

6 Breaking the Acoustic Wall between the Kastner and Eichmann Trials

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Introduction

"K. sold his soul to the Devil." This sentence, alluding to the famous story of Faust, functions as the connecting thread between the Kastner trial (1954-5)¹ and the Eichmann trial (1961).² The trials are depicted in Prina Lahav's book *Judgment in Jerusalem* as two constitutional moments in Israeli law.³ Constitutional in the literal sense of *constituting* a modern Zionist identity for an old nation. The Kastner trial brought to the public attention the acts of Rudolf (*Rejo*) Kastner, a leader of Hungarian Jewry who negotiated with Adolf Eichmann over the fate of Hungarian Jewry (the "blood for trucks" negotiations), and who was accused by Malchiel Gruenwald, an Israeli political activist, of collaboration. After a long and heated libel trial against Gruenwald, these accusations were affirmed by district court judge Binyamin Halevi who added that Kastner had "sold his soul to the devil." A few years later, Israeli society confronted the "devil" himself in the Eichmann trial.

Sitting in judgment over Kastner's appeal, Israel Supreme Court Justice Simon Agranat took upon himself to break the spell of Halevi's devastating sentence by questioning the word "sold," that is, the supposed free will of Kastner.⁴ His decision, which was joined by the majority of the appellate court, reversed Halevi's judgment and cleared Kastner's name of most of Gruenwald's accusations. Alas, it was too late for Kastner himself who had been assassinated in 1957 before the appeal was decided. The second part of Halevi's sentence, "to the devil," had to wait until the opening of the Eichmann trial in Jerusalem. The German-American philosopher

* I would like to thank Duncan Kennedy and Prina Lahav for their helpful discussion of the paper, and Anahu Verbin for her invaluable research assistance.

Arendt, who came to Jerusalem to report on the trial proceedings for the *New Yorker*, took upon herself to dismantle the "devil" characterization and to replace it with a story about the banality of evil.⁵ Both Agranat and Arendt chose to challenge the mythifying narrative by "situating" their judgments in the relevant historical period, and by "going visiting" the viewpoints of the participants in their imagination. They replaced the existing narrative with their own contextual judgments in which there were neither demons nor holy saints. In so doing, they asked the Israeli audience and the entire world to join them in their efforts to confront the Holocaust as a human possibility, brought about by a totalitarian regime.

The Acoustic Wall

The trial of the victims (Kasner) and the trial of the perpetrator (Eichmann) were to constitute two autonomous trials, carefully separated from one another. For this to happen, the many connecting threads had to be deliberately hidden away from the public eye. Thus, the trials came to represent two independent chapters in Israeli case law with an acoustic wall between them. This separation was understood to be necessary by the architects of the Eichmann trial (first among them, Israeli Attorney General Gideon Hausner) in order to induce a change of attitude in Israeli society – from blaming the victims to blaming the perpetrators. Hausner took pains to explain to witnesses who insisted on raising the issue of the behavior of Jewish leaders during the war that this was "the trial of the exterminator and not of his victims."⁶ However, the acoustic wall so carefully constructed could not conceal the fact that many of the main actors in the two trials were repeat players. Most important among these were witnesses Joel Brand, Hansi Brand and Pinchas Freudiger, and Judge Binjamin Halevi and Justice Simon Agranat who sat in judgment over the trial and the appellate level respectively, in both cases.

In fact, so tightly woven together were the two trials that Hausner had to appeal to his witnesses for the sake of national unity, not to drag into the Eichmann trial the bitter controversy regarding the Kasner affair (and the question of Jewish cooperation).⁷ The efforts to convince Judge Halevi, the judge who had presided over the Kasner trial, to waive his right to preside over the Eichmann trial was another attempt to separate the trials.⁸ However, once the prosecution decided to base the case against Eichmann on live testimonies of survivors, the attempt to separate the trials became

impossible because the central witnesses who had met and negotiated with Eichmann and who could therefore best assist the Attorney General to prove his guilt, were the same people who had negotiated with him over rescue plans for Hungarian Jews. That is, they were the people who were involved, in one way or another, with the Kasner affair. In his book, Hausner mentions one such witness in particular, whose hostile testimony against Kasner was the reason he was not summoned to testify again in the Eichmann trial.⁹

Though the Eichmann trial was planned so that the issue of Jewish cooperation with the Nazis would not be raised, traces of the Kasner affair still surfaced in the trial unexpectedly. For example, during the testimony of Pinchas Freudiger, one of the leaders of the Orthodox community in Budapest, a spectator from the audience shouted at the witness in Hungarian: "You reassured us so that we wouldn't flee, so that you and your families could be saved."¹⁰ Likewise, in one of Judge Halevi's interrogations of Eichmann, he established the fact that the Nazis regarded cooperation by the Jews as the cornerstone of their "Jewish policy."¹¹ Judge Halevi also asked Hansi Brand (Kasner's partner on the rescue committee) whether she and her partners had considered the possibility of assassinating Eichmann. Brand rejected the implicit accusation in the judge's question ("Why didn't you rebel?") and answered:

We were a rescue committee and none of us was a hero. Our goal was to try and save these people. We did not know if killing Eichmann will bring relief. . . . We were sure . . . that someone else will replace him and the system will keep moving, maybe even faster.¹²

Hannah Arendt was quick to notice the acoustic wall constructed between the trials and harshly criticized it. She considered it essential to dismantle this artificial wall because in her view the key to understanding Nazi totalitarianism was to realize how it deliberately blurred the boundaries between victims and perpetrators.¹³ Her decision to devote twenty pages of her report to a discussion of the Kasner affair, and more generally, to the Judenrat cooperation with the Nazis, was strongly criticized at the time.¹⁴

