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# Massive Human Rights Tragedies: Prosecutions and Truth Commissions

The topics and documents in this chapter grow out of massive human rights tragedies. The illustrations below include the Holocaust, Bosnia, Rwanda, the apartheid regime of South Africa, and the earlier years of the Pinochet government in Chile. Most of these tragedies had powerful underlying ethnic components—religion, race, ethnic tradition—and involved savage dehumanization and hatred, often stimulated by an oppressor state.

The theme of the chapter can be stated simply: what have been the nature and effects of two types of legal and political reactions to such systematic, massive and cruel violations: criminal prosecutions before international or national tribunals, and truth commissions? How do we understand them, how do we assess them, in what directions do or should they now point?

To approach such questions, the chapter explores a number of related themes: international crimes and universal jurisdiction, the *ad hoc* international criminal tribunals for the former Yugoslavia and for Rwanda, the permanent International Criminal Court whose Statute was adopted in 1998 and that is yet to enter into force, the Pinochet judgment in the UK in 1999, and the use of truth commissions, particularly in South Africa. With some exceptions, the emphasis in the earlier sections is on prosecutions before international tribunals, and in the concluding sections on national tribunals and truth commissions.

Several of the chapter's illustrations of systemic violations grow out of contexts of armed conflict, whether principally international in character or principally internal to a state. Others took place in periods of severe internal repression that, despite its violence, stopped shy of internal armed conflict—Chile, for example. For the first category, the *humanitarian laws of war* with their deep historical roots become particularly relevant. Hence the chapter builds on the earlier discussions of laws of war in connection with the Nuremberg Judgment and on that Judgment itself, pp. 112–122, *supra*. In cases like Chile and much (though not all) of the South African experience, mainstream *international human rights law* that has developed over the last half century has been the source of criticism and judgment.

Nonetheless, the trends since the 1940s in both bodies of law have brought them into a closer, intertwined relationship—a relationship vividly illustrated by the statutes of the two international criminal tribunals and the judgments of those

tribunals. Each field retains a near exclusive interest in a large number of important issues—the laws of war, say, with respect to aspects of *jus in bello* such as military necessity or proportionality in the waging of war; human rights law, say, with respect to free speech, gender equality, or political participation. But on numerous issues that are germane to the international crimes and criminal prosecutions described below, the boundary lines are blurring.

The post-Nuremberg growth of the humanitarian laws of war—particularly through the Geneva Conventions and their two Additional Protocols, and the statutes and judicial decisions of the two international criminal tribunals—as well as the striking success in standard-setting of the human rights movement, have greatly expanded the number of crimes defined by international law that are based on those bodies of law and that impose individual responsibility. Today's international crimes are both conventional and customary in character. Issues of punishment, impunity or immunity, amnesty and pardon of those involved in the most serious violations of human rights have become endemic to the resolution of today's major conflicts.

## A. UNIVERSAL JURISDICTION AND INTERNATIONAL CRIMES

As used in this chapter, 'international crimes' refer to crimes committed not by states as such but by individuals who bear a personal criminal responsibility for commission of crimes defined (at least in the first instance) by international law. The meaning of the term is not self-evident. For example, is a crime 'international' simply by virtue of being within the subject-matter jurisdiction of an international tribunal? Or by virtue of having been defined by a treaty (such as the Torture Convention) that obligates states parties to take the necessary measures (such as legislation) to make that crime applicable to individuals within its territory? Or by virtue of being subject to universal jurisdiction?

Section A reviews basic jurisdictional principles on which states prescribe (make law), particularly prescribe criminal laws imposing individual responsibility, and the basic jurisdictional principles on which a state's courts try criminal cases. Some of these principles are also germane to cases brought before an international tribunal.

