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## **Philosophical Foundations of International Criminal Law: Correlating Thinkers**

Morten Bergsmo and Emiliano J. Buis (editors)



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**Front cover:** *The cut stem of a fir tree in the forest around Vallombrosa Abbey in Reggello, in the Apennines east of Florence. The monastery was founded in 1038, and is surrounded by deep forests tended over several centuries. The concentric rings show the accumulating age of the tree, here symbolising how thought expands and accumulates over time, and how lines or schools of thought are interconnected and cut through periods.*

**Back cover:** *The forest floor covered by a deep blanket of leaves from past seasons, in the protected forests around Camaldoli Monastery in the Apennines east of Florence. Old leaves nourish new sprouts and growth: the new grows out of the old. We may see this as a metaphor for how thinkers of the past offer an attractive terrain to explore and may nourish contemporary foundational analysis.*

## Arendt on Prevention and Guarantees of Non-Recurrence

**Djordje Djordjević\***

Today, prevention is once again at the forefront of collective efforts by the international community. In 2015, the Sustainable Development Goals (SDGs) explicitly recognised interdependence between violent conflict and development, and the role of development in building peace.<sup>1</sup> Subsequently, based on independent United Nations (‘UN’) reviews of the peacebuilding architecture and peace operations, in twin resolutions of the General Assembly and Security Council on sustaining peace,<sup>2</sup> Member States called for expanding the horizon of prevention, both in terms of early action to prevent outbreak of violence and sustained effort to build societal resilience to shocks and conflict risks. In 2017, the new UN Secretary-General, António Guterres, indicated that for him “prevention is not merely a priority, but *the* priority”, adding that “if we live up to our re-

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<sup>1</sup> See UNGA resolution 70/1, “Transforming our World: the 2030 Agenda for Sustainable Development”.

<sup>2</sup> See UN Security Council Resolution 2282 (2016), UN Doc. S/RES/2282, 27 April 2016 ([www.legal-tools.org/doc/6e094b/](http://www.legal-tools.org/doc/6e094b/)), and UN General Assembly Resolution, UN Doc. A/RES/70/262, 12 May 2016 ([www.legal-tools.org/doc/f34c4f/](http://www.legal-tools.org/doc/f34c4f/)), respectively.

sponsibilities, we will save lives, reduce suffering and give hope to millions”.<sup>3</sup> To support this goal, in March 2018, the UN and the World Bank released a first joint report that re-examines and updates a knowledge base for prevention,<sup>4</sup> while the UN has also undertaken to complete its new sustaining peace policy integrating contributions from peace and security, development and human rights pillars.<sup>5</sup>

The attempt by the UN to refocus on preventive action instead of relying on assistance in response to the outbreak of armed conflict is not entirely new. The Agenda for Peace of 1992 and the World Summit of 2005, for example, have both previously recommended prioritising prevention as a more effective way to minimise the risks and the effects of war, and maximise the use of resources at hand. Nevertheless, significant insights also come from further back afield, namely the post-World War II policy debate on a viable international solution for preventing the recurrence of Nazi atrocities and of war with global ramifications. It is this historical challenge that led to the creation of the United Nations and to designating prevention of violent conflict as its first and foremost task.<sup>6</sup>

This chapter argues that at that historical junction, Hannah Arendt identified a set of conditions that are critical in resisting mass participation in, and support for, what constitutes today core international crimes. These types of crimes and other serious human rights violations are known to instigate and aggravate violent conflict.<sup>7</sup> Furthermore, the pluralist outlook that informs civic action, which Arendt singled out as the

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<sup>3</sup> UN News, “At Security Council, UN chief Guterres makes case for new efforts to build and sustain peace”, 10 January 2017, available on the UN web site.

<sup>4</sup> See United Nations and World Bank, *Pathways for Peace: Inclusive Approaches for Preventing Violent Conflict*, World Bank, Washington, D.C., 2018 ([www.legal-tools.org/doc/556167/](http://www.legal-tools.org/doc/556167/)).

<sup>5</sup> See, UN Secretary General’s report on peacebuilding and sustaining peace, UN Doc. A/72/707–S/2018/43, 18 January 2018 ([www.legal-tools.org/doc/d67622/](http://www.legal-tools.org/doc/d67622/)).

<sup>6</sup> The first sentence of the UN Charter in the Article 1 reads:

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace [...]

([www.legal-tools.org/doc/6b3cd5/](http://www.legal-tools.org/doc/6b3cd5/)).

<sup>7</sup> See, for example, David Cingranelli *et al.*, “Human Rights Violations and Violent Internal Conflict”, Background Paper for UN-WB Flagship Study, in *ibid.*

only guarantee of non-repetition of crimes, is also instrumental in developing civic resilience to violent conflict more generally.

In 1945, the policy choice rested between a political solution, exemplified in the Morgenthau Plan,<sup>8</sup> and a legal alternative that eventually came to fruition with the establishment of the International Military Tribunal in Nuremberg. Arendt considered neither of these policy responses suitable for recognising and defining the uniqueness of totalitarian abuses. In looking for decisive preventive measures, Arendt weighed against means of deterrence of the leaders and State actors, and in favour of resistance by the citizens. The root causes of broad participation of German society in administrative mass murder, she found, lied in the corruption of civic virtue and the removal of civic space for political action. An antidote to totalitarian challenge was thus found in civic resilience, and more precisely, in developing mental predisposition of citizens that could desist mobilisation for genocidal causes. In identifying a capacity that outlines this predisposition, Arendt utilised philosophical mapping of cognitive faculties and predominantly relied on Kant's theory of cognition. Alternatively, *thinking* (as well as its principle of non-contradiction with oneself) and *judging* (as an ability to see things in the perspective of all those who happen to be present) were credited with a decisive role in situations when, to use Arendt's favourite phrase, "the chips are down". Therefore, over and above political and legal means of prevention of recurrence of Nazi

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<sup>8</sup> As late as September 1944, the Allied post-war policy towards Nazi leaders favoured summary executions over judicial action. According to the Morgenthau Plan, which was agreed upon at the meeting between Roosevelt and Churchill in Québec City, an unspecified number of Nazi leaders were to be shot without trial and Germany's industrial capacity diminished to a "pastoral" level. The plan of Henry Morgenthau Sr., who was the US Treasury Secretary at the time, was however strongly opposed by Henry Stimson, the Secretary of War in the Roosevelt Administration. Stimson, a firm believer in American respect for due process, thought trials of war criminals would set a better example for future generations in Germany and elsewhere than harsh punitive measures. The ultimate demise of the Morgenthau Plan was the American public opinion when, in a turn of events characteristic of Washington politics, the plan leaked to the front page of the *New York Times*. In fact, the undoing of the plan was the "pastoralisation" of Germany and not the method of punishment for war crimes which was not mentioned in the newspaper article. The polls at the time also showed that the majority of Americans were in favour of executions without trial. Nevertheless, swayed by this course of events and public outcry against already agreed-upon political measures, President Roosevelt turned to judicial policy. See Gary Jonathan Bass, *Stay the Hand of Vengeance*, Harvard University Press, Cambridge (MA), 1999, pp. 80–147; see also Bradley F. Smith, *The Road to Nuremberg*, Basic Books, New York, 1981, pp. 22–55.

crimes, Arendt outlined the possible normative basis for a third solution or what I will call ‘civic prevention’. Pushed further in a normative direction, prevention here depends on the exercise of different forms of civic responsibility. Looking from a policy angle, which is our primary concern, critical thinking and judging are indicative of the forms of citizenship needed to protect and preserve institutions set up to guarantee non-recurrence.<sup>9</sup>

There are significant perils in trying to present a single coherent Arendtian concept of prevention. From the initial response to the Morgenthau Plan in 1945 till her untimely death in 1975, Arendt never ceased re-examining, re-conceptualising and reformulating her insights on the topic. She would often start anew when prompted by a different topical interest without taking stock of her previous analyses and findings. In this process, both her critique of the legal response and her account of critical cognitive faculties underwent significant changes. This ongoing project can be broken down into roughly three separate, though interdependent, tasks: (i) to identify social and political conditions that led to previously unimaginable atrocities and the new face of evil in the world; (ii) to illustrate the failure of existing normative frameworks to capture the nature of wrongdoing and to inform adequately the accountability of individuals; and (iii) to identify an alternative mode of thought to rule-following, associated with a type of civic action, which can prevent recurrence of mass atrocity crimes. These issues were among the topics addressed in, respectively, (i) *The Origins of Totalitarianism*; (ii) Arendt’s essays in the immediate aftermath of the war and her reporting from the Eichmann trial; and (iii) her

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<sup>9</sup> The term ‘guarantees of non-recurrence’ is often associated with one of the four pillars of transitional justice and included in the mandate of the UN Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence (see the web site of the Office of the United Nations High Commissioner for Human Rights). The pillar that is generally concerned with the preventive aspect of transitional justice processes was initially conceived as consisting of institutional reforms during transitional period. This primarily implied vetting of personnel of security and justice institutions that have previously been involved in assisting in, or failing to prevent, human rights violations. More recently, it has been indicated that in addition to a set of institutional measures (such as constitutional reform, civilian oversight of security institutions, national human rights commissions and peacebuilding architecture), prevention should include societal and cultural interventions primarily taken in the sphere of civil society (for instance, civic education, memorialisation, and so on). On this broader understanding of the concept, and other legal and conceptual issues of guarantees of non-recurrence, see UN Special Rapporteur, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc. A/HRC/30/42, 7 September 2015 ([www.legal-tools.org/doc/d72a4a/](http://www.legal-tools.org/doc/d72a4a/)).

post-trial lectures, articles and book reviews addressing the questions of moral and political responsibility as well as her re-conceptualisation of the theory of judgment in *The Life of the Mind*.

In presenting the case for the Arendtian type of prevention, I will follow this historical trajectory of her thought. I will not attempt to reconstruct a coherent account of cognitive faculties that Arendt singled out or discuss normative implications for moral and political conduct. My intention is limited to highlighting theoretical considerations that inform policy choice of civic prevention over institutional responses, and indicate how they can assist us in shaping long-term prevention measures and perspectives.

