Universal Jurisdiction

National Courts and the Prosecution of Serious Crimes under International Law

Edited by Stephen Macedo
had been hampered by the failure of such states to directly incorporate international crimes in their criminal codes and their reliance on domestic crimes, such as homicide, as the source of substantive criminal liability. Most statutes adopted in recent years (for example, those of Canada, New Zealand, and Australia) generally incorporate international crimes covered by the Rome Statute into their criminal codes, thus permitting the state’s domestic law to reflect more accurately the evolving standards of international law.

The traditional immunity for senior government officials under customary international law continues to pose a significant obstacle to domestic prosecutions for international crimes. However, there is growing recognition that such immunity is primarily procedural in nature, rather than substantive, and exists only as long as the suspected offender holds office. As the concurring opinion in the International Court of Justice’s recent decision in Democratic Republic of Congo v Belgium noted:

The increasing recognition of the importance of ensuring that the perpetrators of serious international crimes do not go unpunished has had its impact on the immunities which high state dignitaries enjoyed under traditional customary law. Now it is generally recognized that in the case of such crimes, which are often committed by high officials who make use of the power invested in the State, immunity is never substantive and thus cannot exculpate the offender from personal criminal responsibility. It has also given rise to a tendency, in the case of international crimes, to grant personal immunity from jurisdiction only for as long as the suspected state official is in office.49

As nations have gradually broadened the scope of domestic jurisdiction over international crimes and limited immunities from prosecution, a system of international criminal justice has begun to emerge in which both international criminal tribunals and national courts have an important and mutually reinforcing role to play in the enforcement of international criminal norms. The emergence of this system surely increases the likelihood that the recently established International Criminal Court will achieve its central mission, as eloquently articulated by Kofi Annan, United Nations Secretary General: “In the prospect of an International Criminal Court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through to the end. We ask ... you to do yours in our struggle to ensure that no ruler, no state, no Junta, and no army anywhere in the world can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights and that those who violate those rights will be punished.”50

Chapter 4
The Adolf Eichmann Case: Universal and National Jurisdiction
Gary J. Bass

And with lightning speed my tanks turn and thunder eastward... With furious wrath they hound all the bands of the butchers of the Jews: Poles, Lithuanians, Ukrainians... And I see Moshe Dayan, in his dusty battle dress, standing awesome and gaunt, as he receives in grim silence the surrender of the governor general of Kishinev.

—Amos Oz, A Late Love

The capture of Adolf Eichmann in Buenos Aires by Israeli agents in April 1960, and his trial in Jerusalem about a year later, was so spectacularly dramatic that it almost seems wrong to look to it as precedent. Louis Henkin, for instance, an international law specialist, warily wrote: “For the law of jurisdiction... the Eichmann case may be too extraordinary to serve as precedent. Unpunished Nazi criminals will not long be with us. The possibility of new genocides cannot, alas, be totally discounted; but it is far from clear that their perpetrators will be brought to judicial trial, and the coincidence of factors impelling exercise of jurisdiction solely on the ‘universal’ principle would in any event be rare... The Eichmann case reminds us of an area of the law that has not yet been shaken by the new winds.”

Since Henkin wrote, the news has been largely gloomy. True, there are fewer and fewer Nazi war criminals who have eluded the ravages of age (if not justice), but there is a fresh crop of Cambodians, Serbians, Croatsians, and Rwandans to take their sorry place. And the judicial punishment of perpetrators is still hardly something to take for granted—it is still, as it was in 1961, something rare and astonishing.

There is no point in pretending that the Eichmann case is a perfectly apposite precedent for current efforts at universal jurisdiction for war crimes. It is, however, one of the few precedents of any kind at hand, and as such even the most dubious aspects of the trial are receiving new attention.
For instance, prosecutors at the United Nations war crimes tribunal for the former Yugoslavia have found themselves poring over Israeli arguments for abducting Eichmann from Argentina to justify the arrests of two suspects who claim they were caught in Serbia proper. In one sense, the Israeli abduction of Adolf Eichmann and his subsequent trial before an Israeli court is an important precursor to current notions of universal jurisdiction. After all, here was a sovereign state invoking its jurisdiction over a war criminal hiding out in Argentina, and on that basis trying him. But in another sense, this was a case of distinctly nonuniversal jurisdiction: the Jewish state trying a man for the extermination of the Jews. The Eichmann case is as much about Jewish justice as universal justice.3

