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POSITIVISTS VERSUS MORALISTS

The Eichmann Trial and International Law

“This is only one example among many to demonstrate the inadequacy of the prevailing legal system and of current juridical concepts to deal with the facts of administrative massacres organized by the state apparatus. If we look more closely into the matter we will observe without much difficulty that the judges in all these trials really passed judgment solely on the basis of the monstrous deeds. In other words, they judged freely, as it were, and did not really lean on the standards and legal precedents with which they more or less convincingly sought to justify their decisions.” (Arendt 1963/1965, 294.)

This is how Hannah Arendt characterized the war crime trials of World War II in the *Postscript to Eichmann in Jerusalem. A Report on the Banality of Evil* (1963/1965). It is easy to read her account as an expression of a view according to which the judges at these trials did not really apply any established standards or criteria whatsoever but rather ruled arbitrarily without respecting legal precedents. However, this would be a misreading. What Arendt really wanted to say was that the Nazi crimes in general and Eichmann’s crimes in particular posed a serious problem to the entire Western judicial system and its legal practice. This problem stemmed from the nature of these

crimes. Since they were partly unprecedented, the Western judicial system lacked standards and criteria on the basis of which to judge them. On the other hand, the unbelievably enormous scale of the crimes did not correspond to any conventional punishment and expiation. In other words, the existing Western legislature simply turned out to be totally unprepared to deal with these kinds of crimes. This unpreparedness is well reflected in the debate caused first by the Nuremberg trials and then by the Eichmann trial. What was at stake in these debates were basic foundations of the Western judicial system and their capacity to respond, punish, and reconcile extreme and unprecedented crimes.

In this article I deal with the debate caused by the Eichmann trial among lawyers¹. My aim is to show how the metatheoretical nature of the debate shaped different accounts. I will argue that the basic controversy was between legal positivists who attempted to keep the Eichmann case in the realm of the rule of law and “moralists” who challenged the former, arguing for moral and ethical justification of the case. Consequently, I will argue that there is a thematical link between the debate over the Eichmann case and contemporary discussion of the significance of international law. Legal, ethical, and political problems revealed by the Eichmann case speak for a need to establish supranational law shared and ratified by all the political communities of the world. However, the Eichmann case shows that the problem of crimes against humankind² cannot be resolved simply by international legislation as far as these kinds of crimes are political by their nature. Even less can the problem be resolved by “new cosmopolitanism”³ in the meaning of world government. The political nature of Eichmann’s crimes shows that what is at stake in this issue is not so much the question of how to rule and punish but rather how to share the world with other people. In other words, what is at stake is the question of how are we supposed to belong to the world in such a way that this belonging is not based on sovereign rule but rather sharing the world in freedom, equality, and respect for other people.

The juridical problems of the Eichmann case concerned both his capture⁴ and a number of aspects of the trial itself. Given the highly controversial nature of the case it is no surprise that it aroused a lively discussion among jurists. However, it is conspicuous that most

of the lawyers who approached the case seemed to be somehow embarrassed about it: from the viewpoint of the existing legal order there seemed to be something equivocal in every possible phase and aspect of it.

The general embarrassment and the controversial nature of the trial was reflected in the fact that the number of accounts of it was considerable. (For the accounts see e.g. Braham 1969) In addition to all kinds of formal problems with the trial the jurists were puzzled by two main problems. On the one hand, and more importantly, they considered what the meaning of the Eichmann trial and its impact on world consciousness was. On the other they asked what its effects were on international law and the role of law in the world in general.

It is also conspicuous that right from the beginning much of the discussion was concerned with metatheoretical justifications of the trial. In my view this reflects the fact that the Eichmann case never really fitted the world of the existing legal order. In other words, it was impossible to discuss it in a sensible way keeping strictly inside the fence of the normal discourse of law. Although the Eichmann trial was an important case in the development of international law it was difficult to simply locate it among the growing number of precedents for future cases. Regardless of the personal opinion of the contributor, metatheoretical justifications were needed to discuss the case at all.

In the following I will start by taking a look at the development of international criminal law before the Eichmann trial. I do not give an exhaustive history of it but rather pick out a few relevant points in its development as the legal background to the Eichmann case. Correspondingly, the subsequent chapter over Israeli Jurisdiction is meant to shed light on the political background of the case in order to be able to approach the Eichmann case in context. Against this background I will then show that what was really in court in Jerusalem were the principles of international law on the one hand and the nature of Jewish identity on the other: it was in this thematical framework that the debate over the case was shaped into a controversy between legal positivists and moralists. I will deal with this controversy by dint of a few representative contributions which encapsulate the most important arguments presented in the course of it. Fi-

nally, I will argue that the debate suffered from an omission of political approach. Had the discussants understood how deeply political the Eichmann case was by character the entire debate might have taken shape in another way which would have brought political aspects more openly to the fore. The unhappy result of this omission was that the Eichmann case did not really manage to improve and accelerate the development of international criminal law but it rather deliberately retarded political discussion of the question of how crimes against humankind should be dealt with.

International Criminal Law before the Eichmann Trial

Although Eichmann's crimes, just like the crimes of the other Nazi criminals, have been claimed to be without precedent because of their extraordinary nature and enormity, his trial did have a clear legal precedent. This precedent was, of course, constituted by the International Military Tribunal (IMT) at Nuremberg in 1945-46 and complemented by twelve subsequent Nuremberg trials in 1946-1949. The purpose of this enormous and extraordinary trial, conducted by the United Kingdom, the United States of America, France and the U.S.S.R., was to try and punish the military, political and economic leaders of the vanquished Nazi Reich. Despite its controversial nature, it constituted an important milestone in the development of international law. Had this trial not taken place, the legal precedents for the Eichmann trial would have remained much weaker.