## **19.1. The Challenge of Understanding the Unprecedented**

### **19.1.1. Nazi Crimes and Downfall of Civic Virtue**

From the very outset of the post-World War II policy debate, Arendt was among those on the margins who considered the crisis to be much more profound than a complete failure of mechanisms of accountability and deterrence put in place after World War I. The crisis, according to them, touched the very core of the Western system of values, and required more than reshaping norms of wartime conduct. At its heart, the historical precedent set by the emergence of totalitarianism was so radical that no re-imagining of the traditional axis of law, morality and politics could sustain or repair it. The outcomes of totalitarian policies “constitute a break with all traditions”, and “have clearly exploded our categories of political thought and our standards for moral judgement”.<sup>10</sup> This event, in turn, required a re-thinking of the very foundations of the modern political community. The first task, then, was to understand this novel phenomenon and indicate the extent to which this posed a challenge to existing moral, political and legal categories.

Arendt entered the debate surrounding the Morgenthau Plan soon after it leaked to the press, in January 1945.<sup>11</sup> The implementation of the

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<sup>10</sup> Hannah Arendt, “Understanding and Politics (The Difficulties of Understanding)”, in Jerome Kohn (ed.), *Essays in Understanding: 1930-1954*, Harcourt & Brace, New York, 1994, p. 310.

<sup>11</sup> Editors at the *Jewish Frontier* published this article under the title “German Guilt”. It was later reprinted as “Organized Guilt and Universal Responsibility”, in *ibid.*, pp. 121–32. See further on the context of this article: Hannah Arendt, “Letter 43”, in Lotte Kohler *et al.*

Morgenthau Plan, in her view, would constitute a serious failure on several counts: (i) by repeating policy mistakes made after the previous war and thus creating incentives for a new cycle of violence;<sup>12</sup> (ii) by sheltering the extent of individual wrongdoing of key perpetrators in creating a realm within which all Germans are perceived as equally guilty; and ultimately, (iii) by enforcing the very Nazi racist ideologies that it intends to condemn via justification of collective punishment. Nevertheless, attempts to assess individual conduct or prosecute individuals through categories borrowed from a regular criminal justice system seemed equally inadequate.

Finding a policy solution was particularly challenging because of what Arendt initially qualified as ‘organised guilt’. This was a deliberate attempt on the part of the Nazis to erase all distinctions between the Nazi elite and ordinary Germans. Ultimately, this was intentionally done to secure the survival of Nazi racial theory through the victor’s policy of collective retribution. The propaganda machine set in motion by Heinrich Himmler was specifically programmed to leave no one untainted or without complicity in crimes. As long as victory was expected, the Nazi organisation was separate from the people and the work of mass murder was reserved for the Storm Troopers and other specialised units. Hitler seemed aware that history had sometimes been forgiving to those who commit atrocities with the aim to annihilate enemies and, in 1939, classified himself in the same rank as Genghis Khan and Mehmet Talaat.<sup>13</sup> But when the

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(eds.), *Hannah Arendt/Karl Jaspers Correspondence 1926-1969*, Harcourt & Brace, New York, 1992.

<sup>12</sup> In a separate article dealing with the Morgenthau Plan from the same period, Arendt says: “The result of such ‘punishment’ would prove to be exactly the same as the Versailles Treaty, also thought as a reliable instrument for crushing Germany’s economic power but which turned out to be the very cause of the over-rationalization and amazing growth of Germany’s industrial capacity [...] Restoration thus promises nothing. If it succeeded, the process of the past thirty years might commence again, this time at a greatly accelerated tempo. For restoration must begin precisely with the restoration of the ‘German problem’! The vicious circle in which all discussion of the ‘German problem’ move shows clearly the utopian character of ‘realism’ and power-politics in their application to the real issues of our time”, see Hannah Arendt, “Approaches to the German Problem”, in Kohn (ed.), 1994, p. 120, see *supra* note 10.

<sup>13</sup> Addressing his military chiefs in August 1939, Hitler declared: “It was knowingly and lightheartedly that Genghis Khan sent thousands of women and children to their deaths. History sees in him only the founder of the state [...] The aim of war is not to reach definite lines but to annihilate the enemy physically. It is by this means that we shall obtain the



fortunes at the battlefield turned, and with it appeared the possibility of facing defeat, the strategy of assigning responsibility for the policy of extermination moved from selected murderers and elite formations to ordinary army units. Efforts were made to erase all the banners that could distinguish the deeds of the ruling party from those of the German people as a whole.

The unprecedented collectivisation of German society, however, cannot be explained solely or primarily by a theory of the State. The extent of access to absolute power by the Nazi elites through their capture of the State, elimination of other elites and implementation of extremist policies was only made possible through forging or fabricating collective consent. For Arendt, the key challenge was then to understand how these elites had managed to achieve a ‘total mobilization of the people’. What were the particular historical and social conditions that had allowed for such a high level of mobilisation and what were the characteristics of the social groups that had contributed decisively to this process?

The primary target of Nazi propaganda and coercive mechanisms was not to be found among the “fanatics, criminal types or potential sadists”, Arendt insisted, but first and foremost, in the “normality of jobholders and good family men”. It was the well-respected citizens of German society – mainly characterised by their concern for private existence, responsibility for their families and lack of any inclination towards public affairs – who turned out to be the most useful to the bureaucratic organisation. Following the secularisation of the code of conduct, they could no longer find common imaginaries to articulate their public role. Once the security of the private domain was endangered, there was little she or he would not do to protect it.<sup>14</sup> Hence, the ability to disregard more extreme aspects of ideologies based on scepticism equally directed towards all political principles alike, judged from a moralistic standpoint. Indeed, if all political action is in principle considered ethically tainted, it is that much harder to make distinctions between merely immoral actions on the one hand, and plainly criminal actions and disastrous policies on the other.

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vital living space that we need. Who today still speaks of the massacre of the Armenians?”. Cf. Samantha Power, *A Problem from Hell*, Basic Books, New York, 2002, p. 23.

<sup>14</sup> See Arendt, 1992, pp. 128–30, *supra* note 11.

Arendt identified this form of middle-class stratification as an international phenomenon, but nevertheless found it particularly prominent in German society:

It is true that the development of this modern type of man, who is the exact opposite of the 'citoyen' and whom for lack of a better name we have called the 'bourgeois,' enjoyed particularly favorable conditions in Germany. Hardly another country of Occidental culture was so little imbued with the classic virtues of civic behavior. In no other country did private life and private calculations play so great a role [...] There is [also] hardly another country where on the average there is so little patriotism as Germany; and behind the chauvinistic claims of loyalty and courage, a fatal tendency to disloyalty and betrayal for opportunistic reasons is hidden.<sup>15</sup>

Therefore, if the rally for national revival played some role in German economic and military resurgence after the first war, forms of nationalist exultation should not be understood as the primary mover behind the mobilisation for administrative mass murder. Rather, the mass mobilisation found its roots in the downfall of civic virtues and general inability to perceive oneself as an actor in the public domain.

### 19.1.2. Totalitarianism and the Closing of Civic Space

In an essay from 1954, originally entitled "The Difficulties of Understanding",<sup>16</sup> Arendt returned to examining the conditions that led to mass mobilisation of Germans and this time recast them in terms of *The Origins of Totalitarianism*, published three years earlier. The phenomenon of totalitarianism, here referring to both Hitler's Germany and Stalin's Soviet Union, had brought about an ongoing historical process of dissolution of social bonds underpinning Western political communities to an extreme conclusion. Arendt credited Montesquieu with an early warning about the potential meltdown of the traditional customary value-system, which constitutes the final defence of not only social, but also political community. While "laws govern the actions of the citizen, customs govern the actions of man", said Montesquieu.<sup>17</sup> History offers ample examples of the decline of nations, when laws are undermined, through governments' abuse

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<sup>15</sup> *Ibid.*, p. 130.

<sup>16</sup> See Arendt, 1994, pp. 307–27, *supra* note 10.

<sup>17</sup> *Ibid.*, p. 315.

of power and through citizens' loss of respect for the law as well as credibility of justice systems. The space for responsible political action is diminished as protection of citizens' rights ceases. In this situation, only the customs of society and traditional moral norms can retain the social bonds of the community and prevent dominance of violence and instability. Moral norms continue to shape the behaviour of private individuals, but the sustained ability of mores to guide human conduct on their own is limited, warned Montesquieu. Arendt added another historical dimension that Montesquieu could not have anticipated. Once the customs of European States came under attack through the social processes unleashed by the Industrial Revolution, she argued, a precondition was made to remove all common grounds between people.

The anticipated dangers, identified as lying in morality as the sole binding force of the polity, concern not only the loss of political freedoms, insisted Montesquieu, but much more destructively, the very understanding of human nature.<sup>18</sup> The consequences of Nazi ideology were most strongly felt in taking away the key precepts of human nature under the pretext of changing them, that is, in an attempt to make human beings superfluous. Human beings, including Nazis themselves in their individual capacity, have become expendable cogs in an unbending progression of History with a capital 'H'.

Thus, it is totalitarian domination that succeeded in accelerating the demise of customs, replacing them with an alternative set of rules and removing all vestiges of freedom, spontaneity and responsibility from political action. The combination of terror and systematic ideological indoctrination created conditions of meaninglessness and thereby destroyed the capacity of citizens for understanding and judging. In the rise of totalitarian societies, therefore, we are faced with "more than loss of capacity for political action, which is the central condition of tyranny, and more

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<sup>18</sup> *Ibid.*, Arendt cites two passages from Montesquieu: "The majority of the nations in Europe are still ruled by customs. But if through long abuse of power, if through some large conquest, despotism should establish itself at a given point, there would be neither customs nor climate to resist; and in this beautiful part of the world, human nature would suffer, at least for a time, the insults which have been inflicted on it in the three others" (*L'esprit des lois*, Book VIII, ch. 8). And, concerning the understanding of human nature: "Man, this flexible being, who bends himself in society to the thoughts and impressions of others, is equally capable of knowing his own nature when it is shown to him and of losing the very sense of it (*d'en prendre jusqu'au sentiment*) when he is being robbed of it" (*L'esprit des lois*, Preface).

than growth of meaninglessness and loss of common sense (and common sense is only that part of our mind and that portion of inherited wisdom which all men have in common in any given civilization); it is the loss of the quest for meaning and need for understanding”.<sup>19</sup> Civic freedoms are those that enable the process of understanding, a constant production of meaning in relation to political community and changing political realities, which informs political action. In a state of totalitarian domination, deliberate effort is made to undermine the common sense on which understanding rests, to quell the quest for meaning and thus to disable any free and spontaneous participation in communal life. It is, therefore, not only that, under totalitarianism, people’s traditional system of values is replaced with a new set of rules, but that the new rules are intended to stifle their freedom and space for civic action.

