Title

Carl Schmitt Reads Hannah Arendt's *Eichmann in Jerusalem*: Archival Perspectives on Convergences and Divergences.

Short Title

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Key Words

Carl Schmitt, Hannah Arendt, Eichmann, law, violence, territory, humanity, crimes against humanity, universal jurisdiction

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I thank the anonymous reviewers and editors for their comments and feedback. I also thank the librarians and archivists at the *Carl Schmitt Nachlass* for their assistance. Funding for the archival research from the Faculty of Arts and Social Sciences at the National University of Singapore is gratefully acknowledged.

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Abstract

Scholarly interpretations have analyzed theoretical tensions and overlaps between Carl Schmitt and Hannah Arendt and Arendt's reception of Schmitt. Schmitt's engagement with Arendt, however, is left understudied. Based on new evidence from the Carl Schmitt archive, this essay provides a first-time analysis of Schmitt's reading of Arendt's *Eichmann in Jerusalem*. The paper argues that Schmitt's recognition of convergences and divergences between his and Arendt's political thought illuminates two important questions concerning the relationship between law and politics: the capacity of law to capture political violence, and the character of community as a source of law and jurisdiction. The analysis specifically foregrounds Schmitt's attention to Arendt's theorization of territory and humanity, two concepts key to his own political philosophy that Arendt deployed radically differently. Overall, the paper demonstrates that Schmitt's reading of *Eichmann* invests the book with a unique theoretical topography that remains inaccessible to studies of their published works alone.

Word Count: 9,947 (including notes and bibliography)

Carl Schmitt Reads Hannah Arendt's *Eichmann in Jerusalem*:
Archival Perspectives on Convergences and Divergences.

I almost wrote something on Hannah Arendt's "Eichmann in Jerusalem" while I was reading it. I fell ill with excitement about the book for several weeks, not because it includes a jab against me [...], but because I was reminded of my *Gutachten* [legal brief] from August 1945 and especially of its concluding note.
But I shall remain silent.

Carl Schmitt to Ernst Forsthoff, November 18, 1963.
(in Mußgnug and Reinthal 2007, 198)[1]

I) Introduction

Carl Schmitt closely followed Israel's 1961 trial of Otto Adolf Eichmann and he carefully read Hannah Arendt's *Eichmann in Jerusalem. A Report on the Banality of Evil*. His interest in the trial and in Arendt's work spanned biographical, historical and philosophical aspects. Nonetheless, Schmitt's engagement with *Eichmann*[2] has remained unexamined. Comparative studies of Arendt and Schmitt as contemporary political philosophers have until very recently proceeded without evidence of their actual reading of another (Lindahl 2006; Kalyvas 2009).[3] New archival research has documented Arendt's reading of Schmitt but not Schmitt's

[1] Author's translation from the German. Schmitt wrote the mentioned legal brief (*Gutachten*) in 1945 to prepare the legal defense of German industrialist Friedrich Flick, who was charged with war crimes and crimes against humanity at the 1947 Nuremberg Military Tribunals (*United States of America vs. Friedrich Flick et al*).

[2] The italicized word denotes Arendt's book, not the person Eichmann.

[3] Luban 2011 connects *Eichmann* to Schmitt's published works.

reception of Arendt (Jurkevics 2017).[4] The scholarly silence on Schmitt's reception of Arendt's oeuvre is likely explained by his reclusion after his interrogation in Nuremberg in 1947 and his debarment from academia in post-war Germany.[5] Nonetheless, archival evidence enables an analysis of Schmitt's engagement with *Eichmann*. This essay offers a first-time study of Schmitt's reading of Arendt's book based on unpublished materials discovered in Schmitt's private estate.[6] The archive shows that although Schmitt had long followed Arendt's life and work, his attention centered on her interpretation of the Eichmann trial.[7] He must have eagerly anticipated *Eichmann*, because he acquired the English original immediately upon its 1963 first-time publication in the USA, although these were years in which he sold parts of his library to ease his family's financial hardship (Lindner 2017).[8] As Schmitt's letter to Ernst Forsthoff quoted above attests, his anticipation was vindicated. In his mind, *Eichmann* directly spoke to his 1945 legal brief in which he objected to the Allies'

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[4] Jurkevics analyzes Arendt's marginalia in her copy of *The Nomos of the Earth* and argues that Arendt found his theory both imperialist and inconsistent (2017, 364). For Arendt's copies of Schmitt's work see https://blogs.bard.edu/arendtcollection/marginalia/.

[5] The enigma around Schmitt extends to his use of a by-now undecipherable shorthand (*Altgabelsberger Kurzschrift*) and his strategically illegible handwriting (Bojanić 2011).

[6] The Schmitt archive is part of the German North Rhine-Westphalia State Archive. Materials are catalogued and here cited under the entry RW265 followed by document number.

[7] The archive also shows his interest in *Eichmann's* reception of amongst Jewish intellectuals.

