Chapter Seven

Truth and Judgment in Arendt's Writing[1]

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Arendt is known for her critique of the use of witnesses in the Eichmann trial. She argued against the decision of the Israeli prosecution to call "witnesses of suffering" whose testimony was not directly related to the determination of the defendant's guilt, undermining in her view the objectives of criminal justice.[2] In other words, Arendt objected to what scholarship later defined as the "didactic purposes" of international criminal law. As a result, she has been portrayed as a legalist, advocating a strict separation between law and history/politics.

With the perspective of time, it seems that Arendt's warnings were not heeded. If we look at international criminal law and truth commissions – the two mechanisms of choice for addressing violence committed by prior regimes – we see that common to both tracks is the recognition of the "clarification of the historical truth" as an objective in international criminal law and transitional justice, and specifically the rise of the individual victim's right to the truth. Thus, while the Eichmann trial has remained associated with Arendt's critique, from a legal perspective, it is precisely the didactic approach inaugurated in the Eichmann trial that is now taken very seriously by international tribunals as well as other transitional justice institutions.[3]

Does this mean that Arendt was wrong, and that there are no legal or jurisprudential insights to be learned from *Eichmann in Jerusalem*?

In this article I would like to offer an alternative reading of *Eichmann in Jerusalem*, one that moves beyond the question of legalism and focuses on the act of judgment. It is in relation to judgment that Arendt's book offers the most promising contribution to the contemporary jurisprudence of international crimes. I will argue that reading Arendt holistically, that is, reading her critique of the Eichmann trial

alongside her other works, reveals a very different picture from the one that portrays her as a legalist. I will try to show that Arendt is less concerned with protecting the law from so-called extralegal purposes than with preserving or creating the necessary conditions for politics in general, and for politics in transition to democracy in particular. I will proceed to examine this thesis through Arendt's discussion of three fields: law, moral philosophy, and politics. In all three of them the question of judgment is raised in relation to truth; specifically, judgment entails the rejection of a conception of truth that is dominant in each of the three respective fields. I argue that Arendt's observations about the juridification of politics carry important insights for current developments in international law – among them, the growing recognition of a human right to the truth.[4] I will end by critically examining the emerging right to the truth as experienced in the paradigmatic case of Argentina's transition to democracy. In contrast with the optimistic story international law tells us about the recognition of a human right to truth, I will ask whether the growing legalization of the truth might not actually undermine the democratization in the name of which the right to truth is heralded. Adopting an Arendtian perspective will thus help us distinguish between the new political role of the "truth teller" in the stuggle against organized lies, and the need to preserve a space for political judgment – a judgment of particulars without reference to universal rules – in transitions to democracy.

Truth and Law

Arendt is known as the most famous critic of the Eichmann trial. But there is an ongoing debate as to how to interpret her criticism. Is it a warning against the political uses of law? Is it about the inherent limitations of criminal law to address the nature of "administrative massacres"? Or rather, is it about the failure of the court to understand the novelty in the new category of crimes against humanity, and the new type of criminal ("the banality of evil")? Although Arendt addressed each of these issues, we need to better understand her jurisprudential stance in order to see what brings these issues together as a coherent criticism of the Jerusalem court.

Arendt opens and ends her book *Eichmann in Jerusalem* with a criticism of the direction in which the Israeli prosecution took the trial. She is concerned with what has come to be known as the "didactic purpose of the trial" – the attempt to use the trial to clarify historical truths and

construct collective memory. For Arendt, the sole legitimate purpose of the trial was to determine the guilt of the defendant Adolf Eichmann. She was suspicious of the court taking on the role of historian, and in particular criticized Prosecutor Hausner's depiction of the Holocaust as a repetition of the anti-Semitic persecution of the Jews in a long history of their victimization and persecution throughout the ages. She argued that this was "bad history and cheap rhetoric."[5]

However, it is not only to the expanded role of judicial investigation that Arendt objected. She also criticized the Israeli prosecution's decision to put on the stand over one hundred Holocaust survivors to testify about their personal experience under the Third Reich. Such testimonies, she argued, were irrelevant to proving Eichamnn's guilt, and threatened to overwhelm the trial with emotions of suffering, pain and rage, which undermine the ability to judge the defendant fairly and objectively.[6]

The conventional understanding of Arendt's jurisprudential stance is to see her as a "legalist,"[7] following Judith Shklar's definition of legalism as an ethos that holds that law and politics must be separate.[8] However, a closer look at Arendt's arguments reveals difficulties in viewing her as an advocate of legalism.

First, the opposition that Arendt erects between law and history is undermined by her own advocacy of an alternative historical narrative that the trial should promote, one that centres on the rise of the totalitarian state instead of anti-Semitism. Moreover, although she seemingly opposed any "historical excursions" by the court, and objected to the role of victims in the trial, she chose to devote over ten pages[9] of her book to discuss the behaviour of the Jewish councils, Judenrat, a discussion with historical and political importance, but irrelevant to proving the defendant's guilt. Thus, in a previous article I argued that in order to understand the controversy between the Israeli prosecutor, Gideon Hausner, and Arendt, it is better to view it as a "competition of storytellers" – that is, a controversy over historiography, politics, and law.[10] Rather than a battle between justice and politics, or justice and history, Arendt's critique of Hausner should be understood as a controversy about the "right" kind of history needed to make an informed legal judgment about Eichmann's crimes.

But what about Arendt's critique of the reliance on victims' testimonies in the trial? Is this not a clear indication of a legalist stance? Arendt vehemently opposed opening the trial to testimonies the main purpose of which was to allow the survivors to relate their experiences and

suffering under the Nazi regime and portrayed the prosecutor Hausner and Judge Landau as two antagonists who asked to pull the trial in two different directions – the political and the legal.[11] Arendt sided with Landau, who for her represented legal limitations. The sharp opposition that Arendt erected between judge and prosecutor, however, is not supported by a closer reading of the Eichmann judgment. In the judgment the court in fact endorses victims' testimonies as relevant to the legal examination, but rejects the expansive didactic role of the trial. In doing so the court articulates a victim-oriented jurisprudence for atrocity trials that responds to the nature of the new crimes without falling into pure didactics.[12] This undermines Arendt's "legalism" from the opposite direction, showing that a legal justification could have been, and indeed was, articulated by the court for the expansive role of victims' testimonies. Thus, again, it is not law versus politics, but rather different conceptions of criminal law that better explain Arendt's critique. Likewise, Arendt's objection to the portrayal of all victims as "pure" as opposed to a frank discussion of the various degrees of collaboration with the Nazis makes less sense as an internal legal critique but points to Arendt's worry – the effect of the trial on the political sphere.

When we adopt a more holistic view of Arendt's critique of the Eichmann trial, it becomes even more problematic to understand her position as "legalist" or "positivist" because her solutions to the legal problems that stood in the way of the court, such as retroactivity, extra-territorial jurisdiction, and the interpretation of crimes against humanity, defy our conventional understanding of legalism. We see that on every issue, Arendt goes beyond a purely legalist position in offering ways for the law to properly respond to the novel crimes of the Nazi regime.[13]

One might think that these examples simply point to contradictions within the book. However, reading *Eichman in Jerusalem* in light of later writings by Arendt, I argue that the attempt to view Arendt's jurisprudence as legalist is insufficient and even misleading. While "legalism" assumes that judging Nazi criminals does not pose a new challenge for the law (as all we need is to apply the correct rules), I would like to suggest the opposite. In my view, the question that concerns Arendt in *Eichman in Jerusalem* is the question of judgment and the possibility of judging the Nazi crimes. Rather than assuming that the law already possesses the tools to judge, Arendt points time and again to the crisis of judgment that the Eichmann trial exposes.

