

Memory, Politics and Law -- The Eichmann Trial: Hannah Arendt's View on the Jerusalem Court's Competence

By Thomas Mertens*

A. Introduction

When the true scale of what would later be called 'crimes against humanity', 'genocide' and, specifically, 'the Holocaust' became clear in the aftermath of the Second World War, a number of questions were raised. First, is this a new type of crime, in which evil manifests itself in a radically different way than it had earlier? Some disputed this. Evil exists at all times and it has always confronted people with an abyss of atrocities. With Rawls, one might then say that every 'great evil' is sufficient in itself and that making comparisons is not necessary, even if the Holocaust cannot be detached from earlier ravages of evil such as the Inquisition and antisemitism.¹ Others thought this question ought to be answered positively. Adorno and Levinas formulated their philosophies in part as a response to the unique character of the Holocaust. Even now, more than a half a century later, the events associated with the Holocaust form a rich source for public debate, scientific inquiry and literary expression.² Secondly, the question has been raised as to how one is to cope with this modern form of political evil and with a new type of criminal offender. Some argued in favour of the familiar recourse to politics and international law. Specifically, political crimes ought either to be dealt with politically or to be considered in the light of the principle of international law: *par in parem non habet jurisdictionem*. So, ordinary criminal law is not applicable where the mutual conduct of states is concerned. Others, however, including the Allied governments in the period immediately following the termination of hostilities,

* I owe special thanks to Bert van Roermund (Tilburg), Stanley Paulson (Kiel), Christian Joerges and Morag Goodwin (Florence).

¹ JOHN RAWLS, *THE LAW OF PEOPLES* 22 (1999). See, also, his *POLITICAL LIBERALISM* lxii (2nd ed., 1996).

² Some examples: the (ongoing) discussions on the Holocaust monument in Berlin; ROBERT JAN VAN PELT / DEBORAH DWORK, *AUSCHWITZ. 1270 TO THE PRESENT* (1996); JONATHAN S. FOER, *EVERYTHING IS ILLUMINATED* (2002).

argued that these crimes were such that punishment would be inevitable. This might give rise to legal problems, but these crimes ought to be dealt with to the extent possible by means of ordinary criminal procedure.

Hannah Arendt's controversial work, *Eichmann in Jerusalem. A Report on the Banality of Evil*, offers answers to the two questions adumbrated that follow the second line of reasoning. In her opinion, the Holocaust presented us with a new type of evil and a new type of crime, unprecedented in history and related to totalitarianism as a modern phenomenon.³ Since any new act entering into the history of humanity can become a part of its history, it is of the greatest importance that it be evaluated not only from a historical and moral perspective, but also from a legal perspective. For this reason, Arendt is both keenly interested in and supportive of the trials against the Nazi criminals. She even becomes involved – to some extent – in the debate over the legal basis of these trials, when, as a reporter for *The New Yorker*, she covered the trial against Nazi-officer Adolf Eichmann, conducted in Jerusalem in the early 1960's. In her coverage of that trial, she emphasized the novelty both of the crime and the criminal. According to her, 'the actual horror of Auschwitz ... is of a different nature from all the atrocities of the past'.⁴

In this article, I aim first to provide some background information concerning the trial and its protagonist. Thereafter, I will briefly turn to the reasons as to why Arendt's report aroused such controversy. Then, I will take up several legal problems that had to be overcome at the International Military Tribunal's proceedings at Nuremberg (in short, the Nuremberg Trial). Finally, I will discuss Arendt's legal assessment of the Jerusalem trial. In the course of the discussion, an important ambivalence in her assessment will emerge. This ambivalence turns on her interpretation of the Jerusalem court's competence on the basis of territoriality on the one hand and her view on 'crimes against humanity' as a crime to be adjudicated only by an International Criminal Court on the other.

B. 'The specialist'

On Monday, the 23 May 1960, Israel's Prime Minister David Ben Gurion made an important announcement in the Knesset in Jerusalem: the war criminal Adolf Eichmann, having eluded capture over a long period of time, had been kidnapped in Argentina by the Israeli secret service, the Mossad on the 11 May; he was secretly

³ As examined in: *THE ORIGINS OF TOTALITARIANISM* (1966) (ORIG. AS: *ELEMENTE UND URSPRÜNGE TOTALER HERRSCHAFT*) (1958).

⁴ HANNAH ARENDT, *EICHMANN IN JERUSALEM. A REPORT ON THE BANALITY OF EVIL* 267 (1992) (ORIG. 1963).

transferred to Israel on the 22 May and would soon be standing trial for his role in the Holocaust.⁵

Despite his relatively low rank as *SS-Obersturmbannführer*, Eichmann had long been considered to be among the most important organizers of the genocide of the Jews. His name circulated several times during preparations for the Nuremberg Trial. Eichmann, however, had been able to hide from the Allied forces, later finding safe haven in Argentina, where he began a new life under the name of Ricardo Klement. Now he would be required to account for his acts in a Jerusalem courthouse. Eichmann's trial, also known as 'trial 40/61',⁶ commenced on the 11 April 1961; after several hearings of very emotional testimony, the trial was concluded in December 1961 with the prosecutor's closing statement, the defence's plea, and the court's judgment. Eichmann was found guilty on several counts, *e.g.*, of crimes against the Jewish People, crimes against humanity, and war crimes. Under the 1950 Israeli 'Nazis and Nazi Collaborators (Punishment) Act', such crimes were punishable by death. Eichmann was indeed sentenced to death. Upon his appeal, his verdict was confirmed by the Israeli Supreme Court, and he was hanged on the 30 May 1962.

