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Hannah Arendt's Judgement of Bureaucracy

LEORA BILSKY

THE HOLOCAUST POSED a difficult dilemma for the law: how to judge bureaucratically organised crimes. In her postscript to *Eichmann in Jerusalem*,[1] Hannah Arendt argued that the problem stemmed from the attempt to apply a legal system and juridical concepts that were not meant to deal with 'the facts of administrative massacres organized by state apparatus'. Later, in her critique of the Frankfurt-Auschwitz trial, she pointed to the absurdity created when a trial addressing the symbol of evil in the twentieth century—the death machine of Auschwitz—ends up dealing with individual infringements of the law by sadistic perpetrators. While Arendt was quick to identify the disjunction between the idiom of law and the facts of bureaucratic crimes, she continued to insist on the need to establish individual criminal responsibility.

Law's continued encounter with State-organised crimes since the end of the Second World War has brought about radical legal transformations. New crimes were developed, such as crimes against humanity and genocide, the temporal and spatial boundaries of jurisdiction were redefined, and the focus of adjudication has shifted from the defendant to the victim. These changes have matured into a new corpus of international criminal law amounting to a 'jurisprudence of atrocity'.[2]

Notwithstanding these transformations in the form and content of the law, the demand to establish individual liability according to the dictates of traditional criminal law has not been abandoned, and in some aspects has strengthened since the Nuremberg trials. This continuity is perplexing, as it was often this very focus on individual guilt that was shown to undermine law's attempt to make bureaucratic organisations accountable.

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[1] H Arendt, *Eichmann in Jerusalem* (New York, Penguin, 1977) (hereafter 'EJ').

[2] L Douglas, 'Shattering Nuremberg, Toward a Jurisprudence of Atrocity' (2007) *Harvard International Review*, available at <http://hir.harvard.edu/shattering-nuremberg>.

Contrary to Arendt, I suggest that it is not the law as such, but rather the dominance of criminal law that has obstructed the law from addressing the involvement of bureaucracy (both State and private) in the Holocaust. Arendt's argument that criminal law cannot retain its basic moral integrity if it abandons the requirement of individual guilt is persuasive, but it is not true of all areas of law. I conclude by identifying a shift away from the limitations of criminal law in the wave of Holocaust restitution lawsuits filed against German and European companies in American courts during the 1990s. I suggest that this litigation may offer a solution to a problem that has haunted Holocaust jurisprudence for more than six decades. Most importantly, the class-action suit dispenses with the need to establish the liability of individual perpetrators within private bureaucratic organisations, and in this way allows the courts to confront bureaucracy on its own terms. Thus, while Arendt was right to point out the need to develop new legal tools to adjudicate the involvement of bureaucratic organisation in the Holocaust, she wrongly assumed that the only legal road open to handle the problem is through criminal law.

I. FIRST ENCOUNTER: ARENDT AND THE EICHMANN TRIAL

The phrase 'the banality of evil' was coined by Hannah Arendt in relation to the defendant Adolf Eichmann, in the subtitle to her book *Eichmann in Jerusalem*. With this term Arendt points to a new kind of evil appearing under the Nazi regime. Using the term 'banal' to describe Eichmann's acts caused immediate controversy in Israel and in the international community.[3] Many saw this as an unfortunate term, a provocative and misleading description that trivialises the Holocaust and undermines Eichmann's culpability.[4] Furthermore, the choice of the term 'banal' to depict Nazi evil-doing surprised those familiar with Arendt's previous book, *The Origins of Totalitarianism*,[5] where she used the term 'radical evil' to describe the crimes of the Nazi regime. Richard Bernstein, one of the most sophisticated readers of Arendt's work, argues that in fact there is no contradiction. We should understand the two terms as relating to different aspects of the same phenomenon. Radical evil refers to the socio-structural dimensions of the Holocaust, while banal evil refers to the psychological-ethical constitution of the perpetrators.[6] In other words, with the provocative term 'banal', Arendt exposes the new mindset of the functionary that makes him the ideal actor in a bureaucratic organisation of mass murder and extermination. However, this explanation does not help us

[3] L Bilsky, *Transformative Justice: Israeli Identity of Trial* (Ann Arbor, Michigan University Press, 2004).

[4] The most famous critic is Gershom Scholem. H Arendt, *The Jew as Pariah* (RH Feldman ed) (New York, Grove, 1978) 245. For elaboration on the controversy about the term, see E Young-Bruehl, *Hannah Arendt: For Love of the World* (New Haven, Conn, Yale University Press, 1982) 337–40.

[5] H Arendt, *The Origins of Totalitarianism* (New York, Harcourt Brace, 1973) (hereafter 'OT').

[6] RJ Bernstein, *Hannah Arendt and the Jewish Question* (Cambridge, Mass, MIT Press, 1996) 137–53. For further elaboration, see D Pendas, 'Eichmann in Jerusalem, Arendt in Frankfort: The Eichmann Trial, the Auschwitz Trial, and the *Banality of Justice*' (2007) 34 *New German Critique* 77.

understand whether the law has the capacity to bridge the rift that opens between the enormity of the crimes and the banality of the motives.

In this essay I do not intend to engage the problem of evil as a philosophical question that the banality of evil invokes.[7] The question that interests me here is more specific to the law and points, I believe, to a crisis of judgement that the law has been facing in its various attempts to judge the crimes of the Nazi regime. Specifically, I ask how and in what way bureaucratically organised slave-work and mass-murder challenge the foundations of criminal responsibility. I argue that Arendt accurately identified the dilemma created for the law by the new type of murderer who sends millions to their death while understanding his own role in bureaucratic terms, as a 'specialist' in immigration and an 'expert' on the Jewish problem. The challenge that this new type of perpetrator created for traditional conception of *mens rea* was connected to the bureaucratic setting of the crime. However, most of the scholarly attempts to address the problem have focused on the *mens rea* requirement and ignored, for the most part, the need to develop tools to judge the bureaucratic organisation as such.

In identifying the novelty of the crimes, Arendt points time and again to the bureaucratic setting in which they are carried out. In the epilogue to *Eichmann in Jerusalem* Arendt writes: 'The fundamental problems posed by crimes of this kind … [is] that they were, and could only be, committed under a criminal law and by a criminal state.'[8] Furthermore, Arendt underscores the fundamental implications of this shift: the State that is ordinarily taken to be the source of legality under positive criminal law is transformed under the Nazi regime into the source of organised crime. Indeed, this is one of the unique aspects of Nazi crimes: their systematic and organised nature due to the fact that a State bureaucracy stands behind them. Arendt is well aware that bureaucracy can help render individual motivation irrelevant to institutional outcomes, and that this carries important implications for our understanding of the *mens rea* requirement of criminal law. And yet, this recognition does not lead Arendt to question the very attempt to use criminal law, and in particular to establish the individual culpability of the Nazi perpetrators. There is an unexplained gap in Arendt's argument, a leap between the descriptive (a social-science understanding of bureaucratic action) and the normative (a demand to establish individual guilt according to the strictures of criminal law).[9]

[7] See S Neiman, *Evil in Modern Thought: An Alternative History of Philosophy* (Princeton, NJ, Princeton University Press, 2002) 299–304.

