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DOES THE GOAL ALWAYS JUSTIFY ALL MEANS? – THE DANGER AS WELL AS THE CRUCIAL NEED OF USING ILLEGITIMATE TOOLS FOR LEGITIMATE CAUSES – THE EICHMANN CASE

Abstract

This article analyzes the use of illegitimate tools to achieve legitimate goals in the international criminal law. It especially deals with the case of Eichmann, a former high official of the Third Reich who lived in disguise for 10 years in Argentina until he was captured and kidnapped by the Israeli secret service, and brought to trial in Jerusalem where he was punished by death penalty. The article argues that using an illegal tool such as kidnapping could contribute to achieving a legitimate and just goal such as putting to trial a war criminal, however, this kind of action should be avoided in order to give way to an efficient mutual cooperation between states in combatting international crimes based on instruments of law.

Keywords: Eichmann, international crimes, Israel, Argentina, legality, legitimacy

INTRODUCTION

The Eichmann case is usually regarded as one of the most controversial and unique cases when talking about the prosecution of perpetrators of international law. This case brought up numerous questions related to the nature of law and its main principles. It was regarded as a severe violation of the doctrine of absolute sovereignty, non-interference into the interior affairs of a foreign state, and especially as an overruling of the principle of not using illegal ways to achieve justice. But on the other hand, it was also regarded as a way to show the world that there should not exist a safe heaven for perpetrators of serious atrocities identified as international crimes. Some authors argue that everything should be done to achieve this goal, even if "everything" includes illegal measures. Or as the Romans would say: *Fiat iusticia, pereat mundus!* (May justice be achieved even if the world collapses)

First of all, this case clearly indicates the difference between what law is and what it should be. Law students encounter two opposite concepts as soon as they begin studying law: *de lege ferrenda* (what law should be) *and de lege lata* (what law is). As *Llewellyn* indicates: "No less important than what people think law is, is what people conceive that law should be" (Llewellyn 2003: 38). There are numerous examples where certain things are written in the laws and entirely other things happen in reality. There are rules, but there is an exception from every rule. It is interesting that when an "important" goal is to be achieved, people give themselves the luxury to break some other, "less important" rules in order to keep up the major ones. Sometimes this situation is compared with the concepts of self-protection or extreme need, according to which the person who committed a crime is released from criminal responsibility if it is proved that no other way existed to defend a more important good.

But the question remains: Can injustice produce justice? Can crime produce law? As professors, we teach our students that this should not happen, that this is forbidden and unacceptable. However, cases like Eichmann make students wonder if that is truly so.

Many authors agree that the law after Eichmann has substantially changed. *Llewellyn* argues that: "the trend of the most fruitful thinking about law has run steadily towards regarding law as an engine (a heterogeneous multitude of engines) having purposes, not values in itself; and that the clearer visualization of the problems involved moves towards ever-decreasing emphasis on words, and ever-increasing emphasis on observable behavior (in which demonstrably probable attitudes and thought-patterns should be included)" (Llewellyn 2003, p. 38). Even though one may think that values are not completely left out, almost everybody agrees that the idea of "purpose" is leading, re-establishing the Machiavelli principle that the goal justifies the means.

The purpose of this paper is to analyze this case from the scope of the relation between legal formalism and legal pragmatism, to give some ideas about what could be done so that the "unlawful" part of the case would not occur and naturally, what can be done in order to avoid similar situations in the future.

THE EICHMANN CASE

There are no doubts that the kidnapping of Eichmann from Argentina by Israeli agents and his transfer to Israel to face trial for his senior role in the genocide of six million European Jews that occurred 15 years after Nuremberg and Tokyo trials, at 1960, is an interesting precedent that raised many important questions and issues. Numerous contradictory reactions appeared to this event.

