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EICHMANN in Jerusalem

A REPORT ON THE BANALITY OF EVIL

BY

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We heard the protestations of the defense that Eichmann was after all only a "tiny cog" in the machinery of the Final Solution, and of the prosecution, which believed it had discovered in Eichmann the actual motor. I myself attributed no more importance to both theories than did the Jerusalem court, since the whole cog theory is legally pointless and therefore it does not matter at all what order of magnitude is assigned to the "cog" named Eichmann. In its judgment the court naturally conceded that such a crime could be committed only by a giant bureaucracy using the resources of government. But insofar as it remains a crime—and that, of course, is the premise for a trial—all the cogs in the machinery, no matter how insignificant, are in court forthwith transformed back into perpetrators, that is to say, into human beings. If the defendant excuses himself on the ground that he acted not as a man but as a mere functionary whose functions could just as easily have been carried out by anyone else, it is as if a criminal pointed to the statistics on crime—which set forth that so-and-so many crimes per day are committed in such-and-such a place—and declared that he only did what was statistically expected, that it was mere accident that he did it and not somebody else, since after all somebody had to do it.

Of course it is important to the political and social sciences that the essence of totalitarian government, and perhaps the nature of every bureaucracy, is to make functionaries and mere cogs in the administrative machinery out of men, and thus to dehumanize them. And one can debate long and profitably on the rule of Nobody, which is what the political form known as bureau-cracy truly is. Only one must realize clearly that the administration of justice can consider these factors only to the extent that they are circumstances of the crime—just as, in a case of theft, the economic plight of the thief is taken into account without excusing the theft, let alone wiping it off the slate. True, we have become very much accustomed by modern

psychology and sociology, not to speak of modern bureaucracy, to explaining away the responsibility of the doer for his deed in terms of this or that kind of determinism. Whether such seemingly deeper explanations of human actions are right or wrong is debatable. But what is not debatable is that no judicial procedure would be possible on the basis of them, and that the administration of justice, measured by such theories, is an extremely unmodern, not to say outmoded, institution. When Hitler said that a day would come in Germany when it would be considered a "disgrace" to be a jurist, he was speaking with utter consistency of his dream of a perfect bureaucracy.

As far as I can see, jurisprudence has at its disposal for treating this whole battery of questions only two categories, both of which, to my mind, are quite inadequate to deal with the matter. These are the concepts of "acts of state" and of acts "on superior orders." At any rate, these are the only categories in terms of which such matters are discussed in this kind of trial, usually on the motion of the defendant. The theory of the act of state is based on the argument that one sovereign state may not sit in judgment upon another, *par in parem non habet jurisdictionem*. Practically speaking, this argument had already been disposed of at Nuremberg; it stood no chance from the start, since, if it were accepted, even Hitler, the only one who was really responsible in the full sense, could not have been brought to account—a state of affairs which would have violated the most elementary sense of justice. However, an argument that stands no chance on the practical plane has not necessarily been demolished on the theoretical one. The usual evasions—that Germany at the time of the Third Reich was dominated by a gang of criminals to whom sovereignty and parity cannot very well be ascribed—were hardly useful. For on the one hand everyone knows that the analogy with a gang of criminals is applicable only to such a limited extent that it is not really applicable at all, and on the other hand these crimes undeniably took place within a "legal" order. That, indeed, was their outstanding characteristic.

Perhaps we can approach somewhat closer to the matter if we realize that back of the concept of act of state stands the theory of *raison d'état*. According to that theory, the actions of

the state, which is responsible for the life of the country and thus also for the laws obtaining in it, are not subject to the same rules as the acts of the citizens of the country. Just as the rule of law, although devised to eliminate violence and the war of all against all, always stands in need of the instruments of violence in order to assure its own existence, so a government may find itself compelled to commit actions that are generally regarded as crimes in order to assure its own survival and the survival of lawfulness. Wars are frequently justified on these grounds, but criminal acts of state do not occur only in the field of international relations, and the history of civilized nations knows many examples of them—from Napoleon's assassination of the Duc d'Enghien, to the murder of the Socialist leader Matteotti, for which Mussolini himself was presumably responsible.