In seeking to come to terms with the problem of judgment, Arendt moves away from both a positivist and natural-law understanding of law. In her view the totalitarian experience in general, and the Third Reich in particular, requires that we rethink basic conception of criminal law, such as the mental state of the accused (mens rea), and the role of conscience. Moreover, her book undermines the basic dichotomy underpinning criminal law between perpetrator and victim as falling under the simple opposition between "satanic evil and complete innocence." She points to the need of the law to deal with the phenomenon of what Primo Levi called the "grey area" – the mass complicity that is indispensable to political violence.[14] Finally, in her discussion about obedience to superior orders, Arendt raises important questions about the relations of criminal law to morality and points to the need to explore the act of judgment as more than just applying pre-given rules to particular situations.

Arendt raises difficult jurisprudential questions: Can we think about the perpetrator of atrocious crimes, such as genocide and crimes against humanity, as a normal person acting from banal motives? And can the law, that is, traditional categories of criminal law that require that actus reus be accompanied by mens rea, convict such a defendant? And what if the most terrible crimes can occur without proper mens rea – does this signal the bankruptcy of our criminal law, or is there a way to revise the fundamental requirement of individual guilt when we deal with collective crimes of that magnitude?[15]

In answering these questions Arendt arrives at the need to develop an alternative theory of judgment that she called, following Kant, reflective judgment.

Reflective Judgment – Truth and Morality

Unlike those who see Arendt as criticizing all the participants in the Eichmann trial, whether prosecutor, witnesses, or judges, from the standpoint of one who knows better, I believe that the Eichmann trial was also a moment of crisis for Arendt, a crisis which helped her identify the questions that need answers. She did not give a satisfactory answer to these questions in her book about Eichmann but returned to them in subsequent articles and in lectures she gave on Kant's *Third Critique*. Reading *Eichmann in Jerusalem* together with her lectures on Kant and judgment[16] allows us to identify this crisis, as well as the way she tried to resolve it.

In the postscript to *Eichmann in Jerusalem*, Arendt reconsiders the defence that was raised repeatedly at the Nuremberg trials, the defence of "obedience to superior orders." The formal legal answer given at Nuremberg was the nullification of the defence for criminals of the Third Reich. The more substantive answer given in Israel in the Kafr Qasim trial in 1958 (regarding the massacre of inhabitants of an Arab village by Israeli soldiers) was the recognition of a duty not to obey an order that is manifestly illegal.[17] However, Arendt believes that this legal doctrine can help judges only in a functioning democracy, when the illegal command sticks out clearly and is "manifest" in its illegality. This response is inadequate in the context of a regime that has turned illegality into state law, that is, a legal system in which the exception has become law.

In contrast to the Jerusalem court, Arendt refuses to ground the obligation to disobey a manifestly illegal order in presupposing the existence of a universal conscience. She writes "the order, to be recognized by the soldier as 'manifestly unlawful,' must violate by its unusualness the canons of the legal system to which he is accustomed."[18] All that can be expected in Arendt's view of the soldier is to know how to distinguish between rule and exception. Accordingly, Arendt reaches the conclusion that the Kafr Qasim precedent cannot help address Eichmann's guilt since the latter dealt with a situation in which the exception became the rule: "We are forced to conclude that Eichmann acted fully within the framework of the kind of judgment required of him: he acted in accordance with the rule, examined the order issued to him for its 'manifest' legality, namely regularity; he did not have to fall back upon his 'conscience,' since he was not one of those who were unfamiliar with the laws of his country. The exact opposite was the case."[19] This goes beyond the problem of legalizing crime and touches the core question about conscience presupposed by criminal law. How does one's conscience change in accordance with legal norms and the norms of civil society? What can we make of the fact that German elites acquiesced with the Nazi regime? Arendt writes: "He did not need to 'close his ears to the voice of conscience,' as the judgment has it, not because he had none, but because his conscience spoke with a 'respectable voice,' with the voice of respectable society around him."[20]

We are therefore faced with a crisis of judgment that goes beyond a positivist understanding of law and challenges the moral foundations of criminal law. A legal system presupposes that ordinary people can distinguish right from wrong. That is, we assume that conscience is

different and independent from society's norms. But what if it is not? How do we deal with the process of "coordination" that German society underwent with the crimes of the Nazi regime? This is a question that moves us from law to moral theory.

For Arendt, who came to the trial from the philosophical tradition, it was possible to think differently about the problem of totalitarian law with the help of Kant's moral philosophy, based on each person's ability to judge for himself the law before him according to principles of universal reason. This is the heritage of the Enlightenment expressed in Kant's categorical imperative, which tells us, "Act only in accordance with that maxim through which you can at the same time will that it become a universal law."[21]

Why, in the face of the failure of Nazi law, did Arendt not choose to return to Kant's categorical imperative as a moral guide? Here we approach the depth of the crisis Arendt experienced at the Eichmann trial – the moment at which Eichmann himself cites Kant's categorical imperative in his police interrogation and later in his court's testimony, showing the ease with which Kant's moral philosophy was turned on its head in Nazi Germany.

In the eighth chapter of *Eichmann in Jerusalem*, titled "Duties of a Law-Abiding Citizen," Arendt writes:

> The first indication of Eichmann's vague notion that there was more involved in this whole business than the question of the soldier's carrying out orders that are clearly criminal in nature and intent appeared during the police examination, when he suddenly declared with great emphasis that he had lived his whole life according to Kant's moral precepts, and especially according to a Kantian definition of duty. This was outrageous, on the face of it, and also incomprehensible, since Kant's moral philosophy is so closely bound up with man's faculty of judgment, which rules out blind obedience.[22]

How can Kant's categorical imperative, based on an autonomous independent moral judgment, be reconciled with Eichmann's obedience to superior orders? Can it be that his obedience was not blind, Arendt asked, but was actually guided by his conscience? In court, Eichmann explained that from the moment he was ordered to execute the Final Solution, he ceased living according to Kantian principles. However, Arendt identifies a deeper difficulty, as the categorical imperative received a new and distorted interpretation under Nazi rule, in the new

wording provided by Hans Frank: "Act in such a way that the Führer, if he knew your action, would approve it."[23] Arendt writes, "In this household use, all that is left of Kant's spirit is the demand that a man do more than obey the law, that he go beyond the mere call of obedience and identify his own will with the principle behind the law the source from which the law sprang. In Kant's philosophy, that source was practical reason; in Eichmann's household use of him, it was the will of the Führer."[24] In Arendt's view, it is precisely this combination of moral idealism and obedience to orders that accounts for "the horribly painstaking thoroughness in the execution of the Final Solution,"[25] which she traces to "the odd notion, indeed very common in Germany, that to be law-abiding means not merely to obey the laws but to act as though one were the legislator of the laws that one obeys. Hence the conviction that nothing less than going beyond the call of duty will do."[26]

To counter Eichmann's defence of obedience to superior orders, the prosecution brought evidence of Eichmann's refusal to follow Himmler's orders to stop deportations to Auschwitz. This could be an indication that Eichmann was lying, and that it was identification with Nazi ideology that guided his actions, not a sense of obligation to obey superior orders. Yet from Arendt's perspective there is no internal contradiction in this refusal. She writes, "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 his uncompromising attitude during the last year of the war … Eichmann knew that Himmler's orders ran directly counter to the Führer's order."[27]

Here we have a glimpse of the horror: in the interpretation of orders by law-abiding Eichmann, it is Himmler's order to stop deportations that bore a "black flag" of manifest illegality. As a result, for Arendt both law and moral theory fail to respond to the particular challenge posed by the new subject of totalitarianism. She therefore believes that the most urgent challenge for post-Holocaust jurisprudence is to rethink our assumptions about the relations between law and morality. This is the crisis of judgment with which Arendt chooses to end her book.[28]

In my view, even though Arendt clearly identified the crisis of judgment, she was not able to properly address it in her book about Eichmann. The answer she gave at the end of the book as to why, despite all the doubts, it is legitimate to convict Eichmann, is not sufficient.[29] I would like to suggest that we can find the seeds of her more developed answer to the crisis of judgment in her lectures about Kant's political

philosophy. Here Arendt tried to sketch the contours of a solution based on Kant's theory of aesthetic judgment, which she interpreted as relevant more broadly to political judgment and to the question of how we (as actors) judge without applying pre-given rules (of law or morality) more generally.