### COMMENT ON JURISDICTIONAL PRINCIPLES FOR CRIMINAL LAWS AND LITIGATION

Criminal litigation, unlike civil litigation, ordinarily requires that the state whose courts are trying a case have custody of the defendant. Holding criminal trials *in absentia* is rare. Choice of law, so vital an element of many civil cases, generally does not figure in criminal litigation; the court applies only the law of the state

from which it derives its authority, almost always the one in which it sits, even if the conduct occurred or the effects were felt in other states. The principle of universal jurisdiction, below, constitutes a major exception to this generalization.

The bases on which states enact the criminal laws to which their courts look therefore becomes a critical issue. There are certain conventional categories, some of which are more broadly accepted internationally than others. Several of these categories appear in the following description, based on the American Law Institute, *Restatement (Third), The Foreign Relations Law of the United States* (1987), section 402.

> (1) *Territorial principle*, or prescribing with respect to conduct taking place within a state's territory. This principle is surely the most common and the most readily accepted throughout the world. (2) *Effects principle*, prescribing with respect to conduct outside the territory that has effects within it. (3) *Nationality principle*, prescribing with respect to acts, interests or relations of a state's nationals within and outside its territory. (4) *Protective principle*, prescribing with respect to certain conduct of non-nationals outside a state's territory that is directed against the security of the state or against a limited class of state interests that threaten the integrity of governmental functions (such as counterfeiting). (5) *Passive personality principle*, or prescribing with respect to acts committed outside a state by a non-national where the victim was a national. This principle is surely the least recognized among states as a valid basis for criminal legislation.

These principles are bounded by a number of qualifications and competing considerations, some of which are sketched in section 403 of the Restatement. There follow the Restatement's provision on universal jurisdiction.

> 404. Universal Jurisdiction to Define and Punish Certain Offenses
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> A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism. . . .
>
> COMMENT:
>
> *a. Expanding class of universal offenses.* . . . [I]nternational law permits any state to apply its laws to punish certain offenses although the state has no links of territory with the offense, or of nationality with the offender (or even the victim). Universal jurisdiction over the specified offenses is a result of universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations. These offenses are subject to universal jurisdiction as a matter of customary law. Universal jurisdiction for additional offenses is provided by international agreements, but it remains to be determined whether universal jurisdiction over a particular offense has become customary law for states not party to such an agreement. . . .

. . .

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REPORTERS' NOTES

1. *Offenses subject to universal jurisdiction.* Piracy has sometimes been described as 'an offense against the law of nations'—an international crime. Since there is no international penal tribunal, the punishment of piracy is left to any state that seizes the offender. . . . Whether piracy is an international crime, or is rather a matter of international concern as to which international law accepts the jurisdiction of all states, may not make an important difference.

. . .

That genocide and war crimes are subject to universal jurisdiction was accepted after the Second World War. . . .

The [Genocide] Convention provides for trial by the territorial state or by an international penal tribunal to be established, but no international penal tribunal with jurisdiction over the crime of genocide has been established. Universal jurisdiction to punish genocide is widely accepted as a principle of customary law. . . .

International agreements have provided for general jurisdiction for additional offenses, e.g., the Hague Convention for the Suppression of Unlawful Seizure of Aircraft . . . and the International Convention against the Taking of Hostages. . . . These agreements include an obligation on the parties to punish or extradite offenders, even when the offense was not committed within their territory or by a national. . . . An international crime is presumably subject to universal jurisdiction.

. . .

The description at p. 1072, *supra*, of the Torture Convention and the enactment by the United States Congress of implementing legislation before the United States became a party to that Convention illustrate the principle of universal jurisdiction at work.

