Zadání na argumentační seminář č. 3 – případ Eichmann

Akademický rok 2004-2005

Situace: Adolf Eichmann (1906-1962) ve své funkci vedoucího referátu Gestapa pro židovskou otázku sehrál hlavní roli při zatýkání, deportaci a vyvraždění téměř šesti miliónů Židů. Na konferenci ve Wannesee 20.ledna 1942 dostal na starost "konečné řešení židovské otázky." Eichmann podporoval zavedení plynových komor, které považoval za účinnější než hromadné popravy. Koncem války dokázal proklouznout spojeneckými liniemi a uprchl. Od května 1945 nikdo netušil kde se ukrývá. Žádná vláda ani žádná mezinárodní instituce po něm nepátrala, aby ho předala do rukou spravedlnosti, ačkoli byl označen za válečného zločince. V roce 1957 izraelské tajné služby získaly informace o možném pobytu Eichmanna v Argentině. Přísně tajná akce týmu izraelské tajné služby – Mosadu, který vedl Ister Harel začala. Členové komanda pracovali bez oficiálního krytí izraelskou stranou na odhalení Eichmana, který se v Argentině skrýval pod jménem Klement. Posléze ho unesli ho a propašovali z Argentiny do Izraele, kde ho předali soudním orgánům. Eichmann byl obžalován z genocidy a válečných zločinů proti lidskosti před zvláštním soudem v Jeruzalémě. Proces byl zahájen 2. dubna 1961. Eichmanna hájil tým německých advokátů. Dne 2. prosince byl Eichmnann odsouzen k trestu smrti oběšením. Poté co byla zamítnuta všechna odvolání byl Eichmnann 31. května 1962 popraven. Byla to jediná poprava v dějinách státu Izrael.

Celá akce je zahalena rouškou utajovaných informací. Zprvu se uvádělo, že jelikož tehdy byla v Argentině u moci vojenská diktatura, izraelská vláda z politických důvodů veřejně nedoznala, že při Eichmannově únosu operoval Mosad s jejím vědomím. Celá akce se prezentovala jako akce nezávislé skupiny Židů vedených snahou předat Eichmana justičním orgánům. Poté se připustilo, že celá akce byla schválena izraelskou vládou, a že německá vláda předala Mosadu informace, které nakonec vedly k Eichmannovu dopadení. Tento fakt byl nejprve prezentován tak, že Fritéz Bauer, židovský právník, který zastával funkci státního prokurátora ve spolkové republice Hesensko, jednal sám z vlastní iniciativy. Ovšem později se prokázalo, že jednal ve spojení s německou vládou. Po odtajnění veškerých informací a podle protagonistů celého případu, celou tajnou operaci schválil izraelský premiér David Ben Gurion. O akci věděla ministerstva spravedlnosti a zahraničí. Celá operace byla vedena ve jménu morálky a spravedlnosti. Izrael celou situaci předběžně posoudil tak, že je v souladu se zákonem soudit osobu, která byla dopravena do Izraele proti své vůli. Izrael oznámil, že je legitimním představitelem židovského lidu a jelikož se bude jednat o zločinech spáchaných na židovském lidu, je pouze Izrael oprávněn vynést rozsudek

Argentina podala stížnost k Radě bezpečnosti, že ze strany Izraele došlo k jasnému porušení argentinské suverenity. Rada bezpečnosti prohlásila, že „činy jako takovýto, které se dotýkají suverenity členských států a přispívají k mezinárodním třenicím mohou, jestliže budou opakovány, ohrozit mezinárodní mír a bezpečnost.“ Rada bezpečnosti vyzvala vládu Izraele k reparaci v souladu s Chartou OSN a pravidly mezinárodního práva. Argentina nepožadovala návrat Eichmanna. V srpnu 1960 se vlády Argentiny a Izraele vyřešily danou situaci společným komuniké *"to regard as closed the incident which arose out of the action taken by citizens of Israel, which infringed the fundamental rights of the State of Argentina."*

Otázky:

