
Epilogue

The irregularities and abnormalities of the trial in Jerusalem were so many, so varied, and of such legal complexity that they overshadowed during the trial, as they have in the surprisingly small amount of post-trial literature, the central moral, political, and even legal problems that the trial inevitably posed. Israel herself, through the pre-trial statements of Prime Minister Ben-Gurion and through the way the accusation was framed by the prosecutor, confused the issues further by listing a great number of purposes the trial was supposed to achieve, all of which were ulterior purposes with respect to the law and to courtroom procedure. The purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes—"the making of a record of the Hitler regime which would withstand the test of history," as Robert G. Storey, executive trial counsel at Nuremberg, formulated the supposed higher aims of the Nuremberg Trials—can only detract from the law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.

The judgment in the Eichmann case, whose first two sections were written in reply to the higher-purpose theory as it was expounded both inside and outside the courtroom, could not have been clearer in this respect and more to the point: All attempts to widen the range of the trial had to be resisted, because the court could not "allow itself to be enticed into provinces which are outside its sphere. . . . the judicial process has ways of its own, which are laid down by law, and which do not change, whatever the subject of the trial may be." The court, moreover, could not overstep these limits without ending "in complete failure." Not only does it not have at its disposal "the tools required for the investigation of general questions," it speaks with an

authority whose very weight depends upon its limitation. "No one has made us judges" of matters outside the realm of law, and "no greater weight is to be attached to our opinion on them than to that of any person devoting study and thought" to them. Hence, to the question most commonly asked about the Eichmann trial: What good does it do?, there is but one possible answer: It will do justice.

The objections raised against the Eichmann trial were of three kinds. First, there were those objections that had been raised against the Nuremberg Trials and were now repeated: Eichmann was tried under a retroactive law and appeared in the court of the victors. Second, there were those objections that applied only to the Jerusalem court, in that they questioned either its competence as such or its failure to take into account the act of kidnaping. And, finally, and most important, there were objections to the charge itself, that Eichmann had committed crimes "against the Jewish people," instead of "against humanity," and hence to the law under which he was tried; and this objection led to the logical conclusion that the only proper court to try these crimes was an international tribunal.

The court's reply to the first set of objections was simple: the Nuremberg Trials were cited in Jerusalem as valid precedent, and, acting under municipal law, the judges could hardly have done otherwise, since the Nazis and Nazi Collaborators (Punishment) Law of 1950 was itself based on this precedent. "This particular legislation," the judgment pointed out, "is totally different from any other legislation usual in criminal codes," and the reason for its difference lies in the nature of the crimes it deals with. Its retroactivity, one may add, violates only formally, not substantially, the principle *nullum crimen, nulla poena sine lege*, since this applies meaningfully only to acts known to the legislator; if a crime unknown before, such as genocide, suddenly makes its appearance, justice itself demands a judgment according to a new law; in the case of Nuremberg, this new law was the Charter (the London Agreement of 1945), in the case of Israel, it was the Law of 1950. The question is not whether these laws were retroactive, which, of course, they had to be, but whether they were adequate, that is, whether they applied only to crimes previously unknown. This prerequi-

site for retroactive legislation had been seriously marred in the Charter that provided for the establishment of the International Military Tribunal at Nuremberg, and it may be for this reason that the discussion of these matters has remained somewhat confused.

The Charter accorded jurisdiction over three sorts of crimes: "crimes against peace," which the Tribunal called the "supreme international crime . . . in that it contains within itself the accumulated evil of the whole"; "war crimes"; and "crimes against humanity." Of these, only the last, the crime against humanity, was new and unprecedented. Aggressive warfare is at least as old as recorded history, and while it had been denounced as "criminal" many times before, it had never been recognized as such in any formal sense. (None of the current justifications of the Nuremberg court's jurisdiction over this matter has much to commend it. It is true that Wilhelm II had been cited before a tribunal of the Allied powers after the First World War, but the crime the former German Kaiser had been charged with was not war but breach of treaties—and specifically, the violation of Belgium's neutrality. It is also true that the Briand-Kellogg pact of August, 1928, had ruled out war as an instrument of national policy, but the pact contained neither a criterion of aggression nor a mention of sanctions—quite apart from the fact that the security system that the pact was meant to bring about had collapsed prior to the outbreak of war.) Moreover, one of the judging countries, namely, Soviet Russia, was open to the *tu-quoque* argument. Hadn't the Russians attacked Finland and divided Poland in 1939 with complete impunity? "War crimes," on the other hand, surely no more unprecedented than the "crimes against peace," were covered by international law. The Hague and Geneva Conventions had defined these "violations of the laws or customs of war"; they consisted chiefly of ill-treatment of prisoners and of warlike acts against civilian populations. No new law with retroactive force was needed here, and the main difficulty at Nuremberg lay in the indisputable fact that here, again, the *tu-quoque* argument applied: Russia, which had never signed the Hague Convention (Italy, incidentally, had not ratified it either), was more than suspected of mistreatment of prisoners, and, according to recent

investigations, the Russians also seem to be responsible for the murder of fifteen thousand Polish officers whose bodies were found at Katyn Forest (in the neighborhood of Smolensk, in Russia). Worse, the saturation bombing of open cities and, above all, the dropping of atomic bombs on Hiroshima and Nagasaki clearly constituted war crimes in the sense of the Hague Convention. And while the bombing of German cities had been provoked by the enemy, by the bombing of London and Coventry and Rotterdam, the same cannot be said of the use of an entirely new and overwhelmingly powerful weapon, whose existence could have been announced and demonstrated in many other ways. To be sure, the most obvious reason that the violations of the Hague Convention committed by the Allies were never even discussed in legal terms was that the International Military Tribunals were international in name only, that they were in fact the courts of the victors, and the authority of their judgment, doubtful in any case, was not enhanced when the coalition that had won the war and then undertaken this joint enterprise broke up, to quote Otto Kirchheimer, "before the ink on the Nuremberg judgments had time to dry." But this most obvious reason is neither the only nor, perhaps, the most potent reason that no Allied war crimes, in the sense of the Hague Convention, were cited and prosecuted, and it is only fair to add, that the Nuremberg Tribunal was at least very cautious about convicting the German defendants on charges that were open to the *tu-quoque* argument. For the truth of the matter was that by the end of the Second World War everybody knew that technical developments in the instruments of violence had made the adoption of "criminal" warfare inevitable. It was precisely the distinction between soldier and civilian, between army and home population, between military targets and open cities, upon which the Hague Convention's definitions of war crimes rested, that had become obsolete. Hence, it was felt that under these new conditions war crimes were only those outside all military necessities, where a deliberate inhuman purpose could be demonstrated.