It is not an exaggeration to maintain that the Nuremberg trials opened a new chapter in the development of international law which could no longer lean solely on a simple ideal of the rule of law but inevitably had to be intertwined with ethical and political aspects of human conduct as well. From the Nuremberg trials on, the debate over international criminal law has expanded to concern also fundamental metatheoretical questions of the grounds of law: who is allowed and justified to try whom. In this respect, the Nazi crimes challenged one of the most important principles of international law. Ordinarily, it was maintained that the state can exercise its right to

punish only in respect of persons or acts which concern it more than any other country. Obviously, in the case of the Nazi crimes it was not always so easy to decide which country was most concerned. In this context, the Eichmann trial constitutes one of the most important cases in the history of international criminal law. It was reflected already in the conduct of the trial itself. During the trial, international law was constantly invoked both by the defence and the prosecution as the ethical basis of the trial and of the law under which it took place. This position was also adopted indirectly by the court of Jerusalem as far as in its decision it referred at length to international theory and practice (cf. Papadatos 1964, 43).

Until the IMT and other war crime trials after World War II the development of international criminal law had been slow and painful, hindered by the desire of the leading Western powers to maintain and cherish their absolute sovereignty.⁵ In other words, they were unwilling to surrender their absolute power to an external authority provided by international treaties and codification: it was believed that the essence of sovereignty consisted in the fact that it was not responsible to any foreign sovereignty or the international community at large (cf. Woetzel 1962, 29; Zolo 1995; Ferrajoli 1997).

It was only after the second world war that the field of application of universal jurisdiction was further enlarged to include crimes against humanity in general. In Papadatos' view this resulted from the fact that the conscience of the civilized world reached the point of conceiving fundamental human rights not as an internal question of each state but as an imperious postulate of the international community (Papadatos 1964, 46). This postulate was consecrated in international law by the Universal Declaration of Human Rights of 1948 and by a number of conventions after World War II.

One of the great advances of Nuremberg was the recognition of individual criminal responsibility combined with the rejection of the doctrine of the "act of state" in international penal law. The most striking aspect of this advance was that it presupposed the limitation of the principle of sovereignty. In the present-day world sovereignty is no longer accepted in its absolute form and it no longer corresponds to reality either on the national or international plane. (Papadatos 1964, 73; Zolo 1995)

Several authors (e.g. Papadatos 1964, 73-74; Zolo 1995; Ferrajoli 1997) have argued that according to the modern concept, the sovereign state is no longer an absolute power which bears within itself its limits and its end. The rights of a state have limits and end at the point where their exercise might endanger the peace and security of other states. Each state merely has a sphere of competence which is set by international law. In the international community, international law then becomes the supreme regulator which grants rights and sets the responsibilities of the states who are members of that community. Law at the mercy of states has given way to that of law above states.⁶

Israeli Jurisdiction

Adolf Eichmann was neither tried *in absentia* by the IMT or any of the subsequent Nuremberg Trials nor by an international criminal court later established but was tried by a national court in Jerusalem. However, Israel was by no means unprepared for his case. Although it did not exist at the time the Nazi crimes were committed, the State of Israel did not hesitate to grant itself the right to judge the perpetrators under the principle of the universality of the punishment of these crimes. In its claim to have the right to try Eichmann it leaned both on certain principles of international law and national jurisdiction.

The national legal basis for the trial of Eichmann or any other Nazi criminal in Israel had been laid ten years earlier in the Law against Genocide and the Nazis and Nazi Collaborators (Punishment) Law which was among the first laws enacted in Israel. This law was partly derived from then existing international criminal law and especially from the practices followed in the war crime trials after World War II. It set out the factual element of crimes against the Jewish people, crimes against humanity and war crimes specifying them in identical fashion with the London Agreement.⁷

On the other hand, it contained national characteristics which differed from the basic principles of international law. It was an exceptional law even in national terms in the sense that it reintroduced

the death penalty earlier abolished in Israel for the punishment of Nazi criminals and their collaborators. According to Israeli understanding, the Nazi crimes were so extraordinary that the only conceivable punishment for them was the death sentence. It also provided for the punishment of certain acts already made punishable by the Israeli Penal Code when these were committed in enemy territory, during the period of the Nazi régime and against a persecuted person. It was intended to ensure the punishment of the criminal acts by means of which the criminal persecution by the Nazis of their political and racial enemies was mainly carried out (Papadatos 1964, 34-35).

However, in general terms the Israeli law did not dramatically go against earlier international practice. The earlier Nazi criminal and war crime tribunals also had to resolve the problem of retroactive legislation and other questions of more or less the same character as the Israeli law. The main difference lay, perhaps, in the fact that the latter lacked a statute of limitations unlike, for example, the German war crime and Nazi criminal laws which expired in the mid-60s because they contained a statute of limitation of twenty years.

Nevertheless, the Israeli legislation could not lean on an anonymously established set of international norms, not to mention international laws, simply because such were still lacking at the beginning of the 60s. The earlier Nazi war crime trials provided only a precedent which was continuously contested by a number of lawyers especially those representing the German school of legal thought. Although the League of Nations had already expressed an urgent need for establishing a permanent international criminal tribunal, such a tribunal had never been founded. All the tribunals for trying Nazi criminals had been occasional and had been suppressed immediately after the trials.

Thus, the formal legal basis for trying Eichmann had to be built by combining retroactive national legislation with a set of precedents provided by earlier Nazi war criminal trials. The available set of precedents and international jurisdiction were defective, leaving room for different interpretations. No wonder then that the debate over the legal basis and justification for the trial burst out almost immediately after Eichmann's capture and soon spread from the pages of daily newspapers to periodicals and journals of law.