1. Je chování členů tajného komanda přičitatelné státu Izrael z hlediska mezinárodněprávní odpovědnosti?
2. Jednal Mosad jako orgán státu Izrael (srov. čl. 4 Návrhu článků o odpovědnosti států za protiprávní chování)?
3. Jednalo tajné komando jako orgán *de facto* státu Izrael (srov. čl. 5 Návrh článků o odpovědnosti států za protiprávní chování)?
4. Jednali členové tajného komanda jako soukromé osoby (srov. čl. 11 Návrhu článků o odpovědnosti států za protiprávní chování)?
5. Jak bude stát odpovídat za jednání osoby v postavení veřejného činitele jednajícího *ultra vires*?
6. Na jakém právním základě mohl izraelský soud Eichmanna soudit?

Povinná literatura:

1. Malenovský, J., *Mezinárodní právo veřejné, jeho obecná část a poměr k vnitrostátnímu právu, zvláště k právu českému, 4. vyd.*,MU – nakl. Doplněk, Brno, 2004, str. 272 - 300
2. Čepelka, Č., Šturma P., *Mezinárodní právo veřejné*, Eurolex Bohemia, Praha 2003,str. 553 – 566

Dokumenty na seminář:

1. Rezoluce Rady bezpečnosti č. 138 z roku 1960. Odkaz na tuto rezoluci naleznete:

http://www.un.org/documents/sc/res/1960/scres60.htm

2. Relevantní články návrhu odpovědnosti států za protiprávní chování (jsou součástí tohoto materiálu)

Studijní materiál

Plán operace: Jelikož se chystala oslava 150 výročí argentinské nezávislost a Izrael, protože byl pozván, chystal se vypravit delegaci vysoce postavených vládních činitelů. Ministerstvo zahraničí zprvu o dané tajné akci nevědělo. Domnívalo se, že speciální letadlo vyslané přímo do Argentiny zvýší prestiž Izraele. Ministerstvo zahraničí oficiálně požádalo Argentinu o povolení zkušebního letu letecké společnosti, která měla dopravit delegáty na oslavu. Oslavy měly začít 20 května 1960. Letadlo letecké společnosti mělo odlétat 11. května a vracet se zpět do Izraele 13. května. Tento zvláštní let byl oznámen veřejnosti a veřejnosti byly nabídnuty letenky do Buenos Aires. Letecká společnost si sama musela obstarat povolení k přistání, zajistit agenty pro službu v letadle, zajistit povolení pro přepravu cestujících z Argentiny do Izraele atd. Mezitím tajné komando naprosto samostatně operovalo na území Argentiny a chystalo únos Eichmanna. Plán byl takový, že do 12. května musel být Eichmann při cestě domů z práce zadržen a poté několik dnů držen v domácím vězení a nakonec dopraven do tohoto speciálního letadla jako původní člen posádky, který v době mezi příletem a odletem onemocněl nebo se zranil. V letadle byl tedy dvojník, který přiletěl do Argentiny a na jeho doklady poté měl Eichmann odletět. Dva agenti tajných služeb měli být jako doprovod nemocného. Tito 3 lidé byly představeni členům posádky jako tělesní strážci oficiální izraelské delegace na výroční oslavy a o celé akci bylo spraveno vedení letecké společnosti. Nikoliv posádka letadla. Plán zkomplikovalo to, že se na začátku května

Argentina rozhodla, že přijme Izraelskou delegaci až 19. května. Speciální let se musel o týden odložit.. Ovšem zadržení muselo proběhnout podle původního plánu, což znamenalo držet Eichmanna v domácím vězení o týden déle. Všichni z týmu měli nařízeno v případě odhalení tvrdit, že jsou Izraelci, že jednají z vlastní iniciativy a jediným motivem tohoto počínání je přání předat válečného zločince soudu.

