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GENOCIDE: ISRAELI LAW

ROBERT ROBINSON GALES*

I. GENOCIDE — THE THEORY

Through the many barbarous phases of its history, human civilization has endured such atrocities as the destruction of Carthage by the Romans, the extermination of the Indians in North America, pogroms¹ in Czarist Russia, and the Armenian massacres in imperial Turkey.² Mass annihilation, therefore, has not been unknown during these black periods; but until the middle of our present century no word existed in the thesaurus of human expression to describe adequately such enormities.³ The word coined to describe these activities, and particularly the systematic extermination of European Jewry, was "genocide."⁴

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these groups, and is contrary to moral law and to the spirit and aims of the United Nations.⁵

Although genocide may coincide in some respects with the concept of crimes against humanity, there are features distinctive to each. To prove genocide—crimes aimed against groups—no connection with war need be shown. On the other hand, crimes against humanity—deviations from a transcendent moral law—generally are connected in some way with war.⁶ Unfortunately, the two concepts can never be fully separated.

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1. A pogrom is an organized massacre of helpless people, usually with the connivance of officials. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1902 (1950).

2. GREENSPAN, THE MODERN LAW OF LAND WARFARE 197 (1959).

3. *Ibid.*

4. The word was coined by Dr. Raphael Lemkin, a Polish scholar and attorney now in the United States; see LEMKIN, AXIS RULE IN OCCUPIED EUROPE, Chap. IX, "Genocide," 79-95 (1944). The term is compounded from the ancient Greek word *genos* (race, tribe) and the Latin derivation *cide* (killing).

5. Resolution 96 (1) General Assembly: DROST, THE CRIME OF STATE GENOCIDE 1 (1959).

6. BRAND, 15 DIGEST OF LAWS AND CASES; LAW REPORTS OF TRIALS OF WAR CRIMINALS 138 (1949); DROST, *op. cit. supra* note 5, at 186.

II. GENOCIDE IN ISRAELI LAW

A. Sources of Israeli Law

Before a discussion of any particular segment of the law can be deemed fruitful, it is necessary to acquaint the reader with the basic origins of such law.

There are three distinct sources from which the present law of Israel is derived.⁷ The first and earliest source is the Ottoman law which was in force on November 1, 1914, when Turkey entered the war against Great Britain. It was in essence the codification, by French-trained Turkish jurists, of law based on the Koran and Moslem custom. Also introduced at this time were the French Criminal, Commercial, and Civil Procedure Codes.

Another judicial contribution was "the law enacted by the British administration in Palestine and the English common law on which the Palestine courts of law had drawn in significant measure during the Mandatory era."⁸

The last and most recent source is "the law enacted by the Israel Legislature since May 14, 1948, and the judicial decisions handed down by the Israel courts of law."⁹ This last source is perhaps the most important of all, for it is both a codification and extension of the ancient law of historical Israel arising from the *Mishna*¹⁰ and the *Talmud*.¹¹

B. The Crime of Genocide (Prevention and Punishment)¹²

1. Genocide — Interpretation

Under the first of the two basic genocide statutes enacted by the Israeli Knesset,¹³ genocide includes any acts committed with intent to destroy partially or totally, national, ethnic, racial, or religious groups through any of five enumerated means, or any combination thereof. These means are: "(1) killing members of the group; (2) causing serious physical or mental harm to the members of the group; (3) inflicting life curtailing conditions on the group; (4) imposing birth prevention measures within the group; (5) forced child transfer."¹⁴

7. BADI, *FUNDAMENTAL LAWS OF THE STATE OF ISRAEL* 5 (1961).

8. *Ibid.*

9. *Ibid.*

10. "The traditional Doctrine of the Jews as represented and developed chiefly in the decisions of the rabbis before the 3d century A.D." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1569 (1950).

11. "The body of Jewish civil and canonical law, consisting of the combined *Mishnah* or text, and *Gemara*, or commentary." WEBSTER'S NEW INTERNATIONAL DICTIONARY 2574 (1950).

12. BADI, *op. cit. supra* note 7, at 152-53; SEFER HA-CHUKKIM No. 42, April 7, 1950 at 137. The SEFER HA-CHUKKIM is the official government publication of principal legislation.