Both of these brands of justice—the national and the universal—are important for future prosecutions under universal jurisdiction. Although the legal duty of universal jurisdiction may seem to be offset equally on all states, in practice, the exercise of universal jurisdiction is politically costly for a state. It means embroiling one’s diplomatic apparatus in an imbroglio and, quite likely, a confrontation with one or more states; it means setting a precedent that undermines one’s own national sovereignty, something which states are not exactly in a hurry to do; it means burdening one’s court system with what will probably be an incredibly complex and problematic case; and it almost certainly means a great deal of domestic turmoil and controversy. Why would a country bother? The Eichmann case gives one clear answer: because the country feels itself to have been victimized.

The problem here is that countries that feel victimized may be less likely to be able to deliver impartial justice. To be sure, the victims can always claim that those countries who stood by during a mass slaughter are not impartial but simply heartless—a kind of bias in itself and certainly one that disqualifies the bystanders from becoming judges.4 Still, when countries undertake to punish those who persecuted their own, there is at least a risk that this will undermine the impartiality that distinguishes true justice: that the roles of victim and judge should not be blurred. This is anything but an abstract concern. During World War II, Winston Churchill became so enraged at Nazi Germany that he ended up calling for the execution of the top Nazi leadership. Bosnian and Rwandan courts are trying to prosecute enemy war criminals today. The paradox is that noninvolved countries are more likely to deliver impartial justice if there is ever a fair trial, but they are at the same time less likely to want to have such a trial in the first place.

Compared to cases that may arise in the future, Israel’s trial of Eichmann is relatively free of some key political dilemmas that often bedevil universal jurisdiction. The trial could not delegitimize a leader who might otherwise have been able to negotiate a peace treaty (like Radovan Karadžić, Slobodan Milošević, or Franjo Tudjman) or a democratization pact (like Augusto Pinochet): Eichmann was a fugitive whose genocidal power had existed only in a state that had been destroyed by Allied arms. Nor could the trial prolong a war; the war had been over since 1945. And nobody could have accused Israel of using the trial primarily to carry on a vendetta against a strategic enemy by legal means (although the prosecution did emphasize Arab links with Nazism when it could); Israel was primarily focused on punishing an architect of the Holocaust, which rises above accusations of moral equivalence, partisanship, or tu quoque.

Instead, the controversy around the Eichmann trial mostly revolved around the question of whether Israel had the right to try the Nazi leader. The tension between international or Israeli jurisdiction is well captured in the different crimes on trial in Nuremberg and in Jerusalem. At Nuremberg, the Nazis were accused of—among other things—crimes against humanity. That is the category that leads to the idea of universal jurisdiction; if the crimes are against humanity, then humanity is entitled to judge them. In contrast, in Jerusalem, Eichmann stood his trial under a 1950 Israeli statute—the Nazis and Nazi Collaborators (Punishment) Law—which makes “crimes against the Jewish people” a capital offense. As Walter Laqueur put it, it was a difference between being hostis generis humani (the enemy of all humanity) or being hostis fudorum (the enemy of the Jews).5

Israel was criticized by some at the time for taking justice into its own hands. The issue was whether Israel had the right to try Eichmann, as Israeli premier David Ben-Gurion argued, or whether a more impartial court should have been found, as Hannah Arendt and Telford Taylor thought. In this essay I will consider these kinds of arguments in turn. I will then make two arguments, both of which are aimed not just at the Eichmann case but also at possible future exercises of universal jurisdiction. First, I will argue that the difference between Israeli and universal jurisdiction was not actually so stark. There was a noteworthy tone of universalism to Israel’s actions, even though the instrument of universal justice was Israel’s own court system. Second, I will argue that much of our evaluation of the Eichmann abduction must turn on the quality of the trial he received—that the real question was not whether he was on trial for murdering humans or Jews, but whether he got a fair day in court. There are many legitimate concerns about universal jurisdiction, which, like all political trials, open the door to all manner of politicking, but as a minimum precondition for the future exercise of universal jurisdiction, a genuinely fair trial is a baseline.

