

**EICHMANN
SUPREME
COURT
JUDGMENT**

50 YEARS ON, ITS
SIGNIFICANCE TODAY

Amnesty International Publications

First published in 2012 by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org

© Amnesty International Publications 2012

Index: IOR 53/013/2012
Original Language: English
Printed by Amnesty International, International Secretariat, United Kingdom

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I. INTRODUCTION

Half a century ago today, on 29 May 1962, the Supreme Court of Israel confirmed the conviction of Adolf Eichmann by the District Court in Jerusalem in December 1961 for crimes against humanity, war crimes and crimes against the Jewish people (genocide) during the Second World War.¹ This landmark judgment was the first universal jurisdiction case in over a decade since the USA and the United Kingdom, together with other Commonwealth countries, had secretly called a halt to all prosecutions of Axis nationals for crimes against humanity and war crimes.² Although the Supreme Court stated that it fully concurred, “without hesitation or reserve, in all [the District Court’s] conclusions”, its own judgment developed and strengthened the lower court’s reasoning.

Adolf Eichmann was responsible for the implementation of Adolf Hitler’s Final Solution, involving the deportation, robbery and murder of approximately six million Jews, as well as of other minority groups, including Roma and homosexuals.³ He was seized by Israeli secret agents in Argentina on 11 May 1961, where he had been hiding under a false name after entering the country on forged papers.⁴ Israel and Argentina had each signed an extradition treaty shortly before his capture, but neither had ratified it. Israel decided to abduct him without waiting for the treaty to enter into force, apparently in fear that Adolf Eichmann would escape.

Argentina, as a non-permanent member of the UN Security Council at the time, raised the abduction in the Council. Ambassador Mario Amadeo argued that the abduction violated Argentina’s sovereignty and said that Argentina demanded appropriate reparation, which “would in its view be the return of Eichmann and the punishment of those responsible”.⁵ He also argued that, “if each State considered itself entitled, whenever it so desired, to supersede the authority of another State and take justice into its own hands, international law

¹ *Attorney-General of the Government of Israel v. Eichmann* (Israel Sup. Ct. 1962), Int’l L. Rep., vol. 36, p. 277, 1968 (English translation).

² For a brief overview of the secret decisions by the USA and Commonwealth countries between 1947 and 1951 to halt prosecutions in national courts of war crimes and crimes against humanity, see Amnesty International, *Universal jurisdiction: The duty of states to enact and enforce legislation, Chapter Two – The evolution of the practice of universal jurisdiction*, IOR 53/004/2001 September 2001, pp. 29 to 31

(<http://www.amnesty.org/en/library/info/IO53/004/2001>).

³ Others who perished included perceived political opponents, Soviet prisoners of war, ethnic slaves and ethnic Poles.

⁴ At the time of the dispute with Argentina, Israel claimed that the Israelis who seized Adolf Eichmann were private citizens, acting entirely on their own initiative. Subsequently, it became widely known that they were agents of the Israeli intelligence services, Mossad and Shin Bet.

⁵ U.N. Doc. S/PV. 865, 22 June 1960, paras. 5 and 12.

would very soon be replaced by the law of the jungle”.⁶ Golda Meir, the Foreign Minister and later Prime Minister of Israel, responded that “this isolated violation of Argentine law must be seen in the light of the exceptional and unique character of the crimes attributed to Eichmann, on the one hand, and the motives of the those who acted in this unusual manner, on the other”.⁷

The Security Council adopted a resolution which in the operative part declared that acts such as the abduction “which affect the sovereignty of a Member State and therefore cause international friction, may, if repeated, endanger international peace and security” and requested Israel “to make appropriate reparation in accordance with the Charter of the United Nations and rules of international law”.⁸ However, in the preambular paragraphs the Security Council stated that it was “mindful of the universal condemnation of the persecution of the Jews under the Nazis, and of the concern of people in all countries that Eichmann should be brought to appropriate justice for the crimes of which he is accused”.⁹ On 3 August 1960, before the trial began, Argentina and Israel issued a joint statement declaring the matter closed.¹⁰

The Eichmann judgment, controversial at the time it was delivered and still controversial now in some respects, contains much that is still of great significance for the world today. The judgment is a ringing affirmation of the sound basis in international law of universal jurisdiction as an essential tool of the international community to achieve justice. It articulated certain important procedural aspects of this form of jurisdiction and of the inappropriateness of certain bars to prosecution that courts should still heed today. The judgment also clarified that states may enact legislation defining crimes under international law as crimes in their penal codes applicable retrospectively, as long as the conduct was criminal under international law when it was committed. However, as explained below, in some other respects, such as the abduction of suspects across national frontiers and the death penalty, the judgment has not stood the test of time.

⁶ *Ibid.*, para. 34.

⁷ *Ibid.*, para. 19.

⁸ S.C. Res. 138 (1960), 23 June 1960.

⁹ *Ibid.*(emphasis in original)

¹⁰ Joint Communiqué, 3 August 1960, quoted in *Attorney General of the Government of Israel v. Eichmann* (Dist. Ct. Jerusalem), Int'l. L. Rep., vol. 36, 1968, p. 59.

II. REAFFIRMING UNIVERSAL JURISDICTION AS AN ESSENTIAL TOOL OF INTERNATIONAL JUSTICE

As the Supreme Court explained, national courts when trying persons for crimes under international law are not simply enforcing their own law, but they are acting as agents of the international community in enforcing international law. It stated:

“Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed.”¹¹

A. RECOGNIZING THE VALIDITY OF UNIVERSAL JURISDICTION UNDER INTERNATIONAL LAW

As noted in the judgment, there was a solid foundation in international law authorizing national courts to exercise universal jurisdiction over war crimes and crimes against humanity. Evidence included decisions by a number of national courts that had exercised such jurisdiction over these crimes in the immediate aftermath of the Second World War.¹² It is a pity, however, that the Supreme Court in upholding the reasoning of the District Court in

¹¹ *Eichmann* (Sup. Ct.), *supra* note 1, p. 304.