As we can see, the crisis does not derive from Kant's moral philosophy itself, as it is obvious that Eichmann does not take that philosophy seriously and he misinterprets Kant's categorical imperative. The problem Arendt identifies is that Kant's moral philosophy is not sufficient to guide action in the world, and therefore a theory of judgment is required. Kant's moral theory identifies the a priori, necessary, and general moral law, which according to the typography of truths Arendt later suggested, is a rational truth.[30] That Arendt identifies Kant's moral theory with rational truth becomes apparent with another example she gives. Arendt suggests that the Socratic proposition "It is better to suffer wrong than to do wrong" stands at the basis of Kant's categorical imperative, and argues that this proposition is true only for the speaker who is concerned with himself as a thinking being – i.e., the philosopher – and not for the citizen who cares about the world or the community.[31] She concludes this discussion with a general note: "Philosophical truth concerns man in his singularity, [thus] it is unpolitical by nature."[32]

Arendt is concerned with judgment about right and wrong in the absence of either socially accepted or universal legal norms, and in light of the insufficiency of universal moral law to guide such judgment alone. Interestingly it is the first part of Kant's third critique (his theory of aesthetic judgment) that provides her with a solution for the question of judging the particular without pre-given rules.

Turning to Kant's critique of taste as a basis for a theory of political judgment, Arendt exposes the puzzle that lies at the heart of such a move: Why does Kant decide to derive the mental phenomenon of judgment from the most subjective senses of taste and smell, and not from the more objective senses?[33] Arendt's answer to this puzzle points to the discriminatory quality of taste: "because only taste and smell are discriminatory by their very nature, and because they relate to the particular qua particular."[34] But this answer raises another difficulty: how do we overcome the subjectivity of judgment? Here Arendt points to a double movement that is enabled by our faculties of imagination and common sense. While imagination allows a move of internalization of the object of judgment, common sense allows a subsequent move of externalization. Together these faculties allow

forming a judgment of the particular that is not dependent on pre-existing rules while escaping the arbitrariness and idiosyncracy of personal preferences. Arendt explains:

> The solution to these riddles can be indicated by the names of two other faculties: *imagination* and *common sense.* Imagination, that is the faculty of having present what is absent, transforms an object into something I do not have to be directly confronted with but that I have in some sense internalized, so that I now can be affected by it as though it were given to me by the nonobjective sense … One then speaks of judgment and no longer of taste because, though it still affects one like a matter of taste, one now has, by means of representation, established proper distance.[35]

In other words, the imagination allows one to both internalize the object of judgment while keeping enough distance to allow reflection on it. However, this is only the first move necessary to arrive at a valid judgment. It has to be accompanied by another movement, one of externalization – that is, of turning to the plurality of viewpoints in the community in light of which to view our judgments. Here one relies on common sense. As Arendt explains,"Judgment, and especially judgments of taste, always reflects upon others and their taste, takes their possible judgments into account. This is necessary because I am human and cannot live outside the company of men."[36] In other words, what enables us to make subjective judgments that are not merely indiosyncratic is our capacity for what Kant called "enlarged thought," that is, the ability to view one's own judgments from the standpoint of others.[37] This act of judgment depends on men in the plural, on the community, which one goes to visit in one's imagination in order to critically examine one's own subjective judgments.

Arendt thinks that judgment can become impartial with the help of the imagination and through a process of representative thinking. She believes that the internal dialogic process of enlarged mentality can help orient the actor's judgments even under conditions brought about by totalitarianism – in which the exception becomes the norm, and society coordinates itself accordingly. Instead of being based on an absolute truth or existing norms, reflective judgment involves forming our judgment in the process of imagining trying to persuade others.

Arendt did not develop her theory of reflective judgment or "enlarged mentality," and she left many puzzles unanswered. Here, however, I would like to return to the dilemma posed by Arendt in *Eichmann in*

Jerusalem with the guidance of this theory of judgment. I briefly return with the help of the theory of reflective judgment to Arendt's analysis of Eichmann's failure of judgment. We saw that the court found that Eichmann had lied about being bound by orders when he organized deportations to Auschwitz, since his acts did not result from literal obedience to orders but from ideological identification with the policy. In other words, the court found that Eichmann had the required mens rea for criminal liability. Arendt, in contrast, explored the possibility that Eichmann had not lied, since he believed Himmler's order to stop deportations was manifestly illegal. That is, Eichmann acted according to his conscience. What, then, would be the basis for morally condemning Eichmann, if he commited his crimes "under circumstances that make it well-nigh impossible for him to know or to feel that he is doing wrong?"[38]

Here we can see how turning to Kant's theory of reflective judgment may help. If we understand judgment as requiring "enlarged thought," we see that even if Eichmann did not lie to the court, his actions involved a failure of judgment to which he has to give account. Eichmann, who was capable of imagining the perspective of his victims for instrumental or manipulative purposes, deliberately failed to do so for the purposes of reflective judgment – to enlarge his judgment so that it could encompass the point of view of his victims. In other words, Eichmann protected his subjective judgments from becoming impartial by refusing to open himself to the point of view of his victims. Arendt provides three examples in her book for this failure, examples that seem trivial at first reading. However, if we read them in light of her lectures on judgment, we can better understand their importance for her condemnation of Eichmann.

First, when Eichmann describes his activities in Vienna to organize the forced immigration of Jews, he uses the term "cooperation" to describe his work with Jewish leaders, as if there had really been a common interest and equality to both sides. Arendt writes:

> A more specific, and also more decisive, flaw in Eichmann's character was his almost total inability ever to look at anything from the other fellow's point of view. Nowhere was this flaw more conspicuous than in his account of the Vienna episode. He and his men and the Jews were all "pulling together," and whenever there were any difficulties the Jewish functionaries would come running to him "to unburden their hearts," to tell him "all their grief and sorrow," and to ask for his help.[39]

Second, his failure to understand the perspective of others stands out even more in his description of his meeting with one of the leaders of the Jewish community in Vienna, Mr. Storfer, with whom he had worked and who was later caught by the Gestapo and sent to Auschwitz when he tried to escape. Eichmann describes their meeting at Auschwitz like this:

> With Storfer afterward, well, it was normal and human, we had a normal, human encounter. He told me all his grief and sorrow: I said: 'Well, my dear old friend … we certainly got it! What rotten luck!' And I also said: 'Look, I really cannot help you … I hear you made a mistake, that you went into hiding or wanted to bolt, which, after all, you did not need to do.' … And then I asked him how he was.[40]

