in the Law of 1950, which we have grouped under the inclusive heading `Crimes against Humanity,' must be seen today as acts that have always been forbidden by customary international law - acts which are of a `universal' criminal character and entail individual criminal responsibility. This being so, the enactment of the Law was not, from the point of view of international law, a legislative act that conflicted with the principle nulla poena or the operation of which was retroactive, but rather one by which the Knesset gave effect to international law and its objectives. For this reason, too, the first contention of Counsel for the Appellant rests on shaky foundations.

12. The second proposition. It will be recalled that, according to this proposition, it is the universal character of the crimes in question which vests in every state the power to try those who participated in the perpetration of such crimes and to punish them therefor. This proposition is closely linked with the one adduced in the preceding paragraph from which, indeed, it follows as a logical outcome. The reasoning behind it is as follows:

(a) One of the principles whereby states assume, in one degree or another, the power to try and punish a person for an offence he has committed, is the principle of universality. Its meaning is, in essence, that that power is vested in every state regardless of the fact that the offence was committed outside its territory by a person who did not belong to it, provided he is in its custody at the time he is brought to trial. This principle has wide support and is universally acknowledged with respect to the offence of piracy jure gentium. But while there exists general agreement as to its application to this offence, there is a difference of opinion as to the scope of its application (see Harvard Research (1935), p. 503 ff). Thus one school of thought holds that it cannot be applied to any offence other than the one mentioned above, lest this entail excessive interference with the competence of the state in which the offence was committed. This view is reflected in the following extract from the judgment of Judge Moor in the Lotus case (ibid., p. 71):

"It is important to bear in mind the foregoing opinions of eminent authorities as to the essential nature of piracy by law of nations, especially for the reason that nations have shown the strongest repugnance to extending the scope of the offence, because it carried with it...the principle of universal jurisdiction ..."

and supra (p. 70)

"Piracy by law of nations, in its jurisdictional aspects, is sui generis."

A second school of thought - represented by the authors of the draft Convention on this subject in the Harvard Research (ibid., p. 559) - though agreeing to the extension of the principle to all manner of extra-territorial offences committed by foreign nationals, considers it to be no more than an auxiliary principle, to be applied in circumstances in which no resort can be had to the principle of territorial sovereignty or to the nationality principle, both of which are universally agreed to. The authors of this draft, therefore, impose various restrictions on the application of the principle of universal jurisdiction, which are designed to obviate opposition by those states that find themselves competent to punish the offender according to either of the other two principles mentioned. One of these reservations - to which we shall yet revert - is that the state contemplating the exercise of the power in question must first offer the extradition of the offender to the state within whose territory the offence was committed (forum delicti commissi). The justification seen by that school of thought - as distinct from the first-mentioned school - for the adoption of this principle, albeit as a purely auxiliary principle, is the consideration that it is calculated to prove useful in circumstances in which the offender is likely to evade punishment, if it is not applied.

A third school of thought holds that the rule of universal jurisdiction, which is valid in cases of piracy, logically applies also to all such criminal acts of commission or omission which constitute offences under the law of nations (delicta juris gentium) without any reservation whatever or, at most, subject to a reservation of the kind mentioned above. (See quotation in paragraph 14 of the judgment of the District Court from Wheaton's Elements of International Law, 5th English edition, p. 184; also proposals in this spirit referred to in Harvard Research, p. 555 and pp. 562, 563.) This view has been opposed in the past because of the difficulty in securing general agreement as to the offences to be included in the above-mentioned class (ibid., pp. 555, 558).

A fourth view is that expressed de lege ferenda by Lauterpacht in the Cambridge Law Journal of 1947 (vol. 9, p. 348, note 61):

"It would be in accordance with an enlightened principle of justice - a principle which has not yet become part of the law of nations - if in the absence of effective extradition, the courts of a state were to assume jurisdiction over common crimes, by whomsoever and wherever committed, of a heinous character..."

(b) This brief survey of views set out above shows that, notwithstanding the differences between them, there is full justification for applying here the principle of universal jurisdiction, since the international character of the `crimes against humanity' (in the wide meaning of the term) is, in this case, not in doubt, and the unprecedented extent of their injurious and murderous effects is not open to dispute

at the present day. In other words, the basic reason for which international law recognizes the right of each state to exercise such jurisdiction in piracy offences - notwithstanding the fact that its own jurisdiction does not extend to the scene of the commission of the offence (the high seas) and the offender is a national of another state or is stateless - applies with all the greater force to the above-mentioned crimes. That reason is, it will be recalled, that the interest to prevent bodily and material harm to those who sail the seas, and to persons engaged in free trade between nations, is a vital interest, common to all civilized states and of universal scope, as was emphasized by the authors of the Harvard Research (p. 552):

"...The competence to prosecute and punish for piracy was commonly explained by saying that the pirate...was the enemy of all alike... The competence is better justified at the present time upon the ground that the punishable acts are committed upon the seas where all have an interest in the safety of commerce and where no state has territorial jurisdiction. Notwithstanding the more effective policing of the seas in modern times, the common interest and mutual convenience which gave rise to the principle have conserved its vitality as a means of preventing the recurrence of maritime depredations of a piratical character."

That is to say that it was not the recognition of the universal jurisdiction to try and punish the person who committed `piracy' that justified the viewing of such an act as an international crime sui generis, but it was the agreed vital interest of the international community that justified the exercise of the jurisdiction in question:

"As a result of this attitude of mankind towards these two great public crimes...piracy and the slave trade, wherever practised, are subject to punishment by any political authority apprehending the persons engaged therein irrespective of their nationality or allegiance" (Robert Lansing, op. cit., p. 25).

It follows that the state which prosecutes and punishes a person for that offence acts solely as the organ and agent of the international community, and metes out punishment to the offender for his breach of the prohibition imposed by the law of nations:

"...with regard to the pirate, the state punishing him acts as as an organ of the international legal community. For it is international law which the state applies against the pirate" (Kelsen op. cit., p. 345).

"...the prosecution must perforce be conducted in the courts of the state which has seized the pirate; but the violation of the law invoked is one which concerns the entire community of nations, and the prosecuting state is acting, in effect, as agent of all civilized states in vindicating the law common to them all" (Glueck, op. cit., p. 100).

The above explanation of the substantive basis underlying the exercise of universal jurisdiction in respect of the crime of piracy also justifies its exercise in regard to the crimes with which we are dealing in this case.

(c) The truth is - and this further supports our conclusion - that the application of that principle has been advancing for quite some time beyond the international crime of piracy. We have in mind its application to conventional war crimes as well. As stated

in paragraph 11 (c) of this Judgment, whenever the `belligerent' countries tried and punished a member of the armed forces of the enemy for any act contrary to `the laws and customs of war,' it did so because an international crime was involved which the countries of the world as a whole were anxious to prevent. Thus, in his article mentioned in the same paragraph, Cowles reviewed a series of cases that occurred prior to World War II, in which American military tribunals tried the offenders for war crimes committed within territory which was not, at the time, under the control of the armed forces of the United States, but was reached by them only subsequently. On the strength of that review he summarized the position by saying (p. 217): "Actual practice shows that the jurisdiction assumed by military courts, trying offences against the law of war, has been personal, or universal, not territorial. The jurisdiction, exercised over war crimes, has been of the same nature as that exercised in the case of the pirate, and this broad jurisdiction has been assumed for the same fundamental reason."

He therefore reached the conclusion (p. 218):

"...under international law, every independent state has jurisdiction to punish war criminals in its custody regardless of the nationality of the victim, the time it entered the war, or the place where the offence was committed."

In his article "Legal Basis of Jurisdiction over War Crimes" (published in the British Yearbook of International Law (1951) pp. 390-391), Baxter stated that at the end of World War II cases of war crimes were tried by the British military tribunals in Germany, in which victims were not British subjects but nationals of allied countries:

"In the Zyklon B case...those killed by poison gas supplied by the accused included Belgian, Dutch, French, Czech and Polish nationals, and it was not alleged that any British subjects were among the victims."

(See report of this case in L.R.T.W.C., vol. 1, pp. 93, 102).

In this connection, mention should also be made of a case which was tried by a British military court in Singapore. In that case, the court, composed of British officers, sentenced to death a member of the Japanese army for unlawfully killing American prisoners of war in Saigon (then French Indo-China); that is to say, the court so composed exercised jurisdiction, notwithstanding the fact that the scene of the crime was in French territory, and the victims were not British nationals (L.R.T.W.C., vol. 1, p. 106).

True, the fact that the victims of the crimes in these cases were nationals of countries in alliance with the state prosecuting the offender derogates somewhat from the universal character of the jurisdiction exercised, but, on the other hand, they indicate that substantial strides were made towards extending the use of that principle. Indeed, Baxter concluded, on the basis of these cases and also of those that were tried by the American tribunals in Germany under Control Law No. 10, that:

"International law also surmounts the jurisdictional barrier, as municipal law cannot, by recognizing the universality of jurisdiction enjoyed by war crimes tribunals."

Moreover, according to this expert's opinion, even a neutral country has the right to try a person for a war crime (ibid., p. 392). This is also the view of Greenspan (op. cit.,p. 503):

"Since each sovereign power stands in the position of a guardian of international law, and is equally interested in upholding it, any state has the legal right to try war crimes, even though the crimes have been committed against the nationals of another power and in a conflict to which that state is not a party."