[8] Arendt (1963), RW265Nr.22801. Schmitt purchased the German translation one year later (RW265Nr.23461).

jurisdiction and adjudication of international crimes and, crucially, rejected the possibility of legal punishment of Nazi atrocities altogether.[9]

Following this thematic thread, this essay reconstructs key portions of Schmitt's reading of *Eichmann* considering the archival materials and his published works. I argue that Schmitt's engagement with the book crystallizes his and Arendt's rival approaches to two important questions regarding the relationship between law, violence and community. The first question pertains to the capacity of law to respond to political violence. Schmitt, who considered political and criminal acts as mutually exclusive, paid attention to Arendt's argument that a legal trial for 'crimes against humanity' could render justice unto Eichmann and capture the distinct gravity of his deeds.[10] The second question concerns the nature of community as a source of law and jurisdiction.[11] Schmitt maintained that territorial occupation must ground a political community prior to the establishment of a legal order. He thus focused on Arendt's argument that intersubjective spaces created by concerted action of individuals can constitute communities as the spring of law and jurisdiction. Similarly, Schmitt tracked Arendt's argument that the irreducible plurality of human individuals yields humanity's normative fabric, which informs her interpretation of crimes against humanity– a position that speaks against Schmitt's dismissal of humanity as an empty, abstract universal.

I contend that Schmitt examined these issues in *Eichmann*, because he noticed the tension between his and Arendt's conceptions of law and 'the political'. Schmitt's theory of 'the political' centers on relationships of existential enmity between territorially bounded communities. Arendt's notion of politics, by contrast, is one of a public life in which diverse

[9] See note 1 above.

[10] This issue informs sections II.2, II.3.1 and III.

[11] Sections II.3.2 and II.4 elaborate this topic.

individuals create a space of appearance by acting in concert. Despite their divergences, I submit that Schmitt also recognized moments of convergence between his and Arendt's theories. Within this tension between convergences and divergences, I argue that he scrutinized Arendt's theorization of 'territory' and 'humanity'–concepts key to his political philosophy – in their relationship to law.[12] The essay substantiates these claims as follows.

Section II discusses Schmitt's attention to Arendt's discussion of the trial's procedural mechanics and its legal foundations. Building on overviews of the Eichmann trial, *Eichmann* and Schmitt's and Arendt's biographies (II.1), section II.2 analyzes Schmitt's focus on Arendt's criticism of the politicized features of the trial, which – she argued – detracted from the administration of justice. This issue pertains to Schmitt and Arendt's views on whether law can meaningfully speak to political violence. I submit that, unlike Arendt, for whom the trial's flaws did not annul the legitimacy of Israel's proceedings against Eichmann in the absence of an international criminal tribunal, Schmitt opposed the entire trial as an ideological distortion of eminently political questions. Section II.3 considers Schmitt's mark-ups of Arendt's discussion of the nature of Israeli jurisdiction over Eichmann. Schmitt densely stresses Arendt's rejection of Israel's claim of universal jurisdiction (II.3.1) and her proposal that Israel could have established territorial jurisdiction (II.3.2). Both the Arendt of *Eichmann* and the Schmitt of his 1945 legal brief reject the piracy analogy as a justification for universal jurisdiction, because the pirate pursues private, apolitical interests (II.3.1). However, both thinkers draw divergent conclusions from this standpoint, which show that only Arendt thought that political violence could be captured through law. Schmitt further attended to

[12] Schmitt's attention to these two concepts is especially striking, because Arendt likely read *The Nomos of the Earth* in 1952 (Jurkevics 2017, n.2) – a fact that Schmitt may have recognized given his mark-ups of *Eichmann*'s German and English editions.

Arendt's idiosyncratic argument that Israel could have claimed territorial jurisdiction over the crimes Eichmann had committed in Europe before Israel's founding (II.3.2). His focus on this issue highlights their divergent views on the relationship between community and law. Arendt's proposal for Israeli territorial jurisdiction rests on her unique notion of 'territory', which she understood not as bounded land, but as the intersubjective space maintained between members of the Jewish diaspora prior to Israel's geographical consolidation. Schmitt's notation on the text indicates that he considered Arendt's argument to dismantle his conception of *Landnahme* (territorial acquisition) as the founding act of community and law.

Section II.4 widens the aperture from the Jewish diaspora to Arendt's view of humanity as unified under law, such that humanity's order can be violated via crimes against humanity. For Arendt, humanity derives its normative status from the irreducible plurality of human beings. Eichmann's attempt to eradicate the Jewish people therefore amounted to a crime against humanity for her. Schmitt's notion of 'the political', by contrast, considers invocations of humanity as disavowals of the primacy of enmity that clothe particularistic interests in the garb of empty universalism. Unsurprisingly, he marked-up Arendt's theorization of humanity as both empirically concrete *and* normatively unified under law.

Section III follows this thread into Schmitt's focus on Arendt's interpretation of crimes against humanity, which she conceived as a crime against the human status based on her conceptualization of humanity, as a legal norm that could capture the enormity of Nazi atrocities and furnish legitimacy to Eichmann's capital punishment. Both Schmitt and Arendt considered the violence of Nazi atrocities to be unprecedented. But they disagreed on the question of whether law could adequately respond to such violence. Schmitt argued in the concluding note of his 1945 legal brief that Nazi atrocities exceeded law. Attempts to penalize them via criminal law, he argued, would profane their extraordinary character. Arendt, by contrast, defended Eichmann's death sentence on the grounds that that humanity did not have

to share the world with him, because he had not wanted to share the world with the Jewish people. The conclusion discusses the value of the archival evidence and mobilizes the Arendt-Schmitt conversation to question current issues surrounding the relationship between international criminal justice, humanity and political violence.