A third example of Eichmann's inability to enlarge his thought and look at things from the perspective of others emerges from a recording of his interrogation at the police, when Eichmann unwraps before Captain Less, a Holocaust survivor from Germany, all the details of his biography, as if trying to obtain sympathy for his story of bad luck, without taking into account the perspective of his audience. Arendt comments: "The presence of Captain Less, a Jew from Germany and unlikely in any case to think that members of the S.S. advanced in their careers through the exercise of high moral qualities, did not for a moment throw this mechanism out of gear."[41]

With the term "banality of evil" Arendt pointed to the way language (with its clichés etc.) loses its communicative function and is used to block the reality of the victim from the perpetrator. Indeed, each of the examples that I referred to above demonstrates this point, as Eichmann uses idioms and clichés to resist the process of enlarged mentality and to block the possibility of visiting through imagination the point of view of his interlocutor. The difficult question Arendt poses to law and moral theory, for which truth plays such an important role, is how to judge such persons who seem to act beyond truth and falsehood, fact and fiction.[42]

It is interesting that to address this problem Arendt reintroduces the notion of "common sense" – but not in its common use, of conventions or common social beliefs. Following Kant, she refers us back to its origins in the Latin term "sensus communis."[43] Accordingly, she argues that the type of reflective judgment explored by Kant requires that the judging subject engage in a process of "enlarged mentality" as

a basis for arriving at valid judgments. It is only when one's judgments become "common" that is – inspected from the point of view and opinions of others – that they gain their objectivity. It is in relation to such a notion of common sense that we can best identify Eichmann's flight from judgment. It allows us to notice that even if Eichmann were not lying, he nevertheless should be accountable for his failure of judgment, notwithstanding the changed legal and social norms in Nazi Germany.

Truth and Politics

The phenomena of organized lying in general and social taboo in particular stand at the centre of Arendt's more general reflections on truth and politics. Both, she believed, undermine one's ability to make the distinction between fact and fiction. With a note in the beginning of her essay on the subject, she explains that her thesis grew directly from the controversy brought about by the publication of her book *Eichmann in Jerusalem*.[44] With this essay she purports to return to the question of truth but to locate it in the political sphere. How does she envision the place of truth in politics? At first glance it seems that while her discussion of law and morality is based on a rejection of the coercive power of truth on the act of judgment, in "Truth and Politics" Arendt takes the opposite position and points to the dangers that lies, and in particular organized lies, pose to the integrity of the political sphere.

However, a closer reading of Arendt's argument reveals a more complex relationship between truth and politics. According to Arendt, political debate must be based on truth. For this purpose it is not enough to guarantee freedom of speech, but also to build institutions designed to actively protect the truth: courts (legal truth) and universities (scientific truth).[45] Arendt distinguishes between different kinds of truths: rational or scientific truth, religious truth, and factual truth and draws a genealogy of the relations of politics to each. She claims that whereas antiquity was characterized by a conflict between the philosopher and the citizen concerning rational truth, the modern tension lies between the political ruler and the citizen and concerns factual truth. According to Arendt, of all the types of truth, it is factual truth – a truth entirely dependent on witnesses and testimonies, and the existence of a political space in which views can be exchanged – that is most vulnerable to the onslaught of organized political lies: "[Factual truth] is always related to other people; it concerns events and circumstances in which many are involved; it is established by witnesses and depends

upon testimony; it exists only to the extent it is spoken about, even if it occurs in the domain of privacy. It is political by nature."[46] The language Arendt uses draws a close connection between the legal process of "fact finding" and a functioning political sphere. According to Arendt, the modern era of mass communication allows a systematic attempt by rulers to control and shape "factual truths" by reframing the entire context instead of relying on a few discrete lies as was the practice in the past.[47] It is against this background of organized lying that Arendt is able to identify a new political role for the "truth-teller":

> Only where a community has embarked upon organized lying on principle, and not only with respect to particulars, can truthfulness as such, unsupported by the distorting forces of power and interest, become a political factor of the first order. Where everybody lies about everything of importance, the truth teller, whether he knows it or not, has begun to act; he, too, has engaged himself in political business, for, in the unlikely event that he survives, he has made a start toward changing the world.[48]

The importance of the truth teller to politics is connected to the important distinction between past and future. Arendt writes: "Not the past – and all factual truth, of course, concerns the past – or the present, insofar as it is the outcome of the past, but the future is open to action. If the past and present are treated as parts of the future – that is, changed back into their former state of potentiality – the political realm is deprived not only of its main stabilizing force but of the starting point from which to change, to begin something new."[49]

This understanding of the political role of truth telling can explain Arendt's harsh criticism of the treatment of the Judenrat (the Jewish leadership appointed by the Nazis) in the Eichmann trial, as she saw how the issue of their collaboration with the Nazi authorities was transformed before her eyes into a social taboo. In a sense, she sees herself as undertaking the political role of "truth teller" in *Eichmann in Jerusalem*.[50] Maybe in reaction to the Israeli prosecution's attempt to avoid the subject altogether, Arendt went to the other extreme and generally condemned the Jewish leadership, without trying to "enter their shoes" and without making important distinctions between different Judenrate as was made in later historical research.[51]

However, if politics depends on the preservation of factual truth against the onslaught of organized lying, politics should not be reduced to truth finding. Arendt emphasizes that factual truth is only the ground

upon which valid political judgment can be made. This becomes clear when we turn our attention to a more recent phenomenon of a struggle against organized lying – the struggle of the Mothers of the Plaza de Mayo.

From the Eichmann Trial Back to Argentina: The Emergence of a Human Right to the Truth

Arendt was concerned with the use of the court in the service of what she regarded as political lies. She saw it as the role of the public intellectual to protest against social taboos and to resist the substitute of truth with myth. But what happens when modern truth tellers rely on courts and the human rights discourse as part of a political struggle against an orchestrated, organized lie by the authorities? How is the truth conceptualized in this context, and how does this conceptualization influence the political debate?

The Israeli authorities had kidnapped Eichmann from Argentina, where he found refuge after the war, in order to bring him to public trial. The struggle of the Mothers of Plaza de Mayo in Argentina dealt with another type of kidnapping – kidnapping on a mass scale. Their struggle provides a paradigmatic case of the modern use of courts by human rights activists against an organized lie, here the lie by the military authorities about the "disappearance" and kidnapping of around thirty thousand suspected leftists by the Argentine military regime in the years 1976–83. The Argentine case can help explain how, on the one hand, the search for the factual truth about the fate of missing persons becomes a political act of the first order. And it will help us understand how, on the other hand, the conceptualization of the truth as a legal, human right threatens the rule of law as well as political debate and judgment in Argentina about the prior regime and the transition to democracy.

My discussion of Argentina is not intended to simply serve as an illustration of Arendt's arguments. The discussion of the rise of a human right to truth in Argentina helps us tie together Arendt's discussion of truth and judgment in the three fields of law, moral philosophy, and politics. It also reveals the relevance of Arendt's discussion of political judgment for pressing contemporary debates in international law and transitional justice. Arendt's essay "Truth and Politics" explores the dangers that a certain understanding of truth poses to the political realm. Thus, contrary to the human rights discourse celebrating the rise of

a "right to truth" as part of the end of the era of impunity, Arendt's essay reminds us of the dangers that the legalization of truth poses to politics. In what follows I focus on the case of Argentina, where the right to the truth has been taken to extremes. My argument is not against the struggle to end an organized lie, but rather against the triumphant depiction of the emergence of a right to truth in international law as unambiguous progress for human rights.