The Eichmann Trial in International Law

Right from the beginning professional debate over the Eichmann case was intertwined with two other ongoing debates. One of these was concerned with Jewish identity and the fate of Judaism and Zionism after the establishment of the state of Israel. The second was concerned with the moral and ethical justification for the capture and trial of Eichmann. Since most writers did not satisfy themselves with dealing only with one of these aspects, it is virtually impossible to classify the contributions as belonging only and exclusively to one of these debates. Especially the moral and juridical debates were intertwined in such a way that they may be read as contributions to one and the same metadefate. As I pointed out above, this metadefate was concerned with the foundations and principles of the Western judicial system and its criteria for doing justice: the Western conception of justice and the rule of law turned out to be totally unprepared and insufficient in the face of Nazi crimes which went beyond any conventional conception of crime. Correspondingly, moral and juridical arguments may be read as two different types of answer to the same basic questions.

In other words, in the debate, there were two metathemes under scrutiny which went beyond ordinary judicial practice and which shaped the debate in a decisive way. On the one hand, the trial was approached as a test case of the then existing principles of international law. On the other hand, what was at stake was the nature of Jewish identity and the future of Israel as a Jewish state. If these two issues are situated on a more metatheoretical level they can be seen as contributions to one and the same great debate which was that between legal positivists and "moralists" concerning fundamental justifications of the Western judicial system.

The Principles of International Law in Court

One of the sceptics as to the impact of the Eichmann trial on international law was D. Lasok, who considered it extraordinary in two ways. He predicted that it would go down in history not only as a

trial without precedent because of the enormity of the charges but also because it was likely to perpetuate and deepen the controversy provoked by the Nuremberg War Crimes Tribunal (Lasok 1962, 355).

One of the problems provoked by the Nuremberg trials was the validity of the principle *nullum crimen sine lege* generally respected in the Western judicial system. Lasok pointed out that ordinarily, in the province of municipal law, the principle *nullum crimen sine lege* was enshrined as a guarantee against the abuse of power through retrospective legislation. In other words, its purpose was to protect individuals against arbitrary treatment by the state. On the other hand, it should operate to ensure a fair trial and protect those who come to court with clean hands and a clear conscience. (Lasok 1962, 365-366.)

However, the case of the Nazi war criminals was different. They did not come to court with clean hands but rather pleading that their deeds should be considered as acts of state as far as they had acted under the orders of the Third Reich. Thus, in their mind not only the *nullum crimen sine lege* principle should have been considered as valid but also the act of state principle which ruled out personal responsibility.

Faced with these kinds of criminals the Nuremberg Tribunal decided to rule out both the principle of *nullum crimen sine lege* and the act of state. In so doing it paved the way for the idea that states are not organic personalities but merely forms of organisation and that crimes against international law are committed by men, not by abstract entities. Thus it is only by punishing individuals that the law can be vindicated. (Lasok 1962, 366.)

Nevertheless, in Lasok's view, the real problem with the Eichmann trial was not with these developments in international law. He argued that the trial constituted a very dangerous precedent in another sense: "When a man is spirited away from the protection of a sovereign State and put on trial by his captors for crimes which he allegedly committed in some other country or countries, against people who were related only by bonds of race or religion to the country in which he is tried, such country not even having been in existence when the crimes were committed, all formal barriers separating arbitrariness from administration of justice appear to be broken." (Lasok 1962, 372-373.) In other words, the major problem with the

Eichmann case lay in the way Eichmann was brought to trial. This undeniably illegal way would provide international law with a dangerous precedent for corresponding cases in the future if abused by criminal states.

The Eichmann trial constituted a dangerous precedent also in another sense. As far as it rested on a synthesis of international and national precedents it also constituted a precedent for arbitrary combinations in the future. More precisely, the Eichmann case might encourage general principles of international law and a fair trial to be neglected and pave the way for the practice of organizing trials of international criminals on an *ad hoc* -basis also in the future. Thus, in Lasok's view the fundamental problem with the trial was that it "exposed one of the chief defects of the [existing] system of international law, namely, the absence of an International Criminal Tribunal, and has reminded the world that something must be done in order to avoid international justice remaining in the hands of victorious nations or individual States acting like international 'vigilantes'." (Lasok 1962, 373-374.)

Unfortunately, although the Eichmann trial plainly exposed these defects it did not manage to precipitate the development of international law. On the contrary, Lozier (1963, 75) had good reason to complain that efforts commenced in a spirit of post-war *élan* to develop an effective international criminal code embodying the principle of individual responsibility had foundered. They had foundered not because of Israel's exceptional conduct in the international community but because sovereign states had been reluctant to commit themselves to international projects of such far-reaching consequences. They had turned out to be hopelessly reluctant to develop international codes against extreme crimes, jealously guarding their own irreducible sovereignty.

The Nature of Jewish Identity in Court

If the legal aspects of the Eichmann case aroused considerable controversy, even more so did its significance for the fate of Jews and the state of Israel. In one of the first and most powerful contributions in this debate Yosel Rogat pointed out that the explicitly admitted mo-

tive of Israel for organizing the trial was to teach rather than to punish: although it is normally maintained that using the law for ulterior purposes immediately endangers its dignity, it has to be admitted that ideally, law should also be a teacher. More precisely, the relationship between law and moral attitudes is a reciprocal one: legal rules do not always follow in the wake of moral attitudes but it is also the case that moral attitudes are changed by what is legally permitted or forbidden. Thus, in Rogat's view it was essential to ask whether Israeli authorities managed to do what they wanted to. (Rogat 1961, 4.)