13. Hebrew word equivalent to the English word "legislature."

14. The Crime of Genocide (Prevention and Punishment) Law (hereinafter cited as First Israeli Law), § 1, BADI, *op. cit. supra* note 7, at 152. Badi's work is an unofficial compilation of various selected Israeli legislative enactments.

The first method is self-explanatory. Mass arbitrary annihilation of persons individually, but not as members of a group, does not constitute genocide under the act, but rather a series of homicides punishable under the penal statutes. To constitute genocide, intent to harm a person because of his membership in the group is necessary.

The second method must be read in the light of the purpose of the whole statute—group protection. The crime mentioned must endanger the health and morality of at least a part of the protected group. Intent once again brings the crime within the statute. Some of the acts proscribed would be brainwashing, causing congenital defects, causing infectious diseases, and creating ghetto conditions.

The third method includes all those concerted acts which, in the long run, would cause the death of or grave bodily injury to at least a portion of the group. Such crimes would include surgical testing upon live humans and causing "slow death" by inducing terminal diseases. The distinguishing feature of this method is that it tends to produce extinction much more slowly than the first method.

The fourth method involves limiting the number of births within the group by various means. Total prevention of births would bring the crime within the third classification. The fourth method may be carried out by sterilization, separation of the sexes, prohibition of marriages, and the killing of either pregnant women or their fetuses.

The last method relates to the forced transfer of children from their own group either to another distinctly different one, or to a detention or concentration type camp. The different groups referred to are national, ethnic, racial, or religious.

2. Penalty for Genocide

Individuals found guilty of the crime of genocide are, with but two exceptions, punishable with death under the statute.¹⁵ The first exception¹⁶ falls within the provisions of the Criminal Code Ordinance, 1936.¹⁷ This includes judicial function constraint, necessity and justification. The second exception¹⁸ provides a minimum ten year prison term for those individuals who tried to the best of their ability to mitigate the consequences of their acts or whose acts by reason of other circumstances exempt them from criminal responsibility. Just what these circumstances might be is left to the interpretation of the judiciary, for they are not enumerated within the statute. It is interesting to note, however, that the so-called doc-

15. First Israeli Law § 2, BADI at 152.

16. First Israeli Law §§ 2,6, BADI at 152-53.

17. Palestine Gazette No. 652, Supplement I, December 14, 1936; BADI, *op. cit. supra* note 7, at 153, n. 144.

18. First Israeli Law § 2, BADI at 152.

trines of "sovereign immunity"¹⁹ and "act of state"²⁰ have no application within the statute.

A person guilty of an offence under this Law shall be punished whether he is a legally responsible ruler, a member of a legislative body, a public official or a private individual.²¹

This follows the Soviet idea that "all engaged in the activities of a genocidal character are to be considered guilty and punishable without distinction."²²

3. Other Acts Treated With Genocide

As do other penal statutes dealing with "lesser" crimes, this act also covers those persons who, along with the principal perpetrators, conspire, incite, attempt, or aid and abet in any way the commission of the crime of genocide.²³

Conspiracy is the agreement among two or more parties to commit a certain act; the section is self-explanatory. Incitement on the other hand suggests a curtailment on freedom of the press. This section is therefore open to argument.²⁴ Attempt²⁵ and complicity²⁶ are clear, and no further comment is deemed necessary.

4. Place of Crime

The Israeli statute is extra-territorial in effect. This section²⁷ provides for the prosecution and punishment of any person who commits genocide outside as well as within the state. The constitutionality of such a provision will be discussed below.

5. Extradition

Due to the feeling that the crimes dealt with in the statute are not political in nature, but rather are against humanity as a whole, provision is made for the extradition of persons charged with the crime of genocide.²⁸ Thus the universally honored plea of political extradition will not be entertained.

19. "According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." 26 DEP'T. STATE BULL. 984 (1952); RESTATEMENT, THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 72. 235 (1962).

20. "Every sovereign state is bound to respect the independence of every sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

21. First Israeli Law § 6, BADI at 153.

22. DROST, *op. cit. supra* note 5, at 98.

23. First Israeli Law § 3a, BADI at 153.

24. First Israeli Law § 3b, BADI at 153. The terms are construed with reference to the provision of the Criminal Code Ordinance, 1936.