Note 357: "This has been called the doctrine of the Universality of Jurisdiction over war crimes."

(The expression `war crimes' in the above passage extends also to `crimes against humanity' and `genocide' in time of war: ibid., p. 420).

(d) This is the place to discuss the limitation imposed by most of those who support this principle upon the exercise of universal jurisdiction, namely, that the state which has apprehended the offender must first offer his extradition to the state in which the offence was committed (see sub- paragraph (a) above). This means that only if the second state does not respond to the offer of extradition may the first state arrogate to itself the jurisdiction to try and punish. The above limitation is based upon the approach implicit in the maxim aut dedere aut punire. Counsel for the Appellant also took this approach, and accordingly submitted that, so long as the State of Israel had not offered to extradite his client to Germany - the forum delicti commissi of many of the crimes attributed to him - it has no right to place him on trial. He further contended that the fact of the Appellant's German nationality also obliged Israel to follow the course of extraditing him to that state. As to the last fact, let it be said at once that it cannot avail him, as the requirement of making an offer to extradite the offender to the state of his national origin is supported neither by international law nor by the practice of states (Harvard Research, p. 569).

As to the limitation itself in the sense explained above, we are of the opinion that it has no place in the circumstances of this case. First, as already stated, Counsel for the Appellant has himself admitted that his application to the Government of Western Germany to demand the extradition of his client was refused, and therefore an offer in this sense by the Government of Israel could be of no practical use. Secondly - and this is the principal reason for the rejection of his submission - the idea behind the above- mentioned limitation is not that the requirement to offer the offender to the state in which the offence was committed was designed to prevent the violation of its territorial sovereignty. Its reason is rather a purely practical one: The great majority of the witnesses and the greater part of the evidence are concentrated in that state, and it becomes, therefore, the most convenient place (forum convenicus) for the conduct of the trial. This point was taken by Lauterpacht, in continuing after the passage cited in sub- para. (a) above:

"Territoriality of jurisdiction is a rule of convenience in the sphere of the law of evidence. It is not a requirement of justice or even a necessary postulate of the sovereignty of the state."

Baxter, too, had this meaning of the limitation in mind when he stated (ibid.):

"If a neutral state should, by reason of the availability of the accused witnesses, and evidence, be the most convenient locus in which to try a war crime, there is no reason why that state should not perform that function."

If, therefore, we should consider the above-mentioned contention of Counsel for the Appellant in the light of this practical test, it must be said that the great majority of the witnesses who gave evidence here on the grave crimes attributed to the Appellant, especially those against the Jews, were residents of Israel, and, moreover, the bulk of the vast mass of documents produced was previously gathered and preserved (through Yad Vashem) in the State of Israel. It should be noted that the Appellant himself has relied for his defence on a number of the documents which are in this country and have been made available to him. It is clear, therefore, that it is the State of Israel - not the State of Germany - that must be regarded as the forum convenicus for the trial.

We have also taken into consideration the possible desire of other countries to try the Appellant, insofar as the crimes included in the indictment were committed in those countries or their evil effects were felt there. But what has been said of the practical object that has justified the holding of the trial here is equally applicable to them. It is to be observed that we have not heard of a single protest by any of these countries against conducting the trial in Israel, and it is reasonable to believe that, as Israel has exercised its jurisdiction in this matter, no other state has demanded the right to do so. What is more, it is precisely the fact that the crimes in question and their effects have extended to numerous countries that empties the territorial principle of its content in the present case and justifies Israel in assuming criminal jurisdiction by virtue of the `universal' principle. This is so because Israel could not possibly have decided to which particular country the Appellant ought to have been extradited without the selection being arbitrary:

"The allegedly general principle of law entitling a man to be tried where his offences are charged to have been committed is rendered nugatory...by the fact that his offences were committed in a great number of places. Application of the territoriality principle in this instance would thus lead to an arbitrary choice" (Helen Silving, op. cit., p. 335).

It follows that the aut dedere rule cannot assist the Appellant in the circumstances of this case.

(e) Counsel for the Appellant has further submitted that, under Article 6 of the Genocide Convention, a person accused of this crime shall be tried by a court of competent jurisdiction of the state in which it was committed. According to his submission, that Article has confirmed the application of the `territorial' principle, and the `universal' principle, therefore, is implicitly negated. The reply to this contention was given by the District Court in paragraph 21 et seq. of its judgment: That Article 6 imposes upon the parties contractual obligations with future effect, that is to say, obligations which bind them to prosecute for crimes of `genocide' which will be committed within their territories in the future. This obligation, however, has nothing to do with the universal power vested in every state to prosecute for crimes of this type committed in the past - a power which is based on customary international law.

(f) We sum up our views on this subject as follows: Not only are all the crimes attributed to the Appellant of an international character, but they are crimes whose evil and murderous effects were so widespread as to shake the stability of the international community to its very foundations. The State of Israel, therefore, was entitled, pursuant to the principle of universal jurisdiction, and acting in the capacity of guardian of international law and agents for its enforcement, to try the Appellant. This being the case, it is immaterial that the State of Israel did not exist at the time the offences were committed. Here, therefore, is an additional reason - one based on a positive approach - for rejecting the second `jurisdictional' contention of Counsel for the Appellant.

We wish to add one further observation. In regard to the crimes directed against the Jews, the District Court found additional support for its jurisdiction in the connecting link between the State of Israel and the Jewish People, including that between the State of Israel and the Jewish victims of the Catastrophe, and the National Home in Palestine, as explained in its judgment. It therefore upheld its criminal jurisdiction also by virtue of the protective principle and the principle of passive personality. It should be clear that we fully agree with every word said by the Court on this subject in paragraphs 31-38 of its judgment. If we, in our judgment, have concentrated on the international and universal character of the crimes for which the Appellant has been convicted, one of the reasons for our doing so is that some of them were directed against non-Jewish groups (Poles, Slovenes, Czechs and Gypsies).

13. It will be convenient if at this point we deal first with the fourth contention of Counsel for the Appellant, which is also of a jurisdictional character. It will be recalled that he submitted that his client was brought to this country against his will, without the consent of his country of residence (Argentina), and by the agents of the State of Israel. Counsel for the Appellant complained before us against the District Court's refusal to grant his application for the hearing of testimony to prove that the Government of Israel was implicated in the act of abduction, and he repeated his application in this Court.

This contention is not connected with the two preceding contentions, as it negates the right of the State of Israel to try the Appellant for the crimes in question because of the circumstances under which he was brought here, while the others negate such right even if he were to be tried in this country after having arrived here of his own free will. We have no intention of dealing with this contention at any length, for it has been analysed with great thoroughness by the District Court (paragraphs 41-52 of its Judgment). Relying on a long array of local, British, American and Continental precedents, which were set out extensively in the Judgment, the Court has reached the following conclusions:

(1) In the absence of an extradition agreement between the state to which a `fugitive offender' has been brought for trial and the country of `asylum' (from which he was removed by force or by stratagem) - and even if there existed such an agreement between the two countries, but the offender was not extradited to the first country in accordance therewith - the Court will not investigate the circumstances in which he was detained and brought to the area of jurisdiction.

(2) This also applies if it is the offender's contention that the abduction was carried out by the agents of the state prosecuting him, since in such a case the right violated is not that of the offender, but the sovereign right of the state aggrieved. In other words, the violation of the right raises a question - either political or one of a breach of international law - between the two countries concerned. It must therefore find its solution at this international level, and is not justiciable before the court into whose area of jurisdiction the offender has been brought.

(3) From the point of view of international law, the aggrieved state may condone the violation of its sovereignty and waive its claims, including the claim for the return of the offender to its territory, and such waiver may be explicit or by acquiescence.

(4) Only in one eventuality has a fugitive offender a right of immunity - when he has been extradited by the country of asylum to the country requesting his extradition for a specific offence, which is not the offence for which he is tried.

(5) The Appellant was not extradited to Israel by Argentina, and the State of Israel is not bound by any agreement with Argentina to try him for another specific offence, or not to try him for the offences for which he is being tried in this case.

(6) Moreover, following upon the Resolution of the Security Council of the United Nations of 23.6.60 (exhibit T/1), the Governments of Argentina and Israel settled the dispute between them when they issued, on 3.8.60 - and that was before the indictment was presented - a joint communique (exhibit T/4) saying that they "resolved to view as settled the incident which was caused in consequence of the action of citizens of Israel, which violated the basic rights of the State of Argentina." This means that Argentina has condoned the violation of her sovereignty and has waived her claims, including that for the return of the Appellant. Any violation of international law that may have been involved in this incident has thus been remedied.

(7) The rights of asylum and immunity belong to the country of asylum, not to the offender. It was not for the Appellant, therefore, to force Argentina, a foreign sovereign state, to give him asylum against its will, especially since he was a `wanted war criminal,' concealed his true identity, and resided there subsequently `under an assumed name and on forged papers.' It follows, therefore, that the State of Argentina gave him no asylum or refuge from the outset, while, by the declaration of the settlement of the incident and the waiver of the claim for his return, it refused, finally, to grant him asylum.

(8) In view of the foregoing, there was no room for hearing the evidence which Counsel for the Appellant sought to produce on the circumstances of the abduction.

As stated above, we agree with the reasoning of the Court in its entirety, and shall therefore content ourselves here with a brief reply to some of the contentions by which Counsel for the Appellant sought to destroy it.