## COMMENT ON INTERNATIONAL CRIMES

Recall the following observation in the Nuremberg Judgment, p. 117, *supra*:

> That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

Both that Judgment and the Restatement provisions above refer to customary international law , whose rules long ago imposed criminal sanctions on individual pirates. The Comment at p. 112, *supra*, and the Judgment describe the slow development of war crimes, which turned out to be the single most important component of the crimes defined in the Charter of the International Military Tribunal (IMT) at Nuremberg. That development, spurred by the Nuremberg Judgment, has since continued in the forms of both customary and conventional international law, as evidenced in codified form by the statutes of the three international criminal tribunals described in this chapter. So has the development of crimes against humanity, a category so highly limited by the Nuremberg Judgment in view of its then novelty that it played little independent role in those

proceedings. During the last few decades, such crimes have gained both clarity and number. Genocide, not a category of international crimes at Nuremberg, rapidly became one through UN resolutions and the early UN approval of the Genocide Convention, which soon entered into force.

Other institutions played an important role over these decades in the development of international crimes. Foremost among them was the International Law Commission, created by the UN General Assembly (GA Res. 174 (II), 1947). Its 25 members, 'persons of recognized competence in international law' under its Statute, examine subjects at the ILC's own initiative or at the request of the General Assembly. The ILC worked throughout this period on a draft code of offences, and in 1996 completed a Draft Code of Crimes against the Peace and Security of Mankind. Its work figured in the arguments of advocates in this field that were based on the developing customary law.

The evolution of war crimes was stimulated by the four Geneva Conventions of 1949 for the protection of victims of war. The four conventions contain common articles defining so-called 'grave breaches' of the conventions for injuries to protected persons or property. The parties to the Conventions are required to search for persons alleged to have committed grave breaches and, upon arresting such persons, either to try them criminally (no matter what their nationality or the nationality of the victim or where the acts causing the injuries occurred) or extradite them. Like the Torture Convention, the Conventions thereby establish a universal jurisdiction for grave breaches.

The definitions of grave breaches vary among the four conventions. Article 147 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War is the most extensive. It includes willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury, extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly, unlawfully deporting or transferring or confining a protected person, willfully depriving a protected person of the right to a fair trial, and taking hostages. The First Protocol to the Geneva Conventions—the 1977 Additional Protocol Relating to the Protection of Victims of International Armed Conflict, which entered into force in 1978—added several grave breaches, including: medical experimentation on protected persons, transfer by an occupying power of part of its own population into territory it occupies, deporting part of the population of occupied territory, and racial discrimination.

Other international crimes, unrelated to armed conflict whether international or internal and not necessarily related to traditional human rights themes, have been created by treaties on enslavement and slave trade, on traffic in persons for prostitution, on the production or distribution or sale of narcotic drugs, on aircraft hijacking, and on a few other selected activities.

When treaties define criminal offences, they use a range of formulae. (1) Sometimes the international agreement will both define and directly establish the crime underlying prosecutions (before an international tribunal), as in the London Charter for the Nuremberg trials held before the IMT, or in the statutes for the three international criminal tribunals discussed in this chapter. (2) Sometimes treaties provide in very general terms that a forbidden act, such as genocide,

constitutes an international crime that, in absence of an international penal tribunal, must be tried before specified national courts. (3) Sometimes they impose a duty on treaty parties to prosecute those who commit the defined acts on the basis of universal jurisdiction, as with respect to the provisions for grave breaches in the Geneva Conventions or the provisions in the Torture Convention.

The juristic techniques by which states comply with their obligations under such treaties will vary, depending either or both on the precise treaty provisions and on states' constitutional or traditional ways of dealing with internal obligations under treaties or customary law—issues discussed at pp. 999–1029, *supra*. For example, in the United States criminal laws cannot be self-executing. That is, the treaty's criminal provision standing alone cannot provide a basis for criminal prosecution. Normal legislation that reproduces (and sometimes changes) the treaty definition of a crime must be enacted, thereby 'incorporating' the treaty's criminal provision into US law. A prosecution would then rest directly on the statute rather than on the treaty animating it (which might, however, serve as a source of interpretation of or justification for the statute). As a formal matter, state rather than international criminal law is applied to the defendant. Nonetheless, the crime has a fundamental international character, which is indeed an important basis for subjecting it to universal jurisdiction. Consider the following observations of Yoram Dinstein, 'International Criminal Law', 5 Israel Y'bk on Hum. Rts. 55 (1975) 73:

> . . . [A]s long as no penal tribunal has been established on the international plane, the trial of persons charged with offences defined by international law must take place in the national courts of States. . . . These courts may be regarded, for this purpose, as organs of the international community applying international criminal law and bringing it home to the individual, who is directly subjected to international obligations . . .
>
> While this situation lasts, international criminal law is admittedly beclouded by doubts: from the viewpoint of the offender facing a regular judge in a domestic court, the criminal trial looks like ordinary municipal proceedings: and from the standpoint of the national judge, that judge does not apply international law unless it is incorporated into the national legal system and to the extent of its incorporation. If and when a permanent international criminal court comes into being, it will be possible to distinguish between real international offenses (namely, international duties incurred directly by the individual, who is criminally liable for their infraction) over which the court will have jurisdiction, and national offences originating in international treaties (that is, international obligations imposed on the State, which is required to take measures to suppress the forbidden acts. . .). But as long as no such court exists, the distinction is not easy to draw.

Note the great range of treaties or customary laws and of conduct that figures in the contemporary categories of international crimes:

> (1) Most international crimes have a clear basis in treaty law, even though, like war crimes and genocide, they may have a substantial foundation in

customary law as well. Others, such as crimes against humanity, have developed since the Nuremberg Judgment primarily through customary law, although they have taken codified form in statutes of the two current international criminal tribunals.

(2) Some crimes growing out of the humanitarian laws of war require a context of armed conflict, such as many defined under the Geneva Conventions or a later Additional Protocol. Certain treaties, or articles in treaties, require that the conflict be international in character; others cover internal conflict. The definition of conflict itself varies among such treaties. On the other hand, treaties such as the Genocide Convention or Torture Convention that form part of mainstream human rights law do not require a context of armed conflict (although that context will often exist).

(3) The major international crimes involve unjustified violence, primarily to persons but also to property, whether within or outside contexts of armed conflict. But other crimes such as those related to airplane hijacking or drug trafficking demand no such violence as a condition to prosecution. Indeed, such crimes express serious state and international interests and concerns that are at some level related to but that are distinct from mainstream human rights norms.

(4) Some treaties such as the Torture Convention that impose criminal liability require an important relationship—employment, public office or function, and so on—between the individual defendant and the state. Other crimes such as hijacking or genocide do not demand a state nexus, although genocide will ordinarily involve one. Such other crimes can then involve entirely 'private' defendants without any state links (the traditional pirate, airplane hijacking, drug trafficking), as well as members of organized military or other nonstate groups that may, for example, be insurgents in armed conflict against the state. Nonetheless, it is true that the principal international crimes like genocide or war crimes or crimes against humanity are likely to occur within a state plan or in implementation of state policy.

(5) Some crimes can be discrete occurrences, not part of a systematic plan or policy of the state—for example, the war crime of rape committed by an individual soldier, or a violation of the Torture Convention by an official acting against orders but under color of law. Other crimes have an implicit mass or systemic character that may enter into their definition, such as crimes against humanity and genocide.

These and other variations among international crimes require a close attention in legal argument to the texts of relevant treaties and to the political, ideological and formal developments that have pushed customary law so far in this field. The opinions below of international criminal tribunals evidence that close attention.

It is well to keep this expanding but bounded domain of international crimes distinct from the many situations in the human rights corpus where states are required by treaty to regulate the conduct of nonstate parties, whether individuals or groups/associations. That regulation *may* involve a state's resort to criminal laws and prosecutions that are independent of any international crime. Consider, for example, Article 2 of the ICCPR. A state party 'undertakes to respect and to ensure to all individuals within its territory. . .the rights recognized in the present covenant'. As emphasized in the materials at pp. 180–184, *supra*, such a provision requires the state to take reasonable action to protect people from conduct of