It should come as no surprise that the strongest expressions of the right to the truth come from Latin America, which was also the birthplace of truth commissions. Because disappearances were a prevalent mode of repression, the new democracies in Latin America at the end of the 1980s were faced with a colossal lack of information regarding the fate of thousands of victims. To this must be added the practice in a number of countries of kidnapping and changing the identity of children of political dissidents. In order to respond to these types of repression which affect the very fabric of family life, knowledge is key. Hence, it is in connection with disappearances that the most explicit reference to the right to the truth in a human rights treaty has been made. Article 24(2) of the International Convention for the Protection of All Persons from Enforced Disappearances adopted in December 2006 provides that "each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person."[52]

The military dictatorship of the juntas in Argentina was known for its repression through torture and forced disapperances. It collapsed in 1983 and the country transitioned to democracy under President Raúl Alfonsín. In 1984 and 1985 Argentina held criminal trials of nine senior junta members and five were convicted. However, when more junior officers began to be targeted for prosecution, the military expressed its discontent with the process and attempted a coup. President Alfonsín responded by granting amnesty to officers through the Full Stop Law of 1986 and the Law of Due Obedience of 1987. In 1990, his successor, President Carlos Menem, pardoned those who had been convicted and were still in prison.

In Arendtian terms, during the years of the "dirty war," Argentina was subjected to an organized lie, which prevented the revelation of information and public discussion of the fate of tens of thousands of disappeared. This organized lying continued in a different way, well after Argentina became a democracy, protected by the general amnesty laws. A number of scholars have described how, in the face of this organized lie, coalitions of local and international NGOs as well as

local, foreign, and regional courts and politicians, drove what Naomi Roht-Arriaza has called "wedges" into the Full Stop and Due Obedience laws, exploiting loophooles and exerting pressure on the Argentine government until these laws were set aside and declared unconstitutional by the president and the Supreme Court.[53] What is interesting for our purposes is that in the struggle to defy this organized lie, the coalition of civil society, courts, and politicians has legalized the truth to an unprecedented extent, destroying on its way important individual legal rights as well as endangering political debate.

We can identify three legal campaigns that contributed to the increased legalization of the truth in Argentina.

Habeas Data

As the amnesty laws blocked trials for most human rights violations, the relatives of victims asked the courts to develop legal proceedings aimed at uncovering the truth about the fate and whereabouts of the disappeared. In 1995, in the Lapaco case, family members, supported by local and international human rights groups, presented the first petition arguing that although the amnesty laws had blocked criminal proceedings, they had a right to obtain information from state agencies and to access the remains of their loved ones.[54] Argentine first-instance and appeals courts, relying in part on the Inter-American Court of Human Rights' jurisprudence,[55] agreed, establishing that since the right to mourn the dead is a fundamental need in all human cultures, the state has an obligation to investigate disappearances even if because of the amnesty no one can be prosecuted and punished in a criminal trial on the basis of the information uncovered.[56] However, on appeal the Supreme Court refused to recognize this right, holding that the only point of an investigation is criminal prosecution.[57] In response the families turned to the Inter-America Commission on Human Rights, whose pressure led to a 1999 settlement in which the Argentine government agreed to adopt the necessary laws to grant federal courts jurisdiction "in all cases to determine the truth regarding the fate of persons who disappeared prior to December 10, 1983."[58]

Truth Trials

The Lapaco settlement made it an official obligation on the Argentine state to continue with judicial investigations. This paved the way

for what has come to be known as "truth trials" – judicial investigations not involving the establishment of criminal responsibility. These unprecedented court hearings tried to establish what had happened to the disappeared and who was responsible, without there being a defendant.[59] Thousands of such hearings were held, and judges proactively sought out new evidence, visiting torture sites and subpoenaing former and current political and military officers suspected of crimes. And since they could not be formally accused (due to the amnesty laws) they were summoned to testify as ordinary witnesses not enjoying the right against self-incrimination granted to defendants in Argentine criminal law.[60] As witnesses, if they failed to appear they could be arrested and imprisoned for perjury or contempt of court. Later, when the immunity laws were annulled, evidence gathered during truth trials has been used in criminal proceedings, raising questions of due process.[61]

Illegal Adoptions

The lack of criminal trials led to a third innovative legal challenge to the amnesty laws by the organization of the Grandmothers of the Plaza de Mayo to hold military officers responsible for the kidnapping and identity change of the children of the disappeared. According to the organization of Grandmothers, over four hundred children had been kidnapped by the military, either from their homes or after they were born in detention, their identities changed, and handed over to families of sympathizers with the regime. They argued that because the crimes of kidnapping minors and changing their identities had not been covered by the amnesty laws, they were not blocked from pursuing justice for these crimes in a court of law.[62]

The issue of stolen children not only led to new criminal prosecutions. In 2009 legislation was passed to allow the courts to obtain DNA samples from suspected children of the disappeared even against their consent, leading to court injunctions against suspected kidnapped children.[63] Thus, for example, Marcela and Felipe Noble Herrera, heirs to Argentina's largest media empire, who were adopted in 1976, have been subject to a decade of pressure to submit to DNA testing, and have had their home searched by the police to seize personal belongings and conduct a DNA test.[64] Other children who were not interested in knowing their origins have fled the country, to find themselves the subject of extradition proceedings. In the process of trying to establish the "truth" of their identity against their will, their basic rights to privacy

and dignity have been infringed, as well as their right not to know their biological origins.

The case of the kidnapped children put the Argentine system in the untenable postion of holding people criminally responsible for kidnapping a child but not for the more serious original crime of murder and disappearance of the parents. As a result, in 2005 the Supreme Court found the amnesty laws unlawful and null.[65]

What began as a search for the "factual truth" about the fate of the disappeared – under the legal theory that in order to determine whether the amnesty laws applied, a court should first determine the truth about the alleged crime – turned into a search for loopholes in the amnesty laws to prosecute illegal adoptions of the children of the disappeared, and ended in nullifying the amnesty laws and opening a new wave of criminal trials twenty years after the events.

The invocation of the "right to truth," its classification as a private right of the families of the victims, and in particular its depoliticization in relation to "innocent victims" such as the children of the disappeared helped mobilize the judicial system, and ultimately the political system as a whole, in resisting an organized lie. However, it did not come without a cost. Ironically, a campaign that was carried out in the name of restoring the rule of law ended up undermining basic guarantees of the rule of law. As a result of the proceedings surrounding stolen children, the criminal justice system became a participant in human rights violations. The search for the truth, conceptualized as an absolute, autonomous human right, gradually released all restrictions intended to ensure basic civil liberties – statutes of limitations, the prohibition of double jeopardy, the non-retroactivity of penal law, and consent requirements to infringing privacy.

This not only affected the legal system in Argentina, but also the possibility of political judgment about Argentina's "dirty war." The unique path that Argentina took has made the mothers and grandmothers the symbol of the struggle, and the search for the identity of the "stolen children" became a metaphor for the search for a new national identity.[66] This debate was cast as a search for factual truth that would obey a high standard of genetic and scientific certainty. It led to discussions of the complex issue of identity in biological and essentialist terms.[67] Likewise, since the search for "truth" was depoliticized, it was used to trump political contestation about the proper path to the future.

How can Arendt's writing help us understand the case of Argentina, and the broader problem it exemplifies? The military regime in

Argentina arose against the background of a conflict among political groups. However, since the repressive regime had constantly accused its leftist political opponents of subversion, civil society organizations saw the need to develop an alternative discourse in their struggle against the regime.[68] Accordingly, the Mothers of Plaza de Mayo developed an apolitical discourse by resorting to human rights and the legal arena. Their legal battle to expose the facts about abductions was to fulfil the important "truth-telling" function identified by Arendt. To do so, they presented the victims of the kidnappings as innocent people and played down the disappeareds' political agency. Later, the Grandmothers focused on the ultimate innocent victim – children – abducted illegally and adopted by families affiliated with the military. The turn to law helped civil society organizations reframe the public debate from one that blamed the victim to one that discussed and exposed the crimes of the previous regime. It thus helped expose the organized lie of the regime.