This factor of gratuitous brutality was a valid criterion for determining what, under the circumstances, constituted a war crime. It was not valid for, but was unfortunately introduced

into the fumbling definitions of, the only entirely new crime, the "crime against humanity," which the Charter (in Article 6-c) defined as an "inhuman act"—as though this crime, too, were a matter of criminal excess in the pursuit of war and victory. However, it was by no means this sort of well-known offense that had prompted the Allies to declare, in the words of Churchill, that "punishment of war criminals [was] one of the principal war aims" but, on the contrary, reports of unheard-of atrocities, the blotting out of whole peoples, the "clearance" of whole regions of their native population, that is, not only crimes that "no conception of military necessity could sustain" but crimes that were in fact independent of the war and that announced a policy of systematic murder to be continued in time of peace. This crime was indeed not covered by international or municipal law, and, moreover, it was the only crime to which the *tu-quoque* argument did not apply. And yet there was no other crime in the face of which the Nuremberg judges felt so uncomfortable, and which they left in a more tantalizing state of ambiguity. It is perfectly true that—in the words of the French judge at Nuremberg, Donnedieu de Vabres, to whom we owe one of the best analyses of the trial (*Le Procès de Nuremberg*, 1947)—"the category of crimes against humanity which the Charter had let enter by a very small door evaporated by virtue of the Tribunal's judgment." The judges, however, were as little consistent as the Charter itself, for although they preferred to convict, as Kirchheimer says, "on the war crime charge, which embraced all the traditional common crimes, while underemphasizing as much as possible the charges of crimes against humanity," when it came to pronouncing sentence, they revealed their true sentiment by meting out their most severe punishment, the death penalty, only to those who had been found guilty of those quite uncommon atrocities that actually constituted a "crime against humanity," or, as the French prosecutor François de Menthon called it, with greater accuracy, a "crime against the human status." The notion that aggression is "the supreme international crime" was silently abandoned when a number of men were sentenced to death who had never been convicted of a "conspiracy" against peace.

In justification of the Eichmann trial, it has frequently been

maintained that although the greatest crime committed during the last war had been against the Jews, the Jews had been only bystanders in Nuremberg, and the judgment of the Jerusalem court made the point that now, for the first time, the Jewish catastrophe “occupied the central place in the court proceedings, and [that] it was this fact which distinguished this trial from those which preceded it,” at Nuremberg and elsewhere. But this is, at best, a half-truth. It was precisely the Jewish catastrophe that prompted the Allies to conceive of a “crime against humanity” in the first place, because, Julius Stone has written, in *Legal Controls of International Conflict* (1954), “the mass murder of the Jews, if they were Germany’s own nationals, could only be reached by the humanity count.” And what had prevented the Nuremberg Tribunal from doing full justice to this crime was not that its victims were Jews but that the Charter demanded that this crime, which had so little to do with war that its commission actually conflicted with and hindered the war’s conduct, was to be tied up with the other crimes. How deeply the Nuremberg judges were aware of the outrage perpetrated against the Jews may perhaps best be gauged by the fact that the only defendant to be condemned to death on a crime-against-humanity charge alone was Julius Streicher, whose specialty had been anti-Semitic obscenities. In this instance, the judges disregarded all other considerations.

What distinguished the trial in Jerusalem from those that preceded it was not that the Jewish people now occupied the central place. In this respect, on the contrary, the trial resembled the postwar trials in Poland and Hungary, in Yugoslavia and Greece, in Soviet Russia and France, in short, in all formerly Nazi-occupied countries. The International Military Tribunal at Nuremberg had been established for war criminals whose crimes could not be localized, all others were delivered to the countries where they had committed their crimes. Only the “major war criminals” had acted without territorial limitations, and Eichmann certainly was not one of them. (This—and not, as was frequently maintained, his disappearance—was the reason he was not accused at Nuremberg; Martin Bormann, for instance, was accused, tried, and condemned to death *in absentia*.) If Eichmann’s activities had spread all over occupied Europe, this

was so not because he was so important that territorial limits did not apply to him but because it was in the nature of his task, the collection and deportation of all Jews, that he and his men had to roam the continent. It was the territorial dispersion of the Jews that made the crime against them an "international" concern in the limited, legal sense of the Nuremberg Charter. Once the Jews had a territory of their own, the State in Israel, they obviously had as much right to sit in judgment on the crimes committed against their people as the Poles had to judge crimes committed in Poland. All objections raised against the Jerusalem trial on the ground of the principle of territorial jurisdiction were legalistic in the extreme, and although the court spent a number of sessions discussing all these objections, they were actually of no great relevance. There was not the slightest doubt that Jews had been killed *qua* Jews, irrespective of their nationalities at the time, and though it is true that the Nazis killed many Jews who had chosen to deny their ethnic origin, and would perhaps have preferred to be killed as Frenchmen or as Germans, justice could be done even in these cases only if one took the intent and the purpose of the criminals into account.