(a) One contention is that the authorities on which the Court based its conclusions - especially British and American judgments - all deal with an offender who fled from the area of jurisdiction of a court that was already competent to try him at the time he

committed the offence, whereas that rule cannot apply here because the State of Israel did not exist at the time of the commission of the crimes attributed to the Appellant; they were not committed within its territory, and he did not escape from the jurisdiction of an Israeli court.

We have already replied to this contention when we dealt with the first two jurisdictional contentions. The reply is that the Appellant is a `fugitive from justice' from the point of view of the law of nations, since the crimes that were attributed to him are of an international character and have been condemned publicly by the civilized world (see Resolution No. 96(1) of the United Nations Assembly of 11.12.46 on `the Crime of Genocide'); therefore, by virtue of the principle of universal jurisdiction, every country has the right to try him. This jurisdiction was automatically vested in the State of Israel on its establishment in 1948 as a sovereign state. Therefore, in bringing the Appellant to trial, it functioned as an organ of international law and acted to enforce the provisions thereof through its own laws. Consequently, it is immaterial that the crimes in question were committed at a time when the State of Israel did not exist, and outside its territory. Indeed, Counsel for the Appellant has on this point confused the question of the substantive penal jurisdiction of the State of Israel with the question whether his client enjoys immunity from the exercise of that jurisdiction against him by reason of the circumstances of his abduction. These two questions are entirely separate from one another. As has been indicated, the moment it is admitted that the State of Israel possesses criminal jurisdiction both according to local law and according to the law of nations, it must also be conceded that the Court is not bound to investigate the manner and legality of the Appellant's detention. This indeed is the conclusion to be drawn from the judgments upon which the District Court rightly relied.

(b) Counsel for the Appellant also argued that in the Resolution of the United Nations Security Council dated 23.3.60, the Government of Israel was requested to make appropriate reparation to Argentina for the above-mentioned incident; hence the matter involves a violation of international law, and in these circumstances it cannot be accepted that the Court should refuse to examine the factual question of whether the Government of Israel was a party to the abduction of the Appellant.

We cannot accept this contention either. The text of the resolution appears in extenso in paragraph 40 of the Judgment, and from the operative part thereof - which refers to the question of reparation - it emerges clearly that all that the Security Council sought to do was to cause a settlement of the dispute which had arisen between the two countries in connection with Argentina's complaint of the violation of her sovereignty. As the Court has shown, insofar as there was any such violation by the Government of Israel, the Appellant cannot benefit by it, and therefore what was said in the resolution regarding the settlement of the dispute between the two countries cannot avail the Appellant or accord him any rights, especially as the dispute has meanwhile been settled.

Moreover, in the preamble to the resolution it is stated that:

"Mindful of the universal condemnation of the persecution of the Jews under the Nazis and the concern of the people in all countries that Eichmann should be brought to appropriate justice for the crimes of which he is accused.

"Noting at the same time that this resolution should in no way be interpreted as condoning the odious crimes of which he is accused."

These two passages give expression - and precisely because the whole world condemns the persecution of Jews by the Nazis - to the international interest involved in the prosecution of the Appellant for the crimes of which he was accused; and their language, including the expression "to appropriate justice," cannot be interpreted otherwise than in the sense that the State of Israel, too, is among the countries which must be taken into account for this purpose. After all, the Security Council well knew that Israel was holding the Appellant in custody in order to place him on trial here, but nevertheless did not give the slightest hint of an objection to this course.

(c) Another submission of Counsel for the Appellant was that the Court was not justified in inferring from the joint communique of the Governments of Argentina and Israel, dated 3.8.60, the fact that the former has waived her claims, but only that this issue has been terminated for the purpose of preventing `diplomatic friction' because of the incident. Counsel for the Appellant stated that he read in the press of a new approach of Argentina to Israel on the same issue, and therefore asked to call the Ministers of Justice of the two countries as witnesses to be interrogated on this fact.

This submission is without substance. The language of the said communique is clear and unequivocal, and the Court was right in the construction which it put upon it. Therefore, there is no point in acceding to Counsel's request.

(d) The last point raised by Counsel for the Appellant was that as an international law imposes obligations on the individual, so also does it grant him rights, and here the Appellant's right to freedom and personal security, a right vested in him by international law, has been violated. In support of this contention, he based himself on Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which was signed in Rome on 4.11.50. The short reply of the Attorney General was that the State of Israel is not a party to this Convention, and with this reply we agree. From the point of view of customary international law, it has already been explained that the abduction of the Appellant is no ground for denying to the Court its competence to try him once he is within the area of its jurisdiction.

14. The next contention to be considered is that the crimes of which the Appellant was convicted were at the time in the nature of Acts of State and that, therefore, he is absolved from criminal responsibility for those crimes. The theory of `Act of State' means that the act performed by a person as an organ of the state - whether he was the head of the state or a responsible official acting on the government's orders - must be seen as an act of the state only. It follows that the state alone bears responsibility therefor, and it also follows that another state has no right to punish the person who committed the act, save with the consent of the state whose mission he carried out. Were it not so, the first state would be interfering in the internal affairs of the second, which is contrary to the conception of the equality of states based on their sovereignty (see Kelsen, Peace through Law, p. 81 ff). The contention of Counsel for the Appellant is, therefore, that the acts done by his client towards the implementation of the Final Solution had their origin in Hitler's decision to carry out that plan, and consequently these acts were purely `Acts of State,' responsibility for which does not rest on the Appellant.

We utterly reject this contention, as did the District Court (paragraph 28 of the Judgment). Our reasons are as follows:

(a) The concept of `sovereignty,' from which the doctrine of `Act of State' derives, is not considered in our time to be an absolute concept, as was made clear by Kunz in his article "The Nottebohm Judgment" (A.J.I.L., vol. 54, p. 545):

"Any a priori or unlimited political concept of sovereignty must, with inescapable logic, lead to the non-existence of international law as law. Sovereignty is, therefore, essentially a relative notion."

This also applies to the `Act of State' doctrine. Even Chief Justice Marshall, who relied on it in Schooner Exchange v. McFaddon (3 L. ed. 287), was particularly careful to base it on the sole foundation that the state within whose territory an illegal act was committed on behalf of another state had expressly or impliedly consented to waive its sovereign territorial right to punish therefor. What is more, he added the reservation that where implied consent is involved

"its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act" (p. 296).

Glueck, commenting on this passage, said (Harvard Law Review, vol. 59, p. 426):

"As Marshall implied, even in an age when the doctrine of sovereignty had a strong hold, the non-liability of agents of a state for `Acts of State' must rationally be based on an assumption that no member of the Family of Nations will order its agents to commit flagrant violations of international and criminal law."

As to the Opinion given in 1841 by the American Secretary of State, Webster, in re McLeod, which is also based on the said doctrine, and on which Kelsen relied (ibid., p. 83), it was pointed out by Quincy Wright (A.J.I.L., vol. 41, p. 71) that even then it had not gained general recognition:

"This position was disputed by many at the time on the ground that the government's authority could not confer immunity upon its agents for acts beyond its powers under international law."

(b) In any event, there is no basis for the doctrine when the matter pertains to an act prohibited by the law of nations, especially when they are international crimes in the class of `Crimes against Humanity' (in the wide sense). Of such heinous acts it must be said that they are completely outside the `sovereign' jurisdiction of the state that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot seek shelter behind the official character of their task or mission, or behind the `Laws' of the state by virtue of which they purported to act. Their case may be compared with that of a person who, having committed an offence in the interests of a corporation which he represents, is not permitted to hide behind the collective responsibility of the corporation therefor. In other words, international law postulates that it is impossible for a state to sanction an act that violates its severe prohibitions, and from this follows the idea which forms the core of the concept `international crime': that a person who was a party to such a

crime must bear individual responsibility for his conduct. Otherwise, the penal provisions of international law would be frustrated:

"...in modern times a State is - ex hypothesi - incapable of ordering or ratifying acts which are not only criminal according to generally accepted principles of domestic penal law but also contrary to that international law to which all states are perforce subject. Its agents, in performing such acts, are therefore acting outside their legitimate scope, and must, in consequence, be held personally liable for their wrongful conduct ..." (Glueck, op. cit., pp. 427-428).

This was written before the Nuremberg Tribunal delivered its judgment, and indeed already before World War II the defence of `Act of State" was not regarded as an adequate defence to the charge of an offence against the `laws of war' (`conventional' war crime). Lauterpacht saw in this a complete answer to the doctrine in question:

"...it is universally agreed that in any case persons who have ordered the commission of war crimes are liable to punishment for the violations of rules of warfare. It is clear that in this vital respect the apparently established doctrine breaks down altogether. The law declines, in this matter, to accept the artificial distinction between the state and those acting on its behalf. The fact that the offender acts on behalf of the state is irrelevant. He is bound personally by rules of international law, whether he is acting in his personal capacity, in order to satisfy private greed or lust, or as an organ of the state." (63 Law Quarterly Review (1947), pp. 442-443).

In support of the same opinion, Glueck (ibid., p. 428) cites the case of the German general, Stenger, who was sentenced in 1920 by the Supreme Court in Leipzig for the killing of wounded French soldiers during World War I. In its judgment the German court said:

"The lawfulness or unlawfulness of an act of war is determined by the rules of international law. The killing of enemies in war is in accordance with the will of the state which wages the war and whose laws are decisive for the question of legality or illegality only to the extent that it is done under the conditions and within the limits which international law established."