However, there was a price in terms of political judgment. What we see in the case of Argentina is a pathological situation in which an organized lie turned truth telling, or the search for the truth, into an act of political opposition. Eventually the legal system was enlisted in this struggle. Yet contrary to Arendt's suggestion to use the truth as a sort of boundary or limit on political discourse, in Argentina the truth filled the space of political discourse. Instead of the political community engaging in reflective judgment about its dark past, Argentine political discourse reproduced the binary understanding of society prevalent under the military regime. Already a decade after the junta trials, Jaime Malamud-Goti, presidential adviser to Alfonsín and one of the architects of the trial, came to regret using criminal trials to address Argentina's violent past. In his view, by focusing the blame on the military and obscuring the responsibility of civil society for complicity, criminal trials reproduced the friend/enemy logic of the dirty war and therefore reinforced authoritarianism.[69] The binary structure of criminal law polarized society, with each side striving to occupy the position of perfect victim and demonize the opponent.[70] The legalism of the new politics also created the false impression that law – and in particular criminal law – has clear rules to address situations of political repression, and that all that is needed to address the past is to hold criminal trials. With the emergence of a human right to the truth, the legalization of politics went even further. Politics were reshaped as biopolitics, founded upon the search for genetic and scientific truth, with

the expectation that this sort of truth would bring certainty and define political identity. In other words, the legalization of the truth was used to circumvent the difficult task of political judgment of the grey area of complicity with the military regime in which much of Argentine civil society was implicated to different degrees.

Arendt's writing on the Eichmann trial and on reflective judgment helps to point to the difficulty in addressing the grey area, with its banal perpetrators and less than pure victims (requiring reflective judgment), by means of criminal law (a form of determinative judgment). But as I have shown, the overtaking of politics by legalism was unique in Argentina, in that it operated through the formulation of a new human right – the right to the truth. To understand the dangers created by the conceptualization of the truth as a human right, I turned to Arendt's essay, "Truth and Politics," where she assigns factual, scientific truth a legitimate role as basis or boundary on political discourse. Reading that essay alongside her writing on the importance of non-determinative, reflective judgment exposes the danger of the truth taking over political dialogue and judgment, especially in a society facing the difficult transition to democracy.

The debate about abducted children in Argentina clearly demonstrates these dangers. The Grandmothers' campaign offers scientific truth as a simple solution – all that is needed to find the "real" identity of the children is to have a genetic test and return the children to their biological families. However, such an approach ignores the more complex understanding of identity as determined not once and for all at some point in time but as a process built on relationships. Some of the individuals who refused to undergo genetic testing in Argentina introduced such a concept of relational identity.[71] However, the courts found it hard to accept such a position in criminal proceedings against the person charged with complicity in the alleged illegal adoption. The problem became worse when the struggle for the identity of the children came to be understood as a symbol of the broader struggle over the definition of Argentina's identity. The analogy made was that just as a simple genetic test could return abducted children to their families, democracy could be brought back to Argentina simply by ascertaining the factual, genetic truth about the abducted children and prosecuting the abductors. Such an approach not only ignores the important role played by civil society in sustaining the military regime. It also ignores that while facts are important limitations on what can be said in political debate – "the ground on which we stand, and the sky that

stretches above us"[72] – they cannot substitute for political judgment. Such judgment, as Arendt explained in her lectures on Kant, requires a process of social dialogue in which individuals seek to understand the different points of view of other members of society. Only by engaging in such a process, can a person or a society judge the very large grey area of cooperation.[73] In this sense, the real threat to democratization is determinative judgment, when it replaces reflective judgment and takes over political discourse.

Conclusion

I suggested at the beginning of this chapter that seeing Arendt's legal theory as legalistic does not do justice to her position in *Eichmann in Jerusalem*. As an alternative, I recommended reading her writings from the perspective of an ongoing conflict between truth and three fields: law, moral philosophy, and politics. This broader perspective allows us to see that the real question at the centre of Arendt's enquiry is not law as such but how to preserve a sphere for political judgment. From this perspective, we can see the relevance of Arendt's writings today when the issue of transitional justice and international criminal law stands at the centre of debate for the international community.

Contrary to Arendt's predictions about the irrelevance of the Eichmann trial as a precedent for international law, it was the Israeli prosecution's view about the expanded role of criminal trials to include didactic goals that shaped international criminal trials since the 1990s. International law in recent decades has gradually released itself from a narrow conception of criminal law, to promote the rights of the victim and adopt the broad didactic goals of clarifying historical truth and shaping collective memory.[74] However, paradoxically, this process has been accompanied by the growth of a new legalism in international law, one that avoids the need to recognize a space of (non-determinative) judgment.[75] This legalism can be seen in the dominance of the human rights discourse over political discourse, the takeover by legal actors of truth commissions and other transitional justice institutions, and the rise of a transnational struggle, led by international and local human rights NGOS, to fight "impunity" through criminal prosecutions, making amnesties and other "softer" ways of reckoning with the past extremely difficult to justify. In the process, the discretion of the local political community to choose how to address and judge its past has been seriously curtailed.

I pointed to the growth of the "human right to the truth" as the latest trend in this process. The danger, as Arendt indicated towards the end of her essay "Truth and Politics," is the collapse of boundaries between legal, political, and scientific discourses, and the takeover of one kind of judgment (legal determinative judgment) over politics as a whole. A universal model of transitional justice imposed by international bodies prevents the creation of spaces in which different communities can engage in reflective judgment – a judgment that recognizes the element of subjective choice, as well as the need to have a discussion that takes into account different viewpoints in the community in the transition to democracy. Here we see the real conflict between truth and politics. As Arendt argued, there need not be a conflict between factual truth and political discourse in principle, as opinions must be based on facts, and facts must be used to limit interpretation.[76] However, according to Arendt there is an inherent conflict in terms of process, between a coercive method based on the truth and a persuasive method that relies on opinions. Here lies the lure of the discourse of truth, as well as the great threat to political debate and judgment.

NOTES

1 תודות. The Israel Science Foundation supported this research under Grant No. 1173/15. I deeply thank my research assistants Natalie Rose Davidson, Rachel Klagsbrun and Miryam Wijler for their help in writing this chapter.

2 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 2006), 9, 19, 206–19.

3 Note, however, that Wilson identifies a rise and fall in didactic objectives, and sees the Milošević trial as a turning point. Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011).

4 According to the Inter-American Commission on Human Rights, "the right to know the truth with respect to the facts that gave rise to the serious human rights violations … constitutes an obligation that the State must satisfy with respect to the victims' relatives and society in general." See *Ignacio Ellacría et al. v. El Salvador*, Inter-American Commission Case 10.488, Report 136/99 (22 December 1999), para. 221; The European Court of Human Rights, the African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights have all recognized in one form or another the right to truth of family members of victims disappeared, tortured, or otherwise abused by the government.