There is significant continuity between Arendt’s works in the mid-1940s and 1950s, although she drew from different sources and used distinctive conceptual frameworks. Nazi rule as a socio-political phenomenon, on both accounts, made a decisive break with the past and all previous forms of tyranny and authoritarian rule. Existing moral, legal and political categories were unable to fully account for the new phenomenon, find an adequate policy solution and sanction for excesses and transgressions. Mass participation of German society in Nazi crimes was due to a downfall of norms regulating conduct in the public sphere, whether of customs, by default, or of civic virtue. The decisive step, however, is the tendency to continue following the rules in those novel circumstances even when all connections to common sense have broken. Gradually, Arendt singled out reliance on the rule-following behaviour *itself* as constituting the key weakness of the modern political community in the aftermath of Nazi abuses.

It was in the context of indicating a remedy for over-reliance on rules that she offered a more optimistic outlook for a solution. Drawing from Augustine, Arendt evoked the human capacity to bring about a new beginning, no matter what history may bring our way. “Even though we have lost yardsticks by which to measure, and rules under which to subsume the particular”, this human cognitive capacity will allow us to find

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<sup>19</sup> *Ibid.*, pp. 316–7.

the means “to understand without preconceived categories and to judge without the set of customary rules which is morality”.<sup>20</sup>

## 19.2. Critique of Legalism

### 19.2.1. The Scope and Purpose of War Crimes Trials

Prior to the announcement of the *Eichmann* trial in Israel, Arendt expressed no interest in war crime trials of the Nazis. We only find several brief and categorical statements that denounce the use of criminal justice categories and penal policy as inadequate, and Nuremberg trials as a policy failure.<sup>21</sup> Almost intuitively, without analysing the trials themselves or their legal basis, she considered these categories to be in principle insufficient to apportion responsibility and establish guilt, at least in the case of the masses of lesser subordinates. No traditional notion of criminal guilt, she assumed, is equipped to deal with perpetrators for adhering to laws that themselves have become criminal, from a standpoint of international norms and standards, and for breaking customary rules that have since become superfluous, without discriminatory intent, if all opposition, space for individual intervention and voices of collective conscience are forcefully removed from the public sphere.

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<sup>20</sup> *Ibid.*, p. 321.

<sup>21</sup> For example, in the “Organized Guilt” article, Arendt points to the inability to appropriately assess the uniqueness of each individual’s criminal actions, and lack of consciousness of guilt and responsibility: “Just as there is no political solution within human capacity for the crime of administrative mass murder, so the human need for justice can find no satisfactory reply to the total mobilization of a people for that purpose. Where all are guilty, nobody in the last analysis can be judged. For that guilt is not accompanied by even the mere appearance, the mere pretence of responsibility. So long as punishment is the right of the criminal – and this paradigm has for more than two thousand years been the basis of the sense of justice and right of Occidental man – guilt implies the consciousness of guilt, and punishment evidence that the criminal is a responsible person”, see Arendt, 1992, pp. 126–7, *supra* note 11. In “Understanding and Politics”, in the most damning pronouncement against the Nuremberg Tribunal, where she singles out lack of incriminating motivation and limitation of penal policy: “The very event, the phenomenon, which we try – and must try – to understand has deprived us of our traditional tools of understanding. Nowhere was this perplexing condition more clearly revealed than in the abysmal failure of the Nuremberg Trials. The attempt to reduce the Nazi demographic policies to the criminal concepts of murder and prosecution had the result, on the one hand, that the very enormity of the crimes rendered any conceivable punishment ridiculous; and, on the other, that no punishment could ever be accepted as ‘legal’, since it presupposed, together with obedience to the command ‘Thou shalt not kill’, a possible range of motives, of qualities which cause men to become murderers and make them murderers, which quite obviously were completely absent in the accused”, see Arendt, 1994, p. 310, *supra* note 10.

The first sign of change came from correspondence with Arendt's former German professor Karl Jaspers, who was over the years her key interlocutor on the subject. "It seems to me", she said, "to be in the nature of [the *Eichmann*] case that we have no tools to hand except legal ones with which we have to judge and pass sentence on something that cannot even be represented either in legal terms or in political terms".<sup>22</sup> It is with the expectation that the *Eichmann* trial would provide a prime forum and a fitting profile of the accused for re-examining our preconceptions that Arendt took up the role of trial reporter for the *New Yorker* magazine.

One will find further reversal, and perhaps some irony, in the fact that, in her new role, she would end up defending some of the key tenants of the Nuremberg tribunal. Namely, she would praise the unique virtue of a criminal justice forum for judging individual accountability in otherwise overly collectivised contemporary societies.<sup>23</sup> The trial is thus about assessing the individual conduct of the accused, not States or organisations, and even less about condemning historical patterns, within which the individual's actions are alleged to be but a single manifestation. On the other hand, even if the new category of 'crimes against humanity' was never effectively put in practice in Nuremberg, it was, in Arendt's opinion, a much more fitting charge against Eichmann than 'crimes against Jewish people', which eventually prevailed in Israeli legislation.<sup>24</sup>

Arendt's insistence on individual accountability as the purpose of the trial has prompted criticism for a supposed overly narrow understanding of the judicial process as it pertains to war crime prosecutions and a "conservative philosophy of law". This alleged attitude rests on the prem-

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<sup>22</sup> Arendt, 1992, p. 417, see *supra* note 11.

<sup>23</sup> See Hannah Arendt, "Some Questions of Moral Philosophy", in Jerome Kohn (ed.), *Responsibility and Judgment*, Schocken Books, New York, 2003, p. 57: "It is the undeniable greatness of the judiciary that it must focus its attention on the individual person, and that even in the age of mass society where everybody is tempted to regard himself as a mere cog in some kind of machinery – be it the well-oiled machinery of huge bureaucratic enterprise, social, political, of professional, or the chaotic ill-adjusted chance pattern of circumstances under which we all somehow spend our lives. The almost automatic shifting of responsibility that habitually takes place in modern society comes to a sudden halt the moment you enter a courtroom". On centrality of courts for assessment of individual accountability, see also Hannah Arendt, "Personal Responsibility Under Dictatorship", in *The Listener*, 1964, vol. 185–87, no. 205, pp. 21–22.

<sup>24</sup> On the enactment of Israeli law in 1950, see Hanna Yablonko, *The State of Israel vs. Adolf Eichmann*, Schocken Books, New York, 2003, p. 9. On Yablonko's objections to Arendt, see pp. 242–4.



ise that legal process must take place in the vacuum of social and political dynamics, removed from any extra-legal objectives. Indeed, some of the passages from *Eichmann in Jerusalem*, taken in isolation, seem to lend themselves to such an interpretation of her position.<sup>25</sup> In contrast, Arendt's critics, Lawrence Douglas and Shoshana Felman, see the key achievement of the trial in its ability to provide a voice for the victims and a much needed narrative of the Holocaust for the State of Israel.<sup>26</sup>

There is sufficient evidence, I will argue, which shows that the perception of Arendt as holding a conservative understanding of the judicial process is, at best, oversimplified. What is at stake in conflicting perspectives on the trial is the prosecutorial strategy of Israel's Attorney-General and Chief Prosecutor Gideon Hausner. The Chief Prosecutor's strategy was centred on the need for a young State to provide a broader historical understanding of discriminatory abuse against the Jewish people over centuries and to send a message of defiance and confidence in the ability of Israel to punish the culprits who have harmed the community.<sup>27</sup>

Arendt saw this strategy as a failure on several accounts. Firstly, in its overall performance, the trial failed to recognise and define the unprec-

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<sup>25</sup> See, for example, Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Viking Press, New York, 1965, p. 5: "Justice demands that the accused be prosecuted, defended, and judged, and that all other questions of seemingly greater import [...] be left in abeyance. Justice insists on importance of Adolf Eichmann [...] On trial are his deeds, not the sufferings of the Jews, not the German people or mankind, not even anti-Semitism or racism". See also, p. 157: "The purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes – 'the making of a record of the Hitler regime which would withstand the test of history', as Robert G. Storey, executive trial counsel at Nuremberg, formulated the supposed higher aims of the Nuremberg Trials – can only detract from the law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment".

<sup>26</sup> See Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*, Yale University Press, New Haven, 2001; Shoshana Felman, "Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust", in *Critical Inquiry*, 2001, vol. 27, no. 2.

<sup>27</sup> Douglas claims that the criminal trial was successfully "used as a tool of collective pedagogy and as a salve to traumatic history", see Douglas, 2001, p. 2, *ibid*. Similarly, Felman says that "the acquisition of semantic authority by victims is what the trial was all about", so that "a Jewish past that formerly had meant only a crippling disability was now being reclaimed as an empowering and proudly shared political and moral identity", see Felman, 2001, p. 233, *ibid*. Even though she spends less time in discussion with Arendt, Yablonko makes a similar argument for taking the Eichmann trial as a "historical trial" that played a state-building role in Israel as against Arendt's assessment based on legal formalism. See Yablonko, 2003, pp. 236–49, *supra* note 24.

edented nature of Nazi crimes in either legal or moral terms. “The current Jewish historical self-understanding”, she said, “is actually at the root of all the failures and shortcomings of the Jerusalem trial”. “Prosecution and judges alike” have failed to account for the discontinuity between the pogroms in Jewish history and the horrors of Auschwitz, which are “different not only in degree of seriousness but in essence”.<sup>28</sup> Secondly, focusing on the history of the persecution of the Jews, and calling witnesses that had no connection to Eichmann’s conduct, had the effect of helping his defence. It was reinforcing the idea that he was but a tiny cog in a machine propelled by historical forces that predate the Nazi regime. The image of a scapegoat that he so desperately clung to was not far behind.<sup>29</sup> Thirdly, she genuinely resented the attempt to politically instrumentalise the trial and render the prosecution of the accused secondary. The case was not helped by the fact that this course of action was also promoted by President Ben Gurion himself, who apparently announced that he did “not care what verdict is delivered against Eichmann”.<sup>30</sup> Therefore, Arendt’s attempt to narrowly define the purpose of the trial has to be viewed as a function of defending the very integrity of due process, as she saw it.