¹² According to the United Nations War Crimes Commission, United States military courts conducted “many” trials involving crimes committed against non-nationals of Allied countries. Introduction, *Law Reports of Trials of War Criminals* (London: H.M.S.O. 1949), vol. 10, pp. 43-44. See, for example, the following decisions either exercising or approving of universal jurisdiction: *In re List (Hostages Case)*, Judgment, Case No. 47, U.S. Mil. Trib. Nuremberg 19 February 1948, *ibid.*, vol. 8, pp. 35, 54; *Trial of Wilhelm von Leeb and Thirteen Others (German High Command Case)*, Judgment, U.S. Mil. Trib. Nuremberg 28 October 1948, *ibid.*, vol. 12, p. 61; *The Hadamar Trial*, Judgment, Case No. 4, U.S. Mil. Comm’n - Wiesbaden, 8-15 October 1945, *ibid.*, vol. 9, pp. 46, 53; *In re Eisentrager*, Judgment, Case No. 84, U.S. Mil. Comm’n - Shanghai, 3 October 1946 to 1947, *ibid.*, vol., 14, pp. 8, 15.

all respects regarding universal jurisdiction did not expressly cite that court's implicit recognition that states where persons suspected of such crimes under international law were present did not merely have a right to exercise such jurisdiction, but a duty to do so to avoid giving them safe haven.¹³

The Supreme Court noted that "we have not heard of a single protest" by any country affected by the crimes and that "it is reasonable to believe that in the face of Israel's exercise of jurisdiction no other State will demand the right to do so itself".¹⁴ No country did. Indeed, no member of the Security Council objected to the substance of the statement in the preamble of the resolution that the Council was mindful "of the concern of people in all countries that Eichmann should be brought to appropriate justice for the crimes of which he is accused", knowing that Israel was the only country actively seeking to prosecute the suspect.¹⁵

B. ESTABLISHING EFFECTIVE PROCEDURES

The Supreme Court's judgment made several positive contributions to the development of jurisprudence relating to the legal procedure that should apply in universal jurisdiction cases. It rejected claims that the state seeking to exercise universal jurisdiction must first offer to extradite the suspect to that person's own state, a requirement that could lead to endless delays.¹⁶ Almost every treaty since the judgment containing an *aut dedere aut judicare* (extradite or prosecute) provision has followed the Supreme Court's approach by deliberately omitting any such requirement.

In addition, the Supreme Court rejected a contention that the state where the crime occurred had legal priority over other states. It noted that although the territorial state often was the most convenient forum in terms of evidence, courts in other states, such as Israel, where the bulk of the evidence happened to be located in this case, could be the most convenient forum.¹⁷ This rejection of priority for the territorial state is significant since contemporary

¹³ *Eichmann* (Dist. Ct.), *supra* note 9, p. 74 ("There is considerable foundation for the view that the grant of asylum by any country to a person accused of a major crime of this type and the prevention of his prosecution constitute an abuse of the sovereignty of that country contrary to its obligation under international law.") (citation omitted).

¹⁴ *Eichmann* (Sup. Ct.), *supra* note 1, p. 303.

¹⁵ S.C. Res. 138 (1960), 23 June 1960. Although at one point Argentina made a somewhat ambiguous statement that it would prosecute Eichmann, U.N. Doc. Para. 41, S/PV.865, 22 June 1960, it could not have prosecuted him since it did not define genocide, war crimes and crimes against humanity as crimes in its law subject to universal jurisdiction until 2007, almost half a century later.

¹⁶ *Eichmann* (Sup. Ct.), *supra* note 1, p. 302.

¹⁷ *Ibid.*, p. 303.

advocates of such the priority principle ignore the very reason that national courts exercise universal jurisdiction, which is that law enforcement officials in territorial states – as in the *Eichmann* case – have failed to investigate or prosecute the suspect who has travelled or is living abroad, and often have no intention of doing so in good faith.

In addition, in a carefully considered decision rejecting a challenge to the impartiality of the Israeli judges, which has relevance to attacks in recent years on the supposed bias of courts exercising universal jurisdiction, the Supreme Court affirmed the conclusion of the District Court that even though all of the judges had been affected by the Holocaust, they could judge him fairly:

“ . . . the judge, when dispensing justice in a court of law, does not cease to be a human being, with human emotions and human passions. Yet he is enjoined by the law to overcome these emotions and passions, for were it not so, no judge would ever be fit to try a criminal case which evokes deep feelings and revulsion, such as treason or murder or any other serious crime. It is very true that the memory of the Holocaust shakes every Jew to the depths of his being, but once this case has been brought before us it is our duty to subdue even these emotions as we sit in judgment. We shall abide this duty.”¹⁸

C. EXCLUDING BARS TO PROSECUTION AND EXTRADITION

The Supreme Court also rejected a bar to prosecution often found in national law as inapplicable to crimes under international law: the act of state defence. However, it is disappointing that, although the Supreme Court fully concurred with the District Court's conclusions and reasons, it passed up the opportunity to refer expressly to the lower court's rejection of two other bars – one to extradition contending that crimes under international law were political crimes¹⁹ and one to prosecution contending that such crimes could be subject to national statutes of limitation.²⁰

The Supreme Court expressly stated that the act of state defence could not prevent a foreign court from trying a person charged with crimes under international law. It said:

“[T]here is no basis for the doctrine when the matter pertains to acts prohibited by the law of nations, especially when they are international crimes of the class of “crimes against humanity” (in the wider sense). Of such odious acts it must be said

¹⁸ *Ibid.*, p. 319, quoting *Eichmann* (Dist. Ct.), *supra* note 9, p. 277.