Equally unfounded, I think, was the even more frequent argument against the possible partiality of Jewish judges—that they, especially if they were citizens of a Jewish State, were judging in their own cause. It is difficult to see how the Jewish judges differed in this respect from their colleagues in any of the other Successor trials, where Polish judges pronounced sentence for crimes against the Polish people, or Czech judges sat in judgment on what had happened in Prague and in Bratislava. (Mr. Hausner, in the last of his articles in the *Saturday Evening Post*, unwittingly added new fuel to this argument: he said that the prosecution realized at once that Eichmann could not be defended by an Israeli lawyer, because there would be a conflict between "professional duties" and "national emotions." Well, this conflict constituted the gist of all the objections to Jewish judges, and Mr. Hausner's argument in their favor, that a judge may hate the crime and yet be fair to the criminal, applies to the defense counsel as well: the lawyer who defends a murderer does not defend murder. The truth of the matter is that pres-

tures outside the courtroom made it inadvisable, to put it mildly, to charge an Israeli citizen with the defense of Eichmann.) Finally, the argument that no Jewish State had existed at the time when the crime was committed is surely so formalistic, so out of tune with reality and with all demands that justice must be done, that we may safely leave it to the learned debates of the experts. In the interest of justice (as distinguished from the concern with certain procedures which, important in its own right, can never be permitted to overrule justice, the law's chief concern), the court, to justify its competence, would have needed to invoke neither the principle of passive personality—that the victims were Jews and that only Israel was entitled to speak in their names—nor the principle of universal jurisdiction, applying to Eichmann because he was *hostis generis humani* the rules that are applicable to piracy. Both theories, discussed at length inside and outside the Jerusalem courtroom, actually blurred the issues and obscured the obvious similarity between the Jerusalem trial and the trials that had preceded it in other countries where special legislation had likewise been enacted to ensure the punishment of the Nazis or their collaborators.

The passive-personality principle, which in Jerusalem was based upon the learned opinion of P. N. Drost, in *Crime of State* (1959), that under certain circumstances “the *forum patriae victimae* may be competent to try the case,” unfortunately implies that criminal proceedings are initiated by the government in the name of the victims, who are assumed to have a right to revenge. This was indeed the position of the prosecution, and Mr. Hausner opened his address with the following words: “When I stand before you, judges of Israel, in this court, to accuse Adolf Eichmann, I do not stand alone. Here with me at this moment stand six million prosecutors. But alas, they cannot rise to level the finger of accusation in the direction of the glass dock and cry out *J'accuse* against the man who sits there. . . . Their blood cries to Heaven, but their voice cannot be heard. Thus it falls to me to be their mouthpiece and to deliver the heinous accusation in their name.” With such rhetoric the prosecution gave substance to the chief argument against the trial, that it was established not in order to satisfy the demands of justice but to still the victims' desire for and, per-

haps, right to vengeance. Criminal proceedings, since they are mandatory and thus initiated even if the victim would prefer to forgive and forget, rest on laws whose "essence"—to quote Telford Taylor, writing in the *New York Times Magazine*—"is that a crime is not committed only against the victim but primarily against the community whose law is violated." The wrongdoer is brought to justice because his act has disturbed and gravely endangered the community as a whole, and not because, as in civil suits, damage has been done to individuals who are entitled to reparation. The reparation effected in criminal cases is of an altogether different nature; it is the body politic itself that stands in need of being "repaired," and it is the general public order that has been thrown out of gear and must be restored, as it were. It is, in other words, the law, not the plaintiff, that must prevail.

Even less justifiable than the prosecution's effort to rest its case on the passive-personality principle was the inclination of the court to claim competence in the name of universal jurisdiction, for it was in flagrant conflict with the conduct of the trial as well as with the law under which Eichmann was tried. The principle of universal jurisdiction, it was said, was applicable because crimes against humanity are similar to the old crime of piracy, and who commits them has become, like the pirate in traditional international law, *hostis humani generis*. Eichmann, however, was accused chiefly of crimes against the Jewish people, and his capture, which the theory of universal jurisdiction was meant to excuse, was certainly not due to his also having committed crimes against humanity but exclusively to his role in the Final Solution of the Jewish problem.

Yet even if Israel had kidnaped Eichmann solely because he was *hostis humani generis* and not because he was *hostis Judaeorum*, it would have been difficult to justify the legality of his arrest. The pirate's exception to the territorial principle—which, in the absence of an international penal code, remains the only valid legal principle—is made not because he is the enemy of all, and hence can be judged by all, but because his crime is committed on the high seas, and the high seas are no man's land. The pirate, moreover, "in defiance of all law, acknowledging obedience to no flag whatsoever" (H. Zeisel,

Britannica Book of the Year, 1962), is, by definition, in business entirely for himself; he is an outlaw because he has chosen to put himself outside all organized communities, and it is for this reason that he has become "the enemy of all alike." Surely, no one will maintain that Eichmann was in business for himself or that he acknowledged obedience to no flag whatsoever. In this respect, the piracy theory served only to dodge one of the fundamental problems posed by crimes of this kind, namely, that they were, and could only be, committed under a criminal law and by a criminal state.

The analogy between genocide and piracy is not new, and it is therefore of some importance to note that the Genocide Convention, whose resolutions were adopted by the United Nations General Assembly on December 9, 1948, expressly rejected the claim to universal jurisdiction and provided instead that "persons charged with genocide . . . shall be tried by a competent tribunal of the States in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction." In accordance with this Convention, of which Israel was a signatory, the court should have either sought to establish an international tribunal or tried to reformulate the territorial principle in such a way that it applied to Israel. Both alternatives lay definitely within the realm of possibility and within the court's competence. The possibility of establishing an international tribunal was cursorily dismissed by the court for reasons which we shall discuss later, but the reason no meaningful redefinition of the territorial principle was sought—so that the court finally claimed jurisdiction on the ground of all three principles: territorial as well as passive-personality and universal-jurisdiction, as though merely adding together three entirely different legal principles would result in a valid claim—was certainly closely connected with the extreme reluctance of all concerned to break fresh ground and act without precedents. Israel could easily have claimed territorial jurisdiction if she had only explained that "territory," as the law understands it, is a political and a legal concept, and not merely a geographical term. It relates not so much, and not primarily, to a piece of land as to the space between individuals in a group whose members are bound to, and at the same time separated and

protected from, each other by all kinds of relationships, based on a common language, religion, a common history, customs, and laws. Such relationships become spatially manifest insofar as they themselves constitute the space wherein the different members of a group relate to and have intercourse with each other. No State of Israel would ever have come into being if the Jewish people had not created and maintained its own specific in-between space throughout the long centuries of dispersion, that is, prior to the seizure of its old territory. The court, however, never rose to the challenge of the unprecedented, not even in regard to the unprecedented nature of the origins of the Israel state, which certainly was closest to its heart and thought. Instead, it buried the proceedings under a flood of precedents—during the sessions of the first week of the trial, to which the first fifty-three sections of the judgment correspond—many of which sounded, at least to the layman's ear, like elaborate sophisms.

