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The Eichmann Trial and the Legacy of Jurisdiction

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Although the phenomenon of political trials has a long history that goes back to the beginning of Western civilization, to the trials of Jesus and Socrates, it has gained renewed interest of late. This interest was triggered by developments in international law, in particular the possibility of bringing heads of state to trial for crimes of genocide, crimes against humanity, and war crimes in national courts exercising universal jurisdiction. Although the legal cases vary, defendants such as Yugoslav president Slobodan Milošević, former Chilean dictator General Augusto Pinochet, and Israeli prime minister Ariel Sharon all raised one common defense: They claimed that the proceedings against them amounted to a political trial.

In my book *Transformative Justice: Israeli Identity on Trial,*[1] I tackled the dilemma of the political trial with the help of political theory elaborated by Otto Kirschheimer, Judith Shklar, and Hannah Arendt. In this chapter, I would like to develop the theory of political justice further and apply it to what I call "the new (international) political trial." I offer a reading of the Adolf Eichmann trial as occupying the intersection between *national political trial* and *international political trial*. I focus on one aspect of the trial – the *legacy of jurisdiction* – and on a neglected aspect of Hannah Arendt's writing on the trial. I argue that it is in this seemingly legalistic aspect of the trial that we can identify the roots of a crisis for modern criminal law that emerged in the wake of World War II. It reveals the deep sense in which an important source of legitimacy for the criminal law, its connection to a single and coherent political community, has been undermined and is in need of a new articulation.

One of the first moves toward better enforcement of international norms was taken by the Israeli court in the trial of Eichmann in 1961. It was here that the precedent of the authority of a national court to adjudicate "crimes against

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

humanity" committed outside its territorial jurisdiction was established.[2] For this purpose, the Israeli court had to provide an entirely new basis for its jurisdiction, one that transcended the traditional constraints that national sovereignty imposes on territorial criminal law.[3] The defense argued that since the crimes had been committed outside Israel and prior to the establishment of the state, the Israeli court lacked jurisdiction. The court could have responded to this challenge by relying on the Israeli law for punishing Nazis and their collaborators (1950), which invested the court with special jurisdiction over crimes against humanity and crimes against the Jewish people that were committed during the Nazi regime from 1933 to 1945.[4] However, the court was unsatisfied with such a positivist legal answer and provided an additional justification by offering an alternative basis for its jurisdiction based on principles of international law.[5] The court ruled that in judging crimes against humanity, there is no need to establish a territorial link or a personal link of the perpetrator or his or her victims to the state. Rather, every national court assumes the power to adjudicate the case, acting as the delegate of the international community. The idea behind this doctrine was that these are acts so deeply offensive to the entire international community that the case may be brought in any other state if the country of the culpable person takes no action. According to this doctrine, international law recognizes the authority of each state to enforce international norms when the infringement concerns humanity as such.[6] This new basis for the court's authority was called the principle of "universal jurisdiction." The new doctrine of jurisdiction allowed the court to circumvent the boundaries of state sovereignty, thus offering a way to adjudicate crimes against humanity that enjoyed de facto impunity from the national courts of their perpetrators' state and in the absence of a permanent international criminal tribunal. It thus purported to eliminate an important source of impunity for those engaged in crimes against humanity under the auspices of

[2] For an interesting article connecting the Eichmann trial to current debates about universal jurisdiction, see Gary J. Bass, "The Adolf Eichmann Case: Universal and National Jurisdiction," in Stephen Macado, ed., *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Philadelphia: University of Pennsylvania Press, 2004), pp. 77–90.

[3] For elaboration on the connection between territory, sovereignty, and national law, see Jeremy A. Rabkin, *Law without Nations? Why Constitutional Government Requires Sovereign States* (Princeton and Oxford: Princeton University Press, 2005), pp. 45–70.

[4] Nazi and Nazi Collaborators (Punishment) Law, 5710/1950, 4, Laws of the State of Israel (LSI) (1949–50), 154.

[5] Cr.C (Jm.) 40/61, *Attorney General v. Adolf Eichmann*, 45 P.M 3.1965, *International Law Reports,* vol. 36 (Cambridge: Cambridge University Press, 1968) (hereafter *Eichmann Trial*), pp. 18–276; Cr. A 336/61, *Eichmann v. Attorney General*, 16(3) P.D. 2033, ibid., pp. 277–342 (Dist. Ct. Jerusalem 1961); *affd,* ibid., pp. 277, 279–304 (Supr. Ct. Jerusalem, 1962). This volume of *International Law Reports* (*ILR*) includes the full record of both district and supreme court judgments in the Eichmann trial. The English texts are translations made by the Israeli Ministry of Justice of Israel from Hebrew of the original record.

[6] Ibid., p. 299.

a sovereign state. This precedent, however, remained dormant for many years until its reinvocation in recent years.[7]

At the time of the Eichmann trial, various critics warned against the danger of its becoming a "show trial" as a result of its being held in a national court related to the community of the victims, which might be tempted to prefer particularistic national interests over juridical ones.[8] Today, however, the very willingness of national courts to recognize universal jurisdiction and to apply international norms over officials of third-party states is viewed as an advancement of the rule of law in the field of international relations. The doctrine of universal jurisdiction is presented as an answer to the inability (or unwillingness) of the concerned national courts to try state officials who commit war crimes or crimes against humanity in the name of "state interests."[9] This shift in understanding of the role of "third-party" national courts in applying international norms requires explanation. Are national courts the source of danger of the politicization of international law, or are they the best guarantee against "political justice," piercing the shield of sovereign immunity?[10]

We will not be able to solve this puzzle unless we clarify our concept of the political trial and the danger it poses to the rule of law. Hannah Arendt first articulated these concerns in the context of the Eichmann trial and proceeded to offer a unique way of addressing them. The solution she advocated, though, was different from the one advanced by the Israeli court. Since Arendt's commentary on the trial was not read with juridical eyes,[11] this part of her

[7] Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford and New York: Oxford University Press, 2003).

[8] It might be argued that international criticism of the Eichmann trial did not stem from the court's exercise of universal jurisdiction as such, but rather from the tribunal's connection to the community of the victims. Under this view, the Israeli court lacked "impartiality" in exercising universal jurisdiction. This "purist" view, however, presupposes a certain understanding of the "rule of law," as detachment which I undertake to challenge in this chapter. Indeed, third-party courts, in Germany, Spain, and elsewhere, concerned about their legitimacy in exercising universal jurisdiction, have added requirements of proving a stronger nexus between the court and the case at hand. For elaboration and evaluation of this trend, see Anne-Marie Slaughter, "Defining the Limits: Universal Jurisdiction and National Courts," in Macedo, ed., *Universal Jurisdiction*, pp. 168–90. Bass adds another argument against the exercise of "pure" universal jurisdiction connected to the issue of incentives. He argues that the more disconnected the court is from the case at hand, the less interest there will be in conducting the trial in the first place. See Bass, "The Adolph Eichmann Case."