**Crimes against Humanity**

There was a strong sense in some of the Western democracies that Israel had gone too far by seizing Eichmann. Some Israelis, too, thought that Ben-Gurion had overreached. Martin Buber, the distinguished Hebrew University philosopher, thought that victims should not become judges. Nahum Goldmann, president of the World Zionist Organization, preferred a mixed international court in Israel with an Israeli chief judge but including
judges from other countries whose citizens had been killed by Eichmann’s agents.6

Telford Taylor, the American chief prosecutor for the second round of trials at Nuremberg, was probably the most prominent Western skeptic. Taylor wrote in the New York Times in 1961 that Israel’s action was “emotionally understandable” and had no doubt that Ben-Gurion “voices the deepest feelings of his countrymen when he proclaims that it is ‘historic justice’ for Eichmann to be tried in a Jewish state.”7 But Taylor argued that the “essence of law is that a crime is not committed only against the victim, but primarily against the community whose law is violated.” A racially motivated lynching in the American South, Taylor wrote, “is as much a crime against whites as blacks.” Israel’s law, to Taylor’s mind, implied that crimes against Jews were not crimes against non-Jews. To the contrary, Taylor wrote, “Nuremberg was based on the proposition that atrocities against Jews and non-Jews are equally crimes against world law.”8

I will return to these arguments below. Before doing so, though, some of Taylor’s other complaints are more easily answered. Taylor also objected to the fact that Eichmann did not face justice where he committed his crimes: “[A] model for the shaping of international law, there is little to be said for trying a man at a place far distant from the scene of his actions, in a land to which he had been brought by clandestine force and which was not yet a nation at the time of the alleged crimes.”9 Israel’s invocations of its sovereign prerogatives, Taylor wrote, was “absolute nationalism,” which put him in mind of Hitler’s similar invocations—a gratuitously harsh charge, since Taylor could equally well have remembered such invocations from pretty much any sovereign state (and usually not for reasons as “emotionally understandable” as Israel’s when it came to Eichmann).

Taylor then argued that instead of an Israeli trial, Israel should draw up charges and ask that West Germany or the United Nations hold a trial. This, Taylor thought, would help complete the pedagogical task started at Nuremberg.10 But, as Ben-Gurion had already pointed out, West Germany had not criticized Israel, let alone asked that Eichmann be turned over to Bonn’s authority for trial. Indeed, the Federal Republic had been moving slowly on the prosecution of Nazi war criminals at home but was galvanized by the arrest of Eichmann. (It was actually a West German official—Fritz Bauer, a German Jew who had escaped the Nazis and was in 1960 serving as chief prosecutor of Hessen—who gave Israel the information that Eichmann was in Buenos Aires, because Bauer feared that if he told the Federal Republic, someone would tip off Eichmann or prevent his extradition.)11 Soon after the Buenos Aires arrest, West German authorities finally moved against a score of Nazis—most notably Richard Baer, commandant of Auschwitz, as well as many of Eichmann’s aides.12 By not taking Taylor’s advice, Israel nevertheless got some of the result he wanted: a more serious West German effort at prosecuting the Nazis.

Crimes against Nationals

Still, Taylor’s criticism of the idea of “crimes against the Jewish people” is harder to dismiss. His basic argument—that crimes against humanity are, by definition, the concern of the whole human community—is still current today. In Taylor’s tradition, Martha Minow, a distinguished Harvard law professor, argues that it is not just the victims who have been wronged by the gross transgression of legal norms but society as a whole.13

The first problem with Taylor’s argument is that it holds the Israelis to a standard that the Allies themselves did not meet. This is not to say that that standard is not a desirable one in and of itself. But one should not forget that Allied justice after World War II (and World War I) rested largely on the principle that countries dealt with the crimes committed against them.

In pursuing Eichmann, Israel was merely following a trend that dates back at least to World War I. In pursuing German war crimes trials, the victorious Allied democracies showed few qualms about holding themselves up as both victim and judge. As David Lloyd George, Britain’s prime minister, told the Imperial War Cabinet: “every judge tried an offence against the society of which he was a member.”14 Georges Clemenceau, France’s president, was, if anything, more emphatic, demanding to the Allies in 1918 that

[!] here would be no neutrals on the Tribunal. They had no right to it, they had not intervened in the war, and had undergone no sacrifices. The Allies had secured this right by their immense losses in men and sacrifices of all kinds.