The Eichmann trial, then, was in actual fact no more, but also no less, than the last of the numerous Successor trials which followed the Nuremberg Trials. And the indictment quite properly carried in an appendix the official interpretation of the Law of 1950 by Pinhas Rosen, then Minister of Justice, which could not be clearer and less equivocal: "While other peoples passed suitable legislation for the punishment of the Nazis and their collaborators soon after the end of the war, and some even before it was over, the Jewish people . . . had no political authority to bring the Nazi criminals and their collaborators to justice until the establishment of the State." Hence, the Eichmann trial differed from the Successor trials only in one respect—the defendant had not been duly arrested and extradited to Israel; on the contrary, a clear violation of international law had been committed in order to bring him to justice. We mentioned before that only Eichmann's *de facto* statelessness enabled Israel to get away with kidnaping him, and it is understandable that despite the innumerable precedents cited in Jerusalem to justify the act of kidnaping, the only relevant one, the capture of Berthold Jakob, a Leftist German Jewish journalist, in Switzerland by Gestapo agents in 1935, was never mentioned. (None of the other precedents applied, because they invariably con-

cerned a fugitive from justice who was brought back not only to the place of his crimes but to a court that had issued, or could have issued, a valid warrant of arrest—conditions that Israel could not have fulfilled.) In this instance, Israel had indeed violated the territorial principle, whose great significance lies in the fact that the earth is inhabited by many peoples and that these peoples are ruled by many different laws, so that every extension of one territory's law beyond the borders and limitations of its validity will bring it into immediate conflict with the law of another territory.

This, unhappily, was the only almost unprecedented feature in the whole Eichmann trial, and certainly it was the least entitled ever to become a valid precedent. (What are we going to say if tomorrow it occurs to some African state to send its agents into Mississippi and to kidnap one of the leaders of the segregationist movement there? And what are we going to reply if a court in Ghana or the Congo quotes the Eichmann case as a precedent?) Its justification was the unprecedentedness of the crime and the coming into existence of a Jewish State. There were, moreover, important mitigating circumstances in that there hardly existed a true alternative if one indeed wished to bring Eichmann to justice. Argentina had an impressive record for not extraditing Nazi criminals; even if there had been an extradition treaty between Israel and Argentina, an extradition request would almost certainly not have been honored. Nor would it have helped to hand Eichmann over to the Argentine police for extradition to West Germany; for the Bonn government had earlier sought extradition from Argentina of such well-known Nazi criminals as Karl Klingenfuss and Dr. Josef Mengele (the latter implicated in the most horrifying medical experiments at Auschwitz and in charge of the "selection") without any success. In the case of Eichmann, such a request would have been doubly hopeless, since, according to Argentine law, all offenses connected with the last war had fallen under the statute of limitation fifteen years after the end of the war, so that after May 7, 1960, Eichmann could not have been legally extradited anyway. In short, the realm of legality offered no alternative to kidnaping.

Those who are convinced that justice, and nothing else, is the

end of law will be inclined to condone the kidnaping act, though not because of precedents but, on the contrary, as a desperate, unprecedented and no-precedent-setting act, necessitated by the unsatisfactory condition of international law. In this perspective, there existed but one real alternative to what Israel had done: instead of capturing Eichmann and flying him to Israel, the Israeli agents could have killed him right then and there, in the streets of Buenos Aires. This course of action was frequently mentioned in the debates on the case and, somewhat oddly, was recommended most fervently by those who were most shocked by the kidnaping. The notion was not without merit, because the facts of the case were beyond dispute, but those who proposed it forgot that he who takes the law into his own hands will render a service to justice only if he is willing to transform the situation in such a way that the law can again operate and his act can, at least posthumously, be validated. Two precedents in the recent past come immediately to mind. There was the case of Shalom Schwartzbard, who in Paris on May 25, 1926, shot and killed Simon Petlyura, former hetman of the Ukrainian armies and responsible for the pogroms during the Russian civil war that claimed about a hundred thousand victims between 1917 and 1920. And there was the case of the Armenian Tehlirian, who, in 1921, in the middle of Berlin, shot to death Talaat Bey, the great killer in the Armenian pogroms of 1915, in which it is estimated that a third (six hundred thousand) of the Armenian population in Turkey was massacred. The point is that neither of these assassins was satisfied with killing "his" criminal, but that both immediately gave themselves up to the police and insisted on being tried. Each used his trial to show the world through court procedure what crimes against his people had been committed and gone unpunished. In the Schwartzbard trial, especially, methods very similar to those in the Eichmann trial were used. There was the same stress on extensive documentation of the crimes, but that time it was prepared for the defense (by the Comité des Délégations Juives, under the chairmanship of the late Dr. Leo Motzkin, which needed a year and a half to collect the material and then published it in *Les Pogromes en Ukraine sous les gouvernements ukrainiens 1917-1920*, 1927), just as that time it was the ac-

cused and his lawyer who spoke in the name of the victims, and who, incidentally, even then raised the point about the Jews "who had never defended themselves." (See the *plaidoyer* of Henri Torrès in his book *Le Procès des Pogromes*, 1928). Both men were acquitted, and in both cases it was felt that their gesture "signified that their race had finally decided to defend itself, to leave behind its moral abdication, to overcome its resignation in the face of insults," as Georges Suarez admirably put it in the case of Shalom Schwartzbard.