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other (nonstate) individuals or associations—action that might include murder, rape, interference with the right to practice religion, or interference with the right to vote. The treaty duty to protect requires the state to develop bodies of law like tort (civil liability) or the criminal law, as well as to establish police, courts, prisons. But the individual defendant in a criminal action based on murder or physical assault is not necessarily the subject of an international duty or international crime, as are the defendants described above in this Comment who commit crimes against humanity or a crime like hijacking. The husband physically abusing his wife will have broken the criminal law of the state, which here serves (among other functions) to fulfil the state's obligation under Article 2 to 'ensure' the Covenant's rights to all within its jurisdiction. But he is not a subject of international law.

Consider another illustration. Article 11 of CEDAW requires states parties to 'take all appropriate measures' to eliminate discrimination against women in employment. A state may proceed through only civil regulation by creating judicial or administrative remedies for the victims of any such discrimination—damages, injunctive relief, and so on. It may enact criminal legislation that covers certain acts of discrimination of corporations and of individuals. But the individual who is convicted of illegal sex discrimination under such legislation is not (today) within the scope of international crimes.

## COMMENT ON THE *EICHMANN* TRIAL

The Eichmann trial and conviction in 1961 illustrate themes in the preceding Comments at an early stage of the post-Nuremberg evolution of human rights law.

Adolf Eichmann, operationally in charge of the mass murder of Jews in Germany and German-occupied countries, fled Germany after the war. He was abducted from Argentina by Israelis, and brought to trial in Israel under the Nazi and Nazi Collaborators (Punishment) Law, enacted after Israel became a state. Section 1(a) of the Law provided:

> A person who has committed one of the following offences—(1) did, during the period of the Nazi regime, in a hostile country, an act constituting a crime against the Jewish people; (2) did, during the period of the Nazi regime, in a hostile country, an act constituting a crime against humanity; (3) did, during the period of the Second World War, in a hostile country, an act constituting a war crime; is liable to the death penalty.

The Law defined 'crimes against the Jewish people' to consist principally of acts intended to bring about physical destruction. The other two crimes were defined similarly to the like charges at Nuremberg. The 15 counts against Eichmann involved all three crimes. The charges stressed Eichmann's active and significant participation in the 'final solution to the Jewish problem' developed and administered by Nazi officials. Eichmann was convicted in 1961 and later executed. There

appear below summaries of portions of the opinions of the trial and appellate courts.

### *The Attorney-General of the Government of Israel v. Eichmann*[1]

Eichmann argued that the prosecution violated international law by inflicting punishment (1) upon persons who were not Israeli citizens (2) for acts done by them outside Israel and before its establishment, (3) in the course of duty, and (4) on behalf of a foreign country. In reply, the Court noted that, in event of a conflict between an Israeli statute and principles of international law, it would be bound to apply the statute. However, it then concluded that 'the law in question conforms to the best traditions of the law of nations. The power of the State of Israel to enact the law in question or Israel's 'right to punish' is based . . . from the point of view of international law, on a dual foundation: The universal character of the crimes in question and their specific character as being designed to exterminate the Jewish people'.

Thus the Court relied primarily on the universality and protective principles to justify its assertion of jurisdiction to try the crimes defined in the Law. It held such crimes to be offences against the law of nations, much as was the traditional crime of piracy. It compared the conduct made criminal under the Israeli statute (particularly the 'crime against the Jewish people') and the crime of genocide, as defined in Article 1 of the Convention for the Prevention and Punishment of Genocide.

> The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.[2]

The Court also stressed the relationship between the Law's definition of 'war crime' and the pattern of crimes defined in the Nuremberg Charter. It rejected arguments of Eichmann based upon the retroactive application of the legislation, and stated that 'all the reasons justifying the Nuremberg judgments justify *eo ipse* the retroactive legislation of the Israeli legislator'.

The Court then discussed another 'foundation' for the prosecution—the offence specifically aimed at the Jewish people.

