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Israel

Eichmann Case - 1960

16-17 June

2 Interoffice memoranda to D.H.
from U.N. Legal Counsel

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This may interest you

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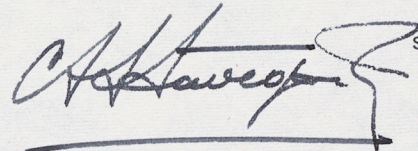
INTEROFFICE MEMORANDUM

TO: The Secretary-General

Date: 16 June 1950

FILE NO.: CONFIDENTIAL

FROM: The Legal Counsel



SENDER'S TELEPHONE EXTENSION: 2301

SUBJECT: The Eichmann Case

I. Introduction

1. As Argentina has now formally submitted the Eichmann Case to the Security Council, I have undertaken an exploratory and tentative study of some of the aspects of it which give rise to legal problems. This memorandum contains some brief remarks on the following matters:

- (a) The facts;
- (b) State responsibility for illegal seizures of persons on foreign soil;
- (c) Prosecution in national courts of persons illegally seized on foreign soil;
- (d) Extradition;
- (e) The Convention on Genocide and the punishment of war criminals;
- (f) International penal tribunals;
- (g) Submission of a case to the International Court of Justice;
- (h) Reparation for violations of sovereignty.

2. It is assumed in this memorandum that the Security Council will proceed to discuss the Argentinian complaint. While it may be argued that this is not a proper matter for the Council as it does not seem to involve a threat to international peace and security, Argentina will undoubtedly assert that such a threat exists. It is unlikely, therefore, that the Council will decline to discuss the case. In the outcome, the Council could either recommend specific action, such as the submission of a case to the International Court of Justice (see paragraph 17 below), or it could content itself with calling upon the parties to settle their dispute by amicable means while re-affirming the rules of international law regarding the seizure of persons on foreign soil.

II. The facts

3. The facts in the Eichmann Case are by no means clear. The Prime Minister of Israel appears to have originally stated that Eichmann was discovered

by the Israel security services.^{1/} This would lead to the conclusion that the same services were probably responsible for taking Eichmann to Israel. However, in a subsequent note of 6 June 1960 to Argentina, Israel asserted^{2/} that Eichmann had been tracked down by "volunteers", who persuaded him to go "spontaneously" to Israel, where he was handed over to the security services. It is unlikely that all the members of the Security Council will accept the latter account without some question, and no doubt the facts of the case will be one of the principal issues in disputes. The account contained in the Israel note of 6 June 1960 seems clearly aimed at freeing Israel of any international responsibility for the seizure of Eichmann by asserting that State agencies were not involved and that Eichmann's departure from Argentina was of his own free will. However, for the purposes of this memorandum, it is assumed that Eichmann was taken from Argentina with at least the connivance of the Israel authorities.

III. State responsibility for illegal seizures of persons on foreign soil

4. The position in international law regarding the illegal seizure of persons on foreign soil is clear. According to Oppenheim:^{3/}

"It is ... a breach of international law for a State to send its agents to the territory of another to apprehend persons accused of having committed a crime. Apart from other satisfaction, the first duty of the offending State is to hand over the person in question to the State in whose territory he was apprehended."

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1. Statement in the Knesset. See New York Times, 24 May 1960, p. 1. See also statement by head of Israel's Security Service, in New York Times, 25 May 1960, p. 1.
 2. See New York Times, 7 June 1960, p. 11.
 3. Oppenheim's International Law, Vol. 1, 5th ed., p. 295, n.1. In support of this view Oppenheim gives the following example. "Thus Germany restored to Switzerland, in 1935, a certain Herr Jacob-Salomon, an ex-German political refugee who had been abducted from Switzerland with the connivance of German officials. The case was submitted to arbitration, but soon after the commencement of written proceedings Germany admitted in September 1935 that a State official acted in an inadmissible manner in this case and surrendered Jacob to the Swiss authorities."

5. This view is re-inforced by reference to the Harvard Draft Convention of 1934 on Jurisdiction with Respect to Crime. In the comment on Article 16 of that Draft, which covers cases of persons seized in violation of a State's sovereignty, it is stated that:^{4/}

"It is everywhere agreed, of course, that 'recourse to measures in violation of international law or international convention' in obtaining custody of a person charged with crime entails an international responsibility which must be discharged by the release or restoration of the person taken, indemnification of the injured State, or otherwise ..."

6. In view of the foregoing, if Eichmann was removed illegally from Argentina by Israel agents, it appears that Israel is, in strict law, under a responsibility to return Eichmann to Argentina, unless the latter agrees to waive this requirement and accept some other form of redress.

