Ayça Çubukçu

On the exception of Hannah Arendt

Article (Accepted version) (Refereed)

DOI: 10.1177/1743872115588442

Forthcoming in *Law, Culture and the Humanities*

Corresponding author:

Ayça Çubukçu, Centre for the Study of Human Rights, London School of Economics and Political Science, Houghton Street, London WC2A 2AE, UK.

Email: a.cubukcu@lse.ac.uk

On the Exception of Hannah Arendt

Ayça Çubukçu

London School of Economics and Political Science, UK

Abstract

This article offers a close reading of Hannah Arendt's *Eichmann in Jerusalem*: *A Report on the Banality of Evil.* It argues that in this text, Arendt consistently, even obsessively, evaluates the legal and moral challenges posed by Eichmann's trial through the relationship between exception and rule. The article contends that the analytical lens of the exception allows us to appreciate the perplexities that *Eichmann in Jerusalem* presents—some fifty years after the book's publication—from a still uncommon perspective, and enables us to attend in new ways to Arendt's own suppositions, propositions, and contradictions in this text.

Keywords

Arendt, Exception, Law, Conscience, Crimes Against Humanity, Paradigms of Justice

In an essay published as *On Violence* in 1970, Hannah Arendt objected to "the ceaseless, senseless demand for original scholarship," which had led in many fields, she claimed, "to sheer irrelevancy, the famous knowing of more and more about less and less."[1] Scholars writing on Arendt today continue to confront this demand for originality, a demand that has only intensified with the towering literature that "Arendt studies" has accumulated over the decades.[2] Is it possible to say

[1] Hannah Arendt, *On Violence* (New York: Harcourt, 1970), p. 29-30.

[2] Craig Calhoun and John McGowan offer an informative narrative of what was once Arendt's wavering prominence in the US academy, from the 1950s through 1996. See Craig Calhoun and John McGowan, 'Introduction', in Craig Calhoun and John McGowan eds., *Hannah Arendt and the Meaning of Politics* (Minneapolis: University of Minnesota Press, 1997), pp. 1-24. In contrast, note how an endorsement for John McGowan's book, *Hannah Arendt: An Introduction* (Minneapolis:

something original about Arendt's scholarship now, about its intentions, implications, inclinations? Is there something else to be done with the charm of her writing, its propensity to slap us in the face with the wit of wisdom? Perhaps, what we could use is "a meter of guts to measure our chances" as one of Arendt's favorite poets, René Char once said, each time we begin anew the task of interpretation.[3] For this task requires the valor to think "with Arendt against Arendt,"[4] and if the philosopher Seyla Benhabib is correct, we should continue to clarify where Arendt's political thought should be revised,[5] if not abandoned altogether.

But that is not all, since Arendt was not only a "political" theorist.[6] Her inquiries into the lives of racism, imperialism, totalitarianism, and revolution, her ruminations on the significance of plurality and the mystery of moral judgment, all of this and more could as well position Arendt where political, moral, social—and even legal—theory intersect.[7] I say *even* legal theory because surprisingly, law remains "one topic in Arendt that has not been examined in a sustained and

---

University of Minnesota Press, 1998) already declares in 1998 that the book is a welcome addition to "the growth industry known as Arendt studies."

[3] René Char, *Hypnos Waking: Poems and Prose*, selected and translated by Jackson Mathews (New York: Random House, 1956), p. 123.

[4] Seyla Benhabib, 'Judgment and the Moral Foundations of Politics in Arendt's Thought', *Political Theory*, Vol. XVI, No. I (Feb., 1988), pp. 29-51.

[5] Seyla Benhabib, *The Reluctant Modernism of Hannah Arendt* (Oxford: Rowman & Littlefield, 2003), p. 198.

[6] Most scholars writing in the English language treat Arendt as a political theorist or philosopher. While they are often quick to note, like Maurizio Passerin d'Entrèves, that Arendt "cannot be characterized in terms of the traditional categories of liberalism, conservatism and socialism," (Maurizio Passerin d'Entrèves, *The Political Philosophy of Hannah Arendt*. New York: Routledge, 1994, p. 1), Arendt scholars have been less inclined to examine her thought in relation to social theory and the social sciences, perhaps on account of her unsparing critique of this field. See Peter Baehr, *Hannah Arendt, Totalitarianism and the Social Sciences* (Stanford: Stanford University Press, 2010).

[7] For a recent attempt to place Arendt's thought in conversation with social theory, see Finn Bowring, *Hannah Arendt: A Critical Introduction* (London: Pluto Press, 2011). For a clear articulation of the sharp distinction that Arendt draws between the social and the political in *On Revolution* (London: Penguin Books, 1990 [1963]), see Emilios Christodoulidis and Andrew Schaap, 'Arendt's Constitutional Question', in Marco Goldoni and Christopher McCorkindale, eds., *Hannah Arendt and the Law* (Oxford: Hart Publishing, 2012), pp. 101-116.

systematic manner."[8] And there is great room for debate here. David Luban, a scholar of law and philosophy proposes, for one, that we treat Arendt as a theorist of international criminal law, even though "before 1960 her writings display little interest in law or legal institutions."[9] Nonetheless, Richard Bernstein insists that "there is scarcely a major book or essay of Arendt that doesn't deal with some aspect of the law," and that despite the scholarly neglect of Arendt's thoughts on this subject, "virtually *all* of her writings" deal with some feature of the law.[10]

While it is beyond the scope of this article to review how Arendt, throughout her oeuvre, thinks about the law, in offering a close reading of *Eichmann in Jerusalem: A Report on the Banality of Evil,* I will focus on tensions that animate Arendt's struggle with *jurisprudential* problems in this book.[11] Although she may not be among the primary scholars—Kierkegaard, Schmitt, Benjamin, or Agamben, for instance—associated by political and legal theorists with a tendency to think through the exception, I insist in this article that Arendt is, in fact, a thinker of the exception.[12] My argument

---

[8] This is what Richard Bernstein, an eminent scholar of Arendt, observes in his foreword to a 2012 volume on *Hannah Arendt and the Law*: "there is one topic in Arendt that has not been examined in a sustained and systematic manner—her thinking about law, jurisprudence, and the creating of constitutions." Richard Bernstein, 'Foreword', in Marco Goldoni and Christopher McCorkindale eds., *Hannah Arendt and the Law* (Oxford: Hart Publishing, 2012), p. vi. It is also notable that Arendt's thinking about the creation of constitutions has received more attention than her thinking about law as such. On Arendt and constitution making, see especially, Jeremy Waldron, 'Arendt's Constitutional Politics', in Dana Villa, ed., *The Cambridge Companion to Hannah Arendt* (Cambridge: Cambridge University Press), pp. 201-219 and Andreas Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (New York: Cambridge University Press, 2008), pp. 187-291.

[9] David Luban, 'Hannah Arendt as a Theorist of International Criminal Law', *International Criminal Law Review* XI (2011), pp. 621-641, p. 621.

[10] Bernstein, "Foreword," p. vi (emphasis in the original).

[11] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Press, [1963] 1964). Hereafter, all references to page numbers of this particular text will be provided in parentheses.