The advantages of this solution to the problem of legalities that stand in the way of justice are obvious. The trial, it is true, is again a "show" trial, and even a show, but its "hero," the one in the center of the play, on whom all eyes are fastened, is now the true hero, while at the same time the trial character of the proceedings is safeguarded, because it is not "a spectacle with prearranged results" but contains that element of "irreducible risk" which, according to Kirchheimer, is an indispensable factor in all criminal trials. Also, the *J'accuse*, so indispensable from the viewpoint of the victim, sounds, of course, much more convincing in the mouth of a man who has been forced to take the law into his own hands than in the voice of a government-appointed agent who risks nothing. And yet—quite apart from practical considerations, such as that Buenos Aires in the sixties hardly offers either the same guarantees or the same publicity for the defendant that Paris and Berlin offered in the twenties—it is more than doubtful that this solution would have been justifiable in Eichmann's case, and it is obvious that it would have been altogether unjustifiable if carried out by government agents. The point in favor of Schwartzbard and Tehlirian was that each was a member of an ethnic group that did not possess its own state and legal system, that there was no tribunal in the world to which either group could have brought its victims. Schwartzbard, who died in 1938, more than ten years before the proclamation of the Jewish State, was not a Zionist, and not a nationalist of any sort; but there is no doubt that he would have welcomed the State of Israel enthusiastically, for no other reason than that it would have provided a tribunal for crimes that had so often gone unpunished. His sense of justice would have been satisfied. And

when we read the letter he addressed from his prison in Paris to his brothers and sisters in Odessa—“*Faites savoir dans les villes et dans les villages de Balta, Proskouro, Tzcherkass, Ouman, Jitomir . . . , portez-y le message édifiant: la colère juive a tiré sa vengeance! Le sang de l'assassin Petlioura, qui a jailli dans la ville mondiale, à Paris, . . . rappellera le crime féroce . . . commis envers le pauvre et abandonné peuple juif*”—we recognize immediately not, perhaps, the language that Mr. Hausner actually spoke during the trial (Shalom Schwartzbard's language was infinitely more dignified and more moving) but certainly the sentiments and the state of mind of Jews all over the world to which it was bound to appeal.

I have insisted on the similarities between the Schwartzbard trial in 1927 in Paris and the Eichmann trial in 1961 in Jerusalem because they demonstrate how little Israel, like the Jewish people in general, was prepared to recognize, in the crimes that Eichmann was accused of, an unprecedented crime, and precisely how difficult such a recognition must have been for the Jewish people. In the eyes of the Jews, thinking exclusively in terms of their own history, the catastrophe that had befallen them under Hitler, in which a third of the people perished, appeared not as the most recent of crimes, the unprecedented crime of genocide, but, on the contrary, as the oldest crime they knew and remembered. This misunderstanding, almost inevitable if we consider not only the facts of Jewish history but also, and more important, the current Jewish historical self-understanding, is actually at the root of all the failures and shortcomings of the Jerusalem trial. None of the participants ever arrived at a clear understanding of the actual horror of Auschwitz, which is of a different nature from all the atrocities of the past, because it appeared to prosecution and judges alike as not much more than the most horrible pogrom in Jewish history. They therefore believed that a direct line existed from the early anti-Semitism of the Nazi Party to the Nuremberg Laws and from there to the expulsion of Jews from the Reich and, finally, to the gas chambers. Politically and legally, however, these were “crimes” different not only in degree of seriousness but in essence.

The Nuremberg Laws of 1935 legalized the discrimination practiced before that by the German majority against the Jewish minority. According to international law, it was the privilege of the sovereign German nation to declare to be a national minority whatever part of its population it saw fit, as long as its minority laws conformed to the rights and guarantees established by internationally recognized minority treaties and agreements. International Jewish organizations therefore promptly tried to obtain for this newest minority the same rights and guarantees that minorities in Eastern and Southeastern Europe had been granted at Geneva. But even though this protection was not granted, the Nuremberg Laws were generally recognized by other nations as part of German law, so that it was impossible for a German national to enter into a "mixed marriage" in Holland, for instance. The crime of the Nuremberg Laws was a national crime; it violated national, constitutional rights and liberties, but it was of no concern to the comity of nations. "Enforced emigration," however, or expulsion, which became official policy after 1938, did concern the international community, for the simple reason that those who were expelled appeared at the frontiers of other countries, which were forced either to accept the uninvited guests or to smuggle them into another country, equally unwilling to accept them. Expulsion of nationals, in other words, is already an offense against humanity, if by "humanity" we understand no more than the comity of nations. Neither the national crime of legalized discrimination, which amounted to persecution by law, nor the international crime of expulsion was unprecedented, even in the modern age. Legalized discrimination had been practiced by all Balkan countries, and expulsion on a mass scale had occurred after many revolutions. It was when the Nazi regime declared that the German people not only were unwilling to have any Jews in Germany but wished to make the entire Jewish people disappear from the face of the earth that the new crime, the crime against humanity—in the sense of a crime "against the human status," or against the very nature of mankind—appeared. Expulsion and genocide, though both are international offenses, must remain distinct; the former is an offense against fellow-nations, whereas the latter is an attack upon human

diversity as such, that is, upon a characteristic of the "human status" without which the very words "mankind" or "humanity" would be devoid of meaning.