Quite contrary to the claims of a restrictive and formalistic understanding of judicial process, there is textual evidence indicating that trials can bring about a multiplicity of extra-judicial benefits, including in relation to moral inquiry, historical truth-telling and as collective means for dealing with the past. The unique role of the judicial system is to be able to extract from the broader context of collective violence and still ask pertinent questions about individual conduct. Given that legal and moral issues “have in common that they deal with persons, and not with systems or organizations”, the stage set for legal proceedings also necessarily leads to moral questioning, said Arendt. The increasing number of war crimes prosecutions at the time consequently instigated the resurfacing of the moral issue.<sup>31</sup>

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<sup>28</sup> Arendt, 1965, p. 267, see *supra* note 25.

<sup>29</sup> Arendt, 1964, pp. 29–31, see *supra* note 23.

<sup>30</sup> Cf. Arendt, 1965, p. 20, see *supra* note 25.

<sup>31</sup> *Ibid.*: “I said that moral issue lay dormant for considerable time, implying that it has come to life during the last few years [...] There was first and most importantly, the effect of the postwar trials of the so-called war criminals. What was decisive here was the simple fact of courtroom procedure that forced everybody, even political scientists, to look at these matters from a moral viewpoint”.

There are a number of remarks, made during and after the trial in Jerusalem, which indicate the importance of the truth-telling component of the trial for victims. For example, at the very beginning of the trial, and upon hearing the testimony of Zindel Grynszpan, Arendt wrote to her partner Blücher: “I told myself – even if the only result was that a simple person, who would otherwise never have such an opportunity, is given the chance to say what happened, publicly, in ten sentences and without pathos, then this whole thing will have been worth it”.<sup>32</sup> It was the particular openness and storytelling quality of Grynszpan that set him apart from numerous testimonies given at the trial.<sup>33</sup> Grynszpan’s story of expulsion from Germany and dramatic crossing into Poland was recounted in some detail in Arendt’s trial report.<sup>34</sup> We can sometimes find true understanding in rare moments when first-hand accounts have the power to bring about something new, an insight or a truth-revelation. In this sense, truth-telling can play a transformative role in understanding and articulating unprecedented events. Conversely, the failure to identify the central moral issue, namely, the role of personal responsibility, or to adequately adjust legal categories in post-war years, is attributed to an unproductive atmosphere of “speechless horror”. Only after coming face to face with the unthinkable and creating the new language needed to capture the tragedy of the Holocaust can we start to address the normative realm.<sup>35</sup>

Arendt offered further insight into the benefits of truth-telling in court proceedings in her subsequent commentary on the Auschwitz trial of 1963 in Frankfurt, conducted under the German penal code dating from 1871:

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<sup>32</sup> Arendt, 1992, p. 359, see *supra* note 11.

<sup>33</sup> Arendt, 1965, p. 230, see *supra* note 25: “No one either before or after was to equal the shining honesty Zindel Grynszpan”.

<sup>34</sup> Arendt prefaced the account of Grynszpan’s testimony by saying that “every once in a while one was glad that Judge Landau had lost his battle” to constrain the number of witnesses called by the prosecution. See *ibid.*, p. 227.

<sup>35</sup> In “Some Questions of Moral Philosophy” we find the following qualification: “What I wanted to indicate is that the same speechless horror, this refusal to think the unthinkable, has perhaps prevented a very necessary reappraisal of legal categories as it has made us forget the strictly moral, and one hopes, more manageable, lessons which are closely connected with the whole story but which look like harmless side issues if compared with the horror”. Somewhat explaining the uniqueness of Grynszpan’s testimony Arendt says, “[People] have all too frequently yielded to the obvious temptation to translate their speechlessness into whatever expressions for emotions were close at hand, all of them inadequate”. See Arendt, 2003, p. 56, *supra* note 23.

Had the judge been wise as Solomon and the court in possession of the “definitive yardstick” that could put the unprecedented crime of our century into categories and paragraphs to help achieve the little that human justice is capable of, it still would be more than doubtful that “the truth, the whole truth,” which Bernd Naumann demanded could have appeared. [...]

Instead of *the* truth, however, the reader will find *moments of truth*, and those moments are actually the only means of articulating this chaos of viciousness and evil. The moments arise unexpectedly like oases out of the desert. They are anecdotes, and they tell in utter brevity what it was all about.<sup>36</sup>

The truth then, cannot be established as an outcome of the judicial process, a form of ‘judicial truth’ delivered in a legal judgment, no matter how finely adjusted legal instruments may be. Nor is it a matter of pasting together facts from witness testimonies, and so on. Instead of a form of finality, truth for Arendt has an echo of Walter Benjamin’s fragmentary history.<sup>37</sup> In this fashion, Arendt closed the article with a number of short anecdotal tales from Auschwitz recounted at the trial. Each story carries an almost unbearable brutality and brings in something new, unheard and unpredictable, something that teaches about this ‘other’ world through a single instance or example.

It is commonplace today to see war crime trials as one of the major incentives for public recognition of deeds done in one’s name. In line with contemporary thinking, Arendt was also aware of the role that war crime trials play in a community’s effort to assimilate a traumatic past. So, for example, in spite of her negative assessment of the legal aspects of the Nuremberg trials, in her correspondence with Jaspers, Arendt emphasised its significance for post-war Germany in dealing with the “unmastered” past.<sup>38</sup> Similarly, she was concerned about the number of people who

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<sup>36</sup> Arendt, “Auschwitz on Trial”, in *ibid.*, p. 255.

<sup>37</sup> Walter Benjamin says: “To articulate the past historically does not mean to recognize it ‘the way it really was’ (Ranke). It means to seize hold of a memory as it flashes up at a moment of danger”. See Walter Benjamin, “On the Concept of History”, *Gesammelten Schriften* I:2, Suhrkamp Verlag, Frankfurt, Thesis VI.

<sup>38</sup> In a response to Jaspers’s strong endorsement of the Nuremberg trials, Arendt wrote: “I was especially taken with your view of the Nuremberg trial. I was so pleased by it, because it always seemed to me that particularly in Germany of today these things are bound to be

would be able to learn details about the *Eichmann* trial in Israel and elsewhere, while pointing out that the most far-reaching consequences of the proceedings were felt in Germany.<sup>39</sup>

Beyond meting out justice, war crime trials then have a role in engaging the whole community on the issues of the past and shaping post-conflict social and political transformations. With their high public visibility, they provide a forum for understanding the moral stakes; assist in unearthing the truth about traumatic events, which ordinarily defy conceptualisation through ready-made expressions; and enable meaningful collective reckoning and memorialisation of the past. It is worthwhile to note that these social and political functions are, as a general rule, a part and parcel of tools for developing civic resilience towards violent conflict and guarantees of non-recurrence.

### 19.2.2. Eichmann and the Perils of Rule-Following Behaviour

Part of the interest in the trial in Jerusalem for Arendt was the profile of the accused. Adolf Eichmann was not among the Nazi leadership that made key policy decisions. He was only a note-taker at the Wannsee Conference where the decision for the “final solution” of the “Jewish question” was made, yet he had a substantive role in implementing the policy. He fell in the group of culprits that Arendt previously singled out as both decisive for their ability to execute administrative mass murder and, at the same time, beyond the pale of liability in the criminal justice system.

With the deliberate Nazi policy of imposing the idea of collective guilt on German society, Arendt considered it a key task to differentiate between various degrees of involvement in atrocities. The primary matrix for making distinctions, in her “Organized Guilt” article, was located between the concepts of guilt and responsibility, which would continue to inform Arendt’s discussion of the issues in the future. Using this formula, she identified three groups of culprits. “The number of those who are responsible *and* guilty will be relatively small”, she insisted. This first group she reserved for the chief architects and leaders of the Nazi party who “produced the whole inferno”, and who unambitiously fell in the group slated for criminal prosecutions, though facing no adequate penal

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nearly incomprehensible”. See Arendt, “Letter 43” and “Letter 54”, 1992, see *supra* note 11.

<sup>39</sup> See Arendt, 1965, p. 16, *supra* note 25.

policy. In the next group, “there are many who share responsibility without any visible proof of guilt”. Here, she identified those who supported Hitler and his party as long as it was politically viable. They voted him into power, publicly propagated or financially supported the cause, and applauded wartime victories. No direct relationship between their actions and instances of crime can be established, though the end-results of the policies they supported are apparent. Finally, “there are many more who have become guilty without being in the least responsible”.<sup>40</sup> Probably the largest group consists of “lesser subordinates”, those whose work, obedience and expandability allow for the system to run smoothly, without disruption. Apart from ‘desk murderers’ like Eichmann, Arendt also classified direct executioners into this group. The profile would generally fit those who did not have power of policy-making, whose main characteristic was obeying orders, while at the same time not being driven by any discriminatory intent towards the victims when performing murderous tasks.