For example, in her controversial book "Eichmann in Jerusalem - A Report on the Banality of Evil" *Hannah Arendt* claims that it's useless to condemn an individual who acted according to the rules of an evil society. She raises the question whether Eichmann was aware that his actions were in fact criminal (Arendt 1963) She asserts that "under conditions of the Third Reich only exceptions could be expected to react normally" (Arendt 1963: 26-27)". So according to this, Eichmann acted obeying the rules of the society he lived in, following the orders that were given by that society. It is clear that the ideology that existed in the Third Reich proclaimed the crimes that were to be committed and were committed as completely legal and legitimate. Even concrete laws were passed in reference to this question. But is this a ground for finding people who committed those terrible crimes not guilty? Even though there are authors who recognize the importance of ius-positivism, (Hart 2003: 80-82), these crimes can never be declared as legal in a ius-naturalistic approach, therefore, authors such as L. Lon (Lon 2003) object to the positivistic approach of Hart and others who claim that there is a strict separation between law and moral.

Other authors argue in the opposite of the above explained attitude. *Rosenbaum* explains that: "the Holocaust was committed by fully responsible, fully engaged human beings, and not by unthinking bureaucratic automatons. The Nazis were human beings capable of making moral choices who consciously chose radical evil" (Rosenbaum 1999). Thus, one should not be deceived by the "just following orders" alibi because this would lead to a cynic and "sophisticated form of denial: not denying the crime but denying the full criminality of the perpetrators" (Rosenbaum 1999). Furthermore, this approach is included in the fourth Nuremberg Principle, which indicates that "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under

international law, provided a moral choice was in fact possible to him" (Nuremberg Principles, 1945) (Ratner and Abrams, 2001: 350). It should also be remembered that Eichmann was not just a simple soldier following orders, but he was one of the heads of the Final Solution Operation.

On the other hand, the fact that Eichmann managed to escape from the U.S. detention, survive for five years in different European states and then fled to Argentina where he lived in peace with his family, under an alias name, for another ten years until he was captured in May 1960, represents a complete failure of the justice systems in these countries. It is obvious that the international cooperation in criminal matters was not yet developed in the 1960s, however, it is frustrating to learn that a notorious criminal managed to avoid the justice for 15years.

Furthermore, it's not only the personality of Adolf Eichmann that intrigues the opinion; but rather the role the two concerned countries played in the entire situation.

On one side there was Argentina, which was recognized at that time as a safe heaven for many Nazis. Can a state really not know what happens in its territory?! The conscious indifference of the state institutions towards the fact that there are people prosecuted for grave atrocities living within the territory of that state represents a serious violation of international principles of justice, peace and security. It is a similar situation with the tax-free countries that offer "excellent" conditions for opening bank-accounts and complete transactions under the principles of bank secrecy what creates major problems in regard to preventing and punishing white collar crime and money laundering. Thus, tolerating similar situations of either covering the identity of notorious criminals or covering profits gained in illegal way makes the concerning state accomplice in the committed crimes.

On the other side, there was Israel and the simple question: Is kidnapping (which represents a criminal act) a way to achieve justice? It sure looked so back then. It was a simple and a typical use of the principle "The goal justifies the means". It is true that the goal was noble: an effective prosecution for international atrocities. The means, however, were certainly illegal.

When I try to explain this situation to my students, I like to compare it to something they learn in Comparative Law: the way Napoleon effected the adoption of the French Civil Code of 1804. No one opposes the fact that it was a great code for that time, an entirely new, understandable and very efficient code. However, the adoption of this revolutionary code was sabotaged by Napoleon's political opponents in the Parliament who didn't oppose the code itself but had a problem with Napoleon's growing power, so what he did was that he withdrew the code from the parliamentary procedure, "cleaned up" the Assembly from the opponents, and

then restarted the procedure in which the code was, of course, adopted (Zweiger and Kötz 1998). Obviously, this entire process was far from being legal and legitimate from the legal formalism viewpoint, however, taking into account the fact that the French Civil Code of 1804 was in power for around two centuries, so Napoleon's behavior can be certainly distinguished as pragmatic.