(c) Whatever may be the value of the above doctrine in other cases, the principle laid down in Article 7 of the Charter of the International Military Tribunal at Nuremberg, to which the Tribunal (basing itself also on the case of ex parte Quirin) adhered, is that that doctrine cannot afford a defence in respect of international crimes, particularly those defined in the Charter. To quote the court on this issue:

"The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares: `The official position of defendants, whether as heads of state, or responsible officials in government departments, shall not be considered as freeing them from responsibility, or mitigating punishment.' On the other hand, the very essence of the Charter is that

individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state, if the state, in authorizing action, moves outside its competence under international law" (Trial of Major War Criminals (Nuremberg, 1947, vol. 1., p. 223)).

The principle expressed in these views, which totally negates the `Act of State' contention, is today one of the `Nuremberg Principles,' which have become part and parcel of the law of nations, and must be seen as having been rooted in it in the past as well, as was explained in paragraph 11 above (see Article IV of the Genocide Convention; Principle No. III of the Nuremberg Principles, as formulated by the International Commission following upon the United Nations resolution 177(II) - report of the Commission on its proceedings, U.N. Gen. Ass. Off. Recs., 5th Sess. Suppl. No. 12A 1316 (1950) p. 12). The result is that this contention, insofar as it refers to the crimes in question, finds no support in international law, and can by no means avail the Appellant.

(d) Counsel for the Appellant proceeded to contend that the acts attributed to his client were committed within the framework of the anti-Jewish decrees of the Nazi regime and the personal orders of Hitler himself, decrees and orders which, for all the injustice they entailed, had at the time the force of law. To this contention there are two replies. First, if anyone wishes to entrench himself behind the formal concept of a Nazi `Law,' it must be said that the Final Solution was at no time embodied in a `Law' - not, indeed, because of any deference on the part of the Nazis to the law, as if they had no wish to break it, but because they were most anxious to hide their deeds in darkness and not expose them to the civilized world (a fact which also points to their having been aware of the criminal nature of their deeds). It would appear, moreover, that the dominant tendency in the jurisprudence of Western Germany today is to invalidate ab initio the discriminatory and destructive decrees of the Nazi regime, to deny them any legal validity from the day they were issued or enforced, and to apply this approach also to the `norms' which were of Hitler's own creation. The view by which West German courts are guided is that expressed in the formula stated by Radbruch (called by the Attorney General "the greatest positivist in German thought") in his post-war writings (Rechtsphilosophie (1950) p. 353):

"Preference should be given to the rule of positive law, supported as it is by due enactment and state power, even when the rule is unjust and contrary to the general welfare, unless the violation of justice reaches so intolerable a degree that the rule becomes in effect `lawless law' and must therefore yield to justice."

(The translation is by Professor Lon Fuller of Harvard University; see also the article by Silving, p. 344, and the extracts from German judgments therein cited; see also the review of these judgments in Legal Theory by Friedman, 4th ed., pp. 310, 311.)

It follows that, according to the above jurisprudence, not only is the present contention of Counsel for the Appellant completely untenable also in German law, but that also according to the theory of Kelsen (ibid., note on p. 82) the acts in question cannot be treated as `Acts of State.' However, we need not resort to modern German judgments as support for rejecting this contention. The second and principal reason for our doing so is that the discriminatory and plunderous decrees of that wicked

state, and the murderous edicts of the autocrat who directed its affairs, are not laws in the eyes of international law and can by no means give these terrible crimes the imprimatur of validity, or absolve those who participated in them from the personal responsibility they bear:

"Hitler's decrees were a protection neither to the Fuehrer himself nor to his subordinates, if in violation of the law of the community of nations" (U.S. v. Altstoetter, L.R.T.W.C., vol. 3, p. 1011).

To conclude this subject, we can do no better than repeat the words of the District Court:

"The very contention that the systematic extermination of masses of helpless human beings by a government or regime could constitute an `Act of State,' appears to be an insult to reason and a mockery of law and justice."

The contention of `Act of State' is rejected.

15. Counsel for the Appellant coupled with the contention of `Act of State' also that of `obedience to superior orders.' He contended that it was the oath of allegiance taken by his client on joining the SS organization, and the compulsion of Hitler's order to destroy the Jews completely - an order which was passed on to him through that organization's chain of command and was given to him by his superior - by which he was guided in acting as he did. For the present we shall deal with this submission only from the legal point of view; our principal object will be to distinguish it from the `Act of State' contention on the one hand, and to clarify its meaning and significance from the viewpoint of international law on the other:

(a) The defence of `obedience to superior orders' differs from that of `Acts of State' in the following three respects: (1) While the latter defence means that the criminal act cannot be imputed to the person who committed it, but only to the state, the former signifies that he may indeed be regarded, even legally, as the doer of the act, but that the fact of his having acted under the compulsion of an order of the competent authority, to whom he was directly subordinated, is his justification.

(2) While the `Act of State' theory regards the performance of the mission in question as being of this character only because the supreme authority in the state ("the Heads of State" etc.) commanded or authorized it (Kelsen op. cit., p. 104), this does not necessarily apply to the theory of `superior orders,' which justifies the criminal act solely because the immediate superior of the perpetrator of the act ordered him to carry it out, and the latter was bound to obey such order.

(3) `Act of State' does not necessarily mean that the person who performed the mission acted under a ministerial direction, which left him no margin of discretion, but it is rather the fact that the act performed was within the scope of the authority given which suffices to vest it with that character. On the other hand, the defence that the act was done in obedience to superior orders means - ex hypothesi - that the person who performed it had no alternative - either by law or by virtue of the regulations of the disciplinary body (army, etc.) of which he was a member - but to carry out the order he received from his superior.

It should be noted that we have not as yet dealt with the legal value of the defence in question, but have only dwelt on the differences existing between it and the other defence advanced. The third difference makes it clear that the `superior orders' doctrine cannot, by its very nature, avail the Appellant because, when we come to analyse the facts, it will be found that within the framework of the order to carry out the Final Solution, the Appellant acted independently, and even exceeded the tasks assigned to him through the service channels of the official chain of command (see paragraphs 16-18 of Part III of this Judgment.)

(b) The question whether the public interest requires that the defence of `superior orders' be recognized, raises the following two difficulties. On the one hand, the purpose of ensuring good order in the disciplinary body to which the accused belongs necessitates that he should not disobey his superior officer and should not stop to ponder the legality of the command he received, lest the object for which he was ordered to act be foiled. On the other hand, the damage that will be caused to the public by the offence involved in carrying out the order demands that he should not obey it automatically, but should do so only if reasonably convinced that the order was lawful. These two conflicting aspects have been aptly summarized by Stephen in his History of Criminal Law in England (vol. 1, p. 206):

"The inconvenience of being subject to two jurisdictions, the sympathies of which are not unlikely to be opposed to each other, is an inevitable consequence of the double necessity of preserving, on the one hand, the supremacy of the law, and on the other, the discipline of the army."

There is also the personal problem of the soldier himself when placed in the dilemma that, if he disobeys the order of his commanding officer, and it later turns out to have been lawful, he will be brought before a court-martial, whereas if he obeys it, and it later transpires that this was not the case, he will be liable to punishment under the general criminal law. This difficulty is likely to be grave, in view of the fact that the simple soldier is not always capable of deciding on the spot whether the order given was lawful or not:

"It is not easy for any man, still less for the poorly educated soldier, to decide whether an order addressed to him is reasonably necessary for quelling a disturbance... To make matters worse for him, he is subject to two different jurisdictions" (Glanville Williams, The Criminal Law etc., 2nd ed., p. 297).

All three difficulties show that the problem whether it is proper to recognize this defence depends on the answer to the question if, and to what extent, the mental state of the accused at the time of the offence ought to be taken into consideration, namely, the fact that he did not then know that the order he carried out was contrary to the law. The via media solution provided by the general Criminal Law of this country - in accordance with the tendency of English law (ibid., pp. 297, 298) - is that such defence is admissible where there was obedience to an order not manifestly unlawful (section 19(b) of the Criminal Code Ordinance 1936; see also the passages from Israeli cases, quoted in paragraph 219 of the Judgment). However, in Section 8 of the Nazis and Nazi Collaborators (Punishment) Law, the legislature has provided that the defence of "superior orders" - and the same applies to the defences of "constraint" and "necessity" - shall not be admissible with respect to the offences

covered by the Law; while in Section 11, the legislature has provided that it is permissible, in certain circumstances to consider it as a factor in mitigation of sentence. We certainly agree with the view of the District Court that, even if it had to decide the case on the basis of the provision in the general Criminal Law, it would have had to reject that defence, not only because the order for physical extermination was manifestly unlawful, and also all other orders to persecute the Jews were contrary to the "basic ideas of law and justice," but also because the Appellant was fully conscious at the time that he was a party to the perpetration of the most grave and horrible crimes. Indeed, in paragraph 221 of the Judgment, the Court has set out the testimony of the Appellant in which he himself admitted this fact:

"Your Honour, President of the Court, since you call upon me to tell and give a clear answer, I must declare that I see in this murder, in the extermination of the Jews, one of the gravest crimes in the history of mankind."