[9] See for example, Sally Falk Moore, "Egregious Crimes against Humanity: Some Reflections in August 2003," in John Borneman, ed., *The Case of Ariel Sharon and the Fate of Universal Jurisdiction* (Princeton: Princeton Institute for International and Regional Studies, Princeton University, 2004), pp. 116–30.

[10] For elaboration, see Paul W. Kahn, "Universal Jurisdiction or the Rule of Law," in Borneman, ed., *The Case of Ariel Sharon and the Fate of Universal Jurisdiction*, pp. 131–45.

[11] The exception being Jacob Robinson, an international law jurist who devoted an entire book to refuting all of Arendt's juridical mistakes and misconceptions: *And the Crooked Shall Be Made Straight: The Eichmann Trial, the Jewish Catastrophe, and Hannah Arendt's Narrative* (Philadelphia: Jewish Publication Society of America, 1965). Needless to say, Robinson did not find any merit in Arendt's ideas for the development of the jurisdiction of atrocity.

argument was ignored. The international community regarded the Eichmann trial as largely a "Jewish issue," concerning Jewish politics and Jewish memory of the Holocaust.[12] As a result, the legal implications of the doctrine of "universal jurisdiction" as interpreted by the Israeli court were not explored. Today, with the growth of interest in the doctrine of universal jurisdiction, and with the changing understanding of the role of the victims in the trial, the Eichmann trial is often posited as a legal precedent for the doctrine of universal jurisdiction. However, this legalistic approach fails to articulate the normative basis for the court's jurisdiction and the question it raises about the proper link between the tribunal and the community of the victims. In the following, I suggest reading the court's judgment together with Arendt's assessment of the juridical text in order to reconcile the two perspectives and develop a theory about the sources of legitimacy for a national court adjudicating crimes against humanity. This inquiry can help us gain a more precise understanding of the problems facing the jurisprudence of atrocity today.

8.1 Judgment in Jerusalem

The Nuremberg trials conducted in the aftermath of World War II are seen as a milestone for the international community.[13] For the first time, the political leaders of a defeated regime were brought to trial before an international tribunal for war crimes, crimes against the peace, and crimes against humanity. The London Charter that established the ad hoc tribunal had to overcome difficult legal obstacles in order to apply criminal responsibility over the defendants. Many of these obstacles stemmed from the fact that modern criminal law is based on the idea of state sovereignty and, as a consequence, it fails to address collective crimes that are conducted in the name of sovereign states.[14] This difficulty is exemplified in traditional criminal law doctrines such as "acts of state," "state immunity," "superior order justification," "territorial jurisdiction," and so on with which the Nuremberg court had to wrestle. After the conclusion of the Nuremberg trials, the challenge for the international community was how to turn this important precedent for overcoming state sovereignty and trying international crimes into a working precedent in the absence of a permanent international criminal court.

The Eichmann trial was an important precursor to current notions of universal jurisdiction. The Israeli court, being a national court, had to provide justification for its jurisdiction. The court articulated several bases for its jurisdiction

[12] For example, Judith N. Shklar, *Legalism* (Cambridge: Harvard University Press, 1964), p. 155.

[13] Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000). Bass characterizes war crimes trials as a regular part of international politics that emerged well before Nuremberg. However, he argues that the discipline of international criminal law as a distinct legal field originated in the aftermath of World War II, in the Nuremberg trials.

[14] George P. Fletcher, "The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt," *Yale Law Journal* 111 (2002): 1499.

that could be recognized internationally. First, the court based its extraterritorial jurisdiction on the doctrine of "passive personality" (also known as passive nationality), according to which a national court acquires jurisdiction over crimes committed outside its territory when it can show a special connection to the victim of the crime. Usually, this means that the victim is a citizen of the state, but since Israel did not exist at the time when the crimes were committed, the court extended its notion of citizenship and based its link to the victims on the fact that they were Jews and that Israel was established as a Jewish state. Aware of the difficulties that such ethno-religious reasoning raises for liberal thinkers, the court offered two other bases for its jurisdiction: the protective principle[15] and the principle of "universal jurisdiction" over crimes against humanity.[16] I will concentrate on the latter since it provides a novel basis for jurisdiction.[17] The court ruled that in judging crimes against humanity, there is no need to establish a territorial link or a personal link of the perpetrator or his or her victims to the court. Rather, every national court assumes the power to adjudicate the case, acting as the delegate of the international community.[18]

The new theory of "universal jurisdiction" allowed the court to circumvent the barrier of territorial sovereignty. Respect for the sovereignty of states is manifested in delineating the boundaries of criminal law according to territorial boundaries of states.[19] It means, however, that the criminal law is rarely applied to crimes against humanity, since they are often committed by state

[15] The protective principle recognizes that states may prosecute certain conduct committed outside their territory on the basis that it threatens the security interests of the state. For elaboration on the various instances where courts may be permitted to exercise extraterritorial jurisdiction, see Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1990), pp. 303–9.

[16] *Eichmann Trial*, p. 277. The Israeli Supreme Court stated: "There is full justification for applying here the principle of universal jurisdiction since the international character of 'crimes against humanity' (in the wide meaning of the term) dealt with in this case is no longer in doubt, while the unprecedented extent of their injurious and murderous effects is not to be disputed at the present time. In other words, the basic reason for which international law recognizes the right of each State to exercise such jurisdiction in piracy offences – notwithstanding the fact that its own sovereignty does not extend to the scene of the commission of the offence (the high seas) and the offender is a national of another State or is stateless – applies with even greater force to the above mentioned crimes." See *Eichmann Trial*, pp. 277, 299.

[17] As explained by Bassiouni, all bases for extending territorial jurisdiction still rely on the nexus to a territorial sovereignty, apart from universal jurisdiction. "The reach of a state may, therefore, be universal with respect to the forms of extraterritorial jurisdiction . . . but in all of them there is a connection or legal nexus between sovereignty and the territoriality of the enforcing state, or the nationality of the perpetrator or victim, or the territorial impact of the extraterritorially proscribed conduct." In contrast, "the theory of universal jurisdiction transcends national sovereignty, which is the historical basis for national criminal jurisdiction." See, M. Cherif Bassiouni, "The History of Universal Jurisdiction," in Macedo, ed., *Universal Jurisdiction,* pp. 39–63, at 42.

[18] *Eichmann Trial*, pp. 279–304 (basing jurisdiction on protective, passive personality, and universality principles).

