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The Strange and Curious History of the Law Used to Prosecute Adolf Eichmann

MICHAEL J. BAZYLER* AND JULIA Y. SCHEPPACH**

I. INTRODUCTION

The modern State of Israel was born of two powerful impulses. First was the dream of the Zionist pioneers, starting in the late nineteenth century, to return to the ancient Jewish homeland, cultivate the land, and create a new kind of Jew—strong and proud—in an independent state of their own.¹ Second was the growing need for a place of refuge in the land of Zion for persecuted Jews from Christian Europe in reaction to the long history of anti-Semitism on the European continent.² While immigration to Mandate Palestine was restricted through the war years by the British, with Israel’s Declaration of Independence on May 15, 1948, the floodgates were open for Holocaust survivors to enter the new country.³ By the end of the 1950s, close to half a million survivors of the Holocaust were living in the State of Israel, constituting fully one quarter of the country’s population.⁴

Our analysis of the Nazi and Nazi Collaborators (Punishment) Law (the “NNCL”), passed by Israel’s first Knesset (Parliament) in August,

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1. DONNA ROBINSON DIVINE, *EXILED IN THE HOMELAND* 4–9 (2009).

2. IDITH ZERTAL, *ISRAEL’S HOLOCAUST AND THE POLITICS OF NATIONHOOD* 3 (Chaya Galai, trans., 2005).

3. DIVINE, *supra* note 1, at 89; *see also* DVORA HACOHEN, *IMMIGRANTS IN TURMOIL* 251 (2003).

4. *HOLDING ON TO HUMANITY – THE MESSAGE OF HOLOCAUST SURVIVORS: THE SHAMAI DAVIDSON PAPERS* 28 (Israel W. Charny ed., 1992).

1950,⁵ will take note of the relationship between these two communities: the European Jews who settled in Palestine out of Zionist convictions prior to the Second World War—and built what eventually became the State of Israel—and the Jews who came as refugees and survivors of the Holocaust. We regard this background as essential to our understanding of the enactment of this law.

This essay explores the strange and curious history of the NNCL, a law commonly associated with the prosecution of one Adolf Eichmann,⁶ but a law that did not come into being for the purpose of trying Nazis at all.⁷ In fact, more Jews have been prosecuted under the NNCL than non-Jews.⁸ There is no doubt that the Eichmann trial marks the crowning glory of the NNCL. Its single instance of use after the Eichmann trial, however, was, in many ways, an embarrassment to the judicial system of Israel.

We first set out the legislative history of the NNCL and then discuss its initial use to prosecute Jews accused of collaboration with the Nazis and persecution of their Jewish brethren. We then discuss its application in the Eichmann trial. We conclude by exploring the NNCL's use in prosecuting a Ukrainian collaborator, Nazi SS guard John "Ivan" Demjanjuk, who was extradited from the United States to face trial in Israel and then returned back to the United States after the Supreme Court of Israel reversed Demjanjuk's death penalty conviction.⁹

II. THE NAZI AND NAZI COLLABORATORS (PUNISHMENT) LAW OF 1950

A. Purpose of the NNCL

The post-war enactment in Israel of the NNCL springs from the insidious method used by the Nazis of recruiting Jewish and non-Jewish prisoners in the concentration camps to maintain order and discipline, and oversee the fulfillment of work quotas.¹⁰ Such prisoner

5. *History: The State of Israel*, ISRAEL MINISTRY FOREIGN AFF. (Nov. 28, 2010), <http://www.mfa.gov.il/MFA/Facts+About+Israel/History/HISTORY-+The+State+of+Israel.htm>.

6. Orna Ben-Naftali & Yogev Tuval, *Punishing International Crimes Committed by the Persecuted: The Kapo Trials in Israel*, 4 J. INT'L CRIM. JUST. 128, 129 (2006).

7. TOM SEGEV, *THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST* 261 (1991).

8. See Ben-Naftali & Tuval, *supra* note 6.

9. See Jack Ewing & Alan Cowell, *Demjanjuk Convicted for Role in Nazi Death Camp*, N.Y. TIMES (May 11, 2011), http://www.nytimes.com/2011/05/13/world/europe/13nazi.html?_r=1.

10. Ben-Naftali & Tuval, *supra* note 6, at 129.

functionaries were known as *capos* or *kapos*.¹¹ A slang term originated by the inmates themselves, the word is attributable to various origins: *kapo* was short for *kameradanpolizei* or *Katset-Polizei* (“head foremen”) or derived from the Italian word *capo*, meaning “boss.”¹² According to *The Holocaust Encyclopedia*, a *kapo* was the “[h]ead of a unit in a concentration camp. The term was also used to refer to any Nazi collaborator, although some *kapos* were not collaborators and behaved honorably.”¹³ In its wider sense, *kapo* refers to any prisoner in a concentration or labor camp given some supervisory function by the German administrators. Initially, the Nazis chose *kapos* from the ranks of common criminals and later, political prisoners.¹⁴ Jews were only appointed *kapos* in camps that were entirely Jewish.¹⁵

Kapos were part of the day-to-day running of the camps.¹⁶ They ranged from low-ranking functionaries in camp offices, kitchens and infirmaries, to chiefs in charge of work gangs and barracks, who were expected to deal out punishments and beatings.¹⁷ All were, in a sense, collaborators in the system, and all were prisoners themselves—ultimately subject to the same fate as everyone else.¹⁸

Taking on the role of *kapo* could mean the hope of survival for oneself or a family member because of the special privileges the *kapo* received from the German SS authorities running the concentration and labor camps.¹⁹ Legal scholar Lisa Yavnai explains that for Jewish inmates, becoming a *kapo* “often meant choosing between the possibility of life and almost certain death. In exchange for complete

11. *Id.*

12. Jozeph Michman, *Kapo*, JEWISH VIRTUAL LIBR. (2008), http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0011_0_10732.html.

13. THE HOLOCAUST ENCYCLOPEDIA 379 (Walter Laquer, ed., 2001). Michael Bazyler was provided a handwritten note written to Toni Green, the widow of Jack Green, a Holocaust survivor from Poland who died in 1981. The note was written upon Jack’s death, reading in part: “Dear Tonka! Sorry we could not attend the funeral of Jack who I loved and respect[ed]. Being with Jack in two concentration camps I feel that I knew Jack better than others. Watching day by day how he treated the boys as a CAPO. We should of have more CAPOS like Jack and we would have more survivors. As a CAPO he used his love, his kindness but never his power. When the Gestapo was around his mouth was his power, that’s all. Jack risked his life that others should live. Let his soul rest in peace and let the Mitzvah [good deeds] he did be counted by God.” This essay is dedicated to the memory of Jack Green and other Holocaust survivors who risked their lives to save others.

14. Michman, *supra* note 12.

15. *Id.*

16. *Id.*

17. *Id.*

18. Ben-Naftali & Tuval, *supra* note 6, at 148 n.75.

19. *Id.*

obedience to the SS, *kapos* received more food, warmer clothing, and better sleeping accommodations. These amenities, which were unattainable for the regular prisoner population, increased *kapos*' likelihood of survival tenfold."²⁰

A common refrain heard from Jewish survivors of the camps is the cruelty of the Jewish *kapos*.²¹ Survivor memoirs invariably include details of killings, participation in selection of prisoners for extermination, beatings, theft and humiliation imposed by Jewish *kapos* on their fellow Jewish prisoners.²² A frequent charge is that the Jewish *kapos* behaved "worse than the Germans"²³—and this statement, we believe, reflects in large part the bitterness and shame felt by the authors of such statements towards their Jewish brethren. It also reflects the reality of camp life under a system where prisoners would do much of "the dirty work." On a day-to-day basis, Jewish prisoners would have many more encounters with their Jewish prisoner-bosses, rather than the Germans.

The purpose of the NNCL has been hotly debated, as well as criticized, by Israeli scholars. According to one Israeli Supreme Court decision, "[t]he law in question is designed to make it possible to try, in Israel, Nazis, their associates and their collaborators for the murder of the Jewish people . . . and for crimes against humanity as a whole."²⁴ While this purpose may seem straightforward enough, some Israeli scholars do not agree on the *motivations* behind creating this legal remedy.

Israeli journalist Tom Segev, for example, provides a plausible explanation for how the NNCL came on the books. He notes that after the war had ended, liberated Jews who were recognized as *kapos* were

20. Lisa Yavnai, *Vengeance or Justice? Trials of Kapos*, Panel Presentation at the International Institute for Holocaust Research at Yad Vashem, Holocaust and Justice: Post-War Trials and Holocaust Representation, Awareness, and Histiography (2006). See also Lisa Yavnai, *Vengeance or Justice? Trials of Kapos*, YAD VASHEM, http://www1.yadvashem.org/yv/en/holocaust/insights/podcast/nuremberg_yavnai.asp (last accessed Feb. 17, 2013) (a slightly different version of the above-mentioned presentation as a podcast).

21. Michman, *supra* note 12.

22. Oliver Lustig, *Concentration Camp Dictionary: Kapo*, HOLOCAUST SURVIVORS NETWORK, http://isurvived.org/Lustig_Oliver-CCDictionary/CCD-08_K.html#B1.

23. Sarah Stricker, *Demjanjuk's Lawyer Argues Jewish 'Kapos' Worse Than Nazis*, YNETNEWS (Dec. 21, 2009), <http://www.ynetnews.com/articles/0,7340,L-3823149,00.html>.

24. Jonathan M. Wenig, *Enforcing the Lessons of History: Israel Judges the Holocaust*, in THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES 105 n.12 (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997).

beaten in Europe, with some even being murdered.²⁵ In British Mandate Palestine, the most serious acts of violence were beatings.²⁶ With the establishment of the State of Israel, survivors, now living in a Jewish state, felt no need to take the law into their own hands and turned to the police. But, as Segev explains: “[T]he police were powerless—there was no law that covered this situation or allowed them to arrest the suspects. As a result, the Ministry of Justice introduced an ‘Act against Jewish War Criminals’ in August 1949 but did not push for immediate enactment [by the Knesset].”²⁷ After ten months, the contemplated Act against Jewish War Criminals was introduced into the Knesset, but with a new name—Nazi and Nazi Collaborators Law (NNCL)—and expanded jurisdiction, targeting not only so-called “Jewish war criminals” but also Nazis and their non-Jewish collaborators who murdered Jews. On August 1, 1950, it won Knesset approval.²⁸

Israeli legal scholar Orna Ben-Naftali provides a similar, but more detailed, narrative for how the law came to be:

Beginning in 1948, a few dozen complaints had been accumulated at police stations statewide, although nothing could be done with these complaints because of the absence of an appropriate legal basis on which to act. The complaints were made by Holocaust survivors who had recently immigrated to Israel against other such Jews, charging the latter with having collaborated with the Nazis. . . . Work on the Nazi and Nazi Collaborators Law thus began in the Ministry of Justice to rectify this legal lacuna and provide a basis for bringing such suspects to justice.²⁹

But Israeli historian Idith Zertal, while acknowledging some influence of initial survivor complaints, questions the degree to which such complaints by Holocaust survivors themselves motivated the law:

The police were under some pressure from survivors—a few dozen all in all—who demanded justice and action against “collaborators.” According to this quasi-official narrative, the “predicament” of the survivors is therefore what expedited the legislative process. The Justice and Police Ministries joined forces to draft an appropriate law

25. TOM SEGEV, *THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST* 260 (1991).

26. *See id.* at 259–60.

27. *Id.* at 260 n.15.

28. Nazis and Nazi Collaborators (Punishment) Law, 5710-1950, 4 LSI 154 (1950–1951) (Isr.), *available at* http://www.mfa.gov.il/MFA/MFAArchive/1950_1959/Nazis+and+Nazi+Collaborators+-Punishment-+Law-+571.htm.

29. Ben-Naftali & Tuval, *supra* note 6, at 128, 144.

based on the complaints of a handful (out of more than a quarter of a million) of survivors against other survivors. Thus, a law was promulgated against “war criminals” and the perpetrators of “crimes against humanity,” which, in practice, targeted Jews, themselves Holocaust victims.³⁰

Although it was no longer called the Act against Jewish War Criminals, everyone was aware that the main target of the NNCL was Jewish collaborators and not Nazis.