Toward a New Theory of Judgment

It is beyond the scope of this chapter to discuss the full legal, political and historiographical ramifications that stem from the decision to construct an acoustic wall between the trials. Rather, I would like to consider an unexpected consequence of this decision: its implications for the development of a new theory of judgment. More specifically, I suggest that the artificial separation between the trials obscured two important attempts to develop a new theory of judgment that diverged in important ways from the dominant jurisprudence of the period. As I shall show, these attempts were made by Justice Agranat (in his Kastner decision) and by Arendt (in her Eichmann report). Notwithstanding their differences in role and perspective, the judge and the philosopher came to uphold very similar views about the process of judgement. Moreover, both Arendt and Agranat transgressed the boundaries of their professions in approaching the issue of judgment. Agranat, in an unusual step for a judge, inserted into his decision on Kastner's appeal five pages on the theory of judgment in law and in historiography.¹⁵ Arendt, on her part, abandoned the ivory tower of academia and came to Jerusalem to form her own independent judgment of Eichmann.¹⁶ In subsequent years she gave a seminar on judgment (which was published posthumously), and planned to devote the third book of her trilogy on the life of the mind to the faculty of judgment. In her introduction to the book, she wrote that her reflections on judgment were influenced to a large degree by her experiences in the Eichmann trial.¹⁷ These initial attempts to develop a comprehensive theory of judgment makes the comparison between the two all the more compelling. In the following pages I hope to illuminate a missed opportunity at developing a new approach to judgment. I shall argue that the artificial separation between the trials concealed not only the continuation and internal connections between the trials, but also the unexpected similarity between the answers that Arendt and Agranat offered to the difficult question of judging the Holocaust. This affinity could not be discerned by focusing only on the Eichmann trial because they reached opposite conclusions in the Eichmann case. But by extending our frame of reference to the Kastner trial, we are able to see the similarities in their approaches. We will also see that Agranat and Arendt themselves fell prey to the acoustic wall and failed to apply their method of judgment consistently to the two trials. This chapter will discuss three

elements of the new approach to judgment, that together offer a new direction for further research on this largely neglected topic.

A. The Method of Judgment

Justice Agranat was critical of the captivating phrase, "Kastner sold his soul to the devil," offered by Judge Halevi as an explanation for Kastner's betrayal. Agranat attributed Halevi's central error to the tendency to judge Kastner's actions through hindsight. To counter this tendency, he took upon himself to situate Kastner's actions and decisions in the context of his time and place and to judge his actions accordingly.¹⁸ Agranat wrote that the judge should attempt to "put himself in the shoes of the participants themselves; evaluate the problems they faced as they might have done; take into consideration sufficiently the needs of time and place, where they lived in their lives; understand life as they understood it."¹⁹ This contextual method of judgment allowed him to expose the conditions of terror and deception under which Kastner had acted. Agranat argued that given these conditions, in addition to the approaching end of the war, and the lack of means for organizing a large-scale escape, Kastner's negotiations with the Nazis were risky, yet represented the best chance of saving Hungarian Jewry. He concluded, therefore, that Kastner's actions were reasonable in the eyes of the law.²⁰ This method has strong resonance to Arendt's views on judgment, developed in her seminars on Kant's *Critique of Judgment*. Arendt referred to her method of judgment as "enlarged mentality" or simply as "going visiting."²¹ Like Agranat, she argued that in order to form a fair judgment of another's actions one has to train the imagination to "go visiting" in the world of the one judged. As we shall see, she exercised this method in judging Eichmann's actions.

This method of judgment had important political and ideological ramifications in both cases. Agranat's judgment of Kastner served to undermine the binary logic of the prevailing Zionist ideology of the time: that held that the world was divided into two distinct categories of people: heroes (underground rebels in the ghettos) and collaborators (Judenrat members). Agranat's decision helped to expand this conceptual map and to recognize a whole range of intermediate possibilities of action. In particular, it illuminated the heroism of Jewish leaders like Kastner who were committed to saving as many lives as possible and who thought that the best chance to achieve this was by cooperating with the Nazis. This

view put Agranat ahead of his time in challenging the binary picture of the world of heroism and betrayal prevalent in Israel. At the time of the Kastner affair, the Israeli public was not mature enough to accept it and it was only during the Eichmann trial, influenced by the testimonies of 110 Holocaust survivors, that this rigid dichotomy began to crack.²²

Justice Agranat had to consider the proper method of judgment again when he confronted Eichmann's "small cog" defense (the legal defense for obeying superior orders) while sitting in judgment on his appeal.²³ Could it be that the same conditions of terror and deception that Agranat analyzed so carefully in the Kastner case had a corrupting effect on Eichmann's moral judgment? Agranat answered this question with a definite "No," relying on traditional criminal law doctrine about the duty to disobey a manifestly illegal order. In a later conversation with his biographer, Pnina Lahav, who asked him about the seeming inconsistency between his two judgments, Agranat explained that the comparison did not occur to him at the time. However, he explained that there was an important difference between the two cases since Kastner acted under pressure and terror while Eichmann did his job "con amore."²⁴ However, Agranat's answer does not fully address the deeper question raised by the need to judge Eichmann in view of the circumstances under which he acted. This difficulty is suggested by Arendt:

From the viewpoint of our legal institutions and of our moral standards of judgment, this normality was much more terrifying than all the atrocities put together, for it implied -- as had been said at Nuremberg over and over again by the defendants and their counsels -- that this new type of criminal . . . commits his crimes under circumstances that make it well-nigh impossible for him to know or to feel that he is doing wrong.²⁵

Arendt saw in Eichmann a representative of the Nazi system and sought to understand its workings by listening to Eichmann's reasoning. She therefore applied the method of contextual judgment to examine Eichmann's acts and deeds outside the cultural frameworks of myth and fiction about evil. She took her cue from Eichmann's language and made every effort to reconstruct the historical circumstances under which he acted.²⁶ Indeed, after listening carefully to Eichmann's clichés and "winged words," Arendt came to change her previous views about radical evil and to conclude that what the world was witnessing in the Eichmann trial was "the banality of evil."²⁷ By this Arendt did not mean that Eichmann's acts were banal, but

rather that his motivation was banal. He was not motivated mainly by hatred of Jews or sadistic inclinations but, rather, by a job holder's concerns with success, promotion, the esteem of his co-workers and the praise of his superiors. In her eyes this modern phenomenon made Eichmann's deeds all the more horrific and dangerous because the actor did not have to be abnormal in order to take part in them. They could spread "like a fungus" among other bureaucrats under other totalitarian systems.²⁸ For Arendt, the main challenge to the legal system was the need to adjust its traditional doctrines of *mens rea* to be able to punish this new type of bureaucratic perpetrator.²⁹