Raison d'état appeals—rightly or wrongly, as the case may be—to *necessity,* and the state crimes committed in its name (which are fully criminal in terms of the dominant legal system of the country where they occur) are considered emergency measures, concessions made to the stringencies of *Realpolitik,* in order to preserve power and thus assure the continuance of the existing legal order as a whole. In a normal political and legal system, such crimes occur as an exception to the rule and are not subject to legal penalty (are *gerichtsfrei,* as German legal theory expresses it) because the existence of the state itself is at stake, and no outside political entity has the right to deny a state its existence or prescribe how it is to preserve it. However—as we may have learned from the history of Jewish policy in the Third Reich—in a state founded upon criminal principles, the situation is reversed. Then a non-criminal act (such as, for example, Himmler's order in the late summer of 1944 to halt the deportation of Jews) becomes a concession to necessity imposed by reality, in this case the impending defeat. Here the question arises: what is the nature of the sovereignty of such an entity? Has it not violated the parity (*par in parem non habet jurisdictionem*) which international law accords it? Does the *"par in parem"* signify no more than the paraphernalia of sovereignty? Or does it also imply a substantive equality or likeness? Can we apply the same principle that is applied to a

governmental apparatus in which crime and violence are exceptions and borderline cases to a political order in which crime is legal and the rule?

Just how inadequate juristic concepts really are to deal with the criminal facts which were the subject matter of all these trials appears perhaps even more strikingly in the concept of acts performed on superior orders. The Jerusalem court countered the argument advanced by the defense with lengthy quotations from the penal and military lawbooks of civilized countries, particularly of Germany; for under Hitler the pertinent articles had by no means been repealed. All of them agree on one point: manifestly criminal orders must not be obeyed. The court, moreover, referred to a case that came up in Israel several years ago: soldiers were brought to trial for having massacred the civilian inhabitants of an Arab village on the border shortly before the beginning of the Sinai campaign. The villagers had been found outside their houses during a military curfew of which, it appeared, they were unaware. Unfortunately, on closer examination the comparison appears to be defective on two accounts. First of all, we must again consider that the relationship of exception and rule, which is of prime importance for recognizing the criminality of an order executed by a subordinate, was reversed in the case of Eichmann's actions. Thus, on the basis of this argument one could actually defend Eichmann's failure to obey certain of Himmler's orders, or his obeying them with hesitancy: they were manifest exceptions to the prevailing rule. The judgment found this to be especially incriminating to the defendant, which was certainly very understandable but not very consistent. This can easily be seen from the pertinent findings of Israeli military courts, which were cited in support by the judges. They ran as follows: the order to be disobeyed must be "manifestly unlawful"; unlawfulness "should fly like a black flag above [it], as a warning reading, 'Prohibited.' " In other words, the order, to be recognized by the soldier as "manifestly unlawful," must violate by its unusualness the canons of the legal system to which he is accustomed. And Israeli jurisprudence in these matters coincides completely with that of other countries. No doubt in formulating these articles the legislators were thinking of cases in which an officer who

suddenly goes mad, say, commands his subordinates to kill another officer. In any normal trial of such a case, it would at once become clear that the soldier was not being asked to consult the voice of conscience, or a "feeling of lawfulness that lies deep within every human conscience, also of those who are not conversant with books of law . . . provided the eye is not blind and the heart is not stony and corrupt." Rather, the soldier would be expected to be able to distinguish between a rule and a striking exception to the rule. The German military code, at any rate, explicitly states that conscience is not enough. Paragraph 48 reads: "Punishability of an action or omission is not excluded on the ground that the person considered his behavior required by his conscience or the prescripts of his religion." A striking feature of the Israeli court's line of argument is that the concept of a sense of justice grounded in the depths of every man is presented solely as a substitute for familiarity with the law. Its plausibility rests on the assumption that the law expresses only what every man's conscience would tell him anyhow.

If we are to apply this whole reasoning to the Eichmann case in a meaningful way, we are forced to conclude that Eichmann acted fully within the framework of the kind of judgment required of him: he acted in accordance with the rule, examined the order issued to him for its "manifest" legality, namely regularity; he did not have to fall back upon his "conscience," since he was not one of those who were unfamiliar with the laws of his country. The exact opposite was the case.