Mr. Balfour asked if this course would not take away all appearance of impartiality? If the Allies set up the Court themselves, where would be the moral effect before the world?

M. Clemenceau said that all justice was relative, and that the impartiality of all judges was liable to be questioned. It was a misfortune which could not be helped. But when a crime took place on a scale so unprecedented in history, he thought that France, Great Britain, Italy, and the United States must place themselves high enough to take the responsibility for dealing with it.15

In the subsequent botched war crimes trials at Leipzig in 1921, the British, French, and Belgian charges were all based respectively on the suffering of British, French, and Belgian citizens at German hands.16

During World War II, the first serious Allied policy on the prosecution of war crimes rested squarely on the principle of national jurisdiction. The Moscow Declaration—written by Winston Churchill and issued in 1943 in his name and those of Franklin Delano Roosevelt and Joseph Stalin—stipulated that once an armistice was concluded with a post-Hitler German government, “those German officers and men and members of the Nazi Party who have been responsible for, or have taken a consenting part in the above atrocities, massacres, and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged
The Adolfo Eichmann Case

At the Nuremberg trial, the prosecution of top Nazi leaders, that was decisive for the course of World War II, is often seen as the moral justification for the Nuremberg Trials. The trials were held in 1945 and 1946 in the city of Nuremberg, Germany, following the defeat of the German army in World War II. The trials were a response to the crimes committed by the Nazi regime, including the Holocaust, and were seen as a symbol of justice for the atrocities committed during the war.

The trial of Adolfo Eichmann, who was a key figure in the Holocaust, was particularly significant as it was the first time that a single individual was brought to trial for war crimes. Eichmann was captured in Argentina in 1960 and was extradited to Israel, where he was tried and convicted of war crimes.

The trial of Eichmann was seen as a moral and legal victory for the Jewish people, who had suffered under Nazi rule. The trials were also seen as a symbol of international justice, and set a precedent for future trials of war criminals.

The Nuremberg Trials were a turning point in international law, and established the principle that individuals could be held accountable for crimes against humanity.

In conclusion, the Nuremberg Trials were a significant event in world history, and their legacy continues to be felt today. The trials were a symbol of justice for the victims of Nazi atrocities, and set a precedent for future trials of war criminals. The trials also underscored the importance of international law in preventing future atrocities.

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court. Only anti-Semites or Jews with an inferiority complex could suggest that it does. America does not need that kind of protection, nor does England or any other country. I feel very strongly about that. In any case, Eichmann’s victims were not murdered because they were international people but only because they were Jews.”

On this point, it seems clear that most Israelis felt more or less the same way as their prime minister. Arendt wrote of “the almost universal hostility in Israel to the mere mention of an international court which would have indicted Eichmann, not for crimes against the Jewish people, but for crimes against mankind committed on the body of the Jewish people.” Natan Alterman, the great Israeli poet, wrote: “Putting Eichmann on trial before a Jewish court in Israel will compensate for the inhuman and chaotic emptiness that has marked Jewish existence from the day the Jews went into Exile until now.” In the Israeli press, from the highbrow Ha’aretz to the mass-market Yediot Ahronot, there was unanimity that the abduction was a triumph. Popular enthusiasm was so great that it became difficult to keep the press and Knesset from calling for Eichmann’s immediate execution.

This is not to say that Ben-Gurion’s calculations were all simply about justice. He thought it important that Israel’s Sephardic Jewish citizens learn about the catastrophe that had befallen the Ashkenazi Jews, that Israel’s youth be steeped in Zionist pride, and that the world be reminded of the inadequacy of its response to the Holocaust. In Ben-Gurion’s mind, national security was still an enormous problem for his new and besieged state, and national solidarity could bolster Israel’s chances of survival. He made no secret of his Zionist take on the trial. In an Israeli Independence Day speech during the trial, Ben-Gurion said, “For the first time Israel is judging the murderers of the Jewish people. . . . Let us bear in mind that only the independence of Israel could create the necessary conditions for this historic act of justice.”