The thrust of Arendt’s argument in *Eichmann in Jerusalem* lay in raising concerns regarding reliance on the rules in general and structural limitations of such behaviour, based on Nazi legislative reforms and the historical decline of moral customs. Since, in this case, rule-following behaviour concerns both moral and legal rules, which are seen as co-dependent, I will use the term ‘legalism’, coined by Judith Shklar at approximately the same time as the release of Arendt’s text, to refer to this reliance on rules.<sup>41</sup> The challenge for legalism then, comes from situations in which moral and legal codes, not so much collapse, but are *de facto* reversed, put on their head. It is the following of orders based on this substitute for legitimate rules that enabled the mobilisation of large segments of German population. One of the passages that tries to explain the “banality of evil” in the wake of Arendt’s text, also provides insight on Eichmann’s ability to substitute one set of rules with an inconsistent set without being troubled by the logical contradiction:

However monstrous the deeds were, the doer was neither monstrous nor demonic, and the only specific characteristic one could detect in his past as well as in his behavior during

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<sup>40</sup> Arendt, 1994, p. 125, see *supra* note 11.

<sup>41</sup> See Judith Shklar, *Legalism: Law, Morals and Political Trials*, Harvard University Press, Cambridge (MA), 1964. I could find no evidence that Arendt read Shklar or was influenced by her book, though this is not entirely impossible.



the trial and the preceding police examination was something entirely negative: it was not stupidity but curious, quite authentic inability to think. He functioned in the role of prominent war criminal as well as he had under the Nazi regime; he had not the slightest difficulty in accepting an entirely different set of rules.<sup>42</sup>

The inability to think, or “thoughtlessness” as Arendt otherwise stated, further strengthens reliance on rules, irrespective of their content. At the same time, it enabled two substitutions of rules, firstly common sense into the universe of Nazi rules, and then back into the common sense of the Jerusalem court. That moral codes were perceived as amounting to rules of language for Eichmann, is illustrated by his acknowledgment that his Nazi conduct was wrong from the perspective of post-war realities, but nevertheless should be considered understandable regarding the ideological setting in which he operated. According to Arendt, Eichmann’s thoughtlessness was detectable at every step during his police interrogation and testimony at the trial stand. His expressions in clichés, stock phrases, ‘Officialese’ or *Amtssprache*, using overly formal address on all occasions and the same formulation to describe an event over and over again, could form an exemplary lexicon for unreflective deniers.

In applicable legal terms, the rules become relevant when they are to be assessed against superior orders. The defence of lesser subordinates critically rests on the question of whether the orders of their Nazi superiors can be considered manifestly illegal. Namely, according to military law, not all orders should be obeyed, and there is an assumption that soldiers should be able to recognise and refuse to act upon those orders that are clearly criminal in nature. Our goal will not be to examine the merits of Arendt’s argument for manifest illegality in the *Eichmann* case, but to show how and why these considerations led to the formulation of critical thinking and political judgment.

The recognition of an illegal order becomes particularly problematic under totalitarian rule. The State system has found means of reversing the legal order altogether, of ‘legislating’ crimes on a massive scale, and arguably, and by the appearance of things, making them into something ‘ordinary’. The *Führer* principle, in particular, not only gave Hitler’s orders the force of law but, in fact, put them in the “absolute center of pre-

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<sup>42</sup> Arendt, “Thinking and Moral Considerations”, in Kohn (ed.), 2003, p. 159, see *supra* note 23.

sent legal order”, as constitutional law expert Theodor Maunz defined it at the time.<sup>43</sup> Thus, in light of the positive law of the Third Reich, Arendt duly noted, Eichmann was a law-abiding citizen. Furthermore, as Mark J. Osiel noted<sup>44</sup> and Arendt alluded to, Hitler’s words were legally binding, even if communicated privately without any formal decree. When oral performance can at any point supersede applicable law, all usefulness of judging action by a rule-following standard is lost. This is a situation that framers of criminal law never considered and were unable to predict.

In considering defence from superior orders, the Jerusalem court seized upon an example from Israeli domestic legal practice. The ruling on an incident that took place in 1956 on the *de facto* Israeli-Jordanian border, known as the Kafr Qasim massacre, established an important legal principle as to when soldiers should disobey illegal orders.<sup>45</sup> On the first day of the Suez war, the commander of the Israeli Border Police, Issachar Shadmi, decided to extend the nightly curfew and to impose a permanent curfew for twelve Arab villages under his jurisdiction without advance notice. When concern was raised about the villagers who were already in the fields or outside the village and unaware of the change in the curfew regime, he reportedly made an order through the commanding chain to make no arrests and to “shoot on sight”. All platoon commanders in charge of enforcing the curfew disobeyed the order and held their fire, except the platoon in Kafr Qasim which, under the orders of Gabriel Dahan, killed 48 civilians in nine separate incidents, many of whom were minors and children, as they were returning to their village. Shmuel Malinki, who was in the direct chain of command, and Dahan were tried in 1958 and sentenced to ten and eight years’ imprisonment respectively, while six soldiers acting under Dahan’s orders were also found guilty. However, their sentences were gradually commuted and, by November 1959, they were released from prison. In his verdict, Judge Benjamin Halevi, who was also sitting in the three-judge panel of the *Eichmann*

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<sup>43</sup> Arendt, 1965, p. 24, see *supra* note 25.

<sup>44</sup> Mark Osiel, *Obedying Orders: Atrocity, Military Discipline and the Law of War*, Transaction Publishers, New Brunswick, 1999, p. 64.

<sup>45</sup> The Kafr Qasim case ruling has since attracted the attention of legal scholars as an example of case law regarding superior orders. See, for example, M.R. Lippman, “Humanitarian Law: The Development and Scope of the Superior Orders Defense”, in *Penn State International Law Review*, Fall 2001. In the 1960s, the Israeli Defence Forces also distributed to its recruits a pamphlet that contained Judge Benjamin Halevi’s verdict, in order to inform about the nature of orders that are to be disobeyed.

trial,<sup>46</sup> stated that not all orders needed to be examined for their legality on the basis of subjective feeling, but only those that are manifestly illegal, which must be disobeyed: “The distinguishing mark of a manifestly illegal order is that above such an order should fly, like a black flag, a warning saying: ‘Prohibited!’”. Based on this case of conviction for performing acts under superior orders, and articles of German penal law predating the Third Reich, which were not repealed after 1933 and existed in parallel with the *Führer* principle, the Jerusalem court dismissed the notion that orders that amounted to participation in atrocity on a grand scale can be misrecognised as legal.

In the Kafr Qasim massacre case, however, defendants were found guilty because Shadmi’s and Malinki’s order was considered an exception to the standard rules of engagement that could be easily recognised, especially concerning civilians. The exceptionality of the order was further confirmed by the response of all other platoon commanders, who understood its illegality and disobeyed the order. But, the requirement of a striking exception to the rule, argued Arendt, was impossible to meet in “conditions in which every moral act was illegal and every legal act was a crime”.<sup>47</sup> Given the reversal of conditions, in the context of the Third Reich, it is precisely the non-criminal orders that appeared exceptional. The fact that Eichmann acted against Himmler’s orders of late 1944 to stop deportations and to dismantle the installation of camps, from a legal standpoint, should not be taken against him, says Arendt, as he, based on the same principle, recognised exceptionality to the rule.

From these considerations, Arendt came to the conclusion that rule-following behaviour alone cannot inform about the illegality of orders that Eichmann and other lesser subordinates received. Our only alternative is to assume a separate mental faculty that can distinguish right from wrong on case-by-case basis without the guidance of rules. Arendt explained it as follows:

Hence, the rather optimistic view of human nature, which speaks so clearly from the verdict not only of the judges in the Jerusalem trial but of all postwar trials, presupposes an independent human faculty, unsupported by law and public

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<sup>46</sup> On Judge Halevi, his presiding role in the related Rudolph Kastner trial of 1954, which drew public attention to Eichmann, and his removal as the president of the panel for Eichmann trial, see Yablonko, 2003, pp. 130–3, *supra* note 24.

<sup>47</sup> Arendt, 1964, p. 41, see *supra* note 23.

opinion, that judges in full spontaneity every deed and intent anew whenever the occasion arises. Perhaps, we do possess such a faculty and are lawgivers, every single one of us, whenever we act: but this was not the opinion of the judges. Despite all the rhetoric, they meant hardly more than a *feeling* for such things has been inbred in us for so many centuries that it could not suddenly have been lost.<sup>48</sup>

Instead of facing up to the challenge posed by legal standards, judges and legal experts have been seized by the magnitude of deeds, considered to be patently wrong on the basis of the unquestioned and allegedly all-pervasive quality of moral intuition.<sup>49</sup> Not sufficiently concerned with the historical precedent, they failed to consider a radically different totalitarian universe in which masses of subordinates operated, and thus to understand that one had to go by oneself in judgment. If this is what those few who refused to follow orders were guided by, then this specific mental capacity needs to be identified and qualified rather than simply assumed. It is only by identifying and characterising this “independent human faculty” that we can still find viable grounds for attributing culpability. Arendt’s strategy in the post-trial period was precisely to examine the sources and applicability of this allegedly common human capacity to judge, which we will examine in the next section.

In order to apply the defence of superior orders in the *Eichmann* case, it was also necessary to establish, due to the lack of manifest illegality, that he had no alternative personal malicious motives towards the victims in performing his orders. Over the years, Arendt’s portrayal of Eichmann according to which he neither joined the Nazi party out of conviction and subscribed to its ideological creed, nor was he particularly anti-Semitic,<sup>50</sup> has received much scrutiny. This is not a place to discuss Arendt’s depiction of Eichmann, but based on historical evidence that subsequently emerged, it seems safe to say that the case she made for his

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<sup>48</sup> *Ibid.*

<sup>49</sup> “If we look closely into the matter”, says Arendt, “we will observe without much difficulty that the judges in all these trials really passed judgment solely on the basis of the monstrous deeds. In other words, they judged freely, as it were, and did not really lean on the standards and legal precedents with which they more or less convincingly sought to justify their decision”. See Arendt, 1965, p. 294, *supra* note 25.

<sup>50</sup> See *ibid.*, pp. 30–3.

lack of racial and anti-Semitic motives is rather unconvincing.<sup>51</sup> Nevertheless, part of the argument that concerns rule-following behaviour of lesser subordinates could still be valid as subject to historical investigation.<sup>52</sup> At least hypothetically, there may have been many others who participated without holding malicious intent against their victims.