[8] EJ 262.

[9] Here I follow Pendas, who identifies this tension in Arendt's writings. See Pendas above n 6. Pendas argues that while in *Eichmann in Jerusalem* Arendt calls for a recognition of the new type of desk-murderer, in her analysis of the Frankfurt-Auschwitz trial she 'balked at the implications of her own earlier insights' by characterising the killers as 'simple sadists'. I agree with Pendas that a tension exists in Arendt's analysis between understanding the working of bureaucratic organisations and the demand from the law to prove individual guilt. However, as I shall argue, Arendt is critical of German law's emphasis on the individual sadist, and in her analysis of the Auschwitz trial she pushes her readers further to understand the limitations, and even paradoxes, to which traditional criminal law, with

Arendt, who was not a jurist, objected to the legalistic way of thinking, to the precedent-orientated reasoning that attempts to fit the new into pre-existing legal categories. As a critical thinker she undertook to expose the unprecedented nature of the new crime. In her book the *The Origins of Totalitarianism*, she investigated the different ways in which the totalitarian State works to destroy the spaces of civic and political action. She was among the first to identify the ways in which this regime undermines freedom of action and even the conscience of the individual. Furthermore, she writes that totalitarian governments operated

> according to a system of values so radically different from all others, that none of our traditional legal, moral, or common sense utilitarian categories could any longer help us to come to terms with, or judge, or predict their course of action.[10]

However, in a letter to Karl Jaspers, from December 1960, shortly before she went to Jerusalem to report on the Eichmann trial, she writes that

> We have no tools to hand except legal ones with which to judge and pass sentence on something that cannot even be adequately represented either in legal terms or in political terms.[11]

Arendt admits that her change of mind can be attributed to an American influence of relying on juridical thinking to solve political problems. Indeed, American jurists insisted on conducting the Nuremberg trials against the oppositions of their allies.[12] Given Arendt's sophisticated understanding of the administration of the Holocaust, can the law fulfil her expectations?

Arendt was among the first to point to the limits of criminal law in relation to the new crimes. Yet, unlike later critics who questioned the very turn to the law as the dominant way to deal with the Holocaust,[13] Arendt affirms the recourse to the law, and upholds its demand to establish individual culpability. One explanation is her attempt to wear simultaneously the hats of both the spectator and the actor. As a historian, a social scientist and a philosopher, she undertook to identify the novelty of the crimes (of genocide and crimes against humanity) committed by the administration of a criminal State, and made possible by a network of public and private bureaucratic organisations. Yet putting herself in the place of an actor in the legal drama, that is, wearing the juridical hat, Arendt upholds the normative and moral commitments of criminal law that require proof of

its central focus on the individual, can lead, in respect to understanding Auschwitz as a bureaucratic mass-murder machine.

[10] OT 360.

[11] H Arendt and K Jaspers, *Correspondence 1926–1969* (L Kohler and H Saner (eds)) (New York, Harcourt Brace & Company, 1992), letter 274 (23 December 1960) 417.

[12] GJ Bass, *Stay the Hand of Vengeance* (Princeton, NJ, Princeton University Press, 2000) 147–81.

[13] See G Agamben, *Remnants of Auschwitz: The Witness and the Archive* (DH Roazen trans) (New York, Zone Books, 2002) 19–20, criticising law's limited understanding of testimonies of the Holocaust.

individual guilt. Arendt is well aware of the difference between these two points of view, writing:

> 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 … [Yet] one must realize clearly that the administration of justice can consider these factors only to the extent that they are circumstances of the crime.[14]

Such a stance, of deliberate legal blindness to social circumstances, is a well-known technique of legal reasoning, generally known as legal formalism. What is surprising here is that this position is upheld by one of the strongest critiques of legalism.[15] Indeed, aware of the limits of old precedents, Arendt calls to construct new crimes that can respond to the novel social and political conditions of the totalitarian State. Moreover, she does not limit their application to future cases notwithstanding their apparent retroactivity, but rather articulates interpretations that can allow the judges to apply the new crimes to Eichmann's actions. Indeed, Arendt chooses to end her book with a warning about the danger of not developing new legal tools that respond to the unprecedented nature of these crimes.[16] Arendt is willing to go a long way in changing the requirements of criminal law, including a move from subjective to objective standard liability.[17] And yet she is not willing to abandon the principle of individual responsibility. This seeming contradiction leads one commentator to argue that Arendt is trying to reconcile the two points of view: 'Part of what Arendt tries to do in *Eichmann in Jerusalem* is to find a way to resolve this paradox by encompassing banal evil and individual criminal guilt within the same conceptual apparatus.'[18]

The difficulty in reconciling the two points of view of the historian and the judge is evident in the epilogue to *Eichmann in Jerusalem*, where Arendt tries both to point out the dilemma that judging the crimes of the Holocaust poses to the law and offer her solution. She writes:

> Foremost among the larger issues at stake in the Eichmann trial was the assumption current in all modern legal systems that intent to do wrong is necessary for the commission of a crime. On nothing, perhaps, has civilized jurisprudence prided itself more than on this taking into account of the subjective factor. Where this intent is absent, where, for whatever reasons … the ability to distinguish between right and wrong is impaired, we feel no crime has been committed.[19]

[14] EJ 289. Arendt repeats and elaborates this position in her essay, 'Personal Responsibility Under Dictatorship' in J Kohn (ed), *Responsibility and Judgment* (New York, Schocken Books, 2003).

[15] For elaboration on 'legalism' as a distinct form of legal reasoning connected to liberal theory, see JN Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, Mass, Harvard University Press, 1964).

[16] EJ 273.

[17] For elaboration, see S Neiman, 'Banality Reconsidered' in S Benhabib (ed), *Politics in Dark Times: Encounters with Hannah Arendt* (Cambridge, Cambridge University Press, 2010) 305, 311.

[18] Pendas, above n 6, 78.

[19] EJ 277.