[12] Scholars have addressed certain aspects of the exceptional in Arendt's thought by highlighting her emphasis on "the extraordinary" in relation to the perplexities of revolution, constitution making, political action and freedom. For an example, see Andreas Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt*, pp. 187-291. While Kalyvas warns his readers against the "all-too-usual conflation of the extraordinary and the exception, that is,

is that Arendt consistently, even obsessively, evaluates the legal and moral challenges posed by Eichmann's trial through the relation of exception and rule. Further, I contend that the analytical lens of the exception allows us to appreciate the perplexities that *Eichmann in Jerusalem* presents—some fifty years after the book's publication—from a still uncommon perspective, and enables us also to attend in new ways to Arendt's own suppositions, propositions, and contradictions in this text.

As is well known, Arendt continued to address the challenges posed by Eichmann's trial during the subsequent years of her scholarship, turning to the domain of moral philosophy with the recognition that even though legal and moral issues are not the same, "they have a certain affinity with each other because they both presuppose the power of judgment."[13] If what I offer in this article as a contribution to the scholarship on Arendt is indeed well-founded—if, in fact, the relation between exception and rule is more fundamental to Arendt's "structure" of thought in *Eichmann in Jerusalem* than has been appreciated so far—then we may also wish to consider how Arendt mobilizes the conceptual grid of the exception in her subsequent efforts to understand "the very mysterious nature of human judgment,"[14] especially in response to the vexing problem of establishing a "working morality in borderline situations."[15]

In his editorial introduction to *Responsibility and Judgment*, a collection of Arendt's essays published in 2003, Jerome Kohn presents his suspicion that "it is the truly bewildering problem of

---

of foundings and emergencies" (p. 3), the conceptual grid of the exception that I think through in this article is not limited to "emergencies." Instead, I employ the category of the exception capaciously, in its relation to the norm, the rule, the law, the ordinary, and as the unprecedented, to history.

[13] Hannah Arendt, 'Personal Responsibility Under Dictatorship', in Jerome Kohn, ed., *Responsibility and Judgment* (New York: Schocken Books, 2003), p. 22. For the consequences of Eichmann's trial on Arendt's later thought and her "preoccupation with mental activities" such as thinking, see Arendt's own narrative in Hannah Arendt, 'Introduction', in Mary McCarthy, ed., *The Life of the Mind* (Orlando: Harcourt, 1978), pp. 3-16.

[14] Hannah Arendt, 'Personal Responsibility Under Dictatorship', p. 27.

[15] Hannah Arendt, 'Some Questions of Moral Philosophy', in Jerome Kohn ed., *Responsibility and Judgment* (New York: Schocken Books, 2003), p. 106. The conceptual grid of the exception, arguably, is also central to both the form and the content of Arendt's earlier arguments in *The Origins of Totalitarianism*. In particular, it is possible to read Arendt's reflections on the minority treaties as a critique of the exceptional status they helped establish for minorities within states that were now primarily—if not only—expected to care for the life of their national majorities. The minority treaties were instrumental in expressing and normalizing the usurpation of the state by the nation, which was truly problematic to Arendt's mind.

Eichmann's conscience, which no one apart from Arendt either saw, understood, or cared to broach," which may lie behind the many misunderstandings of what Arendt wrote in *Eichmann in Jerusalem*, "one of the most disputed books ever written."[16] I shall begin to unfold my own argument about the book with this bewildering problem. To preview the structure of what follows: In the next section, I reflect on the question of Eichmann's conscience through the eyes of Arendt to demonstrate how she employs the relation between exception and rule when addressing the traditionally presumed coincidence between "conscience as such" on the one hand, and the law and the lawful on the other. I then extend this demonstration to Arendt's construction of two separate normative frameworks for differentially assessing what she asserts to be two distinct types of regimes—"the normal" and "the criminal"—and argue that she establishes this distinction through the conceptual grid of the exception as well.

In the section after, I turn to Arendt's insistence on the exceptionality of the Final Solution and the crime of genocide and reflect on the "essence" of this crime, which to Arendt's mind, violated "the very nature of mankind." I then review Arendt's interpretation of the exception presented by the state of Israel and describe (what I argue to be) her consequent hesitation between a Jewish Right and a Human Right to sit in judgment over Eichmann's life. It is here that I mobilize the concept of the "exemplary exception" to offer a unique interpretation of how Arendt appraises Eichmann's trial in a *national* court for having committed crimes against *humanity*. In the subsequent section, I turn a critical eye towards Arendt's assessment of the "mutual interests" shared by the Nazi authorities and the Jewish authorities, and argue that what the two authorities actually shared in common was a desire for (what I name) sovereign selection, a desire that was fulfilled, in both cases, by means of the exception.

I conclude the article with critical reflections on Arendt's consistent reversal of the relation between exception and rule when judging two types of regimes, "the normal" and "the criminal," to ask by which principle and with what consequences this discrimination is effected. While such a normalizing (and righteous) discrimination raises the specter of ethical, legal, political and military interventions into "criminal regimes," I suggest that today's cosmopolitan commentators—who may be inclined to endorse, for one, the Responsibility to Protect doctrine[17]—may find a peculiar ally in the exceptional scholar that was Hannah Arendt.

---

[16] Jerome Kohn, 'Introduction', in Jerome Kohn, ed., *Responsibility and Judgment* (New York: Schocken Books, 2003), p. xvi. The second part of the quotation is from the first footnote on this page.

[17] Ayça Çubukçu, "The Responsibility to Protect: Libya and the Problem of Transnational Solidarity," *Journal of Human Rights*, Vol. XII (2013), pp. 40-58.

I. The Dilemma: Expecting Exceptions

In December 1939, Otto Adolf Eichmann was promoted to head Reich Central Security Office Referat IV D4, the department dealing with Jewish affairs and evacuation. In 1942, he participated at the Wannsee Conference where top officials of the Third Reich debated various methods for the Final Solution. In the Final Solution of the Jewish Question, he was appointed as Transportation Administrator and charged with the smooth operation of the trains that would carry Jews to the camps. And some fifteen years after the end of the war, Eichmann stood accused in the District Court in Jerusalem on April 11, 1961, charged by the State of Israel of having committed "crimes against the Jewish people, crimes against humanity, and war crimes during the whole period of the Nazi Regime and especially during the period of the Second World War" (21).

For the purposes of his trial, half a dozen psychiatrists certified Eichmann to be "normal," whence "experts lay the hard fact that his was obviously no case of moral let alone legal insanity" (26). Granted his normality, throughout his prosecution, Eichmann affirmed that his conscience was clear, that "he would have a bad conscience only if he had not done what he had been ordered to do" (25).

> And the judges did not believe him, because they were too good, and perhaps all too conscious of the very foundations of their profession, to admit that an average, "normal" person, neither feeble-minded nor indoctrinated nor cynical, could be perfectly incapable of telling right from wrong. They preferred to conclude from his occasional lies that he was a liar—and missed the greatest moral and even legal challenge of the whole case. Their case rested on the assumption that the defendant, like all "normal persons" must have been aware of the criminal nature of his acts, and Eichmann was indeed normal insofar as he was "no exception within the Nazi regime." However, under conditions of the Third Reich only "exceptions" could be expected to react "normally." This simple truth of the matter created a dilemma for the judges which they could neither resolve nor escape (26-27).