The trial would today be called a 'media event'. Arendt formed part of a large group of the press, the presence of which was one of the reasons of public awareness and discussion of the trial. In addition, television had entered people's lives and pictures of the trial were broadcast. Less well known, was the fact that all the hearings before the court were filmed.⁷ A few years ago, a film based on these tapes, entitled '*The Specialist*', was released. This film, lasting two hours, consists of some telling 'fragments' of the Eichmann Trial.⁸ To be able to watch these 'highlights' after so many years is fascinating and an interesting story on the making of this film can be told. The recordings made during the trial were stored and then forgotten. When they re-emerged after many years, their condition had seriously deteriorated. Large parts were beyond restoration, while other parts were seriously damaged requiring restoration costing considerable amounts of time, energy and money. That restoration was initiated by Steven Spielberg Jewish Film

⁵ For the precise background, see, for example, Annette Wieviorka, *Die Entstehung des Zeugen*, in: HANNAH ARENDT REVISITED. 'EICHMANN IN JERUSALEM' UND DIE FOLGEN 140 (G. SMITH, ED., 2000).

⁶ This then is the title of the report of the 'Dutch journalist' (*cf.*, H. Arendt, note 4, 282): HARRY MULISCH, DE ZAAK 40/61 (1961).

⁷ See Wieviorka (note 5), 149.

⁸ EMIL FACKENHEIM, *TO MEND THE WORLD* 237 (1982), comments on and rejects Arendt's thesis of the banality of evil as a result of those clips.

Archives.⁹ Subsequently, Sivan and Brauman took upon themselves the task of editing the material in the form of a film. In selecting and putting together the material, they, remarkably, decided to follow Arendt's book on Eichmann. By doing so, they opted for what was not only at the time of the trial itself,¹⁰ but even today, a highly controversial perspective.¹¹ Arendt's portrayal of the trial was by no means an unbiased report. In fact, it was problematical for no fewer than three reasons, even if we disregard the 'tenor' of the book. And this itself was seen by many as highly inappropriate.¹²

First, the central function of criminal proceedings, according to Arendt, consists in determining the criminal culpability of the suspect and not in giving expression to the severe suffering of the victims, unless the latter is instrumental to the main aim of the trial. The failure to recognize this pervaded, according to Arendt, the whole trial. During the hearings, she ascertained a shift from a focus on Eichmann to a focus on the victims. The use of criminal procedure for goals other than establishing criminal responsibility, such as the moral recognition of the victim's misery or education of the young,¹³ will necessarily have an adverse effect on its credibility. Moreover, the State of Israel in Arendt's view had a political agenda in conducting this trial. According to some in the political leadership, notably Ben Gurion, the Eichmann trial was intended to contribute significantly to strengthening both the identity of Israel's people and the legitimacy of the young state *vis-à-vis* the outside world. By extensively demonstrating the suffering of Jewish victims, the trial would cause people to realize that the decision to establish a Jewish state was justified.¹⁴

⁹ Not to be confused with the 'Survivors of the Shoah Visual History Foundation', which was founded by Spielberg after filming *Schindler's List* with an aim of capturing Holocaust survivors' testimonies on film, see <http://www.vhf.org/>.

¹⁰ This report led to a split between Arendt and Gershom Scholem, see, Stéphane Mosès, *Das Recht zu urteilen: Hannah Arendt, Gershom Scholem und der Eichmann-Prozess*, in: GARRY SMITH (note 5), 78. On the 'civil war' among intellectuals in New York, which was caused by Arendt's report, see, for example, Anthony Grafton, *Arendt und Eichmann am Esstisch*, in: G. SMITH (note 5), 57.

¹¹ DANIEL GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 592-3 (2nd ED., 1996).

¹² The element that was seen as most disturbing was Arendt's evil qualification of Leo Baeck, president of the Berlin Jewish Council, as 'Jewish Führer', a qualification she deleted in later editions of her book, ARENDT (note 4), 119.

¹³ Tuija Parvikko, *Positivists versus Moralists. The Eichmann Trial and International Law*, FINNISH YEARBOOK OF POLITICAL THOUGHT 4 223, 233 (2000).

¹⁴ *Id.*, 235.

These instrumental uses of the trial, however, would create the real danger, according to Arendt, of it becoming a show trial.¹⁵ In Arendt's rendering of the trial, Chief Prosecutor Hausner, in his eagerness to orchestrate the entire trial with an eye to these goals, is portrayed as the Israeli political leadership's puppet. His opening words are telling: "As I stand before you, Judges of Israel, to lead the prosecution of Adolf Eichmann, I do not stand alone. With me, in this place and in this hour, stand six million accusers."¹⁶ By presenting the state of Israel as the representative of the Jewish victims of the Holocaust, possibly even other audiences were addressed and the following messages sent: "Jewish community abroad, be sure that that the fate of the Jewish community as such is safeguarded by the State of Israel"; 'State of Germany, be very generous in paying compensation money.'¹⁷ Arendt is more than pleased that the presiding judges were much keener on sticking to their task. She comments positively on the work of Judges Raveh and Landau,¹⁸ both of whom concentrated on the accused and on the criminal charges. With her critical stance towards the prosecuting State of Israel, Arendt did not make herself popular and she was accused of having little compassion for the victims.