¹⁹ *Eichmann* (Dist. Ct.), *supra* note 9, p. 74 (the “accused is not a ‘political’ criminal at all”).

²⁰ *Ibid.*, p. 79 (“Because of the extreme gravity of the crime against the Jewish people, the crime against humanity and the war crime, the Israel legislator has provided that such crimes shall never be subject to prescription. . .”).

that in point of international law 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 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.”²¹

The same rationale has equal force with regard to the somewhat similar claim that has been advanced that certain high-level officials are immune from prosecution in a foreign court for crimes under international law. Regrettably, however, the International Court of Justice, in a widely criticized judgment four decades after the Supreme Court’s judgment in *Eichmann*, ignored that court’s reasoning and upheld claims by a foreign minister to immunity from prosecution in a foreign court for crimes against humanity and war crimes.²²

D. EXCLUSION OF SUPERIOR ORDERS AS A DEFENCE

The Supreme Court also held that superior orders were not a defence to genocide, crimes against humanity or war crimes. It noted that during the Second World War “no principle recognizing such a defence had crystallized in international law” and that the Nuremberg Charter had excluded this defence, although accepting that superior orders could be taken into account in mitigation of punishment.²³

International instruments, with one exception, have, like the Supreme Court, rejected the

²¹ *Eichmann* (Sup. Ct.), *supra* note 1, pp. 309-310 (The Supreme Court defined crimes against humanity in the wider sense as including genocide and war crimes.).

²² *Democratic Republic of the Congo v. Belgium*, Judgment, Int’l Ct. Justice, 14 February 2002, I.C.J. Rep., para. 60 (made applicable in paragraph 51 to certain holders of high-ranking offices, including heads of state, heads of government and foreign ministers). The Court went so far as to say in *obiter dicta* that a national court of one state with jurisdiction “may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office *in a private capacity*.” *Ibid.*, para. 61 (emphasis supplied). This approach, if it were accepted, would appear to preclude prosecutions of high-ranking officials after they leave office for crimes under international law committed while in office, such as genocide, crimes against humanity and war crimes.

²³ *Eichmann* (Sup. Ct.), *supra* note 1, pp. 316-317. The Supreme Court noted that the Nuremberg Judgment had said that the true test was not whether there had been a superior order, but “whether moral choice was possible”. *Ibid.*, p. 318. It then implicitly approved the rejection by the Israeli Nazi and Nazi Collaborators (Punishment) Law, 1950 of a defence of constraint or necessity and said that even if such a defence were acceptable, that it would have to be proved that the danger to the accused’s life was imminent and that the accused “carried out the criminal task out of a desire to save his own life and because he saw no other possibility of doing so.” *Ibid.*

defence of superior orders for genocide, crimes against humanity and war crimes.²⁴ The notable exception is the Rome Statute of the International Criminal Court (Rome Statute).

In disregard of the Supreme Court's judgment and other international instruments, a significant number of states parties to the Rome Statute have, instead, followed that treaty, which permits a narrow acceptance of a defence of superior orders for war crimes, but not for genocide or crimes against humanity, in trials in the International Criminal Court.²⁵

E. THE INCREASE IN NATIONAL LEGISLATION PROVIDING FOR UNIVERSAL JURISDICTION AND IN PROSECUTIONS UNDER SUCH LEGISLATION

Since the Supreme Court judgment, there has been a slow, but steady expansion in the number of states enacting legislation providing for universal jurisdiction. As of late 2011, 164 (approximately 85 per cent) of the 193 UN member states had defined one or more of the following four crimes under international law (war crimes, crimes against humanity, genocide and torture) as crimes in their national law. In addition, 145 out of 193 states (approximately 75.1 per cent) had provided for universal jurisdiction over one or more of these crimes.²⁶ Indeed, a total of 91 states have provided universal jurisdiction over ordinary crimes, even when the conduct does not involve conduct amounting to a crime under international law.²⁷ This number is particularly significant as many states have not yet defined all crimes under international law as crimes under national law or provided universal

²⁴ Charter of the International Military Tribunal, annexed to the London Agreement (Nuremberg Charter), 8 Aug. 1945, art. 8; Allied Control Council Law No. 10, Punishment of persons guilty of war crimes, crimes against peace and against humanity (Allied Control Council Law No. 10), 20 Dec. 1945, art. II (4) (b), (published in the Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 Jan. 1946); Charter of the International Military Tribunal for the Far East (Tokyo Charter), art. 6; ICTY Statute, art. 7 (4); ICTR Statute, art. 6 (4); UNTAET Regulation 2000/15 (establishing the Special Panels for Serious Crimes, Dili, East Timor), 6 June 2000, Sect. 21; Statute of the Special Court for Sierra Leone (Sierra Leone Statute), art. 6 (4); Cambodian Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 Oct. 2004 (NS/RKM/1004/006), art. 29; International Convention for the Protection of All Persons from Enforced Disappearance, art. 6 (2). It is also excluded in the 1996 Draft Code of Crimes against the Peace and Security of Mankind, art. 5.

²⁵ In an unfortunate setback, Article 33 of the Rome Statute of the International Criminal Court permits the defence of superior orders to war crimes, but it is narrowly circumscribed, applicable only to trials in the International Criminal Court and contrary to every other international instrument adopted concerning crimes under international law, including instruments subsequently adopted, such as the Statute of the Special Court for Sierra Leone and the Cambodian Extraordinary Chambers Law.