A major proponent of the law was Pinchas Rosen, Israel’s first Minister of Justice. Rosen, born Felix Rosenblüth in Germany in 1887, was already an experienced lawyer when he came to Mandate Palestine in 1926, motivated by his long-standing Zionist commitment.³¹ Elected to the First Knesset, he was appointed to serve as Israel’s first Minister of Justice by Israel’s first prime minister, David Ben-Gurion. In that capacity, on March 27, 1950, Rosen testified at Knesset Session 131, during the first reading of the bill and explained the need for this law to the parliamentarians:

While other nations legislated laws immediately following the war, and some of them even beforehand, concerning bringing the Nazi and their collaborators to justice, the Jewish people, the people whose grievance against the Nazi is the most severe, was deprived until the creation of the state of the authority to bring the Nazi criminals and their collaborators to justice. . . . This will be changed now [with this proposed law] . . .³²

But Rosen acknowledged that the NNCL was not just a symbolic gesture by Israel to make what the Nazis did to the Jews a crime under Israeli law. If this is all that the bill sought to do, it would have been akin to another symbolic proposal being floated at the time (but never adopted) to grant posthumously Israeli citizenship to all those who perished in the Holocaust (the *Shoah*, in Hebrew).³³ The real thrust of the law, its practical significance as Rosen calls it, came out at the end of his presentation:

30. ZERTAL, *supra* note 2, at 62.

31. Gunther Kuhne, *The Impact of German Jewish Jurists on German Law Until 1933 and Their Immigration Thereafter to the U.S., Israel, and Other Countries*, 15 TEL AVIV U. STUD. L. 67, 75 (2000).

32. Ben-Naftali & Tuval, *supra* note 6, at 143 (quoting and translating 20 PR mtg. no. 131 (first vote) Mar. 27, 1950, at 1147).

33. See LAW AND CATASTROPHE 143–44 (Austin Sarat, Lawrence Douglas, & Martha Merrill Umphrey, eds., 2007).

It is assumed that Nazi criminals, who could be charged on the basis of the crimes included in the Law, would not dare come to Israel. But the Law applies also to Nazi collaborators, and, unfortunately, we cannot be certain that such people would not be found in our camp, even if their numbers are probably not many . . . The proposed Law may also contribute to the cleansing of the atmosphere amongst the survivors who immigrated to the land of Israel. Whoever knows their problems, knows how painfully embedded in them is the question of suspicions and reciprocal accusations . . . the police could not, given the absence of the proposed Law, commence an investigation . . . ‘let our camp be pure.’³⁴

But which “camp” or community was Rosen seeking to purify? There are three possibilities. First, it could be the camp of Holocaust survivors living in Israel who themselves had recently emerged from another category of camps—concentration camps—in Nazi-occupied Europe to return to the Jewish homeland built for them by their brethren who came before the war. Second, it could mean the entire camp of the State of Israel, that is, the Jewish pioneers from around the world that shared the Zionist dream and made the decision to return to their ancient homeland.³⁵ Third, it could have been a reference to the camp comprising all Jews throughout the world.

Certainly, it was not the last, since Israel did not seek to cleanse the Jewish people worldwide of those who collaborated with the Nazi oppressors.³⁶ That worldwide cleansing was not intended (putting aside the impracticalities of doing so) is illustrated by the fact that the law was not drafted as an extra-territorial statute that would reach out and punish also *kapos* that stayed in desecrated Europe or found refuge in North America, Australia, or other parts of the world to which survivors could emigrate to start new lives.³⁷ The impurity of these camps was of no concern to Rosen.

It would seem, taken at face value, that Rosen in Session 131 was addressing the community of survivors in Israel, and saying, “We are doing this for you.”³⁸ He appears to be making this point when he told Knesset members:

34. Ben-Naftali & Tuval, *supra* note 6, at 143.

35. *Id.* at 146–47.

36. *See id.* at 144.

37. *See id.* at 149.

38. ZERTAL, *supra* note 2, at 65–66 n.51.

Anyone familiar with the problems [of the survivors] . . . knows how painful for them [are] the mutual suspicion and recrimination that, to this day, hover over some of Israel's immigrants who were liberated from camps and ghettos; in some cases perhaps—because they have not been given an opportunity to prove their innocence before an authorized court.³⁹

We are somewhat suspicious, however, that the motivation behind the NNCL was in fact to calm the wrath of the survivors and avenge their suffering. Out of the 200,000 or so survivors living in Israel at the time, the police received “a few dozen complaints.”⁴⁰ A few dozen complaints do not amount to a popular demand.

Rather, it seems that the law was enacted for the psychological benefit of the community of *non-survivors*, the prewar population in Israel. Its intention most likely was to distance Israelis from what they regarded as the shameful response of Europe's Jews to their destruction. As Zertal explains:

While the social predicament of survivors who found themselves sharing a new country with former petty tormentors may well have added impetus for devising that law, it seems unlikely that this alone would have set into motion so grave and complex a legislative process. . . . Above all, . . . as the early trials demonstrated, the law was meant to appease society's disgust at “Jewish conduct” during the Holocaust. Israel introduced an anomaly into its legal code not in order to confront Nazism, not in order “to clear us of the shame of infamous Germany” . . . but to purge the new and “pure” state of Jewish shame. . . . Jews who had not been in Nazi-occupied Europe brought to justice Jews who had been . . . and conducted trials that, in every sense of the word, were purges.⁴¹

The greater Israeli society, a majority of whom were *not* survivors, exhibited considerable disdain for the Jews of Europe for not standing up to the Nazi onslaught but instead, as the narrative went, meekly going to their deaths like “lambs to the slaughter.”⁴² Otherwise, how could the Nazis have succeeded in murdering six million Jews in Europe? Moreover, as Israeli sociologist Judith Buber Agassi writes, “In the early years after the War, all survivors of the Holocaust who came

39. *Id.* at 60 (quoting Rosen, Session 131).

40. Ben-Naftali & Tuval, *supra* note 6, at 144.

41. ZERTAL, *supra* note 2, at 64–66.

42. Ben-Naftali & Tuval, *supra* note 6, at 148.

to Israel were regarded with suspicion as possible collaborators.”⁴³ Female survivors had an additional accusation thrust at them. According to Agassi, “In the case of female survivors, a most unfortunate myth had developed: it was additionally claimed that some Jewish women—especially young and pretty ones—had survived because they had been prostitutes in the brothels of the German forces, and that they had even been tattooed as such.”⁴⁴

Ayala H. Emmett relates her memories as the daughter of Holocaust survivors growing up in the new Israel:

What I hated and dreaded most when I was a child was summertime. It was a time when the numbers on my mother’s arm would be there for all to see and people would know that she was a survivor and was one of the despised people. People like my parents were despised in Israel, and I was ashamed of them.⁴⁵

In the new Israel, the narrative adopted by Israelis towards the survivors, articulated by one parliamentarian during the debate on the NNCL, was that “had there been the slightest sign of physical resistance, it would not have been possible to murder six million Jews.”⁴⁶ This narrative pitted Israeli heroism in the face of extinction by her Arab enemies against the perceived “submissive meekness” of Diaspora Jews.⁴⁷ The survivors were scornfully referred to as *sabonim* (bars of soap), a reference to the widely held belief at the time that the Nazis manufactured bars of soap out the remains of murdered Jews.⁴⁸

And if survivors as a group were despised, then those who collaborated were doubly so.⁴⁹ During the debate on the law, one parliamentarian expressed what was probably the view of others in the Knesset:

[O]ne cannot turn a blind eye on the fact that collaboration is what assisted the Nazis to realize their objective. . . . “Collaboration applies to anyone who joins the Judenrat or becomes a *kapo*

43. JUDITH BUBER AGASSI, *JEWISH WOMEN PRISONERS OF RAVENSBRÜCK: WHO WERE THEY?* 13–14 (2007).

44. *Id.*

45. AYALA H. EMMETT, *OUR SISTERS’ PROMISED LAND: WOMEN, POLITICS, AND ISRAELI-PALESTINIAN COEXISTENCE* 147 (2003).

46. Ben-Naftali & Tuval, *supra* note 6, at 147–48 (quoting MK Eliezer Perminger).

47. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 10–11 (1963).

48. Jonathan Cook, *Israeli Firms Accused of Profiting from the Holocaust*, NATIONAL (Jun. 25, 2009), <http://www.thenational.ae/news/world/middle-east/israeli-firms-accused-of-profiting-from-the-holocaust>.

49. See Ben-Naftali & Tuval, *supra* note 6, at 148 n.75.

believing that thereby he would save himself. . . . If one was a *kapo* for two or three years he could not have been anything but a criminal.”⁵⁰

In enacting the NNCL, it would seem that the members of the Knesset were not responding with compassion and empathy for those who survived, as they claimed, but with shame that they did not resist, and a belief that they might have survived because they collaborated. According to Ben-Naftali, “For those who survived without putting up a fight, their very survival became suspect, smacked of opportunism and was certainly not worthy of attention, let alone respect.”⁵¹ Moreover, “If the Law could be used as a mechanism to cleanse this community of those members whose survival could be attributed to some function or privilege, the survival of the rest could be tolerated. As living/dead, they would be absolved and then absorbed into the ‘pure victim’ category.”⁵² Ben-Naftali, unlike Zertal, does not explicitly use the word “purge” to characterize the purpose of NNCL, but the import is the same.

B. Crimes and Punishment

Minister of Justice Rosen’s presentation before the Knesset and the first reading of the bill took place on March 27, 1950. On August 9, 1950 the bill became law.⁵³ It was “an odd legislative creation.”⁵⁴ As discussed, the law was not conceived in order to punish actual Nazis, but, rather, their so-called Jewish collaborators now living in Israel, who were persecuted survivors themselves.⁵⁵ However, nowhere did the NNCL define who a “collaborator” was and how that individual could be distinguished from a Nazi. In effect, by failing to distinguish between Nazis and collaborators, the NNCL conflated the behavior of both groups and appeared to equate their behavior.

This, however, was not the only exceptionality of the law. It was also unique in its *ex post-facto* orientation.⁵⁶ Unlike the *domestic* genocide statute, the Crime of Genocide (Prevention and Punishment)

50. *Id.* (statement of MK Eliezer Perminger, Meeting of the Constitution, Law and Justice Committee of the Knesset, Mar. 29, 1950).

51. Ben-Naftali & Tuval, *supra* note 6, at 148.

52. *Id.*

53. Nazis and Nazi Collaborators (Punishment) Law [NNCL], 5710-1950, 4 LSI 154 (1949–1950) (Isr.).

54. DOUGLAS LAWRENCE, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 117 (2001).

55. *See id.*

56. *See id.*

Law of 1950,⁵⁷ the NNCL was concerned mainly with the past, targeting those who committed or assisted in the genocide of the Jewish people during the Nazi era.⁵⁸

What follows is a brief summary of the various provisions of the NNCL.

Section 1: Crimes against humanity, War crimes, and Crimes Against the Jewish People. The NNCL introduced three principal crimes, enumerated in Section 1 of the Law: (1) crimes against humanity, (2) war crimes, and (3) crimes against the Jewish people. Unless an extenuating circumstance could be proven pursuant to NNCL Section 11(b), which would reduce the sentence to no less than ten years, Section 1 mandated the death penalty for all three crimes.⁵⁹ Israeli judges hearing these cases were generally denied any room for mercy: a Nazi or collaborator found guilty of any of these three crimes “is liable to the death penalty.”⁶⁰

Crimes against humanity, as articulated within the NNCL, are substantially similar in definition to crimes against humanity specified in the Nuremberg Charter.⁶¹ Similar examples of such crimes are enumerated in the Israeli counterpart: “murder, extermination, enslavement, starvation or deportation and other inhuman acts committed against any civilian population, and persecution on national, racial, religious or political grounds.”⁶²

The *war crimes* portion of the NNCL similarly does not stray far from international principles articulated in the Nuremberg Charter, though it is considered “slightly more restrictive.”⁶³

Crimes Against the Jewish People is a *sui generis* crime, with a formulation not found in the criminal code of any other state (there is, for example, no offense in Polish law of “Crimes Against the Polish

57. The Crime of Genocide (Prevention and Punishment) Law, 5710-1950. The law was passed by the Knesset five months earlier on March 29, 1950, after Israel became a party to the UN Genocide Convention. The emphasis of this act, as the name implies, was prevention of future acts.