### 19.3. Thinking, Judging and Taking Action Without Rules

Once Arendt sets out to identify a capacity to judge without the help of established rules, she offers, not one, but two separate answers. Two distinct capacities will correspond to two different aspects of the challenge. Judging, derived from Kant's theory of cognition, is able to decide on individual cases, not based on subsuming under rules, but by taking into account the standpoint of all relevant actors.<sup>53</sup> In this sense, it also designates the autonomy of the political sphere of opinion in distinction to truth-centred discourse in science and ethics. Political judgement rests on recognition of the plural conditions of modern political communities, which have learnt the lessons of totalitarianism and the Holocaust.

The limitation of judging, as a consequence of Kant's political theory,<sup>54</sup> is that corresponding political action requires at least a minimum of political power, which was forcefully removed from all totalitarian subjects. If judging can then assist us in strengthening modern forms of citi-

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<sup>51</sup> For prominent criticism of Arendt on historical grounds, see Christopher Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland*, HarperCollins, New York, 1992; Deborah E. Lipstadt, *The Eichmann Trial*, Nextbook Press/Schocken, New York, 2011; David Cesarani, *Becoming Eichmann: Rethinking the Life, Crimes, and Trial of a "Desk Murderer"*, De Capo Press, Cambridge, 2006.

<sup>52</sup> See, for example, Christopher Browning's insistence that Eichmann was not an "ordinary Nazi" unlike Udo Klaue who "felt himself to be 'decent', not 'really' a Nazi, and an apolitical civil servant who was involved in 'only administration'", in "How Ordinary Germans Did It?", in *The New York Review of Books*, 20 June 2013 issue.

<sup>53</sup> On the chronology of Arendt's identification of the concept of judging as the main problem arising from the Eichmann trial, see Ronald Beiner, "Hannah Arendt on Judging", in *Lectures on Kant's Political Philosophy*, University of Chicago Press, Chicago, 1982, pp. 97–8.

<sup>54</sup> Arendt quotes Kant on these issues: "The freedom to speak or to write can be taken away from us by the powers-that-be, but the freedom to think cannot be taken from us through them at all. However, how much and how correctly would we think if we did not think in community with others to whom we communicate our thoughts and who communicate theirs to us! Hence, we may safely state that external power which deprives man of the freedom to communicate his thoughts *publicly* also takes away the freedom to *think*, the only treasure left to us in our civic life and through which alone there may be a remedy against all evils to the present state of affairs". See *ibid.*, p. 41.

zenship and preventing the re-emergence of new totalitarianism, it cannot explain the behaviour of those who refused to obey superior orders. Recognition of powerlessness, in fact, is a precondition of understanding that we can only rely on our moral judgment and that we still have personal, if not political, choices.<sup>55</sup> Therefore, in totalitarian conditions, the only adequate decision that could leave intact one's moral integrity is personal, not to participate in public life. To explain how such a decision comes about, Arendt looked to Socratic thinking-exercises devised to strengthen Athenian citizenship. The decisive element of this form of thinking comes from the ability to maintain the consistency of one's thoughts and be able to live with ourselves and our deeds.

Arendt never made an attempt to link up these two mental capacities, thinking concerned with the self, and judging concerned with the community and the world. We therefore do not have a single coherent account of how outlined mental faculties relate to each other. In fact, it has been justly pointed out that historical sources and associated conceptual commitments, stemming from Plato and Kant respectfully, are mutually incompatible.<sup>56</sup> I will not be able to address this problem here, other than saying that I consider two separate outlines as examples of thinking that underline model civic behaviour that we want to encourage as means of prevention.

### 19.3.1. Critical Thinking and the Silent Dialogue with Oneself

In trying to identify the human mental capacity that can inform behaviour without pre-established rules, one finds a good starting point in the process of thinking itself, which is ongoing, constantly renewed and “unhinged”. In search of an illustration of thinking in practice, Arendt reached for a historical example, finding in Socrates a representative model for the examination of thinking activity. Socrates is an especially good fit for this role, as he neither aspired to be a philosopher formulating a doctrine that can be taught, nor a ruler who claimed superior knowledge

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<sup>55</sup> See Arendt, 1964, p. 45, *supra* note 24; Hannah Arendt, “Collective Responsibility”, in J. W. Bernauer, SJ (ed.), *Amor Mundi*, Martin Nijhoff, Dordrecht, 1987, pp. 43–50.

<sup>56</sup> Arendt herself states “two rather different origins” of her preoccupation with mental activities in the introduction to her *The Life of the Mind*, vols. 1–2, Harvest, San Diego, 1981, p. 3. On the incompatibility of two conceptions of judging in Arendt, that of an actor and that of a spectator, see Richard J. Bernstein, *Philosophical Profiles*, University of Pennsylvania Press, Philadelphia, 1986.



of how to improve the conditions of citizens. He operated in a sphere of opinion, as citizen among citizens, doing nothing, claiming nothing that, in his view, every citizen should do and had a right to do. The narrative about Socrates's trial and the end of his life, captured in four Platonic dialogues, has become over the centuries almost inextricably tied to Western notion of citizenship.

The Socratic method of examination, as described by Plato, is essentially aporetic: it questions commonly held beliefs about moral concepts without ever arriving at a satisfactory definition of its own. In the course of standard exchange, Socrates elicits from his interlocutor widely accepted meanings of concepts like 'justice', 'goodness', 'courage' and 'piety'. Once inspected for consistency, argumentation leads either to counter-intuitive implications or to contradictions tied within the very meaning of the concept, or yet another argument that goes in circles through the inspection of other previously unquestioned concepts. The result is invariably the same: the validity of socially accepted and unexamined norms on the basis of which we conceive morality as "a matter course" becomes radically undermined. "It is in [thought's] nature to undo, unfreeze as it were, what language, the medium of thinking, has frozen into thought", said Arendt. "The consequence of this peculiarity is that thinking inevitably has a destructive, undermining effect on all established criteria, values, measurements on good and evil, in short on those customs and rules of conduct we treat of in morals and ethics".<sup>57</sup> In ordinary circumstances, this kind of exercise could have a detrimental kind of "freezing" effect on individuals who are not prepared to deal with uncertainty concerning the value-system that makes their communal life possible. From a political standpoint, the effects of Socratic examination are confined to a marginal case, related to times of crises. When we face communal upheaval nevertheless, the price to pay for inability to think will be considerably larger than the side effects of proneness to think in normal circumstances.

By shielding people against the dangers of examination, [non-thinking] teaches them to hold fast to whatever the prescribed rules of conduct may be at a given time in given society. What people then get used to is not so much the content of the rules, a close examination of which will always lead them to perplexity, as the possession of rules under

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<sup>57</sup> Arendt, 2003, see *supra* note 42, p. 176.

which to subsume particulars. In other words, they get used to never making up their minds.<sup>58</sup>

Plato described the thinking process as a “silent dialogue between me and myself”. The conversation that goes on within the self, and indicates an inherent plurality of the self, is in this case the primary model of thinking. Extending this ability through external means of communication, of speech and writing, is considered only an epiphenomenon. What Socrates tried to do is to emulate this process through a public dialogue and establish it as a social practice.<sup>59</sup>

In accordance with Plato’s definition then, there are two main propositions attributed to Socrates that revolve around the concern for the self, rather than the system of values and beliefs in the world. In spite of the inward-looking insight, both propositions have important implications for understanding civic responsibility.<sup>60</sup> The first proposition states that it is better to suffer wrong than to do wrong.<sup>61</sup> The second proposition claims that “it is better to be at odds with multitudes than, *being one*, to be at odds with yourself, namely to contradict yourself”.<sup>62</sup> The two propositions are based on what Arendt considered to be Socrates’s main discovery. She called it “the only rule that holds sway over thinking”,<sup>63</sup> namely the rule of consistency.

In order to fully appreciate the meaning of the first proposition, we need to stress its dependence on the notion of personality and inner consistency. According to Arendt, we arrive to this world as strangers to others and to ourselves. We assert ourselves and find our place in the world, and we ‘strike roots’ through the process that Locke already identified as thinking and remembering. In the course of this process, we become someone, a person, as distinguished from a mere member of the race of

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<sup>58</sup> *Ibid.*, p. 178.

<sup>59</sup> See Arendt, 1982, p. 37, see *supra* note 54.

<sup>60</sup> Arendt insists that these propositions are not a result of a deliberate attempt to identify principles that guide moral truth. “They are insights, to be sure”, she says, “but insights of experience, and as far as the thinking process itself is concerned they are at best incidental by-products”, see Arendt, 2003, p. 182, *supra* note 42.

<sup>61</sup> This proposition appears in different versions in several texts, see Arendt, 2003, pp. 72, 109, *supra* note 23; Arendt, 2003, p. 181, *supra* note 42.

<sup>62</sup> Cf. Arendt, 1982, p. 37, see *supra* note 54. For a longer version of this proposition in a different translation, see Arendt, 2003, p. 181, *supra* note 42.

<sup>63</sup> Arendt, 1982, p. 37, *supra* note 54.

human beings. However, to the extent that we are concerned with losing the self that constitutes the person, we will have to set a limit to what we can allow ourselves to do. Namely, being constituted through thinking as a dialogue that goes on in myself, a process of being ‘two-in-one’, I will have to live with the consequences of whatever I do. Thus, if I participate in mass murder, I will have to live with a mass murderer and converse with a mass murderer for the rest of my days. It is in this sense that the concern for the self overrides the concern for the world in the claim that it is better to suffer wrong than to do wrong.

Considering the capacity of limiting and preventing ourselves from putting our personal integrity in jeopardy, Arendt said:

These limits can change considerably and uncomfortably from person to person, from country to country, from century to century; but limitless, extreme evil is possible only where these self-grown roots, which automatically limit the possibilities, are entirely absent. They are absent where men skid only over the surface of events, where they permit themselves to be carried away without ever penetrating into whatever depth they may be capable of.<sup>64</sup>

Through the notion of personality, Arendt came closest to explaining the possession of a shared thinking ability among human agents and at the same time, the possibility of large-scale corruption of this capacity. On the one hand, we can see how the ability to think critically and face the conscience through silent dialogue can be attributed as a possibility to everyone across all distinctions of class, profession, culture and age. On the other, the limits of the application of the rule of consistency and protection of personal integrity are not subject to any kind of rules or standards. They will vary from one instance to another based on different social and individual predicaments. Further, there will always be circumstances that will tempt people *en masse* to relinquish their personal identity for the sake of collective identity.