And in answer to Judge Halevi:

"...I already at that time realized that this solution by the use of force was something illegal, something terrible, but to my regret, I was obliged to deal with it in matters of transportation, because of my oath of loyalty from which I was not released." (Session 95, Vol. IV).

2(c) Thus far we have dwelt principally on the theoretical aspect of the defence in question - on the distinction between it and the `Act of State' defence, and on the attitude adopted towards it by the legislature. We now wish to reply to the question as to whether the particular attitude taken by the legislature in Section 8 of the 1950 Law which precludes the application of the `superior orders' defence to the crimes defined in the Law, conflicts with the principles of international law.

2(1) Our first reply to this question is that until World War II there was no agreed rule in the law of nations, by which recognition was given to the defence of `superior orders,' not even with respect to the charge of committing an act contrary to the laws of war. See: Stone op. cit., p. 362; Schick, A.J.I.L., vol. 41, p. 793; Wright, History of U.N. War Crimes Commission (1948), p. 274.

The solutions given in regard to the question whether such defence should at all be admissible - and, if so, to what extent may be taken into account the accused's knowledge or ignorance of the unlawful character of the order or the fact that he was bound to know of it - have varied from state to state. This is not the place to deal with them at length (see the review of Greenspan, pp. 490 ff; also Wright, ibid., p. 281 ff). We may, however, mention the principle embodied in the British and American Military Codes of 1914 which laid down that a superior order shall serve as a defence for a member of the armed forces who committed a war crime in obedience to it, and that the commanding officer responsible for such order shall alone be criminally responsible for the former's act. This is the principle known as respondeat superior, and it conflicted with the provisions of the general criminal law which was then in force in those countries and was, moreover, not in harmony with the decisions of their courts. In 1944 Glueck (see his book, pp. 149-150) wrote that the legal position on this issue had not yet crystallized there. It is true that a little later the above military codes were amended, and the principle was laid down that a superior order, under

which a member of the armed forces acted in contravening the laws of war, would not confer upon him absolute immunity from punishment, but that the court could take such defence into consideration, if the order was not obviously unlawful (British amendment). It is also pertinent to add that the provision in German law of the last century, which the Nazis maintained intact, imposed liability for a breach of the criminal law committed by a person, while acting in obedience to an order given him by his superior, on the latter alone, but at the same time it specified that the first-mentioned person shall be punished as an accomplice, if he knew that the order concerned an act that aimed at a crime or an offence under the general or the military law. (Article 47(2) of the German Military Law of Criminal Jurisdiction of 1882, cited in paragraph 220 of the Judgment). That provision appears to have prescribed a sort of subjective test as to the admissibility of the `superior orders' defence, but in its judgment in the Llandovery Castle case, in which it tried the charge of a war crime committed in World War I, the Supreme Court of Germany in Leipzig held, in 1921, that the accused shall be deemed to have had knowledge of the unlawful character of the order he carried out

"if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law... In the present case it was perfectly clear to the accused that killing defenceless people in the lifeboats could be nothing but a breach of law." (Quoted from the judgment in U.S. v. Ohlendorf L.R.T.W.C., vol. 4, p. 484).

We have made passing reference to this test because it, too, entails that full criminal intent be attributed to the Appellant even had he not admitted this fact in his evidence. But our main purpose here is to make it clear that in the past no principle recognizing such defence became crystallized in international law.

(2) There was thus no departure from the provisions of international law - and this will be our second reply to the above question - when in Article 8 of the Charter of the International Military Tribunal it was provided, with respect to the crimes defined therein, that the fact that the accused acted pursuant to an order of a superior shall not free him from responsibility, but the Tribunal may take it into consideration in mitigation of punishment, should it determine that justice so requires. It must be understood that this express provision was designed to defeat in advance any attempt by the Nazi criminals to resort to the respondeat superior plea to the point of carrying it ad absurdum, in view of the Fuehrerprinzip which, in the last analysis, made it possible to trace to Hitler alone the source of the satanic orders which resulted in the perpetration of the horrendous Nazi crimes, including that of the `Final Solution':

"Had their contention that they acted upon the orders of Hitler been accepted as a valid defence, the rule respondeat superior would have served merely as a reductio ad absurdum for the purpose of frustrating the law. Upon such a theory it would have been impossible to punish anyone for the crimes of this war. All the perpetrators charged with offenses might have made the same defense, and the arch- criminal Hitler, by committing suicide, made it impossible to inflict punishment upon this earth" (Finch, A.J.I.L., vol. 41, p. 21).

See also the observation of Justice Jackson in the report he submitted to the President of the United States in June 1945 (quoted by Wright, ibid., p. 274):

"Society as modernly organized cannot tolerate so broad an arch of official irresponsibility."

Here, therefore, is a weighty reason for repudiating the above defence as one which relieves from responsibility in cases of this kind. The other reason - that the very commission of the crimes in question necessarily points to the existence of criminal intent in the perpetrator - emerges from the language used by the Nuremberg Tribunal in confirming that Article 8 is part of the law of nations:

"The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible." (Trial of Major War Criminals (Nuremberg 1947) vol.1, p. 224).

The above principle, too, is one of the `Nuremberg Principles' which were affirmed by the United Nations Assembly resolution of 11.12.46 and have become the legacy of civilized countries. If this is so, it must again be concluded that the provisions in sections 8 and 11 of the Law of 1950 are in conformity with international law.

(d) The last point on this subject with which it is necessary to deal - one touching on the third aspect of the general problem presented above - pertains to the statement at the end of the passage just cited from the Nuremberg judgment. It was there pointed out that the true test was not whether a superior order existed, but "whether moral choice was in fact possible." In other words, the mere defence of obeying a superior order - as distinct from the defence that he could not avoid committing the crime because he had no "moral choice" to pursue another course - will not avail the accused. The Tribunal did not specify what it meant by the expression "moral choice." It may well be, however, that it had in mind the consideration of circumstances which placed the accused under the threat of having to pay with his life in the event of his failure to obey the criminal order (see Greenspan, p. 493, especially note 334; Levontin, Myth of International Security, pp. 260- 261). If this interpretation be correct - and we express no opinion on this point - then it must be understood that the Tribunal recognized that a defence of `constraint' or `necessity' might be advanced. As stated, the application of these defences as grounds for relief from responsibility in respect of the crimes defined in the Law of 1950 has been excluded by section 11 thereof. But even if the Law would have permitted the accused to set up the defence that in carrying out the order to commit the crime he was acting in circumstances of `constraint' or `necessity,' he could not have done so successfully unless the following two facts had been proved: (1) that the danger to his life was imminent; (2) that he carried out the criminal assignment out of a desire to save his own life and because he found no other possibility of doing so. The American Tribunal IIA which applied Control Commission Law No. 10 also insisted on the necessity of proving these two facts (U.S. v. Ohlendorf L.R.T.W.C., vol. 4, p. 480):

"The threat, however, must be imminent, real and inevitable."

"The test to be applied is whether the subordinate acted under coercion or whether he himself approved of the principle involved in the order. If the second proposition be true, the plea of superior orders fails... When the will of the doer merges with the will of the superior in the execution of the illegal act, the doer may not plead duress under superior orders."

As will be seen below, neither of the said facts has been proved in this case. But we stress, in particular, the failure to prove the second fact, because each of the said two defences goes to the motive that prompted the Accused to carry out the criminal act - the motive to save his own life - and also because the District Court relied in the main on its finding that the Appellant performed the order of extermination at all times con amore, that is to say, with genuine zeal and devotion to that objective. We shall also justify this finding of the Court when we come to examine the factual contentions of Counsel for the Appellant.

16. We have yet to reply briefly to the contention of Counsel for the Appellant that the Judges of the District Court - and he advanced the same contention with reference to the Judges of this Court - were psychologically incapable of judging the case of his client objectively.

Like the District Court, we, too, reject this contention, and the reply it gave in so doing is also our reply:

"As for the Accused's fear concerning the background against which this trial will be heard we can only repeat the principles which apply to every judicial system worthy of the name; that indeed while on the bench a judge does not cease to be flesh and blood, possessed of emotions and impulses. However he is required by law to subdue these emotions and impulses, for otherwise a judge will never be fit to consider a criminal charge which arouses feelings of revulsion, such as treason, murder or any other grave crime. It is true that the memory of the Holocaust shocks every Jew to the depth of his being, but when this case is brought before us we are obliged to overcome these emotions while sitting in judgment. This duty we shall fulfil" (Session No. 6, Decision No. 3, Vol. I).

The learned Judges did fulfil their duty - fully and to the end.

II

1. Learned Counsel has asked us to admit further evidence on appeal, and also to admit, as such, notes made by the Appellant while in prison, after his conviction by the District Court, and prior to the hearing of the appeal.

By virtue of Section 71 of the Criminal Procedure (Trial Upon Information) Ordinance, this Court may allow further evidence on appeal, but it is an established rule that the Court will not exercise this power save in exceptional cases. So far as we are aware, this Court has not allowed further evidence to be given except on two occasions: in Cr.A. 24/52 (8 Pesakim 123) on the ground that the evidence of a witness as

recorded was unclear and ambiguous, and in Cr.A. 49/55 (9 Piske Din 1937) with the consent of the prosecution.