In her *Report on the Banality of Evil,* Arendt, too, is taken by this dilemma as she strives to address the troubled relation between "conscience" and "the law" on the one hand, and exception and rule on the other.[18] Ultimately, the problem of Eichmann's conscience leads Arendt to an ostensibly

[18] Writing a few years after *Eichmann in Jerusalem,* Arendt observes that while the phenomenon of conscience was not known in antiquity, "it was discovered as the organ in man which hears the voice of God and later taken up by secular philosophy where it is of doubtful legitimacy" (Arendt, 'Some Questions of Moral Philosophy', p. 107). In fact, Arendt's observations about Eichmann's trial should prompt us to question the very "legitimacy" of conscience as a legal and moral concept.

disturbing conclusion: "the sad and very uncomfortable truth of the matter probably was that it was not his fanaticism but his very conscience that prompted Eichmann" to adopt an uncompromising attitude in the execution of the Final Solution during the last year of the war (146).[19]

Instead of prompting him to cease the performance of his murderous duties—as "the law in civilized countries" and the judges in Jerusalem presumed—Eichmann's conscience told the man to seize them. How could this possibly be the case? In the zealous execution of his duties, Eichmann was following his conscience, which demanded that he abide by the law of his land and that he do so without exceptions. Interpreting this uncompromising attitude of a "law-abiding citizen," Arendt finds that in this respect, "there is not the slightest doubt" that Eichmann indeed followed Kant's precepts as he had claimed: "a law was a law, there could be no exceptions" (137).[20]

But Arendt's conclusion about the status of Eichmann's conscience—that it prompted him not to cease, but to seize his murderous duties—is disturbing only if we suppose that conscience as such speaks universally, through each person, with identical voice and "good" substance. Arendt seemingly suggests this may not be the case.

---

[19] It is remarkable that some of the most perceptive interpretations of *Eichmann in Jerusalem*, including that offered by Richard Bernstein in 'Evil, Thinking, and Judging', do not mention this striking assertion by Arendt. See Richard Bernstein, *Hannah Arendt and the Jewish Question* (Cambridge: Polity Press, 1996), pp. 154-179. On the other hand, scholars who do discuss this striking statement do not agree about its standing. The philosopher Arne Johan Vetlesen claims, for instance, that Arendt is "contradicting herself" when she attributes Eichmann's uncompromising attitude to his very conscience. "Absence of conscience *is* what we must assume in Eichmann," he asserts forcefully, "if we are to follow through on Arendt's own logic" (original emphasis). See Arne Johan Vetlesen, 'Hannah Arendt on Conscience and Evil', in *Philosophy and Social Criticism*, Vol. XXVII, No. V, pp. 1-33, p. 17. I find it difficult to be convinced by Vetlesen's claim, which cannot accommodate Arendt's own ambivalence about the question of Eichmann's conscience. My interpretation is closer to Dana Villa's: the problem here is not Eichmann's absence of conscience, but that "Eichmann's conscience did not function in the expected manner." Dana Villa, *Politics, Philosophy and Terror: Essays on the Thought of Hannah Arendt* (New Jersey: Princeton University Press), p. 45.

[20] For an interpretation of how Eichmann's "vulgar Kantianism" is related to what Arendt once called "the inhumanity" of Kant's moral philosophy, see Michael Mack, "The Holocaust and Hannah Arendt's Critique of Philosophy: Eichmann in Jerusalem," *New German Critique* 106, Vol. XXXVI, No. I, p. 54.

> And just as the law in civilized countries assumes that the voice of conscience tells everybody 'Thou shalt not kill,' even though man's natural desires and inclinations may at times be murderous, so the law of Hitler's land demanded that the voice of conscience tell everybody 'Thou shalt kill,' although the organizers of the massacres knew full well that murder is against the normal desires and inclinations of most people (150).

In this differential scheme constructed by Arendt, the problem presents itself as twofold: one of assumption and the other one of demand, as the law both assumes and demands conscience. Whereas in "civilized countries" the law assumes that conscience tells one not to kill, in Nazi Germany, Arendt finds, the law demanded that conscience tell one to kill. If so, we may ask, do the assumptions and demands of the law belong to two different orders in "civilized countries" and "the uncivilized," with the implication that they should be evaluated independently? Or, is the presumed coincidence between conscience and the law to be taken as the kernel of a global problem to be interrogated?

One thing seems to be clear: neither the law nor conscience can safely be assumed to correspond universally to a singular (and "normal") desire, whatever this desire may be. Yet, in the case of Nazi Germany, Arendt pronounces that "from the accumulated evidence, one can only conclude that conscience as such had apparently got lost in Germany" (103), whereby she effectively claims that "conscience as such" should assume and demand a particular desire, for instance, to let live.[21] While Arendt shares the presumptions of the law in civilized countries in this regard, the "sad and very uncomfortable" conclusion she draws about Eichmann's conscience challenges at its core these "civilized" presumptions. For this reason, the question of Eichmann's conscience creates a dilemma for Arendt, a tension that accounts for her ambivalence about a jurisprudence that reasons through the concept of conscience.[22]

---

[21] A few years after Eichmann's trial, Arendt once again speaks of "the problem of conscience, whose very existence has become questionable through our more recent experiences." See Arendt, 'Some Questions of Moral Philosophy', p. 107. My argument is that for Arendt, the *very existence* of conscience becomes questionable because, contrary to the expectations and presumptions of "our tradition," it has *failed* to tell everyone: "Thou shalt not kill."

[22] It is important to underline, once again and against the grain of many interpretations, that Arendt did not think Eichmann was "lacking 'an unequivocal voice of conscience,'" as David Luban claims (see David Luban, 'Hannah Arendt as a Theorist of International Criminal Law', p. 26). On the contrary, as discussed above, Arendt arrives at "the sad and very uncomfortable" conclusion that it probably was Eichmann's very conscience that prompted him to seize his murderous duties. This

There is a cognate tension—even contradiction, one might suggest—which Arendt exhibits in her evaluation of "the law" and "the lawful."[23] Consider her interpretation of Eichmann's decision towards the end of the war to disobey orders from Himmler which told him *not* to kill.

> [T]he Fuhrer's *words*, his oral pronouncements, were the basic law of the land. Within this "legal" framework, every order contrary in letter or spirit to a word spoken by Hitler was, by definition, unlawful. Eichmann's position, therefore, showed a most unpleasant resemblance to that of the often-cited soldier who, acting in a normal legal framework, refuses to carry out orders that run counter to his ordinary experience of lawfulness and hence can be recognized by him as criminal (148).

Here, the unpleasant truth Arendt marks by her inverted commas framing the "legal" order of Nazi Germany is that when he decided to disobey Himmler's orders not to kill, Eichmann resembled a conscientious objector acting in a "normal," i.e. "civilized," legal framework. Arendt's discomfort arises from the fact that although identical in form, in substance this situation constitutes an inversion of what "the law in civilized countries" would expect. Formally speaking, Eichmann actually fulfilled the expectations of the law in Nazi Germany. But in doing so, he substantively violated the basic assumptions and demands of the "the law in civilized countries." This preservation of the *form of law* (while its substance is reversed contrary to "normal" expectations) constitutes a fundamental problem for Arendt, to the extent that she shares the assumption that the law, the legal and the lawful must correspond to the desirable, the good, and the just.

As I argue in greater detail below, Arendt attempts to resolve this problem by suggesting a reversal of the relationship between the rule and the exception in the case of "a state founded upon criminal principles" (291). While she asserts, for example, that "one could actually defend Eichmann's failure to obey certain of Himmler's orders, or his obeying them with hesitancy: they were manifest exceptions to the prevailing rule" (292), Eichmann's formal identity with a

---

finding is consistent with Arendt's objections to the compromised phraseology of a jurisprudence framed in terms of "conscience." She could not assert this more clearly, in the very passage that Luban cites above: "To fall back on an unequivocal voice of conscience … not only begs the question, it signifies a deliberate refusal to take notice of the central moral, legal and political phenomena or our century" (Arendt, *Eichmann in Jerusalem*, p. 148).