For a survey of these bodies' jurisprudence concerning the right to truth, see: Thomas M. Antkowiak, "Truth as Right and Remedy in International Human Rights Experience," *Michigan Journal of International Law* 23 (2002): 977–1014, and Yasmin Naqvi, "The Right to Truth in International Law: Fact or Fiction?" *International Review of the Red Cross* 88, no. 862 (2006): 245–73; The UN has also recognized the human right to truth. For example, the "updated set of principles for the protection and promotion of human rights through action to combat impunity," adopted by the UN in 2005, declares that "irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate." See Commission on Human rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, Report of Diane Orentlicher, UN Doc. E/CN.4/2005/102/Add.1 (2005).

5 Arendt, *Eichmann in Jerusalem*, 19.

6 Arendt writes: "Mr. Hausner had gathered together a 'tragic multitude' of sufferers." *Eichmann in Jerusalem*, 209.

7 See Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Cambridge, MA: Harvard University Press, 2002), 120–1; Lawrence Douglas, *The Memory of Judgment* (New Haven and London: Yale University Press, 2005), writes that "Arendt's argument presupposed a strict separation between the legal and the extralegal, between the rule of law and the interests of collective instruction" (2). Both Felman and Douglas are critical of Arendt's legalism.

8 Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, MA: Harvard University Press, 1964), 1.

9 Arendt, *Eichmann in Jerusalem*, 115–26.

10 Leora Bilsky, "Between Justice and Politics: The Competition of Storytellers in the Eichmann Trial," in *Hannah Arendt in Jerusalem*, ed. Steven E. Aschheim, 232–51 (Berkeley: University of California Press, 2001), 236.

11 Arendt, *Eichmann in Jerusalem*, 4–5.

12 For elaboration see Leora Bilsky, "The Eichmann Trial – Toward a Jurisprudence of Eyewitness Testimonies of Atrocity?" *Journal of International Criminal Justice* 12 (2014): 27–57.

13 Arendt, *Eichmann in Jerusalem*, 253–79. For elaboration, see Leora Bilsky, *Transformative Justice: Israeli Identity on Trial* (Ann Arbor: Michigan University Press, 2004), 117–44. For Arendt's view on universal jurisdiction see Leora Bilsky, "The Eichmann Trial and the Legacy of Jurisdiction," in *Politics in Dark Times: Encounters with Hannah Arendt*, ed. Seyla Benhabib (Cambridge and New York: Cambridge University Press, 2010), 198–218.

14 Arendt refused to see them as "pure victims" who clearly fall on the "white" side of the moral spectrum. Rather, she saw the novelty of the totalitarian system as involving the victims in their own destruction, so that they become morally implicated. Arendt, *Eichmann in Jerusalem*, 125–6. For elaboration see Erica Bouris, *Complex Political Victims* (Bloomfield, CT: Kumarian Press, 2007), 53–73.
15 Arendt, *Eichmann in Jerusalem*, 276–7.
16 Hannah Arendt, *Lectures on Kant's Political Philosophy*, ed. Ronald Beiner (Chicago: University of Chicago Press, 1989)
17 For further discussion of the trial see Bilsky, *Transformative Justice*, 169–97.
18 Arendt, *Eichmann in Jerusalem*, 292–3.
19 Ibid., 293.
20 Ibid., 126.
21 Immanuel Kant, *Groundwork of the Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1998), 31; Ak. 4:421.
22 Arendt, *Eichmann in Jerusalem,* 135–6.
23 Cited at ibid., 136.
24 Ibid., 136–7.
25 Ibid., 137.
26 Ibid.
27 Ibid., 146–7.
28 "There remains, however, one fundamental problem, which was implicitly present in all these postwar trials and which must be mentioned here because it touches upon one of the central moral questions of all time, namely upon the nature and function of human judgment. *What we have demanded in these trials, where the defendants had committed 'legal' crimes, is that human beings be capable of telling right from wrong even when all they have to guide them is their own judgment, which, moreover, happens to be completely at odds with what they must regard as the unanimous opinion of all those around them.* Those few who were still able to tell right from wrong went really only by their own judgments, and they did so freely; there were no rules to be abided by, under which the particular cases with which they were confronted could be subsumed. They had to decide each instance as it arose, because no rules existed for the unprecedented." Ibid., 294–5 (emphasis added).
29 Arendt suggests that Eichmann's conviction is legitimate on the grounds that he had played a part, and therefore supported a policy of mass murder. The fact that many others would have done the same thing in his position does not lessen his guilt according to Arendt. A crime like the one Eichmann supported wrongs humanity in such a way that it cannot be left unanswered. Under such extreme circumstances, the mere participation of

Eichmann in this new kind of crime is reason enough to convict him even if he did not have the proper mens rea. Ibid., 277–9.

30 Rational truths include mathematical, scientific, and philosophical truths and are differentiated from factual truths. Hannah Arendt, "Truth and Politics," in Hannah Arendt, *The Portable Hannah Arendt*, ed. Peter Baehr (New York: Penguin Books, 2000), 548.

31 Ibid., 558–9. According to Arendt, the philosopher, as a thinking being, is concerned with keeping the conditions for his philosophizing, while the citizen is concerned with the world and public welfare. The Socratic argument says "it is better to be at odds with the whole world than to be at odds with and contradicted by himself." Such contradiction would jeopardize the conditions of philosophizing since this act is understood as dialogue of one with oneself, which requires a basic agreement between the "two sides." But if one cares about the world the argument doesn't work because there's another way out of the contradiction.

32 Ibid., 559.

33 Arendt, *Lectures on Kant's Political Philosophy*, 66.

34 Ibid.

35 Ibid., 66–7; emphasis in original.

36 Ibid., 67.

37 Arendt writes: "You see that *impartiality* is obtained by taking the viewpoints of others into account; impartiality is not the result of some higher standpoint that would then settle the dispute by being altogether above the melée" (ibid., 42; emphasis in original). She continues: "It is accomplished by 'comparing our judgment with the possible rather than the actual judgments of others, and by putting ourselves in the place of any other man.' The faculty that makes this possible is called imagination." Ibid., 43.

38 Arendt, *Eichmann in Jerusalemm*, 276.

39 Ibid., 47–8.

40 Ibid., 51.

41 Ibid., 50. This contrasts with the attitude of officer Avner Less. A new documentary film reveals the process that Captain Less underwent while investigating Eichmann. Through Less's private diary the film shows his struggle in attempting to understand Eichman's point of view, and his engagement with what Arendt called "enlarged mentality." See *Bureau 06*, directed by Yoav Halevy (Israel: Makor Fund for Israeli Films; Open Doors Films, 2013).

42 Arendt wrote earlier that "the ideal subject of totalitarian rule is not the convinced Nazi or the dedicated communist, but the people for whom

the distinction between fact and fiction, true and false, no longer exists." Hannah Arendt, *The Origins of Totalitarianism* (San Diego, New York, and London: Harvest, 1973), 474.

43 "By using the Latin term [*sensus communis*] Kant indicated that here he means something different: an extra sense – like an extra mental capability – that fits us into community. […] it is the capability by which men are distinguished from animals and from gods. It is the very humanity of man that is manifest in this sense." Arendt, *Lectures on Kant's Political Philosophy*, 70.

It is interesting to note the way in which Arendt contrasts a "common sense" with a "private sense," which marks the state of insanity: "Kant … remarks in his *Anthropology* that insanity consists in having lost this common sense that enables us to judge as spectators; and the opposite of it is a *sensus privatus*, a private sense, which he also calls 'logical *Eignensinn*,' implying that our logical faculty, the faculty that enables us to draw conclusions from premises, could indeed function without communication – except that then, namely, if insanity has caused the loss of common sense, it would lead to insane results precisely because it has separated itself from the experience that can be valid and validated only in the presense of others" (ibid., 64). This can also explain why Arendt turned away from rational truth as the basis for moral judgment and looked for a conception of judgment based on plurality.