58. LAWRENCE, *supra* note 54.

59. NNCL § 1(a), (b).

60. *Id.* § 1(a)(3).

61. THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES, 105 (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997) (citing Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280, 284, § 6(c)).

62. NNCL § 1(b)(7).

63. THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES, *supra* note 61, at 106.

People”). Of course, the formulation stems from the confluence of two unique factors: the single-minded goal of Nazi Germans to target only Jews for complete destruction, and the goal of the Zionists who founded the modern State of Israel to make it the haven for, and the protector of, any Jew anywhere in the world.⁶⁴ The definition of the crime closely tracks the definition of the crime of genocide in the UN Genocide Convention⁶⁵ but limits its application to only one victim group (the Jews), one location (Europe), and one time period (the years of the Nazi rule).⁶⁶

The NNCL then tracks the *actus reus* (behavior) elements of the UN Genocide Convention but limits these acts to Jewish victims during the Nazi era: (1) killing Jews, (2) causing serious bodily or mental harm to Jews, (3) placing Jews in living conditions calculated to bring about their physical destruction, (4) imposing measures intended to prevent births among Jews, (5) forcibly transferring Jewish children to another national or religious group, (6) destroying or desecrating Jewish religious or cultural assets or values, and (7) inciting hatred of Jews.⁶⁷

Sections 2–6, Other Crimes. Apart from the three crimes for which the death penalty was mandated (Section 1), the NNCL included a series of crimes for which the death penalty was not mandated (Sections 2–6). These included: crimes against persecuted persons (Section 2), membership in an enemy organization (Section 3), offenses in places of confinement (Section 4), delivering up persecuted person to enemy administration (Section 5), and blackmailing persecuted persons (Section 6).⁶⁸

Defenses and Mitigation. As noted earlier, for the three crimes enumerated in Section 1, those found guilty would be put to death, unless an extenuating circumstance existed pursuant to Section 11(b). Sections 10 and 11 provide affirmative defenses and mitigating circumstances to the crimes set out in Sections 2 through 6 (unless the

64. *See id.* at 104.

65. Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 78 U.N.T.S. 277, No. 1021 [hereinafter Genocide Convention] (compare “[w]ith intent to destroy, in whole or in part, a national, ethnic, religious or racial group . . .” with NNCL § 1(b): “. . . with intent to destroy the Jewish people, in whole or in part.”).

66. NNCL § 16 (“[T]he period of the Nazi regime’ means the period which began on [January 30, 1933] and ended on [May 8, 1945].”).

67. *Id.* § 1. Acts (6) and (7) are criminal acts not specifically set out in the Genocide Convention. Act (6) criminalizes cultural genocide, excluded from the Genocide Convention. Act (7) is found in the Genocide Convention as a separate crime of incitement to genocide. Genocide Convention, *supra* note 65, art. 3.

68. NNCL § 1(b).

crime was murder as defined under Israeli law).⁶⁹ The Israeli legislators, therefore, contemplated specific situations where acquittal or a lesser penalty was possible for Section 2 through 6 crimes even though the *prima facie* elements of any of the NNCL crimes have been proven.

Section 10 calls for acquittal for these non-death penalty crimes if the person who committed the crime (a) did so “to save himself from the danger of immediate death threatening him and the court is satisfied that he did his best to avert the consequences of the act or the omission”; or (b) when the actor’s reason for committing the crime was “with intent to avert consequences more serious than those which resulted from the act or omission, and actually averted them. . . .”⁷⁰

Section 11 permits the judges to take into account two mitigating circumstances when considering punishment: (a) “that the person committed the offence under conditions which . . . would have exempted him from criminal responsibility or constituted a reason for pardoning the offence, and that he did his best to reduce the gravity of the consequences of the offence”; and (b) “that the offence was committed with intent to avert, and was indeed calculated to avert, consequences more serious than those which resulted from the offence.”⁷¹ These mitigating circumstances can be considered for Section 1 offenses, but then limited the judges to imposing a sentence of at least ten years imprisonment. (“[I]n the case of an offence under Section 1, the court shall not impose on the offender a lighter punishment than imprisonment for a term of ten years.”)⁷²

III. USE OF THE NNCL

A. *The Kapo Trials*

We do not know the exact number of *kapo* trials that took place in Israel. The records of these trials remain sealed and will only be opened seventy years after each of the trials has taken place. According to Israeli scholars, about thirty to forty prosecutions took place between 1951 and 1964,⁷³ but these are rough estimates.

As for the verdicts, Ben-Naftali summarizes: “The available, though incomplete, sources suggest that fifteen of a total of about forty

69. *Id.* §§ 10, 11.

70. *Id.* § 10.

71. *Id.* § 11(a).

72. *Id.* § 11(b).

73. See Ben-Naftali & Tuval, *supra* note 6, at 150.

cases ended in convictions. The sentences tended to be light, and only rarely was a person sentenced to prison for a period exceeding the time he had already been in detention awaiting verdict.”⁷⁴ Zertal points out that “*not one* of the defendants tried under the law was charged with or found guilty of directly or indirectly causing the death of a single person.”⁷⁵

In stark contrast to the eventual results, the prosecutor’s initial charges tended to be harsh, with a number of the known cases showing individuals being charged with war crimes or crimes against humanity.⁷⁶ We do know of one case where a Jewish survivor indicted for crimes against humanity was convicted of that crime. Pursuant to the mandatory provisions of the NNCL, he was sentenced to death.⁷⁷ However, as discussed below, it appears that this conviction was overturned on appeal.

Despite the sealing of these records, which “lie like corpses in the obscurity of Israel’s legal archives,”⁷⁸ some information about the *kapo* trials turned up in the papers of Asher Levitzi, a lawyer who represented some of the *kapos*,⁷⁹ and in the press. After his death, Levitzi’s family donated his files to the State Archive, and the sealing order failed to include the Levitzi papers.⁸⁰ These papers contain the judgments rendered in only three of the trials, and some relevant information about other cases for which judgments are otherwise missing.⁸¹ Relying on newspapers, however, presents another problem since scant media attention was given to the *kapo* trials.⁸² As Segev remarks, “Only a few trials were covered by the press, some not at all. A *kapo* trial was a filthy and embarrassing story, and the papers did not want to get caught up in it.”⁸³

Though newspapers had a choice whether or not to “get caught up in” these “filthy and embarrassing stor[ies],” the Israeli courts and judges sitting on them did not. Soon after the law came into being,

74. *Id.* at 160 n.125.

75. ZERTAL, *supra* note 2, at 67.

76. Ben-Naftali & Tuval, *supra* note 6, at 153. No Jew was charged under the NNCL with Crimes Against the Jewish people, the primary charge against Adolf Eichmann in his trial in 1961.

77. *Id.*

78. ZERTAL, *supra* note 2, at 87.

79. Ben-Naftali & Tuval, *supra* note 6, at 151.

80. *Id.*

81. *Id.*

82. SEGEV, *supra* note 7, at 262.

83. *Id.*

Israeli prosecutors began charging individuals with crimes under the NNCL.

The Israeli legal system does not have jury trials. Professional judges, lawyers with long-time experience appointed to the bench, render all decisions.⁸⁴ The pool from which these judges came at the time was the same as that of the Knesset: European Jews who immigrated to Mandate Palestine before the war.⁸⁵ In fact, one of the judges to preside over a *kapo* trial, a survivor from Germany, was a member of the Knesset when the law was promulgated.⁸⁶

But writing a general law to prosecute perceived criminals is different than sitting in judgment over specific individuals and learning how their conduct took place under unimaginable circumstances. As a result, Segev explains, “[t]he trials required the judges to make extraordinary ethical and historical decisions that often fell outside their areas of expertise. They had to decide whether a man could refuse to accept the post of *kapo*, and to what extent the job required cruelty. They tended not to punish a person for simply being a *kapo*, only for not having been a decent one.”⁸⁷ Ben-Naftali gives a similar account:

The courts thus found themselves caught between a rock and a hard place—a position that helps to explain both the sense of unease one feels when reading the judgments and the consequential compromise expressed therein. Nowhere is this compromise more evident than in the discrepancy between the harsh language that the courts often used to describe the acts of the accused and the relatively mild sentence that they finally delivered. . . . Moreover, the accrual of relatively light sentences was quite typical of the *Kapo* trials that ended in conviction.⁸⁸

Segev quotes Supreme Court Justice Moshe Silberg, who felt that punishing *kapos* was detracting from the horror perpetrated by the Nazis: “It is hard for us, the judges of Israel, to free ourselves of the feeling that, in punishing a worm of this sort, we are diminishing, even if by only a trace, the abysmal guilt of the Nazis themselves.”⁸⁹ In sum,

84. Ruth Levush, *Features – A Guide to the Israeli Legal System*, LLRX.COM (Jan. 15, 2001), <http://www.llrx.com/features/israel.htm>.

85. See generally SHIMON SHETREET, JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY 47–76 (1994) (on the organization of the judicial system in Mandated Palestine through the formative years of the Jewish State).

86. See ZERTAL, *supra* note 2, at 74.

87. SEGEV, *supra* note 7, at 262.

88. Ben-Naftali & Tuval, *supra* note 6, at 160.

89. SEGEV, *supra* note 7, at 262.

despite the eagerness of the Knesset to prosecute these individuals, Israeli judges found it extremely difficult to apply the NNCL to actual cases that manifested the “choiceless choices” faced by individual *kapos*.⁹⁰

Let us now take a look at some of the more notable trials.

1. Enigster Trial

The *Enigster* trial was decided by the District Court of Tel-Aviv on January 4, 1952.⁹¹ Yehezkel Enigster (also transliterated as Anigster) had been a chief *kapo* in the labor camps at Graeditz and Fauelbruch from 1943 to 1944.⁹² The available records show that he was charged with five counts: (1) one count of committing a “war crime”; (2) one count of “crime against humanity”; and (3) three counts of “grave . . . and deliberate bodily harm . . . to a persecuted individual.”⁹³ As noted earlier, if convicted of either of the first two counts, Enigster could receive the death penalty.⁹⁴

Enigster was described in his role as *kapo* as follows: “[A] heavy man, a red-neck, dressed in a leather jacket and boots, walking with a wire-club covered with rubber, which he used to hit whoever happens to cross his path, whenever he pleased.”⁹⁵ Witness testimony included the following descriptions of his behavior:

“He used to hit us like a man hitting his enemy. . . . He would beat us for no reason.”⁹⁶

“I spent three years in the camps and never encountered a kapo who behaved as badly . . . towards Jews.”⁹⁷

“He used to lash with his club at the weak and the fainting . . . he severely beat any prisoner whose posture he didn’t like.”⁹⁸

“I was in 19 camps and the worst hell was when I was working for the defendant . . . On the day that he and 25 kapos . . . were sent away from the camp, people danced with joy.”⁹⁹

90. Ben-Naftali & Tuval, *supra* note 6, at 173.

91. INTERNATIONAL LAW REPORTS 540–42 (Sir Hersch Lauterpacht ed., 18th ed. 1957).

92. ZERTAL, *supra* note 2, at 71.

93. *Id.* at 71 (quoting Verdicts E (District Courts), S.C., 9/51, at 152–80).

94. Ben-Naftali & Tuval, *supra* note 6, at 130–31.

95. *Id.* at 167 (quoting CrimC (TA) 9/51, Att’y Gen. v. Enigster, PM 5712(5) 152 (1952) (Isr.) [hereinafter *Enigster*]).

96. ZERTAL, *supra* note 2, at 72 (quoting Verdicts E (District Courts), S.C., 9/51, at 157–59).

97. *Id.*

98. *Id.*

99. *Id.*

In the end, the court refused to accept Enigster's claims that he was forced to accept the job of *kapo* and that he only hit people to stop them from fighting with each other. With regard to coercion, the majority decision stated that "[a]ccepting the job was not coerced and . . . if the job was not done to the satisfaction of the Germans, the consequences would have been no more severe than being put out of the job and resuming the life of an ordinary inmate."¹⁰⁰ The factual basis for this conclusion was not given.