Since Arendt rejected the "con-amore" thesis of Agranat, she had to address the implications that her "banality" thesis had for traditional doctrines of criminal law. She argued that the existing doctrines of criminal law could not adequately address the conditions of action in Nazi Germany.³⁰ More specifically, she pointed out the inversion of the moral code under the Nazi regime ("thou shalt not kill" became the exception) that was followed by a disintegration of civil society. After all, even the priest Grueber who was brought by Hausner as an example of the "good German" admitted in his testimony that he did not confront Eichmann directly about the immorality of his actions. Could it be then, that the very moral and legal structure presupposed by the demand to disobey a manifestly illegal order, did not exist at the time? And what should be the legal and moral implications of such a condition? Arendt thought that this question, namely, the possibility of moral judgment within a totalitarian bureaucracy, was crucial for the law to address. Accordingly, she challenged the Israeli court to reevaluate traditional legal doctrines within the context of the totalitarian State:

There remains, however, one fundamental problem, which was implicitly present in all these postwar trials and which must be mentioned here because it touches upon one of the central moral questions of all time, namely upon the nature and function of human judgment. What we have demanded in these trials . . . is that human beings be capable of telling right from wrong even when all they have to guide them is their own judgment, which moreover, happens to be completely at odds with what they must regard as the unanimous opinion of all those around them.³¹

Arendt argued that in "normal times" soldiers could distinguish legal from illegal orders by contrasting the exception with the rule. Ordinary people

could, likewise, rely on the existence of a critical civil society in forming their moral judgments. But these conditions were abolished under Nazi totalitarianism. Her insistence on "going visiting" in Eichmann's world led her to challenge the Israeli court to probe more deeply into the foundations of the criminal law and the doctrine of disobeying manifestly illegal orders.³²

Committed as she was to her method of contextual judgment, Arendt could not make herself "go visit" Kastner's world when she came to Jerusalem to watch the Eichmann trial.³³ Her approach to the Kastner affair could not be further from Agranat's admonition to put oneself in his shoes. In her report, she had only harsh words for Kastner and the Jewish leaders' behavior during the war:

The extent to which even the Jewish victims had accepted the standards of the Final Solution is perhaps nowhere more glaringly evident than in the so-called Kastner report. . . . Even after the end of the war, Kastner was proud of his success in saving "prominent Jews".³⁴

It is interesting to note here the importance that Arendt attributes to the language of the actor. From Kastner's language, she learned about his moral corruption, because in her view his language indicated the extent to which he accepted the Nazi distinctions between more deserving and less deserving people. Her criticism of Kastner appears at first glance to resemble the position of defense attorney Shmuel Tamir who accused Kastner of collaborating with the Nazis. I believe, however, that a crucial difference sets them apart. Arendt rejected the version of heroism that Tamir and Judge Halevi advocated in the Kastner trial. In her report of the Eichmann trial she repeatedly criticized the Israeli militaristic conception of heroism that justified pointing the finger of blame at Holocaust survivors. Arendt criticized Hausner's repeated question to the witnesses, "Why didn't you rebel?", remarking that this was a stupid and cruel question. Arendt claimed that under the Nazi totalitarian system, no one could do otherwise. The cruel question, she argued, served to obscure another, much more painful question, that could implicate the leaders of the Jews in Europe and possibly also Zionist leaders:

But the question the prosecutor regularly addressed to each witness except the resistance fighters which sounded so very natural to those who knew nothing of the factual background of the trial, the question "why did you not rebel?" actually served as a smoke screen for the question that was not asked (i.e.,

"Why did you cooperate in the destruction of your own people and, eventually, in your own ruin.") And thus it came to pass that all answers to the unanswerable question Mr. Hausner put to his witnesses were considerably less than "the truth, the whole truth, and nothing but the truth".³⁵

We see that Arendt chose to reintroduce the painful issue of the Jewish leaders' behavior under Nazi rule in order to unsettle the new ideological order that was advanced in the Eichmann trial, which divided the world into devilish murderers and holy martyrs. She argued that this binary structure made the complex reality of Nazi totalitarianism fit the mythological conceptions of evil instead of being directly confronted by the judges and the audience. Arendt's own grounds for criticizing Kastner and the Judenrat were different from those advanced by defense attorney Tamir in the Kastner trial. She condemned their decision to cooperate because they failed to adopt a position of civil disobedience. In her eyes, coming to terms with this failure was the key to understanding how the Nazi system of destruction worked. Nonetheless, it is apparent from her book that her criticism of Kastner and other Jewish leaders was so deep that it barred her from "visiting" their world and the circumstances under which they made their difficult decisions to cooperate with the Nazis.

We see that both Agranat and Arendt diverged from the popular ideologies of their time and sought to judge the Holocaust by using the method of contextual judgment. Agranat was ahead of his time in rejecting the dichotomy between the heroism of the Ghetto fighters and the cowardice of the Jewish councils. Arendt was ahead of her time in refusing to see Eichmann as an Iago or a modern day Pharaoh, choosing instead to examine the role of bureaucracy in producing the mass criminals of the twentieth century. As we have seen, she rejected not only the notion of the "satanic perpetrator" but also the notion of "holy saints." Both Agranat and Arendt, however, failed to apply their method of contextual judgment consistently to Kastner and to Eichmann.

B. Objectivity in Judgment

The other side of "visiting" the world of the people we judge in our imagination is being able to honestly confront how our own worldview and common sense shapes our judgments. This question was acute in the Eichmann trial since here the judges belonged to the community of the victims. Can a fair trial be conducted when the victims undertake to try

those who victimized them? Is it possible for Jews to give Nazis a fair trial? Interestingly, both Arendt and Agranat dismissed this question fairly briefly. According to Hannah Arendt:

Equally unfounded, I think, was the even more frequent argument against the possible partiality of Jewish judges – that they, especially if they were citizens of a Jewish State, were judging in their own cause. It is difficult to see how the Jewish judges differed in this respect from their colleagues in any of the other Successor trials, where Polish judges pronounced sentence for crimes against the Polish people, or Czech judges sat in judgment on what had happened in Prague and in Bratislava.³⁶

Agranat, uncharacteristically, simply quoted the opinion of the district court:

It is true that the memory of the Holocaust shocks every Jew to the depths of his being, but once this case has been brought before us it becomes our duty to control even these emotions when we sit in judgment. We shall abide by this duty.³⁷

Both Arendt and Agranat chose not to elaborate on objectivity in judgment on the occasion of Eichmann's trial. However, both engaged this question on other occasions and challenged the traditional conceptions of objectivity. They attempted to develop a theory of judgment that would acknowledge the situatedness of the judge as an unavoidable element in reaching a fair judgment. Surprisingly, their views on this issue suggest an unexpected resonance between the judge and the philosopher.