In order to answer this question one needs to determine who was on trial. In Rogat's view it was precisely here that Israeli authorities failed to teach the world. Their strategy was to depict the profile of an arch-slaughterer, an inhuman monster, a psychotic whose evil went beyond normal human understanding. This was a serious mistake. It did not teach anything because it did not force people to rethink anything or involve anybody personally:

"It is psychologically easy for us to relate these terrible events to an inhuman automaton; such a perception leaves us relatively comfortable by placing the greatest distance between us and responsibility for evil. Since by 'monster' we really mean 'inhuman', it is easy to see little or nothing of ourselves in him. On the other hand, we could be touched and changed only if we were forced to realize what countless ordinary men, because of weaknesses, deficiencies, and susceptibilities like our own, were led to do. We all resist learning about the ways in which we contribute to injustice and cruelty; and in order to affect our sense of responsibility so that we can more effectively guard against dangers like anti-Semitism the trial had to confront us with hard knowledge rather than with easy lessons." (Rogat 1961, 8.)

In other words, instead of doing its best to show how extraordinary Eichmann's crimes were in their inhuman monstrosity, Israel should have done the opposite. It should have tried to show that despite his plain ordinariness Eichmann was able to commit awful crimes and that he was far from being irreplaceable. If he had not been there, somebody else would have committed the same crimes. This would have invited others to consider their responsibility and complicity. It would have suggested that it is not enough to stare at

Eichmann's individual deeds without relating them to what others did in the mean time. More precisely, Eichmann's individual deeds ought to have been considered in connection with the structures of evil in operation. This kind of approach would have shown that neither the structures of evil nor individual deeds needed to be monstrous in order to produce a nightmarish result. (Rogat 1961, 9-10.)

Further, Rogat argued that in this connection the problem with the law is that it is not able to retain ambiguities. A trial is a process in which individual deeds are judged. It inevitably simplifies relations and structures of responsibility. A trial is structurally composed in such a way that by convicting somebody it absolves all others. Thus, against all Israel's attempts and desires, the Eichmann trial absolved the rest of the mankind from all responsibility for the Nazi horrors. It did not encourage anybody to consider how to prevent similar atrocities in future. (Rogat 1961, 11.)

Moreover, Rogat points to the fact that the Eichmann trial could not really lean on the normal ideal of trial and punishment as a process by which certain deeds are reconciled. If there was ever agreement about anything it was that Eichmann's crimes were irreconcilable and unforgivable. The Eichmann case simply breaks the principle of a normal trial that the punishment fits the crime. In other words, Eichmann's punishment could not possibly follow from what he did. This leads to the breaking of another principle of the normal law process. As far as Eichmann's crimes were incommensurable and as such irreconcilable, his punishment could not be justified either by the ideal of reform of the criminal or deterrence of others. (Rogat 1961, 11.)

Nevertheless, Israel preferred to deal with Eichmann as a normal criminal case and this caused a number of serious problems. By trying Eichmann for a crime, Israel suggested an analogy to ordinary legal phenomena. The problem here was that reducing the unique historical events at issue in the trial to legally manageable proportions risked leaving out too much that was vital. In other words, what is at stake here is the capability of a normal legal process to deal with all kinds of problems. Is there really any sense to try to reduce all kinds of problems to legal processes or criminal cases?

Rogat's reply is that legal processes are not necessarily appropriate for the solution of all problems. He suggests that perhaps events that transcend all of our categories of judgment should not be thrust into categories of law. (Rogat 1961, 13-14.)

After all these reservations placed on the Eichmann case as a normal legal process Rogat linked its ultimate justification elsewhere to Jews, Jewishness, and Israel. In his view the consequences of the trial for Jews constituted a basic part of the trial's significance for Israel. In this connection the strategy chosen by the prosecution was of vital importance. It did not only try to tell the world what Israel did to the Jews, but also to tell the Jews what the world did to them. Its message was that the Jews were better never to trust the gentile world which had proved to be intrinsically hostile towards them. Consequently, the Jews could find relative security only by banding together in Israel. (Rogat 1961, 16.)

It is important to see that what was at stake here was not a simple political tactic to deal with the case but rather an integral part of Israel's self-understanding. Israel's Prime Minister David Ben-Gurion by no means wanted to convince the world that the Jews wanted to share the world on equal terms with other people, being a nation among nations, rather he attempted to show and demonstrate the specificity of the Jews above the other nations. This is why Israel took for granted its leadership of world Jewry and its right to speak for all Jews without giving much weight to the fact that this assumption contained within itself a set of propositions about Jewishness and about the very nature of the personal identity of modern Jewry. (see Ben-Gurion 1960; Segev 1993.)

Thus, Rogat argues, the trial may be seen as part of Ben-Gurion's constant effort to galvanize all Jews into tense self-consciousness of their heroic destiny and as part of his desperate attempt to prevent Israel from becoming like other nations. (Rogat 1961, 18.) In other words, for Ben-Gurion Jewishness was not a product of individual choice but of belonging. The individual can no more completely determine the way in which he is a Jew than he can dissociate himself and cease to be a Jew. In this context the trial presented for Rogat a daring attempt to exert communal authority by utilizing all the primitive symbols and resources of a tribal community:

“to conform Jewish identity by the traditional device of relating the story of their persecution, as in the Passover retelling of Pharaoh’s cruelty; to link Jews of the present and future to those of the past and to Israel through a unique and demonic historical event; to assert that because of their extraordinary experience and history Jews cannot escape their extraordinary role (destiny?); to hold, in fact, that they cannot themselves choose because they were chosen.” (Rogat 1961, 19.)