In a divided decision, the court convicted Enigster of one count of committing a crime against humanity and also of three other lesser counts.¹⁰¹ Nevertheless, the majority judges did not want to impose the mandatory death penalty and bemoaned that the NNCL did not give them a choice. It would have been better, they stated, had "the legislator left sentencing to the courts."¹⁰² The majority pointed out that there could be no comparison between a SS German working in the camp and the Jewish prison-functionary.¹⁰³ Moreover, they explained that not all crimes against humanity are equal.¹⁰⁴ In the case before them, evidence was proffered that some Jewish *kapos* acted even more cruelly than Enigster.¹⁰⁵ Consequently, they would have preferred a sentence of ten years' imprisonment for crimes against humanity, and briefer concurrent prison terms for the other offenses.¹⁰⁶

Judge Yosef-Michael Lamm dissented. Lamm was a former Jewish lawyer from Vienna, who was arrested in 1938 and sent to Dachau, but was able to flee in 1939 to Mandate Palestine. Interestingly, Lamm was a member of the First Knesset that passed the NNCL, and served on its Law and Justice Committee that considered the law. Lamm would not have convicted Enigster of crimes against humanity, but instead of one of the lesser crimes.¹⁰⁷ He also would have sentenced the defendant to ten years' imprisonment.¹⁰⁸ Since Enigster, by the time of trial, had become severely ill, the judges unanimously agreed to recommend to the President of Israel that he mitigate the sentence.¹⁰⁹ The Court

100. Ben-Naftali & Tuval, *supra* note 6, at 168 (quoting *Enigster*, at 178–79).

101. *Id.* at 173.

102. ZERTAL, *supra* note 2, at 74.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 74–75.

107. *Id.*

108. *Id.* at 75.

109. *Id.*

reduced his sentence to two years' imprisonment from the day of his arrest and Enigster died shortly afterwards.¹¹⁰

Of the known cases, Enigster's case showed the most brutal behavior by a Jewish *kapo*. The defendants in the other cases appear to have committed less serious acts.

2. Tarnek Trial

Earlier, in August 1950, Else Tarnek (also referred to as "Elsa Trank"), stood trial at age 26 for alleged crimes she had committed at age 18 in her capacity as "block commander" at Auschwitz-Birkenau.¹¹¹ The state prosecutors displayed conduct bordering on callousness in seeking the death penalty. They did so by charging Tarnek with both war crimes and crimes against humanity, even though the most serious accusations against her involved beating other inmates.¹¹² None of the victims was alleged to have died from the beatings.¹¹³ Furthermore, the position of commander of Block 7 in the female section in Auschwitz was imposed on Tarnek.¹¹⁴ As a result, it became her responsibility to "maintain order and discipline, to assemble the women for roll call as the Germans ordered, and to supervise the fair distribution of food. In so doing, she hit several women 'with her hands' and forced recalcitrant prisoners to kneel, a common camp punishment also before her arrival."¹¹⁵

The judges rejected the prosecution's claims. Tarnek was acquitted of both war crimes and crimes against humanity but found guilty of two lesser counts.¹¹⁶ In their decision, the judges recognized the untenable position of the female *kapos* at Auschwitz and demonstrated an understanding of, and almost empathy for, Tarnek's actions in Block 7:

We must take the circumstances under consideration: the defendant was placed in charge, against her will, of a block where 1000 persecuted women lived. She herself was a persecuted person, just as

110. *Id.*

111. *Id.* at 67 (citing Verdicts E (District Courts), S.C. [Severe Criminal (Files)], 2/52, at 142–52). Lauterpacht gives a different date for the trial, stating that it was decided on December 14, 1951. *See* War Crimes Cases, 18 I.L.R. 539 (Isr.). If the August 1950 date is correct, then Tarnek would have been either the first, or one of the first, to be tried under the NNCL law, which came into effect on August 9, 1950.

112. ZERTAL, *supra* note 2, at 67.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 69.

they were. Her functions were to take care of the distribution of meager and horrible food and to ensure that the inmates would attend the twice-daily parade . . . During the time the food was distributed, the inmates fought to get their portion, or even a double portion. Experience had taught the defendant that consequently some inmates would be left without even one portion. She herself experienced hunger as a result of disorderly distribution of food. The defendants battled against these disorders by slaps, which were the quickest and most effective weapon under the circumstances . . . there were surely times where an innocent inmate got hit . . .¹¹⁷

Focusing on the *mens rea* of the defendant, the judges explained: “It was not proven to us that the defendant identified in any of her acts with the Germans . . . the defendant herself had been interned under much harder conditions since 1942, before she was placed in charge of other inmates, and suffered a great deal.”¹¹⁸

Finding Tarnek guilty of assault and battery, the judges sentenced her to two years imprisonment with credit for time served. As Zertal observes: “The sentence was not arbitrary. It was exactly two years since her arrest; Elsa Trank was released the same day.”¹¹⁹

3. Berenblatt Trial

Hirsch Berenblatt (spelled alternatively Hersz Bernblat) technically was not a *kapo* but served as a Jewish police commander of the Polish town of Benedin.¹²⁰ He was brought before the Tel Aviv District Court in the early 1960s and charged under Section 5 of the NNCL with “delivering up persecuted person to enemy administration.”¹²¹ Berenblatt’s case was one of the last to be heard, filed before the Eichmann trial, but decided soon after the Eichmann proceedings.

Berenblatt was convicted in early 1963 of having assisted the Germans in rounding up the town’s Jews for a “selection” (*selektzia*).¹²² The most serious charge against him was of having “rounded up and arrested, together with others, dozens of Jewish children from the

117. Ben-Naftali & Tuval, *supra* note 6, at 170 (quoting CrimC (TA) 2/52, Att’y Gen. v. Tarnek, PM 5712(5) 142, 151–52 (1952) (Isr.)).

118. Ben-Naftali & Tuval, *supra* note 6, at 170.

119. ZERTAL, *supra* note 2, at 69.

120. *Id.* at 76.

121. *Id.* (citing CrimA 77/64, Hirsch Berenblatt v. Att’y Gen., 18 Legal Verdicts 70, 70–108 (1964)).

122. *Id.* at 76.

municipal orphanage . . . and [of having] handed them over to the Gestapo.”¹²³ Berenblatt was convicted on the testimony of a single witness, “whom the court found reliable,” and he was given a five-year sentence.¹²⁴

On appeal, the Supreme Court in 1964 reversed and acquitted Berenblatt of all charges.¹²⁵ The Court did so by relying on the complete defenses provided in Section 10 discussed above.¹²⁶ Justice Moshe Landau, who had earlier presided over the Eichmann trial, noted that:

It [would] be presumptuous and self-righteous on our part, us who never walked in the shoes of those [who were there] . . . to be critical of these ‘small people’ who were incapable of transcending into an ultimate level of morality . . . [L]et us not delude ourselves that if we subject the acts committed by our persecuted brethren [sic] there to criminal justice on the basis of pure moral standards, we would ease the weight of the distress in our heart regarding the horrid blow our people suffered . . . [C]riminal law prohibitions, including the Nazi and Nazi Collaborators Law, were not written for exceptional heroes, but for ordinary mortals, with their ordinary weaknesses.¹²⁷

Another justice, Yakov Ulshan, concurred: “[T]his is a question for history and not for the courts.”¹²⁸

4. Pal Trial

The defendant, Joseph Pal, was a block elder in a concentration camp between 1943 and 1944.¹²⁹ Brought to trial in 1951, he was charged under Section 2 with crimes against persecuted persons. His crimes were described by the Supreme Court on appeal: Pal apparently “hit an unknown number of inmates during *parades*, and especially on one occasion, when he compelled them to sit for a few hours without uttering a sound . . . and hit whoever dared to move, and especially when he compelled the inmates . . . on various occasions to kneel and exercise in the snow.”¹³⁰ In one instance, he purportedly “hung an

123. *Id.*

124. *Id.*

125. *Id.* at 77.

126. *See* NNCL.

127. Ben-Naftali & Tuval, *supra* note 6, at 173 (quoting Barnblatt Appeal at p. 101).

128. *Id.* at 174 (quoting Barnblatt Appeal at pp. 95–96).

129. *See id.* at 162 (emphasis in original); *see generally* CrimA 119/51 Pal v. Att’y Gen. 6 PD 498 [1952] (Isr.) [hereinafter Pal Appeal].

130. Ben-Naftali & Tuval, *supra* note 6, at 162 (quoting Pal Appeal, *supra* note 129, at 500).

inmate for a few minutes above the floor with a rope, which he had used to tie the hands of the inmate behind his back.”¹³¹

Pal was sentenced to ten years imprisonment and the Supreme Court upheld the lower court’s conviction.¹³²

5. Goldstein Trial

The defendant was a *kapo* in a forced-labor camp near Osterowitz, Poland. He was also charged under Section 2, and accused of one instance of mistreatment of a fellow inmate.¹³³ The alleged incident took place in a bathhouse located outside the camp. Since the bathhouse was not used habitually by the inmates in the camp, Goldstein argued that the alleged mistreatment technically did not occur in “a place of confinement”¹³⁴ as required under the NNCL. This proved to be a convenient way for the Supreme Court to dispose of the matter. Relying on what the Supreme Court characterized as a “common sense” interpretation of the NNCL’s text, the Court acquitted Goldstein on the basis that his acts took place outside the bounds of the law.¹³⁵

Ben-Naftali notes that “the fact that the court had to make bizarre distinctions between what is and what is not ‘a place of confinement’ in order to reach a sensible legal result—in this case, the acquittal of the accused—underscores the futility of the attempt to subject an irrational situation to common-sense analysis. . . .”¹³⁶

B. *The Eichmann Trial*

The first Nazi charged, tried, and found guilty of crimes pursuant to the NNCL was Adolf Eichmann. Eichmann’s early service for the Nazi regime was as its “expert” on Jewish affairs and policy, building “alliances” with Jewish leaders.¹³⁷ In 1938, Eichmann became the “expert on emigration.”¹³⁸ From 1938 to 1941, the Nazi’s solution to the “Jewish problem” was the deportation and emigration of Jews from Germany and its territories.¹³⁹ To achieve this goal, Eichmann

131. Ben-Naftali & Tuval, *supra* note 6, at 162.

132. *Id.* at 162 n.130.

133. *See id.* at 159.

134. *Id.*

135. *Id.* at 159.

136. *Id.* at 164.

137. DAVID CESARANI, *BECOMING EICHMANN: RETHINKING THE LIFE, CRIMES, AND TRIAL OF A “DESK MURDERER”* 56 (2004).

138. *Id.* at 61.

139. *Id.* at 60–61.

developed and manned The Central Office for Jewish Emigration in Vienna, Austria.¹⁴⁰ The Central Office was devoted to the forced emigration of Austrian Jews and was described by British historian David Cesarani as being “a place of terror, where Jewish supplicants were routinely abused by SS men and Nazi officials so as to encourage speed.”¹⁴¹ Cesarani further explains that “Eichmann and his aides had absolutely no interest in where Jews went or even how they got there, as long as they left Austria.”¹⁴²

Eichmann’s role in the emigration of Jews from German territories led to his next position as “expert in mass murder and genocide.”¹⁴³ In 1942, Nazi officials held the Wannsee Conference in Berlin, wherein it was decided that the “Final Solution” to the Jewish problem would be the physical annihilation of European Jews.¹⁴⁴ Eichmann, already an expert at Jewish emigration, was responsible for the apprehension and deportation of Jews to concentration and extermination camps.¹⁴⁵ Eichmann embraced this role whole-heartedly and it became clear to Rudolf Höss, the commandant of Auschwitz, that Eichmann “was completely obsessed with the idea of destroying every single Jew that he could lay his hands on.”¹⁴⁶ Cesarani described Eichmann’s attitude toward Jews as “cold inhumanity,” allowing Eichmann to manage the deportation and annihilation of the Jewish population much like a “director of a multi-national corporation manages production and distribution of product . . .”¹⁴⁷

At the end of the war, when other top Nazi officials were being detained and eventually tried at Nuremberg, Eichmann escaped detection by the use of false identities.¹⁴⁸ With the aid of Nazi sympathizers, Eichmann successfully fled to Argentina, assuming the identity of Ricardo Klement.¹⁴⁹ Eichmann’s wife and children would eventually join him in Argentina.¹⁵⁰ In 1960, Israeli operatives captured Eichmann in Argentina and brought him to Israel to stand trial.¹⁵¹

140. *Id.* at 67.