Already during the period of the Mandate, the Supreme Court ruled that it would not admit further evidence on appeal except where the evidence tendered was prima facie of such importance that, if it had been before the Court of First Instance, it would have had an influence upon the court in favour of the applicant, and provided he was unable, despite reasonable diligence, to adduce such evidence in the Court of First Instance: Cr.A. 10/42 (11 C.L.R. 149). See also Cr.A. 73/39 (7 C.L.R.21).

2. The evidence now proposed does not comply with the above two requirements.

Notes made by the Appellant after the event, that is after the termination of the hearing in the District Court, are of no evidentiary value. We have, therefore, not called upon the Attorney General to reply to Counsel's application for leave to produce these notes.

3. By the evidence of Dr. Serafim, a lecturer at the University of Goettingen in Germany, the Appellant sought to prove that under the Nazi regime in which he served, he could not have been relieved of the duties imposed upon him by his superiors, even had he wished to do so. But in the District Court the Attorney General tendered an affidavit of Serafim in evidence for the purpose of rebutting the contention of Counsel for the Defence, and he offered to bring him to this country to give evidence viva voce. This was opposed by Counsel for the Appellant on the ground that Serafim was only a lecturer in the university, and had not attained the rank of professor. In view of the attitude of the Defence in the Trial Court, we saw no reason to grant the Appellant's application to hear the witness at this stage.

4. The application to hear the witness Dr. Wetzel is related to the findings in paragraph 167 of the Judgment of the District Court. Counsel for the Appellant contends that this witness has only now returned to Germany from long imprisonment abroad, and that he now resides in Hanover; it was therefore impossible for the Defence to call him before the Trial Court.

What does Dr. Servatius seek to prove by the evidence of Wetzel?

Wetzel was, in 1941, a Specialist Officer in the Reich Ministry for the Eastern Occupied Territories. A sheaf of documents (Exhibit T/308) was produced to the District Court, including a handwritten memorandum, a typed copy of such memorandum, and drafts of two letters prepared on the same subject. The subject matter of the said document is the introduction of a method of killing by gas through specially constructed death-vans. The names of Wetzel and Eichmann are not mentioned in the memorandum, but from the draft copy and the drafts of the two letters it transpires that a conversation concerning this subject took place between three persons, viz. between Wetzel, a man by the name of Brack, of Hitler's Chancellery, and the Appellant. The documents were shown to the Appellant in the course of his interrogation by the police, and he stated twice - an interval of time having elapsed between one interrogation and the other - that the documents describe the situation "very accurately," and that "there is no doubt that Wetzel came

to me on this matter, ... and thereafter I informed Wetzel of the attitude of the Chief of the Security Police and the SD Only thus is this reasonable."

These were the words of the Appellant on which the District Court based its conclusion that in 1941 he conveyed the consent of his office to the use of gas vans for the purpose of extermination.

In what way can Wetzel's evidence help the Appellant, in view of his statement to the police?

Counsel for the Appellant raises two points. He says, first, that the typed copy differs from the memorandum, in that the memorandum (which is not clearly written) mentions a conversation which Wetzel had with Brack or another person (i.e., the Appellant), and not a conversation with Brack and another, third, person, as stated in the typed copy. Counsel further argues that the drafts of the said letters remained drafts, and the letters were not dispatched. But the District Court did not find anything to the contrary. It is irrelevant whether or not the letters were actually dispatched by the Ministry where they were prepared. The essential fact is that the Appellant talked to Wetzel, and in view of the Appellant's admission to the police, coupled with the fact that the method of killing referred to in the said exhibit was actually introduced - the Appellant cannot benefit from any evidence that may now be given by Wetzel to the effect that the letters were not dispatched. Even if they were not dispatched, the conversation referred to in the letters took place, and at that conversation the Appellant made his statement. And even if Wetzel were now to come forward and say in evidence that he did not speak to the Appellant, his evidence would not detract from the Appellant's admission that he had a meeting with Wetzel and spoke to him.

We, therefore, have rejected this application as well.

5. The evidence of Shimoni and Tohar, and statements of the Ministry of Justice in respect of the request of the Government of Argentina to investigate the circumstances of the occurrence, on which Counsel sought to base his contention that the Court had no jurisdiction, are irrelevant, in view of the conclusion arrived at by us on the merits of the case. The same applies to the evidence of Dr. Hans Globke, whom Counsel asked the Court to hear as an expert on the Nuremberg Laws enacted by the Reich Government.

6. Finally, Counsel requested the Court to admit as evidence a report by the witness Joel Brand, if such report would be found in another of the Court's files (the Kasztner case), or to call Joel Brand to give further evidence. This application refers to the transaction `Blood for Goods' in

Hungary, and was dealt with in paragraphs 116 and 117 of the Judgment.

The Appellant contends that he promised Brand - who tried at the time to mediate in a transaction for the saving of Jews from Hungary - that he would immediately, and without any consideration given in return, release 100,000 Jews as soon as Brand obtained the consent in principle of the Jewish representatives in Constantinople to supply trucks to the Reich in exchange for the release of Jews. This contention was rejected by the District Court which held that the Appellant adopted his version of

willingness to release Jews, in token of his friendly attitude towards them, only after he had read the book of Joel Brand and taken advantage of an error of Brand in his memoirs. Counsel seeks to have that finding disturbed by the production of further evidence.

The line of defence pursued by the Appellant was that he did nothing relating to the persecution of Jews except upon orders of his superiors, and that he personally was not competent to determine their fate. It follows, therefore, that if there existed at any time any willingness to release 100,000 Jews without consideration, contrary to the findings of the District Court, it was the Appellant's superiors who were willing to do so, and not the Appellant. The Appellant acted as he was ordered to act, and we are not here judging his superiors. But the Appellant's version was rejected, also on its merits, in paragraph 116(b) of the Judgment of the District Court, and there again the Court based itself upon the Statement of the Appellant to the police. It should be added that the transaction concerning 100,000 Jews did not directly constitute one of the particulars of the Indictment, and the Court, therefore, pointed out that it had no intention of going into details, but confined itself to a number of observations which were in the nature of obiter dicta.

For these reasons, we refused the application by the Defence.

It is immaterial to the question with which we are concerned whether or not the `promised' shootings were indeed carried out; neither is it material to establish whether there was a cause-and-effect relationship between the Appellant's recommendation and the killing of those Jews. Important to us is the blatant fact that the Appellant's interest was not restricted to the `transportation of the sentenced' only.

(c) March-April, 1943. On 3.3.43 the Appellant writes to the Foreign Ministry to say that:

"In accordance with reliable information, which must be kept confidential, Jewish officials are conducting, through their offices in Constantinople, promising negotiations with Turkey as to the issue of Turkish transit visas to a group of one thousand Jewish children, together with one hundred accompanying staff, from Romania, to be transported to Palestine, overland, via Bulgaria and Turkey, in co-operation with the `Waggons Lits Company.' You are requested to thwart this emigration project, if possible" (T/1048).

Similarly, Guenther (the Appellant's deputy) appeals on 2.4.43 to the Foreign Ministry and requests `anew' that that office see to it that "no Jewish emigration overseas takes place" (T/950). That appeal came in the wake of a broadcast report to the effect that the British Ambassador in Washington stated to the Jewish Congress that "the negotiations between Bulgaria and Great Britain in the interest of the deportation of 4,000 adult Jews and 4,000 Jewish children have been successfully concluded."

The Appellant was overjoyed when he succeeded in stopping the rescue of Jewish children, for that was the most effective blow he could deal to the physical survival of the nation, and against such emigration he fights everywhere (e.g., France, T/439).

(d) September-October 1943. The Appellant sees everything, nothing is hidden from him, nor does any error escape his prying eye. He examines and re-examines, scrutinizes and re- scrutinizes, with a pathological and pedantic suspiciousness, all the figures laid before him by the various authorities, and knows - or believes he knows - thoroughly, the most minute detail on the most insignificant internee in any of the camps, as may be seen from the following cases:

(aa) On 23.9.43 the Appellant telegraphs to Standartenfuehrer Dr. Knochen in Paris that he has received secret information that in Switzerland attempts are being made to obtain citizenship of a South American country for the Jew Gollub, in order to enable him to go abroad. This Jew is at present in the Drancy camp. He (the Appellant) passes this information on (to Knochen) and requests that the matter be investigated and that the Jew Gollub be arrested immediately and, if possible, to include him in the evacuation transport to the East, to reception camp Auschwitz" (T/496).

Noteworthy in this request are: the directions to send the internee to Auschwitz, without waiting for the results of the review, which he himself ostensibly ordered, and the designation `reception camp' here given to the great camp of destruction at Auschwitz. After a lapse of five days, a report is received from Drancy to the effect that "no such person is known in the camp" (see note on T/496). The wickedness was therefore in vain.

(bb) A Jewish lawyer by the name of Rosenthal, an old man of over 71, of Romanian nationality, had lived since 1943 in occupied France. The government of Romania, in gratitude to this lawyer for his past good record, made representations to the Foreign Ministry in Berlin not to evacuate Mr. Rosenthal to any of the eastern camps. The Foreign Ministry refers to the competent evacuation Section IVB4 of the RSHA, and one of the Appellant's assistants, Hauptsturmfuehrer Woehrn, informs them by telephone that the Appellant had ordered his Section in Paris not to carry out Mr. Rosenthal's planned deportation until further notice.