[19] As explained by Bassiouni, "Sovereignty, jurisdiction, and territory have traditionally been closely linked. This is due to the recognized importance of avoiding jurisdictional conflicts

officials and in promotion of what is deemed to be "state interest." Indeed, this understanding underlies the justification for the establishment of the ad hoc international tribunal at Nuremberg, since German courts were not to be trusted to prosecute major Nazi war criminals.[20] The national state often does not view these acts as "crimes" (and so the perpetrators are not indicted in its courts) or is too weak to seriously prosecute them, and other states are prevented from interfering in the name of respect for state sovereignty.

The paradox of human rights that Arendt explored in *The Origins of Totalitarianism* highlights the difficulty of developing tools to adjudicate crimes against humanity. The paradox reflects a tension between two contradictory obligations that seem to originate in the same idea of human rights. On the one hand, in the name of human rights the international community recognizes the right of "self-determination" and upholds the right of all societies to govern themselves. On the other hand, the danger that unlimited sovereignty may be applied against the state's own citizens creates an acute need to protect minority groups against the power of their own state.[21] The doctrine of "universal jurisdiction" that was developed by the Jerusalem court and applied for the first time to crimes against humanity offered an elegant solution to this dilemma. It connected the substance of the crime (against humanity) to the means of prosecution (by each national court acting in the name of humanity). However, at the time of the Eichmann trial, the court did not articulate what conditions or limitations (if any), other than the presence of the defendant on trial, are needed in order to establish the competence of the court. This oversight might be the result of the strong link of the court to the Eichmann case, which was felt so dramatically through the testimonies of Israeli Holocaust survivors during the trial.

The Eichmann trial was the first time in which the victims as a group faced a perpetrator of the Holocaust in a courtroom. It was also the first case in which "crimes against humanity" occupied the center of the trial. However, since the case was brought before a national court, the difficulty of reconciling traditional doctrines of criminal law with the extraordinary character of the new crime had to be addressed. The court opted for a dual solution: to sit both as spectator

between states and providing legal consistency and predictability." "The History of Universal Jurisdiction," p. 40.

[20] For a historical discussion of the difficulties faced by the German court in adjudicating the crimes of Auschwitz according to German criminal law during the Frankfurt trial (1965), see Devin Pendas, *The Frankfurt Auschwitz Trial, 1963–1965: Genocide, History, and the Limits of the Law* (Cambridge: Cambridge University Press, 2006).

[21] For elaboration of this tension as the source of a crisis for political theory of the state, see Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, translated by Daniel Heller-Roazen (Stanford: Stanford University Press, 1998). For a theoretical attempt to resolve some of these problems in the context of current controversies over global justice, see Seyla Benhabib, *Another Cosmopolitanism*, with an introduction by Robert Post and with commentaries by Jeremy Waldron, Bonnie Honig, and Will Kymlicka (New York: Oxford University Press, 2006); Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004).

and as actor in the trial of Eichmann.[22] As spectators, the judges opened the stage of the trial to the testimonies of about a hundred Holocaust survivors, thus allowing the court to become a forum for weaving collective memory out of the individual threads of survivor testimonies. Nonetheless, as an actor in the legal field, the court did not allow these voices to overwhelm its judgment. Here, the court applied its juridical lenses to the case and focused on the ways in which Israeli criminal law could be adapted to the crimes of the Holocaust without creating dangerous precedents that would jeopardize the liberties of ordinary criminal defendants in the future. The dilemma of how to reconcile traditional doctrines of criminal law (based on the idea of state sovereignty) with the postsovereign condition exemplified by crimes against humanity was particularly salient here. This normative crisis of core tenets of criminal law did not surface during the Nuremberg trials, due to its extraordinary status as an ad hoc international military tribunal. It was only during the Eichmann trial that it was first felt with all its urgency. However, due to the tendency of judges and jurists to think via legal precedents and analogies, the judgment of the court tended to obfuscate the problem. Only in the critical reports of the trial by the political philosopher Hannah Arendt was the problem identified with all its ramifications for the future of criminal law.

8.2 Hannah Arendt and the Eichmann Trial

Hannah Arendt is known for her criticism of the Eichmann trial and, in particular, of the conduct of the Israeli prosecution. In her report on the trial, *Eichmann in Jerusalem*, she criticized the prosecutor, Gideon Hausner (and Prime Minister David Ben Gurion) for using the trial as a means for promoting a political agenda, a national version of the history of the Holocaust, through the testimonies of Holocaust survivors and under the legal category of "crimes against the Jewish people." In contrast, Arendt presented herself as the guardian of law, advocating the complete separation of criminal law from politics and denying any legitimacy to "external" political goals that go beyond the traditional aim of ascertaining the guilt of the defendant.[23] For that purpose, she suggested that the prosecution should refrain from relying on the category of "crimes against the Jewish people" and use instead the more general category of "crimes against humanity."

During the heated controversy that erupted after the publication of Arendt's report, it was convenient to stress the universalistic strand in her criticism

[22] For elaboration on the idea of the judge as spectator and actor, see Bilsky, *Transformative Justice*, pp. 117–44.

[23] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (London: Faber and Faber, 1963). (Hereafter abbreviated *EJ*.) Arendt's view of the role of trials is challenged in contemporary writings on transitional justice by proponents of the symbolic role of trials. For a good example, see Lawrence Douglas, *The Memory of Judgment* (New Haven: Yale University Press, 2001); Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (New Brunswick and London: Transaction, 1997).

and hence to depict Arendt in stark opposition to the official position of the Israeli political and legal establishment. This opposition was further stressed by the public exchange of letters between Arendt and Gershom Scholem in which he accused her of lacking love of Israel.[24] In retrospect, we can see that this simplistic dichotomy between universalism and particularism cannot be maintained. It is not easily reconciled with the various doctrines developed by the Israeli court (especially the emphasis on international law by Justice Simon Agranat of the Israeli Supreme Court).[25] Likewise, it cannot be easily reconciled with Arendt's support of the competence of an Israeli court to adjudicate Eichmann.

Arendt's criticism of the Israeli prosecution, which opens *Eichmann in Jerusalem*, has gained much public attention. Less known is her position regarding the jurisdiction of the Israeli court. Arendt thought that the best tribunal to judge Eichmann's acts would be a permanent criminal international court. But in its absence, she favored the jurisdiction of an Israeli court (*EJ*, 258–60). On this issue, Arendt was a lone voice against many in the international community who rejected outright the legitimacy of the Jerusalem court because of the identification of the judges with the Jewish victims.[26] Arendt, in contrast, argued that just as other national courts were competent to judge crimes of the Holocaust committed on their territory and against their nationals, so was an Israeli court. The real difficulty, in her view, was not the assumed "partiality" of the judges but a misguided understanding of "territory." She called for a new interpretation of the legal concept of "territory" in a way that would better reflect the legitimate boundaries of national courts exercising jurisdiction over crimes against humanity.