44 Arendt, "Truth and Politics," 545.

45 Ibid., 571–2.

46 Ibid., 553.

47 "We must now turn our attention to the relatively recent phenomenon of mass manipulation of fact and opinion as it has become evident in the rewriting of history, in image-making, and in actual government policy" (ibid., 564). "The traditional lie concerned only particulars and was never meant to deceive literally everybody; it was directed at the enemy and was meant to deceive only him. These two limitations restricted the injury inflicted upon truth … both these mitigating circumstances of the old art of lying are noticeably absent from the manipulation of facts that confronts us today" (ibid., 565).

48 Ibid., 564.

49 Ibid., 569.

50 Arendt explicitly refers to herself in these terms: "The hostility against me is a hostility against someone who tells the truth on a factual level, and not against someone who has ideas which are in conflict with those commonly held." Carol Brightman, ed., *Between Friends: The Correspondence of Hannah*

Arendt and Mary McCarthy 1949–1975 (New York: Harcourt, Brace, 1995), 148.

51 See, for example, Isaiah Trunk, *Judenrat* (Jerusalem: Yad Vashem Press, 1979) [Hebrew]. Yerushalmi comments that "what is disturbing in Arendt's wholesale condemnation of the Jewish Councils is her uncharacteristic refusal to confront complexity, nuance, context and the historical background which she herself had elucidated in her earlier work." Yosef Hayim Yerushalmi, *Servants of Kings and Not Servants of Servants: Some Aspects of the Political History of the Jews* (Atlanta, GA: Tam Institute for Jewish Studies, Emory University, 2005), 22.

52 G.A. res. 61/177, *International Convention for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. A/RES/61/177 (2006).

53 Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia: University of Pennsylvania Press, 2005), 113. See also, Kathryn Sikking and Carrie Booth Walling, "Argentina's Contribution to Global Trends in Transitionl Justice," in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, ed. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge: Cambridge University Press, 2006), 301–24.

54 The petitioners had argued that "the right to the truth in this case means nothing else but the obligation on the part of the State to use all means at its disposal to determine the fate of the disappeared between 1976 and 1983." Cited in Supreme Court Decision in the Lapacó Case. *Suarez Mason, Carlos Guillermo s/ homicidio, privacion ilegal de la libertad, etc.* S. 1085. XXXI, Argentina: Corte Suprema de Justicia (13 August 1998), 3.

55 Notably the Velásquez case: *Velásquez Rodríguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACrtHR), (29 July 1988).

56 Roht-Arriaza, *The Pinochet Effect*, 101.

57 "Given that investigation proceedings are intended to determine the existence of a punishable fact and discover its authors … it is not permissible to conduct an investigation in the current state of the present case, as such an investigation would exceed its procedural purpose." Supreme Court Decision in Lapacó Case, *Suarez Mason, Carlos Guillermo s/ homicidio, privacion ilegal de la libertad, etc.* S. 1085. XXXI, Argentina: Corte Suprema de Justicia (13 August 1998), 1.

58 See *Carmen Aguiar De Lapacó – Argentina.* Inter-America Human Rights Commission Case 12.059, Report No. 70/99, (February 29, 2000), para. 17.

59 See Elena Maculan, "Prosecuting International Crimes at the National Level: Lessons from the Argentine 'Truth-Finding Trials,'" *Utrecht Law Review* 8 (2012): 106–21.

60 This constituted a gross violation of due process, since despite the amnesty in Argentina at the time, foreign courts such as those in Spain began prosecuting Argentine officers on the basis of universal jurisdiction. Note however that the practice was not uniform. Some tribunals treated the alleged perpetrators as defendants in criminal trials and accorded them the right against self-incrimination, while others regarded them as witnesses (since formally they were not defendants, and the impunity laws were blocking their indictment). Ibid., 112–13.

61 Ibid., 118.

62 Roht-Arriaza, *The Pinochet Effect*, 108–13.

63 Elizabeth B. King, "A Conflict of Interests: Privacy, Truth, and Compulsory DNA Testing for Argentina's Children of the Disappeared," *Cornell International Law Journal* 44 (2011): 535–68, 540–6.

64 Ibid., 536–7.

65 *Case of Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.*, No 17.768, Argentina: Corte Suprema de Justicia (14 June 2005).

66 According to Gandsman "these campaigns do not simply aim to generate doubt about individual biological identities but intend to raise much larger questions about national belonging." Ari Gandsman, ""Do You Know Who You Are?" Radical Existential Doubt and Scientific Certainty in the Search of the Kidnapped Children of the Disappeared in Argentina," *ETHOS* 37, no. 4 (2009): 441–65, 443.

67 Ari Gandsman, "A Prick of a Needle Can Do No Harm: Compulsory Extraction of Blood in the Search for the Children of Argentina's Disappeared," *Journal of Latin American and Caribbean Anthropology* 14 (2009): 162–84.

68 Patricia Naftali, "The Subtext of New Human Right Claims: A Socio-Legal Journey into the 'Right to Truth,'" in *Diverse Engagement: Drawing in the Margins: Proceedings of the University of Cambridge Interdisciplinary Graduate Conference June 2010*, ed. Matthew Frenchet al. (Cambridge: Cambridge University, 2010), 118.

69 Jaime Malamud Goti and Libbet Crandon Malamud, *Game without End: State Terror and the Politics of Justice* (Norman: University of Oklahoma Press, 1996).

70 See generally Leebaw, who argues that the legalism of international criminal law and the restorative justice paradigm of truth commissions both prevent transitional justice measures from addressing the grey zone between perpetrators and victims. Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (Cambridge: Cambridge University Press, 2011).

71 Noa Vaisman, "Shedding Our Selves: Perspectivism, the Bounded Subject and the Nature–Culture Divide," in *Biosocial Becomings: Integrating Social and Biological Anthropology*, ed. Tim Ingold and Gisli Palsson (Cambridge: Cambridge University Press, 2013), 106–22.

72 Arendt, "Truth and Politics," 574.

73 In "Truth and Politics" Arendt explains: "Political thought is representative. I form opinion by considering a given issue from different viewpoints, by making present to my mind the standpoints of those who are absent; that is, I represent them … It is this capacity for 'enlarged mentality' that enables men to judge; as such it was discovered by Kant in the first part of his *Critique of Judgment*, though he did not recognize the political and moral implications of his discovery" (ibid., 556).

74 On the recognition of victims' rights alongside defendants' rights in international criminal law see T. Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court* (Oxford and New York: Oxford University Press, 2010).

Central writers in the field today view the didactic purpose of the trial as the main, and sometimes even the ultimate, goal of the legal process. See Lawrence Douglas, "Shattering Nuremberg: Toward a Jurisprudence of Atrocity," *Harvard International Review* (21 November 2007), accessed 12 December 2013, http://hir.harvard.edu/shattering-nuremberg ; Leora Bilsky, *Transformative Justice*; Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (New Brunswick, NJ: Transaction, 1997); Shklar, *Legalism*; and Robert D. Sloane, "The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law," *Stanford Journal of International Law* 43 (2007): 39–94.

75 McEvoy points to this paradox; see Kieran McEvoy, "Letting Go of Legalism: Developing a Thicker Version of Transitional Justice," in *Transitional Justice from Below*, ed. Kieran McEvoy and Lorna McGregor (Oxford and Portland: Hart, 2008), 15–47. Leebaw, *Judging State-Sponsored Violence*, warns about the effects of such legalism on narrowing the space for judgment.

76 Arendt, "Truth and Politics," 555.