But immediately after she points out the fundamental premise of modern criminal law that seems to be undermined by the bureaucratic organisation of the crime, and right before she provides her own solution to this problem, a strange thing occurs. Arendt abandons the point of view of the 'spectator' that she occupies throughout her book and takes on the insider's position to address the defendant as the judge:

> You admitted that the crime committed against the Jewish people during the war was the greatest crime in recorded history, and you admitted your role in it. But you said you had never acted from base motives, that you had never had any inclination to kill anybody … What you meant to say was that where all, or almost all, are guilty, nobody is.[20]

Arendt is quick to dismiss these claims:

> Let us assume, for the sake of argument, that it was nothing more than misfortune that made you a willing instrument in the organization of mass murder; there still remains the fact that you have carried out, and therefore actively supported, a policy of mass murder. For politics is not like the nursery; in politics obedience and support are the same.[21]

With this answer we witness Arendt's vacillation between the objective standard (obedience to orders) and the subjective standard (inferring 'support' or subjective intention from objective facts). However, this brief answer does not deal with the considerable difficulties of judging actors in a bureaucratic organisation, let alone a criminal State. Specifically, it does not address the systematic undermining of cognitive and moral capacities of individuals acting under such conditions. Indeed, in her later essay, *On Violence*, Arendt describes the bureaucratic phenomenon as a novel form of governance of 'rule by Nobody'.[22] It might be that Arendt can dismiss the strength of such arguments in relation to Eichmann due to the unique position that he held in the Nazi bureaucracy, a position that allowed him considerable control and knowledge in relation to the fate of the Jews that he persecuted. Still, one can raise doubts as to how satisfying are the answers that Arendt formulates as a judge, to the questions she has raised as a historian.[23] It is

[20] EJ 277–78.

[21] EJ 279.

[22] '[T]he latest and perhaps most formidable form of … dominion: bureaucracy or the rule of an intricate system of bureaus in which no men neither one nor the best, neither the few nor the many, can be held responsible, and which could be properly called rule by Nobody. (If, in accord with traditional political thought, we identify tyranny as government that is not held to give account of itself, rule by Nobody is clearly the most tyrannical of all, since there is no one left who could even be asked to answer for what is being done. It is … impossible to localize responsibility and to identify the enemy.' H Arendt, *On Violence* (San Diego, Cal, New York, Harcourt Brace Jovanovich, Publishers, 1970) 38–39.

[23] Neiman, above n 17, suggests that Arendt upholds an objective standard of liability that is independent of the actor's subjective intention and instead focuses on the objective harm his actions have brought about. In her view, this move from subjective guilt to objective fact is similar to the conception of guilt articulated in Greek tragedies. However, the replacement of subjective intention with

not reconciliation that we witness in the epilogue to *Eichmann in Jerusalem*, but rather an unexplained shift of perspectives from spectator to judge that covers an unresolved tension.

What can explain this shift from the detached historian to the involved judge? Would the answer to the dilemma that Arendt formulated as a historian be any different from the one she articulated under her assumed position as judge? Instead of trying to solve these questions, I suggest that this abrupt shift points to something fundamental about the act of legal judgment. The act of judging the perpetrator seems to undermine the understanding of the historian about the power of the bureaucratic organisation over the individual will.[24] Is it possible that the very leap to the position of judge necessarily results in a certain blindness to the historical facts? Does this leap in Arendt's writing represent a deeper antinomy between legal judgment and historical understanding of the Holocaust, one that cannot be reconciled simply by defining new crimes? I would like to argue that Arendt's unexplained shift from historian to judge, at the very critical moment in which she recognises the abyss of judgment, is meaningful. It seems to hide, not just from her readers, but also from herself, the crisis of judgment faced by liberal criminal law. The leap from historian to judge helps cover the fundamental way in which bureaucracy undermines the liberal foundations of criminal law. I argue that facing this crisis demands nothing less than a shift in our conception of legal judgment. In other words, the encounter of law with bureaucratically organised crime might demand the abandonment of a conception of justice based on individual guilt.

II. SECOND ENCOUNTER—ARENDT AND THE AUSCHWITZ-FRANKFURT TRIAL

Arendt had another opportunity to clarify the relation between individual liability and the organised nature of Nazi crimes in her review of the Frankfurt-Auschwitz trial (1963–65), in which 22 defendants were charged under German criminal law for their roles as mid- and lower-level officials in the Auschwitz-Birkenau concentration camp.[25] Whereas Eichmann's trial dealt with the 'desk-murderer' who planned the extermination, here the law turned its attention to the direct perpetrators of 'administrative-massacre' who operated the Auschwitz concentration

objective harm undermines the basis of liberal criminal law and raises doubts as to the very possibility of conducting a liberal criminal trial for Eichmann, an endeavour that Arendt upholds.

[24] For elaboration on the tension between judging and understanding, see L Bilsky, 'Judging and Understanding: Response to Prof Douglas and Prof Luban' (2001) 19 *Law and History Review* 184. See also Neiman, above n 17, at 307.

[25] Reappeared in Kohn (ed), above n 14, at 227–56. Originally appeared as H Arendt, *Introduction to Bernd Naumann, Auschwitz: A Report on the Proceedings against Robert Karl Ludwig Mulka and Others before the Court at Frankfurt* (J Steinberg trans) (London, Pall Mall, 1966).

camp, those who implemented the Nazi genocide, those who actually shot, gassed or tortured their victims to death.[26]

In her critique of the Frankfurt trial, Arendt is quick to point to the immense gap between the old categories of the German criminal code and the new crimes committed by the Nazi regime. She writes that 'what the old penal code had utterly failed to take into account was nothing less than the everyday reality of Nazi Germany in general and of Auschwitz in particular'.[27] As a result of this,

> a man who had caused the death of thousands because he was one of the few whose job it was to throw the gas pellets into the chambers could be criminally less guilty than another man who had killed 'only' hundreds, but upon his own initiative according to his perverted fantasies.[28]

Here again, Arendt points to the gap between subjective intentions and objective results. While criminal law creates grades of liability that increase according to the subjective intention of the actor, it fails to account for the way in which the organisation of mass-murder in the concentration camp was dependent upon the subordination of individual will to the needs of the organisation. Arendt explains that ignoring this background, ignoring Auschwitz as an institution, resulted in a failure of understanding, a blurring of the distinction between murder and mass-murder.[29] The tension between individual liability and the bureaucratic organisation of the crime increased in the Frankfurt trial as a result of the application of the nineteenth-century German criminal code with its subjectivist emphasis. Missing were the categories of 'crimes against humanity' and 'genocide' that were created after the Holocaust and which were meant to address mass-murder. Moreover, in 1965 all crimes but murder were barred under a statute of limitation, and murder, according to the German code, required a special subjective motive.[30] A third obstacle stemmed from the distinction that the German code makes between perpetrator and accomplice.[31] These legal obstacles led the Frankfurt court to focus, as Arendt points out, on the 'extraordinary' sadistic perpetrators, failing to come to terms with 'ordinary' perpetrators of Auschwitz. In other words, the structure of German penal law prevented it from judging the ordinary perpetrators of the 'mass production of murder'. This frustration with

[26] Pendas, above n 6.
[27] H Arendt, *Auschwitz on Trial*, reprinted in Kohn (ed), above n 14, 243.
[28] *Ibid* 243.
[29] *Ibid* 242.
[30] Art 211 of the *Strafgesetzbuch* (StGB) (Penal Code) defines murder (*Mord*) as follows: 'A murderer is anyone who kills a human being out of blood lust, in order to satisfy their sexual desire, out of greed or other base motives, maliciously or treacherously or by means dangerous to the public at large or in order to enable or conceal another crime.' For elaboration on the limitations of the German criminal code in this respect, see D Pendas, *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History and the Limits of Law* (Cambridge, Cambridge University Press, 2006) 53–79.
[31] Pendas, *ibid*.