The Appellant, however, is uneasy lest his order, communicated by telephone, was not properly understood, and lest the Foreign Ministry misconstrue it. He hastens, therefore, four days later, to dispel the bad impression by explaining clearly in a letter the purely temporary tenor of the order. In that letter (T/491 of 11.9.43) he refers to Woehrn's telephone communication, and then proceeds to say:

"Even if the Romanian Government grants the Jew Rosenthal a special status by reason of his services for Romania, even then it would be undesirable, from a police security point of view, and because of the steps taken to de-judaize (Entjudung) the European continent, that the Jew Rosenthal continue to live in France...

"If, therefore, I gave an order to refrain, for the time being, from the planned deportation of the Jew Rosenthal, in the light of the reasons set out above, this is by no means to be seen as an absolute and definitive decision."

Again, the sounding of a warning to the Foreign Ministry, to say: Lest you forget that the supreme object is the de- judaization of the whole of Europe, including those parts of the European continent that have not yet had the benefit of indoctrination by

the Nazi doctrine. Certainly there could be no question here of the `transportation of the sentenced.'

(cc) The Monagasian episode, in which we find the detecting hand, the prying eye, of the Appellant behind the scenes and over the heads of all other authorities.

In mid-September 1943, the Appellant's Section begins `to take an interest' in the Jews living within the Principality of Monaco. The Appellant, who was then in France, telephones to the RSHA in Berlin to report that some 15,000 Jews have escaped from Southern France to the hills of Monaco, and that the government of Monaco agrees in principle to their capture within Monaco territory by the Germans, should that be requested by the Reich Government.

On 21.9.43 the RSHA forwards the message of the Appellant to the Foreign Ministry, requesting that they consider the possibility of an appeal to the Monaco Government, with a view to the capture of the above-mentioned Jews. The Appellant's message is referred to in a minute (T/492) by von Thadden, the Specialist on Jewish Affairs in the Foreign Ministry, who adds there, in brackets, as though in passing, the most interesting and instructive observation:

"It was impossible to establish in what way Obersturmbannfuehrer Eichmann managed to come into contact with the Government of Monaco, and whether the consulate took part in this."

The Foreign Ministry therefore communicates with the German consulate in Monte Carlo, which reports that, in its view, there can be at most 1,000, not 15,000, Jews in Monaco, most of whom have been residing there for many years. The competent unit of the Security Police in Nice also confirmed that estimate. Therefore - and for other reasons stated by von Thadden - he holds that the appeal to the Government of Monaco must be regarded as premature (T/494).

On 30.9.43, a conference is held on this subject between the Appellant and von Thadden. The Appellant says that the figure (1,000) given by the consulate cannot possibly be correct. He had just arrived from a visit to Southern France, and the information he received from the SD Chief of Southern France was that in Monaco there were some ten thousand to fifteen thousand Jews (T/493). In view of the `astounding difference' (verblueffende Differenz) between the figure given by the RSHA and that given by the German consulate in Monte Carlo, the Appellant contemplates (or is requested by von Thadden) sending immediately an express telegram to the competent SD unit, requesting it to review the matter afresh (T/494, T/493).

In the end Guenther, the Appellant's deputy, reports on 22.10.43 to the Foreign Ministry: "it has meanwhile been established that there are in the territory of Monaco not - as was formerly believed - fifteen thousand Jews, but only 1,000-1,500 Jews," and he requests the Foreign Ministry to see to it that "the government of Monaco makes these 1,000- 1,500 Jews available and ready for deportation" (T/495).

It was thus the estimate of the consulate, not that of the Appellant, which was accepted; yet that loss was `offset' by another `profit': No discrimination is made any

longer between refugees from Southern France and permanent residents of Monaco proper.

The Appellant's long hand reaches as far as Sweden, and he does not despise even the paltry figure of 64 Jews, for when the Government of Sweden agrees, out of humanitarian sentiments, to grant Swedish nationality to 64 Jews who were citizens of Norway, to save them from Nazi enormities, he (the Appellant) is the only one to foil the plan (T/593, T/605).

(e) Finally, July 1944. The Appellant's tour of duty in Hungary.

At the beginning of July 1944, the dormant conscience of the world begins to be aroused on hearing of the total murder the Nazis were perpetrating within European Jewry, and President Roosevelt, jointly with the Pope and the Governments of Sweden and Switzerland, urged Regent Horthy to stop the transport of Jews to Auschwitz, and submitted proposals for the emigration of Jews to countries outside Hungary. That request is soon followed by effective acts: American aircraft bomb Budapest heavily, and on 7 July Horthy vetoes the continued deportation of the Jews. At that time he was contemplating dismissing the Sztojay cabinet and constituting a new cabinet.

Horthy's overlords, the Germans, are astounded at this `treason,' but they are no longer as strong as before, for meanwhile Allied forces have landed on the coast of Normandy, while on the eastern front the great Russian offensive has begun. They are compelled, therefore, to swallow the bitter pill, and begin making concessions.

Indeed, three days after Horthy's veto, Ribbentrop sends Veesenmayer a telegram full of new notes of softness and appeasement (N/85 of 10.7.44). It says:

"The Fuehrer has acceded to my proposal and has decided to meet the Hungarian Government re the proposal of foreign governments on the transfer of Jews to countries abroad. Therefore, the requests of the Governments of Sweden, Switzerland and the United States may be granted, assuming, as we do, that those governments will admit into their own territories the said groups of Jews - namely into Sweden, Switzerland and the United States. The transfer of Jews to Palestine should be avoided, if at all possible (waere, wenn irgend moeglich, zu vermeiden), in view of our policy towards the Arabs."

But the Appellant would not rest. His ire was aroused over that permission granted for emigration, and he begins combatting the Foreign Ministry itself, leaving no stone unturned to sabotage the rescue plan. We must not forget that Ribbentrop was a Minister of the German Reich, that the Appellant's post was by some four or five grades inferior to that of a cabinet minister, and that the `chain of command' on the `hierarchy ladder' in relation to the Appellant was Himmler (Minister of the Interior) - Kaltenbrunner (Chief of RSHA) - Müller (Head of Department IV) - some other officer (Chief of Group IVB) - the Appellant (Head of Section IVB4). Nevertheless, he views himself as of equal rank with Ribbentrop, and as one fully qualified to compete with him when his own exclusive domain is at stake, namely the implementation of the Final Solution of the Jewish Question in Europe.

He begins to act, as is his wont, in all possible ways. First he detects a `clerical error' in the affirmative German reply to the proposals of foreign countries for emigration. He writes to his principal assistant, Guenther, in Berlin, to draw his attention to the fact that the German reply to the proposals of the foreign countries was not phrased with proper clarity, a defect that has caused, or is likely to cause, grave trouble:

"In the German note in reply, emigration to Palestine is not strictly forbidden, but it says that emigration to Palestine must be avoided as far as possible. While it has so far not become apparent that emigration to countries other than Palestine had been tried by the foreign neutral legations concerned with the matter, they are already, from the outset, furthering emigration to Palestine. The German Embassy here has so far not stood in the way of these efforts, as it is believed that emigration to Palestine was not rejected by Germany in principle. We, for our part, saw to it that also on the part of the Embassy here, everything possible should be done, in order to delay the emigration efforts, and in the end to prevent them, after the evacuation of the Jews was continued. This step would be rendered possible all the more, since every emigrating Jew has to be in possession of a German visa or a special transit visa for departing from Hungary, issued by the German military authorities through the German Embassy. In order that emigration to Palestine might be prevented more efficiently, it seems to us to be useful to formulate with greater clarity and greater stringency the consent of the German Reich, which was given on this point in the first place, so that emigration to Palestine within the framework of this operation will not receive Germany's consent" (T/1216 of 24.7.1944).

To put it simply: Here is a piece of disguised information concerning the Embassy to the RSHA, or to the Foreign Ministry through the RSHA, and an `authentic' interpretation of Hitler's assent given on Ribbentrop's recommendation, as stated above.

Simultaneously with all this, he takes a parallel course of action, rather less interpretive and more sly, with the object of total sabotage of the implementation of that assent, and so as to confront Ribbentrop as well as Hitler with an `established fact,' and leave no possible crack in the door even to emigration of Jews to countries other than Palestine. We find, indeed, on the morrow of that day, on 25.7.1944, Veesenmayer telegraphing to Berlin to report, inter alia, that:

"The chief of the SD's local Sondereinsatzkommando for the Jews, SS Obersturmbannfuehrer Eichmann, has expressed his opinion that as far as he is aware, the Reichsfuehrer-SS does not agree, under any circumstances, to the emigration of Hungarian Jews to Palestine. The Jews who are under consideration constitute, without exception, valuable human material from a biological point of view. Many of them are veteran Zionists, whose immigration to Palestine is definitely undesirable. It is his intention, in view of the Fuehrer's decision which had been brought to his notice, to report to the Reichsfuehrer-SS and, if necessary, to ask for a renewed decision by the Fuehrer. It was further settled with Eichmann that if additional deportations of Jews from Budapest are approved, they must try to carry them out suddenly (schlagartig) and speedily, so that the deportation of the Jews being considered for emigration should be completed already before the formal arrangements are carried our. The legations concerned had already been informed that the planned operation could obviously only relate to those Jews who were still in

the country. With this object in view, they would also try to induce the Hungarian Ministry of the Interior to give a negative reply to the Swiss proposal, by which the Jews registered for emigration would be concentrated in special camps. As far as this plan was concerned, Eichmann was considering - in the event of permission for emigration to Western countries - to prevent the progress of the transports by taking appropriate steps, for example on French territory" (T/1215, pp 2-3).

