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The Limits to Natural Law and the Paradox of Evil

Agnes Heller

1.

Regardless of whether moral decisions are evaluated by universal standards or by those of local traditions, moral conflicts themselves are always contextual. Kant's categorical imperative is absolutely universalistic, but its test cases are eminently concretely situated; for example, one should return the deposit even if the depositor is dead and no one else knows about it. When I now ask the question of how we can deal with Evil, I do it in a concrete context. I discuss the moral conflicts which occur in the aftermath of the collapse of totalitarian regimes, military and other kind of dictatorships. The question is whether the evils perpetrated under murderous political regimes can, should or will be punished, whether people who were responsible for murder, kidnap, mass incarceration and discrimination or else can, will, or should pay for that what they have committed.

»Paying« stands here for paying in part, not the full prize. Capital punishment is either abolished or there is a consensus against its application in cases where politics is also involved, even if the indictment is for common murder. Thus, Hannah Arendt's grave ruminations on the justification of capital punishment in the Eichmann-case are out of context here. The alternatives are not life or death but prosecution or doing nothing.

The question of whether or not the perpetrators or crimes will be prosecuted, is not a matter of theoretical discussion. In all probability, some of them will be, but most of them will not. What is at issue here is whether they *can* be prosecuted; that is, whether there are legal grounds for their prosecution in the extant constitutions, or in the laws equivalent to them and whether they *should* be prosecuted, that is, whether there are stringent moral reasons or obligations to do just that.

All of the combinations of »Can« and »Should« represent a moral standpoint. But for the most part, it is the political considerations and the personal life-histories that make people inclined to adopt one of them rather than the other. Here I can address only the merits or demerits of the arguments or refer to some general intuitions.

There are six combinations: (a) There should be no prosecution at all, nor can there be; (b) there should be no prosecution at all, although there can be; (c) the perpetrators should be prosecuted, but they cannot be; (d) they should be prosecuted and indeed they can be; (e) they should be prosecuted in order for historical justice to be done; (f) they should pay for their crimes, they should be prosecuted, yet they should not be prosecuted at the same time.

2.

In whichever of the combinations it might occur, the formula that perpetrators of heinous crimes »should be punished« stands for »justice should be done«, whereas the other formula, according to which »they should not be punished«, stands either for »justice should not be done« or for »there is no justice in this matter anyhow« or for »it would be unjust to punish them«.

When we assert that »justice should be done« and subscribe thereby to the injunction that »perpetrators of heinous crimes ought to be punished«, we take responsibility for the punishment of perpetrators, regardless of whether or not they can be (legally) punished or whether or not they will *actually* be punished, and even *irrespective* of the fact whether we continue our statement in the following fashion: »yet they cannot be«. This

is so because, regardless of the actual course of events, with our injunction we have already given our signature to their punishment.

Signing is the act of taking responsibility. Signing, that is, taking responsibility, is not a matter that can be taken lightly. Even in the capacity of a common citizen, one should take responsibility *as if* one were an appointed judge, a member of a jury, of a legislative or executive body of political actors.

Thus before one signs the ought-sentence that »perpetrators of heinous crimes should be punished«, one would do better, first, to circumscribe which crimes are to be termed heinous, and who could be identified as their »perpetrators«.

In the case of identifying the perpetrators of politically motivated or conditioned crimes, one can rely upon the more than forty years of discussions conducted on the Nürnberg trials. If one gives order »to shoot to kill« innocent persons trying to escape to freedom one is a perpetrator of murder, whereas the soldier who obeys that order is not. Certainly, the soldier too is responsible for the death of the persons he has shot: Everyone is the author of his or her own deeds, be they good or bad, but not necessarily also the author of the *conditions* under which they were committed. In the political context, one is a »perpetrator« of crimes if one is the author of not only the crime, but also of the circumstances under which those crimes were ordered or encouraged.