the law leads Arendt to observe the limits of criminal law when dealing with the organisation of mass murder:

> The background here was administrative massacres on a gigantic scale committed with the means of mass production—the mass production of corpses. Mass murder and complicity in mass murder was a charge that could and should be leveled against every single SS man who had ever done duty in any of the extermination camps and against many who had never set foot into one.[32]

This insight, however, was not applied during the Frankfurt-Auschwitz trial. Indeed, not until 2010, when German prosecutors indicted John Demjanjuk for mass murder for allegedly serving as a guard in an extermination camp, did the law try to make good on this observation.[33]

In 1965, when Arendt wrote her review of the Frankfurt trial, and out of frustration with the criminal law, she entertained the idea that the foundation of individual liability, the assumption of innocence, should be reversed in this trial. She writes:

> Within the setting of Auschwitz, there was indeed 'no one who was not guilty,' as the witness said, which for the purposes of the trial clearly meant that 'intolerable' guilt was to be measured by rather unusual yardsticks not to be found in any penal code.[34]

In trying to explain the unique nature of the mass-murder at Auschwitz, Arendt emphasises its bureaucratic structure that stands in tension with the individualist orientation of criminal law, and in particular the legal definition of 'murder' in the 1897 German penal code.[35] Again, Arendt's insights about the limitations of criminal law to deal with administrative massacre do not lead her to rethink the reliance on criminal law. She limits her criticism to the German criminal code. At most, she is willing to entertain the possibility of changing the legal presumption of innocence. But she is not seriously considering a change of direction for the law.

From the perspective of the law's capacity to cope with the bureaucratic aspects of the Holocaust, the Frankfurt-Auschwitz trial was clearly a regression from the

[32] *Auschwitz on Trial*, above n 27, 243–44.

[33] For elaboration see ch 15 of this volume by Lawrence Douglas. John Demjanjuk's trial began in Munich on 30 November 2009, on charges of being an accessory to over 27,000 counts of murder. This was the second attempt to bring Demjanjuk to trial, after his conviction in Israel for offences under the Nazi and Nazi Collaborators (Punishment) Law (1950) was overturned by the Israeli Supreme Court in 1993 due to a finding of reasonable doubt based on evidence suggesting that Demjanjuk was not 'Ivan the Terrible' from Treblinka. For further elaboration, see L Douglas, *The Memory of Judgment* (New Haven, Conn, and London, Yale University Press, 2001) 185–211.

[34] *Auschwitz on Trial*, n 27 above, 244.

[35] 'Reading the trial proceedings, one must always keep in mind that Auschwitz had been established for *administrative* massacres that were to be executed according to the strictest rules and regulations. These rules and regulations had been laid down by the desk murderers, and they seemed to exclude—probably they were meant to exclude—all individual initiative … The extermination of millions was planned to function like a machine …' (*ibid* 252).

advances made in the Nuremberg trials, where a systematic attempt was made to handle the organised nature of the crime. First, with respect to piercing the shield of State sovereignty, the Nuremberg charter abolished the defences of 'act of State' immunity and superior orders, thus allowing judgment of those who kill upon orders.[36] Secondly, in relation to the collective aspects of the crime, the charter created the new crime of participation in a criminal organisation.[37] Lastly, and most importantly, the American prosecution relied on the doctrine of 'conspiracy' taken from American anti-trust litigation in order to overcome the immense gap between the planners and the actual perpetrators.[38] The Frankfurt-Auschwitz trial retreated from the understanding that there is a need for a profound reform of criminal law in order to handle Nazi crimes. However, these difficulties were not unique to German law; rather, they stemmed from traditional conceptions of criminal law about individual liability.[39] The most important innovation of the Nuremberg trials was the notion that international law cannot remain focused on the behaviour of States but should pierce the veil of sovereignty to reach the individual perpetrator of the crimes.[40] However, in doing so, international law had to rely on traditional concepts of criminal law which emphasise the subjective state of mind of the individual and thus frustrate the understanding of the administration of mass-murder. The move from international tribunals to domestic courts (in Jerusalem, Frankfurt and elsewhere) only strengthened this tendency, but was not the source of the problem. The problem, as I pointed out, was the result of the lack of legal tools to address the liability of organisations. This problem, which was somehow mitigated in the Nuremberg trials, resurfaced in later years when the central innovations of Nuremberg in relation to the organised nature of the crime (of criminalising whole organisations and relying on criminal conspiracy)

[36] Charter of the International Military Tribunal, Arts 7 and 8.

[37] Charter of the International Military Tribunal, Arts 9 and 10.

[38] JA Bush, 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said' (2009) 109 *Columbia Law Review* 1094.

[39] Unique to German law is the problem that arises out of the 'continuity of the State' hypothesis. In order to avoid charges of retroactivity of the penal law, the court had to answer the defence's argument that 'a State cannot possibly punish that which it ordered in another phase'. In response, the court emphasised that 'National Socialism was also subject to the rule of law', and hence the 1897 code applied. Arendt is critical of this fiction, given the radical change taken in the meaning of 'law' under National Socialism, where the will of the Fuhrer was the source of law and the Fuhrer's order was valid law (*Auschwitz on Trial*, n 27, at 244).

[40] S Ratner, JS Abrams and JL Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 3rd edn (Oxford, Oxford University Press, 2009) 6: '[T]he watershed for the development of the principle of individual accountability for human rights abuses was the exercise undertaken by the WWII victors … The creation of the International Military Tribunal at Nuremberg … evinced a decision by the Allies that individual officials bear personal responsibility for outrageous conduct towards their own citizens and foreigners during wartime and ought to be accountable. As a result, the IMT Charter provided for individual criminal responsibility …' The authors explain that the notion that international law would prescribe accountability for individuals for their misconduct was anathema to the whole conception that international law governed principally relations between States (*ibid* 4).

fell into disfavour, thereby undermining the ability of the criminal law to cope with the organised aspects of the Holocaust.[41]

Legal theorists struggling with the bureaucratic aspects of modern genocide and mass-murder have tried to develop doctrines that overcome the gap between the individualist assumptions of criminal law and the reality of administrative massacre.[42] For example, with respect to the problem of the interchangeability of the perpetrator, the question arose whether responsibility can simultaneously be attributed to the direct perpetrator who physically committed the crime and to the indirect perpetrator who instigated or planned it. The positive answer articulated by Arendt was not part of domestic Israeli criminal law at the time of the Eichmann trial. Faced with this dilemma, German jurist Klaus Roxin later developed a doctrinal solution known as the doctrine of the 'perpetrator behind a perpetrator'.[43] This solution, later to be incorporated in part into Israeli criminal law, was meant to overcome one of the problems of bureaucratic crimes—the functional division within every administration.[44] Other legal theorists have attempted to explain the way in which administrative massacres undermine the conditions for establishing individual criminal culpability, emphasising the shaky assumptions about the individual's conscience and the moral judgement upon which criminal law relies,[45] the weakening of individual will, the lack of full control by the individual, or the way in which bureaucracy undermines the ability of individual perpetrators to know and understand the full implications of their actions.[46] These authors have tried to develop doctrines that overcome the gap between the individualist assumptions of criminal law and the reality of administrative massacre.[47] However, these proposals have not become part of international criminal law, where, as we shall see below, the commitment to the principle of individual guilt has only strengthened over the years.