[23] The tensions I examine below partly result from the equivocal meanings of "the law" and "lawful," which sometimes reference positive law and at other times indicate "the law that supposedly speaks in all men's hearts with an identical voice" (Arendt, *Eichmann in Jerusalem*, p. 148). However, the reverse is also true: the very ambiguity of these concepts is facilitated by Arendt's own "usage" of them.

conscientious objector is nevertheless presented by Arendt, in a single breath, as a *reversal* of the relationship between exception and rule: "we must again consider that the relationship of exception and rule, which is of prime importance for recognizing the criminality of an order executed by a subordinate, was *reversed* in the case of Eichmann's actions" (292, emphasis added). Whereas she normatively associates the exception with the criminal in a "normal legal situation," Arendt finds the reverse is the case in a "criminal regime" like Nazi Germany, where it is the exception which appears as the lawful, the good, and the just. It is on this normative ground that Arendt presents Eichmann's formal identity with a conscientious objector as a "reversal" of the relationship between exception and rule.

But what accounts for this normative reversal, if not Arendt's decision to identify the law as such with "the good" and her attempt at rescuing the law's name from "the evil" it has been associated with? Paradoxically, in her attempt to rescue the law as such, Arendt is successful only to the extent that her designation of the Nazi regime as "criminal"—as a regime founded upon Criminal Principles with capital letters—is able to find for its own self a principle *outside* the sphere of the legal, as she concurrently disavows the very legality of the Nazi regime in this designation.[24] Ultimately, the grounds of Arendt's judgment of the Nazi regime's "criminality" is not positive law, but instead an unarticulated "natural law," a moral, legal and political universalism invested in the constitutive assumption that the law and the lawful must be recognizable, and crime and criminality judgeable, outside the domain of posited law.[25] It is as if Arendt describes "the foundation" of her

[24] Hence, Arendt's telling oxymoron: she speaks of regimes in which "crime is legal." See Arendt, *Eichmann in Jerusalem*, p. 292. In fact, the whole book is saturated with variations of this ostensibly oxymoronic terminology.

[25] In the recently emerging scholarship on the concept of law in Arendt's thought, there is considerable disagreement over the relative significance of the Greek concept of law as *nomos* and the Roman one of *lex* in her understanding of "the law." Some scholars argue that Arendt held in greater esteem the Roman understanding of law. See, in particular, Jacques Taminiaux, 'Athens and Rome', in Dana Villa, ed., *The Cambridge Companion to Hannah Arendt* (Cambridge: Cambridge University Press, 2010), p. 174. Others contend that *nomos* is Arendt's main conception of the law. See, for instance, the meticulous article by Lindahl, 'Give and Take: Arendt and the *Nomos* of the Political Community', in *Philosophy and Social Criticism*, Vol. XXII (2006). For an excellent overview of this scholarly disagreement, see Keith Breen, 'Law Beyond Command? An Evaluation of Arendt's Understanding of Law' in *Hannah Arendt and the Law*, pp. 16-34. It must be noted however that Arendt's approach to the question of law in *Eichmann in Jerusalem* is virtually absent from Breen's evaluation of this debate.

own judgment of Nazi Germany's criminality when, a few years after Eichmann's trial, she describes what collapsed almost overnight in Hitler's Germany: "the few rules and standards according to which men used to tell right from wrong, and which were invoked to judge and justify others and themselves, and whose validity were supposed to be self-evident to every sane person either as part of divine or of natural law."[26] Given such self-evidentiality, shall we expect exceptions?

II. Humanity Counts: The Law of the Exemplary Exception

The unprecedented makes its original appearance as an exception to what has hitherto been in existence. For Arendt, the exceptionality of the unprecedented consists in its radical difference from what antedates it.[27] This is the ground on which she asserts that the unprecedented cannot be dealt with "well-known coins," which would only maintain "the illusion that the altogether unprecedented could be judged according to precedents and the standards that went with them" (135). If the requirement were met that the unprecedented *not* be judged by precedents and standards which are

---

[26] Arendt, 'Some Questions of Moral Philosophy', p. 50. I suspect the "normative lacuna" that Benhabib identifies in Arendt's thought concerns, at least in *Eichmann in Jerusalem*, the "foundation" of natural law's moral universalism. See Benhabib, *The Reluctant Modernism of Hannah Arendt*, p. 193. Still, I cannot conclude, as Benhabib elsewhere does, that Arendt does not "accept" natural law, for in *Eichmann in Jerusalem*, as I demonstrate in this article, Arendt writes as if she does. See Seyla Benhabib, *Another Cosmopolitanism* (Oxford: Oxford University Press, 2006), p. 20. In fact, in an earlier formulation in *The Origins of Totalitarianism*, Arendt offers a definition of "lawful government," which could correspond to what she repeatedly calls a "normal legal order" in *Eichmann in Jerusalem*: "By lawful government we understand a body politic in which positive laws are needed to translate and realize the immutable *ius naturale* or the eternal commandments of God into standards of right and wrong. Only in these standards, in the body of positive laws of each country, do the *ius naturale* or the Commandments of God achieve their full reality" (*The Origins of Totalitarianism*, p. 464).

[27] The significance Arendt attaches to the unprecedented has clear affinities with her valorization of political action as the capacity to initiate and found something new and extraordinary. See Katep, 'Political Action: Its Nature and Consequences', in Dana Villa ed., *The Cambridge Companion to Hannah Arendt*, pp. 130-148, p. 142. However, note the argument by Kalyvas that "to be sure, [Arendt] sometimes used the misleading expressions of 'altogether new' and 'absolute novelty' to describe the instituting character of extraordinary politics, giving thus the impression that she may have affirmed total new beginnings," but that in fact, her philosophical reflections overwhelmingly point towards "the absurdity of absolute beginnings." Andreas Kalyvas, *Democracy and the Politics of the Extraordinary*, pp. 224-225.

incompetent to address its original appearance, then the unprecedented would have a creative quality to it: It would facilitate the creation of a new law of judgment to address its original factuality. In this sense, the unprecedented embodies for Arendt a quality that can at once be destructive and creative. To echo Walter Benjamin's qualification of violence, the unprecedented has the potential to destroy the old and to declare a new law.[28] While violence may be more readily recognizable as such, however, the unprecedented needs to be articulated into recognizability as a social fact. That is, its exceptional originality and radical difference from what antedates it has to be asserted.

It is the exceptionality of the Final Solution in relation to all other historical situations that Hannah Arendt struggles to articulate in her report on the trial of Eichmann. She finds Eichmann's case to be marked by a difference from the ordinary, with respect to "the very essence of the crime, which was no ordinary crime, and the very nature of this criminal, who was no common criminal" (246). And concerning the Final Solution, Arendt affirms that the unprecedented horror of Auschwitz "is of a different nature," embodying crimes that are, politically and legally, "different not only in degree of seriousness but in essence" (267). But what constitutes the *essence* of a crime and the *nature* of a criminal, whose difference from the ordinary can be thus asserted?

Arendt offers no direct answers to this question in her *Report on the Banality of Evil*. In her discussion of the commission of a "crime against humanity" by the Nazi regime, however, she articulates a conceptual definition of this particular crime's "essence".