On a first reading, it seems that Arendt advocated two contradictory positions. On the one hand, she objected to the use of the category "crimes against the Jewish people" as too particularistic; on the other hand, she favored the jurisdiction of a national court whose judges belonged to the Jewish nation and were identified with the community of the Jewish victims. Indeed, one commentator who recognized this inconsistency suggested that it cannot be resolved and that we should take Arendt's writing on jurisdiction as a deviation from her general position.[27] I would like to advance a different reading, one that embraces this seeming contradiction as the key to understanding Arendt's position on

[24] Scholem raised the issue of Arendt's blaming the victims in the context of her focus on the responsibility of the Jewish Councils for cooperating with the Nazis. See Bilsky, *Transformative Justice,* pp. 146–51.

[25] Pnina Lahav, *Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* (Berkeley and Los Angeles: University of California Press, 1997), pp. 145–62.

[26] A good example is Telford Taylor, the American chief prosecutor for the second round of trials at Nuremberg, who expressed his strong reservations about the trial in Jerusalem. Telford Taylor, "Large Questions in the Eichmann Case," *New York Times Magazine,* January 22, 1961, p. 11.

[27] Thomas Mertens, "Memory Politics and Law: The Eichmann Trial: Hannah Arendt's View on the Jerusalem Court's Competence," *German Law Journal* 6/2 (February 1, 2005): 407. The author identifies an inconsistency between Arendt's interpretation of the Jerusalem court's

how to articulate the jurisprudence of atrocity by national courts. I will argue that if we read Arendt's interpretation of the nature of the crime together with her interpretation of the principle of "territorial jurisdiction," we discover that she began to develop the novel idea about the need for criminal law to adjust to a fundamental change in the conception of community, one that would transcend geographical borders. This conceptual change could endow legitimacy to the court's "extraterritorial" use of coercive force against the accused. According to my interpretation of Arendt, criminal law (or courts applying domestic criminal codes) has to adopt a double lens, one that is capable of recognizing its simultaneous embeddedness in two communities: a national community and the community of humanity.[28] However, Arendt does not fully elaborate this theory, and we can detect it only when we link her interpretation of the unique nature of "crimes against humanity" to her interpretation of the principle of territorial jurisdiction.

8.2.1 The Nature of the Crime: Crimes against Humanity

"Crimes against humanity" are usually understood as being directed at the core of "humaneness," so that this category constitutes a legal barrier against "inhuman" actions. In contrast, Arendt attributed the unprecedented nature of the crime not to the inhumanity of the actors, but to the novel purpose of the crime. In this argument, she adopted the lens of a political philosopher, viewing the crime from the broader perspective of humanity:

> 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 . . . [it is] an attack upon diversity as such. (*EJ*, 268–9)

In Arendt's formulation, crimes against humanity are not just "inhuman acts," as the Israeli court had it; neither are they similar to more familiar crimes like expulsion or mass murder. Rather, they threaten the very possibility of humanity (what she calls the "human status") even when they are perpetrated against particular groups (Jews, Gypsies, and so on). An attempt to annihilate one group should be understood as an attack on the condition of human plurality. It was on this point that Arendt differed from the district court, which stressed the unique nature of the crime as "crimes against the Jewish people." In contrast, Arendt saw the particular crime against the Jewish people as an instance of a universal crime against humanity.

Arendt wrote that this understanding was obscured from the court because it viewed the crime solely from the perspective of Jewish history. However, I would add that a further obstacle arose from the fact that the court was a

competence on the basis of territoriality, on the one hand, and her view that "crimes against humanity" should be adjudicated only by an international court, on the other. The author dismisses the former position as unsupportable.

[28] Benhabib traces this vision of dual citizenship in both a national republic and a cosmopolitan community to Kant's ideas. See Benhabib, *Reclaiming Universalism*, p. 124.

domestic court applying positive criminal law. Domestic criminal law tends to conceive the community that is harmed by the crime in terms of national borders. Thus, for example, the crime of murder is understood not in terms of the harm to the individual whose life was taken, but in terms of undermining the values and interests of the political community at large. But this is usually where domestic criminal law stops. Arendt wanted the court to go a step further and acknowledge that the harm to an ethnic or a religious group envisioned by crimes against humanity should be understood as harm to humanity as such.[29] This different type of harm is obscured by the category of "crimes against the Jewish people," which defines the harm in terms of the specific group harmed and does not point to the condition of human plurality as its protected value. Furthermore, from the perspective of domestic criminal law, it is hard to distinguish between the crime of genocide and mass murder. Arendt urged recognition of a different community that was targeted by the Nazi crimes: the community of humankind. Recognizing a community that transcends national borders helps Arendt explain the difference between mass murder and crimes against humanity. She wrote:

> The supreme crime it was confronted with, the physical extermination of the Jewish people, was a crime against humanity, perpetrated upon the body of the Jewish people . . . only the choice of victims, not the nature of the crime, could be derived from the long history of Jew-hatred and anti-Semitism. (*EJ*, 269)

We can understand Arendt's position as extending the logic of domestic criminal law to international crimes. Just as national criminal law conceives of a crime as an offense against the state as a collective, not merely against the individuals immediately harmed by it, so a "crime against humanity" should be understood as being directed against the core values of the international community or the community of humanity, and not merely against the victimized group injured by it.[30]

8.2.2 Jurisdiction

Although Arendt recognized the jurisdiction of the Israeli court, she rejected as unsatisfactory the two bases offered by the court in support of its jurisdiction (she did not elaborate on the protective principle). The doctrine of "passive personality," she argued, was not compatible with the foundations of modern criminal law because it put too much emphasis on the injury to the individual victim as the main justification for the criminal process and not on the more

[29] A similar approach was taken by Justice Agranat in the Eichmann appeal; see Lahav, *Judgment in Jerusalem*. For developments in this direction, including the emergence of state laws enacting universal jurisdiction over certain crimes such as slavery, war crimes, genocide, torture, and crimes against humanity, and the definition of the harm in terms of the larger international community, see A. Hays Butler, "The Growing Support for Universal Jurisdiction in National Legislation," in Macedo, ed., *Universal Jurisdiction,* pp. 67–76.