However, Israel was accused for endanger[ing] international peace and security. *Medoff*, explaines that the New York Times rejected the Israeli claims that Eichmann's role in the Nazi genocide justified Israel's intrusion into Argentina, on the grounds that "no immoral or illegal act justifies another." The Times also denounced the idea of trying Eichmann in Israel. It preferred that he be brought before an international tribunal since "it was not against Israel but against humanity that his crimes were committed" (Medoff 2003). Furthermore, the same author indicates that an editorial in the Times of London warned that while the trial might be fair, it was tainted because it "springs from an admittedly illegal act - the abduction of Eichmann from Argentina" (Medoff 2003). So, despite the final result of the entire situation, using criminal activities for achieving justice is very dangerous, because once it becomes a precedent it can easily be misinterpreted and misused for other goals.

WHAT COULD BE DONE DIFFERENTLY?

Since the rationale of the goal in Eichmann case was explained, it would be useful to mention some things that could be done differently in regard to this case.

Firstly, it is important to take into consideration the principle of universal jurisdiction in this regard, which appeared right after WW2 but was neglected for a couple of decades. This principle provides that "the fact that a crime did not occur within or have a discernible impact on the territory or security of a State (thus falling outside of territorial or protective principle jurisdiction) or that no national of the State perpetrated or was a victim of the act (active or passive personality jurisdiction) is no impediment to proceedings by the state authorities" (Brownlie and Lowe 2004: 106). Thus, *Brownlie and Lowe* indicate that the Eichmann case is considered to have "brought the doctrine [of universal jurisdiction] back to international attention in 1961" (Brownlie and Lowe 2004: 113). However, one must have in mind that Eichmann would have been a real case of universal jurisdiction only if he was tried in Argentina, under the principle of universal jurisdiction that already existed.

Secondly, there was a clear lack of any kind of official cooperation between the who states. Taking into consideration that Argentina didn't ask for the return

of Eichmann after his kidnapping, instead, it reached a compromise with Israel on considering this case closed, the question remains on whether a similar compromise on a regular extradition could be agreed. Israeli officials may have feared that Argentina would fail to extradite Eichmann and the entire operation would look like the Leipzig Trials after WWI, taking into consideration the fact that Eichmann had already lived freely for ten years in Argentina. They may have also feared from the possibility that Argentina, using the principle *aut dedere, aut iudicare* (either extradite or try in a court procedure), Argentina itself could chose to try Eichmann, which would be against Israel's wish taking into account the words of Israeli Prime Minister of that time David Ben-Gurion indicated that "...historic justice and the honor of the Jewish people demand that this trial should be done only by an Israeli court in the sovereign Jewish State" (Medoff 2003).

Thus, many legally appropriate manners to get Eichmannto trial could have been used in this case, which would avoid the legitimacy issues that overshadow the goal to put a war criminal into trial.

THE SITUATION TODAY

Eichmann was certainly not the last case when illegitimate means are used to achieve legitimate goals. It usually happens in times of military interventions that do not always happen to be fully supported by the UN as the only competent organization for giving such orders. Often this is a result of differences in world politics and interests of different states.

The doctrine of universal jurisdiction remains the only way to avoid situations similar to the Eichmann case. It is regarded as something that "fills a gap left where other, more basic doctrines of jurisdiction provide no basis for national proceedings" (Brownlie and Lowe 2004: 106). Taking into account the reforms in many criminal justice systems, implementing the universal jurisdiction is possible and should be used more frequently.