[41] A Cassese, *International Criminal Law*, 2nd edn (Oxford, Oxford University Press, 2008) 33–34, 227.

[42] See D Luban, A Strudler and D Wasserman, 'Moral Responsibility in the Age of Bureaucracy' (1992) 90 *Michigan Law Review* 2348, suggesting the use of principles of culpable ignorance to hold individuals in organisations culpable for wrongdoing; and M Osiel, *Mass Atrocity, Ordinary Evil and Hannah Arendt* (New Haven, Conn, Yale University Press, 2001) 149–64, proposing to turn the legal presumption about manifest illegality into a factual presumption that can be rebutted because of the bureaucratic organisation of administrative massacre.

[43] The first formulation of the theory of 'indirect perpetration' through control over an organised system of power dates back to 1963. Claus Roxin offered a novel way of conceptualising the relationship between different actors who had clearly contributed to the crime: instead of qualifying those who are far removed from the commission of the crimes as instigators or mere accomplices, Roxin proposed to see them as perpetrators behind the perpetrators. See C Wilke, 'Traveling Responsibilities', paper presented at the ASLCH Meeting in Boston in April 2009. Wilke examines the application of the theory in Argentina during the 1980s, Germany during the 1990s and by the International Criminal Court after 2000. Wilke explains that the attempt to apply this doctrine in trials of genocide or mass-murder, such as the Argentine 'dirty war', faced considerable difficulties.

[44] Section 29 of the Penal Law, 5737-1977 (39th amendment, 1994).

[45] Osiel, above n 42,149–64.

[46] Luban, Strudler, and Wasserman, above n 42, 38.

[47] *Ibid*.

III. THE INTERNATIONAL CRIMINAL LAW OF ATROCITY SINCE NUREMBERG

An overview of the evolving international criminal law of atrocity, as developed by international tribunals and in the Rome Statute of the ICC, reveals that following Nuremberg, the primacy of the principle of individual guilt has only strengthened, through the development of a regime of individual responsibility clearly distinct from that of State responsibility,[48] as well as the failure of the doctrines of conspiracy[49] and participation in a criminal organisation[50] to become firmly accepted in international criminal law. These doctrines were short-lived and subsequently rejected in 1998 by the Rome Statute.[51] In addition, though the doctrine of joint criminal enterprise has emerged in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY),[52] it is not clear whether it has gained widespread recognition.[53] What we see in the area of international criminal law is that alongside the ability to overcome limitations of space and time (the development of universal jurisdiction and the inapplicability of statutes of limitation to heinous crimes under customary international law),[54] the law has not abandoned its commitment to individual liability.

During the many criminal trials that followed the Second World War, the unquestioned assumption of the law was that it is possible, indeed necessary, to establish the individual culpability of the perpetrator of international crimes. However, this normative position was not supported by the social facts revealed in these trials. For the most part the courts failed to address the bureaucratic structure within which the perpetrators worked, and, as a result, many of these trials, with their emphasis on individual responsibility, failed to reflect the historical realities. It therefore seems that the normative commitment of the law to judge the individual according to the traditional strictures of criminal law stands in tension with the need to clarify the historical truth about the bureaucratic nature of the Holocaust.

[48] A Bianchi, 'State Responsibility and Criminal Liability of Individuals' in A Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford, Oxford University Press, 2009).

[49] Cassese, above n 41, 227.

[50] Eg, the Rome statute does not provide for liability stemming from mere participation in a criminal organisation.

[51] Cassese, above n 41, 33–34; MC Bassiouni, *Introduction to International Criminal Law* (New York, Hotei Publishing, 2003) 82–84; R Cryer, *Prosecuting International Crimes—Selectivity and the International Criminal Law Regime* (Cambridge, Cambridge University Press, 2005) 316; A Eser, 'Individual Criminal Responsibility' in A Cassese, P Gaeta and JPWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, Oxford University Press, 2002) 767, 784–85; Bush, above n 38, 1094-1100; Osiel, above n 42, 6.

[52] K Gustafson, 'Joint Criminal Enterprise' in Cassese (ed), above n 48, 391–96.

[53] For the view that this form of criminal liability is implicitly permitted under Art 25(1) of the Rome Statute of the ICC, see Cassese, above n 41, 212. But see M Osiel, *Making Sense of Mass Atrocity* (Cambridge, New York, Cambridge University Press, 2009) 114, claiming that the ICC is showing reluctance to use the doctrine of joint criminal liability.

[54] Cassese (ed), above n 48.

Lawrence Douglas rejects this criticism, arguing that it misses the profound transformations that the law has undertaken through its contact with atrocity.[55] The last two decades, he argues, have seen the development of a large body of writing that analyses the major changes that occurred in international criminal law as a result of its ongoing involvement with the Holocaust and subsequent atrocities. Douglas suggests that we should not view these changes sporadically, as isolated reforms meant to overcome certain legal obstacles, but rather as amounting to a paradigm shift in our understanding of the substance and processes of criminal law. In fact, he argues that the contact of the law with atrocity has led to remarkable innovations which form a 'jurisprudence of atrocity', a coherent body of doctrines and theories that aim to submit the most heinous crimes to adjudication. As indicated above, at the centre of the law's transformation stands the puncturing of the shield of national sovereignty and the recognition of new crimes such as crimes against humanity and genocide. The post-Nuremberg jurisprudence concerning these supranational crimes has in turn severed the Nuremberg paradigm of connecting international crimes to the protection of the system of sovereign Nation States, further reducing the relevance of the Nation State as the unit of analysis.[56] In fact Douglas argues that these crimes explode the spatio-temporal limitations on prosecution, as they are not governed by prescriptive periods and can be tried under universal jurisdiction. And this in turn has resulted in a radical transformation of criminal procedure, which has shifted from being mainly concerned with the rights of the accused to a preoccupation with facilitating prosecution and developing the rights of victims.

Having outlined the profound transformations of the legal landscape, Douglas calls for a radical revision of the goals of the criminal trial. Contra Arendt, he supports replacing traditional objectives such as correction, retribution and deterrence with expressive, didactic purposes of ostracism of the defendant, clarifying the historical truth and building a collective memory, with the ultimate hope of remedying the violations experienced by specific groups and communities. With this he joins a line of modern writers who uphold the expressive function of international criminal trials as their main justification.[57] It is important to note that criminal law traditionally has tried to minimise its didactic role, as this has put it in dangerous proximity with 'show trials' and the risk of betraying justice for politics. Indeed, this was precisely Arendt's criticism of the Israeli prosecution of Eichmann. Moreover, it is worth noting that there is an internal logic connecting individual liability with the aim of retribution, and once we recognise the legitimacy of the expressive goals of the criminal trial, it is not clear why we should

[55] Douglas, above n 2.