Had the court in Jerusalem understood that there were distinctions between discrimination, expulsion, and genocide, it would immediately have become clear that the supreme crime it was confronted with, the physical extermination of the Jewish people, was a crime against humanity, perpetrated upon the body of the Jewish people, and that only the choice of victims, not the nature of the crime, could be derived from the long history of Jew-hatred and anti-Semitism. Insofar as the victims were Jews, it was right and proper that a Jewish court should sit in judgment; but insofar as the crime was a crime against humanity, it needed an international tribunal to do justice to it. (The failure of the court to draw this distinction was surprising, because it had actually been made before by the former Israeli Minister of Justice, Mr. Rosen, who in 1950 had insisted on "a distinction between this bill [for crimes against the Jewish people] and the Law for the Prevention and Punishment of Genocide," which was discussed but not passed by the Israeli Parliament. Obviously, the court felt it had no right to overstep the limits of municipal law, so that genocide, not being covered by an Israeli law, could not properly enter into its considerations.) Among the numerous and highly qualified voices that raised objections to the court in Jerusalem and were in favor of an international tribunal, only one, that of Karl Jaspers, stated clearly and unequivocally—in a radio interview held before the trial began and later published in *Der Monat*—that "the crime against the Jews was also a crime against mankind," and that "consequently the verdict can be handed down only by a court of justice representing all mankind." Jaspers proposed that the court in Jerusalem, after hearing the factual evidence, "waive" the right to pass sentence, declaring itself "incompetent" to do so, because the legal nature of the crime in question was still open to dispute, as was the subsequent question of who would be competent to pass sentence on a crime which had been committed on government orders. Jaspers stated further that one thing alone was certain: "This crime is both more and less than common murder," and though

it was not a "war crime," either, there was no doubt that "mankind would certainly be destroyed if states were permitted to perpetrate such crimes."

Jaspers' proposal, which no one in Israel even bothered to discuss, would, in this form, presumably have been impracticable from a purely technical point of view. The question of a court's jurisdiction must be decided before the trial begins; and once a court has been declared competent, it must also pass judgment. However, these purely formalistic objections could easily have been met if Jaspers had called not upon the court, but rather upon the state of Israel to waive its right to carry out the sentence once it had been handed down, in view of the unprecedented nature of the court's findings. Israel might then have had recourse to the United Nations and demonstrated, with all the evidence at hand, that the need for an international criminal court was imperative, in view of these new crimes committed against mankind as a whole. It would then have been in Israel's power to make trouble, to "create a wholesome disturbance," by asking again and again just what it should do with this man whom it was holding prisoner; constant repetition would have impressed on worldwide public opinion the need for a permanent international criminal court. Only by creating, in this way, an "embarrassing situation" of concern to the representatives of all nations would it be possible to prevent "mankind from setting its mind at ease" and "massacre of the Jews . . . from becoming a model for crimes to come, perhaps the small-scale and quite paltry example of future genocide." The very monstrosity of the events is "minimized" before a tribunal that represents one nation only.

This argument in favor of an international tribunal was unfortunately confused with other proposals based on different and considerably less weighty considerations. Many friends of Israel, both Jews and non-Jews, feared that the trial would harm Israel's prestige and give rise to a reaction against Jews the world over. It was thought that Jews did not have the right to appear as judges in their own case, but could act only as accusers; Israel should therefore hold Eichmann prisoner until a special tribunal could be created by the United Nations to judge him. Quite apart from the fact that Israel, in the proceedings

against Eichmann, was doing no more than what all the countries which had been occupied by Germany had long since done, and that justice was at stake here, not the prestige of Israel or of the Jewish people, all these proposals had one flaw in common: they could too easily be countered by Israel. They were indeed quite unrealistic in view of the fact that the U.N. General Assembly had "twice rejected proposals to consider the establishment of a permanent international criminal court" (*A.D.L. Bulletin*). But another, more practical proposition, which usually is not mentioned precisely because it *was* feasible, was made by Dr. Nahum Goldmann, president of the World Jewish Congress. Goldmann called upon Ben-Gurion to set up an international court in Jerusalem, with judges from each of the countries that had suffered under Nazi occupation. This would not have been enough; it would have been only an enlargement of the Successor trials, and the chief impairment of justice, that it was being rendered in the court of the victors, would not have been cured. But it would have been a practical step in the right direction.

Israel, as may be remembered, reacted against all these proposals with great violence. And while it is true, as has been pointed out by Yosal Rogat (in *The Eichmann Trial and the Rule of Law*, published by the Center for the Study of Democratic Institutions, Santa Barbara, California, 1962), that Ben-Gurion always "seemed to misunderstand completely when asked, 'Why should he not be tried before an international court?,' " it is also true that those who asked the question did not understand that for Israel the only unprecedented feature of the trial was that, for the first time (since the year 70, when Jerusalem was destroyed by the Romans), Jews were able to sit in judgment on crimes committed against their own people, that, for the first time, they did not need to appeal to others for protection and justice, or fall back upon the compromised phraseology of the rights of man—rights which, as no one knew better than they, were claimed only by people who were too weak to defend their "rights of Englishmen" and to enforce their own laws. (The very fact that Israel had her own law under which such a trial could be held had been called, long before the Eichmann trial, an expression of "a revolutionary transformation that has taken place in the

political position of the Jewish people"—by Mr. Rosen on the occasion of the First Reading of the Law of 1950 in the Knesset.) It was against the background of these very vivid experiences and aspirations that Ben-Gurion said: "Israel does not need the protection of an International Court."

Moreover, the argument that the crime against the Jewish people was first of all a crime against mankind, upon which the valid proposals for an international tribunal rested, stood in flagrant contradiction to the law under which Eichmann was tried. Hence, those who proposed that Israel give up her prisoner should have gone one step further and declared: The Nazis and Nazi Collaborators (Punishment) Law of 1950 is wrong, it is in contradiction to what actually happened, it does not cover the facts. And this would indeed have been quite true. For just as a murderer is prosecuted because he has violated the law of the community, and not because he has deprived the Smith family of its husband, father, and breadwinner, so these modern, state-employed mass murderers must be prosecuted because they violated the order of mankind, and not because they killed millions of people. Nothing is more pernicious to an understanding of these new crimes, or stands more in the way of the emergence of an international penal code that could take care of them, than the common illusion that the crime of murder and the crime of genocide are essentially the same, and that the latter therefore is "no new crime properly speaking." The point of the latter is that an altogether different order is broken and an altogether different community is violated. And, indeed, it was because Ben-Gurion knew quite well that the whole discussion actually concerned the validity of the Israeli law that he finally reacted nastily, and not just with violence, against the critics of Israeli procedures: Whatever these "so-called experts" had to say, their arguments were "sophisms," inspired either by anti-Semitism, or, in the case of Jews, by inferiority complexes. "Let the world understand: We shall not give up our prisoner."

