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Universal Jurisdiction and International Criminal Law –Lessons learnt from the judicial decision in *Attorney-General of the Govt. of Israel* v. *Eichmann Dist. Ct. Jerusalem, 11 Dec. 1961*

Sandeep Menon Nandakumar*

Introduction

These were the words of Eichmann just before he was hanged,

"After a short while, gentlemen, we shall all meet again. Such is the fate of all men. Long live Germany, long live Argentina, long live Austria. I shall not forget them."[1]

The case against Eichmann popularly known as the 'Final Solution of the Jewish Problem' which is otherwise related to the persecution of the Jews. The Nazi regime did create a dark era in the history of international law and more specifically, international criminal law, but the discussions and arguments involved in the prosecution of the perpetrators did pave the way for new scholarly dimensions in the entire framework of international criminal law.

The case is often highlighted in the area of the concept of universal jurisdiction. In the instant case the District Court of Jerusalem emphasized on the universal jurisdiction to try the accused for crimes against humanity and war crimes committed during the Nazi regime against the Jewish community.[2] The case of Eichmann is also relevant when it comes to the failure of the concept of extradition[3] as he had to be kidnapped by the Israeli Secret Service and brought to trial[4]. He was caught from Argentina and was brought to trial on April 11, 1961. An important thing to be noted is that Eichmann was represented by a lawyer named Robert Servatius hired by him but paid by the Govt. of Israel.

* BALLB (Hons) (NUALS), LLM (CUSAT), LLM (Exeter, UK). Author is presently a PhD research scholar in NUALS, Cochin and formerly Assistant Professor (Sr.) at VIT Law School.

[1] Arendt, *Eichmann in Jerusalem: a Report on the Banality of Evil* (The Viking Press, New York)
[2] Kriangsak Kittichaisaree, *International Criminal Law* (1st edn Oxford, 2001) 39
[3] An instance often highlighted where the existing system of international law regarding extradition sometimes become inapplicable in certain cases.
[4] *Supra* n.2

The trial, the evidence and appreciation of the evidence

Eichmann was a member of the SD, an intelligence wing of the Socialist Party. He was engaged in espionage mission against Jews, stimulated several ant-Jewish propagandas, responsible for emigration of Jews (while working in Central Office for Emigration[5]), the deportation of Jews from the Reich to Poland (the Nisko Plan)[6], the expulsion of Jews from several places, involvement in forced confiscation of property and extermination. Though the Final Solution or the order of extermination of Jews came from Hitler, the accused's prior statements revealed that the idea was rooted already in the minds of top officials. He was tried under the Nazis and Nazi Collaborators (Punishment) Law of 1950[7] which provided death penalty as a punishment for committing any one of the listed crimes in the Act. He was charged basically on 15 counts for the crimes against Jewish people, crimes against humanity and war crimes during the period of the Second World War.

The evidences include the testimony of the accused and witnesses, the affidavits on oath and without oath, evidences from witnesses abroad, documentary evidences showing the activities of the accused, the statement made to the Superintendent, Israeli police out of his own will and notes of the accused which he prepared while in custody in Israel. The court also placed reliance on evidence given at the former trials for which authority can be traced from s. 15 of the Nazi and Nazi Collaborators (Punishment) Law, 1950 but it was specifically stipulated that much careful consideration and scrutiny will be done in such cases. The court also admitted some statements made by Eichmann in 1957 to Sassen, a Dutch journalist.[8]

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[5] The statement of one of the witnesses goes like this: "This is like an automatic factory, like a flour mill connected to some bakery. You put in at the one end a Jew who still has capital and has, let us say, a factory or a shop or an account in a bank, and he passes through the entire building from counter to counter, from office to office, and he comes out at the other end without any money, without any rights, with only a passport in which is written: "You must leave the country within two weeks, if you fail to do so, you will go to a concentration camp"

[6] People were transported in closed carriages and locked up for around eight days which resulted in the deaths of so many and moreover many of the were deported towards the far east with an order to be killed if they return.