[30] For elaboration of this claim in the context of contemporary international criminal law, see Robert Sloan, *The Expressive Capacity of International Punishment*, Columbia Public Law and Legal Theory Working Paper 06100 (2006), pp. 10–20.

general injury to the community.[31] This might, in her opinion, bring criminal law too close to private revenge. Much more surprising was her rejection of the doctrine of "universal jurisdiction" as the basis for recognizing the authority of the Israeli court over the case. As Arendt advocated the adoption of "crimes against humanity," it would seem only natural for her to accompany this choice with "universal jurisdiction."[32] If the injured community is humanity as such (or the condition of human plurality), why not recognize every national court as competent to adjudicate such a crime? Arendt does not give a satisfactory answer to this question. She only explains that the Israeli court based its universal jurisdiction on an unfounded analogy to the law of piracy. A pirate, Arendt wrote, is an "outlaw" who has no flag and who acts on the high seas outside the territorial jurisdiction of any state. Far from being an outlaw, Eichmann had been a loyal member of his state and had acted in its name. In other words, the problem with Nazism was not the actions of outlaw individuals but rather the actions of an "outlaw state" – a criminal state (*EJ*, 262). The new crimes reverse the traditional understanding of the state as the locus of legality, and the analogy to piracy obscures the nature of the problem. However, given the formidable obstacles in the way of prosecuting Nazi atrocities, Arendt's point about piracy seems to be rather legalistic when made by someone who urges the court to be innovative and creative. I believe that behind the legalistic explanation lies a well-founded fear concerning the risk of politicization involved in the prosecution of state actors by third-party courts.[33] Indeed, the history of the doctrine of "universal jurisdiction" over pirates can give us a first hint of the problem it could pose. International law deliberately restricted universal jurisdiction over pirates to pirates acting on their own and not on behalf of states. It was reasoned that expanding this jurisdiction over "state" pirates might politicize the law too much, making it into another tool of political conflict between states.[34]

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

[32] Arendt's interpretation of crimes against humanity made it synonymous with genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Interestingly the convention also rejects universal jurisdiction. Article 6 of the convention states: "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." Universal jurisdiction is not recognized by the convention. Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, United Nations Treaty Series, vol. 78, p. 277.

[33] A good example is Belgium's repeal of the law granting its courts universal jurisdiction over certain international crimes in the face of American pressure. See Falk Moore, "Egregious Crimes against Humanity," pp. 119–23.

[34] Madeline H. Morris, "Universal Jurisdiction in a Divided World: Conference Remarks," *New Eng. L. Rev.* 35 (2001): 337, 339–40; Alfred Rubin, *The Law of Piracy*, 2nd ed. (Irvinton on Hudson: Transnational, 1998). Orentlicher explains why the analogy to piracy law might be

Arendt rejected the two bases given by the court for extending its "territorial jurisdiction." She argued that instead of looking for the "exception" to the rule, the court should have reinterpreted the doctrine of territorial jurisdiction in accordance with the nature of the new crime. Her insistence on returning to the "rule" of territorial jurisdiction implies that the international community should rethink its concept of state sovereignty in its relation to criminal law. Arendt began this process by offering a new interpretation of the concept of territory. Since Arendt's interpretation of "territory" is so novel, it is worth quoting in full:

> Israel could easily have claimed territorial jurisdiction if she had only explained that "territory," as the law understands it, is a political and a legal concept, and not merely a geographical term. It relates not so much and not primarily to a piece of land as to the space between individuals in a group whose members are bound to, and at the same time separated and protected from, each other by all kinds of relationships, based on a common language, religion, a common history, customs, and laws. Such relationships become spatially manifest insofar as they themselves constitute the space wherein the different members of a group relate to and have intercourse with each other. (*EJ*, 262–3)

On the basis of this cultural interpretation of "territory," Arendt justified Israeli jurisdiction over crimes against humanity since she understood them as directed against the Jewish "territory." She explained that Jews throughout the ages had kept their "territory" as a community, and that after the Holocaust, Israel inherited this cultural space (*EJ*, 263). The Nazis' very attempt to destroy the special "territory" that bound the Jews together as a community throughout the ages made their crimes unique, that is, different in quality from prior attempts to murder Jews as individuals (even on a massive scale). The State of Israel was created after the Holocaust, in part out of the world's recognition of what had happened to the Jewish communities. Israel was also the state that three hundred thousand Holocaust survivors had made their home. These facts justified trying Eichmann in an Israeli court.[35]

misleading. "For one thing, justifications for universal jurisdiction over piracy assume (perhaps not always correctly) that no state would consider prosecution an affront to its sovereignty. But when bystander states prosecute traveling dictators, indifference is the least likely response of the defendant's home state. Further, piracy can be truly indiscriminate in its choice of victims; to say that the pirate is an enemy of all mankind may be an exaggeration, but it is more than a metaphor. In contrast the claim that, 'like the pirate . . . before him,' the torturer is now an enemy of all mankind is fundamentally a moral claim." Diane F. Orentlicher, "The Future of Universal Jurisdiction in the New Architecture of Transnational Justice," in Macedo, ed., *Universal Jurisdiction*, p. 231.

[35] Arendt's interpretation of "territory" is in line with the logic behind the Nuremberg trials. The jurisdiction of the ad hoc international military tribunal was restricted to crimes not confined to one territory. Interterritorial crimes were given to the jurisdiction of national courts while the International Military Tribunal dealt with supranational crimes. Likewise, Eichmann's role in the "final solution" of the Jewish people was not restricted to German state borders but was directed against the "territory" of the Jews as a nation across national borders. Thinking of "territory" in a nonreified way allows Arendt to see that the State of Israel and its courts

Arendt's interpretation of territorial jurisdiction presupposes the need to find a stronger link between a national court and crimes against humanity, beyond the state's membership in the community of nations, as the interpretation of universal jurisdiction by the Israeli court suggests. The Israeli court did not dwell on this question because in the Eichmann trial, the strong link of the court to the case was evident (indeed, a link that undermined the impartiality of the court in the eyes of many in the international community).

We can now see that both theories advanced by the court for extending territorial jurisdiction can undermine the validity of the criminal law as a distinct field, connected to an imagined political community. "Passive personality" reduces the criminal law to the individual victim (undermining the distinction between tort law and criminal law). "Universal jurisdiction," on the other hand, threatens to turn the criminal law into a theoretical enterprise, one not burdened by any ties to a specific community, history, or tradition. In the following, I argue that only by introducing the "community" basis of criminal law can we find a proper balance between law and politics in post-Holocaust adjudication. In other words, we need to reintroduce the political community in articulating the proper relation between international criminal law and the jurisdiction of domestic courts.[36] I suggest that Arendt pointed in this direction when she offered a new interpretation of the "territorial principle" of jurisdiction instead of adopting the all-encompassing principle of "universal jurisdiction."

8.3 The Riddle of Jurisdiction

Every system of law grows out of and maintains a human community, and it remains connected to it as long as it is a living law. This fundamental insight is manifested in the beginning of each trial. At this initial stage, even before the parties present their arguments, the court requires that its jurisdiction over the dispute be established. It requires that the parties show a meaningful connection between the case in controversy and the court. The most important connection is based on a *territorial link* – that the disputed acts occurred on the territory over which the court has jurisdiction (the territoriality principle). Another link is a *personal* one, in cases where one of the parties to the dispute is considered a member of the political community over which the court is authorized to judge (the nationality principle). Finally, a *temporal* restriction has to be respected – that the adjudication is not premature and that there is no statute of limitations applicable to the acts under consideration. These three links that establish the court's competence are also the three basic relations that constitute a political

have the strongest link to the community of Jews as a nation and thus can claim "territorial jurisdiction."