> 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 the 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. Expulsion and genocide, though both are international offenses, must remain distinct; the former is an offense against fellow-nations, whereas the latter is an attack upon human diversity as such, that is, upon a characteristic of the "human status" without which the very words "mankind" or "humanity" would be devoid of meaning (268-269).

What characterizes the new crime, the crime against humanity, Arendt implies, is a determination that took place for the first time in history to disappear an entire people from the face of the earth. In substance, this determination represents an "attack upon human diversity," in seeking to eliminate a particular-existence-in-difference of a people. Evidently, for Arendt, the human status is defined by a multitude of differences, whose bearing units are, at least in this specific formulation, distinct

[28] Walter Benjamin, 'Critique of Violence', in P. Demetz, ed., *Reflections: essays, aphorisms, autobiographical writing* (New York: Schocken Books, 1986).

peoples.[29] The essence of a crime against "the very nature of mankind" thus gets articulated, not with respect to the offender, nor the content of the offense, but with respect to that which is offended: in this case, an innate characteristic of the human status, that is human difference, as embodied by the Jewish people.

It is with this understanding that Arendt objects to "the common illusion" which identifies the crime of genocide and mass murder as essentially the same: "these modern, state-employed mass murderers must be prosecuted because they violated the order of mankind, and not because they killed millions of people" (272). Whereas the practice of murder, even mass murder is ordinary (288), what appears as exceptional in the Final Solution is a violation of the human status and "the order of mankind" which presumably had not been violated before. In her definition of the unprecedented, destructive essence of a crime "not found in the lawbooks" (298), Arendt presents the commission of the Final Solution as an original fact that creates the possibility "to break new ground and act without precedents" (262). In this act, that ground to be broken is the law.

Arendt asserts that "if a crime unknown before, such as genocide, suddenly makes its appearance, justice itself demands a judgment according to a new law" (254). Indeed, following the Final Solution, in the case of international law, a new law appeared as the Charter of the International Military Tribunal at Nuremberg; in the case of the State of Israel, it was the Nazis and Nazi Collaborators Punishment Law of 1950. Arendt's consistent concern with the adequacy of these laws, "that is, whether they applied only to crimes previously unknown" (254), manifests itself in her critique of the law's specific formulations of the crime against humanity. She observes that while it was the Jewish catastrophe that prompted the Allies to conceive of a crime against humanity, this was because "the mass murder of the Jews, if they were Germany's own nationals, could only be

[29] In an important contribution to the literature, Benhabib compares how Raphael Lemkin, a principal drafter of the Genocide Convention, and Arendt understood "the value of the group" differently. Benhabib argues that for Arendt, "the group is not ascribed but formed; it is not discovered but constituted and reconstituted through creative acts of human association." While this republican interpretation, which ascribes to Arendt a "voluntarist concept of the group" may be consistent with Arendt's philosophies of action and plurality, it is nevertheless difficult to be convinced that Arendt's understanding of "tradition" and "peoples" (especially the Jewish people) is as voluntarist as Benhabib claims them to be. For this reason, Benhabib's argument that Arendt "escapes" the culturalism of Lemkin's concept of the group is not entirely persuasive. See Seyla Benhabib, 'International Law and Human Plurality in the Shadow of Totalitarianism: Hannah Arendt and Raphael Lemkin', in Goldoni and McCorkinde, eds., *Hannah Arendt and the Law*, pp. 191-214, pp. 210-212.

reached by the humanity count" (258).[30] At Nuremberg, the "humanity count" was mobilized in an international legal situation whereby crimes committed against German citizens had to be related to, if not dealt within, Germany's own sovereign law. Since German law was altogether implicated in the very problem to be addressed—as the acts to be judged could be considered legal within Germany's national legal framework—the Allies claimed a new legal principle transcending the boundaries of national law and sovereignty.

Yet, according to Arendt, the Nuremberg Charter did not fulfill the challenge of the unprecedented crime of genocide that justified the institutionalization of a new legal principle in the first place. This failure was manifest in the fact that the Nuremberg Charter "demanded that this crime [genocide], which had so little to do with the conduct of the war … was to be tied up with other crimes," such as aggressive war and "normal" war crimes (258). In other words, that the new crime was drawn back by the Charter into the sphere of the precedented constituted a failure which, according to Arendt, "prevented the Nuremberg Tribunal from doing full justice" to it (258). Genocide was unprecedented and unique; it could not have been related to anything previously known or defined generally as "an 'inhuman act'—as though this crime, too, were a matter of criminal excess in the pursuit of war and victory" (257).

There was a second reason why the humanity count was mobilized in the Nuremberg Tribunal: for crimes that could not be territorially localized within a single national jurisdiction. These were committed by officials who acted without territorial limitations due to their important rank (258). But also, in the limited, legal sense of the Nuremberg Charter, "it was the territorial dispersion of the Jews that made the crime against them an 'international' concern" (259). In all formerly Nazi occupied territories, such as Poland and Hungary, national post-war trials were established to try Nazis and their collaborators for crimes committed in particular nation-state territories against particular nationals. Crimes committed against the Jews, however, could not be addressed within the territorial jurisdiction of a single nation-state. That was the case, according Arendt, until the state of Israel was founded, even after the fact.

> Once the Jews had a territory of their own, the State in Israel, they obviously had as much right to sit in judgment on the crimes committed on their people as the Poles had to judge crimes committed in Poland. All objections raised against the Jerusalem trial on the ground of the principle of territorial jurisdiction were legalistic to the extreme. […] There was not the slightest doubt that the Jews had been killed *qua* Jews, irrespective of their nationalities at the time, and though it is true that the Nazis killed many Jews who had chosen to deny their ethnic origin, and would perhaps have

[30] Here, Arendt quotes Julius Stone, *Legal Controls of International Conflict* (New York, 1954).

> preferred to be killed as Frenchmen or Germans, justice could be done in these cases only if one took the intent and the purpose of the criminals into account (259).

Arendt's decisive argumentation here is more creative than it may appear at first sight: since the state of Israel is of and for the Jews, and since the Nazis were determined to kill Jews *qua* Jews, the state of Israel has the right to judge crimes committed on its own people. Further, in its sovereign right to judge crimes committed against its "own people" (if not against its own citizens or in its own territory), Israel as an established nation-state of the ethnic Jews should be treated as no exception to the rule affirming national jurisdiction. And if some Jews who were victimized by the Nazis may not have preferred to identify with Israel and would rather have "den[ied] their ethnic origin" (besides the fact that they could not possibly have been Israeli citizens), the ethnic/national constitution of Israel could still claim jurisdiction over their very ethnic/national victimhood.

In fact, Arendt laments that the State of Israel did not redefine the principle of territorial jurisdiction in these terms. Israel could have explained that "territory" is a political "and not merely a geographical term" that relates to the Jewish people's "own specific in-between space throughout the long centuries of dispersion, that is, prior to the seizure of its old territory" (262-263). To Arendt's disappointment, however, the court in Jerusalem "never rose to the challenge of the unprecedented, not even in regard to the unprecedented nature of the origins of the Israel state" and instead "buried the proceedings under a flood of precedents" (263). The court failed to redefine the territorial principle in congruence with that law of nations which affirmed national sovereignty as transcendent —a law that was already and implicitly implemented through the unprecedented founding of the state of Israel as a state of and for the Jews.