Who decides which the heinous crimes were that must be punished in order for justice to be done? Under the present conditions, only the population of the very country where those crimes have actually been committed, has, and can claim to have, the authority to decide. There cannot be international jurisdiction of any kind. Yet the unreflective intuition of the population concerned is unreliable. In regimes which are long lasting, generations have different life experiences, and in a long era of forced silence the unmentioned, or rather unmentionable, crimes will be forgotten. The politics of repression are also the politics of psychological repression; even the guilty ones begin to forget their own guilt. However, the mourners' suffering is not mitigated by the lapse of time. Rather, the forced silence deepens the wounds. It is only now that the victims and the families of victims can cry out for justice and also for revenge.

Thus, if one gives her signature to the sentence »perpetrators of heinous crimes should be punished«, one also needs to seek for a yardstick more just and more reliable than the concrete intuitions of the members of a concrete community. Yet, one cannot help but rely upon exactly this intuition, for no one else but the members of this community are empowered to determine which crimes are heinous to the degree that they do call for punishment.

Since decision is here a matter of judgment, one can replace the types of cases to be *now* judged by analogous ones taken from history books. These analogous stories are supposed to be well-known already in the primary school age. I do not recommend a mental experiment, but an exercise in becoming aware of our judgmental intuitions. One can take well-known historic cases of treason, confiscation of wealth, instigating civil wars, political assassinations, »legal« political murder, mass extermination (regardless whether or not it was committed in a »legal« form). Whenever the intuition to punish the perpetrator will be consensual, the judgment will, analogously, apply to the present cases as well. After having considered many historical examples, we shall find out something about our intuitions.

In cases of treason, confiscation of wealth, instigating civil wars or political assassination, our judgment is normally divided; such acts provide a welter of historic texts for ongoing interpretation and reinterpretation.

Sometimes it is questionable whether the acts themselves were crimes at all or rather virtuous deeds. (The prophet Jeremiah committed treason, Judith assassinated Holofernes.) And even if our intuition is inclined to see a crime in some cases, this does not necessarily make the perpetrator a criminal. (Even if the execution of Mary Stuart can be regarded as a legal murder, Queen Elizabeth does not transpire in our historic intuition as a murderess.) But mass murder, be it an act of collective political proscription (as happened under Sulla), or a collective act of terror against the »religious alien« (as the massacre of Protestants on Saint Bartholomew's night), is not open to a forgiving understanding and interpretation. Such and similar acts of outrage are unanimously condemned as evil, at least in the context of our European tradition of the last few hundred years, for they are the visible face and the manifestation of evil.

In subscribing to the ought-sentence that justice should be done, irrespective of whether or not it will be done, one has historical justice in mind, and the »Ought« refers to the pure moral motivation behind the insistence upon historical justice. But history includes future. Historical justice has nothing to do with the pragmatic consequences of our judgment, but it should have to do something with the moral judgment of future generations. This is why heinous crimes, and those only, should be punished, for only in such cases can we be absolutely sure that our judgment will be signed by all morally competent future generations, for they could not change our interpretation of the act we insist be punished.

It is an entirely different matter whether future interpreters will reinterpret the perpetrators of the crimes in their personhood (e.g. their psychological motivations etc.). Psychological or phenomenological hermeneutics do not concern moral judgments. One can have diverging opinions of Hitler's personality, but no morally competent person can ever justify Auschwitz. If we demand that heinous crimes ought to be punished for historical justice to be done, we claim that all morally competent future generations should consent to our historically just judgment. Whether anything else but the manifestation of evil will be punished is an empirical question and has nothing to do with historical justice; at least we cannot know whether or not it does. For heinous crimes, there can be no statute of limitations, precisely because they are heinous in the above specified sense.

3.

The »heinous crimes« that should be punished for the spirit of historical justice to prevail are the manifestations of evil. But nothing has as yet been said about evil.