It is only fair to say that this was by no means the tone in which the trial was conducted in Jerusalem. But I think it is safe to predict that this last of the Successor trials will no more, and perhaps even less than its predecessors, serve as a valid precedent for future trials of such crimes. This might be of little import in

view of the fact that its main purpose—to prosecute and to defend, to judge and to punish Adolf Eichmann—was achieved, if it were not for the rather uncomfortable but hardly deniable possibility that similar crimes may be committed in the future. The reasons for this sinister potentiality are general as well as particular. It is in the very nature of things human that every act that has once made its appearance and has been recorded in the history of mankind stays with mankind as a potentiality long after its actuality has become a thing of the past. No punishment has ever possessed enough power of deterrence to prevent the commission of crimes. On the contrary, whatever the punishment, once a specific crime has appeared for the first time, its reappearance is more likely than its initial emergence could ever have been. The particular reasons that speak for the possibility of a repetition of the crimes committed by the Nazis are even more plausible. The frightening coincidence of the modern population explosion with the discovery of technical devices that, through automation, will make large sections of the population “superfluous” even in terms of labor, and that, through nuclear energy, make it possible to deal with this twofold threat by the use of instruments beside which Hitler’s gassing installations look like an evil child’s fumbling toys, should be enough to make us tremble.

It is essentially for this reason: that the unprecedented, once it has appeared, may become a precedent for the future, that all trials touching upon “crimes against humanity” must be judged according to a standard that is today still an “ideal.” If genocide is an actual possibility of the future, then no people on earth—least of all, of course, the Jewish people, in Israel or elsewhere—can feel reasonably sure of its continued existence without the help and the protection of international law. Success or failure in dealing with the hitherto unprecedented can lie only in the extent to which this dealing may serve as a valid precedent on the road to international penal law. And this demand, addressed to the judges in such trials, does not overshoot the mark and ask for more than can reasonably be expected. International law, Justice Jackson pointed out at Nuremberg, “is an outgrowth of treaties and agreements between nations and of accepted customs. Yet every custom has its origin in some single act. . . . Our own day

has the right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened international law." What Justice Jackson failed to point out is that, in consequence of this yet unfinished nature of international law, it has become the task of ordinary trial judges to render justice without the help of, or beyond the limitation set upon them through, positive, posited laws. For the judge, this may be a predicament, and he is only too likely to protest that the "single act" demanded of him is not his to perform but is the business of the legislator.

And, indeed, before we come to any conclusion about the success or failure of the Jerusalem court, we must stress the judges' firm belief that they had no right to become legislators, that they had to conduct their business within the limits of Israeli law, on the one side, and of accepted legal opinion, on the other. It must be admitted furthermore that their failures were neither in kind nor in degree greater than the failures of the Nuremberg Trials or the Successor trials in other European countries. On the contrary, part of the failure of the Jerusalem court was due to its all too eager adherence to the Nuremberg precedent wherever possible.

In sum, the failure of the Jerusalem court consisted in its not coming to grips with three fundamental issues, all of which have been sufficiently well known and widely discussed since the establishment of the Nuremberg Tribunal: the problem of impaired justice in the court of the victors; a valid definition of the "crime against humanity"; and a clear recognition of the new criminal who commits this crime.

As to the first of these, justice was more seriously impaired in Jerusalem than it was at Nuremberg, because the court did not admit witnesses for the defense. In terms of the traditional requirements for fair and due process of law, this was the most serious flaw in the Jerusalem proceedings. Moreover, while judgment in the court of the victors was perhaps inevitable at the close of the war (to Justice Jackson's argument in Nuremberg: "Either the victors must judge the vanquished or we must leave the defeated to judge themselves," should be added the understandable feeling on the part of the Allies that they "who had risked everything could not admit neutrals" [Vabres]), it was not the same six-

teen years later, and under circumstances in which the argument against the admission of neutral countries did not make sense.

As to the second issue, the findings of the Jerusalem court were incomparably better than those at Nuremberg. I have mentioned before the Nuremberg Charter's definition of "crimes against humanity" as "inhuman acts," which were translated into German as *Verbrechen gegen die Menschlichkeit*—as though the Nazis had simply been lacking in human kindness, certainly the understatement of the century. To be sure, had the conduct of the Jerusalem trial depended entirely upon the prosecution, the basic misunderstanding would have been even worse than at Nuremberg. But the judgment refused to let the basic character of the crime be swallowed up in a flood of atrocities, and it did not fall into the trap of equating this crime with ordinary war crimes. What had been mentioned at Nuremberg only occasionally and, as it were, marginally—that "the evidence shows that . . . the mass murders and cruelties were not committed solely for the purpose of stamping out opposition" but were "part of a plan to get rid of whole native populations"—was in the center of the Jerusalem proceedings, for the obvious reason that Eichmann stood accused of a crime against the Jewish people, a crime that could not be explained by any utilitarian purpose; Jews had been murdered all over Europe, not only in the East, and their annihilation was not due to any desire to gain territory that "could be used for colonization by Germans." It was the great advantage of a trial centered on the crime against the Jewish people that not only did the difference between war crimes, such as shooting of partisans and killing of hostages, and "inhuman acts," such as "expulsion and annihilation" of native populations to permit colonization by an invader, emerge with sufficient clarity to become part of a future international penal code, but also that the difference between "inhuman acts" (which were undertaken for some known, though criminal, purpose, such as expansion through colonization) and the "crime against humanity," whose intent and purpose were unprecedented, was clarified. At no point, however, either in the proceedings or in the judgment, did the Jerusalem trial ever mention even the possibility that extermination of whole ethnic groups—the Jews, or the Poles, or the

Gypsies—might be more than a crime against the Jewish or the Polish or the Gypsy people, that the international order, and mankind in its entirety, might have been grievously hurt and endangered.