The second account on which the argument based on comparison proved to be defective concerns the practice of the courts of admitting the plea of "superior orders" as important extenuating circumstances, and this practice was mentioned explicitly by the judgment. The judgment cited the case I have mentioned above, that of the massacre of the Arab inhabitants at Kfar Kassem, as proof that Israeli jurisdiction does not clear a defendant of responsibility for the "superior orders" he received. And it is true, the Israeli soldiers were indicted for murder, but "superior orders" constituted so weighty an argument for mitigating circumstances that they were sentenced to relatively short prison terms. To be sure,

this case concerned an isolated act, not—as in Eichmann's case—an activity extending over years, in which crime followed crime. Still, it was undeniable that he had always acted upon "superior orders," and if the provisions of ordinary Israeli law had been applied to him, it would have been difficult indeed to impose the maximum penalty upon him. The truth of the matter is that Israeli law, in theory and practice, like the jurisdiction of other countries cannot but admit that the fact of "superior orders," even when their unlawfulness is "manifest," can severely disturb the normal working of a man's conscience.

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. That was already evident in Nuremberg, where the judges on the one hand declared that the "crime against peace" was the gravest of all the crimes they had to deal with, since it included all the other crimes, but on the other hand actually imposed the death penalty only on those defendants who had participated in the new crime of administrative massacre—supposedly a less grave offense than conspiracy against peace. It would indeed be tempting to pursue these and similar inconsistencies in a field so obsessed with consistency as jurisprudence. But of course that cannot be done here.

There remains, however, one fundamental problem, which was implicitly present in all these postwar trials and which must be mentioned here because it touches upon one of the central moral questions of all time, namely upon the nature and function of human judgment. What we have demanded in these trials, where the defendants had committed "legal" crimes, is that human beings be capable of telling right from

wrong even when all they have to guide them is their own judgment, which, moreover, happens to be completely at odds with what they must regard as the unanimous opinion of all those around them. And this question is all the more serious as we know that the few who were "arrogant" enough to trust only their own judgment were by no means identical with those persons who continued to abide by old values, or who were guided by a religious belief. Since the whole of respectable society had in one way or another succumbed to Hitler, the moral maxims which determine social behavior and the religious commandments—"Thou shalt not kill!"—which guide conscience had virtually vanished. Those few who were still able to tell right from wrong went really only by their own judgments, and they did so freely; there were no rules to be abided by, under which the particular cases with which they were confronted could be subsumed. They had to decide each instance as it arose, because no rules existed for the unprecedented.

How troubled men of our time are by this question of judgment (or, as is often said, by people who dare "sit in judgment") has emerged in the controversy over the present book, as well as the in many respects similar controversy over Hochhuth's *The Deputy*. What has come to light is neither nihilism nor cynicism, as one might have expected, but a quite extraordinary confusion over elementary questions of morality—as if an instinct in such matters were truly the last thing to be taken for granted in our time. The many curious notes that have been struck in the course of these disputes seem particularly revealing. Thus, some American literati have professed their naïve belief that temptation and coercion are really the same thing, that no one can be asked to resist temptation. (If someone puts a pistol to your heart and orders you to shoot your best friend, then you simply *must* shoot him. Or, as it was argued—some years ago in connection with the quiz program scandal in which a university teacher had hoaxed the public—when so much money is at stake, who could possibly resist?) The argument that we cannot judge if we were not present and involved ourselves seems to convince everyone everywhere, although it seems obvious that if it were true,

neither the administration of justice nor the writing of history would ever be possible. In contrast to these confusions, the reproach of self-righteousness raised against those who do judge is age-old; but that does not make it any the more valid. Even the judge who condemns a murderer can still say when he goes home: "And there, but for the grace of God, go I." All German Jews unanimously have condemned the wave of coordination which passed over the German people in 1933 and from one day to the next turned the Jews into pariahs. Is it conceivable that none of them ever asked himself how many of his own group would have done just the same if only they had been allowed to? But is their condemnation today any the less correct for that reason?