Finally, Ben-Gurion had come under withering criticism from Menachem Begin and other rightists for accepting reparations and arms from West Germany, and the Eichmann trial offered an opportunity for Ben-Gurion to demonstrate that his government’s willingness to deal with the Federal Republic implied no meekness about Nazism itself. The courts of the Jewish state would dispense justice to the mastermind of the murder of the Jews.

A Real Dichotomy?

Is there no middle ground between universal justice and national justice? If the Eichmann case is any example, it is important not to draw the distinction too starkly. After all, Israeli law in 1961 included a number of principles of universal jurisdiction—ways in which Israel was conducting the trial both on behalf of the Jews and of humanity. Some of these extraterritorial principles were not Zionist at all, inherited from legislation under the old British mandate: a standard 1936 provision for prosecuting international pirates as hostis humani generis and a 1936 law against dangerous drugs that evidently did not limit itself to the borders of Britain’s Palestine mandate.

Of course, opium and piracy have precious little in common with Nazism. But there were other acts that were more relevant. In 1950 Israel had also signed onto the UN’s 1948 Genocide Convention. In the act which gave force to the Genocide Convention, Israel explicitly embraced the principle that “a person who has committed outside Israel an act which is an offence under this Law may be prosecuted and punished in Israel as if he had committed the act in Israel.”

Israel’s forward-looking ban on genocide in general was evidently meant as a complement to its backward-looking law against Nazi genocide. As law professor Theodor Meron (currently serving as president of the UN war crimes tribunal for the former Yugoslavia) has noted, the law under which Eichmann was prosecuted—the Nazis and Nazi Collaborators (Punishment) Law of 1950—has something of the flavor of universal jurisdiction, but with certain important limits. Anyone who has committed crimes against humanity or crimes against the Jewish people during the Nazi regime, or committed war crimes during World War II, can—in fact, must—be brought to book by any state that has the opportunity to do so. The limitation, of course, is that this Israeli law— unlike today’s broader view of universal jurisdiction for any crimes against humanity—covers only Axis states and their conquests, and war crimes in World War II. The law provides for the punishment of crimes against the Jewish people, but only as a specific instance of crimes against humanity.

Even Ben-Gurion made some nods to universalism. He wrote that it was Israel’s duty “to recount this episode in its full magnitude and horror, without ignoring the Nazi regime’s other crimes against humanity—but not as one of those crimes, rather as the only crime that has no parallel in human history.”

In the event, Eichmann was convicted both of crimes against the Jewish people and of crimes against humanity—for instance, the deportation of Poles, Slovaks, and Roma (Gypsies) from Lidice, Czechoslovakia. In his May 1962 Supreme Court opinion denying Eichmann’s appeal of his conviction by the Jerusalem district court, Justice Simon Agranat—who was American born and educated—carefully tried to conflate the two kinds of crime. He argued that the four categories in Eichmann’s indictment shared a “special universalistic characteristic” and that “the category of ‘crimes against the Jewish people’ is nothing but . . . the gravest crime against humanity.” It is true that there are certain differences between them . . . but these are not differences material to our case.” The whole indictment, Agranat concluded, could be collapsed into “the inclusive category of ‘crimes against humanity.’” Agranat, using reasoning that could just as easily come from a Human Rights Watch press release about Pinochet’s detention in London, argued that gross atrocities should not go unpunished.
simply because of the “primitive” state of international law: “for the time being, international law surmounts these difficulties ... by authorizing the countries of the world to mete out punishment for the violation of its provisions. This they do ... either directly or by virtue of the municipal legislation which has adopted and integrated them.”

As law professor Pnina Lahav has pointed out, on Agranat’s account, Israel was doing nothing more—and nothing less—than shouldering its international responsibility to prosecute crimes that shocked the world community. When the charge was crimes against humanity, any state could exercise jurisdiction; Israel had merely done what the international community recognized was the theoretical prerogative of any state. If the other states could not be bothered, that was a fact that could hardly be held against Israel.

The Problem of Abduction

Of all the things about the Eichmann case that gave Hannah Arendt pause, she singled out the extraterritorial abduction as “the only almost unprecedented feature in the whole Eichmann trial, and certainly ... 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? ...” Today, international lawyers generally frown on the abduction.