Second, Arendt's report was also controversial in another respect. The Eichmann Trial differed from the Nuremberg Trial in its emphasis on the Jewish suffering during the Holocaust. But this inevitably brought also another element to the fore, namely, the problem of the so-called Jewish Councils, the administrative bodies created by the Nazis in order to communicate with the Jewish population. Here, too, Arendt gives the impression of having not taken the side of the victims. Instead, she blurred the distinction between perpetrators and victims. In her rendering of the testimony given during the hearings, she suggests that these councils did not act unconditionally in the interest of the population but allowed themselves to some degree to be misused by the Nazis as an extension of their apparatus of destruction.¹⁹ By acting as part of the Nazi bureaucracy, these councils

¹⁵ See ARENDT (note 4), 9-10.

¹⁶ GIDEON HAUSNER, JUSTICE IN JERUSALEM 323 (1966).

¹⁷ RICHARD WOLIN, HEIDEGGER'S CHILDREN 55 (2001); Amos Elon, *Hannah Arendts Exkommunizierung*, in: SMITH (note 5), 25.

¹⁸ Because of the German-Jewish descent, compared to the 'Galician' Hausner? See: Hannah Arendt / Karl Jaspers, *Letter of April 13th 1961*, in: HANNAH ARENDT / KARL JASPERS. BRIEFWECHSEL 1926-1969 472 (1985).

¹⁹ Scholem protests fundamentally, especially against Arendt's harsh judgement: 'Ich finde in Ihren Darstellungen des jüdischen Verhaltens unter extremen Umstände kein abgewogenes Urteil, .. Ich masse mir kein Urteil an. Ich war nicht dabei', in: Mosès, note 10 above at 79. This is not a minor allegation, as Arendt prided herself in understanding political judgments very well, especially in: LECTURES ON KANT'S POLITICAL PHILOSOPHY (H. BEINER, ED., 1982).

undertook preparatory work for deportations and thus assumed to a certain degree a 'co-operative' stance *vis-à-vis* Nazi crimes. Arendt uses the following words to speak of this 'dark side' of the Jewish annihilation:

*"If the Jewish people had really been unorganized and leaderless, there would have been chaos and plenty of misery but the total number of victims would hardly have been between four and a half and six million people."*²⁰

This quotation also reveals another aspect of the Holocaust, underscored time and again by Arendt, namely, that a fundamental difference exists between antisemitism and the pogroms the Jewish people became 'accustomed to' during their history on the one hand and modern genocide on the other. In the debate on the Holocaust, she defends explicitly the position of 'functionalism'.²¹ From Hilberg's classical study *The Destruction of the European Jews* (1961),²² she learnt about the bureaucratic nature of the Holocaust and then stressed the necessity of understanding this genocide as a specific possibility of modern society. This functionalism evoked and still evokes fierce reactions. In general, it is argued that it overestimates the element of bureaucracy on the basis, in particular, of an inaccurate description of the Jewish councils' role. Moreover, it underestimates and fails to explain why this genocide targeted the Jews and why it happened in Germany. Goldhagen's *Hitler's Willing Executioners* serves as a recent, well-known example of the intentionalist school, which stresses antisemitism as the prime motive behind the genocide.

Third, and related to the previous point, Arendt's characterization of the 'kind' of evil which stood trial in Jerusalem, was also considered to be offensive. Altogether different from the prosecutor's attempts to portray Eichmann as a criminal of demonic dimensions, Arendt stresses the 'normality' of his character and the

²⁰ See ARENDT (note 4), 125.

²¹ In summary, functionalists stress the bureaucratic and modern character of the the Holocaust, which is than said to have begun by the end of 1941 as a result of the failure of the Nazi deportation and emigration policy and the military losses in Russia; Intentionalists argue that the Holocaust was actually willed and planned by Hitler from the very beginning of his political career. Functionalism in Arendt can already be found in her 1948 text: *Organized Guilt and Universal Responsibility*, e.g., in: COLLECTIVE RESPONSIBILITY 273 (LARRY MAY / STANLEY HOFFMAN, EDS., 1981). And in her report of a visit to Germany in 1949-1950, now e.g., in: HANNAH ARENDT, *BESUCH IN DEUTSCHLAND* (1973). See, for a 'functionalist view' deeply inspired by Arendt, ZYGMUNT BAUMAN, *MODERNITY AND THE HOLOCAUST* (1993).

²² Apart from that, Hilberg considered his life work ruined by Arendt's careless use of it, see Gary Smith, *Einsicht aus falscher Distanz*, in: SMITH (note 5), 7.