Closely connected with this failure was the conspicuous helplessness the judges experienced when they were confronted with the task they could least escape, the task of understanding the criminal whom they had come to judge. Clearly, it was not enough that they did not follow the prosecution in its obviously mistaken description of the accused as a "perverted sadist," nor would it have been enough if they had gone one step further and shown the inconsistency of the case for the prosecution, in which Mr. Hausner wanted to try the most abnormal monster the world had ever seen and, at the same time, try in him "many like him," even the "whole Nazi movement and anti-Semitism at large." They knew, of course, that it would have been very comforting indeed to believe that Eichmann was a monster, even though if he had been Israel's case against him would have collapsed or, at the very least, lost all interest. Surely, one can hardly call upon the whole world and gather correspondents from the four corners of the earth in order to display Bluebeard in the dock. The trouble with Eichmann was precisely that so many were like him, and that the many were neither perverted nor sadistic, that they were, and still are, terribly and terrifyingly normal. From the viewpoint of our legal institutions and of our moral standards of judgment, this normality was much more terrifying than all the atrocities put together, for it implied—as had been said at Nuremberg over and over again by the defendants and their counsels—that this new type of criminal, who is in actual fact *hostis generis humani*, commits his crimes under circumstances that make it well-nigh impossible for him to know or to feel that he is doing wrong. In this respect, the evidence in the Eichmann case was even more convincing than the evidence presented in the trial of the major war criminals, whose pleas of a clear conscience could be dismissed more easily because they combined with the argument of obedience to "superior orders" various boasts about occasional disobedience. But although the bad faith of the defendants was manifest, the only ground on which guilty conscience could

actually be proved was the fact that the Nazis, and especially the criminal organizations to which Eichmann belonged, had been so very busy destroying the evidence of their crimes during the last months of the war. And this ground was rather shaky. It proved no more than recognition that the law of mass murder, because of its novelty, was not yet accepted by other nations; or, in the language of the Nazis, that they had lost their fight to "liberate" mankind from the "rule of subhumans," especially from the domination of the Elders of Zion; or, in ordinary language, it proved no more than the admission of defeat. Would any one of them have suffered from a guilty conscience if they had won?

Foremost among the larger issues at stake in the Eichmann trial was the assumption current in all modern legal systems that intent to do wrong is necessary for the commission of a crime. On nothing, perhaps, has civilized jurisprudence prided itself more than on this taking into account of the subjective factor. Where this intent is absent, where, for whatever reasons, even reasons of moral insanity, the ability to distinguish between right and wrong is impaired, we feel no crime has been committed. We refuse, and consider as barbaric, the propositions "that a great crime offends nature, so that the very earth cries out for vengeance; that evil violates a natural harmony which only retribution can restore; that a wronged collectivity owes a duty to the moral order to punish the criminal" (Yosal Rogat). And yet I think it is undeniable that it was precisely on the ground of these long-forgotten propositions that Eichmann was brought to justice to begin with, and that they were, in fact, the supreme justification for the death penalty. Because he had been implicated and had played a central role in an enterprise whose open purpose was to eliminate forever certain "races" from the surface of the earth, he had to be eliminated. And if it is true that "justice must not only be done but must be seen to be done," then the justice of what was done in Jerusalem would have emerged to be seen by all if the judges had dared to address their defendant in something like the following terms:

"You admitted that the crime committed against the Jewish people during the war was the greatest crime in recorded history,

and you admitted your role in it. But you said you had never acted from base motives, that you had never had any inclination to kill anybody, that you had never hated Jews, and still that you could not have acted otherwise and that you did not feel guilty. We find this difficult, though not altogether impossible, to believe; there is some, though not very much, evidence against you in this matter of motivation and conscience that could be proved beyond reasonable doubt. You also said that your role in the Final Solution was an accident and that almost anybody could have taken your place, so that potentially almost all Germans are equally guilty. What you meant to say was that where all, or almost all, are guilty, nobody is. This is an indeed quite common conclusion, but one we are not willing to grant you. And if you don't understand our objection, we would recommend to your attention the story of Sodom and Gomorrah, two neighboring cities in the Bible, which were destroyed by fire from Heaven because all the people in them had become equally guilty. This, incidentally, has nothing to do with the newfangled notion of 'collective guilt,' according to which people supposedly are guilty of, or feel guilty about, things done in their name but not by them—things in which they did not participate and from which they did not profit. In other words, guilt and innocence before the law are of an objective nature, and even if eighty million Germans had done as you did, this would not have been an excuse for you.

"Luckily, we don't have to go that far. You yourself claimed not the actuality but only the potentiality of equal guilt on the part of all who lived in a state whose main political purpose had become the commission of unheard-of crimes. And no matter through what accidents of exterior or interior circumstances you were pushed onto the road of becoming a criminal, there is an abyss between the actuality of what you did and the potentiality of what others might have done. We are concerned here only with what you did, and not with the possible noncriminal nature of your inner life and of your motives or with the criminal potentialities of those around you. You told your story in terms of a hard-luck story, and, knowing the circumstances, we are, up to a point, willing to grant you that under more favorable circumstances it is highly unlikely that you would ever have

come before us or before any other criminal court. Let us assume, for the sake of argument, that it was nothing more than misfortune that made you a willing instrument in the organization of mass murder; there still remains the fact that you have carried out, and therefore actively supported, a policy of mass murder. For politics is not like the nursery; in politics obedience and support are the same. And just as you supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations—as though you and your superiors had any right to determine who should and who should not inhabit the world—we find that no one, that is, no member of the human race, can be expected to want to share the earth with you. This is the reason, and the only reason, you must hang.”