²⁶ *Universal jurisdiction: A preliminary survey of legislation around the world*, IOR 53004/2011, October 2011 (<http://www-secure.amnesty.org/en/library/info/IO53/004/2011/en>), p. 1.

²⁷ *Ibid.*, pp. 1-2.

jurisdiction over them.²⁸

Despite the example of the *Eichmann* case, for nearly three decades until the arrest of former President Augusto Pinochet Ugarte of Chile in London in October 1998, there were only a handful of national prosecutions, not all successful, based on universal jurisdiction. There were prosecutions in Austria in 1958²⁹ and Germany in 1976³⁰ for ordinary crimes. A second conviction in Israel for war crimes, crimes against humanity and crimes against the Jewish people of John Demjanjuk in 1988 was overturned by the Supreme Court in 1993 on appeal on the ground of mistaken identity.³¹ A trial for genocide in Austria ended in an acquittal.³² In 1988, Australia resumed investigating war crimes committed during the Second World War; however, one case was dismissed for lack of evidence and the other two because the accused was not fit to stand trial.³³ A prosecution for war crimes and crimes against humanity begun in Canada in 1988 ended in an acquittal.³⁴ On 25 July 1995, an investigation was opened against a Rwandan present in France for genocide, crimes against humanity and torture; however, as of 29 May 2012, nearly 17 years later, he had not yet faced trial. However, in contrast, a prosecution in 1994 in Denmark for the ordinary crime of assault that amounted to grave breaches of the Geneva Conventions in Denmark³⁵ and another for murder in the United Kingdom³⁶ amounting war crimes both led to convictions.

²⁸ Such legislation permitted Denmark, Germany and Norway, which had not yet defined all crimes under international law as crimes in their national law, to prosecute persons for ordinary crimes of murder and assault with respect to conduct amounting to crimes under international law.

²⁹ *Public Prosecutor v. Milan T.*, *Oberste Gerichtshof*, 29 May 1958, *Serie Strafsachen*, XXIX, No. 32, reprinted in part in *Int'l. L. Rep.*, vol. 28, 1963, p. 341 (fraud).

³⁰ *Prosecutor v. Dost*, *Bundesgerichtshof*, 20 October 1976, reprinted in *Int'l. L. Rep.*, vol. 74, p. 166 (selling prohibited drugs).

³¹ Chris Hedges, *Acquittal in Jerusalem; Israel Court Sets Demjanjuk Free, But He Is Now Without a Country*, *New York Times*, 30 July 1988 (the judgment is not available in English).

³² *Public Prosecutor v. Cvjetkovic*, Judgment, *Oberste Gerichtshof*, 13 July 1994 (Supreme Court judgment on interlocutory appeal upholding jurisdiction); *Public Prosecutor v. Cvjetkovic*, Judgment, *Landesgericht Salzburg*, 31 May 1995 (trial court acquittal).

³³ *Polyukhovich v. Commonwealth of Australia*, (1991) 172 CLR 501, F.C. 91/026 (Australian High Court, 14 August 1991) (*obtainable from* http://www.austlii.edu.au/au/cases/cth/high_ct/172clr501.html) (dismissal for lack of evidence); *Malone v. Berezowsky*, File No. 91/25241 (Adelaide Magis. Ct. 16 July 1992) (unfit to stand trial); *Heinrich Wagner* case (unfit to stand trial) (Discussed in Gillian Triggs, *Australia's War Crimes Trials: All Pity Choked*, in Timothy L. H. McCormack & Gerry J. Simpson, eds, *The Law of War Crimes: National and International Approaches*, The Hague, Kluwer Law International, 1997, pp. 123, 131-134.

³⁴ *R. v. Finta*, 28 C.R. (4th) 265, 297 (1994).

³⁵ *Public Prosecutor v. N.N.*, Judgment, High Court (*Ostre Landsrets*), 3rd Div., 25 November 1994, *aff'd*, *Public Prosecutor v. T.*, Judgment, Supreme Court (*Hojesteret*), 15 August 1995.

³⁶ *R. v. Sawoniuk*, Judgment, Court of Appeal (Criminal Division), [2000] Crim. L.R. 506.

However, the picture changed considerably in the light of the publicity around the arrest of former President Augusto Pinochet Ugarte in London and the decision by the House of Lords that he could be extradited to Spain to face charges of torture in Chile. In addition to the USA, which had exercised universal jurisdiction in military courts and commissions in the immediate aftermath of the Second World War, since the *Eichmann* case, there are now 18 other countries where prosecutions based on universal jurisdiction have been instituted or attempted since the *Eichmann* case (Argentina, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Israel, Netherlands, Norway, Senegal, South Africa, Spain, Sweden, Switzerland and the United Kingdom).³⁷

Significantly, three of those countries are in the Global South. At the request of Chadian victims, on 28 January 2000, a *juge d'instruction* in Senegal opened a criminal investigation of the former President of Chad who had received safe haven in that country. However, in a decision attacked by UN Special Rapporteurs on torture and the independence of judges and lawyers,³⁸ appellate courts ruled that Senegal had not defined these crimes as crimes under national law or provided courts with universal jurisdiction over them.³⁹ The law was amended, but Senegal has taken no effective steps to extradite or prosecute him.⁴⁰ On 21 December 2011, an Argentine court ruled that it had jurisdiction over alleged crimes against humanity committed by the former President of China and a member of the Standing Committee of the Politburo of China against members of the Falun Gong, but, in a decision now being challenged in the Court of Cassation (Corte de Casación), declined to exercise it on the grounds that the same case was being investigated by a Spanish court.⁴¹ Most recently, on 8 May 2012, a South African High Court ordered the South African national police and the National Director of Public Prosecutions to investigate in good faith allegations that certain Zimbabwean police who visited South Africa had committed the crime against humanity of torture in Zimbabwe.⁴²

³⁷ For information about these cases, too numerous to list here, see Trial Watch (<http://www.trial-ch.org/index.php?id=800&L=5>); Máximo Langer *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, Am. J. Int'l. L., vol. 105, 2011, p. 1.