12. května byl Eichmann zadržen. O jeho zadržení byli informováni: Ministerský předseda, ministryně zahraničích věcí a náčelník generálního štábu. Rodina Eichmanna neoznámila únos na policii. Eichmann prý dobrovolně podepsal prohlášení, že odjede do Izraele a stane před soudem tam. 21. května letadlo s Eichmannem odlétlo do Izraele. 23. května 1960 Ben Gurion přednesl v knesetu prohlášení: „ *je mou povinností oznámit knesetu, že před krátkou dobou izraelská zpravodajská služba odhalila jednoho z nejhorších nacistických zločinců …. Adolf Eichmnann je ve vazbě v Izraeli a zanedlouho stane v Izraeli před soudem podle zákona z roku 1950 o potrestání nacistů a nacistických kolaborantů*“

Návrh článků o odpovědnosti států za protiprávní chování:

Draft articles on Responsibility of States for internationally wrongful acts
adopted by the International Law Commission at its fifty-third session (2001)

RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS
PART ONE
THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I
General principles
Article 1
Responsibility of a State for its internationally wrongful acts
Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2
Elements of an internationally wrongful act of a State
There is an internationally wrongful act of a State when conduct consisting of an action or omission:
(a) Is attributable to the State under international law; and
(b) Constitutes a breach of an international obligation of the State.

Article 3
Characterization of an act of a State as internationally wrongful
The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

CHAPTER II
Attribution of conduct to a State
Article 4
Conduct of organs of a State
1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other

functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5
Conduct of persons or entities exercising elements of governmental authority
The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 6
Conduct of organs placed at the disposal of a State by another State
The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Article 7
Excess of authority or contravention of instructions
The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 8
Conduct directed or controlled by a State
The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 9
Conduct carried out in the absence or default of the official authorities
The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10
Conduct of an insurrectional or other movement
1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.
2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.
3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Article 11
Conduct acknowledged and adopted by a State as its own
Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

Commentary to Article 11:

… (5) As regards State practice, the capture and subsequent trial in Israel of Adolf Eichmann may provide an example of the subsequent adoption of private conduct by a State. On 10 May 1960, Eichmann was captured by a group of Israelis in Buenos Aires. He was held in captivity in Buenos Aires in a private home for some weeks before being taken by air to Israel. Argentina later charged the Israeli Government with complicity in Eichmann.s capture, a charge neither admitted nor denied by the Israeli Foreign Minister (Ms. Meir), during the Security Council.s discussion of the complaint. She referred to Eichmann.s captors as a volunteer group..Security Council resolution 138 of 23 June 1960 implied a finding that the Israeli Government was at least aware of, and consented to, the successful plan to capture Eichmann in Argentina. It may be that Eichmann.s captors were in fact acting on the instructions of or under the direction or control of. Israel, in which case their conduct was more properly attributed to the State under article 8. But where there are doubts about whether certain conduct falls within article 8, these may be resolved by the subsequent adoption of the conduct in question by the State

ATTORNEY GENERAL OF ISRAEL v. EICHMANN

Trial Court Decision
36 Intl. L. Rep. 5 (Israel, Dist. Ct. Jerusalem 1961)

Learned defence counsel . . . submits:

(a) that the Israel Law, by imposing punishment for acts done outside the boundaries of the State and before its establishment, against persons who were not Israel citizens, and by a person who acted in the course of duty on behalf of a foreign country ("Act of State"), conflicts with international law and exceeds the powers of the Israel Legislature;

(b) that the prosecution of the accused in Israel following his abduction from a foreign country conflicts with international law and exceeds the jurisdiction of the Court. . . .

[The Court ruled that national law would prevail over international law in an Israel court. Nonetheless, it offered a lengthy analysis of the international law questions.]

From the point of view of international law, the power of the State of Israel to enact the Law in question or Israel's "right to punish" is based, with respect to the offences in question, on a dual foundation: the universal character of the crimes in question and their specific character as intended to exterminate the Jewish people. . . .

12. The abhorrent crimes defined in this Law are not crimes under Israel law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are

grave offenses against the law of nations itself (*delicta jurit gentium*). Therefore, so far from 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. . . .

[Here the Court discussed piracy, and instances of universality jurisdiction over war crimes. It also referred to genocide as having become a crime under customary international law prior to the Genocide Convention; but held that the limitation in the Genocide Convention, Article 6, to trial before the court of the territory, was a treaty rule only, applicable only to offences committed after the Genocide Convention entered into force in 1951.]