[36] For two recent attempts to articulate the role of a political community in the evolving practice of universal jurisdiction, see Orentlicher, "The Future of Universal Jurisdiction"; Sloan, *The Expressive Capacity on International Punishment.*

community: space, time, and people.[37] In other words, in order to establish its jurisdiction, the court has to examine how "close" it is to the dispute – whether it has some meaningful links to it. Jurisdiction requires a relation to the court while the liberal ideal of the "rule of law" requires distance – that the judge be a stranger to the dispute and exercise impartiality. Is there a real contradiction between these two requirements? And what does it tell us about the danger of a political trial? Does it exist when there is too much proximity or too much distance?

The law of jurisdiction can give us pause. It teaches us that the key to solving the problem of a political trial does not necessarily lie in trying to maintain a strict separation between politics and law. "Blind justice" does not always result in a just trial. We are used to thinking about the rule of law in terms of maintaining a distance between the court and the parties to the dispute, but at the same time the rule of law requires that a meaningful link be established between the court and the community injured by the deed. It seems that underlying this tension is a basic assumption that the criminal law belongs to a political community and is an exercise of its self-governance. The distance that the rule of law instructs us to protect between the tribunal and the case is a distance within the known boundaries of a state territory. Today these boundaries are questioned in transnational adjudication. Some argue that the developing jurisprudence of international crimes such as genocide and crimes against humanity explode law's spatio-temporal coordinates.[38] The challenge is to articulate anew the proper distance between court and case.[39] This, I maintain, can be done only if we take into consideration the relation of criminal law to a political community.

8.4 The Specter of the Political Trial

The dangers stemming from the exercise of "universal jurisdiction" were not apparent to many at the time of its announcement in the Eichmann trial. During the 1990s, when various states adopted this doctrine into their laws, and after the Cold War, when several attempts were finally made to apply it by third-party national courts, the question became a pertinent one.[40] From the perspective of many in the international community, the attempts to bring to trial heads of state such as Pinochet, Milošević, and Sharon were signs of advancement in the rule of law. It seems that by taking the issue away from the

[37] In legal terms, international law recognizes five bases for jurisdiction (the territorial principle, the nationality principle, the protective principle, the passive personality, and the universality principle). See Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Clarendon Press, 1997), pp. 140–1.

[38] Lawrence Douglas, "Beyond Nuremberg and Eichmann: Toward a Jurisprudence of Atrocity" (paper presented at Tel Aviv Legal History Workshop, April 2009, on file with author).

[39] Bassiouni, "The History of Universal Jurisdiction," pp. 39–63.

[40] Ibid.

courts of the perpetrators to third-party courts this last vestige of state immunity is removed.[41] In what sense can we honestly claim that this development might be a move toward further politicization of the law? By defining the nature of the new crimes, removing the obstacle of territorial jurisdiction, and overcoming temporal limitations, it seems that finally the international community can bring to trial perpetrators of serious international law crimes. However, by removing these legal obstacles, we also undermine the juridical character of the crime, thus making it vulnerable to political manipulation. For example, from a political point of view, there was no sense in bringing Sharon to trial during his long years in the Israeli opposition. From a legal point of view, it was impossible to bring him to trial after his election as Israeli prime minister in 2001, both because too much time had elapsed since the Lebanon war of 1982 and because of the territorial obstacle (leaving aside the question of immunity). Once these obstacles were removed, it became all too easy to select the best political time for indicting Sharon in a Belgian court.[42] This is one sense of politicization of the law. It impacts the relations between states when used in a politically motivated manner or simply to vex and harass leaders of other states. Another sense of politicization involved in such adjudication, which I believe undermines in a more profound way our concept of criminal law, is an internal one. It stems from the disjunction that universal jurisdiction creates between the judge and the relevant political community, thus raising problems of democratic deficit.[43] This concern goes in two directions. First, some critics worry that to allow foreign judges to make law for societies to whom they are largely unaccountable threatens the democratic foundations of criminal law.[44] Second, since the courts exercising universal jurisdiction operate at a remote distance from the communities that are deeply affected by their judgments, the solidarity between judge and community is undermined. This in turn undermines the legitimacy of the court's judgments in the eyes of the concerned community, since the judges do not take the risk of living under the results of their judgments.[45] Another way to understand the concern of politicization

[41] Diane F. Orentlicher, "Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles," *Georgia Law Journal* 92 (2004): 1057.

[42] For discussion of the various aspects of the case, see Borneman, ed., *The Case of Ariel Sharon.*

[43] Benhabib, *Reclaiming Universalism*, p. 133: "[T]he community that binds itself by these laws defines itself by drawing boundaries as well, and these boundaries are territorial as well as civic. *The will of the democratic sovereign can extend only over the territory that is under its jurisdiction*; democracies require borders. . . . Democratic rule, unlike imperial dominion, is exercised in the name of some specific constituency and binds that constituency alone." Emphasis added.

[44] Orentlicher, "The Future of Universal Jurisdiction."

[45] Anne-Marie Slaughter defines these two problems with universal jurisdiction as "external" and "internal." "The exercise of jurisdiction without a link either to people or territory raises two major problems: one internal and one external. The internal problem concerns the legitimacy of a court in concentrating the full power of the state against an individual defendant who, by definition, cannot be said to have in any way authorized the exercise of that power through

is in terms of the symbolic role of the court's judgment in shaping the collective memory of the concerned communities (of perpetrators and victims).[46] Supporters of universal jurisdiction are not unaware of this democratic deficit. However, they maintain that the gain to democratic values overrides this worry by removing the last vestige of impunity and enhancing the ideal of the "rule of law." In the eyes of supporters of universal jurisdiction, the dangers of unaccountable sovereign power seem to outweigh the new dangers of politicization. This position, however, takes for granted that the two alternatives are at the two opposite ends of the spectrum – universal justice versus national justice. It is worth turning again to the unexplored middle ground suggested by Arendt via her interpretation of the concept of "territory" to see what it can contribute to understanding the future direction of international criminal law.[47]

8.5 Criminal Law and the Community of Humanity

We saw that the Eichmann court introduced the doctrine of universal jurisdiction for crimes against humanity without elaborating any conditions for its legitimate use. In some parts of its decision, the court stressed the link between the State of Israel and the victims, but it did not connect this link to its theory of universal jurisdiction. Arendt, in contrast, believed that the territoriality doctrine should be reinterpreted to allow for a more plural conception of "community" as the basis for post–World War II criminal adjudication. I argued that without introducing some requirement of a link to a living community, the pure concept of universal jurisdiction introduces many dangers of politicization.[48] In other words, it is doubtful whether it would have been justified, according to Arendt, to try Eichmann in Switzerland, for example,

nationality or conduct within the state's territory. The external problem concerns the heightened danger of interference in the affairs of fellow states." Anne-Marie Slaughter, "Defining the Limits," in Macedo, ed., *Universal Jurisdiciton*, p. 172.