'banality' of his evil.²³ In this way, she seems not only to have distanced herself from her previous views on radical evil²⁴ but also to give a quite implausible account of Eichmann. She finds as one of the defendant's most striking aspects the fact that he was certainly not an antisemitic monster or a sadist unusually perverse in character, but rather a clown,²⁵ presenting himself as someone who simply obeyed orders, which he viewed as part of the legal system of his country. He executed his tasks zealously and with ambition. Consequently, he complained about his low-ranking position of *Obersturmbannführer*, which fell far short, he believed, of what he deserved. Holding this modest rank, he did not thus consider himself to be in a position to evaluate the political goals set by his superiors, certainly not following the formal decision of the élite of the Reich to adopt the *Endlösung* at the Wannsee Conference on 20 January 1942.²⁶ Precisely this unwillingness and inability to make decisions autonomously, which Arendt coins as his inauthenticity,²⁷ rendered Eichmann extremely fit for the tasks he was charged with. It was telling, Arendt writes, that Eichmann remembered all the decisive moments in his career, but made frequent mistakes about essential developments of the war and with respect to important steps regarding the destruction of the Jews. Thus, she locates Eichmann's evil not in the depth of his motives, but rather in the lack of profundity, in his shallowness, in his clichés:

"Eichmann was not Iago and not Macbeth, and nothing would have been farther from his mind than to determine with Richard III 'to prove a villain'. ... He merely, to put the matter colloquially, never realized what he was doing. ... It was sheer thoughtlessness - something by no means identical with stupidity - that predisposed him to become one of the greatest criminals of that period."

Arendt instructs us to find here 'the lesson of the fearsome, word-and-thought-defying

²³ See, also, Hannah Arendt and Karl Jaspers, *Letter of October 19th 1946* and *Letter of December 17th 1946* (note 18) 99, 106.

²⁴ See Richard Bernstein, *Did Hannah Arendt Change her Mind? From Radical Evil to the Banality of Evil*, in: *Hannah Arendt. Twenty Years Later* 127 (JEROME KOHN / LARRY MAY, EDS., 1996).

²⁵ See ARENDT (note 4), 54.

²⁶ See ARENDT (note 4), 114. See, also, <http://www.ghwk.de>.

²⁷ See Avishai Margalit / Gabriel Motzkin, *Anstifter und Vollstrecker: Hannah Arendts Authentizitätsbegriff als Kriterium zur Beurteilung Adolf Eichmanns*, in: SMITH (note 5), 202; Thomas Mertens, *Arendt's Judgment and Eichmann's Evil*, *FINNISH YEARBOOK OF POLITICAL THOUGHT* 2 58 (1998).

banality of evil'.²⁸ Although her thesis on banality was never meant as a description of Eichmann's crimes, but rather as a characterization of his personality, many were nevertheless offended by this qualification.²⁹ Still, as we shall see, this thesis played an important role in Arendt's effort to understand the full import of the crimes committed by Eichmann and the Nazis.

C. The Nuremberg Trial

There is little doubt that the Eichmann Trial would not have taken place without the International Military Tribunal in Nuremberg. The Eichmann Trial derives its international legitimacy from the precedent set by the trial of leading figures from the Nazi regime.³⁰ This trial was unique, first of all, for the reason that trying these figures was far from obvious. During the war, the allies conducted research on the war crimes committed by the Axis-powers, and in that context, as would become clear later, a great deal of information on what had happened in Eastern Europe became available. For a number of reasons, however, the revelations about killings had not been given much publicity and no attempts were made, when possible, to stop the genocide. Why no efforts were made is far from obvious. Some believe that the authorities may have been concerned about exaggerating the extent of the German atrocities, as during the First World War. It was suggested, too, that the allied forces had concentrated on the war effort: the sooner the war was over, the sooner these crimes would cease. One can only hope that moral indifference did not play a role here.³¹

These investigations on war crimes and on what later became known as crimes against humanity were not conducted with an eye to preparation for possible post-war trials. Churchill's well-known announcement, on 25 October 1941, that 'retribution for these (German) crimes' takes 'its place among the major purposes of the war', need not be understood as a full commitment to a legal proceeding with all the rights accorded to the defendants. Some deep reluctance to undertake such a trial existed, firstly, owing to the disappointing experiences after the First World War. After Germany's defeat, there were voices calling for an international tribunal

²⁸ See ARENDT (note 4), 252, 287-8 (emphasis in the original).

²⁹ See, also, PETER NOVICK, *THE HOLOCAUST IN AMERICAN LIFE* 134 (1999).

³⁰ The existence of the Nuremberg Trials may give the impression that a large part of the crimes committed by the Nazi regime and during the war has been prosecuted. This is not the case. Only a limited number of 'big fish' have been tried, but in many cases there has not been a legal '*Vergangenheitsbewältigung*', see, for example, FRIEDRICH JÖRG, *FREISPRUCH FÜR DIE NAZI-JUSTIZ* (1983); TIM BOWDER, *BLIND EYE TO MURDER* (2nd ed., 1995) (ORIG. 1981).

³¹ See, also, NOVICK (note 29), 54-58.

with the slogan 'Hang the *Kaiser!*'. The Dutch government refused, however, to extradite the Kaiser, who had found refuge in the Netherlands. The trials after the war of other Germans accused of war crimes after the war were problematic, too. Weimar Germany refused to extradite the would-be defendants, and when their trial was finally handed over to German courts, the results were foreseeable.³² Churchill, responding in effect to these futile efforts, thus formulated a plan to arrest and execute fifty prominent Nazis, claiming that their guilt was so great as to reach beyond ordinary legal procedures. The destiny of vanquished Nazi-leaders ought to be, as far as Churchill was concerned, a political issue, not a legal one, where the obstacles were all too familiar.³³ Opinions in the United States were mixed: some supported the British plan, while others opted for a fair trial. In the end, the allied forces took the latter option, for Stalin, too – albeit for totally different reasons – supported a trial. He, after all, had been used to getting rid of political opponents through show trials.