> [This foundation] of penal jurisdiction conforms, according to [the] acknowledged terminology, to the protective principle . . . The 'crime against the Jewish people,' as defined in the Law, constitutes in effect an attempt to exterminate the Jewish people. . . . If there is an effective link (and not necessarily an identity)

[1] District Court of Jerusalem, Judgment of 11 December 1961. This summary and the selective quotations are drawn from 56 Am. J. Int. L. 805 (1962) (unofficial translation).

[2] Article 6 of the Convention, the meaning and implications of which were viewed differently by the parties, states: 'Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'.

> between the State of Israel and the Jewish people, then a crime intended to exterminate the Jewish people has a very striking connection with the State of Israel. . . . The connection between the State of Israel and the Jewish people needs no explanation.

*Eichmann v. The Attorney-General of the Government of Israel*[3]

After stating that it fully concurred in the holding and reasoning of the district court, the Supreme Court proceeded to develop arguments in different directions. It stressed that Eichmann could not claim to have been unaware at the time of his conduct that he was violating deeply rooted and universal moral principles. Particularly in its relatively underdeveloped criminal side, international law could be analogized to the early common law, which would be similarly open to charges of retroactive law making. Because the international legal system lacked adjudicatory or executive institutions, it authorized for the time being national officials to punish individuals for violations of its principles, either directly under international law or by virtue of municipal legislation adopting those principles.

Moreover, in this case Israel was the most appropriate jurisdiction for trial, a *forum conveniens* where witnesses were readily available. It was relevant that there had been no requests for extradition of Eichmann to other states for trial, or indeed protests by other states against a trial in Israel.

The Court affirmed the holding of the district court that each charge could be sustained. It noted, however, much overlap among the charges, and that all could be grouped within the inclusive category of 'crimes against humanity'.

## PNINA LAHAV, JUDGMENT IN JERUSALEM
### 1997, at 150

[In this portion of her biography of Simon Agranat, Justice and later Chief Justice of the Israeli Supreme Court, Lahav analyses his role in the Supreme Court's affirmance of Eichmann's conviction and death sentence. The Court delivered its judgment in a *per curiam* opinion. Justice Agranat had prepared the section of that opinion dealing with jurisdictional challenges to the trial.]

Agranat also understood that more than appearance was at stake: the soul of the Zionist project was reshaped by the brutal confrontation with the Holocaust. The old tension within Zionism between universalism and particularism now tilted in favor of particularism. Israelis were perceiving themselves as special: a special target for genocide and special in their right to ignore international norms in pursuit of justice. Popular hubris was growing, nurturing a victim mentality, a

[3] Supreme Court sitting as Court of Criminal Appeals, 29 May 1962. This summary is based upon an English translation of the decision appearing in 36 Int'l. L. Rep. 14–17, 277 (1968).

sense of self-righteousness and excessive nationalism, threatening to weaken the already shaky foundations of universalism in Israeli political culture.

. . .

Agranat understood that the legal reasoning he chose would affect the resolution of the tension between particularism and universalism. The Supreme Court could either let the conviction stand on the basis of crimes against the Jewish people, thereby lending force to the contention that Israel operated by its own rules, impervious to the laws developed by the community of nations, or it could try to show that Eichmann's trial was compatible with international norms of justice and fairness.

Most of the legal arguments advanced by Eichmann were designed to prove that Israel lacked jurisdiction to try him. Two of these arguments received extensive attention from the international community. The first was that the 1950 Israeli Law against the Nazis and Nazi Collaborators, which vested jurisdiction in the Israeli courts, was an ex post facto criminal law and as such could not apply to foreign nationals; the second was that, because the crimes were 'extra-territorial offenses' committed by a foreign national, Israel could not prosecute Eichmann according to the territoriality principle of international law.