Evil is not the accumulated, or the excessive moral badness that might be distinguished from all other kinds of badness in quantity. Evil is *qualitatively* different from the morally bad. This qualitative difference became explicit in modern times, although it was already discovered by particularly sensitive moralists such as certain Jewish prophets and Greek philosophers. The knowledge of (moral) evil as such, emerges through reflection. Where there is no freedom to choose maxims or principles for action, there can be badness but not Evil. Moral evil requires a fairly sophisticated and consistent system of self-justification. A bad character chooses to commit injustice rather than to suffer it, for he makes exception with himself. But he does not invent principles that make the wrong right. A bad character succumbs to base passions such as envy, and behaves in a cowardly fashion. Yet. he can feel remorse and it often indulges in gestures

of disorderly repentance. Satan is the model of evil, not because he does the wrong things, but because he induces others to do the wrong things by persuading them that wrong is right. Plato's Trasymachos or Callicles are devilish, not because they are bad characters, but because they make a strong case for maxims that destroy the possibility to distinguish between bad and good. As Kant pointed out, evil resides in evil maxims; not in desires and the weaknesses of character.

In modernity, where traditional morals are thinning out, evil maxims easily gain the upper hand. Totalitarianism in particular is founded (morally) on evil maxims. It is on the ground of those maxims that a discourse is initiated in a totalitarian regime which »draws to itself« the proverbial men on the street. They begin to speak the language of totalitarianism, and, as a result, they will gradually take such things for granted that would not have been accepted by them a year before, the endorsement of which is entirely out of their character. It is thus that they believe to have an obligation to denounce their fathers to the police or to confess crimes which they never committed. I would compare totalitarianism with a disease. Normal people (not always particularly bad characters) are exposed to the disease, they catch it, and they thus become alienated from their previous selves. If one catches the virus of evil, one becomes evil, even if there was no »originary evil« in one's character.

Actually, devils are rare phenomena. Evil characters are few and far between, particularly if we compare their number with that of the wrongdoers who have caught the virus and become evil under its influence.

After the demise of totalitarianism, it is not difficult to distinguish between »originary evil« and those who became evil through secondary infection. The former are the originators of evil maxims who stick to their principles to the last, who have unruffled good conscience and ascribe the defeat to the weakness of their followers. Whereas the latter get confused, re-write their past, forget the evil they have committed and remember only the evils they suffered; they can shed their totalitarian self as a sheer husk. This is why evil looked so banal for Hannah Arendt. But evil is not banal, even if evil persons become banal after the demise of their power basis. The soul is not healed just because the epidemic is gone. The pathetically banal soul does not feel guilty; if there is remorse, it is only for betting on the wrong horse. Pangs of conscience, repentance are rare.

There is a difference between initial and continual totalitarianism. In the original (initial) state, evil has a high density and visibility. Evil is demonic. While the »Merely Bad« is normally repulsive, a certain power of attraction emanates from moral Evil. Evil maxims align themselves with the underworld of the human soul, but they also don the garb of high sophistication. Evil is sorcery, it frightens and calls for submission. In the continuing phase of totalitarianism (here we speak only about communist totalitarianism, since Nazism was defeated in its first phase), evil's density and visibility diminishes, its epidemic character seems to be exhausted. In addition to those men and women who never succumbed to the viruses, those who have only had slight infections shed them smoothly and might also attack Evil on its home territory. Since the evil demon is associated with power, the slackening of power has always a therapeutic effect.

The collapse of totalitarianism is also the end of epidemic. Evil maxims are still around (as always as long as there are maxims to choose and a freedom of choice), but their bearers seem to be, for the time being, marginalized.

It stands to reason that the specificity of evil, namely that it may not be a permanent resident of human character but it may enter a soul and leave it subsequently, complicates the issue of retribution. We know that A.

was the author of a heinous crime and heinous crimes should be punished in order for historic justice to be done. But perhaps A. of today is not the very A. who committed the heinous crime, because the virus of evil that resided in his character has been cured and has left behind only the empty husk of an elderly body and of a banal soul. Puccini's Tosca looks at the dead Scarpia and exclaims: »and before this man trembled the whole of Rome!« – and one could repeat her exclamation in pointing at many a living person today. But those who trembled before them had *then* good reason to tremble. Scarpia was an evil, treacherous political murderer – and there are Scarpias who walk among us, enjoying both their lives and the benefits of their crimes. Should they be punished or not?

4.