³⁸ The press release, dated 2 August 2000, is quoted in Committee against Torture, decision, Communication No. 181/2001 U.N. Doc. CAT/C/36/D/181/2001, 19 May 2006.

³⁹ For the history of this litigation, see: *Case Concerning Questions Relating To The Obligation To Prosecute Or Extradite (Belgium v. Senegal)*, Memorial Of The Kingdom Of Belgium (<http://www.icj-cij.org/docket/files/144/16933.pdf>), 1 July 2010, paras. 1.11-1.18.

⁴⁰ That failure has been challenged by Belgium, which has sought the extradition of Hissène Habré, in the International Court of Justice.

⁴¹ Resolution, Federal Criminal High Court, Court I, C/No.44.196 "Luo Gan", File No. 17.885/05, Buenos Aires, 21 December 2010 (English translation on file with Amnesty International).

⁴² *Southern African Litigation Centre v. National Director of Public Prosecutions*, Judgment, Case Number: 77150/09, North Gauteng High Court (Fabricius, J.), 8 May 2012.

F. CURRENT ATTACKS AT THE NATIONAL AND INTERNATIONAL LEVEL ON THE EXERCISE OF UNIVERSAL JURISDICTION

These positive developments since – and in part inspired by – the Supreme Court judgment in the *Eichmann* case have been offset to some extent by attacks by individual governments and by the African Union on the supposed abusive exercise of universal jurisdiction.

For example, the Israeli government appears to remain firmly committed to the historic validity of the *Eichmann* judgment. However, the government has repeatedly complained over the past decade about a series of attempts in other countries, including Belgium,⁴³ Spain⁴⁴ and the United Kingdom,⁴⁵ seeking to exercise universal jurisdiction over Israeli government officials and military officers alleged to have committed war crimes, contending that such efforts are politically biased, and pressing those states to change or repeal their universal jurisdiction legislation.

Similarly, the Rwanda government, although it has cooperated with national courts exercising jurisdiction over Hutus suspected of committing genocide in 1994, has attacked attempts by French and Spanish criminal courts seeking to exercise universal jurisdiction over current government officials alleged to have committed crimes against Hutus.⁴⁶

The African Union has, in effect, recognized the continuing validity of the *Eichmann* judgment by supporting the use of universal jurisdiction by African courts with respect to African political leaders. For example, in 2006 it directed Senegal to prosecute Hissène Habré “on behalf of Africa”.⁴⁷ However, at the initiative of Rwanda, it has attacked the alleged abuse of universal jurisdiction by national courts outside Africa. It called for and obtained a discussion in the UN General Assembly on the use and application of universal jurisdiction, which now takes place annually in the Sixth (Legal) Committee.⁴⁸

⁴³ The Associated Press and Haaretz Service, ‘Belgium’s highest court throws out case against Sharon’ Haaretz, 24 September 2003 (<http://www.haaretz.com/news/belgium-s-highest-court-throws-out-case-against-sharon-1.101075>).

⁴⁴ Dan Izenberg, ‘Universal jurisdiction victory in Spain but battle goes on’, Jerusalem Post, 19 April 2010 (<http://www.jpost.com/International/Article.aspx?id=173480>).

⁴⁵ Jonny Paul, ‘UK amends law to protect Israelis from prosecution’, Jerusalem Post, 15 September 2011 (<http://www.jpost.com/DiplomacyAndPolitics/Article.aspx?id=238107>).

⁴⁶ See, for example, Amnesty International Report 2009 – Rwanda (<http://report2009.amnesty.org/en/regions/africa/rwanda>).

⁴⁷ On July 2, 2006, the African Union mandated Senegal to “prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court.” Assembly of the African Union, 7th Sess., Decision on the Hissène Habré Case and the African Union, § 5(ii), Doc. Assembly/AU/3 (VII) (2006).

⁴⁸ In the AU request, it proclaimed its support for “the principle of universal jurisdiction within the

In addition, a meeting of Attorney Generals and Ministers of Justice in Addis Ababa from 14 to 15 May 2012 has recommended that the African Union Summit in June 2012 adopt, what is in effect, a retrograde draft model law on universal jurisdiction endorsing claims by officials to immunity from prosecution in foreign courts for crimes under international law.⁴⁹

III. CLARIFYING THAT STATES MAY ENACT RETROSPECTIVE CRIMINAL LEGISLATION REGARDING CRIMES UNDER INTERNATIONAL LAW

The Israeli Nazi and Nazi Collaborators (Punishment) Law, 1950 was enacted five years after the end of the Second World War. However, the Supreme Court held that the prosecution of Adolf *Eichmann* under this law did not violate the prohibition of retroactive criminal law (principle of legality). The Supreme Court stated that the fundamental prohibition of retroactive criminal legislation was not then part of international law.⁵⁰ In addition, it noted that the national law did not violate any ethical prohibition of retroactive criminal punishment since anyone should have known that such acts as deporting or transferring civilians to death camps, stealing their property and then killing them was morally wrong.⁵¹ However, more

context of fighting impunity as well as the need to punish perpetrators of genocide, crimes against humanity and war crimes”, but expressed its concern about the supposed “ad hoc and arbitrary application, particularly towards African leaders”. Request for the inclusion of an additional item in the agenda of the sixty-third session, The scope and application of the principle of universal jurisdiction, Letter dated 29 June 2009 from the Permanent Representative of the United Republic of Tanzania to the United Nations addressed to the Secretary-General, U.N. Doc. A/63/237/Rev.1, 23 July 2009 (<http://daccess-ddsny.un.org/doc/UNDOC/GEN/N09/421/25/PDF/N0942125.pdf?OpenElement>).