In rejecting these arguments, the district court stressed the superiority of Israeli law in the sovereign state of Israel. The Law against the Nazis and Nazi Collaborators, the district court held, was a part of Israeli positive law and, as such, was binding on the courts of the land. It did hold that the law agreed with international norms, but emphasized the impact of the Holocaust on the evolution of the law of nations. This holding contained a symbolic message: Jewish national pride and self-assertion ruled the day. There was poetic justice in this interpretation. If the Final Solution was about the lawless murder of Jews, the *Eichmann* case was about the subjection of the perpetrators to Jewish justice, conceived and applied by the very heirs of those murdered.

There was ambivalence in Agranat's handling of this theme. On one hand, he endorsed the district court's analysis; on the other, his own reasoning went in a different direction. He sought to prove that the validity of the Law against the Nazis and Nazi Collaborators stemmed not from its superiority to the law of nations but from its compatibility with international law. Jewish justice was thereby not different from or superior to the law of nations; rather, it was a part of it.

. . .

. . . Citing scholarly works and judicial opinions, he asserted that international law did not prohibit ex post facto laws and was not dogmatic about the territoriality principle. Thus Israel's decision to prosecute, far from being a violation of international law, was simply a perfectly legitimate reluctance to recognize principles not fully endorsed by the community of nations. . . . He wanted to show that Israel's law was not an aberration but an affirmation of the law of nations.

The Law against the Nazis and Nazi Collaborators created a new category of crimes: crimes against the Jewish people. As such, it was a unique ex post facto law. The crime was specific to Jews and created a category hitherto unknown in any legal system. It was precisely for this reason that the crime formed a coherent part of Zionism. . . . Zionism portrayed the Holocaust less as the vile fruit of

totalitarianism and more as the culmination of two millennia of anti-Semitism. The Jews had been defenseless because they did not possess political power. Even in Nuremberg the Allies refused to recognize that the Jews as a nation were especially targeted by the Nazis. The offense, 'crimes against the Jewish people', was designed to correct that myopia and to assert, ex post facto and forever, the Jewish point of view. . . .

Speaking for the Supreme Court, Agranat raised a different voice. He reviewed the four categories of the indictment, and he concluded that they had a common denominator, a 'special universal characteristic'. About 'crimes against the Jewish people' he had this to say: 'Thus, the category of "crimes against the Jewish people" is nothing but . . . "the gravest crime against humanity". It is true that there are certain differences between them . . . but these are not differences material to our case'. Therefore, he concluded, in order to determine whether international law recognized Israeli jurisdiction stemming from this ex post facto statute, the Court could simply collapse the entire indictment into 'the inclusive category of "crimes against humanity" '. This 'simple' technique enabled Agranat to devote the bulk of his opinion to the universal aspects of the *Eichmann* case.

## QUESTIONS

1. Consider the alternatives to trial of Eichmann by the Israeli court. Would any international tribunal have been competent? What would have been involved in an effort to establish another *ad hoc* international criminal tribunal like Nuremberg, and would that effort have been likely to succeed? Would trial before the courts of another state have been preferable? Which state?

2. What problems, if any, do you see in reliance on 'crimes against the Jewish people'? How would you distinguish it from, for example, legislation by an African state defining 'crimes against the black people' that could reach persons in Western or other states who are accused of violence against black people? Are both types of statutes good ideas?

## ADDITIONAL READING

Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989); Roy Gutman, D. Rieff and K. Anderson (eds.), *Crimes of War: What the Public Should Know* (1999); Hans-Peter Gasser, *International Humanitarian Law* (1993); Timothy McCormack and G. Simpson (eds.), *The Law of War Crimes* (1997); L. C. Green, *The Contemporary Law of Armed Conflict* (1993); Adam Roberts, *Humanitarian Action in War* (1996); Chris Jochnick and R. Normand, 'The Legitimation of Violence: A Critical History of the Laws of War', 35 Harv. Int'l L. J. 49 (1994); Robert Kolb, 'The Relationship between International Humanitarian Law and Human Rights', 324 Int'l Rev. of the Red Cross 409 (1998).