Ben-Gurion fought desperately against the view according to which the self, too, is an artifact. He denied that personal identity can be created by individual action and freedom and asserted that it can only be discovered by understanding one’s own tradition. (c.f. Ben-Gurion 1960.) In Rogat’s understanding, what is important in all this is that it creates the greatest irony of the trial, which was that its two antagonistic forces – Israel and the Nazis – had both asserted the older view of membership and identity. They were at one in their opposition to the rootless, cosmopolitan, and atomized individual. (Rogat 1961, 21-22.)

Hence, what was at stake during the trial was no more and no less than the nature of Jewish identity. Ben-Gurion and his henchmen defended an archaic, tribal way of looking at the world against those who preferred to think of it only in personal terms. In Rogat’s view, it is important to see this stratum of weighty feelings and sentiments brooding beneath the urban, Western, progressive, and scientific atmosphere of modern Israel in order to appreciate the full historical significance of the trial. It would be a serious mistake, however, to assimilate them to contemporary conservatism. They rather antedate all modern patterns of thought, stressing traditional authority and commandments against individual conscience, group bonds against personal commitments, and social duties rather than individual rights. (Rogat 1961, 20.)

It is precisely in this context that certain aspects of the way the trial was conducted were, in Rogat’s view, highly questionable. First and foremost, there was Israel’s failure to consider the importance of the judge’s perspectives, and to distinguish the roles of prosecutor, judge, and victim. More precisely, Israel’s very act of establishing a unique right as a victim to prosecute put into question its right to judge. One of the cornerstones of the Western judicial system is the

impartiality of the court. In the spirit of this principle the victim cannot prosecute because the tribunal needs to be structurally established in such a way that it does not allow the possibility of doubts about impartiality. In other words, the trial does not need to be fair only in practice but it also needs to appear fair. The Israeli court went against this principle in every possible respect not least because it explicitly argued that in this case the victim was the best possible judge. (Rogat 1961, 36-38.)

Secondly, Israel totally failed to understand its role as a member of the international community. It did not understand that if it really wanted to contribute to the development of international law, it could not use an internationally significant case for its national purposes. The fact that existing international law was partly insufficient did not give any excuse for not respecting the norms of the international community. Rogat stresses the fact that international law can develop only as far as the members of international community respect and cherish its principles and bring those to justice who do not. (Rogat 1961, 41-43.) The Eichmann case was one proof more that Israel did not really want to belong to the international community as an equal member but wanted to be regarded as a special case or exception.

The Case of Moralists versus Legal Positivists

As I pointed out above, there were, among the lawyers, also those who enthusiastically supported the trial. It was characteristic of these supporters that they did not focus only on the legal issues of the case but also emphasized the moral aspects. For the defenders of the trial it was not a normal case at all but rather a heroic episode in humankind's brave fight against superhuman evil and antisemitism. Unlike for instance Rogat, they focused on Eichmann's evil as something extraordinary:

“Neither the cult of obedience nor the daily preoccupation with the technical tasks of extermination will explain the phenomenon presented by the career of Eichmann. Some more active, dynamic, positive force is required to explain such a unique happening.” (Draper 1962, 490.)

The understanding of Eichmann's evil as superhuman and extraordinary also shaped the defenders' understanding of the ultimate justification of the trial. For instance Draper argued that the Eichmann trial was first and foremost a case against antisemitism and as such it should not be seen as a case of international law but rather as a case of Jewish law. He praised the contribution of the judges as a feat of high judicial integrity. As a result, "out of the great Catastrophe in the history of the Jewish race a judicial precedent has been forged that can stand without fear as a lasting tribute to Jewish justice, and as an event of which the State of Israel may justifiably be proud." (Draper 1962, 493.)

Perhaps the most powerful and influential contribution of the moralists was presented by Helen Silving who attempted to make a case in Jewish law without totally refusing general principles of international law. On the contrary, she tried to construct the Eichmann case as an extreme situation in which conventional legal norms were not sufficient to do justice. From this standpoint she argued against the maintenance of a purely positivistic legal system and wanted to replace it with a kind of ethical viewpoint which would mix and combine positive law with natural law. She identified three principles on which international law should be based:

"(1) international law must guard itself against indiscriminate claims to 'government by natural law'; (2) its basic approach should be 'positivistic', that is, aimed at preservation of the principle of 'the rule of law'; but that (3) in exceptional situations in which positivism leads to sacrifice of the spirit of justice to its letter, international law should not disregard the relativity of 'positive' and 'natural law' and should have the political courage to relax rule by 'positive law' in order to avoid flagrant injustice. This implies a 'minimum measure of natural law' which might, in case of conflict with 'positive law', override the latter." (Silving 1961, 309)

What is of interest here is obviously the third point. How is international law supposed to avoid flagrant injustice by relaxing rule by positive law, i.e. by having recourse to natural law or to extra-legal measures and principles? Further, who is supposed to decide where the point at which to relax the rule of positive law is? Silving's answer is that it should be decided case by case by the civilized nations

of the world. They should determine whether a concrete situation evinces such disproportion in strength between the natural-law interest and the positive-law claim as to make sacrifice of the former to the latter appear a surrender of the spirit of justice to its letter, evoking in the conscience of a majority of average people a sense of injustice. (Silving 1961, 310.)

In Silving's view the Eichmann trial fulfilled this basic criterion in three respects by combining the elements of "(1) a conflict of a positive-law claim based on a tangible thinghood-interest, territorial inviolability, with a natural-law humanistic interest; (2) a clash of the positive-law claim with a minimum natural-law demand based on a human interest which has been unanimously recognised by all nations, including the claimant, to be justified both in quality and in intensity; (3) a disproportion between the concrete value deprivation of the positive-law interest and the value of the natural-law interest in the issue." (Silving 1961, 331.)