Right at the beginning of this train of thought, I described six combinations of two elements, one of them moral, the other legal, which amount to the six major recommendations for dealing with the unique issues of justice after the collapse of totalitarianism and other criminal dictatorial regimes. I proceeded from here to distinguish between perpetrators of heinous crimes and other criminals and I identified the most heinous crimes as the manifestations of evil. When I now return to those six combinations, I restrict the further discourse to evil. I do not see any grave moral problem in granting general amnesty to, or reaffirming the statute of limitations for, all functionaries and high officials of the former regimes unless they were perpetrators of evil. I see rather good reasons to do just that.

There are several arguments to the effect that not even the perpetrators of the most heinous crimes should be subject to legal indictment. In what follows, I will reflect upon their major reasons point by point. Obviously, I do not consider the opinions of unreconstructed Stalinists relevant here; in their minds, no crimes were committed, and if so, only as the side-effects of an otherwise commendable course of action. Besides, they have no arguments to offer. They are outside of a moral/political discourse.

In the ought-sentence that »perpetrators of heinous crimes should not be punished« »punishment« can either solely refer to legal punishment (indictment, trial) or it can also be extended to moral punishment.

First proposition: Perpetrators of heinous crimes should not be indicted or tried, but should be morally censured.

To this I answer: One cannot morally punish a person who stays outside the moral discourse, who does not experience pangs of conscience, who has already forgotten his crimes. One cannot morally punish a person who despise morals as ›petty bourgeois‹ or as utterly irrelevant.

Modern society is not a community. Everyone can avoid here moral censure by choosing one's company from people like themselves. Public censure is not taken seriously. Divine punishment is mocked as superstition.

Perpetrators of heinous crimes in a totalitarian regime cannot be morally punished unless they feel remorse. But if they feel only an approximately adequate remorse, they have already been morally punished, so they need not be punished (morally) again.

The recommendation that perpetrators of heinous crimes should be only morally punished (yet neither indicted nor tried) is inconsistent. For those who are morally punished are not punished at all.

Second proposition: perpetrators of heinous crimes should not be punished at all.

There is one purely moral argument under this heading and there are many that can be best described as admixtures of pragmatic and moral reasons formulated in support of this recommendation.

The truly moral reason is religious (even if spelt out occasionally by disbelievers). It reads as follows: love your enemies, forgive those who have wronged you.

I may be able to love my enemies, but should I love those who have wronged my neighbor beyond repair? I can forgive those who have wronged me. There is no need to open secret police files, but if one does so all the same and discovers the report of her denouncer, she can still forgive him. But one cannot forgive the murderers of *other's* children, and one should not; one has no moral right to forgive in the name of the dead and of the mourners. For there is logic in the Christian commandment. You should forgive those who have wronged you because the principle is one of justice, not one of revenge. But others should not forgive in your case, nor should you forgive in the case of others, or else there will be no justice. If you forgive in the name of others you can forgive in their name also yourself as a perpetrator of evil, and this is an immoral principle. There is only one purely moral gesture here, that of the saintly Alyosha Karamasow: »shoot him!« No shooting this time – but neither moral forgiveness.

All pragmatic arguments boil down to the theory of »let us turn to a clean page«. There are two major versions of it.

First version: Too much blood has been let; let us put an end to blood-letting. Everything that happened before should be forgotten. We should not poison our soul with the desire for revenge. Revenge calls for further revenge and there is no end to it.

Second version: National reconciliation requires that the past should be buried. Everyone's cooperation and skill is needed here. Looking backwards is a useless gesture; one has to look rather ahead.

In the first formulation pragmatic considerations are supported by strong moral reasons, while in the second, moral motives become insignificant and negligible.

Let me now turn to first argument of the theory of »let us open a new page«. All moral considerations in support of this recommendation are consequentialist.

One could equally maintain that people can open a new page in their history after having meted out punishment for heinous crimes. This would not be a consequentialist position. Even if one believes that without doing historical justice no page in a history book can be properly clean, one does not punish crimes in order to wipe those pages clean. One punishes heinous crimes in an act of retribution so that the balance of justice should be restored as far as it is humanly possible.

In the argument under scrutiny, however, retribution is suspended, the act of justice is deliberately forgone, because it is feared that the act of justice *itself* leads to injustices, or rather to a series of injustices. This fear is *not* unfounded. Every gesture of retribution carries the danger of escalation. The morally wrong can indeed result from the morally right.