The Israelis knew, of course, that they were playing with fire. Isser Harel, who as Mossad chief ran the abduction of Eichmann, later wrote that the operation “caused us a great deal of inner conflict. My mind was by no means easy about the need to carry out a clandestine action in the sovereign territory of a friendly country, and the question of whether it was permissible to do so—from both the ethical and political points of view—had to be faced in all its gravity.”

After the capture of Eichmann, the Israelis remained mum about where they had caught him, and the Foreign Ministry said that the raid had been conducted by independent volunteers; it was left to Time magazine to print that it had been Israeli agents in Buenos Aires. Argentina rejected a clumsy Israeli apology and demanded the return of Eichmann, and the UN Security Council condemned the Israeli operation as an infringement on Argentine sovereignty.

Ben-Gurion did not deny that Israel had violated Argentine sovereignty but apologized and asked the Argentine government to consider the wider moral context. Harel’s argument for abduction, similar to what many Israelis said, was that the more proper options were unworkable. An Israeli request to Argentina for extradition might tip Eichmann off, and Harel feared that Europe had lost its zeal for war crimes prosecutions. (Harel did claim that he checked in with two eminent jurists, who said the operation was legal. He never explained what precedents they were relying on.)

Argentina was also a haven to a number of other Nazi war criminals, including Josef Mengele, who had run the sickening human experiments at Auschwitz, who lived in Buenos Aires under his own name until 1959. When West Germany requested Mengele’s extradition in 1959, Mengele—possibly tipped off somehow—vanished, resurfacing later in Paraguay.

The same general problem that the Israelis faced has come up again and again: a war criminal at large, with no reasonable prospect for extradition. This has been pretty much the pattern for many accused Serbian and Croatian nationals, sheltered for years by the regimes of Slobodan Milosevic and Franjo Tudjman, before Milosevic’s fall and Tudjman’s death. So long as Milosevic was in power, scores of indicted war crimes suspects could shelter under his wing, despite the fact that Yugoslavia is a signatory to the Dayton accords (signed, ironically enough, by Milosevic himself), which mandate compliance with the UN war crimes tribunal. This meant that many key war crimes suspects presumed to be within Yugoslavia—including some senior Yugoslav army officers and Ratko Mladic, the former Bosnian Serb army chief who personally oversaw the Srebrenica massacre—remained at large. Even within Bosnia, which is for all purposes a NATO protectorate, NATO has been terribly reluctant to risk its own troops for the sake of making arrests. From the arrival of NATO troops in January 1996 until July 1997 there was not a single arrest. The victims, after all, are Bosnians, not Americans or Western Europeans.

Conversely, when a great power feels its citizens to have been the victims,then solicitude about sovereignty has sometimes melted away. Consider, for instance, America’s “war on drugs.” In June 1989 the Justice Department issued a legal opinion that the president could legally have the FBI abduct a foreigner abroad for breaking American laws. On that basis, President George H. W. Bush approved a daring operation to abduct Pablo Escobar Gaviria, the Colombian drug lord running the notorious Medellin cartel, although the Bush administration thought they could have also targeted Panamanian dictator Manuel Noriega. Dick Cheney, then Bush’s defense secretary, wanted to offer substantial military assistance. The raid never happened, but only because of concerns about the reliability of U.S. intelligence. In November 1989, another Justice Department memorandum held that the U.S. military could make arrests overseas. As the invasion of Panama started, the elder Bush went to the Oval Office to sign an order that authorized the American military to arrest Noriega and others indicted in the United States for drug charges. Noriega, who had thought he would be treated like a head of state or a prisoner of war, was instead whisked off to an American air force base and arrested on drug charges. In 1992 the U.S. Supreme Court controversially held that a Mexican citizen who was abducted for the murder of a U.S. drug enforcement agent could be put
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In November 1989, another Justice Department memorandum held that the U.S. military could make arrests overseas. As the invasion of Panama started, the elder Bush went to the Oval Office to sign an order that authorized the American military to arrest Noriega and others indicted in the United States for drug charges. Noriega, who had thought he would be treated like a head of state or a prisoner of war, was instead whisked off to an American air force base and arrested on drug charges. In 1992 the U.S. Supreme Court controversially held that a Mexican citizen who was abducted for the murder of a U.S. drug enforcement agent could be put
on trial for the crime in an American court, despite a prior U.S.-Mexican extradition treaty. The disadvantage of abductions is that they are threatening to the international order; the advantage of abductions is that sometimes the abductees are people who deserve to be on trial. The abduction of Eichmann must disturb the sleep of many fugitives. It is a classic tug between sovereignty and universalism. And there is a logical consistency—albeit extreme—to the Israeli position: if sovereignty is no reason to ignore crimes against humanity, then why should sovereignty be allowed to become a bar to the prosecution of those who have committed crimes against humanity?