⁴⁹ Report of Ministers of Justice/Attorneys General on Legal Matters, Min/Legal/ Rpt., 14 to 15 May 2012.

⁵⁰ *Eichmann* (Sup. Ct.), *supra* note 1, p. 281.

⁵¹ *Ibid.*, p. 282.

importantly, it also placed the judgment on the more solid legal foundation that the conduct had long been recognized as criminal under international law when committed.⁵² It declared that the crimes of which Adolf Eichmann had been convicted “must be deemed today as having always borne the stamp of international crimes, banned by the law of nations and entailing individual criminal responsibility”.⁵³

The prohibition of retroactive criminal legislation (principle of legality), recognized in the 1948 Universal Declaration of Human Rights as a fundamental right,⁵⁴ has since been guaranteed in international⁵⁵ and regional human rights instruments⁵⁶ and is now firmly part of customary international law.⁵⁷

⁵² *Ibid.*, p. 283.

⁵³ *Ibid.*, p. 287.

⁵⁴ Article 11 (2) of the 1948 Universal Declaration of Human Rights declares:

“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”

⁵⁵ Article 15 of the ICCPR reads:

“(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

⁵⁶ Article 7 (No punishment without law) of the European Convention on the Protection of Human Rights and Fundamental Freedoms provides:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

⁵⁷ Jean-Marie Henckerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge, Cambridge University Press and Geneva, International Committee of the Red Cross, 2005

However, in line with the Supreme Court judgment, under conventional and customary international law, this principle of legality does not prohibit states from enacting legislation including crimes under international law in their penal codes that applies retrospectively to conduct that was recognized as criminal under international law when committed.⁵⁸ The reason is, as the Supreme Court made clear, the national court is acting as an agent of the international community in enforcing *international*, not *national*, law.

IV. TWO ASPECTS OF THE JUDGMENT THAT HAVE NOT STOOD THE TEST OF TIME

All court decisions are a product of their times and they reflect to some extent contemporary legal theory and precedent. The Supreme Court judgment in the *Eichmann* case is no exception. It is understandable, therefore, that in some respects it falls short of what courts should decide today with respect to abduction of suspects across national frontiers and the death penalty. However, far too many courts today also fall short in the same ways.

(Rule 101 - The Principle of Legality: “No one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed.”)

⁵⁸ Each of the conventional and customary international law sources and standards cited in footnotes 52 to 55 make clear that the principle of legality does not prevent prosecution of anyone for conduct that was a crime under international law when committed. Similarly, The Committee against Torture has made clear that national legislation defining torture as a crime under international law can apply to conduct which was considered as torture under international law prior to the enactment of that legislation. See, for example, Committee against Torture, Concluding observations – Spain, U.N. Doc. CAT/ESP/CO/5, para. 21, 9 December 2009 (<http://www2.ohchr.org/english/bodies/cat/cats43.htm>) (“While it takes note of the State party’s comment that the Convention against Torture entered into force on 26 June 1987, whereas the Amnesty Act of 1977 refers to events that occurred before the adoption of that Act [dating to 1936], the Committee wishes to reiterate that, bearing in mind the long-established *jus cogens* prohibition of torture, the prosecution of acts of torture should not be constrained by the principle of legality . . .”).

A. ABDUCTION OF SUSPECTS ACROSS NATIONAL FRONTIERS

At the time of the judgment, it was generally accepted that if a person was abducted across national frontiers, it was not that person's right that was violated, but the right of the state from which the person was abducted. Therefore, only that state could complain and it could waive its objections to the violation, regardless of the views of the abducted person. Moreover, it was settled law in many states that it was of no concern to a court whether the accused had been abducted from another state and brought into the state where the court was located in violation of national or international law. As a practical matter, this doctrine left the accused without any effective legal remedy for the unlawful abduction.

As noted above, Argentina complained to the Security Council that the abduction of Eichmann violated its right to sovereignty and it demanded reparation from Israel. It pointed out that if states took the law into their own hands and abducted suspects across national frontiers the rule of law would be threatened.

The Supreme Court noted that under international law at the time the right violated was that of Argentina and that this state had, in effect, waived its complaint when it declared the matter "closed". It expressly rejected the accused's argument that international law granted him the right to freedom and personal security, as evidenced by Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and that this right had been violated on the narrow and unconvincing ground that Israel was not a party to this treaty.⁵⁹ It then went on to affirm the conclusion of the District Court that abduction of the accused across national frontiers did not deprive that court of jurisdiction, based on the doctrine *male captus bene detentus* (wrongly captured, properly detained).⁶⁰

However, international law has evolved with respect to both points since 1962. First, intergovernmental organizations have increasingly recognized that abductions across national frontiers violate the human rights of the abducted person. These include the Human Rights Committee,⁶¹ the Working Group on Arbitrary Detention,⁶² UN Special Procedures,⁶³ the

⁵⁹ *Eichmann* (Sup. Ct.), *supra* note 1, p. 308.

⁶⁰ *Ibid.*, p. 308.