If such is the redefinition of territorial jurisdiction offered by Arendt, what implications follow for her own (ac)count of humanity? In her epilogue and postscript discussion to *Eichmann in Jerusalem,* Arendt attempts to conjoin two paradigms of justice predicated on the nation and on humanity respectively. She finds that "insofar as the victims were Jews, it was right and proper that a Jewish court should sit in judgment; but insofar as the crime was a crime against humanity, it needed an international tribunal to do justice to it" (269). The apparent compatibility of these two formulations is precarious and embodies a fundamental tension. First, Arendt asserts the justness of a "Jewish court" to sit in judgment as a function of a determined *particularity of the victim*: Jewishness. Second, she asserts the justness of an "international tribunal" as a function of a determined *universality of the crime*: against the order of humanity. It is relevant to recall here how Arendt finds that in criminal cases, "a crime is not committed only against the victim but primarily against the community whose law is violated" (261), and that "the wrongdoer is brought to justice because his acts have disturbed and gravely endangered the community as a whole, and not as in civil suits, damage has been done to individuals who are entitled to reparation" (261). If so, what

prevents Arendt—who also posits forcefully that the "essence" of the new crime of genocide consists in an unprecedented violation of the order of mankind (272)—from declaring, at least in principle, an exclusive competence on the part of humanity to render justice? Is it because "the Jew" and "the Human" are both damaged, and equally damaged, in "a crime against humanity, perpetrated upon the body of the Jewish people" (269)? Or, is it because at the historical moment when the law is being originated in the name of both the Jew (in Israel), and the Human (at Nuremberg) in reference to the same fact, Arendt's hesitation reflects an indecision as to which law this fact should be drawn into? Which is the primary community whose law and right must prevail: that of "the Jew" or "the Human"?

I posit that Hannah Arendt's hesitancy to conclude definitively the logic of her own argument regarding the unprecedented "crime against humanity" should be read in relation to yet another unprecedented event she perceives: the founding of the state of Israel as the state of the Jews.

> [I]t is also true that those who asked the question ["Why should he not be tried before an international court?"] did not understand that for Israel, the only unprecedented feature of the trial was that, for the first time (since the year 70, when Jerusalem was destroyed by the Romans), Jews were able to sit in judgment on crimes committed against their own people, that for the first time, they did not need to appeal to others for protection and justice, or fall back upon the compromised phraseology of the rights of man—rights which, as no one knew better than they, were claimed only by people who were too weak to defend their "rights of Englishmen" and to enforce their own laws (271).

According to Arendt, precisely because Jews now had a state of their own, the very possibility of claiming "the rights of Jewishmen" rather than "the rights of Man" was opened up effectively for the first time. Considering how acutely aware she was of the predicament of "the rights of man" in practice, perhaps Arendt's hesitation between a Jewish Right and a Human Right to sit in judgment should come as no surprise, especially given the final establishment of a Jewish state as a final solution to the rights of the Jew as Man. Formally speaking, Arendt recognizes that "the argument that the crime against the Jewish people was first of all a crime against mankind, upon which the valid proposals for an international tribunal rested, stood in flagrant contradiction to the law under which Eichmann was tried" in Jerusalem (272). Further, she grants that if it were declared that the Israeli law of 1950 under which Eichmann was tried "does not cover the facts," such a declaration, too, "would indeed have been quite true" (272). It may also be true that Arendt is not prepared to make this declarative decision herself, as it would annul the asserted validity and competence of the court in Jerusalem, while in the interest of justice, Eichmann "had to be eliminated" (277).

As a resolution, Arendt wishes that Eichmann were judged by the Jerusalem court as a court of the Jews, which would nevertheless kill him in the name of humanity. Writing as if she were speaking for this court, Arendt thus addresses Eichmann:

> And just as you supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations—as though you and your superiors had any right to determine who should and who should not inhabit the world—we find that no one, that is, no member of the human race, can be expected to want to share the earth with you. This is the reason, and the only reason, you must hang (279).

Reflecting on this bold statement, it is important to note that although Arendt grants to the Jerusalem court a legitimate sovereign decision over Eichmann's life, that this decision is to be made on behalf of humanity parallels her advocacy of a more "ideal" international criminal law. In fact, Arendt argues that all trials dealing with crimes against humanity "must be judged according to a standard that is today still an 'ideal,'" and that the success and failure of these trials "can lie only in the extent to which this dealing may serve as a valid precedent on the road to international penal law" (273). Given such a measure, did the Jerusalem court set a valid precedent in judging a "crime against the human status"? It may be argued that for Arendt, according to whom Eichmann's trial "had to take place in the interest of justice and nothing else" (286), the court in Jerusalem constituted a valid exception to an international criminal law which existed then as an "ideal" potentiality. Further, the trial of Eichmann in Jerusalem was an *exemplary exception* in relation to Arendt's ideal international criminal law, a trial that had to pronounce not only punishment, but also an exemplary punishment, rendering the example and the exception constituted by the trial indistinguishable.[31] To frame it differently: in the very act of judging the justice of the Eichmann trial, Arendt performs as if she were the sovereign in a state of exception and suspends the validity of her "ideal" international law, which nonetheless remains in relation to her *decision not to deny an exceptional validity* to the Eichmann Trial.

In the interest of the same justice that her ideal international criminal law would serve, Arendt argues that Eichmann had to hang and hang as *hostis humani generis*. In actual fact, however, the judgment of the court in Jerusalem brought no charge of the unprecedented crime of genocide against Eichmann, "except the 'crime against the Jewish people'" (245). This was because the Jerusalem court reserved the categorical charge of genocide exceptionally for the Jews, solely to account for crimes committed against the Jewish people and not, for example, against the Gypsies.

---

[31] I barrow the concepts of "exemplary punishment" and the "exemplary exception" from Giorgio Agamben, *Homo Sacer: Soverignty and Bare Life* (Stanford: Stanford University Press, 1998), p. 23.

Arendt notes that "this was difficult to understand" (245). Difficult also to understand is that in the judgment of the Jerusalem court, everything else Eichmann had done, "all his acts against non-Jews were lumped together as crimes against humanity" (245). Consequently, while the charge of genocide as a "crime against the Jewish people" only dealt with the Jews, Eichmann's acts against non-Jews were adjudicated as "crimes against humanity." In such a judgment, Jewishness becomes the negative marker of humanity: only that which concerns the non-Jew immediately concerns the Human. Thereby, the Jew becomes an example of the Human at best, while in the same capacity "the Jew" remains categorically distinct from "the Human." An exemplary exception, indeed.

III. Sovereign Selection

In her postscript to *Eichmann in Jerusalem*, Arendt introduces the category of "administrative massacre" as a more fitting alternative to genocide (288). She argues that the concept of genocide, although introduced to denote a crime unknown before, is insufficient at two levels. First, attempted massacres of whole peoples are not unprecedented, with centuries of colonialism providing plenty of examples (288). Second, the concept of genocide spells a prejudice that "such monstrous acts can be committed only against a foreign nation or a different race" (288). What emerges as critical in this second insufficiency is a precision concerning "the principle of selection" for extermination:

> There is the well-known fact that Hitler began his mass murders by granting "mercy deaths" to the "incurably ill," and that he intended to wind up his extermination program by doing away with "genetically damaged" Germans (heart and lung patients). But quite aside from that, it is apparent that this sort of killing can be directed against any given group, that is, that the principle of selection is dependent only upon circumstantial factors. It is quite conceivable that in the automated economy of a not-so-distant future men may be tempted to exterminate all those whose intelligence quotient is below a certain level (288-289).