[56] Eg, Art 7 of the Rome Statute of the ICC abandons the requirement elaborated at Nuremberg of a nexus to war in the definition of 'crimes against humanity'.

[57] See Osiel, above n 42; J Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, Mass, Harvard University Press, 1964); M Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook of United Nations Law* 1.

insist on individual liability.[58] The irony is that current support for the recognition of the didactic role of the criminal trial of supranational crimes is not accompanied with a willingness to abandon the need to establish individual guilt. Thus, we witness again a divide, this time between the expressive goals of the trial and the commitment to individual responsibility.

The continued insistence on individual liability, notwithstanding the major changes in the jurisprudence of atrocity, can only be explained, in my view, as stemming from the choice of criminal law as legal tool. The heart of criminal liability is the autonomy of the individual, and without it we cannot justify the taking of liberty. However, it is this very demand that undermines the ability of criminal law to address the bureaucratic organisation of the crimes, as is further shown by the criminal law's poor record in dealing with business involvement in the Holocaust.

IV. PRIVATE BUSINESS AND THE PROBLEM OF CORPORATE LIABILITY

Private corporations and their managers were rarely the subject of criminal trials for their involvement in the Holocaust.[59] Even when they were, courts have been reluctant to convict defendants in the absence of unquestionable criminal intent.[60] In this area we can identify a pattern similar to the one we identified in relation to State bureaucracy: the brave beginnings that were undertaken in Nuremberg, in what came to be known as the industrialists' trials, were short-lived and were discontinued throughout the cold war.

During the subsequent trials at Nuremberg,[61] the American prosecution attempted to bring under legal judgment the involvement of various sectors of civil society in enabling the commissions of heinous crimes, including that of private businesses. However, lacking jurisdiction over the business corporation

[58] This question has become all the more urgent in the trial of Milosevic (Case IT-02-54-T *Prosecutor v Slobodan Milosevic*, Order Terminating the Proceedings, 14 March 2006). After having conducted a long trial aimed at clarifying the historical truth, the unexpected death of the defendant has terminated the legal proceedings without a definitive judgment. Given the expressive purpose of the trial, it remains unclear why the trial should be terminated without a judgment if it is mainly directed towards clarifying history?

[59] As Bush, above n 38, 1098, emphasises, no corporation has ever been charged with or convicted for an international war crime or similar offence; only individuals were charged in the first trials at Nuremberg and Tokyo, as well as in the four subsequent trials at Nuremberg that focused on managers, directors and owners of the giant German enterprises such as Krupp, Flick, IG Farben.

[60] For further discussion see AL Zuppi, 'Slave Labor in Nuremberg's IG Farben Case: The Lonely Voice of Paul M. Hebert' (2005–2006) 66 *Louisiana Law Review* 495.

[61] At Nuremberg, the International Military Tribunal (IMT) did not try any industrialists for their use of forced labour. Subsequently, however, the United States Military Tribunal (USMT) did try executives from three German firms: IG Farben, Flick and Krupp.

as an entity,[62] the prosecution attempted to deal with the criminal complicity of private corporations by indicting their directors and managers as individuals. The court, however, routinely spoke in terms of corporate responsibility and obligations in its judgment of the individual managers.[63]

These trials of the industrialists were conducted by the US military tribunals under the Allied forces' Control Council Law No 10. In three cases, *United States v Flick*,[64] *United States v Krauch*[65] (the *IG Farben Case*) and *United States v Krupp*,[66] the leaders of large German industries were prosecuted for crimes against peace (ie, initiating the Second World War), war crimes and crimes against humanity. The charges stemmed from the active involvement of the defendants in Nazi practices such as slave labour and deportations.[67] Notwithstanding the important precedents created by these trials for the use of criminal law to deal with the conduct of private corporations, their success was partial, due to criminal law's narrow definition of the intent required to establish liability, which involves independent initiative and choice, and not mere contribution to the commission of the crime.[68] The problem of bringing the conduct of the private corporations under the judgment of criminal law has proven especially perplexing with relation to the use of slave and forced labourers. For example, most members of the board of IG Farben were acquitted of charges relating to the use of slave labour due to lack of clear evidence of their knowledge and direct engagement.[69] The trial targeted, among other things, IG Farben's participation in the 'slave labor program' of the Third Reich.[70] Even though the fact that IG Farben exploited a large number of forced labourers was not even disputed by the defence, they argued that they acted out of 'necessity', specifically that IG Farben had yielded to the pressure of the Reich labour office to employ foreign labourers. The tribunal, working under the strictures of criminal law based on subjective intention and free will, accepted this argument and acquitted (Judge Herbert dissenting).[71]

[62] International law at the time of the Nuremberg trials did not recognise the criminal liability of corporations. See SR Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443.

[63] Ratner, *ibid* 477–78, cites the IG Farben decision as an example. See also A Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations' (2002) 20 *Berkeley Journal of International Law* 91.

[64] 6 Trials of War Criminals Before the Nuernberg (*sic*) Military Tribunals Under Control Council Law no 10 (1949).

[65] 8 Trials of War Criminals Before the Nuernberg (*sic*) Military Tribunals Under Control Council Law no 10 (1949).

[66] 9 Trials of War Criminals Before the Nuernberg (*sic*) Military Tribunals Under Control Council Law no 10 (1949).

[67] Ratner, above n 62, 477.

[68] See below n 69 and accompanying text.

[69] Nine of the 23 Farben directors were found guilty of corporate plunder in occupied territories. Only five were held liable for the abuse of slave labour.

[70] Bush, above n 38, 1172–74.

[71] For further discussion see Zuppi, above n 60. The tribunal held that '[t]he defendants here on trial have invoked what has been termed the defense of necessity. They say that the utilization of slave labor in Farben plants was the necessary result of compulsory production quotas imposed upon them