A note on method is in order. I combined four strategies to evaluate Schmitt's mark-ups of *Eichmann*. First, scrutinizing all mark-ups of the English original and the German translation yielded a threefold categorization of his interests based on the highlighted portions' content.[13] These categories are (1) 'biographical/personal concerns', (2) 'procedural, jurisdictional and legal issues' and (3) 'philosophical questions' pertaining to Arendt's trial analysis. This essay excludes discussion of category (1) for purposes of coherence. The main portion of the mark-ups (categories (2) and (3), examined in sections II and III respectively) are classified based on proximities between Schmitt's political theory and the issues he highlighted throughout Arendt's book. Thaler's study of Schmitt's markings of Walter Benjamin's *The Origin of German Tragic Drama* demonstrates that Schmitt carefully highlighted passages that relate to his own philosophy (Thaler 2011). I accordingly examined *Eichmann*'s mark-ups based on their resemblances or tensions with Schmitt's work. Secondly, I relied on Schmitt's reference to having read *Eichmann* in his letter to Forsthoff , quoted above, to interpret mark-ups. The letter explains why the book's Epilogue is the most densely marked-up section of *Eichmann*. The Epilogue contains most of Arendt's analysis of law and jurisprudence. This essay therefore focuses on mark-ups in the Epilogue and especially on those that correspond to Schmitt's legal brief. Third, I examined how densely

[13] Schmitt's mark-ups of the German translation are very sparse, but indicate consistency, not change, in his interest in *Eichmann*. Unless otherwise specified, all citations reference the English original.

Schmitt stressed portions of text. Multiply highlighted segments (side marks, underlines, exclamation points, different colors) I took to indicate not agreement or disagreement, but intensity of interest.[14] I relate legible notations both to Schmitt's published works and to the relevant portion of Arendt's text. Lastly, I considered secondary materials on Arendt and Eichmann's arrest and trial that Schmitt archived in his personal estate as framing devices for his reading of the book.

II) Mechanics and Foundations of the Trial

II.1) Contexts

Carl Schmitt remains amongst the most divisive thinkers in twentieth-century Western political theory. A conservative German jurist, he developed his influential criticisms of liberal democracy and liberal internationalism during the Weimar and Nazi periods. The value of his theoretical critique remains contested due to his personal anti-Semitism and his brief career in Hitler's National Socialist regime. In fact, the Allies interrogated Schmitt after the war, but never charged him at the Nuremberg Trials. His 1945 legal brief and his post-war diary, the *Glossarium*, assailed the legitimacy of the Nuremberg Trials and their prosecution of international crimes such as crimes against humanity. Embittered about his debarment from post-war German academia, Schmitt led a secluded life until his death in 1985. By contrast, Hannah Arendt led an international career as an acclaimed twentieth-century political philosopher, who published widely on the meaning of the human faculties of thought, political action and moral judgment in the wake of Nazist and Stalinist totalitarian rule. A

[14] I specify the precise type of mark-up for every citation. Page references that lack mark-ups are author's mention only. Page numbers cited refer to the now-available 1964 revised edition (Penguin Books), which were derived from transcribing those of Schmitt's 1963 copy.

German Jew, Arendt fled Germany in 1933 and immigrated to the USA after working for Jewish refugee organizations in France. She remained a renowned academic and intellectual until her death in 1975.

Eichmann's case was one of the most iconic trials of Nazi criminals. Schmitt's engagement with Arendt's analysis invests the historical importance of the trial with philosophical significance. Although she fashioned *Eichmann* as a trial 'report', Arendt brought her own distinct philosophical concerns to the case. As a result, the work mounts forceful philosophical interventions into questions regarding the relationship between law, political violence and political community in the wake of the Holocaust. The archive demonstrates that Schmitt was not alone in recognizing *Eichmann* as a momentous theoretical work that spoke to his philosophy. Friends wrote to him about Arendt's work on the trial, letters he marked up and kept for decades.[15] In 1961, for example, Hans-Joachim Arndt wrote to Schmitt about a lecture Arendt delivered on Eichmann's case, which several German academics debated "in the spirit" of Schmitt.[16]

Otto Adolf Eichmann had been tasked with organizing the forced emigration and deportation of Jewish people to coordinate the so-called 'Final Solution' after 1942. By 1945, he had sent over one and a half million Jews to the death camps. After years of hiding in Europe, he clandestinely emigrated to Argentina in 1950. The Israeli Mossad captured Eichmann in 1960 in Buenos Aires and transferred him to Jerusalem, where he was charged with war crimes, crimes against humanity and crimes against the Jewish people.[17] After his

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[15] Hanno Kesting to Schmitt, December 17, 1961, RW265Nr.487.

[16] Arndt to Schmitt, August 14, 1961, RW265Nr.489.

[17] See 'Trial Judgment', §1. For details on the counts on which Eichmann was convicted, see ibid, §244. In *Eichmann,* Arendt summarizes these counts on 244-46. Arendt herself develops

trial, which lasted from April 1961 to May 1962, he was sentenced to death and executed on June 1, 1962. Eichmann's trial drew international attention and controversy. Apart from disagreements over whether Israel was the appropriate forum for the trial, the televised courtroom proceedings exposed to the world the horrific details of the deportations and extermination camps. Arendt's writing on the trial was initially published in five articles in the *New Yorker*, which had sponsored her attendance of the court proceedings in Jerusalem. Part eyewitness report, part historical reconstruction of Eichmann's deeds and part philosophical work, *Eichmann* combined an idiosyncratic portrayal of Eichmann's character with sometimes unreliable historical observations on the deportations, criticisms of the trial's performative aspects and profound jurisprudential reflections. Two aspects that invited vociferous backlashes against Arendt were her characterization of Eichmann as an

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a more idiosyncratic interpretation of the Holocaust as a crime against humanity, in the sense of a crime against the human status perpetrated on the body of the Jewish people.

embodiment of the 'banality of evil'[18] and her scalding criticism of the Jewish Councils' actions.[19] Schmitt himself, however, interestingly focused on other matters.