26. . . . It is superfluous to add that the "crime against the Jewish people", which constitutes the crime of "genocide", is nothing but the gravest type of "crime against humanity" (and all the more so because both under Israel law and under the Convention a special intention is requisite for its commission, an intention that is not required for the commission of a "crime against humanity"). Therefore, all that has been said in the Nuremberg principles about "crimes against humanity" applies *a fortiori* to "crime against the Jewish people". . .

27. . . . It is indeed difficult to find a more convincing instance of a just retroactive law than the legislation providing for the punishment of war criminals and perpetrators of crimes against humanity and against the Jewish people, and all the reasons justifying the Nuremberg judgments justify *eo ipse* the retroactive legislation of the Israel legislator. . . . The accused in this case is charged with the implementation of the plan for the "final solution of the problem of the Jews". Can anyone in his right mind doubt the absolute criminality of such acts? . . .

28. . . . The contention of learned counsel for the defence that it is not the accused but the State on whose behalf he had acted who is responsible for his criminal acts is only true as to its second part. It is true that under international law Germany bears not only moral, but also legal, responsibility for all the crimes that were committed as its own "acts of State," including the crimes attributed to the accused. But that responsibility does not detract one iota from the personal responsibility of the accused for his acts. . . .

The repudiation of the argument of "act of State" is one of the principles of international law that were acknowledged by the Charter and judgment of the Nuremberg Tribunal and were unanimously affirmed by the United Nations Assembly in its Resolution of December 11, 1946. . . .

30. We have discussed at length the international character of the crimes in question because this offers the broadest possible, though not the only, basis for Israel's jurisdiction according to the law of nations. No less important from the point of view of international law is the special connection which the State of Israel has with such crimes, since the people of Israel (Am Israel), the Jewish people, . . constituted the target and the victim of most of the said crimes. The State of Israel's "right to punish" the accused derives, in our view, from two cumulative sources: a universal source (pertaining to the whole of mankind), which vests the right to prosecute and punish crimes of this order in every State within the family of nations; and a specific or national source, which gives the victim nation the right to try any who assault its existence.

This second foundation of criminal jurisdiction conforms, according to accepted terminology, to the protective principle. . . .

34. The connection between the State of Israel and the Jewish people needs no explanation. The State of Israel was established and recognized as the State of the Jews. . . .

In view of the recognition by the United Nations of the right of the Jewish people to establish their State, and in the light of the recognition of the established Jewish State by the family of nations, the connection between the Jewish people and the State of Israel constitutes an integral part of the law of nations.

The massacre of millions of Jews by the Nazi criminals that very nearly led to the extinction of the Jewish people in Europe was one of the major causes for the establishment of the State of the survivors. The State cannot be cut off from its roots, which lie deep also in the catastrophe which befell European Jewry.

Half the citizens of the State have immigrated from Europe in recent years, some before and some after the Nazi massacre. There is hardly one of them who has not lost parents, brothers and sisters, and many their spouses and their offspring in the Nazi inferno.

In these circumstances, unprecedented in the annals of any other nation, can there be anyone who would contend that there are not sufficient "linking points" between the crime of the extermination of the Jews of Europe and the State of Israel?

35. . . . Indeed, this crime very deeply concerns the "vital interests" of the State of Israel, and under the "protective principle" this State has the right to punish the criminals. . . .

41. It is an established rule of law that a person being tried for an offence against the laws of a State may not oppose his trial by reason of the illegality of his arrest or of the means whereby he was brought within the jurisdiction of that State. The courts in England, the United States and Israel have constantly held that the circumstances of the arrest and the mode of bringing the accused into the territory of the State have no relevance to his trial, and they have consistently refused in all instances to enter upon an examination of these circumstances. . . .

50. Indeed, there is no escaping the conclusion that the question of the violation of international law by the manner in which the accused was brought into the territory of a country arises at the international level, namely, the relations between the two countries concerned alone, and must find its solution at such level. . . .