141. *Id.* at 68.

142. *Id.*

143. *Id.* at 91.

144. *Id.* at 112–13, 116.

145. *Id.* at 121–23.

146. *Id.* at 156.

147. *Id.* at 157.

148. NEAL BASCOMB, HUNTING EICHMANN 42 (2009).

149. *Id.* at 66–69.

150. *Id.* at 79.

151. DEBORAH E. LIPSTADT, THE EICHMANN TRIAL 231 (2011).

1. Israeli District Court Trial

The trial of Adolf Eichmann began on April 11, 1961 at the *Beit Haam*, or “the People’s House,” in Israel.¹⁵² Originally intended to serve a community center, housing a theater and a gym, the *Beit Haam* would now serve a new purpose—a court of justice.¹⁵³ The building was retrofitted to serve as a courtroom that could accommodate hundreds of reporters, journalists, translators and spectators.¹⁵⁴ A bullet-proof glass box was added to house Eichmann during the lengthy proceeding—it fit Eichmann and two guards.¹⁵⁵ An internationally broadcast trial, the proceedings were translated and transcribed into English, French, German, and the official language, Hebrew.¹⁵⁶

The trial was the first to tell the story of those who were lost and those who survived the Holocaust, giving the victims a voice.¹⁵⁷ Deborah Lipstadt noted in her book, *The Eichmann Trial*, that “[a]t Nuremberg the murder of the Jews had been an example of crimes against humanity. Here it would be the centerpiece.”¹⁵⁸ As part of his daily journal entry during the Eichmann trial, journalist Sergio I. Minerbi wrote: “This is the first trial that will be able to shed full light on the Nazi massacres and the anti-Semitic persecutions; among the many volumes of the Nuremberg judgments there were only six pages on the crimes committed against the Jews!”¹⁵⁹

a. Initial Challenges

Eichmann’s defense counsel, Robert Servatius, challenged the trial at the outset, calling into question the objectivity of the presiding judges, Israeli jurisdiction to try Eichmann, and the means of arrest.¹⁶⁰

152. SERGIO I. MINERBI, *THE EICHMANN TRIAL DIARY: AN EYEWITNESS ACCOUNT OF THE TRIAL THAT REVEALED THE HOLOCAUST 6–7* (Robert L. Miller trans., 2011).

153. *Id.* at 4–5.

154. *Id.* at 5.

155. LIPSTADT, *supra* note 151, at 41–42.

156. MINERBI, *supra* note 152, at 5.

157. LIPSTADT, *supra* note 151, at 55.

158. *Id.* at 54.

159. MINERBI, *supra* note 152, at 13.

160. LIPSTADT, *supra* note 151, at 58. Robert Servatius was a German attorney who had served as defense counsel for the defendants at Nuremberg. The State of Israel provided counsel for Eichmann in flying Servatius to Israel and paying his fees. Dieter Wechtenbruch served as defense co-counsel.

i. Objectivity

The panel of judges trying Eichmann consisted of judges Moshe Landau, Benjamin Halevy, and Yitzhak Raveh.¹⁶¹ Servatius challenged the objectivity of these judges, contending that it would be highly improbable that a panel of Jewish judges would be able to remain objective in trying Eichmann, a Nazi, for committing crimes against Jews.¹⁶² Judge Landau, speaking for the Israeli District Court, responded:

We must reject the exception made by the defense regarding the objectivity of the judges . . . because while the memory of the killings shakes every Jew it is also true that as it is our duty we shall pass judgment based only on the evidence that is accepted here.¹⁶³

Judge Landau further noted that judges “are required to subdue [their emotions] for otherwise [they] will never be fit to consider a criminal charge which arouses feelings of revulsion.”¹⁶⁴ According to the judges, the trial would “not be a ‘forum for clarification of questions of great import.’”¹⁶⁵ That is, they were not there to decide on matters such as anti-Semitism and roles of other nations in their assistance or non-assistance in the Final Solution.¹⁶⁶ Instead, their responsibility was to focus on Eichmann’s actions alone and his involvement in the crimes charged.¹⁶⁷ Conducting a fair and objective trial was the cornerstone for the panel of judges.

ii. Jurisdiction

Servatius offered several reasons as to why the Israeli court lacked jurisdiction to try Eichmann. Servatius contended that the alleged criminal conduct occurred prior to Israel’s existence, in a foreign territory, and against people who were not Israeli nationals at the time the acts occurred.¹⁶⁸ Servatius questioned the means in which Eichmann was brought to trial in Israel, arguing that the proceedings were inherently unfair because Eichmann was abducted from his country of

161. *Id.* at 41.

162. MINERBI, *supra* note 152, at 9-10.

163. *Id.* at 15.

164. LIPSTADT, *supra* note 151, at 61.

165. *Id.* at 141.

166. *Id.*

167. *Id.*

168. *Id.* at 58.

residence without proper extradition proceedings.¹⁶⁹ For these reasons, Servatius argued, Israel lacked jurisdiction to try Eichmann.¹⁷⁰

As noted above, the NNCL is a unique piece of legislation in that it expressly provides that it applies retroactively and extra-territorially. Specifically, Section 1(a) of the NNCL provides that a person who has committed a crime against the Jewish People, a crime against humanity, or a war crime, in a hostile country during the period of the Nazi regime or during the Second World War is subject to the death penalty.¹⁷¹ Thus, on its face, the NNCL provides that it applies only to acts that occurred during the Nazi regime or Second World War. The law also specifically applies to those acts that occurred “in an enemy country,” thereby expressly applying extra-territorially.¹⁷²

After Servatius made his initial challenges, Judge Landau responded by stating that “the court’s competence . . . is founded on Israeli law . . .”¹⁷³ In other words, the court was simply applying a law passed by the Knesset, and, unlike the Supreme Court in the United States, had no authority to review the law’s constitutionality. At the end of the trial, however, Judge Halevy observed:

The objection that our law is retroactive and therefore illegal is without merit since the Nazis knew that they were perpetrating criminal acts, as their efforts to erase all traces can attest . . . From the point of view of international law the competence of the court derives from the universal character of the crimes committed, which gives every state the right to judge and punish the crimes in question.¹⁷⁴

In its written judgment, the District Court defended its competence to try Eichmann at length, citing English legal precedent.¹⁷⁵ The District Court rested largely on the principle of universality in defending its right to jurisdiction.¹⁷⁶ In its decision, the District Court provided:

The abhorrent crimes defined in this Law are crimes not under Israel [sic] law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (*delicta juris gentium*). Therefore, so far from

169. *Id.*

170. *Id.*

171. Att’y Gen. v. Adolf Eichmann, 36 I.L.R. 277, ¶¶ 4–5 (Isr. Sup. Ct. 1962).

172. *Id.* at ¶ 5.

173. MINERBI, *supra* note 152, at 15.

174. *Id.* at 170.

175. *See generally* Att’y Gen. v. Adolf Eichmann, 36 I.L.R. 277.

176. *Id.* at ¶¶ 12–13.

international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is *universal*.¹⁷⁷

Thus, because the crimes were of the sort universally considered to be crimes, any nation would have the jurisdiction to try a perpetrator of those crimes.

In response to the defense's argument that the victims were not Israeli nationals at the time they became victims, the District Court stated that it is "the moral duty of every sovereign State . . . to enforce the natural right to punish, possessed by the victims of the crime whoever they may be, against criminals . . . [who] have 'violated the law of nations.'"¹⁷⁸ The principle kept in accord with that of universal jurisdiction—the crime was committed against humanity and in violation of the law of nations.¹⁷⁹ Additionally, the District Court related that "[t]here is a tangible connection between the State of Israel that was created and recognized as a 'Jewish State' and the Jewish people."¹⁸⁰

At the time of Eichmann's trial, nearly a quarter of the population in Israel consisted of Holocaust survivors.¹⁸¹ Then Israeli Prime Minister David Ben-Gurion would write, "[t]he Jewish state is the heir of the six million murdered, the only heir."¹⁸² As such, Ben-Gurion felt that it was Israel's "historic duty" to those lost to try Eichmann in Israel.¹⁸³ Thus, the connection between the victims and the State of Israel was viewed as tangible and real.

Finally, Servatius argued that the means of arrest used on Eichmann were illegal and, therefore, trying him would also be illegal.¹⁸⁴ Eichmann was detained by Israeli officials in Argentina and brought to Israel where he was indicted and subsequently tried.¹⁸⁵ Initially, Argentina objected to the removal of Eichmann from its country without the proper extradition proceedings, viewing the

177. *Id.* at ¶ 12.

178. *Id.* at ¶ 14.

179. *See id.* at ¶ 14.

180. MINERBI, *supra* note 152, at 170.

181. BASCOMB, *supra* note 148, at 101.

182. *Id.* at 304.

183. *Id.*

184. LIPSTADT, *supra* note 151, at 58.

185. *Id.* at 231.

kidnapping as an affront to its sovereignty.¹⁸⁶ However, after United Nations intervention, Argentina and Israel reached an agreement—Argentina did not pursue Eichmann’s return.¹⁸⁷ On this basis, the District Court rejected any wrongdoing in Eichmann’s means of arrest and provided that the “two governments reached agreement on the settlement of the dispute between them.”¹⁸⁸ Thus, Eichmann’s abduction from Argentina was not an impediment to trial in Israel.

b. Eichmann’s Crimes—Application of the NNCL

The indictment charged Adolf Eichmann with fifteen counts of committing crimes in violation of the Nazi and Nazi Collaborators (Punishment) Law, 5710-1950.¹⁸⁹ Eichmann was accused and found guilty of committing crimes against the Jewish People (Counts 1–4), crimes against humanity (Counts 5–7 and 9–12), war crimes (Count 8) and membership of hostile organizations (Counts 13–15).¹⁹⁰

Section 1(a) of the NNCL provides that a person who has (1) carried out an act constituting a crime against the Jewish people during the period of the Nazi regime in a hostile country; (2) carried out an act constituting a crime against humanity during the period of the Nazi regime; or (3) carried out an act constituting a war crime during the period of the Second World War is subject to the death penalty.¹⁹¹

i. Crimes against the Jewish People

Section 1(b) of the NNCL defines a “crime against the Jewish people” as any of the following acts, committed with the intent to destroy the Jewish People in whole or in part: (1) killing Jews, (2) causing serious bodily or mental harm to Jews, (3) placing Jews in living conditions calculated to bring about their physical destruction, and (4) devising measures intended to prevent births among Jews.¹⁹²

The first count of the indictment dealt with killing Jews. Eichmann was accused of this offense for his role in implementing the Final Solution.¹⁹³ The indictment alleges that between 1939 and 1945, Eichmann caused the deaths of millions of Jews by deporting them from

186. BASCOMB, *supra* note 148, at 304.

187. Att’y Gen. v. Adolf Eichmann, 36 I.L.R. at ¶ 40.

188. *Id.*

189. *Id.* at ¶ 181.

190. *Id.* at ¶¶ 2, 244.

191. *Id.* ¶ 4.

192. *Id.* ¶ 16.

193. *Id.* ¶ 195.

Nazi occupied territories to the extermination camps of Auschwitz, Chelmno, Belzec, Sobibor, Treblinka, and Maidanek.¹⁹⁴ The District Court acquitted Eichmann of crimes against the Jewish people for acts committed by others that occurred prior to August 1941, finding that Eichmann's role in killing Jews did not begin until Adolf Hitler ordered the general extermination of the Jews in mid-1941, when the Final Solution was developed and subsequently implemented.¹⁹⁵

The second count of the indictment dealt with placing Jews in living conditions calculated to bring about their physical destruction.¹⁹⁶ Again, the District Court looked only to Eichmann's actions from August 1941 to May 1945 in finding Eichmann guilty of subjecting millions of Jews to living conditions that would likely bring about their physical destruction, with the intent to exterminate them.¹⁹⁷ The living conditions that concerned the Court were those of the concentration and extermination camps. The Court found that Eichmann deported millions of Jews to these camps and subjected them to sub-human living conditions, with the intent to carry out the Final Solution.¹⁹⁸

The third count dealt with causing serious bodily or mental harm to Jews.¹⁹⁹ As part of Eichmann's orders and actions to carry out the Final Solution between August 1941 to May 1945, Eichmann was found guilty of causing serious bodily and mental harm to Jews.²⁰⁰

The fourth count dealt with devising measures intended to prevent births among Jews.²⁰¹ The Court found Eichmann guilty of this count, holding that Eichmann had directed that births be banned and pregnancies terminated at the Terezin Ghetto between 1943 and 1944.²⁰²

ii. Crimes Against Humanity (Jews and Non-Jews)

A "crime against humanity" is defined in Section 1(a)(2) of the NNCL as the "murder, extermination, enslavement, starvation [and] deportation of civilian population; and persecution on national, racial, religious or political grounds."²⁰³ Counts 5–7 charged Eichmann with

194. MINERBI, *supra* note 152, at 8.

195. Att'y Gen. v. Adolf Eichmann, 36 I.L.R. at ¶¶ 182–83.

196. *Id.* ¶ 196.