Without denying the relevance of the consequentialist moral argument, one can point out that there are consequentialist arguments also in favor of punishment. They read as follows. There is no clean page without catharsis. To sweep crimes under the rug bars catharsis. The celebrated new page of history will not be really clean. Hatred, resentments, personal grievances are not forgotten simply because the offenders do not stand trial; they only wait for the next best occasion to surface.

Those who suggest that punishment should be forgone for moral reasons, normally subscribe to deterrence as the principle of punishment.

One can forgo punishment, for the perpetrators of heinous crimes cannot commit the same crimes they once did. Furthermore, not only can they not repeat this crime, but no one else can. In contemporary Argentina, no one has the option to make people simply »disappear« as the euphemism for kidnapping, torture and murder had it; in the unified Germany, no one can give order that bordercrossers should be shot. Thus to punish people for the heinous crimes they committed, the argument runs, has no longer a deterrence function.

Let us assume for simplicity's sake, what I otherwise do *not* accept, that the main principle of punishment is deterrence. Imagine the situation where veteran mass murderers continue to live under the same circumstances as everyone else (or even under better ones). What kind of morals would such an example suggest to present and future politicians? It will convey the simple message that whatever they do, in whatever crime they will indulge, they will get away with it – provided that they rule for a sufficiently long time and they lend their crimes a »legal« garb – because people will be so keen to open a new and clean page in history the next time, that their crimes will remain just as unpunished as the crimes of their predecessors were. Perhaps today no political crimes of a previous magnitude are possible. But there are crimes on a smaller scale which are still sufficient to make life a hell, and one never knows what devilish opportunities will occur in the future. If one accepts the principle of deterrence negatively (not to punish for there is no reason to deter) one needs to subscribe to the same in the positive formulation (rather punish if one wishes to deter).

The Spanish solution serves as the model for the successful combination of moral and pragmatic considerations. A clear page was opened in the history book and the consequences were both morally and pragmatically benign. But the situation (the context) was also unique here, and so the Spanish model may serve as an example only in countries where decisions take place in a somewhat similar context. The pure moral injunctions (»love your enemies, forgive those who have wronged you«) rings a bell of truth in Spain. In the civil war heinous crimes were committed on both sides. Symbolically, and not just symbolically, men and women have to forgive the sins of those who wronged them, their families and friends. In post-totalitarian states the situation is quite different, thus the model character of Spain is questionable.

Let me briefly turn to second version of the attitude of »let us turn to a new page in history«. The past should be forgotten in order that the future can begin. This is a technological argument and treats historical periods as if they were machines. The old defunct appliances have to be replaced by new ones and thrown into the bin. Whether commendable in technology, such an attitude is entirely out of place in history. History is about remembering, about hanging on to the past to the same extent as it is about the projection of a future. Nagging on the past creates the third dimension in history, the dimension of meaning that enlivens projection even if the latter breaks with the past on many counts. A merely fabricated future rests on unsolid grounds, because there is no cellar beneath it, no foundation. There is no national reconciliation if one forgets what it is which one needs to be reconciled to or about.

5.

»Perpetrators of heinous crimes should be punished – for no counter argument has convinced us so far that they should not«. Everyone who

subscribes to that ought-sentence, gives thereby his or her signature to their punishment regardless of whether or not they will be actually punished. They sign the ought-sentence led by the belief that it is wrong to let heinous crimes stay unpunished, that justice should be done, for the blood of the victims cries out to Heaven for otherworldly, yet also to us, to posterity, for this-worldly punishment.

Three persons say in unison: the perpetrators should be punished. The first adds: alas, they cannot be punished. The second insists: since they should be punished, they also can be. The third raises her hands in perplexity: they should be punished, yet also they should not be. Let us analyze all three positions separately.

The first position reads as follows: justice calls for prosecuting the perpetrators of heinous crimes – but the legal system bars the way for prosecution (for example, because it would require retroactive legislation). One has to enter into compromises in political life. Justice cannot be done, although it should be.