25. First Israeli Law § 3b, BADI at 153.

26. First Israeli Law § 3c, BADI at 153. The terms are construed in reference to Criminal Code Ordinance, 1936, § 23 (1) b.c.d.

27. First Israeli Law § 5, BADI at 153.

28. First Israeli Law § 8, BADI at 153.

6. Operation

This Law, which is consequent upon the Convention on the Prevention and Punishment of the Crime of Genocide—adopted by the United Nations General Assembly on the 7th Kislev, 5709 (9th December, 1948), signed on behalf of and, in accordance with a decision of the Knesset, ratified by the State of Israel—shall come into force on the date of its publication in *Reshumot*²⁹ and shall remain in force whether or not the Convention comes into or remains in force.³⁰

C. Nazi and Nazi Collaborators (Punishment) Law³¹

Unlike the Prevention and Punishment of Genocide Bill which provided for the future, and which was designed to prevent the repetition of the Nazi war crimes perpetrated under Adolf Hitler, the second of the two basic Israeli genocide statutes, the Nazi and Nazi Collaborators (Punishment) Law, applied to the past and concerned itself with crimes of the Nazi regime.³²

1. Crimes in General

The statute covers three overlapping classifications of offenses.³³ These are acts committed during the period of the Nazi regime,³⁴ in an enemy country,³⁵ constituting a crime against the Jewish people (such crimes will be discussed shortly); acts committed during the period of the Nazi regime, in an enemy country, constituting a crime against humanity;³⁶ and acts committed during the period of the Second World War,³⁷ in an enemy country, constituting a war crime.³⁸

29. *Reshumot* is the official publication of state records by the Government Printer. In this case the statute was published in SEFER HA-CHUKKIM (Principal Legislation); BADI, *op. cit. supra* note 7, at 436.

30. First Israeli Law § 10, BADI at 153.

31. Law of August 1, 5710-1950 (1950) [hereinafter cited as Second Israeli Law], BADI at 162-67.

32. RUSSELL, *THE TRIAL OF ADOLF EICHMANN* xxvii (1962).

33. Second Israeli Law § 1a, BADI at 162.

34. Second Israeli Law § 16, BADI at 166. "Nazi regime" began January 30, 1933, and ended May 8, 1945.

35. Second Israeli Law § 16, BADI at 167. The words "Enemy country" mean: A, Germany during the period of the Nazi regime; B, any other Axis state during the period of the war between it and the Allied Powers; C, any territory which, during the whole or part of the period of the Nazi regime, was *de facto* under German rule, for the time during which it was *de facto* under German rule as aforesaid; D, and territory which was *de facto* under the rule of any other Axis state during the whole or part of the period of the war between it and the Allied Powers, for the time during which that territory was *de facto* under the rule of that Axis state as aforesaid.

36. Second Israeli Law § 1b, BADI at 162. The words "crime against humanity" mean any of the following acts: murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds.

37. Second Israeli Law § 16, BADI at 166. "Second World War" was that period which began on September 1, 1939, and ended August 14, 1945.

38. Second Israeli Law § 1b, BADI at 163. The words "war crime" mean any of the following acts: murder, ill-treatment or deportation to forced labor or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity.

2. Crimes Against the Jewish People³⁹

Those crimes against the Jewish people for which the death penalty is available under the statute are simply an extension from the crimes against groups listed in the first genocide statute. Rather than concerning itself with "killing members of the group," this statute deals with "killing Jews."⁴⁰ The same is true for the remaining sections. One addition to the list of offenses in this statute is "destroying or desecrating Jewish religious or cultural assets or values."⁴¹ With this addition, practically every anti-Jewish activity is covered by the statute.

3. Other Crimes

A large portion of the statute deals with other crimes which are outside the scope of this paper. They include acts against individuals because of their being Jews,⁴² membership in enemy organizations,⁴³ offenses in places of confinement,⁴⁴ collaboration leading to the capture or arrest of Jews,⁴⁵ and blackmailing Jews and those who gave them shelter.⁴⁶

4. Res Judicata

The statute provides for the prosecution of individuals guilty of crimes under it, even if these persons have already been tried abroad by foreign-national or international tribunals, for the same offenses.⁴⁷ However, the statute also takes into consideration prior punishment served abroad by the defendants, before rendering sentence.⁴⁸

5. Other Sections

The remaining sections of the statute are almost carbon copies of similar sections in the first statute.