Given these three elements, attention should be focused on the symbolic meaning of the trial as its utmost justification. In Silving's view, this symbolic meaning was constituted by Israel's unique task to present the Eichmann trial as a warning against future aggression. Israel's special fitness to try Eichmann resulted from her mission as a haven for survivors of the National Socialist regime and as a country created for the very purpose that crimes against "Jews" as a group may never be repeated. (Silving 1961, 332.)

This argument alone would suffice to render Silving's reasoning highly peculiar as far as it awarded Israel an entirely exceptional and morally higher status among nations. What makes it even more extraordinary is the meta-juridical basis introduced by it. Namely, it does not hesitate to switch from secular systems of thought to sacred texts as unquestionably higher moral authorities than anything ever produced by human beings:

"No legal treaty, statute, judicial decision, custom or doctrinal treatise could give Israel's claim to try Eichmann more persuasive support than does the legal ethics symbolized in the Roll of Esther. The lesson taught by this most legalistic book of the Bible fits the facts of the Eichmann case with stupendous accuracy. The crime recorded in the book was 'genocide', the attempted destruction of 'a people'. This destruction was

decreed in the then form of law, i.e., in writing sealed with the king's ring, a 'people' being given to one man 'to do with them as it seemeth good to [him]'. Once sealed, the decree became final and irreversible. To meet the social necessity of the situation, a legal device was invented – a device which has since become part of every known legal system as the principle or institution of 'self-defence'. Significantly, the latter was decreed in the form of law, as a 'legal right of self-defence'." (Silving 1961, 332.)

On the basis of this reasoning Silving concludes that the utmost ethical and judicial value of the Roll of Esther lies in the fact that it transforms a natural human reaction, self-defence, into a positive natural right. Consequently, faced with such analogical extreme crimes as those of Eichmann the international community may have recourse to this ethical principle as a justification for a certain legal procedure. In Israel's and Eichmann's case this meant that no one could more effectively document the Biblical 'right of self-defence' of the people whom Eichmann sought to destroy than a new nation created and dedicated to the proposition of serving as a haven for that people, regardless of whether or not Israel was otherwise entitled to represent all Jewish people of the world. (Silving 1961, 333.)

There are two conspicuous problems in this reasoning as far as it is supposed to be an ethical argument based on natural law. First and foremost, it does not tell the whole story of the Roll of Esther. Had Silving also told the rest of it, she would have been in difficulties with morally justifying a procedure which did not only introduce a politically highly valuable and morally easily defensible principle of self-defence but rather a profoundly peculiar version of self-defence. The genocide planned by Haman never took place because the Jews were warned in advance and defended themselves in time. What took place instead was a kind of preventive revenge: the Jews hurried to destroy their enemies before these had started to act. If this part of the story is taken into account it is very questionable whether it really provides an unambiguous ethical precedent or criterion for later cases of rendering justice. Applied to the case of Eichmann and other Nazis it would suggest that these could and should have been destroyed without trial already during the 30s on the basis of their evil intentions.

Secondly, Silving's reasoning raises the question as to which the generally recognized and commonly shared ethical authorities in the international community are. She treats the Bible as a universally shared religious and moral authority without taking into account that it is such only for Jews and Christians. It is legitimate to ask why the rest of humankind should accept these old stories as authoritative books of law.

It might, indeed, be suggested that the Roll of Esther should not be read as a book of ethics and even less as a book of law but rather ought to be seen as the political manifesto of an oppressed group of people. It is valuable in its claim of self-defence and its encouragement to resistance, but this claim clearly belongs to the realm of politics, not of ethics or morals. It might even be argued that during the 30s European Jews did not remember the message of the Roll of Esther as far as they refused to believe stories of Nazi atrocities and waited for too long to organize a mass escape.

Silving's unhesitating recourse to Jewish law is rendered even more unfortunate by the fact that she fully understood and recognized the novelty of the situation of the Eichmann trial and the problems posed by such a situation to international law. She correctly pointed out that the Eichmann case raised the issue of rule-making *contra legem*, of the progress of law through recognition of the norm-creating power of facts or the morality emanating from them, where they clash with positive law. (Silving 1961, 339.)

However, from here it does not necessarily follow, as she believes, that in the case of conflict between positive and natural law the latter should win. She does not take into account the fact that despite its name natural law is not natural in the sense of being universally and eternally valid supra-human law but is as human and human-made as positive law.

As far as I can see, there are two fundamental problems in Silving's reasoning. Firstly, she regards natural law as morally and ethically superior to positive law and as such necessarily a higher authority. More precisely, she surrenders in the face of extreme crimes, believing that people are not really able to deal with them without some kind of suprahuman authority taking at the same time for granted that the morality of, say, the Bible, is of a higher nature than later

secular modes of thought. In the final analysis one may suggest that this is a reasoning which needs a god in order to justify itself: human beings are not able to create a firm enough jurisdiction. Therefore there must be a higher justification and authority behind everything human-made. From this it inevitably follows that “in certain extreme situations even in international law the need for the admission of a minimum measure of ‘natural law’ may be so great as to call for relaxation of ‘positivistic’ rule.” (Silving 1961, 346.)

Secondly, her reasoning postulates for Israel a morally extraordinary position among the world’s nations which cannot but gnaw away at the principle according to which international law, if it is really supposed to equally bind all humankind, should be based on the idea of equality of all the nations and people of the earth which includes the idea that also the duties and rights of the nations are equal to each other.

This emphasis of the extraordinary position of Israel stems from Silving’s conviction that the holocaust was not so much an event which obliges all humankind but is rather a catastrophe of the Jewish people and should also juridically be dealt with as such. This conviction leads her to make a causal connection between the annihilation of European Jews and the birth of Israel which rises as an authoritative inheritor and moral legislator of the catastrophe (cf. Friedländer 1987).