197. *See id.* ¶¶ 196–97.

198. *Id.* ¶¶ 194–97.

199. *Id.* ¶ 199.

200. *See id.*

201. *Id.* ¶ 199.

202. *Id.*

203. *Id.* ¶ 200.

crimes against humanity with regard to the Jewish population, and counts nine through twelve with regard to the non-Jewish population.²⁰⁴

In this portion of the judgment the District Court focused not only on Eichmann's role in the Final Solution, but also on his role throughout the Nazi regime. Eichmann's actions, beginning in March 1938, are held to be crimes against humanity.²⁰⁵ Specifically, the District Court noted that from March 1938 to October 1941, Eichmann caused the expulsion of Jews from their homes in the territories of the Old Reich through compulsory emigration.²⁰⁶ Additionally, from December 1939 to March 1941, Eichmann was responsible for deporting Jews from German-occupied territories to Nisko.²⁰⁷ For Eichmann's role in the Final Solution from August 1941 to May 1945, the District Court found Eichmann guilty of causing the "murder, extermination, enslavement, starvation and deportation of the Jewish civilian population."²⁰⁸

The sixth count of the indictment charged Eichmann with a crime against humanity for persecuting Jews on national, religious, and political grounds.²⁰⁹ The District Court found Eichmann guilty of this count because Eichmann's actions committed "with the object of exterminating the Jewish people"²¹⁰ amounted *ipso facto* to the persecution of Jews based on national, racial, religious, and political grounds.²¹¹

Finally, count seven charged Eichmann with the plunder of property of millions of Jews.²¹² The District Court found this charge difficult because the plunder of property was not specifically enumerated as a crime against humanity in the NNCL.²¹³ Instead, the plunder of property, public or private, was enumerated as a war crime.²¹⁴ The prosecution argued that the plunder of property fell within the definition of "any other inhuman act committed against any civilian population" provided in Section 1(b) of the NNCL.²¹⁵ The District Court determined:

204. *Id.* ¶¶ 200, 206.

205. *Id.* ¶ 244.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* ¶ 200.

210. *Id.* ¶ 201.

211. *Id.* ¶ 201.

212. *Id.* ¶ 202.

213. *Id.*

214. *Id.*

215. *Id.*

[T]he plunder of property may only be considered an inhumane act within the meaning of the definition of ‘crime against humanity’, [sic] if it is committed by pressure of mass terror against a civilian population, or if it is linked to any of the other acts of violence defined by the Law as a crime against humanity or as a result of any of those acts, *i.e.*, murder, extermination, starvation, or deportation of any civilian population.²¹⁶

Eichmann set up and administered the Central Office for Jewish Emigration, an agency that confiscated the property of Jews prior to their deportation.²¹⁷ The District Court determined that this was done in an effort to instill mass terror and facilitate the deportation and subsequent extermination of the Jews.²¹⁸ Additionally, the District Court noted that Eichmann was also responsible for the confiscation of Jewish property at the extermination camps, which was generally confiscated upon arrival at the camps or soon after the death of its owner.²¹⁹

Eichmann was also charged with crimes against humanity as against the non-Jewish population. In counts nine and ten, Eichmann was charged with crimes against humanity committed against Polish and Slovene civilians.²²⁰ They were from their hometowns and deported to other locations, sometimes including labor camps.²²¹ The court reviewed documentary evidence that established that Eichmann was responsible for their “resettlement” and expelled the Polish and Slovene population under sometimes inhumane conditions.²²² Accordingly, Eichmann was found guilty of counts nine and ten.²²³

In count eleven, Eichmann was charged with removing and transporting Romani and Sinta peoples, commonly known as Gypsies, from their settlements to extermination camps for the purpose of being exterminated.²²⁴ The District Court reviewed the documentary evidence and found that, although Eichmann had a hand in transporting Gypsies, there was no evidence to suggest that Eichmann knew that the Gypsies were being sent to extermination camps.²²⁵ Nevertheless, Eichmann was

216. *Id.* ¶ 204.

217. *Id.*

218. *Id.*

219. *Id.* ¶ 205.

220. *Id.* ¶¶ 207, 210.

221. *Id.*

222. *Id.* ¶¶ 209, 210.

223. *Id.*

224. *See id.* ¶ 211.

225. *Id.*

found guilty of this count for his involvement in the deportation of the Gypsies.²²⁶

Finally, count twelve charged Eichmann with the expulsion and murder of ninety-three children from the Czech village of Lidice.²²⁷ The documentary evidence established that Eichmann was responsible for their removal; however, the evidence did not prove that Eichmann was responsible for their murder.²²⁸

iii. War Crimes

Pursuant to Section 1(a)(3) of the NNCL, the District Court convicted Eichmann on the eighth count of the indictment—committing war crimes—because Eichmann persecuted, expelled, and murdered Jews during the Second World War in German-occupied territories.²²⁹

iv. Membership in Hostile Organizations

Section 3(a) of the NNCL provides: “[a] person who, during the period of the Nazi régime, in an enemy country, was a member of, or held any post or exercised any function in, an enemy organization, is liable to imprisonment for a term not exceeding seven years.”²³⁰

Eichmann was charged in counts thirteen, fourteen, and fifteen for his participation in criminal organizations such as the *Schutzstaffeln der N.S.D.A.P* (SS), the *Sicherheitsdienst der Reichfuhrers SS* (SD), and the *Geheime Staatspolizei*.²³¹ During the trial at Nuremberg, the International Military Tribunal declared it to be a crime to be a member of these organizations where the member held a position within the organization knowing that the organization was used for the commission of the crimes against the Jewish people.²³² The District Court reasoned that Eichmann, as a member of the SS, SD, and the Gestapo, carried out the commission of the crime of extermination of Jews.²³³ Accordingly, he was criminally responsible as a member of these organizations and was found guilty on these counts.²³⁴

226. *Id.*

227. *Id.* ¶ 212.

228. *Id.*

229. *Id.* ¶ 206.

230. *Id.* ¶ 4.

231. *Id.* ¶ 244; MINERBI, *supra* note 152, at 9. *Geheime Staatspolizei* is the long form of “Gestapo,” or secret state police.

232. *Att’y Gen. v. Adolf Eichmann*, 36 I.L.R. at ¶ 214.

233. *Id.*

234. *Id.*

c. Eichmann's Defense

Eichmann attempted to invoke the “act of State” defense, arguing that his acts were carried out pursuant to government orders. The principle provides that a “sovereign State has no dominion over, and does not sit in judgment upon, another sovereign State, and deduces therefrom that a State may not try a person for a criminal act that constitutes an ‘act of State’ of another State, without the consent of such other State to that person’s trial.”²³⁵ Thus, if Eichmann’s actions were considered “acts of State” then Israel could not hold Eichmann criminally liable for those acts. Instead, Israel would have to settle its grievances over the acts committed (or complained of) with Germany itself.

The District Court, following the holding of the International Military Tribunal at Nuremberg, denied Eichmann’s defense that his involvement in the Final Solution was pursuant to an “act of State.”²³⁶ At Nuremberg, the International Military Tribunal rejected the Nazi defendants’ contention that they were acting pursuant to an “act of State.”²³⁷ This decision by Nuremberg was “unanimously affirmed by the United Nations Assembly in its Resolution of 11 December 1946,” which provides: “[t]he fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.”²³⁸ Since crimes against humanity are crimes under international law, as a responsible government official, Eichmann was not relieved from culpability for his role in the Final Solution.

Eichmann also asserted that he was acting pursuant to orders from his superiors.²³⁹ However, the evidence throughout the trial suggested the contrary. In *The Eichmann Trial Diary*, Sergio I. Minerbi noted that various documents had been introduced into evidence establishing that Eichmann himself was responsible for the deportation of many Jews.²⁴⁰

235. *Id.* ¶ 28.

236. *Id.*

237. *Id.*

238. *Id.* In the formulation (on the directions of the Assembly in its Resolution No. II 177) by the International Law Commission of the United Nations, of these acknowledged principles, this principle appears as Principle No. 3.

239. *Id.* ¶ 216.

240. MINERBI, *supra* note 152, at 79. An Italian Jew, Minerbi emigrated from Italy to Palestine in 1947 and became a professor of history and political science in Israel. RAI—the Italian State Radio—asked Minerbi to report on the Eichmann trial for its listeners.

In response to a foreign government, inquiring about one of its Jewish citizens in German-occupied territory, Eichmann declared, “I cannot allow the Jew without a country...to Emigrate to Switzerland.”²⁴¹ To this Minerbi noted: “Here therefore was the person with the power to make a decision!”²⁴²

Though Eichmann attempted to portray himself as a mere instrument of the Final Solution, the evidence suggested that Eichmann played a much more zealous role than that. Accordingly, the District Court rejected Eichmann’s defense, stating at the end of the trial:

The defendant’s main defense rests on the claim that he was merely executing orders from his superiors and that his entire upbringing led him to believe that blind obedience was a supreme duty. But the law doesn’t accept such a justification and the defendant cannot escape from his responsibility for the crimes that were committed even if he carried them out as orders coming from the authorities. . . . Eichmann never showed any pity for the victims. On the contrary, he was an enthusiastic executioner, a fanatical Nazi deeply convinced that he was accomplishing an important national mission. But blind obedience wouldn’t have been enough; the key positions he held required a lot of initiative, thinking, and organizational skill. The defendant was therefore entirely dedicated to his action and was happy to have done good work by sending the Jews to their death.²⁴³

The District Court convicted Eichmann on all counts of the indictment and sentenced him to death.²⁴⁴

2. Eichmann’s Appeal to Israel’s High Court of Justice

Eichmann appealed his conviction and sentence to Israel’s Supreme Court, which was acting as the High Court of Justice.²⁴⁵ The High Court affirmed the District Court’s ruling, reiterating many of the legal bases used by the District Court.²⁴⁶ Servatius raised similar arguments to the objections he raised at the trial level:

(1) That the NNCL was *ex post facto* legislation, enacted by the State of Israel for the commission of acts that occurred prior to its

241. *Id.*

242. *Id.*

243. *Id.* at 174.

244. BASCOMB, *supra* note 148, at 317.

245. Att’y Gen. v. Adolf Eichmann, 36 I.L.R. at ¶ 16.

246. *Id.* at 342.

existence. Accordingly, Servatius argued that the act only applied to Israeli nationals and not Eichmann;²⁴⁷

(2) That the offenses Eichmann was convicted of were “extra-territorial” because they were committed outside the territory of the State of Israel by a citizen of a foreign state. Although the NNCL specifically conferred jurisdiction to these matters, Servatius argued, in so doing, the NNCL conflicted with “the principle of territorial sovereignty” which maintains that jurisdiction belongs to the country where the acts were committed or where the defendant is a citizen. Thus, jurisdiction would be appropriate elsewhere;²⁴⁸

(3) That the actions Eichmann undertook were “acts of State” and, therefore, Eichmann should not be personally responsible for their commission;²⁴⁹

(4) That Eichmann was brought to trial in Israel unwillingly and “without the consent of the country of his residence, (Argentina)”;

(5) That the District Court judges, as Jews, were “psychologically incapable” of giving Eichmann, a Nazi, an objective trial.²⁵⁰

The High Court rejected all of these arguments, providing at the outset:

The District Court has in its judgment dealt with [these] 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 cited in the body of the judgment and by the abundant proof culled and abstracted from the monumental mass of evidence produced to the Court.²⁵¹

The High Court went on to state:

[W]ere it not for the grave outcome of the decision of the Court which constitutes the subject of the appeal, we would have seen no need whatever to give a reasoned opinion separately and in our own language—as we contemplate doing—since the conclusions of the District Court rest on solid foundations.²⁵²

Nevertheless, the High Court proceeded with its opinion on the arguments raised.