Second, then, this trial was unique owing to the legal obstacles that had to be overcome. The first obstacle was the need to establish a legal basis. The London Charter, which was drafted by the Allies on 8 August 1945, was an important milestone in this context, providing the basis for the Tribunal's jurisdiction over (war-) criminals whose crimes were not limited to any specific territory. The tribunal was to have competence to hear the following charges: conducting a war of aggression, *i.e.*, crimes against peace, war crimes and crimes against humanity. This was, of course, only a start in solving the legal problems. Before World War II there was no consensus in international law as to the definitions of any of these crimes. Thus, an obvious reproach could be made: through these charges, conduct that was not punishable at the time it took place, was now made punishable retroactively. This was thus a violation of one of the most important principles of the rule of law, *nulla poena sine lege*. It was by no means clear that Germany's having undertaken an offensive war by attacking Poland in September 1939 was unlawful under positive international law. Perhaps one could refer here to the 1928 Kellogg-Briand Treaty, but no consensus among scholars existed with respect to its status. The legal theorist Carl Schmitt, for instance, did not consider the treaty as a part of a genuinely international legal order, but rather as a part of Britain's imperialist foreign policy.³⁴ More of a consensus existed with respect to what ought legally be considered 'war crimes'. In this context, the Allies and later on the Tribunal itself,

³² See the Versailles Treaty, Par. 227-9; BOWDER (note 30), 17-19; GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY. THE STRUGGLE FOR GLOBAL JUSTICE 225-6 (2000).

³³ See ROBERTSON, *id.*, 211; JUDITH SHKLAR, LEGALISM 159 (1964).

³⁴ Carl Schmitt, *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte* (1939), in: STAAT, GROSSRAUM, NOMOS: ARBEITEN AUS DEN JAHREN 1916-1969 287 (GÜNTHER MASCHKE, ED., 1995).

could refer to The Hague Conventions that had been concluded with broad approval in the international legal community at the end of the nineteenth and early twentieth century. With respect to 'war crimes' and to the disputed 'crime of aggression', however, the credibility of the Allied accusations was at stake. Both with respect to 'crimes of aggression' and to 'war crimes' the argumentation of *tu quoque* applied. The Soviet Union's invasion in Poland in 1939 and in Finland, and the Molotov-Ribbentrop treaty could easily be placed under the first crime and the Allied bombardments of open cities without any military necessity,³⁵ both with and without atomic weapons, under the second crime. With respect to these two indictments, the countries that supported the Charter and initiated the trial could easily be accused of hypocrisy.

Clearly, the Charter's most innovative aspect was its penalizing of 'crimes against humanity' in an effort to target the genocide committed by the Nazis before and especially during the war, yet hardly connected with their war effort.³⁶ The historical basis for this offense was modest.³⁷ Still, it was the least controversial of the counts in the indictment. Article 6, paragraph c, describes crimes against humanity as "murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious ground in execution of or in connection with any crime, within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated".³⁸

Third and last, the Nuremberg Trial was unique in removing two important obstacles for convicting Nazi criminals, originating in positivist legal theory.³⁹ Importantly, in Nuremberg, appeals to the 'acts of state' doctrine and to the related doctrine of state immunity were rejected. These doctrines stem from the idea that one sovereign state cannot judge acts of other sovereign states: *par in parem non*

³⁵ Similarly, recently, for example, JOHN RAWLS, *THE LAW OF PEOPLES* (note 1), 98-100, drawing on MICHAEL WALZER's classic *JUST AND UNJUST WARS* (2nd ED., 1992) (ORIG. 1977).

³⁶ In a way, the war only provided the context in which the genocide became possible: 'a crime that could not be explained by any utilitarian purpose,' ARENDT (note 4), 275.

³⁷ Already before the Second World War, there were attempts, predominantly by Robert Lemkin, to codify the crime of genocide. See SAMANTHA POWERS, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE (2002) and its review by Brian Urquhart, *Shameful Neglect*, 12 7 *THE NEW YORK REVIEW OF BOOKS* 49 (2002). See, also, Vivian Grosswald Curran, *The Politics of Memory/Erinnerungspolitik and the Use and Propriety of Law in the Process of Memory Construction*, 14 *LAW AND CRITIQUE* 309 (2003).

³⁸ See, for example, <http://www.yale.edu/lawweb/avalon/imt/imt.htm>.

³⁹ Stanley L. Paulson, *Classical Legal Positivism at Nuremberg*, in 4 *PHILOSOPHY AND PUBLIC AFFAIRS* 132 (1974).

habet jurisdictionem. Since, in international law, a vertical relation between the sovereign and its subject is lacking, no state can impose criminal sentences on the representative authorities of another state. This reasoning is emphatically rejected in Article 7 of the Charter: 'The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment'. In his opening address, the chief prosecutor added that it is a fiction to assume that states commit crimes: crimes are only committed by individuals.⁴⁰

The second obstacle is removed by Article 9, which rejects as a justification the appeal to superior orders: 'The fact that the defendant acted pursuant to the order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment...'. According to the Nuremberg Tribunal, this is only an extension of what is widely accepted in the martial law and criminal law of all civilized nations. Orders that are evidently criminal do not have to be obeyed. Criminal acts committed while obeying criminal orders can be prosecuted unless the defendant could not have known the criminal nature of the orders or unless he was compelled to comply. In 1961, the appeal to 'superior orders' constituted an important element in Eichmann's defence. He argued that he had only carried out decisions taken by his superiors and therefore could not be held criminally accountable for the outcome of those actions that his superiors had set in motion.