52. . . . According to the existing rule of law there is no immunity for a fugitive offender save in the one and only case where he has been extradited by the asylum State to the requesting State for a specific offence, which is not the offence for which he was being tried. The accused was not surrendered to Israel by Argentina, and the State of Israel is not bound by any agreement with Argentina to try the accused for any other specific offence, or not to try him for the offences being tried in the present case. The rights of asylum and immunity belong to the country of asylum and not to the offender, and the accused cannot compel a foreign sovereign State to give him protection against its will. The accused was a wanted war criminal when he escaped to Argentina by concealing his true identity. Only after he was kidnapped and brought to Israel was his identity revealed. After negotiations between the two Governments, the Government of Argentina waved its demand for his return and declared that

it viewed the incident as 'closed'. The Government of Argentina thereby refused conclusively to grant the accused any sort of protection. The accused has been brought to trial before the Court of a State which charges him with grave offences against its laws. The accused has no immunity against this trial and must stand trial in accordance with the indictment.

EICHMANN V. ATTORNEY-GENERAL OF ISRAEL

Supreme Court Decision
Supreme Court of Israel (1962) 136 I.L.R. 277

... The contention ... that (since) the State of Israel had not existed at the time of the commission of the offences ... its competence to impose punishment therefore is limited to its own citizens is equally unfounded.... [T]his argument too must be rejected on the basis that the lower court had to apply local legislation.

. . . (As) to the contention [that] the enactment of a criminal law applicable to an act committed in a foreign country by a foreign national conflicts with the principle of territorial sovereignty, here too we must hold that there is no such rule in international customary law. . . This is established by the Judgment of the (World) Court in the **Lotus case**. ... It was held ... that the principle of territorial sovereignty merely requires that the State exercise its power to punish within its own borders, not outside them; that subject to this restriction every State may exercise a wide discretion as to the application of its laws and the jurisdiction of its courts in respect of acts committed outside the State; and that only in so far as it is possible to point to a specific rule prohibiting the exercise of this discretion . . . is a State prevented from exercising it. That view was based on the following two grounds:

(1) It is precisely the conception of State sovereignty which demands the preclusion of any presumption that there is a restriction on its independence;

(2) Even if it is true that the principle of the territorial character of criminal law is firmly established in various States, it is no less true that in almost all of such States criminal jurisdiction has been extended . . . so as to embrace offences committed outside its territory. . . .

. . .[O]n the question of the jurisdiction of a State to punish persons who are not its nationals for acts committed beyond its borders, there is as yet no international accord. . . .

It follows that in the absence of general agreement as to the existence of [such a] rule of international law, . . . there is, again, no escape from the conclusion that it cannot be deemed to be embodied in Israel municipal law, and therefore on that ground, too, the contention fails.

[E]ven if Counsel . . . were right in his view that international law prohibits a State from trying a foreign national for an act committed outside its borders, even this would not [help]. The reason for this is that according to the theory of international law, in the absence of an international treaty which vests rights in an individual, that law only recognises the rights of a State; in other words, assuming that there is such a prohibition in international law, the violation of it is deemed to be a violation of the rights of the State to which the accused belongs, and not a violation of his own rights. . . .

[Reference to the Genocide Convention and the Nuremberg judgement]. .

... As is well known, the rules of the law of nations are not derived solely from international treaties and crystallised international usage. In the absence of a supreme legislative authority and international codes the process of its evolution resembles that of the common law; ... its rules are established from case to case, by analogy with the rules embodied in treaties and in international custom, on the basis of the "'general' principles of law recognised by civilised nations," and in the light of the vital international needs that impel an immediate solution. A principle which constitutes a common denominator for the judicial systems of numerous countries must clearly be regarded as a "general principle of law recognised by civilised nations." . . . [C]ustomary international law is never stagnant, but is rather in a process of constant growth....

. . .[As to] the features which identify crimes that have long been recognised by customary international law, . . . they constitute acts which damage vital international interests ... they impair the foundations and security of the international community; they violate universal moral values and humanitarian principles which are at the root of the systems of criminal law adopted by civilised nations. The underlying principle in international law that governs such crimes is that the individual who has committed any of them and who, at the time of his act, may be presumed to have had a thorough understanding of its heinous nature must account in law for his behaviour. It is true that international law does not establish explicit and graduated criminal sanctions; that there is not as yet in existence either an international Criminal Court, or international machinery for the imposition of punishment. But, for the time being, international law surmounts these difficulties . . . by authorising the countries of the world to mete out punishment for the violation of its provisions. This they do by enforcing these provisions either directly or by virtue of the municipal legislation which has adopted and integrated them. . . .