If what constitutes a crime against humanity is a determined "attack upon human diversity" (269) which would eliminate a particular existence-in-difference, Arendt hereby entertains the possibility that the substance of such a difference and the identity of the persons who bear that difference are inconsequential for establishing the commission of this crime. In the case of the Final Solution to the Jewish question, the difference to be eliminated was selected in racial terms, but in principle, any quality could be marked for extermination. Physical appearance, disease, criminality, madness, sexual orientation, and political or religious affiliation—in short any "biological" and "social" difference could occupy the camps of extermination. Further still, if each and every person embodies an incommensurable, unique difference vis-à-vis other humans, a "crime against humanity," defined as a crime against human diversity, can be said to have been committed regardless of both the *quality* of the selected difference, and the *quantity* of the to-be-exterminated persons.

Along such contingencies, however, there is a principle that remains permanent in all scenarios of extermination, namely, the principle of sovereign selection itself. In her *Report on the Banality of Evil*, when commenting on "the darkest chapter of the whole dark story" (117), Arendt insists on the fatal cooperation between the Nazi rulers and the Jewish authorities, a cooperation without which, she asserts, the Final Solution could not have been executed en masse (123-125). Because the court in Jerusalem omitted any witness who would testify on the mere existence of this cooperation, Arendt laments that the opportunity to raise the question "why did you cooperate in the destruction of your own people, and, eventually, in your own ruin" never arose (124). Nevertheless, Arendt's own analysis leads to the conclusion that this question may find an answer in the mutual aspirations of sovereign selection—and for that matter, of sovereign power—shared by the Nazi authorities and the Jewish authorities.

After all, it is no secret that the "naming of individuals who were sent to their doom had been, with few exceptions, the job of the Jewish administration" (120)—and naming not only for death, but also for life had been their occupation. Exercising aspirations of sovereign selection for death and life were Jewish emissaries from Palestine who came to concentration camps to select "suitable material" from the ranks of captive Jews in order to operate their illegal immigration into British-ruled Palestine. In the execution of their duties, "these Jews from Palestine spoke a language not totally different from that of Eichmann" (61). That language, I contend, was the mutually understood one of sovereign selection.

> [T]hey were probably among the first Jews to talk openly about mutual interests and were certainly the first to be given permission "to pick young Jewish pioneers" from among the Jews in the concentration camps. Of course, they were unaware of the sinister implications of this deal, which still lay in the future; but they too somehow believed that if it was a question of selecting Jews for survival, the Jews should do the selecting themselves. It was this fundamental error in judgment that eventually led to a situation in which the non-selected majority of Jews inevitably found themselves confronted with two enemies—the Nazi authorities and the Jewish authorities (61).

What are the "sinister implications" of the mutual interests shared by the Jewish authorities and the Nazi authorities? If the Nazis selected Jews *qua* Jews for extermination, the Jewish authorities exercised yet another sovereign selection to decide who, among the already selected, should be excepted from that law which spelled death. In this arrangement, what the two enemies who confronted "the non-selected majority of Jews" shared in common was their (mutually respected) desire for sovereign selection. As far as "humanity" is concerned, the Nazi authorities selected those who should be let die; and as far as the Jewish "nation" is concerned, the Jewish authorities selected those who should be let live. The Jewish authorities were already "nation building" towards a

potential state of their own and exercising sovereignty in relation to it, in the precise moment of the decided elimination of the Jewish people as such. In this light, is the principle that asserts "if it was a question of selecting Jews for survival, the Jews should do the selecting themselves," far removed from Arendt's principled affirmation that "insofar as the victims were Jews, it was right and proper that a Jewish court should sit in judgment" (269)?

Regardless, the exercise of sovereign selection marking Jews alternatively for death and life by the Nazi authorities and the Jewish authorities operated within the "structure" of exception and rule. In the Third Reich, when the rule dictated death, it was the exception that stood for life. Consider the "privileged categories" established by the Nazi authorities, which spelled exemptions from extermination.

> And the acceptance of privileged categories—German Jews as against Polish Jews, war veterans and decorated Jews against ordinary Jews, families whose ancestors were German-born as against recently naturalized citizens, etc.—had been the beginning of the moral collapse of respectable Jewish society. […] For those who did not want to close their eyes, it must have been clear from the beginning that it "was a general practice to allow certain exceptions in order to be able to maintain the general rule all the more easily" […] What was morally so disastrous in the acceptance of these privileged categories was that everyone who demanded to have an "exception" made in his case implicitly recognized the rule, but this point, apparently, was never grasped by these "good men," Jewish and Gentile, who busied themselves about all those "special cases" for which preferential treatment could be asked (131-132).

What is the status of a privileged category as an exception to the rule? Arendt argues that in Nazi Germany, the acceptance and mobilization of categories of exception amounted to the recognition of the general rule and marked the beginning of "the moral collapse" of respectable Jewish society. But would Arendt warn of the same moral collapse if the exception in question denoted not one of life in the general rule to let die, but one of death in the general rule to let live? To the extent, for example, that in a "normal legal regime," death for the body politic is construed as an exceptional demand in the otherwise general rule to let live, it presents a structural analogy with the case of a "criminal regime" in which life is an exceptional demand in the general rule to let die.

If the formal identity of sovereign selections for life and death can be established, then how should the exception as a means of sovereign selection be assessed? Coupled with her observations regarding the management of an "outward appearance of legality" (149) by the Nazi regime, Arendt provides clues towards a certain answer by speculating that the Nazi rulers "must have felt, at least, that by being asked to make exceptions, and by occasionally granting them, and thus earning gratitude, they had convinced their opponents of the lawfulness of what they were doing" (132). In

such formulations, however, the exception is equated with its "neutral" function as the enabler of a goal that remains distinct from it. Typically (and Arendt participates in a tradition here), once the exception is treated as a "neutral" means, criticism then provides a normative evaluation of the exception's ends. An alternative evaluation would locate the critique of the exception in the realm of "means" as such, and seek parallels across the field of force constituted by sovereign selections.[32] In this field, Arendt's affirmation of the "involuntary complicity" of the Jewish leadership who pleaded special cases (132), and of the Jewish emissaries from Palestine who "of course … were unaware of the sinister implications of this deal" with the Nazis (61), sheds, at best, a hopeful light onto the darkest chapter of the whole dark story, a chapter which would appear less bright if the exceptional means of sovereign selection were considered without end.

IV. The Final Justification

Reflecting on the kidnapping of Eichmann by the Israeli secret service forces in Argentina—an illegal act that created the possibility of Eichmann's appearance before the law in Jerusalem—Hannah Arendt provides a spirited justification for this violation of international law.

> This unhappily, was the only almost unprecedented feature in the whole Eichmann trial, and certainly it was the least entitled ever to become a valid precedent. (What are we going to say if tomorrow it occurs to some African state to send its agents into Mississippi and to kidnap one of the leaders of the segregationist movement there? And what are we going to reply if a court in Ghana or the Congo quotes the Eichmann case as a precedent?) Its justification was the unprecedentedness of the crime and the coming into existence of a Jewish state. There were, moreover, important mitigating circumstances in that there hardly existed a true alternative if one indeed wished to bring Eichmann to justice. […] In short, the realm of legality offered no alternative to kidnapping. Those who are convinced that justice, and nothing else, is the end of law will be inclined to condone the kidnapping act, though not because of precedents but, on the contrary, as a desperate, unprecedented and no-precedent-setting act, necessitated by the unsatisfactory condition of international law (264-265).