The second position negates the relevance of this »cannot«. Whatever we should do, we can also do. No legal system, not even a brand-new democratic one, can stand in the way of justice. If there is a consensus that heinous crimes had been committed, the perpetrators have to answer for them. There is no place for legalism here, first and foremost because the brand-new laws should not run counter to our moral intuitions. As Judith Skhlar rightly said: there is a continuum between moral and legal considerations. The »we should, yet we cannot« argument is based on the principles of legal positivism on two counts. First, it disallows the suspension of our own laws (e.g. the clause about the statute of limitations) in certain extraordinary cases, such as the punishment of heinous historic crimes. Second, it treats the pseudo-laws of totalitarian regimes as if they were real ones. Yet, not everything written on a piece of paper and passed as a law by a bunch of murderers, their accomplices and the agents of their institutions, bullied into obedience, qualifies as a law. Thousands of trainloads of kulaks were lawfully driven to the taiga, in order to starve there to death with their children, and the legitimate prime minister of Hungary was tried and executed according to extant laws. Where laws were produced according to whim, political convenience and the lust for revenge, there were no laws.

As a consequence, the first standpoint (»they should be punished – but they cannot be«) does not stand on both feet; it is limping. While morals are on the side of those insisting on punishment, the legal aspects are treated as if they were matters of mere convenience, or rather tokens on the altar of historical reconciliation; or at any rate, as mere matters for pragmatic considerations. And if morality collides with merely pragmatic considerations, the old Kantian recipe is still valid: the moral Ought should have priority; what one ought to do, one can do. That is, despite all pragmatic arguments to the contrary, the morally approved course of action should get the green light. Let us have a new round of the Nürnberg trials, then. The Nürnberg trials are the exemplar – the exemplar is there to be imitated.

Let us turn to the last position. It says that heinous crimes should be punished – and insists simultaneously that its perpetrators should not be punished. This position sounds absurd and paradoxical, but it is neither of those. It points to a moral conflict. All moral choices are contextual, so are moral conflicts, this one included. The third position (pronouncement of a moral conflict) appears in the same context as positions one and two, that is in those states where the constitution does not offer a legal loophole for prosecuting the perpetrators of heinous crimes.

This moral argument can be summed up as follows: Both positions one and two agreed that a purely moral Ought (justice should be done) is confronted with a (mainly) legal and pragmatic consideration attaching a few secondary moral aspects. Extant laws were considered obstacles to historical justice. The two positions disagreed on one count. The first recommended that the obstacles were better not removed, the second (more consistently) insisted that they should be removed. Yet this is a wrong way of thinking. For the suspension of the law in single cases is not legally but morally wrong. The maxim that the law should be suspended in single cases is an evil maxim. Philosophers who detected the main source of evil in the evil maxims, had always known that the suspension of the law is one of them. It is on these grounds that Socrates suffered injustice, rather than escaping the laws of his country and that Kant made such a strong case against the trial of Louis XVI, although not against tyrannicide. It is also wrong to believe that the maxim cannot be evil merely because no evil consequences followed it some times. It is commonplace that bad designs may bring good results, and vice versa, but no commonplace makes bad designs good or good designs bad.

The maxim that perpetrators of heinous crimes should be punished is transcontextual. Evil should be punished everywhere, under all circumstances, hence also in the context where we now stand. There is no exception from the validity of this maxim. (Self-punishment, such as remorse or penitence is not an exception.) But if someone can be punished only by the suspension of the law, he should not be punished, because the maxim to suspend the law is evil. All these does not change the relevance of the maxim that evil should be punished. Indeed, evil should be punished – but one should not act upon evil maxims, irrespective of eventual good consequences. Thus, perpetrators of heinous crimes should be punished, and they should not be – simultaneously. No paradox here, just a moral conflict in context.