[46] Douglas, "Beyond Nuremberg and Eichmann." Douglas's emphasis on the symbolic role of the court gives support to the need to rethink the relation between law and community in trials that transcend traditional national borders.

[47] Bass maintains that this middle ground between universal justice and national justice was achieved in the Eichmann trial. See Bass, "The Adolph Eichmann Case." In my view, the court simply added a different basis for its judgment, and Arendt's criticism offers a much-needed theoretical formulation of how to arrive at this middle ground.

[48] Indeed, several authors have been urging to the development of principles of imposing conditions on the court's claim for universal jurisdiction. See Orentlicher, "The Future of Universal Jurisdiction," where the author argues that jurisdictional clashes caused by the introduction of universal jurisdiction should be resolved by weighing the respective interests of relevant communities. The need to articulate conditions for the exercise of universal jurisdiction and to create priorities is also reflected in the Princeton Principles of Universal Jurisdiction (in Macedo, ed., *Universal Jurisdiction,* pp. 18–25); Hari M. Osofsky, "Domesticating International Criminal Law: Bringing Human Rights Violators to Justice," *Yale Law Journal* 107 (1997): 191. Osofsky suggests that limits can be placed on the exercise of universal jurisdiction in the United States through an adaptation of the civil law doctrine of *forum non conveniens.*

while it was justified to do so in Israel, the home of many of the victims of the Holocaust. However, Arendt made it clear that Eichmann could not be tried in Israel under the narrower category of "crimes against the Jewish people," as this would be politicization of another sort, requiring us to narrow our conception of the injured community while ignoring its harm to the human community (the condition of plurality).

In what sense is Arendt's interpretation of territorial jurisdiction different from the alternative basis of "passive personality" jurisdiction that was upheld by the court? During the Eichmann trial, the two interpretations converged, so that it was difficult to perceive the different implications each would have in the political world. However, with hindsight, after the proliferation of universal jurisdiction clauses in national legislations, we can clarify the difference. Arendt's interpretation of the territoriality doctrine is more restrictive toward the jurisdiction of a national court than the one entailed by the universal jurisdiction theory or the passive personality doctrine. According to Arendt, an Israeli court cannot adjudicate all crimes against humanity, only those conducted against the body of the Jewish people. Likewise, not every crime directed against a Jew as a Jew justifies the court's jurisdiction, but only those crimes that threaten the continued existence of the Jewish community. In this way, a meaningful link between a third-party national court and the concerned political community (or communities) is maintained. As we shall see, a similar direction is pursued today by adding restrictions to the pure theory of universal jurisdiction and requiring that some nexus exists between the tribunal and the concerned political community.

Arendt's book deals with the nature of the crime (crimes against humanity) and the venue of adjudication in close proximity. She allows us to see the close connection between these two questions. This connection is not often noticed in legal scholarship due to their separation into two distinct stages at the trial.[49] In contrast, Arendt's interpretation of "crimes against humanity" and of the territoriality principle of jurisdiction makes the two issues complementary. On both issues, she rejected a more individualist interpretation of the law in order to reintroduce the political community into her jurisprudence. Thus, Arendt's interpretation of both the substantive law and the procedural rule of jurisdiction retains the connection between the court and a specific political community, without falling into the trap of either empty universalism or ethnocentric particularism.

By adding the political community to her theory of jurisdiction, Arendt stressed the important connection between the tribunal and the concerned community – a connection that is obscured under the pure theory of universal

[49] However, see the discussion of the *Finta* case in the Canadian court, *R. v. Finta* [1994] 88C.C.C. (3d) 417 (S.C.C.), by Slaughter, "Defining the Limits," who maintains that both the majority and dissent based their judgment upon the assumed relationship between the nature of the crime and the jurisdiction of the court.

jurisdiction. But it is this central place given to the political community in her interpretation of the law that raises an acute difficulty for the readers of *Eichmann in Jerusalem*. The starting point of the book is a note on the unique danger that lurks for the Israeli court, the danger of turning Eichmann's trial into a show trial, in the service of the Israeli executive. The question is whether recognizing the need to preserve the bond between a political community and the tribunal undermines the legitimacy of the trial altogether, when it is the community of the victims that undertakes to judge the perpetrator of collective crimes carried out against them.

I believe that by reintroducing the community to international criminal law adjudication and by giving priority to the concerned national courts, we can in fact reduce the danger of illegitimate politics. However, such a move must be accompanied by a clarification of the notion of the injured community. In this, I suggest that we follow Arendt's imperative and adopt a double perspective. Arendt insisted that crimes against humanity injured two communities simultaneously: a particular community of the victims group (Jewish community, for example) and an ideal community of humanity (condition of plurality). To adjudicate such crimes, we should find ways to link these communities together. One such possibility is offered to us today by the permanent International Criminal Court (ICC) in the Hague. It is interesting to note that during the debates over the Rome Statute that established the ICC, the possibility of universal jurisdiction was considered and rejected. Instead, it adopted the requirement of "complementarity" that gives priority to national courts.[50] The "complementarity" requirement upholds the concept of state sovereignty in the sense that the concerned states enjoy priority in trying the case.[51] Only in cases where it is proven that the state is unable or unwilling to adjudicate the crime can the case be taken up by the ICC.[52] It thus provides strong incentive for

[50] See, John T. Holmes, "The Principle of Complementarity," in Roy S. Lee, ed., *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Springer, 1999), pp. 41–78. (The Rome Statute of the International Criminal Court was done at Rome, July 17, 1998, and came into force on July 1, 2002.)

[51] Sloan argues that "[c]omplementarity recognizes . . . that national prosecutions, *if* genuine, feasible, and fair, more effectively serve the manifold goals ascribed to international criminal law than do international prosecutions." *The Expressive Capacity of International Punishment*, p. 15. I would add that such national prosecutions are also more justified from a political theory perspective.