Agranat confronted the question of objectivity in his Kastner decision. It is unusual for judges to offer their reflections on the limits of the objectivity of judgment; it is even rarer to find such reflections inserted in the midst of a politicized and emotional trial. Still, Justice Agranat chose to do just that in his decision, devoting five pages of his opinion to theoretical questions about objectivity in judgment (both legal and historical).

Agranat identified three possible limitations to the judge's objectivity: First, the judge, unlike the historian, does not have direct access to the materials but is dependent on those who choose and select the relevant "facts." In Agranat's view this problem may be further complicated because the selection itself is not made by disinterested people but rather by lawyers who argue the case in a partisan manner. The shocking effects of this point can only be grasped if we read it against the common wisdom of the adversarial tradition that views the competition between two

adversaries as the main path to discovering the truth. Second, Agranat emphasizes the element of time. The judgment of the court is reached after the fact, i.e., after the "end" of the story is known. This poses the danger of judging through hindsight, a danger that is especially acute when judging the recent past, before a proper historical perspective has been developed. Third, in "treason trials" such as Kastner's, the heated and emotional atmosphere in society can impede the detachment required for objective judgment.

One cannot fail to notice that the idea that runs through these pages is *prejudice* or pre-judgment. Agranat does not say it directly, but since these theoretical reflections on objectivity in judgment serve to explain his decision to reverse Halevi's decision, they imply that Halevi might have been entrapped by his prejudices. Such an accusation, even if only implicit, was very difficult to make against a fellow judge in a case that addressed the Holocaust, a time when anti-Semitism prevailed. Still, Agranat is willing to confront not only the prejudices of others but those of Jews and Israelis as well. Even more surprising is the way in which Agranat confronts the problem of prejudice. Enlightenment thinkers treat "prejudice" as the opposite of objective judgment, to be avoided at all costs. In contrast, Agranat is willing to admit that some prejudices play an important role in the formation of judgment. For example, they might give the historian an initial orientation in the facts and criteria for their selection.

It is true that the historian, when he comes to interpret the history of the period that he studies, engages in certain "selections" among the events, among the actions and among other factual details that seem to him to carry "historical" significance. Doing so he by necessity acts with "pre-judice." This prejudice is embedded in his criteria and principle of interpretation, according to which the process of "selection" of the materials is conducted.³⁸

In this passage Agranat diverges from Enlightenment teachings about the existence of a sharp dichotomy between prejudice and reason. Instead, he points to the value of some of our prejudices in the activity of judgment. The important question, in his view, is how to distinguish legitimate from illegitimate prejudices:

We do not call such a process of evaluation as prejudicial, we do not see it as an un-objective method of investigation. Rather, we understand that non-objective (illegitimate) judgments occur only in cases when the historian does not use proper methods of evaluating the testimonies, or overlooks what we

call "facts" or bends the facts to his needs, or changes the rules of interpreting from case to case with no consistency and without a principle, or when he jumps to conclusions without any support in the evidence.³⁹

These passages show Agranat as an anticipator of modern Hermeneutic theories as advanced by Hans-Georg Gadamer.⁴⁰ Agranat explains that "prejudice," for the historian as well as for the judge, can be viewed as both an obstacle to and a facilitator of judgment. Every judgment calls for a framework, a criterion for selecting the relevant facts from the irrelevant ones, and our prejudices provide us with a starting point and a direction. But forming impartial judgments also requires that we do not project our own world-view onto others. Judges have to learn to "go visit," in their imagination, the world of the people they are judging. In doing so they must remain aware of their own historical horizons, that shape the way they view the world. This "to and fro" movement that occurs in the judges' imagination helps them reach a fair judgment, mindful of the differences between the world of the judge and the world of the people being judged. These theoretical remarks helped Agranat to show how a later knowledge about the Holocaust may have hindered Judge Halevi's ability to understand Kastner's actions in their historical context. Agranat than demonstrates how by admitting his own "positionality," he can visit the world of Kastner without collapsing it into his own world. It is remarkable to see how he chooses to quote from Kastner's own words, anticipating the devastating judgment that he would receive if his "gamble" of entering negotiations with the Nazis would prove wrong: "The loser in this game of roulette will also be called a traitor."⁴¹ Against this expectation, Agranat concludes that Kastner was no traitor but a leader who took reasonable risks to try and upset the Nazis' plan to exterminate all the Jews of Hungary.

The issue of objectivity in judgment also occupied much of Arendt's thoughts on the subject, as can be seen in her Kant seminars mentioned above. Her encounter with the Holocaust made her reconsider the prevailing views of the time about objectivity in judgment. She suggested that we must understand judgment as a situated activity (tracing its origins to our subjective faculty of "taste").⁴² In Arendt's view, our judgments are always embodied in our specific history and worldview. This fact, however, does not necessarily make them subjective, providing that the judge is willing to enter a process of "going visiting" and gradually enlarging the frame of reference. Arendt was careful to distinguish her

method of "going visiting" from simple empathy. Empathy, she explained, required that one reproduce the point of view of the other by collapsing all distance between them. Arendt argued, in contrast, that in judging we should seek to acknowledge the "in between" space that separated the judge from the subject of the judgments and not try to overcome this distance.⁴³ Not a collapse of all distance, but rather a constant "visiting" through this space will allow the judge to recognize what distinguishes her from, and what she shares in common with, the person she judges.⁴⁴ It is surprising to what extent Arendt's reflections on judgment resemble Agranat's views on the matter.

Concluding this section let us return to the initial question of what can explain the brief dismissal by both Arendt and Agranat of one of the most difficult questions raised by the Eichmann trial: Can Jewish judges give a fair trial to a Nazi criminal? Notwithstanding their brief answers we see that both gave serious consideration to this question. Surprisingly, they did not try to uphold the traditional view of objectivity that denies the effects of the judge's prejudices, or pre-judgments on decisions. Instead they began to develop a theory of situated judgment that acknowledged the existence of such prejudices in order to see how they could facilitate the process of judgment as "going visiting" the other's point of view. Agranat practiced this type of judgment in his Kastner decision. He constantly acknowledged the "distance" (temporal and geographical) that separated him from Kastner. Instead of trying to overcome this distance, Agranat used it to achieve perspective. He reminded his readers that trying to "stand in the shoes" of another should not be confused with the futile (and dangerous) attempt to fully represent the other. Arendt gave this process a theoretical formulation in her seminars and attempted to practice it in forming her judgment of Eichmann. The dictate to "go visiting" the people we judge was thus made by Hannah Arendt and Shimon Agranat as the cornerstone of their modern conception of judgment. It can be seen that the Holocaust challenged both to rethink the promise of Enlightenment ideals and to adapt them to the demands of justice.