Comment is superfluous!

If that were not all, there follows the Appellant's meddling in all the internal affairs of the camps, which deals the last blow to the contention that his duties were confined to `the transportation of the sentenced' and no more. It has been proved in the Wetzel papers (T/308 and appendices) that in October 1941 the Appellant did "agree to this procedure," in other words, to the killing of those shipped eastwards (Riga, Minsk and Lodz) in gas vans. In T/37 he did not deny this, but admitted that Wetzel came to see him "on this matter" (ibid., p. 2339). It was only in his evidence to the Court that he began to disclaim responsibility for this, but the District Court did not accept this late denial. His application to us to summon Wetzel as a rebutting witness has been rejected by our ruling of 29.3.62, and the grounds therefor have been set out in Section II, paragraph 4 of this Judgment.

Again, the introduction of the use of Zyklon B in Auschwitz was not effected without the Appellant's participation. Höss relates this in his note (T/90); in T/37 the Appellant attempts to hold Guenther responsible for this: "Guenther has secured for himself some sort of gas" (ibid., p. 387). But the witness for the Defence, Huppenkothen, Chief of Group IVE of the RSHA, says that he knew nothing of any duties allegedly assigned by Müller to SS Sturmbannfuehrer Guenther (Huppenkothen's testimony, p. 9). It is true that the direct negotiations with the representatives of the company that supplied the gas were conducted by Guenther (see Gerstein papers, T/1309, p. 1 of the French text, together with the detailed bills of the Degesch Company in Frankfurt, T/1313a, English translation, p. 3). But it was inconceivable to the District Court, and it is equally inconceivable to this Court, that those negotiations by a member of the staff of Section IVB4 were conducted behind the back and without the knowledge of the Appellant, the Head of the Section. The Appellant himself contradicts himself to a large extent in his references to the identity of the person who charged Guenther directly with the task of obtaining the gas; now he attributes this to Müller, now to Globocnik (cf. T/37, pp. 2274, 3340), and the District Court was right in holding the Appellant responsible for the supply of Zyklon B to Auschwitz.

Neither should we omit this particular fact: When the Appellant visited Theresienstadt on duty, he personally selected the candidates for extermination in Auschwitz (evidence of Diamant to which the Court gave credence: paragraph 152). Learned Counsel's expression of surprise (in paragraph 68 of the Statement of Appeal) at the fact that the Appellant was dealing with such `paltry matters' is pointless, in view of the other, truly insignificant, duties which the Appellant performed in that "Ghetto of the Aged."

17. The facts indicated above also constitute a decisive rebuttal of learned Counsel's third contention, namely that the Appellant was acting on orders from his superiors.

We here refer to the factual aspect of the contention, for the legal aspect of it has already been dealt with in Section 1, paragraph 15, of this Judgment.

As a matter of fact the Appellant did not receive any orders `from above' at all; it was he who was supreme, he who was the commander in all that pertains to Jewish Affairs. He ordered and commanded, not only without orders from his superiors in the hierarchy of the service, but also, at times, in absolute conflict with such orders, as already explained above. The following fact should go a long way to illustrate his unstinting dedication to the cause of the Final Solution, and to what degree he attempted to outdo and surpass even his `illustrious masters.' In April 1945, about a month before Germany's total collapse, at a time when even the Reichsführer-SS, in quest of an alibi for himself, already begins to weigh `more humane methods' of persecution of the Jews, he - Eichmann - is still uneasy as to the advisibility of these methods, and it is only with deep regret and emotional self-restraint that he brings himself to comply with Himmler's orders, as he stated to the representative of the International Red Cross (T/865). It is clear that the idea of the Final Solution was not his own, but the Fuehrer's. Yet that idea might not have assumed so satanic and infernal an expression - in the bodies of millions of tortured and martyred Jews - but for the thorough planning, the zeal, the fanatical enthusiasm, and the insatiable bloodthirstiness of the Appellant and those who did his bidding. We do not minimize by even one iota the terrible guilt that rests on the heads of many, many others; no one who gave any help, active or passive, direct or indirect, no matter how insignificant such help, to Nazi gangsterism in Europe, is to be cleared or exculpated. But we here in this Court are concerned with the Appellant's individual guilt, and as to him, it has been proved with unchallengeable certainty that he took his place not only among those who were active in the implementation of the Jews of Europe, but also among those who activated others in this task. The Appellant was no nondescript entity amongst the activators, but was among the leaders and played a central and decisive part among them all.

18. Thereby collapses the fourth contention of Counsel for the Appellant, namely, the contention of `necessity.' He (the Appellant) was not coerced into doing what he did, and was not in any danger of his life for, as we have seen above, he did much more than was demanded of him, or was expected of him by those who were his superiors in the chain of command. No one would have taken him to task, and he would certainly not have been brought to the gallows, had he - to give one example - based himself on the assent of Hitler and Ribbentrop to the emigration to Sweden and Switzerland of a few tens of thousands of Jews (see paragraph 16 (e) above), and had he not undermined it so wickedly and slyly. As we have seen above, he performed a great many `volunteer acts' of this kind. In the higher echelons of their organization, the Nazis were never using the services of people who did their job under irresistible compulsion. That would have impaired the efficiency of the work to be done, and they had no shortage of enthusiastic zealots, people with strong nerves who do not break down; in other words, people stripped of any human feelings. This is proved by the thousands of arch-murderers, the members of the Operations Units and execution squads, who operated near Riga, Minsk, Kiev (Babi Yar) and other places, who killed about a million Jews, each by one, individual shot, from the hand of the murderer to the nape of the victim's neck, without their knees shaking and their nerves breaking down (see statement of Otto Ohlendorf at Nuremberg, T/312). Had the Appellant demonstrated, at any stage, the slightest displeasure or heart-

searching or even lack of enthusiasm towards the implementation of the Final Solution, his superiors would very gladly have dismissed him, and had him replaced by some other person, more `qualified' than himself. Thus on 4.10.43 Himmler delivered a long address in Posen, in which he said, inter alia:

"If anyone thinks that he cannot undertake to carry out an order (given him) he must say honestly: `I cannot undertake this task, please relieve me of it.' Then, in most cases, the order would probably come: `You must nevertheless carry this out'; or (the commander) might think: `This man has suffered a nervous breakdown, he is weak.' In that case we may say to him: `All right, you had better resign'" (T/1288).

The Appellant never showed repentance or weakness or any weakening of strength or any weakening of will in the performance of the task which he undertook. He was `the right man in the right place,' and he carried out his unspeakably horrible crimes with genuine joy and enthusiasm, to his own satisfaction and the satisfaction of all his superiors. The conditions of `necessity' provided in Section 18 of the Criminal Code Ordinance therefore were not in any way present here, and the Appellant would have been liable to the death penalty under Section 1 of the Nazis and Nazi Collaborators (Punishment) Law, 1950, even if the defence provided by Section 18 of the Ordinance had not been excluded by Section 8 of the Law, in respect of offences set out in that Law. All the more so now that that defence has been excluded. For no one has even so much as suggested that the Appellant "did his best to reduce the gravity of the consequences of the offence" or that he did what he did with intent "to avert consequences more serious than those which resulted from the offence" (sub-sections (a) and (b) of Section 11 of the Law).

There was here, therefore, neither any `necessity' within the meaning of Section 18 of the Ordinance, nor any `extenuating circumstances' within the meaning of Section 11 of the Law, and the Appellant deserves the punishment to which he was sentenced by the District Court.

In deciding to confirm both the Judgment and the sentence passed upon the Appellant, we know only too well how utterly inadequate this death sentence is as compared to the millions of deaths in the most horrible ways he inflicted on his victims. Even as there is no word in human speech to describe deeds such as the deeds of the Appellant, so there is no punishment in human laws sufficiently grave to match the guilt of the Appellant.

But our knowledge that any treatment meted out to the Appellant would be inadequate - as would be any penalty or punishment inflicted on him - must not move us to mitigate the punishment. Indeed, there can be no sense in sending to the gallows, under the Nazis and Nazi Collaborators (Punishment) Law, one who killed a hundred people, while setting free, or putting under guard and then keeping under close guard, one who killed millions. When, in 1950, the Israel legislature provided the maximum penalty laid down in the law, it could not have envisaged a criminal greater than Adolf Eichmann, and if we are not to frustrate the will of the legislature, we must impose on Eichmann the maximum penalty provided in Section 1 of the Law, which is the penalty of death.

The fact that the Appellant - by a variety of ruses, escape, hiding, false papers, etc. - succeeded in evading the gallows that awaited him, together with his comrades, at Nuremberg, also cannot afford him relief here, when at long last he stands his trial before an Israeli Court of Justice.

We have therefore decided to dismiss the appeal both as to the conviction and the sentence, and to affirm the judgment and the sentence of the District Court.

Given this 25th day of Iyar 5722 (29 May 1962), in the presence of the Appellant and his Counsel, Dr. Servatius, and of the Attorney General, Mr. G. Hausner, and Assistant State Attorneys, G. Bach and Z. Terlo.

Yitzchak Olshan President	Shimon Agranat Deputy President	Moshe Silberg Justice
Alfred Witkon Justice	Yoel Sussman Justice	