In her justification, Arendt cites the unprecedentedness of Eichmann's crime, the coming into existence of the state of Israel, and the lack of alternatives to kidnapping in "the realm of legality." Above all, however, what is striking is the primacy she affords to the just end of the kidnapping: it is Israel's just end (to bring Eichmann to justice) that ultimately justifies its means, even when that

[32] This alternative evaluation of the exception is inspired by Benjamin's insistence that a proper critique of violence can be affected only "within the sphere of means." Benjamin, 'Critique of Violence', p. 278.

means violating international law. Given that justice is the ultimate end of law and nothing else, and given that Israel's sole interest is justice in committing this act, Israel must, *of necessity*, paradoxically break the law in order to bring about the law's just end. But what if (the) others, say African states, repeat such an illegal act, cite Eichmann's kidnapping as precedent, use its logic of justification, and claim their act to be in the interest of justice? In response, Arendt is cautious in designating Israel's act as "no-precedent-setting," although she can simultaneously cite no principle to seal this designation—besides her performative assertion that this illegal act, required by necessity, is a desperate one not "entitled" to set a precedent. But can necessity itself be asserted as a principle that annuls the "entitlement" to set a precedent of a given act?

For Arendt, the answer to this question finds another positive answer in the logic of *raison d'état*, which she also observes to be appealing to the principle of necessity. The logic of *raison d'état* justifies "state crimes" as measures taken by a state "to preserve power and thus assure the continuance of the existing legal order" (291). According to Arendt, in a "normal" political and legal system, "such crimes occur as an exception to the rule and are not subject to legal penalty … because the existence of the state is at stake and no outside political entity has the right to deny a state its existence or prescribe how it is to preserve it" (291). The reverse is the case, however, in criminal regimes. Whereas in a "normal legal regime" criminal state acts are exceptional concessions to necessity, "in a state founded upon criminal principles," Arendt finds, "the situation is reversed": in criminal regimes, "a non-criminal act (such as Himmler's order in the late summer of 1944 to halt the deportation of Jews) becomes a concession to necessity imposed by reality" (291). Thus, where necessity dictates an exceptional criminality in Normal Regimes—a criminality that can neither be judged nor acted on by outside political entities—in Criminal Regimes, what necessity dictates is an exceptional lawfulness.

Arendt's reversal of the relation between exception and rule in the two distinct orders she constructs (the Normal and the Criminal) enables her to ask a series of exceptional questions. Half a century after their initial formulation, however, the originality of these questions appears somehow to have dissolved into the norm.

> Here the question arises: what is the nature of the sovereignty of such an entity [a criminal regime]? Has it not violated the parity (*par in parem non habet jurisdictionem*) which international law accords it? Does the "*par in parem*" signify no more than the paraphernalia of sovereignty? Or does it also imply a substantive equality or likeness? Can we apply the same principle that is applied to a governmental apparatus in which crime and violence are exceptions and borderline cases to a political order in which crime is legal and the rule? (291-292).

Whereas the principle of *par in parem non habet jurisdictionem* dictates that one sovereign state may not sit in judgment upon another (290), here, Arendt is concerned with establishing the criteria in accordance with which this principle may be suspended. Since all states perpetuate "state crimes" which are justified by *raison d'état*—a fact that Arendt is willing to accommodate but unwilling to problematize—the commission of state crimes cannot constitute a sufficient condition for suspending the principle of *par in parem non habet jurisdictionem.* Otherwise, were the commission of "state crimes" taken as the criteria for annulling the prerogatives of state sovereignty, even "normal legal regimes" would be opened up to judgment and intervention by outside political entities (such as, in Arendt's troubling example, African states intervening in Mississippi).

On the other hand, if the principle of *par in parem non habet jurisdictionem* were read to require, beyond their formal likeness, a substantive likeness among all sovereign states, then "outside political entities" could sit in judgment over (or intervene into) a given state on the basis of a *substantive difference* borne by the latter. And what could such a substantive difference consist in? Today, when the very significance of the distinction between inside and outside judgments is contested, the most common difference mobilized in justifications of "external" judgment and intervention pertain to the degree of democracy and human rights prevailing in a given state, with "rogue states" constituting the limit case. For Arendt, however, the critical substantive difference that should serve as the criterion for annulling the prerogatives of state sovereignty is quite particular, if also abstract: it is the *non-exceptional legality of criminality* in a given state that makes it unworthy of the parity conferred to it by the principle of *par in parem non habet jurisdictionem.*

At the precise historical moment when the nature, and even the very possibility, of moral judgment are put in question, is Arendt's conclusion not paradoxical? If one must "admit that an average, 'normal' person, neither feeble-minded nor indoctrinated nor cynical could be perfectly incapable of telling right from wrong" (26), who can be trusted with the task of distinguishing the Normal from the Criminal? Who can, after all, judge that criminality is legal in a given political order, and that this legal criminality is, or is not, "exceptional"? Who, in short, should or could identify a capitalized Criminality and judge it beyond, and if necessary, despite positive law—and how? In response to such questions raised by the trial of Eichmann, Arendt is only able to offer answers within a troubling legal and moral universalism "structured" by the distinction between civilized/normal orders and the uncivilized/criminal ones.

Essentially, this is a universalism that uses the terms "normal," "lawful," and "civilized" interchangeably to describe liberal-democratic regimes, and mobilizes the (reversible) relation between exception and rule when advocating for the differential treatment of the distinct orders it constructs. Such an advocacy, of course, is neither exceptional nor unprecedented within the colonial history of international law. International lawyers developed "the standard of civilization" in the

nineteenth century to discriminate sovereign from non-sovereign or quasi-sovereign entities in the context of colonization,[33] and in the twentieth and twenty-first centuries, many theorists other than Arendt have specified universal standards which states should meet if their sovereign status is to be affirmed by the international community. While such normalizing discriminations raise the specter of ethical, political, legal, and military interventions, contemporary commentators who are inclined to endorse, for one, the Responsibility to Protect doctrine[34] may indeed find a peculiar ally in the exceptional scholar that was Hannah Arendt.

Arendt's reflections on the relation between conscience and the law, her hesitation between a Jewish Right and a Human Right to sit in judgment over Eichmann's life, her critique of the mutual language spoken by the Jewish authorities and the Nazi authorities, her unique definition of a "crime against humanity"—all of these, and more, make *Eichmann in Jerusalem* a remarkable historical, philosophical, and legal text. Nevertheless, to the extent that her ideal international criminal law has been realized today, it is all the more crucial to question the "progress" this realization represents in adjudicating—and killing—in the name of humanity.

Acknowledgements

Over some years, this essay has benefited from the engagement of many friends and colleagues. In particular, I would like to thank Anthony Alessandrini, Gil Anidjar, Talal Asad, Stefanos Geroulanos and Biju Mathew for critical comments on earlier versions, and the anonymous reviewer, along with Siddhartha Deb, for the final one.

Funding

This research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors.

[33] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2006).

[34] See Ayça Çubukçu, "The Responsibility to Protect: Libya and the Problem of Transnational Solidarity," *Journal of Human Rights*, Vol. XII (2013), pp. 40-58.