III. PRECEDENTS

As stated earlier, there are three distinct sources from which the present law of Israel is derived. The Israeli laws on genocide stem directly from six overlapping sources. These are: Jewish theology, the London Charter, Control Council of Germany Law No. 10, Charter of the International Military Tribunal at Nuremberg, United Nations Convention on the Prevention and Punishment of the Crime of Genocide, and the Constitution of the state of Israel.

39. Second Israeli Law § 1b BADI at 162.

40. Second Israeli Law § 1b(1), BADI at 162.

41. Second Israeli Law § 1b(6), BADI at 162.

42. Second Israeli Law § 2, BADI at 162. Some examples are rape, manslaughter, kidnap, and robbery.

43. Second Israeli Law § 3, BADI at 163-64.

44. Second Israeli Law § 4, BADI at 164. Some examples are threatening violence, assault, failure to supply necessities, and theft.

45. Second Israeli Law § 5, BADI at 164.

46. Second Israeli Law § 6, BADI at 164-65.

47. Second Israeli Law § 9a, BADI at 165.

48. Second Israeli Law § 9b, BADI at 165.

A. Jewish Law

In the concept of the Jewish religion, the life of every creature is surrounded by a certain sanctity and hence must be treated with dignity and regard.⁴⁹ Punishment for failing to so treat the lives of human beings is prescribed in the Bible: "Who so sheddeth man's blood, by man shall his blood be shed: for in the image of God made He man."⁵⁰ The justification of the death penalty is the only exception to this broad general rule against the spilling of man's blood. Such phrases as "the noxious thorns in the garden must be destroyed,"⁵¹ and even "death of the wicked is a benefit to themselves and a benefit to society"⁵² are often quoted to justify the death penalty.⁵³ These concepts furnish the original theological basis for the sections in the two statutes dealing with "killing members of the group" or "killing Jews."

According to the law of the Torah it is forbidden to inflict pain upon any living creature.⁵⁴ This standard is so important that it is deemed sinful to stand idly by while a neighbor suffers hardship at the transgressions of others.⁵⁵ Hence, the basis is established for the sections dealing with "causing serious physical or mental harm" and "inflicting life curtailing conditions."

Jewish law forbids the individual from castrating any living creature, either man, beast, or fowl, anywhere in the world.⁵⁶ It is also "forbidden to cause sterility to any male, man or any living being even by medicine. . ." ⁵⁷ This is a source of the fourth section on birth prevention.

Forced child transfer or kidnapping is also a capital crime forbidden in the scriptures. "And he that stealeth a man, and selleth him, or if he be found in his hand, he shall surely be put to death."⁵⁸

B. International Law

1. The London Charter⁵⁹

The earliest international forum established to deal with crimes of a genocidal nature other than the "conventional" war crimes was the Four-Power Conference out of which came the London Charter. Although the charter dealt with "crimes against humanity," it can easily be seen by the following statement from the charter that these are in actuality crimes of genocide.

49. GANZFRIED, CODE OF JEWISH LAW xxx (1963).

50. *Genesis* 9:6.

51. *Genesis* 15:1.

52. *Mishnah*, Sanhedrin, viii, 5.

53. "When the wicked perish there is joyful shouting." *Proverbs* 11:10.

54. GANZFRIED, *op. cit. supra* note 49, vol. 4, ch. 143 at 84.

55. *Leviticus* 19:16. "Neither shalt thou stand idly by the blood of thy neighbor."

56. GANZFRIED, *op. cit. supra* note 49, vol. 4, ch. 143 at 84.

57. *Ibid.*

58. *Exodus* 21:16.