D. The Trial in Jerusalem

The Nuremberg Trial can be, and was in fact, severely criticized, and on several different grounds: owing to the retroactivity of the statutes applied, owing to the application of a double standard and, of course, owing in general to the fact that they could easily enough be regarded as instances of victor's justice. Notwithstanding these objections, however, there exists a broad consensus to the effect that the Charter and the Trial made a very important contribution to the development of international criminal law and represented, at the same time, a fundamental challenge to the doctrine of state sovereignty. Integrating the 'crimes against humanity' principle into the Charter, convicting on the basis of this principle and setting the doctrines of state immunity and superior orders aside, have been extremely important. Still, genocide of the European Jewry, though it was an important reason for establishing the International Military Tribunal, did not play a predominant role in the trial. Julius Streicher, the publisher of the antisemitic '*Der Stürmer*', was the only person convicted solely for 'crimes against

⁴⁰ See ROBERTSON (note 32), 218.

humanity'. Where the other defendants were concerned, a conviction for this particular crime was linked as far as possible to convictions for the other charges. Thus, this aspect of 'crimes against humanity' remained underdeveloped at Nuremberg. It was not until the trial in Jerusalem that perpetrators and victims of the Holocaust faced each other. Only then did the crimes committed against the Jewish people and other ethnic groups play a central role and only then did the question of the exact nature of this crime arise.

In her rendering of the trial, Arendt considers this question in detail, arguing that the court answered it wrongly. Before doing so, however, she discusses other legal problems in relation to the trial. I will argue that Arendt's approach to these objections leads her into an ambiguous position *vis-à-vis* the nature of the crime at stake. The objections raised were in part similar to those raised at the Nuremberg Trial. With respect to Eichmann, too, the law was said to have been introduced by a victor's court with retroactive effect. Eichmann was thus accused of having committed acts that were not criminal at the time committed or were not foreseeably criminal in nature. In discussing this first set of objections, Arendt does not merely mention the fact that the Jerusalem court can legitimately refer to what the Nuremberg judges said and consider it as a valid precedent. Instead, she addresses this objection substantially and grants that 'Nuremberg', in a certain sense, did indeed violate the *nulla poena* principle. Although the introduction of the crimes in the 1945 London Charter was not altogether without a basis in law, the principle *nulla poena* was formally violated where crimes against peace and war crimes are concerned. *A fortiori* for 'crimes against humanity'. In Arendt's view, however, especially with regard to this last issue, the principle of *nulla poena* was violated only in a formal sense, not in the far more important, material sense. The *nulla poena* principle, she argues, applies only to crimes that the legislator could reasonably be expected to have foreseen. The crime of the Holocaust, however, was a new crime, one without any precedent. Here the demand for justice cannot be ignored out of deference to considerations of temporality and retroactivity. The introduction of a new law, be it in the London Charter, or in the earlier-mentioned Israeli 'Nazis and Nazi Collaborators (Punishment) Law', is, she argues, justified.⁴¹ The *nulla poena* principle is not to be used as a shield to ward off the punishing of acts that are clearly and obviously criminal.

There was, however, also a second specific set of objections raised against the Eichmann trial. These objections concerned the jurisdiction of the Jerusalem court in at least two respects. Firstly, it was argued that a court in Jerusalem, consisting solely of Jewish judges, could not possibly be impartial when focusing, in the

⁴¹ See ARENDT (note 4), 254; See, also, Seyla Benhabib, *Identität, Perspektive und Erzählung in Hannah Arendts 'Eichmann in Jerusalem'*, in: SMITH (note 5), 109.

Eichmann case, on the suffering of Jews before and especially during World War II. According to Arendt, there is not much validity to this objection. Judges should of course be impartial, but that requirement does not mean that judges are not allowed to have sympathy for the victims of the crime or that they cannot express disapproval of a crime. Impartiality concerns the judge's ability to take an unprejudiced position on questions of guilt or innocence. It is not about avoiding a choice between perpetrator and victim.