Socrates spent his life believing that his *praxis* was improving the status of citizenship in Athens in contrast to many of his fellow citizens who did not appreciate the larger implications of his instruction. The all-important lesson was not in teaching people *what* to think, but “*how* to think, how to talk to themselves”, and how to become a person. An in-

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<sup>64</sup> Arendt, 2003, p. 101, see *supra* note 23

creased reliance on the process of critical thinking and understanding of its personal and political implications, Arendt believed, could avert catastrophes. How we fare in testing circumstances will depend on how well we develop critical thinking and the notion of civic responsibility. Learning critical thinking therefore, in contrast to a more contemporary notion, rests primarily not on questioning the received knowledge, but on rigorously applying standards on our own process of thinking.<sup>65</sup>

### 19.3.2. Political Judgment and Representative Thinking

Since Plato's sharp distinction between truth and opinion, the sphere of opinion was viewed by the philosophical mainstream in low esteem, not worthy of normativity that can fully actualise human capacities. As a result, philosophy stood in uneasy tension with the political realm, continually attempting to impose epistemic norms on a sphere that is otherwise dependent on popular opinion. Arendt, however, saw virtue in the realm of opinion as a medium that brings about inclusiveness of the political community.

Truth in itself carries an element of conclusiveness that precludes public exchange of ideas and displays a tendency to coerce action. Exchange of opinion in the marketplace, on the other hand, constitutes the very essence of political life. "The shift from rational truth to opinion", Arendt said, "implies a shift from man in singular to men in plural".<sup>66</sup> We no longer inquire about the capacity of an epistemic subject, which is assumed to be the same throughout human agency, to guide our conduct in the community. Rather, in order to enhance the persuasive power of opinion, we need to consider and attempt to reconcile different standpoints of other actors in the marketplace. Not only does judging operate in conditions of plurality, but plurality is also, according to Arendt, the defining condition of political community. The strength of judgment depends on the ability to reflect on this plurality, and the degree of inclusiveness, impartiality, and capacity to forgo of our personal predilections and parochial outlook.

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<sup>65</sup> Arendt, 1982, p. 42, see *supra* note 54: "To think critically, applies not only to doctrines and concepts one receives from others, to prejudices and traditions one inherits: it is precisely by applying critical standards to one's own thought that one learns the art of critical thought".

<sup>66</sup> Arendt, *Between Past and Future: Six Exercises in Political Thought*, rev. ed., Viking Press, New York, 1968, p. 235.

In order to meaningfully capture and take into consideration the multiplicity of standpoints, we need to deploy representative thinking. Arendt defined it as follows:

Political thought is representative. I form an 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. This process of representation does not blindly adopt the actual views of those who stand somewhere else, and hence, look upon the world from different perspective; this is a question neither of empathy, as though I tried to be or to feel like someone else, nor of counting noses and joining a majority but of being and thinking in my own identity where actually I am not. The more people's standpoints I have present in my mind while I am pondering a given issue, and the better I can imagine how I would feel and think if I were in their place, the stronger will be my capacity for representative thinking and the more valid my final conclusions, my opinion.<sup>67</sup>

Judgment does not pertain to changing opinion and adopting somebody else's opinion without questioning it. Nor should I try in this process to emulate the feelings of what somebody else is going through in his or her own particular situation in life. Judgment is not about the idiosyncrasy of feelings but about communicability and transparency of thought directed towards the public. Most of all, judgment is not political because it proportionately reflects actual views of all those capable of judging. It is not representative of the majority view, which may as well be supporting genocidal policies. In other words, its validity does not lie in representing numbers in politics, but in representing a multiplicity of standpoints. Similar to Ronald Dworkin's rights theory,<sup>68</sup> it is precisely the minority that stands in particular need to be accounted for in representative thinking.

The material for choosing a representative example, a particular instance that "is valid for more than one case", is usually found in characters and events from historical and fictional narratives that reside in collective memory. Examples related to traumatic World War II events that left a mark on collective memory are usually captured in the names of

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<sup>67</sup> *Ibid.*, p. 241.

<sup>68</sup> See Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press, Cambridge (MA), 2005.

locations in which they took place, for example: Pearl Harbour in the minds of Americans, Leningrad of Russians, Hiroshima of Japanese, and so on. The significance of exceptional events for the community is often modelled upon comparisons with ‘exemplary’ events from the past. Based on this use of an example, reactions to September 11 attacks in the US were often related to the response to the Pearl Harbour bombing. The judgment made in this way will have “exemplary validity to the extent that the example is rightly chosen”, said Arendt.<sup>69</sup> Imagination, put to effective use, is the power that enables us to represent a group of items, be they objects, events or points of view, through a single example. Impartiality of judgment is the outcome of this process of exemplification that is capable of adequately representing the diversity of standpoints of actors throughout the relevant public space.

Political judgement is of particular significance in situations of violent conflict and collective antagonism. Representative thinking, often against our strong inclinations, requires taking into consideration perspectives and grievances of others who are collectively opposed, that is, in this context perceived as enemies of our community. This is precisely when the need is most pressing, for example, to include and defend the right to life of “all those who happen to be around”, in the same sense that we would show respect for our own lives as well as those we care for or have allegiances with. In addition, civic responsibility implies the obligation to protect all those who will suffer the consequences not only of our own individual action, but also actions that will be taken in the name of our community. Our “involuntary membership”<sup>70</sup> in political communities requires that we respond to the deeds done in our name as the members of this community. In post-World War II situations when crimes against humanity and genocide were committed, in Cambodia, Bosnia or Rwanda, many accounts suggest that it took tremendous moral rectitude and courage to go against the grain in one’s own community against those who orchestrated and supported the mass killings. Nevertheless, in those cases where diplomatic and security interventions are impossible or ineffective,

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<sup>69</sup> Arendt, 1982, p. 84, see *supra* note 54.

<sup>70</sup> The membership is considered ‘involuntary’ because we cannot dissolve it in the same way that we can do with private associations. We are born in one political community and can naturalise into another, but the responsibility will follow us. On this, see Arendt, 1987, p. 149, *supra* note 55.

arguably, it is the critical mass of voices from inside the perpetrators' community that is our best bet for prevention.

In the last instance however, the process of judging requires not only removing collective biases of one's community, but also reveals the circumstantial nature of community belonging as such. Following Kant, Arendt said: "One judges always as a member of community, guided by one's community sense, one's *sensus communis*. But in the last analysis, one is the member of a world community by the sheer fact of being human; this is one's 'cosmopolitan existence'".<sup>71</sup> Therefore, the assumption of civic responsibility assumes a two-fold perspective. On the one hand, political judgment takes into account equally the standpoints of all those who happen to be affected by the course of action, irrespective of whether they are a part of my community or not. At the same time, civic responsibility requires from us to speak and act as members of our political community, engaging in political life regarding the course of action taken in the name of the community.

The Kantian cosmopolitan outlook of judgment is evident also in Arendt's stand on issues, her critique of the State in *Origins of Totalitarianism* or federal solution for a binational State of Israel, as much as her refusal to deal with Nazi crimes as solely a 'German problem', or historically related to a 'Jewish question'. However, the issues become much more complicated when credibility of preventive capacity of international institutions is concerned. This standpoint is informed by the history of failure to effectively implement the Minority Treaties set up by the League of Nations. The discord within the League of Nations and hypocrisy in the application of international treaties has led to the displacement of hundreds of thousands of people and left them 'stateless', with no protection of their rights. As a consequence, Arendt saw no possibility of enforcing human rights beyond the recognition of citizenship and exercise of State sovereignty. "The restoration of human rights", she said, "as the recent example of the State of Israel proves, has been achieved so far only through the restoration or establishment of national rights".<sup>72</sup> One could assume that her refusal to accept the Nuremberg trials as a solution for

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<sup>71</sup> Arendt, 1982, p. 75, see *supra* note 54.

<sup>72</sup> Hannah Arendt, *The Origins of Totalitarianism*, 2nd ed., Meridian Books, New York, 1958a, p. 179. Cf. Seyla Benhabib, "International law and human plurality in the shadow of totalitarianism: Hannah Arendt and Raphael Lemkin", in *Constellations*, 2009, vol. 16, no. 2, p. 338.

Nazi crimes was partly due to inadequacy of applicable legal norms, and partly to the issues related to the credibility of establishing international criminal justice institutions. It should also be noted that the example of Israel as confirming the trend of national protection, carries a stipulation of ‘so far’, indicating a possibility that international order may change in the future to allow for international institutional protection of rights. Since in Arendt’s lifetime no follow-up to the Nuremberg tribunal, such as the International Criminal Court we have today, was established, history provided no reason to revisit or reconsider conditions of possibility of international institutions. Nevertheless, there are good reasons to believe that, in contemporary conditions, she would be a strong endorser of international criminal law.<sup>73</sup> In fact, the cosmopolitan forms of solidarity among the victims and global public alike, which Arendt envisaged as instrumental for prevention, could also be the key to support further improvement, conduct oversight and protect sustainability of international criminal justice institutions.

By the time of the *Eichmann* trial, Arendt not only looked at the judicial response with a more pragmatic eye, leaving space for further improvement of legal instruments, but displayed more faith in the international law as well. At this later stage, for example, she exhibited readiness to defend the category of crimes against humanity, and embrace and strengthen the ontological force of the crime of genocide, or what she called, a ‘crime against human condition’.<sup>74</sup> The elaboration of this particular type of wrongdoing formed the crux of Arendt’s own alternative verdict addressed to Eichmann:

And just as you supported and carried out a policy of not wanting to share the world with the Jewish people and the people of a number of other nations – as though you and your superiors had any right to determine who should and who should not inhabit the world – we find that no one, that is, no member of human race, can be expected to share the earth with you. This is the reason, and the only reason, you must hang.<sup>75</sup>

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<sup>73</sup> This is an argument put forward by Seyla Benhabib, see *ibid.*

<sup>74</sup> For a detailed account of Arendt’s transition from rejection to acceptance of international law, see *ibid.*, pp. 331–350.