[7] Section 1(a) of the Law provides: "A person who has committed one of the following offences (1) during the period of the Nazi regime in a hostile country, carried out an act constituting a crime against the Jewish People; (2) during the period of the Nazi regime, carried out an act constituting a crime against humanity, in a hostile country; (3) during the period of the Second World War, carried out an act constituting a war crime, in a hostile country; is liable to the death penalty."
Section 3(a) provides: "A person who, during the period of the Nazi regime, was a member of, or held any post or exercised any function, in a hostile organization, in a hostile country, is liable to imprisonment for a term not exceeding seven years."

[8] Initially this evidence was rejected but later as the accused admitted certain statements the court was inclined t accept them.

The court after perusal of the evidence before it came to a conclusion that the accused was fully aware in 1941 that the Jews were going to be exonerated and he did dispatch the Jews to camps with the full knowledge that they were going to be murdered[9]. The court also came to a conclusion after the appreciation of the evidence that Eichmann took part in execution of Jews by gas vans[10] and also by the introduction of killing by Zyklon B. The court observed that in the RSHA (Reich Security Head Office), which was the central authority dealing with the Final Solution of the Jewish Question, the accused was at the head of those engaged in carrying out the Final Solution and that the accused had wide powers of discretion in planning of operations on his own initiative. The court also observed that the accused possessed the requisite *actus reus* and *mens rea* in relation to the crimes against Jews as it is manifest in the act of transportation he had undertaken to an isolated place so as to facilitate killing. The court also found the accused guilty for crimes against humanity including plundering of properties of the Jews which the court considered as falling under crimes against humanity as it was carried out by means of terror against Jews. The court convicted the accused also under the head of war crimes and for the expulsion of numerous Polish people, children and Gypsies which comes under the category of expulsion of civilian population and also for his membership in hostile organisations.[11]

Jurisdiction of the Court – A lesson learnt in favour of universal jurisdiction

The first thing which the court had to do was to explain the jurisdiction to try the matter. As it is clear from the provision in the statute the legislation is applicable to acts committed during the period of the Nazi regime in a hostile country. Moreover in the case of *Honigman* v. *Attorney General* it was observed that the Nazis and Nazi Collaborators (Punishment) Law of 1950 is retroactive and extra-territorial. The court followed the observation made in *Sylvester* v. *Attorney General* which accepts the observation in the case of *Phillips* v. *Eyre* (1871) that makes a distinction between retroactive laws and ex post facto laws. An ex post facto law is unjustified because the act which the perpetrator commits is so indifferent in itself that he may not have had the slightest thought that his act amounts to a crime but it is quite different

[9] Para 165 of the judgment
[10] Materials were produced before the court which shows the involvement of Eichmann in extermination of Jews with the help of gas vans instead of using the method of shooting them in public.
[11] http://www.ess.uwe.ac.uk/genocide/Eichmannz.htm#convict

when a law is made retroactive to punish the heinous activities which in all probabilities the perpetrator knows that he was doing an act which is a crime.

The two opposing contentions raised against the jurisdiction of the court were that:

(i) That the application of Nazis and Nazi Collaborators (Punishment) Law of 1950 for acts committed outside the boundaries of the state and before its establishment, against persons who were not Israeli citizens and by a person who acted in the course of duty on behalf of a foreign country[12] is against the principles of international law.

The court rejected this contention after referring to a number of case laws and analyzing the issue in the light of English position. The court observed that the customary international law definitely becomes part of the law of the land and that the local statutory law should be interpreted generally in terms of international law, but as far as the courts in a particular state is concerned the local statutory laws are binding and must be enforced by them.[13]

Moreover the crimes mentioned under the Nazis and Nazi Collaborators (Punishment) Law of 1950 are not crimes merely in Israel but offences from the point of view of international law.[14] The concept of universal authority is brought in by the court to negate the contention raised with the help of concepts such as *forum deprehensionis*[15], maritime piracy, and universality of jurisdiction over war crimes supported by the United Nations War Crimes Commission and also by tracing the evolution of concept of punishment from the stage of Hugo Grotius.[16] A perusal of the writings of Hyde on international law also revealed the fact that the nexus required between the act and the prosecutor when the act is committed outside the territorial limits is patent when the laws of nations itself views the same as an illegal internationally. Similarly the definitions set out in the Nazis and Nazi Collaborators (Punishment) Law resembles definitions as laid down in the international documents as for example the definition of “crime against the Jewish People" under section 1(b) of the Law of

[12] In short ‘Act of State’ i.e. the act committed should not viewed as that of the accused but it was done exercising the sovereign power of a country which should not be challenged in a foreign court

[13] The court made reference to several decisions including that of *Croft* v. *Dunphy* (1933), *Polites* v. *Commonwealth of Australia* (1945) and to the views of Oppenheim.