[52] Article 17 of the Rome Statute. Cassesse identifies two patterns of development for international criminal law in post-Holocaust jurisprudence. One follows the Nuremberg precedent and culminates in the establishment of the ICCY and ICCR tribunals. The other begins with the Eichmann trial and culminates in the establishment of a permanent international criminal court. The Nuremberg pattern gives priority to international tribunals in trying the highest officials of a criminal regime, while the Eichmann precedent gives priority to national courts of the relevant political community. Cassesse believes that the Nuremberg pattern is the better way to address the problem of sovereign immunity. See Antonio Cassesse, *International Criminal Law* (Oxford: Oxford University Press, 2001).

states to prosecute crimes they would have preferred to ignore.[53] ICC litigation is structured to remain the exception to the rule of national adjudication.[54]

Furthermore, the ICC, being a permanent court, is bound by its precedents and is required to apply them over time in an equal manner, thus reducing the danger of selective political prosecutions. This solution does not eliminate the sources of unjustified political immunities, but it is mindful of the need to retain the legitimacy of the court in the eyes of the concerned political community. The principle of complementarity indicates that the best path for adjudicating crimes against humanity, genocide, and the like is finding a middle ground – not the rule of power (as the doctrine of absolute sovereignty implies) and not empty legalism (as the doctrine of universal jurisdiction might indicate).

Interestingly, we can detect a similar development in the judgments of national courts and in national legislation concerning universal jurisdiction. The requirement of a meaningful link to the court is being added.[55] A similar rethinking can be detected in legal scholarship. Thus, for example, one supporter of universal jurisdiction, when addressing the criticism concerning the democratic deficit in such adjudication, suggests that a legitimate use of

[53] The possibility of a prosecution in the ICC creates a rift between state law agents (prosecutors and courts) and the executive branch. It gives law enforcement bodies a credible threat that by becoming accomplices to an internationally recognized crime they might be indicted in the Hague. This is a negative incentive to the executive to refrain from certain policies that can amount to international crimes. The existence of the ICC also creates a positive incentive to law enforcement bodies since if they choose to prosecute, they enjoy priority over the ICC, so they can explain their intervention to the local community in terms of the good of the national community (since otherwise the case will be adjudicated by the distant ICC). This newly created rift between law enforcement bodies and the executive might resurrect the triangle – among the court, the executive, and the victims – upon which the rule of law is premised. It creates a better balance between politics and law instead of a complete divorce between them.

[54] Two major questions arise concerning jurisdiction priority. First, what shall be done when the national legal system extends immunity to the perpetrator of crimes defined under the Rome Statute of the International Criminal Court? Second, what shall be done in cases of competition between various national courts? These are very large questions that deserve a separate discussion. For initial investigation of these jurisdictional puzzles, see Orentlicher, "The Future of Universal Jurisdiction"; Leila Nadya Sadat, "Universal Jurisdiciton, National Amnesties, and Truth Commissions: Reconciling the Irreconcilable," in Macedo, ed., *Universal Jurisdiction,* pp. 19–21.

[55] Thus, for example, although universal jurisdiction was indispensable to the Spanish proceedings against Pinochet, the case did not rely solely on that principle. The original complaints comprised seven individuals possessing dual Spanish-Chilean citizenship. Moreover, when the jurisdiction of the Spanish court was challenged, the court clarified that it could try crimes of terrorism and genocide pursuant to the principle of universal jurisdiction, bolstered by jurisdiction predicated on the nationality of the Spanish victims. For elaboration, see Orentlicher, "The Future of Universal Jurisdiction," p. 1074. Later, Spain's Supreme Court ruled that universal jurisdiction should be exercised over genocide only when there is a "direct link to Spanish interests." See Sentencia del Tribunal Supremeo sobre el caso Guatemala por genocidio (Judgment of the Spanish Supreme Court concerning the Guatemala genocide case), Sentancia de Tribunal Supremeo Sala Segunda, de lo Penal n. 327/2003 February 25, 2003 (No. 327) (Spain). Similarly, following criticism over the indictment of Prime Minister Ariel Sharon in a Belgian court, the legislator added various conditions that demand a link between the case and the court.

universal jurisdiction is dependent on meeting several conditions that address the disjunction between the court and the relevant political community.[56] This direction is still in its initial stages and much thinking has to be done on how to democratize international criminal law (in the sense of bringing a political community to bear on the legal proceedings).[57]

Can these developments of international criminal law answer Arendt's concern? Should we view a limited version of universal jurisdiction (with a required nexus to a political community) as equal to Arendt's conception of cultural "territorial" jurisdiction? Here we should note the unique circumstances of the Eichmann trial, in which the community of victims was transformed into a sovereign state. Under these unique circumstances, Arent opted for a reinterpretation of the territorial doctrine of jurisdiction. More often, however, the victimized community remains part of the larger community of the perpetrators. In this context, the "cultural" conception of territory should become part of the court's interpretation of the substantive crime. In particular, it should bear on the definition of the harmed community.

Let me close this chapter by returning to the nature of the community we should imagine in adjudicating crimes against humanity. Should national courts and international courts envision the same community when adjudicating international criminal law, or should they diverge and serve distinct communities? There are those who advocate that the ICC serve as a "proxy justice" to the specific political community being injured by the crime.[58] Others maintain that notwithstanding the "complementarity principle," once a case comes before the ICC, the relevant community should be that of humanity as a whole.[59] Following Arendt, I would suggest that we should understand the crime as involving two communities simultaneously, and define the unique detriments and goals of such adjudication, whether it is carried out by national or international tribunals. Arendt's important observation in *Eichmann in Jerusalem* on the necessity for criminal law to be connected to a living community should continue to guide us in our quest for a better way of implementing our basic values of human rights. When criminal law loses this insight in its attempt to adhere as closely as possible to moral strictures, it risks losing its power and meaning. On the other hand, when judges confine themselves to the narrow

[56] Orentlicher, "Whose Justice?"

[57] A step in this direction was undertaken by the Princeton Project on Universal Jurisdiction, which produced the Princeton Principles on Universal Jurisdiction. For the principles and commentary essays on the subject, see Macedo, ed., *Universal Jurisdiction*, pp. 18–25.

[58] Sloan argues that this is indeed the prevailing view, *The Expressive Capacity of International Punishment,* p. 12. See also Steven Glickman, "Victims' Justice: Legitimizing the Sentencing Regime of the International Criminal Court," *Columbia Journal of Transnational Law* 43 (2004): 229, 257; Ruti Teitel, review of M. Cherif Bassiouni, ed., *Post-Conflict Justice* (2002), in *American Journal of International Law* 98 (2004): 872, 874.

[59] Sloan, *The Expressive Capacity of International Punishment,* p. 16. Sloan maintains that the ICC should not serve as a "proxy justice" to local political interests. He learns this from Rome Statute article 1, which states that the mission of international criminal tribunals is to prosecute the most serious crimes of concern to the international community as a whole.

viewpoint of the specific community involved (of perpetrators or victims), they lose sight of the embeddedness of criminal law in the larger community of humanity. Instead of ignoring the community basis of criminal law, we should recognize the political aspects of the litigation as part and parcel of the power of criminal law to serve as a bridge between divided communities and our common aspiration to realize our moral ideals.