<sup>75</sup> Arendt, 1965, p. 279, *supra* note 25. Cf. Benhabib, 2009, p. 343, see *supra* note 72.



The transgression committed by Eichmann and other lesser subordinates, then, is an attempt to alter the essential quality of the human condition, namely plurality. The anthropological study in Arendt's *Human Condition*, highlights the sameness of humans as members of the human species, capable of speech and reasoning unlike any other. We are all, at the same time, also unique in the way of 'who' we are in physical shape and sound of our voice, and 'what' we are with our inner qualities and weaknesses.<sup>76</sup> This plurality is further reflected in our tendency to form, or be a part of, durable associations with others. Humanity thus, manifested both in the richness of human life forms and in the possibility of living together in communities, is premised on accepting the diversity of individuals and groups. An attempt to annihilate aspects of plurality violates this very premise of the human condition and constitutes a historically different type of crime altogether from those ordinarily prosecuted in national criminal justice systems up to that historical juncture.

#### **19.4. Sustaining Peace and Developing Civic Resilience for Prevention**

The imperative of finding adequate means of prevention of recurrence of Nazi crimes has guided Arendt's research over the span of three decades. The precedent set by Nazi crimes and the depth and meaning of wrongdoing revealed in the definition of crimes against humanity and the crime of genocide found a measure of redress for victims. Even if we have only a limited ability to mete out justice for these kinds of crimes that will always remain unique, if not unprecedented, court proceedings are also the prime venue for public reckoning, truth-seeking, questioning the preconceived and re-assessing the past. At the same time, neither political nor legal institutional measures alone will ever amount to a sufficient deterrent for the leaders and a guarantee of non-repetition. The mass atrocity crimes of the magnitude that occurred in Cambodia, Bosnia-Herzegovina or Rwanda are not only possible with the use of State resources, but also with the mobilisation of the large segments of society. The lesson learnt from the Nazi regime is that mobilisation for genocidal causes is possible even in environments that have strong institutional safeguards, let alone places where institutions are weak. Prevention is therefore only possible by nurturing a particular kind of citizenship which will sustain the surge

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<sup>76</sup> Hannah Arendt, *The Human Condition*, University of Chicago Press, Chicago, 1958b.

of political forces that attack the fundamentals of the rule of law, and defend political and legal institutions put in place to prevent recurrence. Civic resilience that can sustain these institutions in the situation “when the chips are down” will depend on a critical mass of citizens that possess two primary sets of qualities: 1) It will rest on active participation as a citizen through critical examination of inherited rules, readiness to make up one’s own mind, and moral (that is, personal) integrity; and 2) it will be marked by an acute awareness of recent history of mass violence in one’s community and beyond, and the ability to act against causes that promote collective violence against political plurality as such.

Having outlined Arendt’s concept of prevention, we can now look at some relevant policy implications. For the sake of argument and brevity, I will assume that prevention of mass atrocity crimes by itself has an impact on reducing risks and effects of violent conflict more broadly. There will also be ways in which we will indicate that civic forms of prevention, proposed by Arendt, address directly some of the root causes of violent conflict. The summary of Arendt’s position indicates how we can model citizenship based on specific mental predisposition and associated political action. A cursory look at entry points for sustaining peace will assist us in illustrating what kind State and civic initiatives are needed to promote and create sustainable social roots for this model of citizenship.

The sustaining peace agenda provides several vantage points for revisiting conflict prevention strategies. Firstly, conditions for re-thinking the prevention focus are set by Goal 16 of the UN’s Sustainable Development Goals. They stipulates that building peace, which can be sustained overtime, is a universal agenda and a development task of all societies. We no longer divide countries between those that need to work on developing safeguards against violent conflict, and those that can safely focus on economic development, which allegedly by itself has a preventive function.<sup>77</sup> There is a recognition that improvement is needed in long-term preventive measures even in places with stronger institutional capacity, as the recent increase of violent conflict in middle-income countries indicates.<sup>78</sup> This outlook encourages a long-term perspective on social change and provides the space to conceive of the sustainability of peace tied to

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<sup>77</sup> See the UN Sustainable Development Goals, *supra* note 1. See also United Nations and World Bank, 2018, para. 12, *supra* note 4.

<sup>78</sup> See Political Instability Task Force: Worldwide Atrocities Dataset, 2016; Uppsala Conflict Data Program, 2016.

work on slow developing social and cultural conditions that can re-enforce prevention.

Secondly, in conceiving prevention we increasingly aim beyond sole reliance on capacity-building of institutions often associated with the previous wave of State-building and peace-building initiatives. This is partly due to performance, real and perceived development outcomes, and partly due to a realisation that, beyond institutional factors, we need more emphasis on the role of actors and structural conditions to explain pathways that lead to both the onset and prevention of violent conflict.<sup>79</sup> A further need is related to looking beyond State actors, who continue to play a key role, but are now in practice accompanied increasingly by non-State actors and especially civil society.<sup>80</sup>

Civic prevention is premised on the role of agency and ability to work on some of the structural conditions. The agency, referring to both individual and group agency, which characterises actors' involvement, is conceived in an actual decision-making capacity responding to challenges along the pathways to peace and conflict. On the other hand, the point that Arendt wanted to make is that group (that is, citizens') agency potentially has a predisposition toward acting preventively, independently of institutional arrangements and safeguards. This potential can be actualised, for example through forms of civic education, and can act to defend against recurrence of mass atrocities, and by default, defend the pathways to peace. We have often heard objections that the process of actualisation is a slow moving one, as we engage in changing one of the structural conditions, namely political culture. However, the World Development Report 2011 has indicated, for example, that among those 20 countries with the fastest institutional reform in the twentieth century, it took on average 41 years to achieve "basic governance transformation" of the rule of law institutions.<sup>81</sup> With similar resources and sustained commitment of key

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<sup>79</sup> See United Nations and World Bank, 2018, chap. 3, pp. 77–108, see *supra* note 4,

<sup>80</sup> See The World Bank, *World Development Report 2017: Governance and the Law*, Washington, 2017; M. Andrews *et al.*, *Building State Capability: Evidence, Analysis, Action*, Oxford University Press, Oxford, 2017; Alexandre Marc *et al.*, *Societal Dynamics and Fragility: Engaging Societies in Responding to Fragile Situations*, The World Bank, Washington, D.C., 2013. See also United Nations and World Bank, 2018, *supra* note 4.

<sup>81</sup> See The World Bank, *World Development Report 2011: Conflict, Security, and Development*, 2011, p. 11, Table 2.1.

stakeholders, one can argue that a significant amount of civic capital for prevention can equally be accrued in this timespan.

With a view to conditions supporting guaranteeing non-recurrence,<sup>82</sup> we can therefore divide measures that fit the universal prevention agenda into two major types: those that are directed at developing institutional safeguards, and those that strengthen civic resilience towards the recurrence of mass atrocities and onset of collective violence. In the first group we find, for example, constitutional reform and the establishment of constitutional courts; legislative reform to strengthen national criminal code pertaining to situations of violent conflict, and incorporating core international crimes; civil oversight mechanisms over security institutions; development of national peacebuilding architecture, with early warning systems and mediation capacities; devolution and financial autonomy of marginalised regions and groups; development of national human rights institutions and other independent human rights monitoring bodies; and so on. In the second group we should cluster measures that are aimed at creating civic resilience, through retroactive practices, including official truth-seeking mechanisms; public information and outreach programmes of courts with jurisdiction over core international crimes; various memorialisation practices and so on, as well as forward looking practices, such as civic, peace and history education in and beyond national curricula; discussion fora on citizenship, including use of social media; art and cultural manifestation that celebrate inclusive civic outlook; youth engagement on social inclusion and against violent extremist ideologies, and so on.

Considering these two types of preventive measures, there is an inter-dependence between the impact of institutional safeguards and of civic resilience on sustainable peace. Reforming institutions and developing a coherent set of new legislative provisions and institutional capacities at the national level is a precondition for prevention of recurrence and, as indicated, it may involve an inter-generational effort. However, once put in place, there is no guarantee that these mechanisms can be effectively maintained and sustained overtime. We find a reminder of this kind of risk in countries such as Hungary, Poland or the Philippines, which made substantive progress in enhancing the respect and strengthening institutions

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<sup>82</sup> See measures listed in support of guarantees of non-recurrence in UN Special Rapporteur, 2015, *supra* note 9.

of rule of law in the last 10 to 20 years. However, more recently we witness a significant rollback regarding the protection of human rights, independence of the judiciary and overall confidence in institutions. A more robust civic capital can be gradually created to prepare for shocks and setbacks, and protect the sustainability of institutions built to promote inclusive, just and peaceful societies.

Finally, there is growing recognition that prevention, as executed by development actors in particular, has to address social, economic and political inequalities, and especially horizontal inequalities and group-on-group exclusions.<sup>83</sup> As Arendt's citizenship presupposes respect for plural and inclusive conditions of the political community, possession of this predisposition could positively inform prevention practices. This can include, for example, the conduct of civil servants in equitable distribution of social services between communities, community-based insider mediation, or prosecutorial strategies inclusive of all sides to the conflict. To the extent that horizontal inequalities enhance the risk of violent conflict, overall political culture sensitive to inclusion of all groups and able to discuss respective challenges openly, could be as effective as specific institutions set up to address inequalities.

In many contemporary democratic societies, we already see the impact of the broad engagement of citizens of a kind that Arendt envisaged. Awareness of risks, and accountability for core international crimes is a specific focus of numerous national constituencies, as well as regional and global support networks. With the recent trend of re-emerging extremist ideologies and undermining of the rule of law, such an engagement could be instrumental in defending institutions set up to both, mete out justice and sustain peace. In this respect then, Hannah Arendt's post-totalitarian and post-Holocaust conception of citizenship may yet become one of the benchmarks of the new approaches to prevention.

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<sup>83</sup> See United Nations and World Bank, 2018, chap. 4, pp. 109–40, *supra* note 4.

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