IV. Prosecution in national Courts of persons illegally seized on foreign soil

7. While the principles of State responsibility just set out appear to be generally accepted, Oppenheim, for one, points out^{5/} that in national courts the fact that the accused had been brought within their jurisdiction in violation of international law has not always been considered a sufficient defence, or a ground for not proceeding with the trial. There are decisions in United Kingdom courts to this effect, and they might well provide the precedent on which an Israel Court would rely if a plea is raised on Eichmann's behalf that he was illegally brought within the jurisdiction. In this respect, it would seem immaterial whether he is charged under Israel's law regarding the punishment of Nazis,^{6/} or indicted for a crime such as murder.

4. American Journal of International Law, Supplement, Vol. 29 (1935), p. 623.

5. Oppenheim, op. cit., p. 295, n.1.

6. See the New York Times, 12 June 1960, Section 4, p.E.

V. Extradition

8. It is clearly unlikely, despite Israel's possible duty to return Eichmann to Argentina, that such a duty will be complied with unless some definite assurance were possible that Eichmann would thereafter be handed over for trial to Israel, or perhaps either some other State or a competent international tribunal. This section of the memorandum deals briefly with the possibilities for extradition under usual procedures. The next section deals with special considerations in this case.

9. A State will usually only extradite a person charged with a crime to another State with which it has an extradition treaty. However, there is no rule of international law which prohibits extradition in the absence of a treaty, and it is for the law of each State to determine whether it will otherwise permit extradition. Israel and Argentina concluded an extradition treaty on 9 May of this year. While I have not seen its full text, according to newspaper reports^{7/} the treaty excludes extradition for "political crimes." However, both Israel and Argentina are also parties to the Convention on Genocide, which provides in Article VII that genocide shall not be considered as a political crime for the purposes of extradition.

10. While, therefore, the nature of Eichmann's crime may not be a bar to his extradition to Israel, it is probable that he could argue that he had committed no crime in Israel, as that State did not exist at the time when he was responsible for the extermination of the Jews and, in any event, the area of his activities never extended to Palestine. Normally extradition treaties provide only for the surrender of persons to States in which they have committed a crime. I do not know whether such a provision appears in the particular treaty in question, but I imagine it is highly likely.

11. If Israel, therefore, was unable to obtain Eichmann's extradition could another State do so? As the crimes with which he is charged must have been committed to a large extent in Germany, it would be logical to imagine that either the Federal Republic of Eastern Germany would wish to try him. However,

7. New York Times, 9 June 1960, p. 1.

no extradition treaty between Argentina and either the Federal Republic or Eastern Germany has been registered with the United Nations and therefore may not exist.^{8/} In the absence of such a treaty the question arises whether there are other grounds which might oblige Argentina to surrender Eichmann. The Convention on Genocide has been mentioned in this respect.

VI. The Convention on Genocide and the punishment of war criminals

12. As already pointed out, both Argentina and Israel are parties to the Convention on Genocide. The Federal Republic of Germany is also a party. The Convention was concluded after the Second World War, but it recognizes in its preamble that, even prior to its conclusion, genocide was a crime under international law. Thus it may be argued that the principles of the Convention are relevant in the Eichmann Case. One such principle is that persons charged with genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction ...". However, the Convention does not contain any express provision requiring automatic extradition of persons charged with genocide, and provides only that contracting parties will "grant extradition in accordance with their laws and treaties in force."^{9/} Some of the difficulties involved in relation to extradition treaties in this case have been mentioned in the previous section of this memorandum.

13. On the other hand, the Genocide Convention does oblige parties to it "to enact the necessary legislation ... to give effect to ...[its]... provisions," and, in this respect, it might be arguable that Argentina, if Eichmann were returned, would be under an obligation to enact legislation providing for his surrender to perhaps the Federal Republic of Germany as the country in which his acts of genocide were principally committed. In this particular context, too, reference might be made to General Assembly Resolution 3(1) which recommends that Member States should arrest war criminals "and ... cause them to be sent back to the countries in which their abominable deeds were done, in order that they may be judged and punished ...". Furthermore, extradition by normal treaty procedures was not considered adequate enough in the case of war criminals, and their

8. Similarly we have no knowledge of any extradition treaty between Israel and the Federal Republic of Germany, or Poland, etc.

9. Article VII.

surrender was called for. The Pan-American Conference held at Mexico City in 1945, for example, adopted a resolution, recommending to the Governments of the American Republics that they should "upon the demand of any of the United Nations surrender individuals charged with the commission of [war] crimes to the United Nations making the request, or to the custody of the agency of the United Nations which may be established for the trial and punishment of such criminals."

VII. International penal tribunals

14. I have seen it mentioned that a possible way out of the present dispute between Israel and Argentina would be for them to agree on the trial of Eichmann by an international tribunal.