From Ethics to Politics

As we saw above, there was no general agreement either on the legal basis of the Eichmann trial itself or its significance for international law although most writers did not condemn it as being entirely wrongful but rather considered it as a unique case in the development of international law. This is no surprise given that even the debate over its legal precedents – the Nuremberg trials – was not over but rather divided lawyers into different views and schools of thought.

Despite all the disagreements the lawyers did agree on one fundamental point. This was a shared understanding that the Eichmann trial should not have been approached simply as a single case in the

long list of Nazi trials but should rather have been dealt with on a higher metatheoretical level. More precisely, the Eichmann trial was not only the culminating point and end of the Nazi trials but it also brought to the fore the question of the basic foundations of the Western judicial system. In a dramatic manner it awakened the question of what kind of criteria international criminal law should be based on: from what kind of law it should draw its legitimation.

In this dispute, there were two main lines of argument. On the one hand there were legal positivists who maintained that law and jurisdiction should be self-sufficient in the sense that they should not be based on an external justification of any kind. In other words, the legal positivists firmly maintained that also in the Eichmann case the existing legal order should be respected. Subsequently, the Eichmann trial should have been seen as a case in international law instead of defining it as an extreme or otherwise extra-legal case to be treated exceptionally. In the legal positivists' understanding, as a case of international law, the Eichmann case spoke powerfully for a need to develop the international legislature to such a point that it would equally bind and commit all the nations of the world.

On the other hand there were "moralists" who believed that in extreme and unprecedented cases such as Nazi crimes it was legitimate to search for a moral justification outside the realm of positive law. They believed that this supra-legal justification could be provided by natural law which they saw as an indisputable suprahuman authority above human-made laws and norms. In the legal positivists' view jurisdiction should not be confused with ethics and morality even though the ultimate purpose of law is always ethical as far it aims at doing justice. In the moralists' view positive law could not do without ethical systems and moral laws because in the final analysis only they could provide law with firm moral justification.

From this standpoint they challenged the legal positivists by exposing the Eichmann case as an entirely unprecedented and extraordinary case which could not be approached and treated as a normal criminal case. As far as Eichmann's evil was extraordinary and superhuman his case was ethical rather than criminal. Subsequently, it could not be treated using the tools of positive law, rather fundamental principles of natural law were needed to deal with this case at all. By dint of the natural law argument it was also possible to

justify Israel's task as the organiser of the trial. As far as the Jewish state was a natural inheritor of European Jews and a living witness of their sufferings it was not only Israel's right but also her duty to take care of this case.

With hindsight it is easy to see that both the legal positivists' and moralists' arguments were to some extent inadequate. This is not because they failed to make their case convincingly or argued badly but rather because their case was partly mistaken. They did not see that Eichmann's crimes were not simply ordinary crimes or ethical failures but rather political by their nature. It is precisely because of their political nature that any judicial or ethical system fails to deal with these kinds of crimes in a satisfactory way.⁸

One of the very few who understood this came from outside the ranks of lawyers. She was Hannah Arendt who attended the Eichmann trial as a reporter for *The New Yorker*. In the epilogue of her report she pointed to Eichmann's basic crime:

"... there still remains the fact that you have carried out, and therefore actively supported, a policy of mass murder. For politics is not like 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." (Arendt 1963/1965, 279)

This argument was based on Karl Jaspers' distinction between crimes against humanity and crimes against humankind (see note number one above). The former may be awful, enormous and go beyond human understanding but still remain in the realm of ordinary violence and destruction meant to defeat the enemy whereas the latter constitute a violation of a basic and unrenouncable human right to exist and share the earth with other people. This right goes beyond all the legal standards and ethical principles and subsequently its violation is political by nature.

By this Arendt did not want to say that Eichmann should not have been punished at all but rather that in the face of Eichmann's crimes

any legal procedures inevitably remained insufficient. Eichmann had to hang because nothing else could be done but the real problem and challenge lay in the question of how unprecedented, extreme political crimes should be dealt with in the future.

Arendt pointed out two things. Firstly, she maintained that as far as crimes committed by individuals are concerned they cannot but be treated by normal legal procedure without escaping behind arguments of collective guilt or acts of state. The Eichmann case had rather showed, once again, that people were far too willing to deny their personal share of responsibility in politically extreme situations.

Secondly, however, she suggested that individual and political responsibility are the same:

“This, of course, is not to deny that there is such a thing as political responsibility which, however, exists quite apart from what the individual member of the group has done and therefore can neither be judged in moral terms nor be brought before a criminal court. Every government assumes political responsibility for the deeds and misdeeds of its predecessor and every nation for the deeds and misdeeds of the past ... It is quite conceivable that certain political responsibilities among nations might some day be adjudicated in an international court; what is inconceivable is that such a court would be a criminal tribunal which pronounces on the guilt or innocence of individuals.” (Arendt 1963/1965, 298)

Alas, this is precisely what has been done since the days of the Eichmann trial. There have been attempts to resolve the problem of totalitarian governments and their criminal policy by establishing the Criminal Court of The Hague which is supposed to punish entire nations by punishing individuals. This is not to say that these criminals should be allowed to go free. It is rather to say that until today the difference between juridical, ethical and political aspects of human conduct has not been understood. It is to say that the problem of crimes against humankind which during the 20th century became a recurrent phenomenon on the earth cannot be resolved by juridical means in a satisfactory manner.