247. *Id.* ¶ 6.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* ¶ 5.

252. *Id.*

Ex Post Facto Law and Extra Territorial Offenses. Servatius argued that the NNCL's validity was limited to Israeli citizens because the law was enacted to punish acts that occurred prior to the State of Israel being formed.²⁵³ Additionally, Servatius argued that the NNCL's jurisdiction over acts that occurred on foreign ground was in conflict with international law and the principle of territorial sovereignty.²⁵⁴ The High Court grouped these arguments into one common argument; namely, that the NNCL is improper because it conflicts with international law in that it applies retroactively and to acts that occurred on foreign soil and with foreign citizens.²⁵⁵

In response to these claims, the High Court examined the gamut of international and English law, as Israeli law was founded upon their model.²⁵⁶ In so doing, the Court examined whether international law would object to retroactive laws or to laws that apply extra-territorially. As to both, the Court determined that there was no rule in international law prohibiting the enactment of laws that apply retroactively, nor prohibiting the enactment of a law that applies to acts committed on foreign soil, by a foreign national.²⁵⁷ This was not a sufficient justification for the Court, however, as it also sought to establish that the NNCL was consistent with existing international law and not valid merely because of a lacking in international jurisprudence.²⁵⁸

The Court explained that in enacting the NNCL, the Knesset only sought to apply international principles to Israeli law.²⁵⁹ The High Court reiterated what the District Court had pointed out—the crimes in question have consistently been prohibited by international law and as such are universal in character.²⁶⁰ Due to the “universal character of these crimes,” the Court explained, each State has the power and authority to “try and punish anyone who participated in their commission.”²⁶¹

Acts of State. The High Court rejected the contention that Eichmann was merely acting pursuant to an “act of State.” The Court reiterated that the Act of State doctrine is inapplicable when the act is

253. *Id.* ¶ 16.

254. *Id.*

255. *Id.*

256. *Id.* ¶ 7.

257. *Id.* ¶¶ 8–9.

258. *Id.* ¶ 10.

259. *Id.*

260. *Id.*

261. *Id.* ¶ 14.

prohibited by international law, or the “law of nations.”²⁶² This is especially so when the acts are crimes in the area of “crimes against humanity.”²⁶³ The High Court provided:

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.²⁶⁴

Within this framework, Eichmann also asserted a defense of obeying superior orders. That is, Eichmann contended that he merely acted on orders from his superiors. The “obeying orders” defense differs from the Act of State defense in that it permits the doer of the act to justify his actions because (1) he was following orders from his superior, (2) the order given was within the scope of the doer’s duties, and (3) the order did not permit for any deviation or discretion.²⁶⁵ The Court determined that this defense could not apply to Eichmann because it was clear from the evidence that Eichmann—on multiple occasions—exceeded his orders and acted independently of them.²⁶⁶

Abduction. Servatius argued that Eichmann was brought to Israel against his will, without the consent of Argentina, Eichmann’s country of residence, and by agents of the Israeli government.²⁶⁷ On appeal, the High Court affirmed the District Court’s findings that absent an extradition agreement between Israel and Argentina, the courts will not investigate how a defendant was brought before it.²⁶⁸ Additionally, even if a State’s sovereignty had been violated, the State might nevertheless waive its claim for the return of the offender.²⁶⁹ In Eichmann’s case, no extradition agreement was in place, and after the abduction had been publicized, the United Nations issued a statement, which indicated that Argentina and Israel had settled the matter, effectively waiving any claim Argentina had over Eichmann’s removal from its territory.²⁷⁰

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* ¶ 15.

266. *Id.*

267. *Id.* ¶ 13.

268. *Id.*

269. *Id.*

270. *Id.*

Objectivity. As to the final contention that the District Court judges were “psychologically incapable” of rendering an objective decision, the High Court stated simply that the District Court judges “fulfil[led] their dut[ies]—fully and to the end.”²⁷¹

With the High Court affirming the District Court’s conviction and death sentence, Eichmann appealed to Israeli President Yitzhak Ben-Zvi to commute his death sentence.²⁷² Eichmann’s appeal was rejected. On May 31, 1962, Eichmann was hanged shortly after midnight at Ramla Prison, Israel’s first and only execution.²⁷³

C. The Demjanjuk Trial

The only other person to be sentenced to death in Israel besides Eichmann was John Demjanjuk, with his conviction and sentence also coming about through the application of the NNCL.²⁷⁴ Unlike Eichmann, however, the sentence against Demjanjuk was never carried out. On May 12, 2011, Demjanjuk, at age 91, was convicted under German law for participating in the killing of 28,000 people at the Sobibor concentration camp, where he served as a guard.²⁷⁵ Demjanjuk was given a five-year sentence, but was released from pretrial detention pending the appeal of his conviction.²⁷⁶ On March 17, 2012, less than one year after his conviction, Demjanjuk died in the nursing home where he resided while he awaited the outcome of his appeal.²⁷⁷

1. Background

John “Ivan” Demjanjuk, a Ukrainian, served in the Soviet Red Army during World War II.²⁷⁸ In May 1942, Demjanjuk became a prisoner of war when he was captured by German troops at the battle of Kerch.²⁷⁹ As a prisoner of war, Demjanjuk served as an SS

271. *Id.* ¶ 16.

272. LIPSTADT, *supra* note 151, at 145–46.

273. *Id.* at 146–47.

274. *In re* Extradition of John Demjanjuk, 612 F. Supp. 544 (N.D. Ohio 1985), *aff’d* Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985).

275. Jack Ewing & Alan Cowell, *Demjanjuk Convicted for Role in Nazi Death Camp*, N.Y. TIMES (May 12, 2011), <http://www.nytimes.com/2011/05/13/world/europe/13nazi.html>.

276. *Id.*

277. Christopher Johnston, *World War II Crimes: The Legal Afterlife of John Demjanjuk*, TIME (Mar. 22, 2012), <http://www.time.com/time/printout/0,8816,2109716,00.html>.

278. *John Demjanjuk: Prosecution of a Nazi Collaborator*, U.S. HOLOCAUST MEM’L MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007956> (last visited Feb. 25, 2013) [hereinafter *Prosecution of a Nazi Collaborator*].

279. *Id.*

(*Schutzstaffel*) Wachmann (guard) in the Trawniki Unit at the Sobibor concentration camp.²⁸⁰ However, it was also alleged that Demjanjuk was “Ivan the Terrible,” a notoriously brutal Wachmann who operated the gas chambers at the extermination camp at Treblinka.²⁸¹ After the war, Demjanjuk immigrated to the United States, became a naturalized citizen in 1958, and made a life in a Cleveland, Ohio suburb working at a Ford auto plant.²⁸² In 1977, the Treblinka allegations would change Demjanjuk’s life forever.

The United States Department of Justice (DOJ) began investigating Demjanjuk in 1975.²⁸³ In 1977, the DOJ initiated denaturalization proceedings, asserting that Demjanjuk falsified immigration and citizenship papers to hide his service in World War II.²⁸⁴ Specifically, the DOJ argued that Demjanjuk tried to hide his involvement at the Treblinka extermination camp.²⁸⁵ The DOJ’s evidence of Demjanjuk’s involvement at Treblinka consisted primarily of the eyewitness testimony of Jewish survivors.²⁸⁶

In 1981, Demjanjuk was stripped of his of US citizenship.²⁸⁷ At this time, the State of Israel requested Demjanjuk’s extradition so that he could stand trial for crimes against the Jewish people and crimes against humanity pursuant to the NNCL.²⁸⁸ The United States District Court for the Northern District of Ohio, with the Sixth Circuit affirming, entered an order certifying that Demjanjuk was subject to extradition pursuant to the United States-Israel Extradition Treaty.²⁸⁹ Thus, in 1986, Demjanjuk was extradited to Israel.²⁹⁰

2. Extradition—Demjanjuk Challenges Israeli Jurisdiction

Israel’s extradition request charged Demjanjuk with murder, manslaughter, and malicious wounding.²⁹¹ The United States district court determined that the alleged crimes were within the framework of

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Matter of Extradition of Demjanjuk*, 612 F. Supp. 544 (D.C. Ohio 1985), *aff’d*, 776 F.2d 571 (6th Cir. 1985).

290. *Id.*

291. *Id.* at 546.

the NNCL.²⁹² At the extradition proceedings, Demjanjuk challenged Israel's jurisdiction to try him for the alleged crimes. The district court responded by stating, "Israeli jurisdiction does not violate United States jurisdictional principles or practices in any way."²⁹³ The district court provided that, "Israeli courts have recognized their jurisdiction to bring to trial war criminals for extraterritorial crimes, pursuant to the Nazi statute. [Citations omitted] Thus, the assertion of jurisdiction over respondent is certainly proper under Israeli law."²⁹⁴

The district court indicated that, "Israel's assertion of jurisdiction over respondent based on the Nazi statute conforms with the international law principles of 'universal jurisdiction.'"²⁹⁵ The district court reiterated that crimes such as those against humanity or war crimes are universal in nature, thereby giving numerous sovereigns the opportunity for jurisdiction, provided their municipal law concurs.²⁹⁶

Demjanjuk argued that extradition would be improper because the NNCL applied retroactively, and as such, was violative of international law.²⁹⁷ The district court held that the NNCL was not an *ex post facto* law because "[t]he Israeli statute does not declare unlawful what had been lawful before; rather, it provides a new forum in which to bring to trial persons for conduct previously recognized as criminal."²⁹⁸

The United States district court essentially agreed with the portion of the Eichmann decision pertaining to jurisdiction, and permitted the extradition of Demjanjuk.²⁹⁹

3. The Court Proceedings in Israel

a. The Trial

In 1987, the State of Israel began its case against Demjanjuk.³⁰⁰ The indictment charged Demjanjuk with (1) crimes against the Jewish people, (2) crimes against humanity, (3) war crimes, and (4) crimes against persecuted people pursuant to the NNCL.³⁰¹ The basis for these

292. *Id.* at 568–69.

293. *Id.* at 554.

294. *Id.* at 555.

295. *Id.*

296. *Id.* at 555–58.

297. *Id.* at 567.

298. *Id.*

299. *Id.* at 571.

300. See ASHER FELIX LANDAU, THE DEMJANJUK TRIAL, xii (Hever Translators Pool, trans., 1991).

301. *Id.* at 7.

charges stemmed from the belief that Demjanjuk was the person known as Ivan Grozny, or “Ivan the Terrible.”³⁰² Ivan the Terrible served at the Treblinka extermination camp, with his primary duty being the operation of the gas chambers, which involved operating the engine and supplying the gas.³⁰³ For Ivan the Terrible, operating the gas chambers was not a sufficient cruelty; it became common for him to stand along the path where victims would enter the gas chambers and “beat them with deadly weapons, with swords, iron bars, and whips.”³⁰⁴ When the gas chamber became full, Ivan would shove the remaining victims in by force, closing and sealing the door behind them.³⁰⁵ Ivan earned his nickname “the Terrible” for his brutality and “enthusiasm . . . in helping the Germans carry out the extermination.”³⁰⁶ Ivan the Terrible was described as having a “murderous lust to kill, annihilate and destroy, as well as to deal brutally with his victims. . . .”³⁰⁷

In response to the indictment, and throughout the proceedings, Demjanjuk maintained that he was not the notorious Ivan the Terrible, that he never served at Treblinka, and that he was merely a captive prisoner of war.³⁰⁸ The prosecution introduced the testimony of five Treblinka survivors and one German guard who identified Demjanjuk as Ivan the Terrible.³⁰⁹ Demjanjuk challenged the reliability of the testimony—with eyewitness testimony already being inherently faulty, Demjanjuk argued that the lapse in time made this testimony even more so.³¹⁰ The District Court disagreed, providing the following rationale:

[A]nyone who underwent this shock, and experienced the terrible reality of the Treblinka extermination camp, cannot forget what his eyes have seen . . . All the identifying witnesses from among the Holocaust survivors who have testified that they identify Ivan the Terrible from Treblinka, were near him, and close to him, day after day, month after month . . . the powerful store of impressions which these people kept within themselves relating to the image of Ivan the

302. Colin Evans, *John Demjanjuk Trial: 1987–88*, in GREAT WORLD TRIALS 441 (Edward W. Knappman, ed., 1997).

303. LANDAU, *supra* note 300, at 79.

304. *Id.* at 80.