If we confront the advocates of the third position with the Nürnberg trials, they will answer that the context in which they decide is entirely different. It is not because the Nazi crimes were heinous on a higher scale – evil is evil, evil is always infinite. And one can say with Nicolaus Cusanus that in an infinite triangle all sides would be always equal, for all of them would be infinite. Yet in the case of Nazi Germany, those who were tried in Nürnberg committed crimes against many different people, so no extant law could possibly apply to their case. The punishment of evil had to have recourse to the fictitious laws of nature, and our intuition approves of it, also retrospectively. If there is a procedure based on fictitious natural law, the consensus of moral intuition is the primary guide that corroborates the rightness of the principle. All the above enumerated arguments show that there is *no* consensus at all as to whether or not people who committed those heinous crimes should *now* be punished. Where intuition is so utterly divided, there is no moral ground to have recourse to those fictitious laws of nature which are, by definition, moral ones.

6.

I drew the conclusion from the discussion on evil that perpetrators of heinous crimes should be punished, for justice should be done. The discussion was conducted on a general level out of context. Then we returned to the context, that is, to the situations where decisions are now taken. After looking briefly into the arguments against prosecution, we listened to three groups of persons who gave their signature to the ought-sentence that perpetrators of such crimes should be punished. The context

is even more narrowed here, down to the hardest cases. It has been assumed that a democratic legal order bars the indictment of the perpetrators and that those perpetrators do not show signs of serious moral repentance.

All three propositions are thoroughly and completely problematic. If the first recommendation is accepted, heinous crimes remain unpunished. Petty thief's will go to prison in countries where mass murderers will enjoy a peaceful old age.

If the second recommendation is accepted, a procedure that feeds on moral legitimacy will be pushed forward in the absence of such legitimacy. If a second edition of a Nürnberg trial comes to pass without the support of consensual moral intuition, this will cast a retroactive shadow on the Nürnberg trial itself. This trial can remain an exemplar of justice only under the condition that it is *not* further copied. It stands as the embodiment of the regulative idea, of the very ought sentence that perpetrators of heinous crimes should be punished. The context remains perennially idiosyncratic and unique.

Still, at least the first two recommendations are genuine recommendations – they tell you what to do. The third recommendation, however, is not a recommendation at all, but the mere formulation of a moral conflict. One can listen to the suggestion of the categorical imperative, or of any of its versions, if a moral choice is confronted with a pragmatic choice or with sheer consequentialism. But if two moral choices confront one another, no categorical imperative can advise you what you should do. If one chooses one maxim, one infringes the other, if one chooses the other one, one infringes the former, if one chooses none, one infringes both. Yet both cannot be chosen simultaneously – this is exactly what a moral conflict is.

One could say here with Derrida (see his »The Force of Law: The Mystical Foundation of Law«) that justice is always incalculable, that it requires calculating with the incalculable, that it addresses itself to singularity, that in deciding we give ourselves up to the impossible decision, and that we still should decide while taking account of law and rules. Yet everything that usually burdens men and women in the process of decision appears here in the extreme, for there are no laws and rules, not even remote ones, to orient those who decide,

further, no new law will be founded, or an old one re-founded, by the decision. Only the impossibility to found one will transpire. Thus those who decide makes themselves guilty whichever course they choose, yet choose we must, at least in our innermost soul.

Thus, the question should the perpetrators of heinous crimes be punished, is emptied out of its political and social content and it no longer calls for a straightforward answer even if asked in the most concrete context. The question is thrown back to the person who asks it: you choose, you sign, it is your responsibility, only be aware of choosing between two evils.

If we think about it, the double formula »perpetrators of heinous crimes should be punished« and »perpetrators of heinous crimes should not be punished«, the gesture of throwing the ball back into the court of the individuals and making them aware that the moral conflict cannot be solved but only cut off by the leap of choice, is a confession of defeat. We concede our impotence in the confrontation with evil.

7.