⁶¹ *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981) (finding a violation "of article 9 (1) because the act of abduction into Uruguayan territory constituted an arbitrary arrest and detention") (<http://www1.umn.edu/humanrts/undocs/session36/12-52.htm>); *García v. Ecuador* (Human Rights Committee), Comm. No. 319/1988, UN Doc. A/47/40 (1994), pp. 287–90; *Celiberti de Casariego v. Uruguay* (Human Rights Committee), Comm. No. 56/1979, Doc. CCPR/C/OP/1, pp. 92–94.

⁶² Working Group on Arbitrary Detention, Report, U.N. Doc. E/CN.4/1994/27 (1993), pp. 139–140.

⁶³ Special Rapporteur on Counter-Terrorism and Human Rights, Report on mission to the United States of America, U.N. Doc. A/HRC/6/17/Add.3, 22 November 2007, para. 36 (stating, in the context of the transfer of a person from one jurisdiction to another, that "the removal of a person outside legally

Human Rights Council⁶⁴ and the European Commission on Human Rights.⁶⁵ National courts, including the Constitutional Court of South Africa, have reached similar conclusions.⁶⁶ The practice has been also condemned by civil society.⁶⁷ Second, although some national courts still adhere to the *male captus bene detentus* doctrine, most notably, the United States Supreme Court,⁶⁸ other courts are beginning to reconsider this doctrine. An increasing number of national courts are concluding that a court can decline to exercise jurisdiction in certain circumstances when the accused has been brought into the forum state through an illegal abduction, including courts in the United Kingdom,⁶⁹ New Zealand⁷⁰ and South

prescribed procedures amounts to an unlawful detention in violation of article 9 (1) of the ICCPR, and raises other human rights concerns if a detainee is not given a chance to challenge the transfer."); Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment Or Punishment, Manfred Nowak; the Working Group on Arbitrary Detention Represented by Its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances represented by its Chair, Jeremy Sarkin, U.N. Doc. A/HRC/13/42, 19 February 2010, para 292 (g) ("Transfers or the facilitation of transfers from one State to the custody of authorities of another State must be carried out under judicial supervision and in line with international standards.").

⁶⁴ Human Rights Council, Res. 19/19, 23 March 2012, para. 12 (noting with concern "measures that can undermine human rights and the rule of law, such as the illegal deprivation of liberty and transfer of individuals suspected of terrorist activities, and the return of suspects to countries without individual assessment of the risk of there being substantial grounds for believing that they would be in danger of subjection to torture, and limitations to effective scrutiny of counter-terrorism measures[.]").

⁶⁵ *Stocké v. Federal Republic of Germany* (European Commission of Human Rights, 12 Oct. 1989) 95 ILR 328, 332–3.

⁶⁶ *Mohamed v. President of the Republic of South Africa*, Judgment, Constitutional Court of South Africa, No. CCT 17/01, 28 May 2001, paras. 59–60; 68–69.

⁶⁷ See, for example, Amnesty International, *State of Denial: Europe's Role in Rendition and Secret detention*, Index: EUR 01/003/2008, 24 June 2008 (<http://www.amnesty.org/en/library/info/EUR01/003/2008/en>), p. 8 "Renditions violate international law because they bypass judicial and administrative due process. As this report illustrates, renditions carried out in the name of the 'war on terror' have typically involved multiple human rights violations, including unlawful and arbitrary detention; torture or other illtreatment; and enforced disappearance." and p. 12 ("Renditions either begin with or result in arbitrary detention – and are therefore prohibited by international human rights law – and typically involve other serious violations.").

⁶⁸ See, for example, *United States v. Alvarez-Machain*, 505 U.S. 655 (1993). However, at least two lower courts had held to the contrary. *United States v. Toscanino* (USA, US Court of Appeals, 2nd Circuit) 500 F.2d 267 (1974); *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991).

⁶⁹ *R v. Horseferry Road Magistrates' Court ex parte Bennett* (England, House of Lords) [1994] 1 AC 42, 95 Int'l. L. Rep. 380.

⁷⁰ *R. v. Hartley* (New Zealand, Court of Appeal) [1978] 2 NZLR 199, 77 Int'l. L. Rep. 330.

Africa⁷¹ For example, the House of Lords said in the Bennett case:

[W]here process of law is available to return an accused to [the United Kingdom] through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party.⁷²

The irony of Argentina's prescient warning about the consequences of states taking justice into their own hands became evident only a little over a decade later when it, along with Bolivia, Chile, Paraguay and Uruguay established Operation Condor on 25 November 1975, supported by the USA. Under this secret plan, security forces of these countries facilitated the clandestine abduction across national frontiers, followed by enforced disappearance, torture and extrajudicial execution outside any legal framework of thousands of opponents and suspected opponents of the governments involved. Courts took no effective action to end such abductions.⁷³

Similarly, two decades after Operation Condor came to an end, the USA established a rendition program involving the abduction of hundreds of persons from around the world suspected of terrorist acts, in some cases to stand trial in the USA or in territory subject to its jurisdiction. Once again, national courts largely failed to bring an end to such abductions or to provide that trials would be stayed pending the bringing to justice of those responsible.

In addition, Israel has used abductions as a means to bring suspects to trial in Israel on at least two occasions after Adolf Eichmann was seized in Argentina. In 1986, Israeli agents abducted Mordechai Vanunu, an Israeli anti-nuclear whistleblower from Italy in 1986 and then sentenced him in Israel to 18 years' imprisonment.⁷⁴ Palestinian engineer Dirar Abu Sisi was abducted from the Ukraine on 18 February 2011 in a manner that might have constituted cruel, inhuman and degrading treatment.⁷⁵ He was reportedly tortured and ill-treated during interrogation and remains in solitary confinement.