C. Interpreting the Law

It is common to view legal judgments as consisting of two independent components: facts and law. Most legal scholarship focuses on the latter in which questions about the interpretations of statutes and legal precedents are at issue. The determination of the facts has traditionally been perceived

as unproblematic, the result of applying rules of evidence and proof to testimonies and documents. In the first two sections of this paper, I addressed the issue of determining the facts. I showed how difficult this could be when the "facts" were related by someone who was considered to be the "other" to the society. It requires that the judge make the effort to "go visit" the world of the "other." But it also means that the judge should learn to recognize the "common sense" that she or he brings to the process, a common sense that can be a facilitator and a hindrance to the formation of judgment.⁴⁵ We have seen that both Arendt and Agranat did not uncritically accept the Israeli frames of "common sense" and their respective judgements contributed to its transformation.

In this final section I would like to turn to the other component of legal judgment, the interpretation of the law. Again, I shall show that this process should not be read as unconnected to larger questions about the prevailing Zionist ethos and the historiography of the holocaust. Against this larger background, we will be able to discern a strong affinity between Agranat and Arendt who both preferred to view Eichmann's crimes through the lens of the more universalistic category of "crimes against humanity" rather than the particularistic category of "crimes against the Jewish people." Notwithstanding their agreement about the proper legal category according to which to judge Eichmann, it is interesting to study the very different interpretations of the law that they offered.

The district court in the Eichmann trial advanced a particularistic framework that illuminated the centrality of the extermination of the Jews to Eichmann's role in the Nazi bureaucracy. This framework dictated that the court emphasize the category "crimes against the Jewish people," a category that carried an additional symbolic message about the failure of the international community to put the Jewish victims and the crimes committed against them in the center of the Nuremberg trials.⁴⁶ Thus, the legal category also enhanced the worldview that posited "us" (Israelis, Jews) against the whole world.

Sitting in judgment over Eichmann's appeal, Justice Agranat did not reject the law of "crimes against the Jewish people" altogether but sought to subordinate it to the universal norms of international law. His legal choice had symbolic ramifications since it could illuminate the continuity between justice in Jerusalem and the universalistic norms of international law. The way to achieve this goal was by identifying the "common denominator" underlying the different prohibitions of the Israeli Nazi and

Nazi Collaborators (Punishment) Law as "crimes against humanity," a category that subsumes "crimes against the Jewish people" and "war crimes."⁴⁷ In Agranat's view, "crimes against humanity" was the gravest and the most inclusive category of the law because these crimes frustrated the most basic ideas of the Enlightenment about the rights of the individual. To support this view, he cited a long chain of legal precedents from international law to which the Eichmann trial could be joined.

Agranat's decision to put "crimes against humanity" at the center of the court's decision also helped him justify the Israeli court's jurisdiction over Eichmann. On this issue, the defense argued that since the crimes were committed outside Israel and prior to the establishment of the State, Israel did not have jurisdiction. The trial court answered this objection by pointing to Eichmann's Jewish victims who immigrated to Israel. In legal terms, it based the extra-territorial jurisdiction of the court on the principle of "passive personality jurisdiction," according to which a State acquires jurisdiction over crimes committed outside its territory when it can show "special relations between the victim of the crime and the State, relations that are reflected in the personal status of the victim as a citizen of that State."⁴⁸ The principle of "passive personality" can explain why the court acquired jurisdiction over Eichmann's "crimes against the Jewish people." However, it did not suffice to establish Israel's jurisdiction over Eichmann in offenses he committed against other victims such as Gypsies or Poles.

Rising to this challenge, Agranat advanced a new justification for the court's extra-territorial jurisdiction. He argued that the court's jurisdiction over Eichmann's crimes against humanity could be learned by way of analogy from the universal jurisdiction that international law confers on states against pirates.⁴⁹ The law of nations recognizes that such crimes transfer "universal jurisdiction" to each state, acting as the representative of humanity. Similarly, by undertaking to prosecute and to judge Eichmann, Israel was acting as the delegate of the international community, thus fulfilling its role as a loyal member of the family of nations.⁵⁰ In this way Agranat changed the focus from a particularistic worldview that stressed the failure of the world to prosecute Nazis for "crimes against the Jewish people" to a universalistic worldview that emphasized the common aims of Israel and the enlightened world in bringing Eichmann to trial. The attempt to show Israel's compliance with the norms of international law, notwithstanding its having kidnapped

Eichmann, can explain Agranat's efforts to cite every possible precedent from international law that could justify its jurisdiction.

Arendt approached the trial with different motivation. Her concern was not so much the consistency of the judgment with precedents from international law but rather its ability to articulate a legal category that would capture the essence of the Nazi crimes. Her earlier studies of totalitarianism convinced her of the unprecedented nature of the Nazis' crimes.⁵¹ She sought to highlight the uniqueness of this darkest of times by distinguishing it from all popular chronicles of Jewish history that viewed the Holocaust as the culmination of a chain of persecutions spanning two millennia (from Pharaoh in Egypt to Eichmann in Europe). For this reason, she objected to the district court's legal framework of "crimes against the Jewish people," a framework that tended to obscure the novelty of the crimes since it centered on the role of anti-Semitism.

Arendt joined Agranat in preferring the path of "crimes against humanity" as better equipped to capture the essence of the Nazi atrocities. However, she could not agree to Agranat's interpretation of the law because of his emphasis on precedents from international law. In contrast, Arendt viewed Auschwitz as a radical break with all legal and historical precedents. In her view, "crimes against humanity" should reflect this break and be clearly distinguished from more familiar acts of discrimination, expulsion or even war crimes prohibited by international law:

Legalized discrimination had been practiced by all Balkan countries, and expulsion on a mass scale had occurred after many revolutions. It was when the Nazi regime declared that the German people not only were unwilling to have any Jews in Germany but wished to make the entire Jewish people disappear from the face of earth that the new crime, the crime against humanity – in the sense of a crime "against the human status," or against the very nature of mankind – appeared.⁵²

The novelty in the Nazis' crimes against humanity, she argued, was that they were aimed against the very foundations of humanity, that is, against human plurality. The history of anti-Semitism, she wrote, could not have prepared us for the crime itself, but only for the choice of its first victims, i.e., the Jewish people.⁵³ She argued that only honest recognition of the radical break from all known historical and legal precedents that Auschwitz represented would enable us to grasp the meaning of the Nazi crimes.