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[18] Arendt styled *Eichmann* as a *Report on the Banality of Evil* (the book's subtitle). Arendt's 'banality of evil' thesis did not mean that Eichmann was stupid or innocent, nor that his deeds were trivial. Instead, she tried to capture the distinct mentality with which ordinary people performed extraordinarily violent acts during the Holocaust. For her, Eichmann was of banal mind, because he had acted obediently to climb socially, not primarily from deep-seated anti-Semitism. She argued that Eichmann could neither think independently for himself, nor assume any perspective other than his own (see 49). The phrase surfaces once in the book's postscript and once in the subtitle. Schmitt did not mark it anywhere in his copies of *Eichmann*. He also paid no visible attention to Eichmann's invocation of Kant's categorical imperative. Chapter 3 of the book, where Arendt elaborates some of her most well-known claims about Eichmann, is mostly unmarked. Historians and philosophers have demonstrated that Arendt misrecognized Eichmann's character. Lipstadt (2011), Stangneth (2014) and Cesarani (2004) argue that Arendt too easily believed Eichmann's demeanor in court. They show him as a committed Nazi who nonetheless knew that his actions were morally horrible, thereby undoing Arendt's portrayal of Eichmann as an unthinking administrator. Furthermore, chapter 8 – where Schmitt is mentioned – scarcely shows mark-ups. Arendt there very briefly mentions Schmitt while commenting on Eichmann's lawyer Servatius's assistant, Dieter Wechtenbruch, whom she calls a "disciple of Carl Schmitt" (129). Schmitt underlines Wechtenbruch's name and places a question mark in the margin, thus indicating uncertainty as to who he was.

[19] International audiences, but especially the Jewish diaspora, protested Arendt's depiction of the Jewish Councils as collaborating in organizing deportations and accused her of equating

II.2) Political Trials and 'The Political' - From Nuremberg to Jerusalem

One line of Schmitt's attention traces Arendt's objections to procedural aspects of Eichmann's trial and her comparisons between the shortcomings of the Jerusalem court and the Nuremberg Trials. His selective attention to these features of Arendt's analysis demonstrates that they shared certain criticisms of the trial proceedings. They nonetheless diverged, I argue, in terms of the vantage point from which they identified the trial's shortcomings. Despite her criticism of some aspects of the trial's conduct, Arendt thought that legal tools could account for Eichmann's genocidal deeds. Schmitt likely objected to the trial in its entirety, because he defined 'the political' as a realm organized by existential enmity untethered from law.

Arendt defended the overall legitimacy of Israel's trial. She would have preferred that an international tribunal try Eichmann for crimes against humanity to more properly capture the singular wrongfulness of his deeds (discussed in III.3), but there was no such tribunal at the time.[20] She rejected concerns over an unfair Israeli trial, arguing that Israel had as much right to try Eichmann, especially for his "crimes against the Jewish people", as the Poles had to try crimes committed in Poland. (Lipstadt, chapter 6). She also dismissed claims that Israel lacked jurisdiction because it was founded after Eichmann's crimes as "legalistic in the extreme" (Lipstadt, chapter 6). She nonetheless disapproved of the trial's politicized features that detracted from rendering justice unto Eichmann. Her position was close to that of Judge

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perpetrators and victims. Lipstadt argues that Arendt misrepresented and exaggerated the Councils' actions (Lipstadt, chapter 4) Importantly, some of the historical evidence in *Eichmann* was unreliable, rendering Arendt "cavalier with history" (ibid., chapter 6).

[20] On this point see Luban 2011, 628.

Moshe Landau and differed from prosecutor Gideon Hausner's (Lipstadt, chapter 2). Hausner wanted the trial to detail the suffering unique to the Holocaust to capture the imagination of Israeli youth and to demonstrate the necessity and legitimacy of a Jewish state (Lipstadt, chapter 5). Hausner thus arranged for several witness testimonies that recounted the horror of the camps, but that were only tangentially – and sometimes not at all – related to Eichmann's crimes. It was these performative, politicized[21] aspects of the trial that Arendt criticized.

Schmitt selectively focused on Arendt's objection to these issues. He did so, I argue, because he opposed the trial *tout court* due to his 'concept of the political'. He defined 'the political' as a distinct realm organized by the existentially antagonistic encounter between equal enemies. Efforts to translate political relationships into the normative hierarchies of criminal trials are, for Schmitt, mere attempts to disavow the primacy of enmity. His *The Nomos of the Earth* criticized the Treaty of Versailles and the League of Nations as eroding an international order stabilized by enmity, heralding a new imperialism (Koskenniemi 2017, 598). Schmitt thought that "[a] people is only then conquered when it subordinates itself under […] a foreign understanding of the law, especially international law" (cited in ibid., 601).[22] He therefore opposed the application of humanitarian norms to politics and particularly the criminalization of the enemy (ibid., 603). The Nuremberg Trials hence "seemed to cement a process that had preoccupied Schmitt for the past twenty-five years." (Hooker 2009, 1). Schmitt's posture towards Versailles and Nuremberg illuminates his

[21] 'Politicization' here does not refer to Arendt's or Schmitt's notion of 'the political', but to those aspects of the trial that were unrelated or loosely connected to Eichmann's crimes and instead mobilized Holocaust recollections to shape public and world opinion.