In the end, the best response to those who desperately want to carry out an abduction, as the Israelis did, is not to leave them with that kind of stark choice between abduction or impunity. Better to strengthen intermediate solutions: by entrenching a norm of extradition, by regularizing such transfers, by punishing those states that will not extradite, by stigmatizing those states that harbor war criminals, by strengthening international tribunals, and by legitimizing international law. Otherwise, the temptation for the victims may simply be too much.

Legalism

Taylor concluded his argument thus: "In whatever forum Eichmann is tried, the important thing is that the trial and judgment shall not only be but appear to be just and fair, and shall contribute to the growth of law among nations. This is exactly right, but it is not necessarily a reason for skepticism about Israel trying Eichmann. There is one crucial precondition for the legitimate exercise of universal jurisdiction: the state holding the trial must have a stable and fair legal tradition. To my mind, this would mean that only liberal states—which respect civil liberties and due process at home—would be properly entitled to exercise universal jurisdiction. After all, an illiberal state cannot even afford its own citizens the benefit of a fair trial; it is in no position to start doing likewise to foreigners.

Of course, this distinction between liberal and illiberal states has to be taken seriously. It can all too easily collapse into a distinction between states we like and states we do not like. But it seems quite clear that Israel in 1960 would qualify as a liberal state, albeit an imperfect one. To be sure, Ben-Gurion's obsession with national security took its toll on civil liberties, first and foremost for the Israeli Arabs. But the Israeli judiciary was developing itself into an increasingly powerful check on executive excesses, championing free speech and individual rights. In a breakthrough opinion written by Justice Simon Agranat for a unanimous Supreme Court, Agranat defended the pro-Stalin Israeli Communist Party organ's right to publish, citing a pantheon of progressive American legal authorities: Thomas Jefferson, Louis Brandeis, Learned Hand, and Oliver Wendell Holmes. As Lahav has documented in her remarkable biography of Agranat, Agranat took the lead as Israel's Supreme Court pushed for judicial review and the rights of the mentally ill in criminal trials.

So when Eichmann was snatched from Buenos Aires, he would get a substantially fair trial before the district court in Jerusalem. Taylor complained that Ben-Gurion had already declared Eichmann guilty, which is a fair enough objection but misses the point: guilt or innocence was not Ben-Gurion's to declare, but the bench's. The international consensus was that Eichmann had a proper day in court. Even Arendt, famously suspicious of Ben-Gurion, admired the judges:

There is no doubt that it is Judge Landau who sets the tone, and that he is doing his best, his very best, to prevent this trial from becoming a show trial under the influence of the prosecutor's love of showmanship. And Ben-Gurion, rightly called the "architect of the state," remains the invisible stage manager of the proceedings. Not once does he attend a session; in the court room he speaks with the voice of Gideon Hausner, the Attorney General, who, representing the government, does his best, his very best, to obey his master. And if, fortunately, his best often turns out not to be good enough, the reason is that the trial is presided over by someone who serves justice as faithfully as Mr. Hausner serves the State of Israel. Justice demands that the accused be prosecuted, defended, and judged, and that all the other questions of seemingly greater import—of "How could it happen?" and "Why did it happen?" of "Why the Jews?" and "Why the Germans?", of "What was the role of other nations?" and "What was the extent of co-responsibility on the side of the Allies?", of "How could the Jews through their own leaders cooperate in their own destruction?" and "Why did they go to their deaths like lambs to the slaughter?"—be left in abeyance. Justice insists on the importance of Adolf Eichmann. . . On trial are his deeds, not the sufferings of the Jews, not the German people or mankind, not even anti-Semitism and racism.