Amnesty International has developed the Fourteen Principles on the Effective Exercise of Universal Jurisdiction, which ensure that national courts can: exercise universal jurisdiction over genocide, crimes against humanity, war crimes, torture, extrajudicial executions and ''disappearances''; prosecute anyone suspected or accused of the crimes whatever their official capacity at the time of the alleged crime or anytime thereafter; exercise universal jurisdiction over the crimes no matter when the crimes occurred, including crimes committed before the universal jurisdiction law is enacted; ensure that there is no time limit after which a person accused of the crimes cannot be prosecuted; ensure that persons on trial in national courts can only

raise defenses that are consistent with international law - in particular, claiming that the person was acting on superior orders, under duress or out of necessity should not be permissible defenses; exercise jurisdiction over the crimes in cases where the suspect or accused is shielded from justice in any other national jurisdiction (for example, a person who has been granted amnesty by the authorities where the crime took place); exercising universal jurisdiction to investigate the crimes and, where there is sufficient admissible evidence, to prosecute, without waiting for a complaint by a victim or any other person with a sufficient interest in the case; ensure that the trial will be fair and prompt in strict accordance with international law and standards for fair trials - all branches of government, including the police, prosecutor and judges must ensure that these rights are fully respected; protect victims, witnesses and their families. Investigation of crimes must take into account the special interests of vulnerable victims and witnesses, including children. Courts must award appropriate redress to victims and their families, as well as they must ensure that the crimes are not punishable by the death penalty or other cruel, inhuman or degrading punishment (Amnesty International 1999).

Apart from the qualitative changes in the doctrine of universal jurisdiction, the reforms of the system of Mutual Legal Assistance in criminal matters is another important progress in the field of international prosecution of war criminals. Taking into consideration for example the new European Union Convention on Mutual Legal Assistance (European Union 2000), it is evident the great importance given to the efficient, timely cooperation between states, with less bureaucratic procedures, through direct channels of communication between competent institutions, and with less grounds for refusal.

The Pinochet case was the first typical case of universal jurisdiction, that triggered new cases in this regard, such as the detention in Mexico of a former Argentine military officer and suspected torturer (Amnesty International 2000), or the Belgian court verdict of June 2001 which convicted four Rwandese nationals of war crimes committed in Rwanda in 1994 (Amnesty International 2001).

However, different legislative shortcomings in regard to prosecuting international crimes and lack of efficient mutual legal assistance between states that still use the old way of assistance despite the new conventions challenge the proper use of the principle of universal jurisdiction. Yet, as indicated by Brownlie and Lowe "despite these difficulties, there is reason to believe that universal jurisdiction is deeply consonant with the underlying aim of international justice" (Brownlie and Lowe 2004: 127).

On the other hand, an evident change in regard to the legal problems in 1960s and 2010s must be emphasized: while back in 1960 the main problem related to the Eichmann case was perceived as using an illegitimate tool to achieve a legitimate

goal, today, in Macedonia, the most important problem is that the government very often uses legitimate tools to achieve illegitimate goals, thus, abusing the voting majority in the parliament as well as in other institutions, it obstructs the work of independent institutions, most evidently, through sabotaging the work of the Special Public Prosecution. In this regard, the illegitimate tools used in the Eichmann case may seem very appealing to be also used by institutions such as the Special Public Prosecution of Macedonia to achieve their legitimate goals, taking into consideration that the misuse of power by the regular state institutions often makes achieving justice simply impossible.

CONCLUSION

If the main aspects of the Eichmann case would be summarized there are some important conclusions to be taken into consideration:

- it is very important that no safe heaven should be granted to people accused for international atrocities, and the use of the principle aut dedere aut iudicare must prevail,
- the use of illegitimate means to achieve the mentioned goal although sometimes appealing, should be entirely avoided,
- the principles of universal jurisdiction and mutual legal assistance should be used as an effective substitute of the mentioned illegitimate means.

Many things could have been done differently in the Eichmann case: he could be captured earlier and be part of the Nuremberg trials, he could be arrested in Argentina and tried there, or Israel could have found a legitimate way to bring him to court. It is also true that any of these possibilities could have failed because of issues of daily politics of that time. Therefore, the good will and trust between nations and states is essential in combating international crimes.

The paper has developed from the views of legal formalism through legal pragmatism to legal idealism, emphasizing the distinction between the pragmatism, morality, ius naturalism and ius positivism in the past and present. In this regard, Arendt's finding that the only hope of preventing future catastrophes must lie in a morality that is inherent in human nature, remains effective.

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