

# The Problems of the Eichmann Trial

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HUNDREDS of memoirs and sociological, psychological, political, historical, legal and other studies have already been written on the Nazi era, the roots of the criminal policies of Nazism, and the means by which they were carried out, including the "final solution." Hundreds of domestic and international trials have already been conducted against the culprits. The whole truth concerning this tragic era has nevertheless not been brought to light as yet, and many uncertain aspects still remain to be clarified and explained by studies, trials, and political debates. This is why the Eichmann trial is awaited with great interest, for it is hoped that this trial will further clarify and throw new light on the circumstances in which the criminal Nazi policies were shaped and carried out, particularly with regard to the "Jewish Question".

Ever since Eichmann was apprehended and brought to Israel, doubts have been expressed from different sources as to his trial in Israel. These doubts can be summed up in the following manner:

(a) By enforcing an Israel law against war criminals, it is not possible to avoid infringing upon sanctified principles of justice, accepted by all, which forbid the condemnation of persons in accordance to laws which did not exist at the time when the crime was committed. Obviously, the Nazi crimes were committed at a time when the State of Israel and its laws did not yet exist.

(b) The Israel law punishing crimes against the Jewish people does not consider the fact that these crimes infringe upon the principles of international law, i.e. that they are crimes against humanity, and not specifically against Jews, and the application of Israel law cannot therefore be free from feelings of vengeance, particularly since the accused was brought to Israel by illegal means.

(c) Israel should be satisfied in interrogating the accused, and should then hand him over for judgment to an international or a German court, for, the State of Israel being a Jewish state, its atmosphere is not

conducive to a just and open trial in the given case.

We shall examine here these arguments, which are certainly serious enough, and which have been recently put forward also in the *New York Times Magazine* of 22 January 1961, by a person highly specialized in the field, Mr. Telford Taylor, who was assistant to the American Chief Prosecutor before the Nuremberg International Tribunal and Prosecutor before the American Military Tribunals in Germany.

In the 17th century, a principle, acknowledged today by all states, was formulated by Grotius, one of the fathers of international law, namely that criminals should be tried or should be extradited so that others may bring them to justice.

As to the obligation of all states to bring war criminals to justice, if they do not extradite them to other states for trial and punishment, this rule is not merely customary today; it is also explicitly formulated in a large number of treaties dating from before the First World War, from the period between the two World Wars, and the period from the beginning of the Second World War to the present day.

Some of these treaties are:

(a) the Geneva Convention of 1864.

(b) The 4th Hague Convention of 1907.

(c) The Versailles Treaty of 1919.

(d) The Declaration of nine states about the Nazi crimes, of January 13, 1942, known as the St. James Declaration.

(e) The Three Powers' Moscow Declaration of October 30, 1945 on the Nazi Atrocities.

(f) The London Agreement of 8 August 1945, establishing the International Military Tribunal, before which the major Nazi war criminals were tried at Nuremberg.

(g) Law no. 10 of the Allied Control Council for Germany, of 20 October 1945, etc. . . .

These principles are also reflected in a large number of UN resolutions, particularly in the resolution of December 11, 1946, which confirmed the principles of the Nuremberg Charter and the judgment of the Nuremberg Tribunal, and in

later resolutions relating to the obligation of States to extradite war criminals.

As is known, none of the States where Department IVB4 of the Gestapo carried out its activities and where the victims of the "final solution" were imprisoned, cremated or annihilated by other means, has demanded the extradition of Eichmann.

The Minister of Justice of West Germany stated explicitly that his government will not ask for Eichmann's extradition; the countries which would have been most justified in making such a demand—Poland, Yugoslavia, France, Czechoslovakia, Hungary, Holland, Belgium and others—approved Israel's decision to bring the accused before an Israel court, and their competent institutions helped the investigation in Israel by collecting relevant information. As to the proposal to return Eichmann to Argentina, it had no strong formal basis, since we have no suitable extradition agreement with this country, and for other reasons too. From the theoretical point of view, there was no possibility of discussing such a proposal, because Eichmann never resided in that country legally, and the asylum that he found there *de facto* (hiding under an assumed name) was in total contradiction with the principles of international law and to the explicit obligations of Argentina and her laws. The diplomatic conflict between Israel and Argentina about the capture of Ricardo Clement (Eichmann) ended with the common declaration of both governments of August 3, 1960 stating that the acknowledgement of the infringement of the sovereignty of Argentina satisfies Argentina. By the ruling of the Security Council regarding this dispute the right of Israel to try and punish Eichmann was confirmed. Since there is no State in the world apart from Israel which has decided to bring Eichmann to trial, there is no room to question its jurisdiction; moreover as there is no qualified international court existing, such opposition could only be construed as an effort to impede the bringing of the accused to bar.

The application of the Israel law to Eichmann prevents in this case the paralysis of international law concerning the prosecution of war criminals. Not only does it not infringe upon the legal principles accepted by all, but on the contrary, it helps to respect them and carry them out.