The reflection that you yourself might have done wrong under the same circumstances may kindle a spirit of forgiveness, but those who today refer to Christian charity seem strangely confused on this issue too. Thus we can read in the postwar statement of the *Evangelische Kirche in Deutschland,* the Protestant church, as follows: "We aver that before the God of Mercy we share in the guilt for the outrage committed against the Jews by our own people through omission and silence."* It seems to me that a Christian is guilty before the God of *Mercy* if he repays evil with evil, hence that the churches would have sinned against mercy if millions of Jews had been killed as punishment for some evil they committed. But if the churches shared in the guilt for an outrage pure and simple, as they themselves attest, then the matter must still be considered to fall within the purview of the God of *Justice.*

This slip of the tongue, as it were, is no accident. Justice, but not mercy, is a matter of judgment, and about nothing does public opinion everywhere seem to be in happier agreement than that no one has the right to judge somebody else. What public opinion permits us to judge and even to condemn are trends, or whole groups of people—the larger the better—in short, something so general that distinctions can no longer be made, names no longer be named. Needless to add, this taboo applies doubly when the deeds or words of famous

* Quoted from the minister Aurel v. Jüchen in an anthology of critical reviews of Hochhuth's play—*Summa Iniuria,* Rowohl Verlag, p. 195.

people or men in high position are being questioned. This is currently expressed in high-flown assertions that it is "superficial" to insist on details and to mention individuals, whereas it is the sign of sophistication to speak in generalities according to which all cats are gray and we are all equally guilty. Thus the charge Hochhuth has raised against a single Pope—one man, easily identifiable, with a name of his own—was immediately countered with an indictment of all Christianity. The charge against Christianity in general, with its two thousand years of history, cannot be proved, and if it could be proved, it would be horrible. No one seems to mind this so long as no *person* is involved, and it is quite safe to go one step further and to maintain: "Undoubtedly there is reason for grave accusations, but the defendant is *mankind* as a whole." (Thus Robert Weltsch in *Summa Iniuria*, quoted above, italics added.)

Another such escape from the area of ascertainable facts and personal responsibility are the countless theories, based on nonspecific, abstract, hypothetical assumptions—from the *Zeitgeist* down to the Oedipus complex—which are so general that they explain and justify every event and every deed: no alternative to what actually happened is even considered and no person could have acted differently from the way he did act. Among the constructs that "explain" everything by obscuring all details, we find such notions as a "ghetto mentality" among European Jews; or the collective guilt of the German people, derived from an *ad hoc* interpretation of their history; or the equally absurd assertion of a kind of collective innocence of the Jewish people. All these clichés have in common that they make judgment superfluous and that to utter them is devoid of all risk. And although we can understand the reluctance of those immediately affected by the disaster—Germans and Jews —to examine too closely the conduct of groups and persons that seemed to be or should have been unimpaired by the totality of the moral collapse—that is, the conduct of the Christian churches, the Jewish leadership, the men of the anti-Hitler conspiracy of July 20, 1944—this understandable disinclination is insufficient to explain the reluctance evident everywhere to make judgments in terms of individual moral responsibility.

Many people today would agree that there is no such thing

as collective guilt or, for that matter, collective innocence, and that if there were, no one person could ever be guilty or innocent. 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. When Napoleon, seizing power in France after the Revolution, said: I shall assume the responsibility for everything France ever did from Saint Louis to the Committee of Public Safety, he was only stating somewhat emphatically one of the basic facts of all political life. It means hardly more, generally speaking, than that every generation, by virtue of being born into a historical continuum, is burdened by the sins of the fathers as it is blessed with the deeds of the ancestors. But this kind of responsibility is not what we are talking about here; it is not personal, and only in a metaphorical sense can one say he *feels* guilty for what not he but his father or his people have done. (Morally speaking, it is hardly less wrong to feel guilty without having done something specific than it is to feel free of all guilt if one is actually guilty of something.) 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.

And the question of individual guilt or innocence, the act of meting out justice to both the defendant and the victim, are the only things at stake in a criminal court. The Eichmann trial was no exception, even though the court here was confronted with a crime it could not find in the lawbooks and with a criminal whose like was unknown in any court, at least prior to the Nuremberg Trials. The present report deals with nothing but the extent to which the court in Jerusalem succeeded in fulfilling the demands of justice.