B. THE DEATH PENALTY

⁷¹ *State v. Ebrahim* (South Africa, Supreme Court (Appellate Division)) 1991 (2) SA 553, 95 Int'l. L. Rep. 417.

⁷² *R v. Horseferry Road Magistrates' Court, ex parte Bennett*, *supra* note 69 (per Griffiths).

⁷³ See, for example, Iain Guest, *Behind the Disappearances: Argentina's Dirty War against Human Rights and the United Nations*, Philadelphia, Pennsylvania University Press, 1990.

⁷⁴ Amnesty International, *Israel: End arbitrary restrictions on Vanunu*, Index: MDE 15/024/2010, 11 October 2010 (<http://www.amnesty.org/en/library/info/MDE15/024/2010/en>).

⁷⁵ Amnesty International, Letter to UN Committee against Torture, 7 March 2012.

Perhaps the most serious flaw in the Supreme Court judgment was that it upheld the death sentence, which, despite many appeals for clemency, was carried out two days later on 31 May 1962. As with the issue of abductions, this flaw has persisted to this day, as Israel still has not fully abolished the death penalty, and is one of the few democracies in the world that still has this ultimate and cruel punishment on the law books, even if it is in practice refraining from applying it.

This death sentence is the only one that Israel has ever carried out. In 1988, the District Court sentenced John Demjanjuk to death, but this sentence was vacated in 1993 when the verdict was overturned on appeal by the Supreme Court on the ground that it was a case of mistaken identity. Israel reportedly has never sentenced anyone else to death in the more than six decades since it was founded in 1948, although some members of the armed forces and various Israeli politicians have called for the death penalty to be used following killings of Israeli civilians at different times over the years.

Amnesty International now classifies Israel as abolitionist for ordinary crimes and it continues to urge it to abolish the penalty in law for all crimes once and for all.⁷⁶

In addition, the absence of death sentences in Israel for more than two decades is a reflection of how much the world has moved on since 1962. On 29 May 1962, there were ten countries that had abolished the death penalty for all crimes.⁷⁷ In contrast, on the eve of the fiftieth anniversary of the Supreme Court judgment, 97 states had abolished it for all crimes.⁷⁸ In addition, eight had abolished it for ordinary crimes (including Israel)⁷⁹ and 36 more were classified by Amnesty International as abolitionist in practice.⁸⁰ Overall, 141 states are now abolitionist in law or practice (70 per cent of all states around the world). In 2011, only about ten per cent of the world's states carried out executions.⁸¹

⁷⁶ The death penalty in Israel is retained for treason in wartime, crimes against the Jewish people, crimes against humanity, war crimes and genocide. Under military orders applicable in the Occupied Palestinian Territories, the death penalty is retained for certain crimes.

⁷⁷ Amnesty International, *Death penalty: Countries abolitionist for all crimes* (<http://www.amnesty.org/en/death-penalty/countries-abolitionist-for-all-crimes>) (but omitting West Germany (1949)); Roger Hood and Carolyn Hoyle, *The Death Penalty - A Worldwide Perspective*, Oxford, Oxford University Press, 4th ed, 2008, p. 12.

⁷⁸ *Death penalty: Countries abolitionist for all crimes*, supra note 77.

⁷⁹ Amnesty International, *Death penalty: Countries abolitionist for ordinary crimes only*

(<http://www.amnesty.org/en/death-penalty/countries-abolitionist-for-ordinary-crimes-only>);

⁸⁰ Amnesty International, *Death penalty: Countries abolitionist in practice* (<http://www.amnesty.org/en/death-penalty/countries-abolitionist-in-practice>).

⁸¹ See Amnesty International, *Death sentences and executions in 2011*, Index: ACT 50/001/2012, March 2012

(<http://www.amnesty.org/en/library/asset/ACT50/001/2012/en/241a8301-05b4-41c0-bfd9->

Moreover, in contrast to the Nuremberg and Tokyo Charters, which provided for the death penalty, every instrument since 1993 establishing an international or internationalized court with jurisdiction over crimes under international law, including those setting up the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the International Criminal Court, the Special Panels for Serious Crimes in Dili, Timor Leste, the UNMIK International Panels in Kosovo, the Special Court for Sierra Leone the War Crimes Chamber in Bosnia and Herzegovina and the Extraordinary Chambers in the Courts of Cambodia, have all excluded the death penalty for genocide, crimes against humanity and war crimes. In addition, the UN General Assembly has on three occasions called on all states to establish a moratorium on executions with a view to abolishing the death penalty.⁸²

V. CONCLUSION

Despite some flaws, discussed above, the Supreme Court judgment remains a landmark of international justice of continuing relevance today. It placed universal jurisdiction over crimes under international law on a solid legal foundation supporting this essential tool of international justice. As the limited number of trials that have taken place in international and internationalized courts in the past two decades demonstrate, national courts will remain the main agents of enforcement of international criminal law, including through the exercise of universal jurisdiction. The Supreme Court judgment will continue to be the starting point for courts doing so for many decades to come.

[2fe72899cda4/act500012012en.pdf](http://www.amnesty.org/en/2fe72899cda4/act500012012en.pdf)), p. 5. Annex I lists 20 countries. After publication of that report, Amnesty International learned that Singapore had also executed someone in 2011, bringing this number to 21 (<http://www.amnesty.org/en/death-penalty/death-sentences-and-executions-in-2011>).

⁸² U.N. G.A. Res. 62/149, 18 December 2007, U.N. G.A. Res. A/RES/63/168, 18 December 2008; U.N. G.A. Res. A/RES/65/206, 21 December 2010; a fourth resolution is planned for December 2012.