As we see, no corporation has ever been charged with or convicted for an international war crime or similar offence, and only individuals were charged in the first trials at Nuremberg and Tokyo, as well as in the four subsequent trials at Nuremberg that focused on managers, directors and owners of giant German enterprises such as Krupp, Flick, and IG Farben. This preference for individual liability has not changed with the establishment of a permanent international criminal court (ICC), as the Rome Statute did not include corporations as permissible subjects of jurisdiction and rejected the doctrine of criminal conspiracy.[72] As a consequence of these developments, one commentator observes that 'the law concerning both corporations and conspiracies is in knots'.[73]

by the government agencies, on the one hand, and the equally obligatory measures requiring them to use slave labor to achieve such production, on the other. Numerous decrees … have been brought to our attention, from which it appears that said agency assumed dictatorial control over the commitment, allotment, and supervision of all available labor within the Reich … Heavy penalties, including commitment to concentration camps and even death, were set forth for violation of these regulations. The defendants who were involved in the utilization of slave labor have testified that they were under such oppressive coercion and compulsion that they cannot be said to have acted with intent which is a necessary ingredient of every criminal offense … In view of these indisputable facts … this Tribunal is not prepared to say that these defendants did not speak the truth …' *United States v Krauch*, above n 65, 1174 cited in F Jessberger, 'On the Origins of Individual Criminal Responsibility under International Law for Business Activity' (2010) 8 *Journal Of International Criminal Justice* 783, 792–93. Judge Herbert criticised the broad application of necessity. Herbert wrote that 'Such doctrine constitutes … unbridled license for the commission of war crimes and crimes against humanity … through the simple expedience of the issuance of compulsory governmental regulations.' (*United States v Krauch*, above n 65, at 1310, cited in Zuppi at 517). He thought that the officers of Farben should be held guilty: 'I cannot agree that there was an absence of a moral choice. In utilizing slave labor within Farben the will of the actors coincided with the will of those controlling the Government and who had directed or ordered the doing of criminal acts.' (*ibid* 1309). The disagreement among the judges involved issues of both historical facts and standards of interpretation. As to the former, the restitution litigation of the 1990s ignited the debate among historians about the scope of choice enjoyed by the corporations under the Third Reich. See P Hayes, 'Corporate Freedom of Action in Nazi Germany' (2009) 45 *Bulletin of the German Historical Institute* 29–42, 51.

[72] See P Saland, 'International Criminal Law Principles' in R Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (The Hague, Kluwer Law International, 1999) 189, 198–99. After considerable discussion, the drafters did not include criminal liability of corporations. The reasons cited for the rejection of corporate liability were that it would shift the ICC's focus away from individual liability, and that there was no common international standard for corporate liability. See M Kremnitzer, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8 *Journal of International Criminal Justice* 909, 917. Thus, notwithstanding the growing recognition of criminal liability of corporations by various European States, the Rome Statute establishing the ICC limited its jurisdiction to natural persons and rejected the introduction of criminal liability for corporations. In addition, the American doctrine of criminal conspiracy was rejected, largely at the insistence of lawyers from civil law countries whose domestic traditions generally do not include criminal or civil liability for conspiracy (see Bush, above n 38, 1100). Instead, the ICC's jurisdiction includes crimes similar to conspiracy, like joint enterprise and aiding and abetting, as well as liability for 'contributing to a common purpose', as a surrogate for conspiracy. See Rome Statute of the International Criminal Court, Art 25(3), July 17, 1998, 2187 UNTS 90, 105 (extending ICC jurisdiction to a person who 'contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose').

[73] Bush, above n 38, 1101. See also WA Schabas, *An Introduction to the International Criminal Court*, 2nd edn (Cambridge, Cambridge University Press, 2004) 101–05, interpreting from Art 25 of the Rome Statute that it does not recognise corporate criminal responsibility and relies instead on the

V. JUDGING BUREAUCRACY: BETWEEN SPECTATOR AND JUDGE

We began our journey of reflection on the crisis of judging bureaucracy posed by the Holocaust, by pointing out the apparent contradiction in Arendt's argument. It seems that Arendt urges us to understand the novelty of the Holocaust as a bureaucratic crime, while exposing the failure of traditional juridical concepts in dealing with the Holocaust's bureaucratic aspect. However, this recognition does not lead Arendt to question the resort to criminal law. On the contrary, she upholds its emphasis on attributing individual responsibility. Arendt is of the opinion that all that is required in the legal arena is to recognise changes in substantive law (recognition of the new crimes of crime against humanity and genocide) without the need to alter the reliance of criminal process on the principle of individual culpability. To the contrary, in the face of the bureaucratisation of the crimes, Arendt appears to stress the importance of proving the individual guilt of the perpetrators. A review of the jurisprudence of atrocity since the Second World War reveals that notwithstanding the changes in substantive criminal law, the emphasis on individual culpability has remained strong. In light of the development of historical knowledge on the complex bureaucratic aspects of the Holocaust, it seems that the gap between the historical understanding and the legal tools has only increased with the years. Is there a way out of this impasse?

One route would be to try to alter criminal law further, by extending criminal liability to corporations under international law.[74] In light of Hannah Arendt's insights discussed throughout this essay, in order for corporate criminal liability to provide an adequate legal response to bureaucratic involvement in atrocity, criminal law's focus on a subjective intent traceable to an individual would have to be relaxed. However, as I have argued above, this subjective focus is at the heart of criminal liability. Indeed, it appears to be retained by contemporary proponents of corporate criminal liability in international law.[75] I should like to

concept of common purpose complicity, which the judges of the ICTY developed into the theory of 'joint criminal enterprise'.

[74] For arguments to this effect, see A Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 *Journal of International Criminal Justice* 899, and Kremnitzer, above n 72, 909–08. Criminal liability of corporations is well-established in common law jurisdictions, but has recently spread to some civil law jurisdictions as well (see T Weigend, 'Societas delinquere non potest? A German Perspective' (2008) 6(5) *Journal of International Criminal Justice* 927).

[75] Eg, Kremnitzer, above n 72, 911, writes that 'criminal liability should not be imposed on conduct that is not significantly anti-social or that can not be defined with reasonable prediction and clarity ... The area appropriate for criminal law should, as a rule, be restricted to acts accompanied by a subjective mental element, not including negligence. The subjective mental element may be stretched as far as the case of an organ of a company who suspects that criminal activity is taking place by a subordinate employee in the framework of the corporation (even when the suspicion relates only to a specific crime in general and does not include details concerning the concrete circumstances of the crime), and encourages, by omission or commission, this criminal activity.' It is doubtful whether such

conclude by suggesting that only by turning to private law have jurists found a way to address the bureaucratic organisation of the crimes of the Holocaust.

The industrialists' trials at Nuremberg did not signal the beginning of the systematic criminal adjudication of private businesses for their involvement in the Holocaust. Neither did the civil domestic road prove any better. German compensation legislation failed to relate to inmates' labour for private firms, and the few private lawsuits brought against the largest industrial firms in Germany resulted in paltry settlements.[76]

Claims for reparations made their debut in American courts in the mid-1990s.[77] Swiss banks were the first target of mass class actions suits filed in US federal courts on behalf of Holocaust survivors. Soon to follow were claims for life insurance plans, and demands for compensation for slave and forced labour. Litigation also expanded to include banks in other countries and other private corporations.[78] In 1998, Swiss banks were the first to settle a claim, for an unprecedented US$1.25 billion.[79] Shortly thereafter, a series of claims against German corporations led to the establishment of a US$5 billion fund to which the German Government and corporations contributed in equal shares, and to a signing of

a 'stretched' subjective element would answer Arendt's concerns, as it requires a definite knowledge and intent on the part of an individual or perhaps group of individuals who compose the corporate organ.