[22] Quoted from Schmitt, 'Die Rheinlande als Objekt internationaler Politik' (1925, in Schmitt 2014).

perspective on the Eichmann trial. It was likely Schmitt's attachment to his concept of 'the political' that trained his attention on the following passages.

Schmitt marks Arendt's critique of three issues inadequately addressed in Jerusalem (274/underlined) that, she notes, had been debated since Nuremberg. These issues are the problem of 'victors' justice', a deficient definition of 'crimes against humanity', and an insufficient understanding of the type of criminal perpetrating this crime (274). Schmitt marks especially the first problem in Arendt's discussion (274/side mark). He highlights her claim that "justice [in Jerusalem] was more seriously impaired than at Nuremberg", because Israel denied immunity to defense witnesses (220-1/underlined), resulting in the lack of defense witnesses altogether (274/side mark).[23] Furthermore, he highlights Arendt's note on the strained relationship between "the demands of justice" and the prosecution's staging of witnesses testimonies recounting the "hair-raising" accounts of the camps (223/side mark; 224/underline) only loosely related to Eichmann's charges.[24] Schmitt's attention to Arendt's criticism of witness testimonies as one of the trial's performative features that impeded the realization of justice indicates that he grappled with the tension between Arendt's discussion of the trial's politicization and his own concept of 'the political'.

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[23] Arendt considered this a minor issue, because evidence against Eichmann was already overwhelming (Luban 2015, 308).

[24] Schmitt highlights Arendt's point that Eichmann would have been hanged anyways, but without these "human interest stories", the prosecution's case would have been weakened (219/underline/side mark). He further underscores her emphasis on the defense's silence on Jewish collaboration, the inclusion of which would have yielded a "picture greatly damaged" (120/underline/side mark).

Schmitt further stresses Arendt's remark on the "inequality of status between prosecution and defence" that characterized Nuremberg and Jerusalem and that "was even more glaring" in Jerusalem (221/underlined/side mark). He underlines Arendt's mention of Eichmann's insufficient defense counsel and of his lawyer's absence on execution day.[25] His tracing of issues pertaining to Eichmann's defense culminates in one of the book's most densely marked-up pages, complete with several exclamation points, which discusses Eichmann's rushed execution (250). Regarding the prosecution's disproportionately powerful role at both tribunals, Schmitt marks Arendt's observation that both Nuremberg and Jerusalem lacked trained staff to survey trial documents (221/underlined/side mark), an organizational detail relevant for the curation of political memory. He explicitly endorses Arendt's statement that Nuremberg yielded a selective historical record of Hitler's regime based on the prosecution's choice of evidentiary materials presented in court.[26] His skepticism towards the trials' 'politics' hence extended to the power of foreign courts to shape collective memory. Schmitt's attention to these aspects of Arendt's discussion indicates that he scrutinized aspects of legal trials that rendered them not only ill-fitted to represent, but also prone to distorting political questions. He systematically attended to Arendt's account of the Eichmann trial's performative features, which advanced both Israel's national identity formation and a symbolic retribution for the Holocaust. This pattern indicates that Schmitt grappled with the pursuit of these agendas through a foreign criminal trial that strove to remain "within the

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[25] Schmitt stressed that Servatius was Eichmann's only lawyer (a "physical impossibility", 244/side mark).

[26] Schmitt here writes 'richtig'('correct'/'accurate') in the margins (221/underlined/side mark).

limits of Israeli law" (274/underlined), rather than through a properly political relationship of Israeli-German enmity.

Schmitt's tracing of Arendt's remarks on 'victors' justice' as a problem of Nuremberg, aggravated in Jerusalem due to the lack of defense witnesses, indicates his criticism of both trials. Her observations on continuities between Nuremberg and Jerusalem were important to him. He highlights her remark that the Jerusalem court relied on Nuremberg precedent too much (274/side mark)[27] and her comparison between the Israeli court's shortcomings and those "of the Nuremberg Trials [and] the Successor trials in other European countries" (274/side mark). Schmitt hence objected to foreign national courts *and* international courts' interventions in political questions. Accordingly, he also highlights Arendt's musings on possible international jurisdiction over Eichmann based on her argument that the Holocaust was "a crime against humanity perpetrated on the body of the Jewish people" (269). Schmitt marks Arendt's argument that a Jewish court could try Eichmann for his crimes against the Jewish people and that an international tribunal would have been required to judge him for those features of his deeds that rendered them crimes against humanity (269/underline/side mark).[28] While he was evidently critical of the Israeli proceedings, he was likely as critical of Arendt's suggestion that "Israel should [have held] Eichmann prisoner until a special tribunal could be created by the United Nations" (270/side mark), given his attachment to the anarchic

[27] Arendt criticizes the court's reliance on Nuremberg precedents, because it "buried the unprecedented under a flood of precedents" (Luban 2011, 640). She holds that the judges ultimately sentenced Eichmann for the gravity of his crimes, regardless of precedent (294).

[28] Unlike current international criminal law, Arendt did not distinguish between genocide and crimes against humanity, but considered crimes against humanity as crimes that quite literally offended humanity, rather than just portions thereof.

nature of international politics that clashes with endorsements of legal hierarchies in world politics.