Something must have gone wrong right at very beginning, for the conclusion is not merely disquieting but downright false. We know from experience that

evil can in fact be resisted; many men and women did resist evil in dark times. Evil has to be resisted as long as it is in power. In our context, where the dilemma of punishing evil arises, evil is out of power. As we have seen, evil is intimately related to power, moreover, evil grows big with the confidence of the irresistibility of its power political, social or psychological. There is no powerless evil. Evil is resisted by men and women of good maxims and extremely good character. Good maxims immunize them to the attraction of evil; they do not become infected during the epidemic. They know where the right ends and the wrong begins. Their good character makes them stand up against evil; they would rather suffer than commit injustice. While resisting evil, these men and women display courage and decency. Yet no courage or decency is needed to sign the ought-sentence that perpetrators of heinous crimes should be punished. Quite different moral characters can sign this ought-sentence; among them are also the cowards who hid in the dark while evil was still in power. What I called our impotence in facing evil is not the manifestation of general human fragility, but a predicament that follows from the very character of evil.

Let me recapitulate where the core of our predicament lies. There are evil persons in the world; they follow evil maxims, they are demonic. But the radius of their influence is insignificant. For many contingent reasons (social, political and other), the influence of evil maxims sometimes suddenly spreads, mobilizing the worst drives and putting into its service subtle intellectual sophistication. The epidemic starts, evil gains the upper hand and begins to operate on grand scale, leaving behind itself human hecatombs; misery and devastation. And then (if there is still a »then«), the epidemic recedes, and the evil maxims are replaced by disappointment or cynicism. What remains important for most is just staying in power. If a totalitarian regime lasts long enough, the most monstrous devils are already in their graves, beyond the reach of human retribution.

Some people who sign that frequently quoted ought-sentence, add to it – »but they cannot be punished«. Previously, I discussed only the pragmatic-legalistic interpretation of this combination. But there is also a different kind. Those perpetrators cannot be punished, because the main culprits, the initiators of all the evils, are now beyond the reach of human retribution. And the genuine perpetrators of heinous crimes are the ones who have also created the initial conditions in which those crimes had been committed. A handful of them are still alive, but most of them are dead. Can justice still be done?

A new Nürnberg trial was said to be morally impossible, given the absence of moral consensus about its desirability. The so-called laws of nature are only the projections of our general moral intuition. In the absence of such a general intuition, they are mere leftovers from the past. But why is there no moral consensus about the desirability of a new Nürnberg trial if there is moral consensus about the heinous character of certain crimes?

Nazism was in power for little more than ten years; these ten years were characterized by the escalation of Evil. With the exception of Hitler, Himmler and Goebbels, who escaped through suicide, all perpetrators of Nazi crimes could be brought before justice. Soviet totalitarianism lasted forty to seventy-five years. After the years of escalation of Evil, the cycles of momentary exhaustion began a long time ago. Although the regime remained the same, and heinous crimes were still committed, and those who suffered from them, suffered no less than the victims at the peak of an escalating terror, the diminishing cycle of evil has led to a kind of banalization. New generations have grown up, and many terrible deeds were simply forgotten. Rekindling remembrance is not generally welcome. The issue is not whether this is a good or a bad thing, but, rather, that under

such conditions, no moral consensus concerning a new Nürnberg-tribunal can possibly emerge, even if there is a consensus about the identity of heinous crimes.

If evil maxims can establish a power base that lasts long enough, perpetrators of evil will, in all probability, never be punished. Those who commit the most formidable crimes will get away with it. This is why we are impotent against evil.

The good can resist evil as long as it lasts, but becomes impotent against evil after its demise. But evil is evil, that is, active evil, while in power; once its power is gone, evil is just an empty shell, the mere body of a once evil person. Can someone punish evil while it lasts, while it is evil incarnate? No one can punish evil, but evil is self-destructive; it turns against itself. Self-destructivity is the logic of evil as long as it is in power, as long as it lasts.

The perpetrators of heinous crimes should be punished, because justice should be done. The time was out of joint – we have to set it right. But it is of secondary importance whether the still living perpetrators of crimes will be actually punished. The Claudius we deal with has already lost his crown and his queen. Yet there is no clean page in the books of history; or at least, cleanliness cannot be bought at the price of forgetfulness. One should never become tired of doing what Horatio once did, of telling and retelling the story »of carnal, bloody, and unnatural acts, of accidental judgments, causal slaughters and deaths put on by cunning and forced cause…« that happened by the hand of Evil in the twentieth century, in our house, and on such an enormous scale that not only Horatio but also Hamlet could have never dreamt of it in his philosophy.