305. *Id.*

306. *Id.* at 79.

307. *Id.* at 80.

308. LANDAU, *supra* note 300, at 7–8.

309. See generally YORAM SHEFTEL, DEFENDING “IVAN THE TERRIBLE” THE CONSPIRACY TO CONVICT JOHN DEMJANJUK (Haim Watzman, trans., 1996).

310. LANDAU, *supra* note 300, at 174–76.

Terrible, is strong, and has been preserved through the course of time.³¹¹

Indeed, the District Court determined that, given the nature of the atrocities committed, it would be impossible for anyone subjected to them to forget the details, essentially finding the testimony of these six witnesses to be even more relevant and credible.

In addition to this eyewitness testimony, the prosecution submitted documentary evidence, the primary piece being Demjanjuk's SS service certificate.³¹² The service certificate indicated that Demjanjuk had served as an SS guard in the Trawniki training center, and in the Lublin district of occupied Poland.³¹³ The Trawniki-trained guard unit worked in three extermination camps (Sobibor, Treblinka, and Belzec); however, the majority of its members were stationed at the Treblinka extermination camp.³¹⁴ Despite the service card placing Demjanjuk at a work farm (L.G. Okzow) and the Sobibor extermination camp, the court determined that the majority of Trawniki unit members were stationed at Treblinka, and that this fact, together with the eyewitness testimony, established that Demjanjuk was indeed Ivan the Terrible.³¹⁵ In 1988, the District Court of Israel, after a 15-month trial, convicted Demjanjuk on all four counts of the indictment and sentenced him to death.³¹⁶ Demjanjuk appealed.

b. The Appeal

Two years passed before the Israeli Supreme Court, or High Court of Justice, considered Demjanjuk's appeal.³¹⁷ On appeal, Demjanjuk continued to maintain that he was not Ivan the Terrible and introduced documents that became available from the Soviet archives after 1991, following the dissolution of the Soviet Union.³¹⁸ Among them were documents concerning Treblinka and the guards who served there, none

311. WENIG, *supra* note 24, at 116.

312. LANDAU, *supra* note 300, at 265.

313. *Id.*

314. *Id.*

315. TOM TEICHOLZ, THE TRIAL OF IVAN THE TERRIBLE: STATE OF ISRAEL VS. JOHN DEMJANJUK 169 (1990); LANDAU, *supra* note 300, at 263 (where the District Court also indicated that it determined Demjanjuk to be not credible and that his statements both in court and at his interrogation were "lies" in light of the eyewitness testimony and documentary evidence).

316. *Id.* at 296.

317. *Id.* at 302.

318. *Prosecution of a Nazi Collaborator*, *supra* note 278.

of which listed Demjanjuk.³¹⁹ Instead, the documents revealed a guard by the name of Ivan Marchenko, a gas chamber operator, who was known for being a “particularly cruel police auxiliary.”³²⁰ This evidence was sufficient to raise reasonable doubt and on July 29, 1993, the High Court acquitted Demjanjuk of all charges.³²¹

At a lecture regarding the doctrine of “reasonable doubt,” United States Circuit Judge Jon O. Newman³²² described the High Court’s decision to acquit Demjanjuk, because of reasonable doubt that he was “Ivan the Terrible”, as a “courageous decision,” and commended the High Court for “[taking] the ‘reasonable doubt’ standard seriously.”³²³

The High Court indicated that it acquitted Demjanjuk because the indictment rested primarily on Demjanjuk being Ivan the Terrible at Treblinka, and for the acts committed there.³²⁴ The evidence produced during the appeal, however, established that Demjanjuk might not be Ivan the Terrible from Treblinka.³²⁵ Although evidence introduced at the trial level indicated that Demjanjuk had served at Sobibor, the High Court determined that it would not pursue alternative charges for Demjanjuk’s service there. The documentary evidence and live testimony produced at trial were introduced for the purpose of establishing that Demjanjuk served at Treblinka, not Sobibor.³²⁶

Just one month before the High Court released its decision to acquit Demjanjuk in June 1993, it was discovered that the United States Office of Special Investigations (“OSI”) had withheld information that

319. *Id.*

320. *Id.*; SHEFTEL, *supra* note 309, at 325.

321. SHEFTEL, *supra* note 309, at 418–19.

322. Judge Newman was appointed to the United States Court of Appeals, Second Circuit in 1979, and assumed senior status in 1997. *Biographical Information: Jon O. Newman*, U.S. CTS. APPEAL SECOND CIRCUIT, <http://www.ca2.uscourts.gov/Judgesbio.htm> (last visited Feb. 25, 2013).

323. John O. Newman, *Beyond “Reasonable Doubt,”* 68 N.Y.U. L. REV. 979, 1000–01 (Nov. 1993).

324. *Id.*

325. See SHEFTEL, *supra* note 309, at 428–29. *But see* Jonathan S. Tobin, *Justice Failed in the Demjanjuk Case*, COMMENTARY (Mar. 17, 2012), <http://www.commentarymagazine.com/2012/03/17/justice-failed-john-demjanjuk-holocaust/> (“Demjanjuk had listed his mother’s maiden name as Marchenko on his U.S. entry papers. The preponderance of the evidence still must be said to show that Demjanjuk really was Ivan the Terrible of Treblinka.”).

326. *Id.* at 431, 434, 436–37; *On This Day: 1950–2005: 1993: Israeli Court Sets Demjanjuk Free*, BBC, http://news.bbc.co.uk/onthisday/hi/dates/stories/july/29/newsid_4561000/4561917.stm (last visited Feb. 15, 2013).

also indicated that Demjanjuk was not Ivan the Terrible.³²⁷ It appears that OSI had this information as early as 1979, yet withheld it from the Israeli government.³²⁸ The release of this information could have changed the course of the Demjanjuk trial in Israel because Israel could have focused the basis of the indictment on Demjanjuk's actual service at Sobibor, instead of the alleged service at Treblinka. Such a change in course would have avoided the District Court's heavy reliance on eyewitness testimony, the imputation of meaning to a document that failed to list service at Treblinka, and ultimately, an acquittal.

Subsequent to the High Court's decision, the Attorney General of Israel declined to re-indict Demjanjuk, much to the dismay of Holocaust survivors and a young political activist named Noam Federman, who filed a petition to the High Court to re-try Demjanjuk and delay Demjanjuk's release.³²⁹ The High Court granted a stay order holding Demjanjuk pending the outcome of the petition.³³⁰ Upon reviewing the petition, the High Court affirmed the Attorney General's decision not to re-try Demjanjuk, citing that the Attorney General had acted within his legitimate discretion, and terminated the stay of deportation.³³¹ Demjanjuk was detained in Israel for over seven years.³³² Of this trial, Israeli Judge Haim Cohen later wrote: "It was a spectacle for the people. Any resemblance to justice was purely coincidental."³³³

Whether Demjanjuk was originally wrongfully convicted in Israel for being Ivan the Terrible remains an open question. As explained at that time by Alex Kozinsky, currently Chief Judge of the United States Court of Appeals for the Ninth Circuit, and a child of Holocaust survivors:

The Israeli Supreme Court's decision to free Demjanjuk rests on two key rulings. The first concerns the sufficiency of the evidence that Demjanjuk was Ivan the Terrible – the operator of the Treblinka gas chamber where thousands, perhaps hundreds of thousands, of Jewish men, women and children perished. This, the court held, was not proved beyond a reasonable doubt. Second, the court decided not to

327. *Prosecution of a Nazi Collaborator*, *supra* note 278.

328. Evans, *supra* note 302, at 444.

329. SHEFTEL, *supra* note 309, at 430.

330. *Id.* at 431.

331. *Id.* at 442.

332. *Id.* at 443.

333. Evans, *supra* note 302, at 444. *See also* LAWRENCE, *supra* note 54 (explaining that "the Demjanjuk trial was a tragic farce, a cautionary tale about the dangers of relying on the legal process to honor the pathos of memory").

pursue the lesser charges that Demjanjuk served as a guard at the extermination camp at Sobibor and the concentration camps at Flossenbuerg and Regensbuerg—charges the court found were proved beyond a reasonable doubt, indeed beyond all doubt. An American court would probably have ruled otherwise on both issues.³³⁴

Following this decision, Demjanjuk returned to the United States, only to face a second round of denaturalization proceedings, initiated in 1999.³³⁵ This time, the basis for denaturalization was Demjanjuk's service as a guard at Sobibor, Majdanek, and Trawniki.³³⁶ In 2002, Demjanjuk officially lost his American citizenship, and in 2004 deportation proceedings began, which resulted in a 2005 court order to deport Demjanjuk to his native Ukraine.³³⁷ Demjanjuk's appeals were rejected, and in 2008, the United States Supreme Court declined review.³³⁸ That same year, Germany became interested in prosecuting Demjanjuk for his service at Sobibor.³³⁹ The German extradition request, and indeed its interest in prosecuting Demjanjuk, was described by legal scholar Lawrence Douglas as Germany's attempt "'to correct the mistakes made earlier by the German government' for failing to try more Nazi perpetrators."³⁴⁰

In May 2009, Demjanjuk was removed from the United States to Germany, where he was arrested and charged with approximately 28,000 counts of accessory to murder at Sobibor.³⁴¹ Rather than building its case predominantly on eyewitness testimony, as Israeli prosecutors had, German prosecutors produced various wartime documents that evidenced Demjanjuk's service at Sobibor—likely similar to the

334. Alex Kozinsky, *Sanhedrin II*, NEW REPUBLIC, Sept. 1993, at 16, available at <http://notabug.com/kozinski/sanhedrin>. The title of the article refers to Sanhedrin, "the body of sages who served as the supreme tribunal of the Jews in ancient times" and who, in an effort to ameliorate the numerous Biblical edicts calling for punishment of death, "developed rules and practices that were remarkably favorable to the accused. All inferences consistent with innocence were to be indulged; the accused was given the benefit of every doubt, reasonable or not. . . . It is this tradition that Ivan Demjanjuk owes his life and freedom." *Id.*

335. *Prosecution of a Nazi Collaborator*, *supra* note 278.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. Diane Lederman, *Amherst College Professor Lawrence Douglas Gives 1st Person Account John Demjanjuk's Nazi War Trial*, MASSLIVE.COM (Dec. 14, 2009), available at http://www.masslive.com/news/index.ssf/2009/12/amherst_college_professor_lawr.html?mobRedir=false.

341. *Prosecution of a Nazi Collaborator*, *supra* note 278.

documents that led to Demjanjuk's acquittal in Israel.³⁴² On May 12, 2011, Demjanjuk was convicted on all counts and sentenced to five years in prison, receiving two years of credit for time served.³⁴³ Demjanjuk was released pending the appeal of his conviction, and moved to a nursing home.³⁴⁴ At that time, he was suffering from a variety of ailments, most seriously chronic kidney and bone-marrow disease. On March 17, 2012 he died, likely as a result of these ailments and old age, being just shy of 92.³⁴⁵

IV. CONCLUSION

Demjanjuk was the last person tried under the NNCL. Though it remains officially on the books, the law is a dead letter. The rapidly diminishing population of both Holocaust victims and perpetrators means that there will be no other prosecutions under the NNCL.

During its life, the NNCL captured worldwide attention and legal interest through the Eichmann trial. Though it originated under checkered circumstances in 1950, its availability in 1961 following Eichmann's capture made it possible for Israel to prosecute Eichmann under national legislation already on the books and covering specifically the acts committed by him.

A national law targeting specifically perpetrators of the genocide of the Jews during the *Shoah*—"Crimes Against the Jewish People"—and its use by Israel against Eichmann serves as precedent that genocide of any group is a universal crime for which its perpetrators become *hostis human generis*, enemies of all mankind and thereby subject to prosecution anywhere they are caught.

342. *Id.*

343. *Id.*

344. Ewing & Cowell, *supra* note 275.

345. Johnston, *supra* note 277.