As a result, Schmitt's mark-ups demonstrate that he extended to the Eichmann trial his longstanding objection to the exercise of foreign jurisdiction over political opponents that he elaborated in *Nomos*. By extension, his stance illustrates his attachment to 'the political' as an existential realm of equal enmity that cannot be captured by legal norms or criminal trials. His selective focus on Arendt's procedural criticisms sits uncomfortably with secondary material he collected on the case, and especially with his reading of Holocaust denier Paul Rassinier.[29] We can thus assume that Schmitt was opposed to Israel's criminal trial of Eichmann not only because he thought of it as a distortion of justice, but because he considered it a category error that wrongly substituted legal proceedings for essentially political questions.

II.3) On Jurisdiction: Territory versus Universality

II.3.1) Piracy and Universal Jurisdiction

While Arendt thought that Israel could prosecute Eichmann absent an international criminal tribunal, she grappled with competing justifications of Israel's application of its criminal code to crimes Eichmann had committed in Europe prior to Israel's founding.[30] Her discussion of

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[29] Schmitt underlined Rassinier's criticism of the judicial interpretation of evidence against Eichmann (Rassinier 1963/RW265Nr.26355). His reading of Rassinier is a most disconcerting indicator of his views on the trial.

[30] The question of whether Argentina, Germany or Israel should try Eichmann raised international disagreements. Anti-Zionists, including those amongst Jews living abroad, criticized the Israeli trial. Moreover, Leaders of the American Jewish Council objected to Israel's trial and worried that Israeli proceedings might distract from the fact that Nazism had

the nature of Israel's jurisdiction in the densely marked-up Epilogue reveals a particularly insightful field of convergence and divergence between Schmitt and Arendt regarding the nexus between law and politics. Arendt idiosyncratically argued that Israel could have claimed territorial, rather than universal jurisdiction over Eichmann.[31] Schmitt paid close attention to her rejection of arguments for Israel's exercise of universal jurisdiction over Eichmann, most likely because they both dismissed the piracy analogy as an illustration of the kind of criminal subject to universal jurisdiction.[32] This agreement nonetheless demonstrates

assaulted all of humanity and not only the Jewish people (Lipstadt, chapter 2). As discussed below, Arendt had similar concerns, but she directed them at the issue of how to name Eichmann's crimes. While she was not opposed to Israel's jurisdiction over him, she thought that he committed not merely crimes against the Jewish people, but rather crimes against humanity, perpetrated on the body of the Jewish people.

[31] Universal jurisdiction is one of the five international legal principles governing the transnational exercise of state jurisdiction. It is hence a form of state jurisdiction and differs from the international jurisdiction of international courts. It allows states to prosecute crimes that offend the interests of the international community in their domestic courts, irrespective of the crimes' location or the nationality of the perpetrators or victims. Apart from universal jurisdiction, international law recognizes the principles of territoriality, nationality, passive personality and the protective principle as governing a state's transnational exercise of jurisdiction.

[32] Until the 19th century, piracy was the only universal jurisdiction crime, with the figure of the pirate as the quintessential *hostis humani generis*, the enemy of all mankind. For an historical account of the pirate as the *hostis humani generis*, see Luban 2020, 560-572. The 'piracy analogy' compares the historical figure of the pirate to contemporary "perpetrators of

that, although both defended an understanding of politics as thoroughly public, only Arendt thought that acts of political violence could be captured by criminal law.

Schmitt highlights Arendt's objection to the piracy analogy as an explanation for Israel's universal jurisdiction over Eichmann. He similarly dismissed the piracy analogy for grounding the Allies' jurisdiction over the crime of aggressive warfare in his 1945 legal brief (*Gutachten*). Both of them reject the piracy analogy as grounding jurisdiction over foreign nationals, because they consider the pirate an a-political figure acting on private motives.[33] Arendt notes that the pirate is "in business entirely for himself" (262/underlined), intent only on private gain. Schmitt similarly writes in the *Gutachten* that the pirate plunders out of an unpolitical "lust for acquisition" (Schmitt 1945, 168). But this moment of convergence reveals the divergent answers to the question of whether criminal law could properly capture acts of political violence (see section III below).

In his 1945 *Gutachten*, Schmitt objects to the Allies' jurisdiction at Nuremberg by dismissing the analogy between the pirate and the wager of aggressive warfare.[34] He holds

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core crimes" subject to universal jurisdiction (ibid., 569). In Jerusalem, prosecutor Hausner relied on the piracy analogy to defend Israel's universal jurisdiction over Eichmann (ibid.). The District Court of Jerusalem also relied on the notion of the *hostis humani generis* in its trial judgment to justify its jurisdiction (ibid., 570; see 'Trial Judgment',§13).

[33] Arendt initially endorsed the pirate analogy to describe Eichmann as a 'hostis humani generis', but she later rejected it (compare letters to Karl Jaspers, 23 December 1960 (in Kohler and Saner 1992, 414-418, at 414) and 5 February 1961 (ibid, 421-424, at 423)).