[14] *delicta juris gentium*: crimes that shock the conscience of nations; a detailed discussion is available on works.bepress.com/context/rahim_hesenov/article/1000/.../viewcontent

[15] The court of the country in which the accused is actually held in custody. Find mentioned in Corpus Juris Civilis.

[16] An analysis of the writings of Grotius persuaded the court to come to the conclusion that there is a duty cast on the state to punish criminals whose acts have violated the laws of nations.

1950 means any of the following acts, committed with intent to destroy the Jewish People in whole or in part: (1) killing Jews; (2) causing serious bodily or mental harm to Jews; (3) placing Jews in living conditions calculated to bring about their physical destruction; (4) devising measures intended to prevent births among Jews which is very similar to definition of genocide under Article II of the Convention for the Prevention and Punishment of the Crime of Genocide.[17]

The court was also confronted with a problem wherein the very same Genocide Convention under article 6 provided that persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the States in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.[18] The court answers to this by observing that the definitional clauses in the convention forms part of customary law and acknowledged by the civilized nations as binding on the country even without a conventional obligation but on the other hand the latter articles (not all) determines the conventional obligations between the contracting parties for the prevention of crimes in future. Moreover if the intention of article 6 is to restrict the jurisdiction of the court to those which happens within the territorial limits then the very object of the convention to prevent genocide and inflict punishment cannot be achieved.[19]

Countering the arguments against 'Acts of State'

The problem which existed at that time was the fact that in a stricter sense if it is analyzed as to whether Eichmann is in fact guilty of the alleged crimes, there may be an argument that he is not responsible for any crimes as those were not really crimes but acts of state in the light of *par in parem imperium non habet* which means a sovereign state does not exercise

[17] In the present Convention genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic or religious group as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group; most of the definitions in the law,1950 resembles the genocide convention or the Nuremberg Tribunal Charter or the Control Council Law No. 10.

[18] On the other hand section 5 of the Law, 1950 provided that "any person who committed an act outside of Israel which is an offence under this law may be tried and punished in Israel as though he committed the act inside Israel.

[19] The court also cites certain discussions at the international level wherein the real intention of article 6 is merely to lay down the duty of punishment of the State in whose territory the act of genocide was committed.

dominion over, and does not sit in judgment against, another sovereign state.[20] The counsel emphasize on Kelsen's theory which casts responsibility on the state for violations and not on the perpetrators.[21] The court negated this contention by holding that the immunity of act of state cannot be read into the penal law as even under the international law principles, for e.g. article 4 of the genocide Convention affirms that persons committing genocide or any of the other acts enumerated in Art 3 shall be punished whether they are constitutionally responsible rulers or private individuals.[22]

The court concluded by saying that the jurisdiction/power of the court to try these matters derive from two sources namely the universal source which gives the right to prosecute and punish these kind of crimes to every state and the national source which provides the nation the right to try anyone who attacks its existence (also known as the protective principle). The court establishes the connection or 'linking point' between the state of Israel and the offences attributed to the accused with the help of the definition of 'crime against Jewish people' as contained in the 1950 Law by which a crime committed against the Jewish people so as to eradicate them had a definite link to the state of Israel.[23]

An argument was also raised against the protective principle as the state of Israel was not in existence during the attack and as such there can be no interest shown as the people were not citizens of Israel at that time to which the court replied that the law was enacted in 1950 and it is the interest existed at the time of enacting the Law that has to be taken in account and moreover in *Katz-Cohen* v. *Attorney General* it was held that "Israeli courts have full jurisdiction to try offences committed before the establishment of the State, and that "in spite of the changes in sovereignty, there subsisted a continuity of law."