59. Adopted by the United Nations on August 8, 1945, and signed by twenty-three United Nation member states.

The following acts or any of them are crimes coming within the jurisdiction of the tribunal for which there shall be individual responsibility: CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.⁶⁰

2. Control Council of Germany Law No. 10⁶¹

The London Charter was promptly followed and enlarged upon by the Control Council of Germany with Law No. 10. In addition to the above enumerated crimes, the council also recognized as "crimes against humanity" or genocide, mass imprisonment, torture, and rape.⁶²

3. Charter of the International Military Tribunal at Nuremberg

Prior to the establishment of the International Military Tribunal at Nuremberg, there had been no actual or practical use put to the earlier genocide statutes. The I.M.T. therefore adopted almost in toto the ideas and formulae that had been established just for such a moment. Article 6c of the Charter, which dealt with jurisdiction and general principles, was a carbon copy of the earlier section of the London Charter dealing with the same subject.⁶³ Soon after the trials, the United Nations' General Assembly unanimously adopted a resolution affirming the "Principles of International Law recognized by the Charter of the Nuremberg Tribunal and the judgment of the tribunal."⁶⁴ Thus, out of the dust and the paper stepped precedents based upon international judicial determinations. The world had in effect codified the age old transgressions of the advanced civilizations of humanity. Humanity had been on trial for its crimes against humanity.

4. The Convention on the Prevention and Punishment of the Crime of Genocide⁶⁵

Several years later, the judicial precedents and the statutory enactments were forged together in the latest and most impressive convention on genocide ever established. The genocide convention took a firm grasp on international law and a new pigeon hole was

60. Brand, CRIMES AGAINST HUMANITY AND THE NUREMBERG TRIALS, 28 Ore. L. Rev. 93, 100 (1949).

61. Signed on December 20, 1945.

62. Brand, *op. cit. supra* note 60, at 101.

63. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 275 (1962); Brand, *id.* at 100.

64. Resolution 1 (95) December 11, 1946; WOETZEL, *id.* at 232-33.

65. Unanimously approved by the General Assembly on December 9, 1948; WOETZEL, *id.* at 235; DROST, *op. cit. supra* note 5, at 138; Article X of the Convention.

plugged with codification. The convention was signed by Israel,⁶⁶ among other states, and ratification was deposited with the august body soon thereafter.⁶⁷

The duty of a state as a member of the family of nations to punish violations of the prohibitions imposed by the law of nations is a matter of international law; but whether any particular local sovereignty requires prior specific "implementation" of international law by "conversion" of its prohibitions into those of municipal, criminal or military law, or prefers to punish them directly without such intercession of domestic legislation, is a matter of each state's own constitution—an arrangement of municipal law.⁶⁸

Although Israel apparently agrees, as the constitutions of some nations provide,⁶⁹ that the law of nations is to be adopted in its full extent,⁷⁰ it also chose to follow the method of converting the desired portions of international law into local law through domestic legislation. "The courts of the country derive their jurisdiction not from the system of international law but from the laws of the land."⁷¹ This is the reason for Israel's "The Crime of Genocide (Prevention and Punishment) Law," which is actually a domestic legislative adaptation of the United Nations' "The Convention on the Prevention and Punishment of the Crime of Genocide." Thus, Israel followed the advice of the late John Foster Dulles when he suggested:

Those who want international laws actually to assure human rights, where these rights are not automatically and freely assured by local law and custom, should seek to make those laws the "law of the land," through legislative or other measures, applicable to individuals and enforceable through the normal processes of the courts International authority, to be effective, "must carry its agency to the persons of the citizens," and be enforceable through "the mild and salutary coercion of the magistracy."⁷²

IV. ARGUMENTS CONCERNING SUCH STATUTES

A. Retroactivity

The basic difficulty concerning Israel's Nazi and Nazi Collaborators Punishment Law, as well as those laws and conventions es-

66. August 17, 1949. ROBINSON, *THE GENOCIDE CONVENTION* 138 (1960).

67. March 9, 1950. ROBINSON, *id.* at 140.

68. GLUECK, *THE NUREMBERG TRIAL AND AGGRESSIVE WAR* 65-6 (1946).

69. U.S. CONST. art. VI, § 2; FR. CONST. art. 46 (October 13, 1946); Bonn Basic Law art 25; WOETZEL, *op. cit. supra* note 63, at 100.

70. Deputy President Justice Cheshin said in Criminal Appeal 174/54 (10 Piske Din 5, 17) that Israel agrees with Blackstone's statement concerning English law in BLACKSTONE, *IV COMMENTARIES ON THE LAWS OF ENGLAND* ch. 5: "In England . . . the Law of Nations . . . is . . . adopted in its full extent by the common law, and is held to be part of the law of the land . . . without which it must cease to be a part of the civilized world." Oliver, *The Eichmann Trial*, 56 Am. J. Int'l. L. 805, 807 (1962).