Arendt's novel interpretation of "crimes against humanity" extended also to her interpretation of the law of jurisdiction. She rejected both the doctrine of "passive personality" advanced by the district court, and the doctrine of "universal jurisdiction" elaborated by Justice Agranat. The doctrine of "passive personality," she argued, was not compatible with the foundations of modern criminal law because it presented injury to the victims as the reason for the legal process instead of injury to the "community."⁵⁴ Arendt was also dissatisfied with the principle of "universal jurisdiction" since it was based on an unfounded analogy to the law of piracy. A pirate, she wrote, is an "outlaw" who has no flag and who acts on the high-seas, outside the territorial jurisdiction of any state. Eichmann represented the very opposite of a pirate because he was not an "outlaw" but a very loyal member of his state and acted in its name. In other words, the problem with Nazism was not the actions of outlaw individuals, but rather the actions of an "outlaw state" – a criminal state.⁵⁵ In Arendt's view, basing the jurisdiction over Eichmann on an analogy to the law of piracy obscured the nature of his crimes. Moreover, applying the principle of universal jurisdiction to crimes against humanity failed to answer the central question of what distinguished Israel and gave her special authority to prosecute Eichmann. Indeed, Lahav notes that this difficulty might explain the ambivalence in Agranat's decision, who, after elaborating the "universalistic" principle, fell back on to the particularistic explanation of the district court to justify Israel's special claim over Eichmann.⁵⁶

Arendt believed that Israel had a justified jurisdiction over Eichmann's crimes, but its basis was different from that offered by Israeli courts. Having dismissed both principles of international law for extending the territorial jurisdiction, she needed to articulate a new basis for the jurisdiction of the Israeli court over Eichmann, one that could combine her universalistic preference for "crimes against humanity" with her particularistic preference for granting jurisdiction over Eichmann to Israel (and not to an international court or any other nation). This was especially difficult to achieve since her choice of substantive law and procedural law seemed to push in opposite directions. The district court and the appellate court did not need to confront this difficulty because both adopted a consistent interpretation linking their choice of substantive and procedural law. As we saw, the district court preferred the particularistic way in its choice of substantive law ("crimes against the Jewish people") and procedural law (the "passive personality" principle of jurisdiction). The Supreme Court,

although adopting a "universality" approach, applied it consistently to its choice of substantive law ("crimes against humanity") and procedural law (the principle of universal jurisdiction). Arendt sought a path between the two polarities of ethnic particularity and abstract universality. Her solution was to interpret a new the condition of "territoriality" that justifies a state's jurisdiction. In other words, instead of focusing on the exceptions (the principles of "passive personality" and "universal jurisdiction") she turned to an examination of the rule (the "territoriality principle").

Arendt argued that the demand for limited state jurisdiction over offenses committed on its territory is justified, but that "territory" in law is not simply a piece of land. Since her interpretation is so novel, it is worth quoting her words in full:

Israel could easily have claimed territorial jurisdiction if she had only explained that "territory," as the law understands it, is a political and a legal concept, and not merely a geographical term. It relates not so much and not primarily to a piece of land as to the space between individuals in a group whose members are bound to, and at the same time separated and protected from, each other by all kinds of relationships, based on a common language, religion, a common history, customs, and laws. Such relationships become spatially manifest insofar as they themselves constitute the space wherein the different members of a group relate to and have intercourse with each other.⁵⁷

On the basis of this new interpretation of "territory," Arendt justified Israeli jurisdiction for crimes against humanity that were meant to extinguish the Jewish people. She explained that the "territory" of the Jews throughout the ages was their community, and that after the Holocaust, Israel inherited this cultural space. The continuity between the Diaspora and the State of Israel could serve as the basis for justifying the court's jurisdiction: "No State of Israel would ever have come into being if the Jewish people had not created and maintained its own specific in-between space throughout the long centuries of dispersion, that is, prior to the seizure of its old territory."⁵⁸

From this perspective, we can see the consistency in Arendt's interpretation of the substantive law ("crimes against humanity") and the procedural law of jurisdiction (the principle of "territoriality"). In both cases she combined the universal with the particular. Her commitment to international law did not obscure the fact that these crimes were carried on the body of the Jewish people. The very attempt by the Nazis to destroy the

special "territory" that bounded the Jews together throughout the ages made their crime unique, that is, different in quality from an attempt to murder Jews (even on a massive scale). The State of Israel that was created after the Holocaust and as a result of the world's recognition of what had happened to the Jewish communities was different in this sense from other states. It is this "unprecedented" nature of the State that justified giving her jurisdiction over this "unprecedented" crime.⁵⁹

By studying the different interpretation of "crimes against humanity" and the jurisdiction of the Israeli court that Agranat (writing for the Supreme Court) and Arendt proposed, we can see how they both tried to reconcile their Zionism with their commitment to the ideals of the Enlightenment. Agranat chose to reaffirm these ideals by basing his decision on the international law of Crimes against Humanity, and by presenting Israel as the delegate of the international community, enforcing its laws through its domestic courts. In his judgment, Israel was presented as a state like all others, committed to enhancing the values of the Enlightenment as they were embodied in the norms of international law.

Arendt chose the more reflective response of questioning these very ideals in view of their failure to protect Jews and other groups during the Third Reich. She attributed this failure to the narrow focus of international law on the protection of the rights of the individual and its neglect of the protection of groups. To amend this situation, she suggested an interpretation of "crimes against humanity" as aiming to protect minority groups. She accompanied this view with a novel interpretation of the territorial principle of jurisdiction in a way that could allow the Israeli courts to enforce the law without having to deny its novelty. According to Arendt there was no need to obscure the novelty of the crime or the novelty of the creation of the State of Israel in order for the court to function as a loyal member of the international community. Her type of Zionism did not stand in contrast to the ideals of Enlightenment but was based on protecting the conditions of human plurality.