Israel, for all its revulsion at Eichmann, nevertheless went out of its way to ensure a trial that would satisfy the world's expectations. Over and over, Israel showed a respect for due process. Eichmann got to choose his own defense counsel—Robert Servatius, a lawyer from Cologne who had defended Nazis at Nuremberg—even when the Nazi leader's wishes required special legislation allowing a non-Israeli citizen to take part in an Israeli court. Israel offered to foot Servatius's bill, eventually paying some thirty thousand dollars. The Jerusalem district court's president, who had called his objectivity into question by comparing Eichmann to the devil, was therefore jockeyed out of presiding over the case. Servatius was given free rein, even when he packed the first week—when press coverage would presumably be most intense—with legal wrangles about jurisdiction and impartiality. The judges kept a watchful eye on the prosecutor and were not shy about voicing their annoyance with him when he strayed from the essentials of the case. The verdict, when it came, rested mostly on documentary evidence and not on the emotional impact of the testimony of Holocaust survivors. And Eichmann was able to appeal his case before the Supreme Court.
This is particularly remarkable since Israel could simply have killed Eichmann in Buenos Aires, rather than going to the trouble of holding a full-fledged trial. Even Ben-Gurion's critics noted approvingly that this alternative had not been raised. Taylor was pleased that in 1961 there were no echoes of the 1944 debate in Washington and London over whether the leading Nazi war criminals should have been shot without trial. Arendt noted that Israel had not followed the example of Soghomon Tehlirian, the Armenian who assassinated Talat Pasha as a reprisal for Talat's role as mastermind of the 1915 Armenian genocide. Throughout its encounter with Eichmann, Israel demonstrated a kind of restraint.

The likes of the Eichmann trial are a rare occurrence. It is not often that a state will want to go out of its way to prosecute war criminals, and it is not so often that that state will then do so with due process. This, in short, is another way in which the Eichmann trial was a spectacularly unusual affair.

Taylor's objections seem to fall short. While one might have reservations about the dominance of national jurisdiction and prefer to see international law developing as a defender of humanity itself, it is probably more realistic in the near term to see international law piggybacking on national idealism. The cumulative effect of a number of respectably executed universal jurisdiction cases could be considerable, and it seems a trifle pure to turn one's nose up at them because the state's nationals had itself suffered at the hands of the war criminal. If there was an established international institution that would reliably do the job, then Taylor's brief would be vastly more powerful. But that seems a distant prospect even in 2005, as it must have in 1961. Until that day, then states will remain the primary actors, and they may not be prepared to wait. If so, then one can at best hope that they will use fair legal means.

In world politics, impunity and crude vengeance are the rule. Israel's relatively responsible exercise of universal jurisdiction is not something so common that one can afford to write it off.

Chapter 5
Comment: Connecting the Threads in the Fabric of International Law

Lori F. Damrosch

The Eichmann episode and the proposed principles of international law both raise the problem of connecting universal jurisdiction with other threads in the fabric of international law. The Eichmann case is of special interest not just because of the jurisdictional questions addressed and resolved in the Israeli judicial proceedings but especially because of the questions of international law raised by the manner in which Israeli authorities forcibly obtained custody of the defendant. Even on the assumption that Eichmann presented a proper case for the exercise of jurisdiction on a universal theory (irrespective of the place the crime was committed or the nationality of those involved), it set a problematic precedent by decoupling questions of judicial jurisdiction from those concerning state compliance with fundamental norms of international law.

The Princeton Principles on Universal Jurisdiction encourage us to make connections between universal jurisdiction and other aspects of international law, as in Principle 1(5) (a state shall exercise universal jurisdiction "in accordance with its rights and obligations under international law"), Principle 2(2) ("other crimes under international law"), Principle 7 (effect of "amnesties which are incompatible with the international legal obligations of the granting state"), and Principle 9(2) (effect of final judgments of a judicial body "exercising such jurisdiction in accordance with international due process norms").

The legitimacy of the effort to codify principles of universal jurisdiction could well depend on whether those principles are understood as integrally connected with and supportive of other equally valid principles of international law. That legitimacy could be undermined if assertion of universal jurisdiction is perceived to be correlated with other actions violative of international law, especially of norms fundamental to interstate relations such as respect for territorial boundaries and prohibition of the use of force in international relations.