The second aspect of the objection against the Jerusalem court's competence goes deeper. It concerns the State of Israel. The objection runs as follows: A defendant cannot possibly be held accountable by a court that is constituted after the crimes have taken place, and constituted by a state that did not exist at that time. This objection is, of course, closely related to the *nulla poena* objection, but runs differently. The argument has it that any newly established court will have only prospective jurisdiction and cannot therefore preside over criminal cases that took place before the court was constituted. A recent example of the application and relevance of this rule is found in the 1998 Rome Statute of the International Criminal Court, which recently came into force.⁴² This challenge to the jurisdiction of the Jerusalem court provoked considerable discussion. In defence of the court's jurisdiction, some argued in favor of the 'passive personality' principle. The State of Israel's right to prosecute and punish would then stem from its claim to stand in the place of the victims, justified by the relation between this state and these victims. According to Arendt, this position can be recognized in Hausner's earlier-mentioned opening speech, in which he claims to be acting on behalf of millions of victims. Arendt, however, is not very satisfied with this way of answering the objection. According to this reasoning, she argues, criminal proceedings would follow from the need for revenge, either on the part of the victims or their substitutes, while they ought to stem from the requirements of justice. A criminal trial is not a civil case; it is not conducted owing to the harm done to a victim, but because a legal norm of the community has been violated.⁴³

For these and related reasons, 'universal jurisdiction' was invoked by others in replying to the challenge of the Jerusalem court's jurisdiction. In this connection, the alleged similarity between 'crimes against humanity' and the well-known 'crime of piracy' was underlined, for in both cases the criminal is said to be an 'enemy of the human species'. Any legal system would be competent to commence

⁴² The Rome Statute determines in its article 11: 'The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute'; and in article 24: 'No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute'.

⁴³ See ARENDT (note 4), 261.

criminal proceedings. This line of reasoning, too, falls short of the mark, Arendt argues. There exists only an apparent analogy. That is that 'universal' jurisdiction was granted over the crime of piracy not so much because the pirate is an enemy of humanity, but because the crime is committed on the open sea, where the territoriality principle has no application. A pirate, taking advantage of the absence of national law, avoids the need to obey any flag. It can hardly be argued that Eichmann committed his crimes in the absence of national law. Here the problem resides, rather, in the fact that the crime of genocide was committed by a criminal state under the flag of its legal system.⁴⁴

E. Territoriality

This still leaves the problem of the court's competence according to Arendt very much unresolved. In her attempt to solve it, Arendt, astonishingly, seems to return to the territoriality principle as endorsed in Nuremberg. It, however, comes at a price. Based on the Preamble to the London Charter, the International Military Tribunal was empowered to prosecute those criminals whose crimes could not be traced to any specific territory, thus, to any specific jurisdiction. Those who committed crimes in a specific territory could be prosecuted by national courts. On this basis, many successor trials to the Nuremberg Trial took place in different countries, and Arendt seems to conceive of the Eichmann Trial as 'just' one of them. This return to the territoriality principle, however, is puzzling and inconsistent. The whole issue of the court's jurisdiction was raised because the State of Israel did not exist when the crimes were committed, and it therefore seems obvious that no crimes took place on its 'territory'. Arendt's answer to this difficulty seems only to exacerbate the problem. As she argues, 'territoriality' should not be seen primarily as a geographical concept but as a political one. This concept refers not so much to a strip of land as to the 'space' between the members of a group of people, united by a common language, heritage, religion, history, and by common customs and laws. The State of Israel would never have been brought into existence, she rightly argues, without the prior existence of a certain unity between the members of the Jewish People ('prior to the seizure of its old territory'),⁴⁵ despite many centuries of the diaspora. According to this line of reasoning, the Eichmann Trial was, indeed, a successor trial to the Nuremberg Trial, and it would then also correspond to the wording of the 1948 Genocide Convention,⁴⁶ signed by Israel and quoted by

⁴⁴ *Id.*, 261-2. See, also, Moïse Postone, *Hannah Arendts 'Eichmann in Jerusalem': Die unaufgelöste Antinomie von Universalität und Besonderem*, in SMITH (note 5), 273.

⁴⁵ See ARENDT (note 4), 263.

⁴⁶ Article 6 reads: 'Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such

Arendt. The only remaining difficulty in this case would then be the fact that the defendant was not properly arrested and extradited. Whereas kidnapping was, indeed, a violation of international law, there was justification aplenty. Argentina was renowned for refusing to extradite criminals. Eichmann was stateless, and the only alternative to kidnapping was to have Israeli agents execute Eichmann in the streets of Buenos Aires.⁴⁷

Despite this apparently plausible reasoning, returning to the territoriality principle is highly questionable. Firstly, to call this prior unity of the Jews 'territorial' in the legal sense seems odd and brings Arendt's argument all too close to the justification she rejected earlier, namely, that of Hausner's passive personality principle. Does she really consider Israel to be representing the Jewish victims of 'crimes against humanity'? Does she really defend the view that it represents all Jews, regardless of where they actually 'inhabit' the world and regardless of their citizenship? Considering territoriality as a 'specific in-between space' that depends on heritage, language and customs, flies in the face of a political definition of citizenship and seems to endorse an 'ethnic' definition, in which all ethnic Jews are seen as potential citizens of Israel.⁴⁸ If Arendt indeed argued in this vein and gave priority to 'nature' over 'will', then her answer to the problem of the court's competence could not be seen as differing much from the 'passive-personality principle'⁴⁹ according to which relatives have the right to demand compensation in the name of absent victims.

According to Arendt, such a manner of justifying the court's competence seriously threatens the way 'crimes against humanity' ought properly to be understood. In her eyes, this crime, precisely because it is 'against humanity', transcends all territorial limits. Thus, on the one hand, she criticizes the court for not taking seriously enough the fact that it was addressing a crime totally new in character, namely, the crime of genocide - the court wrongly interpreted Eichmann's crime not as a crime against humanity but as a crime against the Jewish nation. On the other hand, she seems however to be defending the Jerusalem court's jurisdiction on grounds of territoriality. Interpreting Eichmann's crime according to the standards of territoriality would, however, imply a Jewish 'appropriation' of this

international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.'