Conclusion

In this chapter I have attempted to expose a common thread in the writings of Justice Simon Agranat and philosopher Hannah Arendt in respect to the issue of judging the Holocaust. I have argued that their views about three central issues (method of judgment, objectivity in judgment, and

interpretation of the law) could be read together to offer a new conception of judgment, that diverged in important respects from the prevailing views of their time. However, I have also demonstrated how the attempt to separate the discussion of the Kastner and the Eichmann trials functioned as an acoustic wall, hindering us in considering these deep affinities. Both Agranat and Arendt had the courage to reject the ideologies of the day in order to confront the difficult questions that the Holocaust posed. But in trying to apply theory to practice they both confronted their human limits of "going visiting" the other's world. It is precisely for this reason that we should try to overcome the acoustic wall that separated the two trials and read them together. This was indeed my main purpose for trying to conduct an imaginative dialogue between the judge and the philosopher, forty years after the fact.

Notes

- 1 What is popularly known as the "Kastner Trial" was formally a criminal libel trial against Malchiel Gruenwald relating to one of his pamphlets in which he accused Rudolph Kastner of collaboration with the Nazis and of assisting in the murder of Hungarian Jewry. See Cr.C. 124/53 *Attorney General v. Gruenwald*, 44 P.M. 3 (1965); Cr.A. 232/55 *Attorney General v. Gruenwald*, 12(3) P.D. 2017 (1958). I will refer to the case as the "Kastner Trial."
- 2 Cr.C. 40/61 *Attorney General v. Adolph Eichmann*, 45 P.M. 3 (1965); Cr.A. 336/61 *Eichmann v. Attorney General* 16(3) P.D. 2033 (1962).
- 3 Prina Lahav, *Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* (Berkeley: Univ. of California Press, 1997), 121-162.
- 4 Cr.A. 232/55, 2,021-2,215.
- 5 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1965, reprinted 1994).
- 6 Gideon Hausner, *Justice in Jerusalem* (New York: Harper & Row, 1966), 341.
- 7 *Ibid.*
- 8 When all "friendly advice" failed, the authorities had to resort to an unusual solution – an ad hominem law was enacted prescribing that the power to appoint the presiding judge of the trial would be granted to the president of the Supreme Court in such cases. See Knesset Record 30 (18/1/61): 754-755 and (31/1/61): 855; Tom Segev, *The Seventh Million: The Israelis and the Holocaust*, trans. H. Watzman (New York: Hill & Wang, 1993), 342-343.
- 9 Hausner, *Justice in Jerusalem*, 341. "We knew that the man would not be able to overcome a vitriolic hostility towards some members of the Jewish Council, particularly Kastner, and that he would in all likelihood give vent to his feeling while testifying."
- 10 *Ibid.* This inference was not mentioned in the official transcript of the trial, see *Eichmann's Trial: Testimonies* (Jerusalem, 1974), 2: 734-774 (Hebrew).
- 11 Arendt, *Eichmann in Jerusalem*, 124.

- 12 See *Testimonies*, 2: 933.
- 13 Arendt, *Eichmann in Jerusalem*: The most controversial pages of Arendt's book were the twenty-two pages (112-134) that she devoted to the repressed Kastner affair and to the issue of Jewish cooperation with the Nazis. In explaining the reasons for bringing up this subject, Arendt wrote, "I have dwelt on this chapter of the story, which the Jerusalem trial failed to put before the eyes of the world in its true dimensions, because it offers the most striking insight into the totality of the moral collapse the Nazis caused in respectable European society – not only in Germany but in almost all countries, not only among the persecutors but also among the victims" (123-126).
- 14 Norman Podhoretz, "Hannah Arendt on Eichmann," *Commentary* (September 1963): 201-08. "In the place of the monstrous Nazi, she gives us the Jew as accomplice in evil; and in the place of the confrontation of guilt and innocence, she gives us the 'collaboration' of criminal and victim"; see also Lionel Abel, "The Aesthetics of Evil: Hannah Arendt on Eichmann and the Jews," *Partisan Review* (summer 1963): 211; Marie Syrkin, "Hannah Arendt: The Clothes of the Empress," *Dissent* (autumn 1963): 341; Marie Syrkin, "Miss Arendt Surveys the Holocaust," *Jewish Frontier* (May 1963): 7. For a reflective essay on the two controversial issues raised by Arendt's book, see Richard Bernstein, "'The Banality of Evil' Reconsidered," in *Hannah Arendt and the Meaning of Politics*, ed. C. Calhoun and J. McGowan (Minneapolis and London: Univ. of Minnesota Press, 1997), 297-322.
- 15 Cr.A. 232/55, 2,055-2,060.
- 16 Hannah Arendt and Karl Jaspers, *Correspondence 1926-1969*, ed. L. Kohler and H. Saner (San Diego: Harcourt Brace & Company, 1992), letter from Arendt to Jaspers dated December 2, 1960, 409-410.
- 17 Hannah Arendt, *The Life of the Mind* (San Diego: Harcourt Brace & Co., 1978), 3-5.
- 18 Indeed, Agranat's opinion opens with the sentence, "This trial takes us back to the days of the Holocaust" (Cr.A. 232/55, 2,021). Agranat goes on to structure his decision periodically (from 19.3.44 until 7.7.44; from 8.7.44 until 14.10.44, and from 15.10.44 until the end of December 1944). Compare to Judge Halevi's decision that was structured like a detective story with subtitles such as, "The Contract between Kastner and the SS," "The Meaning of the Contract," "The Secrecy of the Contract," "The Temptation," etc. Cr.A. (Im.) 232/55, 2,058, Trans. P. Lahav (Lahav, *Judgment in Jerusalem*, 132).
- 19 For further discussion of Agranat's decision, see Lahav, *Judgment in Jerusalem*, 140-141; see also Leora Bilsky, "Judging Evil in the Trial of Kastner," *Law and History Review* (forthcoming).
- 21 Hannah Arendt, *Lectures on Kant's Political Philosophy*, ed. R. Beiner (Univ. of Chicago Press, 1982), 42-43.
- 22 Yechiam Weitz, "The Eichmann Trial as a Turning Point," *Measef* 11 (1993): 175-189 (Hebrew).
- 23 Cr.A. 336/61, 2,075-2,079.
- 24 Lahav, *Judgment in Jerusalem*, 157. Lahav suggests that the need to keep the Kastner and Eichmann decisions consistent might explain Agranat's decision to extend his opinion beyond the subject of jurisdiction that was allotted him by the court in order to discuss the "small cog" defense raised by Eichmann.
- 25 Arendt, *Eichmann in Jerusalem*, 276.
- 26 The irony here is that the same language (which Eichmann referred to as "officialdom") that enabled Eichmann to block himself from entering his victim's worlds and

understanding the meaning of his actions, serves Arendt to enter Eichmann's inner world to understand his moral deficiency. For further discussion, see Dagmar Baranow, *Visible Spaces: Hannah Arendt and the German-Jewish Experience* (Baltimore: Johns Hopkins Univ. Press, 1990), 223-251.