71. Criminal Appeal 5/51 (5 Piske Din 1061, 1065); Oliver *id.* at 807.

72. Perlman, *The Genocide Convention*, 30 Neb. L. Rev. 1, 6 (1950).

tablished prior to the United Nations' Convention on Genocide, was the question of retroactivity or ex-post-facto—both descriptive terms being used interchangeably by legal scholars. This question arose because these statutes deal with the punishment of individuals for activities—deemed crimes under the statutes—which took place prior to the statutory creation of the illegality of such activities.

*Nullum crimen sine lege, nulla poena sine lege praevia.*⁷³

Mr. Justice Blackstone had held that ex-post-facto laws were objectionable when "after an action indifferent in itself is committed, the legislator then, for the first time declares it to have been a crime and inflicts a punishment upon the person who has committed it."⁷⁴

The phrase "an action indifferent in itself" is the key to the whole problem. As the above Latin rule is not one of law, but rather one of ethical principle, it may be set aside if justice so demands.⁷⁵ Justice does so demand in certain specified instances: "(1) If the act was a heinous violation of international law; (2) If it was recognizable as such to the individual; (3) If he could reasonably be expected to know that it was punishable; and (4) If he satisfied his intention to do the act in question, the individual should be held criminally responsible for his misdeeds."⁷⁶ "There is [no] taint of ex-post-facto-ism in the law of murder."⁷⁷

Cases where an act is clearly illegal are considered . . . as exceptions to the *nulla poena* rule. Punishments may be fixed for such acts retroactively, since the principle or norm establishing their illegality already existed at the time of their commission. But it has been pointed out that they must be grave violations—qualitatively not quantitatively—according to the principle *minima non curat praetor*, in order to warrant the making of such exceptions.⁷⁸

The type of crime dealt with in this paper, which is the same as that dealt with at Nuremberg, falls within this exception to the rule against retroactive penal legislation.⁷⁹ The theory of *substantive nonretroactivity*⁸⁰ is thus maintained.

This whole problem is non-existent under the United Nations'

73. There is no crime without pre-existing law. WOETZEL, *op. cit. supra* note 63, at 112.

74. RUSSELL, *op. cit. supra* note 32, at 272. This is in accordance with the Hebrew rule that "No one may be punished unless he was forewarned." Oliver, *op. cit. supra* note 70, at 823.

75. WOETZEL, *op. cit. supra* note 63, at 112.

76. *Id.* at 115-16.

77. Operation Group (Einsatzgruppen Case) TWC IV, 411 ff. at 459 (1948); Oliver *op. cit. supra* note 70, at 822.

78. WOETZEL, *op. cit. supra* note 63, at 114.

79. Baade, *The Eichman Trial: Some Legal Aspects*, 1961 Duke L. J. 400, 414 (1961); U.S. v. Ohlendorf, 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 411 (1948); Netherlands Law art. 27a (July 10, 1947); Oliver, *op. cit. supra* note 70, at 822.

80. The theory that the acts charged were punishable under law existing at the time of their commission.

Convention and Israel's Genocide Law for they do not refer back to the period of the Second World War, but rather forward to any such possible future activities.

B. *Extra-Territoriality*

Under Article VI of the United Nations' Convention, persons accused of genocidal crimes are to be tried either by a domestic tribunal within the territory of the commission of such crimes or at another point by an international tribunal. The Israeli statutes depart from the other ones in that an appropriate Israeli court is to try the accused individuals for crimes committed anywhere in the world. The legality of such extra-territorial effect is thus open to question.

There are two principles of universal repression in the law today. The theory of "primary universal repression" applies to offenses such as piracy and slavery, which are crimes "under international law," rather than against it.⁸¹ The authority of the tribunal as the *forum deprehensionis*, or court of the forum where the offender is held in custody, is based on early judicial decisions handed down in Northern Italy during the Middle Ages, when bandits, gypsies, assassins, and pirates, who happened to be within the jurisdiction, were tried for their offenses regardless of where they had been committed.⁸² Grotius, a seventeenth century Dutch jurist, approved of such extra-territorial jurisdiction if the crimes committed "violate in extreme form, in relation to any persons, the law of nature or the law of nations."⁸³ This is the theory under which the Israeli statutes stand.