It should also be emphasized that the application of the Israel law in

this case does not conflict with the principle according to which no conviction has any validity if not founded on a law existing already at the time when the crime was committed. It is true that the State of Israel is a new political body, having no traits in common with the political body existing on its territory before its creation, it is also true that all its laws are an integral part of a new judicial system, related to the emerging of the State of Israel as a new sovereign unit. But it cannot be denied that in certain domains, the State of Israel is the heir of rights which were related to the mandatory territory and to the sovereign power, whose obligation was to further here the building of the "National Home". The State of Israel is the continuation of the "National Home", whose construction began under the Mandate; it is the fruit of the efforts and of the struggle to carry out the Mandate's provisions and to transform it into a sovereign Jewish State. The activity of the Nazis was directed against the interests of the "Home" as a nucleus of a Jewish State—by way of concentrating considerable numbers of Jews—and as a territory governed by one of the main allies in the war against the Axis: Great Britain.

A number of international documents, as for example the Reparations Agreement signed in 1952 in Luxemburg between Israel and West Germany, contain explicit obligations for Israel and its residents as well as for the territory of the past mandate and its residents (re-settlement of refugees from Nazi Germany in Israel, began during the Mandate). There are also documents in which Israel is explicitly named as one of the "United Nations" of the anti-Nazi Alliance, as for example Law no. 54 of the Allied High Commission for Germany, and this in view of the fact that Israel became independent after May 8, 1945, at which date her territory was governed by one of the founding members of the UN, Great Britain.

Even states which are not members of the "United Nations," both former enemy and neutral states, also have rights and obligations as to putting war criminals on trial; these were imposed on the two Germanies and various Axis countries with which peace treaties have already been signed, and likewise several new states have pledged themselves in this context, by explicit legislation, for moral, political, legal, and other reasons.

Since such legislation pertains to

the internal affairs of the states in question, and as they conform to international law, their enactment and application cannot be challenged, and in fact, the Israel law for bringing Nazis to justice, as well as similar legislation of other new states were never questioned or criticized from a purely legal point of view. It is evident that the rights of Israel in this matter are not weaker than those of other states, and the responsibility for special criminal acts against members of the Jewish people should particularly be taken into account.

Furthermore, Eichmann is not accused only of crimes under the law promulgated after the war, i.e. the Law For Judging Nazis and their Collaborators—1950, but also under paragraph 23 of the Criminal Code ordinance 1936 and the common law principles.

As for the law for judging Nazis and their Collaborators, 1950, it is founded on the statute of the International Military Tribunal. This Statute, with all its new formal additions and definitions, is after all to a great extent a codification of customary rules which were confirmed and transformed into written law from the end of the last century, and found their expression in the Geneva and Hague Conventions, in the Versailles Treaty and in other international documents. It should also not be forgotten that Rules and customs of war, included in the 4th Hague Convention of 1907 are an integral part of the English Common Law, which has remained in force in the State of Israel. This is why Eichmann's indictment is in fact founded not only upon the Criminal Code Ordinance of 1936, and the Law for Judging Nazis, 1950, but also on the Common Law, and this means that from the formal or the factual point of view, there is no ground to the contention that the accusation in this case is founded on a retroactive legal basis.

At the same time it should be emphasised that the jurisdiction of Israel courts in this case is also linked with the principle of the personal responsibility of war criminals, which is independent of any territorial considerations, and is a universal principle. However, the fact that the accused is to be tried in Israel is also in accord with many factors related to the principle of territoriality, which enjoins trial at the place where the crime was committed.

As to the punishment of war criminals, it has been accepted from times immemorial that states which

succeeded in obtaining the criminals for trial are competent to establish a court in order to punish them; the American court confirmed this rule in many cases, among others; in the case of the trial of the Nazi jurists. In the trial of the heads of the Nazi concern Flick, it was determined that any state is competent to bring to trial any person infringing upon the Rules of War and upon International Criminal Law in general. Justice Stone of the U.S. repeated this principle as reflected in the Case of Quirin (1942) or even more precisely in the judgment of the Japanese war criminal General Yamashita.

The practice of American courts in these cases and in other similar ones clearly reflects the principles of customary International Law, accepted by all, which today are also principles of conventional International Law, by which any state is competent to judge war criminals as such, without distinction of nationality or the place where their crimes were committed, just as any state is competent to try pirates.

According to the principle of the individual responsibility of war criminals and to the principle of universality regarding their being brought to trial, trials of war criminals were held at the end of the Second World War, not only in the courts of states against whom or against whose citizens war crimes had been committed, but also in the courts of states which decided to try these criminals as an expression of their solidarity in bringing them to justice, this being their contribution in reinforcing peace.

It is also known that the territorial principle, i.e. the trying of criminals on the territory of the state where the crimes were committed, came into existence also because of the fact that it is easier to carry out the investigation on this territory, by taking down testimonies and collecting other material. Now, the greatest concentration of persons who survived extermination and who can testify as to the methods by which the "final solution" was carried out, is to be found in Israel. Here are also located the archives of the "Yad Washem" Remembrance Authority which are one of the basic archives of its kind, containing documents directly concerned with the functioning of the Nazi apparatus headed by Eichmann.

The allegation that the notion of "crimes against the Jewish people" is not acceptable is also founded on misapprehension.

The definition of such a crime is