For a different view that Arendt's change of terms from "radical evil" to "banal evil" did not indicate a change of understanding, see Richard Bernstein, *Hannah Arendt and the Jewish Question* (Cambridge, MA: MIT Press, 1996), 137-153.

Arendt, *Eichmann in Jerusalem*, 276: "The trouble with Eichmann was precisely that so many were like him, and that the many were neither perverted nor sadistic, that they were, and still are, terribly and terrifyingly normal."

For elaboration, see Leora Blitsky, "When Actor and Spectator Meet in the Courtroom: Reflections on Hannah's Arendt's Concept of Judgment," *History and Memory* 8 (2) (1996): 137.

Arendt, *Eichmann in Jerusalem*, 277.

Ibid., 294-295.

For a recent attempt to accept Arendt's challenge and seriously examine the foundations of the duty to disobey an illegal order, see Mark Osiel, *Obeying Orders* (New Brunswick and London: Transaction Publishers, 1998).

Arendt's refusal to contextualize her judgment of Kasner and the Jewish Councils can be attributed to her reaction to the deliberate avoidance of the subject by all the participants in the trial. Arendt took upon herself to expose this staged silence and bring the repressed story to public light.

Arendt, *Eichmann in Jerusalem*, 132.

Ibid., 124-125; Hausner, *Justice in Jerusalem*. In a revealing passage, Hausner describes his meeting with the leaders of the Warsaw ghetto revolt, Yitzhak Zuckerman and Zivia Lubetkin Zuckerman, where the treatment of the Jewish Councils in the Eichmann trial was discussed: "What will you say about the Jewish Councils?" Yitzhak asked me. . . . "This is going to be the trial of the murderer, not of his victims," I replied. "But you will not be able to avoid the issue," Zivia said. . . . "No," I replied, "and what we shall bring forth will be the truth. No embellishments." "That is good," said Yitzhak. "The whole truth must be told" (294-295).

Arendt, *Eichmann in Jerusalem*, 259.

Cr.A. 336/61, 2,081.

Cr.A. 232/55, 2,055.

Ibid., 2,055.

Hans-Georg Gadamer, *Truth and Method* (London: Sheed & Ward, 1989, revised 1993), 271-285.

Cr.A. 232/55, 2,082.

Arendt, *Lectures*, 42.

Hannah Arendt, "Truth and Politics," in *Between Past and Future: Eight Exercises in Political Thought* (New York: Penguin, 1968), 227-264: "This is a question neither of empathy, as though I tried to be or to feel like somebody else, nor of counting noses and joining a majority but of being and thinking in my own identity where actually I am not" [emphasis added, L.B.J. 241].

For further elaboration of Arendt's theory of judgment, see Jennifer Nedelsky, "Communities of Judgment and Human Rights," *Theoretical Inquiries in Law* (2000).

Menachem Mautner, "Common Sense, Legitimacy and Coercion: Judges as Narrators," *Pilim* 7 (1998): 11 (Hebrew).

The jurisdiction of the Nuremberg court was limited to the time period of the war (after 1939). In contrast, the Israeli Nazi and Nazi Collaborators (Punishment) Law (5710-1950, 4 L.S.I. 154) extended (in Article 16) this time frame to the year 1933, thus allowing to put the Jewish Holocaust at the center of the Eichmann's trial.

Cr.A. 336/61, 2,048.

S. Z. Feller, *Elements of Criminal Law* (Jerusalem: Hebrew Univ. of Jerusalem, 1984), 1: 248 (Hebrew); see also S. Z. Feller "Jurisdiction over Offenses with a Foreign Element," *A Treatise on International Criminal Law*, vol. 2, ed. M. C. Bassiouni and V. P. Nanda (Springfield, MA: Charles & Thomas Books, 1973).

Cr.A. 336/61, 2,053, 2,060-2,061.

Ibid., 2,052, 2,062, 2,066.

Hannah Arendt, *The Origins of Totalitarianism* (New York: Meridian Books, 1951, reprinted 1958).

Arendt, *Eichmann in Jerusalem*, 268.

Ibid., 269.

Ibid., 261: "Criminal proceedings, since they are mandatory and thus initiated even if the victim would prefer to forgive and forget, rest on laws whose 'essence' — to quote Telford Taylor . . . is that a crime is not committed only against the victim but primarily against the community whose law is violated."

Ibid., 262.

Cr.A. 336/61, 2,067: "We wish to add one further observation. In regard to the crimes directed against the Jews the District Court found additional support for its jurisdiction in the connecting link between the State of Israel and the Jewish victims of the Catastrophe, and the National Home of Palestine. . . . It should be clear that we fully agree with every word"; In *Judgment in Jerusalem*, Lahav remarks that "This relapse hints at Agranat's ambivalence about the dominating theme of his opinion: that these were crimes against humanity, universally recognized by the community of nations", 155.

Arendt, *Eichmann in Jerusalem*, 262-3.

Ibid., 263.

The tension between the particularistic and universalistic interpretations of the laws of jurisdiction reappeared in a scholarly debate about the reform of criminal law of Israel in 1994 which extended the jurisdiction of Israel over offenses committed against Jews as Jews outside the borders of Israel. See Yoram Shachar, "Against Extra-Territorial Application of Criminal Law on National Grounds," *Pilim* 5 (1996): 5-64 (Hebrew); S. Z. Feller and Mordechai Kremnitzer, "A Reply to the Article 'Against Extra-Territorial Application of Criminal Law on National Grounds' by Professor Y. Shachar," *Pilim* 5 (1996): 65-99 (Hebrew). While Shachar seems to adopt the universalistic approach, Feller and Kremnitzer lean on the particularistic approach. Introducing Arendt's position into this contemporary debate seems to complicate things. Arendt would have upheld Shachar's exception to the territorial principle in cases of genocide, but would have dismissed his abstract universalism. On the other hand, it seems that Feller's reinterpretation of the "protective territoriality principle" adheres to Arendt's novel interpretation of the term "territory", but goes too far in this direction because it concentrates on injuries to individual Jews and not on crimes that aim to extinguish the Jewish community as such.