After World War II the insufficiency of juridical means has been admitted and recognized by a significant number of theoreticians who speak for the establishment of a world government as a new

form of cosmopolitanism. This idea is linked to the by now inevitable globalization of the economy, politics and culture.⁹ The basic idea promoted by these authors is that in the entirely globalized world of the 21st century, the interaction of people can no longer be based on national states which have lost their status as principal actors in world politics (see e.g. Zolo 1995). Roughly speaking, theories of world government and globalization can be divided into two groups. On the one hand there are those who speak for “strong” cosmopolitanism (e.g. Held 1993) suggesting that what we need is a generally authorized world government which really has authority over national and local governments. On the other hand there are authors who speak for “weak” pacifism (e.g. Zolo 1995) suggesting that we should rather develop a mechanism of political negotiation composed of different types of actors such as international organizations made up of national states and voluntary organizations such as Amnesty International.

The latter theories are based on political realism according to which conflict is the hard core of politics and will remain such. From this follows that the idea of world government is and will be unrealistic as far as political actors on different levels will never be willing to “surrender unconditionally” to any global authority. It might be possible, instead, to establish a mechanism of political negotiation by dint of which political conflicts could be negotiated and settled case by case. The guiding principle of this idea is that this kind of mechanism for political negotiation requires a certain amount of involvement and commitment in advance but it does not unconditionally subordinate its members.

I consider this scheme to be highly valuable and worth advancing. However, it is my argument that it needs to be complemented by Arendtian and Weberian ethics of responsibility in order to really understand what kind of involvement is at stake:

“... the maxim of the ethic of responsibility, which means that one must answer for the (foreseeable) *consequences* of one's actions ... If evil consequences flow from an action done out of pure conviction, this type of person holds the world, not the doer, responsible, or the stupidity of others, or the will of God who made them thus. A man who subscribes to the ethic of responsibility, by contrast, will make allowances for pre-

cisely these everyday shortcomings in people. He has no right, as Fichte correctly observed, to presuppose goodness and perfection in human beings. He does not feel that he can shuffle off the consequences of his own actions, as far as he could foresee them, and place the burden on the shoulders of others. He will say, 'These consequences are to be attributed to my actions.'" (Weber 1919, 359-360)

Applied to the contemporary politics of weak pacifism this maxim means that the participants engage in and commit themselves in advance to partly unforeseeable consequences of decisions and agreements made together with others involved in these actions. More precisely, distinct from a world government in which the participants engage in a certain structure of action, the ethic and politics of responsibility commit the persons involved to certain decisions made and deeds done together. In other words, engagement and involvement are negotiated case by case. Thus, it does not require permanent engagement in an established structure of government and authority.

In my view, this kind of scheme for global interaction is not only more realistic than the idea of world government but is also more equal and democratic as far as it is based on recurrent negotiation of conditions of cooperation. In this scheme it can never be taken for granted that the participants silently consent to decisions made by a government above them. It renders impossible a situation which Hannah Arendt saw behind every form of totalitarian or despotic government cited above, one in which support and obedience are the same.¹⁰ On the contrary, a situation in which the support of every participant has to be won by negotiation case by case is radically democratic.

Notes

- 1 I have dealt with the Eichmann trial from the perspective of political judgment in Parvikko 1998. Both this and the present article are parts of my research project on political judgment after the collapse of European tradition of political thought. In the present article I deal with political aspects of international law from a deliberately narrow perspective of

criminal law leaving a more exhaustive discussion of the political nature of international law to my forthcoming book on Hannah Arendt's conception of political judgment as a theoretically untamed human activity.

- 2 Ordinarily, in international law, one speaks of crimes against humanity. However, here I follow a distinction suggested by Karl Jaspers according to which we ought to distinguish between crimes against humanity and crimes against humankind. The former, or crimes against humanity (*Menschlichkeit*) are all those atrocities which are perpetrated against the enemy whereas the latter, crimes against humankind are all the atrocities committed against the unrenouncable right of everybody to live on the earth. In other words they are concerned with the question of which groups of people are permitted or not permitted to live on earth (see Jaspers 1966, 35). I will come back to this distinction in the Conclusion.
- 3 For historical background of new cosmopolitanism see Zolo 1998 which also gives a good picture of contemporary discussion on the theme. The most important predecessors of the advocates of new cosmopolitanism were pacifists of the League of Nations who spoke for elevating international conflicts above politics by dint of international jurisdiction.
- 4 Adolf Eichmann was captured by the Israeli intelligence service in 1960 in Argentina and smuggled to Israel for trial. The kidnapping caused objections in the United Nations and among people at large but it did not lead to any sanctions against Israel. Eichmann was interrogated and kept in prison in Israel until his trial in 1961. The trial lasted over four months and was passionately followed and heatedly discussed all over the world. Eichmann was hung in spring 1962.
- 5 The doctrine of sovereignty had been the most important principle in the interaction of European states from the peace treaty of Westphalia in 1648 on (see e.g. Zolo 1995; Ferrajoli 1997).
- 6 This view may seem too optimistic. We have repeatedly seen that there are a number of states in the world which simply do not respect international law but mistreat their nationals and break and offend against international treaties as they please without regard to international norms and standards. One of the latest and most striking examples of this is the policy carried out by Russia in Chechnya.
- 7 The London Agreement was subscribed to by nineteen nations in August 1945. It was one of the most important treaties made by the allied powers during and after World War II.
- 8 Generally speaking, it is characteristic of lawyers to reduce political questions to special or exceptional juridical cases. In other words, they prefer to define political problems in terms of jurisdiction.

- 9 For discussion about globalization see e.g. Beck 1997 which gives a summary of what has been said and suggested so far.
- 10 However, it is worth remembering that the idea of world government does not, as such, presuppose legal imperialism or any other sort of totalitarian government if it is admitted that it is only a government in which there always are different parties, groups, relics of states, persons and other actors who dispute with each other as in any other government.

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