(ii) That the prosecution of Eichmann in Israel after kidnapping from a foreign territory is against international law.

[20] The point was elaborated in the context of command responsibility wherein it becomes his duty sometimes to obey the orders. Eichmann also tried to argue that he did not commit any murder and at the most he can be charged only for aiding or abetting the eradication of Jews, but the argument didn't hold good.
[21] Exceptions include espionage and war treason
[22] The court also derived authority for rejecting that contention from various texts on international law which includes works of Oppenheim, acknowledgment of the same by International Law Commission of the United Nations
[23] http://www.ess.uwe.ac.uk/genocide/Eichmannd.htm; para 31

The court negates this contention too on the basis that the mode of bringing the accused to trial is of no relevance to the trial as such which has been upheld by the English as well as the US courts as well. The court placed reliance on *Ex parte Susanna Scott* (1829), *Ex parte Elliott* and *R. v. Nelson and Brand* (1867) and upheld the observation made in those cases that it is not a valid plea that he had escaped from the jurisdiction of the court and he was brought back by some illegal means.[24] There is no question of crimes being political arising in the instant case as the Genocide convention specifically provides that extermination of people will not be regarded as political crimes. Moreover his residence also doesn't matter much as he was under a false name and false documents and as such there is no question of refugee or asylum status.

The defense of prescription under the law of Argentina (fifteen years) was also reversed by observing that even assuming that Eichmann was extradited it would of no avail once he is brought to Israel and will be of use only in Argentina and the same is applicable so as to prevent extradition and once extradition is complete it cannot be resorted to. Moreover section 12(a) of the 1950 Law provided that the laws of prescription shall not apply to offences under this law.

In the review proceedings the counsel for the defense tried his luck in bringing new witnesses and putting forth the arguments that the trial was unjust as the witnesses were not even available in Israel and that the Jews would have had the same fate even if accused was absent but of no avail. The court of appeal confirmed the judgment of the lower court on all points and even added the fact that there were no superior orders and that the accused was his own superior.[25] The clemency petitions were also rejected by the President of Israel.

[24] The court also refers to the Palestinian decision in Mahmoud Hassan Yassin, known as *Afuna* v. *Attorney General* and also the US decision of *Ker* v. *Illinois* and *State* v. *Brewster* and several other judgments.
[25] Hannah Arendt, *Eichmann in Jerusalem: a Report on the Banality of Evil* (The Viking Press, New York)

Conclusion

Hannah Arendt in her work brought forth a different perception of the entire Eichmann episode by stating that, for example, in a sense he was obeying the law and doing his duties.[26] On the basis of a series of factual events the author portrayed Eichmann as a man who was incapable of thinking the pros and cons of his acts, his lack of intelligence but did acknowledge the fact that he became part of certain atrocities. But against these observations there have also been instances where even when Hitler decided to send 8700 Jewish families to a neutral place in return for the support of Hungary in war, Eichmann thwarted the order by increase the speed of the deportation of Jews.[27] The case is discussed in length but as a matter of fact one may find that there was a pre determined conclusion from the very beginning as in regard to some contentions it can be seen that the judges begin their decision by considering it as irrelevant but then detailing the pros and cons of the argument to establish the same as irrelevant. But it is of utmost importance that Eichmann was represented by a lawyer paid by the Govt. of Israel taking care of the aspects of fair trial. Some authors though they strongly believe that Eichmann did deserve the death penalty raises a doubt as to whether the laws of punishment are insufficient to combat Eichmann's crimes. This is relevant when it comes to the question as to whether the death penalty imposed on him served as deterrence to other people.[28]

[26] She further makes an observation as follows: "Despite all the efforts of the prosecution, everybody could see that this man was not a "monster," but it was difficult indeed not to suspect that he was a clown. And since this suspicion would have been fatal to the entire enterprise [his trial], and was also rather hard to sustain in view of the sufferings he and his like had caused to millions of people, his worst clowneries were hardly noticed and almost never reported".
[27] Antonio Cassese & Gabriel Bach, 'Eichmann: is evil so banal?' 2009 JICL 650
[28] Gershom Scholem, 'On sentencing Eichmann to death' 2006 JICL 860