⁴⁷ See ARENDT (note 4), 263-5.

⁴⁸ Similarly Benhabib (note 41), 110.

⁴⁹ See ARENDT (note 4), 260.

crime, which Arendt rejects on the ground that this would deny the unique character of what happened during the Holocaust.

This ambivalence can only be resolved by regarding as Arendt's most important view, her thesis that the crime of the Holocaust contained something absolutely unprecedented. If we follow this line of reasoning in Arendt's work and discount her remarks on the territoriality principle, her views become consistent. For example, where she argues that the legal community - not only that of Israel but that of humanity as a whole - was empty handed, it lacked both the categories and the institutions to deal with this new crime. According to Arendt, the problems she identifies in 'Eichmann in Jerusalem' stem from an improper understanding, especially on the part of the Jerusalem court, of the nature of the crime it had before it. This court had the difficult task of judging a crime without precedent and it failed in part, owing to its use of obsolete categories and not particularly relevant historical experience. The judges should have realized that, in Kant's language of the *Critique of Judgement*, they were confronted with a 'particular' for which the 'general' did not yet exist. As we have seen, however, a similar reproach can be made with regard to Arendt herself.

Obviously, the question as to the 'nature' of the 'crime against humanity' arose only in Jerusalem as such a pressing issue. In Nuremberg, the Jews were merely present as spectators and victims in connection with the '*Kriegsschuldfrage*' and 'war crimes' playing a predominant role. This gave to the issue of 'crimes against humanity' only a limited importance.⁵⁰ In the Eichmann Trial, however, the question of what had actually happened to the Jews had to be decided. In Arendt's opinion, this question was answered wrongly. Many argued that this was not the 'unprecedented crime of genocide', but rather a repetition, albeit it on a larger scale, of the old crime of anti-Semitism and anti-Judaism, of discrimination, expulsion and pogrom. Arendt saw this misunderstanding as being at the root of all the mistakes and shortcomings of the Jerusalem Trial. The Holocaust was a crime against humanity committed on the body of the Jewish people for historical reasons alone. The choice of the victims, not the nature of the crime, is drawn from the long history of hate directed at the Jews.⁵¹ However, by reading Eichmann's crimes from this historical perspective, the qualitative difference between discrimination and expulsion on the one hand and genocide on the other, is overlooked. From a historical perspective, this was understandable. During the whole of recorded history, Jews have been subject to expulsion and murder. The Nuremberg 1935 racial statutes were recognized by other states as part of Germany's positive law,

⁵⁰ See SHKLAR (note 33), 170.

⁵¹ See ARENDT (note 4), 269.

and thus appeared as nothing new. Discriminating against the Jews was all too familiar, and there were many historical precedents for what was apparently going on in Germany.

According to Arendt, however, those precedents should not have prevented the court from acknowledging the qualitatively new 'nature' of the Nazi crimes. Denying the right to exist to a whole group of people on grounds of ethnicity is a wholly new phenomenon distinct from historical events like expulsion and pogrom. Genocide constituted the totally new attack on the human status of diversity and plurality, without which the concept 'humanity' would be senseless.⁵²

If the court had sufficiently acknowledged this, it would have appreciated that it had no competence in this case: neither the passive personality principle, nor a traditional understanding of the universal jurisdiction principle, nor - contra Arendt - any territoriality principle, could solve the jurisdictional problem. Only a court that could genuinely claim to represent the whole of humanity, and would act on the basis of a new understanding of the import of 'universal jurisdiction', would have been competent to judge Eichmann. Therefore, Arendt in the end agrees with her former teacher Jaspers. It would have been better if the Jerusalem court, after hearing the case, had declared itself to be without competence and the 'Nazis and Nazi Collaborators Law' to be without application. It should then have asked the United Nations to establish for this case an International Criminal Court, for 'the very monstrousness of the events is "minimized" before a tribunal which represents one nation only'.⁵³ Only such a scenario, in her eyes, would have promoted the development of the new legal category of 'humanity' and the transformation of existing legal orders and concepts.⁵⁴

This is, of course, not what happened. Eichmann was convicted neither for attacking and violating the human condition of plurality, nor for the monstrous claim that certain people have the right to determine who should and who should not inhabit this Earth. This was an unforgivable crime against human nature, or, in Arendt's words, against 'natality' *qua* the unique human ability to make a new start in this world over and over again.⁵⁵ She does not, however, fully disagree with the outcome. She, too, thinks that a single sentence would have been appropriate here;

⁵² *Id.*, 269; Benhabib (note 41), 111: 'den Genozid an einem Volk allein aus dem Grund, weil es *in dieser spezifischen Gestalt* als eine von vielen Möglichkeiten der 'menschlichen Vielfalt' auf der Erde existiert'.

⁵³ ARENDT (note 4), 270.

⁵⁴ See Postone (note 44), 275.

⁵⁵ See WOLIN (note 17), 43.

capital punishment. Those who execute a policy of unwillingness to share the earth with others and who want to determine who can and who cannot inhabit this earth cannot expect others to want to share it with them.⁵⁶

⁵⁶ See ARENDT (note 4), 270.