[34] At Nuremberg, U.S. and British Chief Prosecutors invoked the piracy analogy to argue that the principle of individual responsibility for international crimes was sufficiently well established to charge Nazi officials with such crimes (Chadwick 2018, 11). The United

that jurisdiction over the crime of aggressive warfare cannot be sourced from piracy, because piracy and warfare are antithetical rather than analogous. He argues that it is precisely the *unpolitical*, private essence of piracy that enables its criminalization, which demonstrates the impossibility of criminalizing the irreducibly political, public practice of warfare (Schmitt 1945: 164-9.[35]

Arendt's argument against the piracy analogy in *Eichmann* proceeds markedly differently. She rejects the comparison between piracy and Eichmann's crimes, and thereby the piracy analogy as a justification of universal jurisdiction over him. She argues that universal jurisdiction applies to piracy because it occurs on the high seas beyond all territorial jurisdictions (261/side mark). The pirate is no real enemy of all mankind, because his acts do not actually harm humanity. By contrast, Arendt deemed Eichmann a *hostis humani generis* "in actual fact" (276). While in public office, Eichmann assaulted the order of humanity by organizing the genocidal extermination of the Jewish people, whose members are integral to humanity's constitutive plurality. As detailed below, Schmitt closely attended to Arendt's theorization of irreducible human diversity as definitive of humanity's normative status, which challenges his notion of humanity derived from his theory of 'the political'.

In sum, Schmitt and Arendt's interpretation of the pirate as an apolitical, private figure demonstrates that both conceive of the private sphere as antithetical to the political realm, but once again disagree on the question of whether acts of political violence could be captured by criminal law. To Schmitt, the enemy is a public opponent, a status that is independent of

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Nations Secretary-General Trygve Lie also conjectured that the jurisdiction of the Nuremberg Trials could be understood through the parallel to the case of piracy (1949, 80).

[35] Schmitt's brief is cited here dated 1945, but page numbers are from Nunan's English translation (Nunan 2011, 125-97).

private feelings of hatred. For Arendt, the private sphere is a sphere of particularistic interest that is separate from and inferior to the public sphere as one political action. However, they develop this position in opposite directions. Schmitt holds that the criminalization of the apolitical, privately acting pirate demonstrates that criminality and political acts are mutually exclusive. For Arendt, Eichmann's genocidal deeds, performed in a public capacity within a regime that had become criminal in its entirety[36], render him a criminal against humanity properly speaking.

II.3.2) *Nahme*: Territory and Interactional Space

In addition to Arendt's objection to *universal* jurisdiction over Eichmann, Schmitt also took a keen interest in her unique argument that Israel could have claimed *territorial* jurisdiction over him. To make this argument, Arendt advanced an idiosyncratic notion of 'territory' as a shared intersubjective space of action. His attention to her reflections on territoriality demonstrates their divergent positions on the relationship between political community and law. More specifically, they hold divergent views on the founding conditions of political community from which law could then emanate. Whereas Schmitt prioritized the physical occupation of land as the founding act of political collectives that preceded the articulation of any legal order, Arendt elevated interactively constituted political space as the source of law and jurisdiction (Jurkevics 2017).

Arendt's innovative claim that Jewish territoriality existed in a particular manner *before* the founding of Israel as a state thus commanded Schmitt's attention. In *Eichmann*'s

[36] Schmitt multiply highlights Arendt's rejection of the distinction between non-criminal and criminal organizations in Nazi Germany, which she based on the claim that the entire state had turned criminal (159/underline/side mark/exclamation mark).

German translation, he marks in red her idiosyncratic argument that 'territory' for the Jewish people meant not a geographical, but a political and legal concept denoting a "space between individuals in a group whose members are bound to, and at the same time separated and protected from, each other"[37], a "space wherein the different members of a group relate to [...] each other".[38] Schmitt's attention to the German edition is crucial, because it deploys the term 'Raum' (*space*, underlined), not 'Territorium' (*territory*), which rings of Schmitt's language in *Nomos*. But here, 'Raum' does not refer to a concrete physical space necessary for the existence of political communities, as Schmitt used it, but denotes an intersubjectively shared space of action amongst individuals. Arendt's mobilization of the concept highlights the Jewish diaspora's uniqueness to argue that Israel's territorial jurisdiction could be deduced from the interactional space maintained between Jewish people *during* Eichmann's activities.[39] At this point we can discern another aspect of Arendt and Schmitt's rival conceptions of the relationship between politics and law. In *The Human Condition*, Arendt locates politics in individuals' acting in concert in what she calls a "space of appearance".[40] Therefore, whenever human beings act together, they create an "in-between space" in which they can appraise one another as unique individuals. In *Eichmann*, she hence argues that such

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[37] P. 312 (side mark) in German translation. This page corresponds to p. 263 in author's 1964 English edition.

[38] P. 312 (side mark) in German translation (p. 263 in author's English edition).

[39] Writing 'Nahme' in the margin of the English original (263), Schmitt underlines Arendt's argument that the Jewish people's territorialization in Israel would have been impossible had they not maintained their own intersubjective space during their diasporic existence, thereby noting Arendt's argument about the interdependency of both notions of space.