The classic example of a "customary" international crime . . . is that of piracy *jure gentium*. . . . [Another] example . . .is that of a "war crime" in the conventional sense. . . . the group of acts committed by members of the armed forces of the enemy which are contrary to the "'laws and customs of war." individual criminal responsibility because they undermine the foundations of international society and are repugnant to the conscience of civilised nations. When the belligerent State punishes for such acts, it does so not only because persons who were its nationals . . . suffered bodily harm or material damage. But also, and principally, because they involve the perpetration of an international crime in the avoidance of which all the nations of the world are interested....

In view of the characteristic traits of international crimes and the organic development of the law of nations -- a development that advances from case to case under the impact of the humane sentiments common to civilised nations, and under the pressure of the needs that are vital for the survival of mankind and for ensuring the stability of the world order it definitely cannot be said that when the Charter of the Nuremberg International Military Tribunal was signed and the categories of "war crimes" and "crimes against humanity" were defined in it, this merely amounted to an act of legislation by the victorious countries. . . .

... [T]he interest in preventing and imposing punishment for acts comprised in the category in question--especially when they are perpetrated on a very large scale--must necessarily extend beyond the borders of the State to which the perpetrators belong and which evinced tolerance

or encouragement of their outrages; for such acts can undermine the foundations of the international community as a whole and impair its very stability. . . .

If we are to regard customary international law as a developing progressive system, the criticism becomes devoid of value. . . [E]ver since the Nuremberg Tribunal decided this question, that very decision must be seen as a judicial act which establishes a "precedent" defining the rule of international law. In any event, it would be unseemly for any other court to disregard such a rule and not to follow it....

If there was any doubt as to this appraisal of the "Nuremberg Principles" as principles that have formed part of customary international law 64 since time immemorial," such doubt has been removed by ... the United Nations Resolution on the Affirmation of the Principles of International Law Recognised by the Charter and Judgment of the Nuremberg Tribunal and that affirming that Genocide is a crime under international law ... and as [is seen] in the advisory opinion of 1951 ... the principles inherent in the [Genocide] Convention- - as distinct from the contractual obligations embodied therein -- had already been part of customary international law at the time of the shocking crimes which led to the Resolution and the Convention. . . .

... [T]he crimes established in the Law of 1950 ... must be seen today as acts that have always been forbidden by customary international law -- acts which are of a "universal" criminal character and entail individual criminal responsibility.... [T]he enactment of the Law was not, from the point of view of international law, a legislative act that conflicted with the principle nulla poena or the operation of which was retroactive, but rather one by which the Knesset gave effect to international law and its objectives. . .

... [I]t is the universal character of the crimes in question which vests in every State the power to try those who participated in the preparation of such crimes, and to punish them therefor. . .

One of the principles whereby States assume, in one degree or another, the power to try and punish a person for an offence he has committed is the principle of universality. Its meaning is, in essence, that that power is vested in every State regardless of the fact that the offence was committed outside its territory by a person who did not belong to it, provided he is in its custody at the time he is brought to trial. This principle has wide support and is universally acknowledged with respect to the offence of piracy jure gentium. ... [One view] holds that it cannot be applied to any other offence, lest this entail excessive interference with the competence of the State in which the offence was committed.

A second school ... agrees ... to the extension of the principle to all manner of extraterritorial offences committed by foreign nationals. . . . It is not more than an auxiliary principle to be applied in circumstances in which no resort can be had to the principle of territorial sovereignty or to the nationality principle, both of which are universally agreed to. [Holders of this view] impose various restrictions on the applications of the principle of universal jurisdiction, which are designed to obviate opposition by those States that find themselves competent to punish the offender according to either of the other two principles. [One of these reservations is that the extradition of the offender should be offered to the State where his offence was committed.].....