15. At present no standing international penal tribunal exists. The International Court of Justice has no criminal jurisdiction and may determine only disputes between States. It is possible that the London Agreement of 8 August 1945,^{10/} establishing the Nuremberg Tribunal, is still in force, as Article 7 of it provides that it "shall remain in force for the period of one year; and thereafter, subject to the right of any signatory to give ... one month's notice of intention to terminate it." I do not know whether any or all of the signatories have denounced it and am, in fact, awaiting information on this point from the United Kingdom, with which the Agreement is deposited. Furthermore, it is possible to argue that the Agreement became obsolete with the conclusion of the initial work of the Nuremberg Tribunal and that it has consequently lapsed. However, even if the Agreement is still theoretically in force it would be necessary to reconstitute the Tribunal itself for the Eichmann Case. Should Israel and Argentina wish to participate in the Tribunal it would be open for them to become parties to the Agreement. They do not appear to have adhered to it in the past.

10. The Agreement was signed by France, USSR, United Kingdom of Great Britain and Northern Ireland, and the United States of America. It was subsequently adhered to by Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela and Yugoslavia.

16. Another alternative would be to constitute a new international tribunal with jurisdiction in this case. However, this would require the conclusion of a treaty between parties which may consider themselves concerned. It is an open question whether States other than Israel and Argentina would wish to participate in any new Tribunal. In my view it is not within the province of the functions of the Security Council to establish tribunals of this nature.

VIII. Submission of a case to the International Court of Justice

17. I have seen some mention that the International Court of Justice should be requested to determine the dispute between Israel and Argentina. It would be possible, in this respect, for the Security Council to recommend that Argentina and Israel should submit a case. On the other hand the Council itself could request an advisory opinion, particularly on the proper jurisdiction and forum for Eichmann's trial. In this connexion, however, it must be borne in mind that the Court might refuse to give an opinion if Israel objected. The drafting of a question for submission to the Court would, in any event, require detailed consideration to ensure that it is framed in a manner which will permit of a definite reply by the Court.

IX. Reparation for violation of sovereignty

18. In the explanatory memorandum attached to a letter of 15 June 1960 from the Representative of Argentina to the President of the Security Council,^{11/} the former has requested that the Council will "take decisions involving just reparation for the rights violated" by the seizure of Eichmann in a manner contrary to the territorial sovereignty of Argentina.

19. In international law there are many forms which such reparation could take. Cases of this nature often involve the return of the person seized, but, if Argentina so agreed, other forms of reparation would be possible instead. As no material damage has been involved it would be difficult to assess any pecuniary compensation. In the Corfu Channel Case, for example, the International Court of Justice refused to fix pecuniary compensation for a United Kingdom violation of Albanian sovereignty by sweeping mines in the Corfu Channel, and stated that a declaration by the Court that Albanian sovereignty had been violated constituted sufficient reparation. However, one possibility in the present case is a formal apology. Such an apology might take the form of a public statement by Israel in the Security Council regretting the incident and

11. S/4336.

giving assurances that measures will be taken to prevent its recurrence, or of a note to the Government of Argentina to the same effect. In the past, furthermore, formal apologies have sometimes taken the form of ceremonial acts, such as a salute to the flag of the wronged State, or the dispatch of a special embassy bearing apologies.

UNITED NATIONS  NATIONS UNIES

INTEROFFICE MEMORANDUM

TO: The Secretary-General

Date: 17 June 1956

FROM: The Legal Counsel

FILE NO.: CONFIDENTIAL

SENDER'S TELEPHONE EXTENSION: _____

SUBJECT: The Eichmann Case

In paragraph 15 of my memorandum of today's date, on the Eichmann Case, I mentioned that I was awaiting word from the United Kingdom on the present status of the London Agreement of 8 August 1945, under which the Nuremberg Tribunal was constituted. I have just been informed that, in the view of the United Kingdom, as depositary, the Agreement is still in force. Consequently Article 5 of the Charter of the International Military Tribunal, which is annexed to this Agreement, becomes relevant. The Article provides as follows:

"In case of need and depending on the number of matters to be tried, other tribunals may be set up; and the establishment, functions and procedure of each tribunal shall be identical, and shall be governed by this Charter."

I am further informed that, in the view of the United Kingdom, the establishment of a tribunal under this Article will require the unanimous consent of at least the four signatories of the London Agreement, namely France, the Soviet Union, the United Kingdom and the United States. This interpretation derives from the fact that the Tribunal would consist, pursuant to Article 2 of the aforesaid Charter, of four judges, or their alternates, having the nationality of the signatories. Furthermore, under Article 4 of the Charter, a quorum can only be constituted if all four judges are present. It follows, furthermore, from the provisions just cited, that it would not be possible for a judge from Argentina or from Israel to sit on the Tribunal. However, by means of agreement between the signatories, representatives from these two countries might be permitted to participate in the prosecution or defence of the accused.