[76] Ferencz explains that the German compensation legislation did not include payment for unpaid wages or for companies' unjust enrichment when inmates were assigned to work for private firms, as they were considered relatively minor obligations that could be dealt with by companies themselves. The failure to pay 'slave labourers' gave rise to lawsuits against a few of the big industrial firms whose abuses had been revealed in the Nuremberg trials. Despite intensive litigation in many test cases, Germany's highest court held that all such claims, being in the nature of reparations, could be considered only as part of a peace treaty with a united Germany. (The exception to this rule was in a case brought against IG Farben which ended in negotiated compensation. A civil division of the district court in Frankfurt AM allowed the claim for compensation of DM 10,000 of the former prisoner and forced labourer Norbert Wollheim against IG Farben (in liquidation); subsequently IG Farben (in liquidation) came to an agreement with those prisoners having worked in Auschwitz and Monowitz about total compensation of DM 30 million.) See BB Ferencz, *Less Than Slaves, Jewish Forced Labor and the Quest for Compensation* (Indiana, Indiana University Press, 2002) 34–67. Interestingly, one of the early attempts to overcome the hurdles imposed by German legislation by turning to American courts was by a survivor of IG Farben's plant in Monowitz, whose claim for indemnification had been rejected because he was neither a German national nor a 'refugee' at the time of his enslavement (see *Princz v Federal Republic of Germany* [1994] 26 F 3d 1166 (DC Cir 1994) *cert denied*, 513 US 1121, 115 SCt 923. See Zuppi, above n 60, 524. We can thus trace the origins of forced labour and restitution litigation in American courts to the unsatisfactory treatment by the German legal system of IG Farben's involvement with Auschwitz.

[77] Note, however, that some sporadic claims have been recorded prior to this date. See MJ Bazyler and RP Alford (eds), *Holocaust Restitution: Perspectives on the Litigation and its Legacy* (New York, London, New York University Press, 2006) xiii.

[78] M Marrus, *Some Measure of Justice: The Holocaust Era Restitution Campaign of the 1990s* (Madison, The University of Wisconsin Press, 2009) 4.

[79] See *ibid* 10–25. For a detailed exposition of the settlement mechanism, see M Domes, 'Compensation for Survivors of Slave and Forced Labor: The Swiss Bank Settlement and the German Foundation Provide Options for Recovery for Holocaust Victims' (2001) 14 *The Transnational Lawyer* 171, 175–92.

an Executive Agreement between the Governments of Germany and the United States.[80]

None of the restitution suits was ultimately resolved on the merits of the case. The legal pressure, however, did yield historical findings in a turnabout way. Swiss banks agreed to a comprehensive audit, and German corporations established historical committees and opened their archives to historians whom they appointed to investigate their involvement in the Holocaust.[81] Though the courts did not make any pronouncement of liability, they were actively involved in the negotiation process as well as in the implementation of the settlements, issuing numerous rulings as to the proper categorisation of claims and allocation of funds.[82] Commenting on the legal design of lawsuits launched in court with the aim of reaching out-of-court settlements, Holocaust historian Michael Marrus writes that the problem that Arendt identified about the inadequacy of 'juristic concepts' to deal with matters such as genocide was only exacerbated in this litigation, since the class actions were not really about law but about political, diplomatic and media pressures.[83]

Is this a pre-ordained failure? Is the law doomed to fail when trying to address the bureaucratic aspects of the Holocaust? I would like to suggest that the restitution class actions of the 1990s provide us with the first instance in which the idiom of the law corresponded to the bureaucratic aspects of the crimes.[84] Indeed, because the claims were grounded in tort and property law, the restitution litigation removed one of the most formidable obstacles to bringing Auschwitz under

[80] Under Secretary Eizenstat played a pivotal role in the shaping of this agreement. See Domes, above n 79. Concurrently, an Agreement Concerning Holocaust Era Insurance Claims was concluded between the 'Remembrance, Responsibility, and Future' Foundation, the newly-introduced International Commission on Holocaust Era Insurance Claims (ICHEIC) and the German Insurance Association. This detailed agreement set out the mechanism for settling 'individual claims on unpaid or confiscated and not otherwise compensated policies of German insurance companies', Agreement preamble, available at <http://www.icheic.org/pdf/agreement-GFA.pdf>. These settlements did not bring the sprawling litigation campaigns to a halt, however. For an overview of litigation campaigns by 2006, see Bazyler and Alford, above n 77.

[81] In 1996, in the wake of the restitution campaigns, the Swiss Bankers Association formed a committee of accountants to audit their records and determine the extent of dormant accounts belonging to Holocaust victims. Later that year, the Swiss Government appointed a committee of historians to assess the role of Switzerland in the Second World War. That committee was headed by Swiss historian Jean-Francois Bergier. Both committees published extensive reports. See E Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (Baltimore, Md, The Johns Hopkins University Press, 2001) ch 5. For the final report published in 2002 by the Bergier Committee, see *Final Report of the Independent Commission of Experts, Switzerland—Second World War*, 276–77, available at <http:www.uek.ch>. Holocaust historian Saul Friedlander was appointed as a head of an independent historical commission with the aim of investigating the corporate history of Bertelsmann AG, a German media corporation, during the years 1921–51. The commission issued an extensive report that was accepted as the official institutional history. See S Friedlander *et al*, *Bertelsmann im Dritten Reich* (München, Bertelsmann, 2002) (In German).

[82] For a detailed outline of the courts' involvement in the Swiss Banks Settlement, for example, see the official website of the settlement at <http://www.swissbankclaims.com/Chronology.aspx>.

[83] Marrus, above n 78, 27.

[84] See L Bilsky, 'Transnational Holocaust Litigation' *European Journal of International Law* (forthcoming 2012).

legal judgment: the need to establish subjective individual intent, which does not stem from the law itself (as Arendt seemed to assume) but is connected to the logic of criminal law.[85] Thus, I suggest considering the development of restitution lawsuits in the 1990s as opening the possibility of combining the historical understandings of the bureaucratic aspects of the Holocaust with the legal tools of the class action. In a certain way, it can be said that the law has undergone the same process as Arendt underwent in the Epilogue to *Eichmann in Jerusalem*. By trying to address the involvement of bureaucratic organisations in the Holocaust, the judge abandoned his traditional judicial stance as an umpire and became an involved actor, a judge-manager-bureaucrat of mass claims whose main task is to facilitate monetary settlement. We saw that Arendt did not manage to preserve the separation between the two stances of 'spectator' and 'actor'. Maybe, in order to judge the Holocaust, there is no choice for the law but to adopt the tools and language of bureaucracy itself. This necessarily involves abandoning the principle of individual liability which has been central until now in judging the Holocaust.

[85] Although the restitution claims of the 1990s operated in the field of private law, they reflected certain elements of the international criminal law of atrocity outlined above, in particular the lack of spatio-temporal limitations on litigation and the centrality of the victims. Nevertheless, the Holocaust restitution suits should be read primarily in light of the American structural class action against human rights violations, which abandons the focus on individual liability to tackle social conditions and the ways that large bureaucratic organisations determine those conditions.