A third school..... holds that the rule of universal jurisdiction, which is valid in cases of piracy, logically applies also to all such criminal acts or omissions which constitute offences under

the law of nations (*delicta juris gentium*) without any reservation whatever or, at most, subject to a reservation of the kind Oust] mentioned.... This view has been opposed in the past because of the difficulty in securing general agreement as to the offences to be included. . .

. . .Notwithstanding the differences . . . there is full justification for applying here the principle of universal jurisdiction since the international character of the "crimes against humanity" (in the wide meaning of the term) is, in this case, not in doubt, and the unprecedented extent of their injurious and murderous effect is not open to dispute at the present day. In other words, the basic reason for which international law recognises the right of each State to exercise such jurisdiction in piracy offences ... applies with all the greater force. . .

[I]t was not the recognition of the universal jurisdiction to try and punish the person who committed "piracy" that justified the viewing of such an act as an international crime sui generis, but it was the agreed vital interest of the international community that justified the exercise of the jurisdiction in question. . . .

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

We have also taken into consideration the possible desire of other countries to try the appellant in so far as the crimes..... were committed in those countries or their evil effects were felt there..... But . . . we have not heard of a single protest by any of these countries against conducting the trial in Israel. . . . What is more, it is precisely the fact that the crimes . . . and their effects have extended to numerous countries that empties the territorial principle of its content in the present case, and justifies Israel in assuming criminal jurisdiction by virtue of the "universal" principle....

[It is argued by counsel that Article 6 of the Genocide Convention provides that] a person accused of this crime shall be tried by a court of competent jurisdiction of the State in which it was committed ... Article 6 imposes upon the parties contractual obligations with future effect . .... obligations which bind them to prosecute for crimes of "genocide" which will be committed within their territories in the future. The obligation. however, has nothing to do with the universal power vested in every State to prosecute for crimes of this type committed in the past -- a power which is based on customary international law.

...The State of Israel was entitled, pursuant to the principle of universal jurisdiction and acting in the capacity of guardian of international law and agent for its enforcement, to try the appellant. This being so, it is immaterial that the State of Israel did not exist at the time the offences were committed. . . .

[The Tribunal drew attention to Israel's connection to the Jewish people and the Jewish National Home in Palestine.]

If we . . . have concentrated on the international and universal character of the crimes for which the appellant has been convicted, one of our reasons for doing so was that some of them were directed against non-Jewish groups....

[As to the circumstances of Eichmann's capture, the Court cited a long list of local, British. American and Continental precedents and reached the following conclusions:]

(a) In the absence of an extradition agreement between the State to which a "fugitive offender" has been brought for trial and the country of "asylum" . . . and even if there existed such an agreement . . . but the offender was not extradited . . . in accordance therewith, the Court will not investigate the circumstances in which he was detained and brought to the area of jurisdiction.

(b) This also applies if the offender's contention be that the abduction was carried out by the agents of the State prosecuting him, since in such a case the right violated is not that of the offender, but the sovereign right of the State aggrieved. . . . The issue must therefore find its solution on the international level, and is not justiciable before the Court into whose area of jurisdiction the offender has been brought.

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

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

(g) The right of asylum and immunity belong to the country of asylum, not to the offender. . .

. . .The appellant is a "fugitive from justice" from the point of view of the law of nations, since the crimes that were attributed to him are of an international character and have been condemned publicly by the civilised world . . . ; therefore, by virtue of the principle of universal jurisdiction, every country has the right to try him. This jurisdiction was automatically vested in the State of Israel on its establishment in 1948 as a sovereign State. Therefore, in bringing the appellant to trial, it functioned as an organ of international law and acted to enforce the provisions thereof through its own law. Consequently, it is immaterial that the crimes in question were committed . . . when the State of Israel did not exist, and outside its territory. . . . The moment it is admitted that the State of Israel possesses criminal jurisdiction both according to local law and according to the law of nations, it must also be conceded that the Court is not bound to investigate the manner and legality of the ... detention....

[The Court then turned to the issues of Acts of State and superior orders.]

... Appeal dismissed