The second principle is that of "secondary universal repression." Under this theory, which also goes back to Grotius and has been widely accepted, states are bound to extradite offenders and to refrain from taking jurisdiction unless within a reasonable time extradition is not requested or is deemed impractical.⁸⁴ This theory too is suggested in the statutes, but it is not the dominant one. These principles are then a valid basis for Israeli statutes to claim extra-territorial jurisdiction over those persons whose crimes are dealt with.

V. ISRAELI STATUTES IN OPERATION OF LAW

The first Israeli statute on genocide is valid under local and

81. Kunz, *The United Nations Convention on Genocide*, 43 Am. J. Int'l. 738, 745 (1949); *Delicta Juris Gentium* actually means grave offenses against the law of nations: Oliver, *op. cit. supra* note 70, at 808.

82. WOETZEL, *op. cit. supra* note 63, at 259; Oliver, *ibid.*; *Corpus Juris Civilis* "Ubi De Criminibus Agi Oportet" (ch. 3, 15).

83. Grotius, II DE JURE BELLI AC PACIS ch. 20 (1625): "Sciendum quoque est reges, et qui par regibus jus obtinent, jus habere poenas poscendi non tantum ob injurias in se aut subditos suos commissas, sed et ob eas quae insos peculiariter non tangunt, sed in quibusvis personis jus naturae aut gentium immaniter violantibus."; WOETZEL, *op. cit. supra* note 63, at 260; Oliver, *op. cit. supra* note 70, at 810-11; HYDE, I INTERNATIONAL LAW 804 (1947).

84. DROST, *op. cit. supra* note 5, at 66.

international law, for it corresponds to the law established through the prior internationally recognized and accepted conventions.⁸⁵ Whether the competence of the appropriate Israeli court to try crimes against the Jewish people was derived from domestic legislation or from international law is moot.⁸⁶ Suffice it to say that although the statute has not of this printing been tested by operation of law, it is generally accepted as valid.

The Nazi and Nazi Collaborators (Punishment) Law has, on the other hand, been before the courts of Israel⁷⁴ and before the world.⁸⁸ Adolf Eichmann, the most infamous of the recently tried war criminals, was arraigned under this Israeli extension of the Nuremberg Charter.⁸⁹ Every aspect of any possible defect in the law was challenged by the defense counsel only to be quashed by the court as insufficient. On the grounds mentioned throughout this paper, the court found the law constitutional and the defendant guilty of breaking it. The question concerning the method of gaining physical possession of the defendant will not be discussed as it is outside the scope of this paper.⁹⁰

Other than the earlier discussed questions concerning the retroactive and extra-territorial statutes, the only defect of the present system of international law to be magnified by the Eichmann trial was the absence of an *international criminal tribunal*.⁹¹ Until such a tribunal is established, victorious nations and other states such as Israel will continue to police the world as "vigilantes." Vigilantes are, however, better than no law enforcement at all.

He who saves one life in Israel, is considered as if he had saved the whole world.⁹²

85. RUSSELL, *op. cit. supra* note 32, at 273.

86. WORTZEL, *op. cit. supra* note 63, at 267.

87. Honigmann v. Attorney General, 1951 Int'l L. Rep. 542 (District Court Tel Aviv, 1953); Attorney General v. Eichmann, Criminal Case No. 40/61 (District Court of Jerusalem, 1961).

88. The Nuremberg trials held by the I.M.T. and the later domestic trials in Germany, Netherlands, United Kingdom, etc.

89. See note 87; RUSSELL, *op. cit. supra* note 32, at 4. All the charges were brought under this law and the Criminal Code Ordinance, 1936, § 28.

90. Eichmann had been abducted from his adopted home in Argentina by Israeli agents and flown into Israel against his will.

91. Lasok, 11 Int'l. & Comp. L. Q. 355, 373 (1962).

92. Sanhedrin 37a; Ganzfried, *op. cit. supra* note 49, vol. 4, ch. 143, at 77.