[40] Luban 2011, 635.

intersubjectively shared space amongst humans fulfills the role of geographical territory for the purposes of jurisdiction.[41]

Relatedly, the founding of Israel attracted Schmitt's attention. Israel must have been of interest to him, because he had long considered the Jewish people a diasporic, landless people detached from territorial sovereignty, which he thought rendered them unappreciative of the stakes of enmity as concrete antagonism. However, Israel now offered a territorialized home to the Jewish people in a sovereign state due to, as he highlights in *Eichmann*, the "seizure of its old territory" (263/underlined). Schmitt here writes 'Nahme' in his copy's margins. In *Nomos*, Schmitt had argued that 'Landnahme' (territorial appropriation) was the founding act and essential condition of political communities. His marginal notation on this passage indicates that he saw this fundamental act of territorial acquisition repeated with Israel's founding. A clear reference to his political theory, this annotation shows that he considered the founding of Jewish statehood to have occurred through the fundamental act of occupation. Schmitt hence stresses the territorialization of the Jewish people in the Israeli state as an additional condition of acting "as judges and not merely as accusers" (270/side mark).

Arendt's argument entails, *pace* Schmitt, that 'Landnahme' is not the quintessential, original act of establishing community that must precede the formation of legal order. By 'de-territorializing territory', Arendt unmoors law from Schmitt's concrete order thinking and locates its source in the political space of shared human action. Put differently, whereas Schmitt argued that the appropriation of land precedes both political community and law, Arendt held that intersubjectively shared relations establish the 'in-between' space from which law and jurisdiction can arise before the occupation of physical territory. In this moment in *Eichmann*, Schmitt likely recognized in Arendt a formidable contender who

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[41] ibid.

radically re-deployed concepts foundational to his philosophy. Her interpretation of 'humanity' thus similarly caught Schmitt's eye.

II.4) On Humanity

Schmitt's attention to Arendt's concept of humanity casts into theoretical relief the relationship between community and law. He focused on Arendt's theorization of humanity as unified under law, which informed her argument that Eichmann had committed crimes against humanity, of which the Jews were the victims (269/side mark). Arendt's conception of humanity rivaled Schmitt's, which he had developed in light of his 'concept of the political'. Schmitt considered 'humanity' an empty and totalizing universal that obliterates concrete antagonisms vital for a stable international order. He thought that territorially bounded collectives, who could face other such communities in relationships of enmity, had to precede the formation of legal orders. Arendt on the other hand derived humanity's normative status from the empirically irreducible plurality of its individual members. This conception of humanity allows her to argue that Eichmann's attempt to eliminate the Jewish people was an assault on humanity's constitutive diversity, which distinguished it as crime against the human status, and thus as a crime against humanity (268/underline/side mark).

In one of the most densely marked-up passages, Schmitt stresses Arendt's definition of crimes against humanity as "an attack upon human diversity as such, that is, upon a characteristic of the "human status" without which the very words "mankind" or "humanity would be devoid of meaning" (268-9/underline/side mark/exclamation point).[42] For Schmitt, 'humanity' was of course precisely that, devoid of meaning from a political perspective, because it lacked the boundedness required for relationships of enmity. But Arendt develops

[42] Arendt hence considers genocide as the archetypical crime against humanity.

an empirically concretized and normative vision of 'humanity' defined by the experience of infinite human plurality. This theorization of humanity enables her to argue that "these modern, state-employed mass murderers must be prosecuted because they violated the order of mankind, not because they killed millions of people" (272/side mark). Arendt's concretization of crimes against humanity as a crime against the human status contradicts Schmitt's sardonic remark in his *Glossarium* that a 'crime against humanity' is as preposterous as a 'crime against love' (Schmitt 1991, 113).[43] Her association of humanity with law further catches Schmitt's attention when he highlights her observation that Eichmann's trial rests on the shared humanity of the Jewish people and Nazi criminals, because "the law presupposes precisely that we have a common humanity with those whom we accuse" (251/underline).

The archive shows that Schmitt recognized in Arendt's theorization of humanity as constitutively diverse *and* unified within law a philosophical tradition that ran contrary to his own anthropological commitments. On a clipped book review of Arendt's *On Revolution*, he wrote *homo homini homo* (RW265Nr.22551_000). This adaptation of Hobbes's phrase *homo homini lupus*, a formula expressive of the anthropological pessimism animating Schmitt's political theory, indicates his association of Arendt's work with a rival philosophical tradition.[44] While *homo homini lupus* refers to the violent nature of human relationships, the phrase *homo homini homo* captures shared humanity, thereby – from Schmitt's perspective – draining politics of its existential stakes. His philosophy adopts Hobbes's anthropology of humans as each other's potentially fatal opponents, who must be pacified by state authorities,

[43] Entry dated March 12, 1948.

[44] For the influence of Schmitt's Hobbesian anthropology on his state theory, see McCormick 1997, 252-73ff.

which encounter one another internationally as friends or enemies. In *The Concept of the Political*, *The Age of Neutralizations and Depoliticization* and *The Nomos of the Earth*, he objected to the obliteration of enmity (*lupus*) by a universal appeal to humanity (*homo*). To Schmitt, political theories that overlooked enmity's key role in stabilizing international order misrecognized the import of 'the political' altogether. He feared that acting upon humanity's undifferentiated unity would herald the apocalyptic implosion of a world order consistent with his theory of enmity (Hooker 2011, chapters 4&5). Arendt's political vision of humanity as empirically concrete, shared human plurality cuts through Schmitt's dichotomy between the stable antagonism of enmity and the destructive unity of humanity as an abstract universal. Schmitt dreaded the catastrophic potential of political mobilizations of humanity as an undifferentiated, globally homogenizing concept. He endorsed homogeneity as a necessary trait of *domestic* political communities, while locating plurality in the international realm *qua* a multiplicity of equal sovereign states. Arendt, on the other hand, demonstrates that humanity need not entail homogeneity. By conjoining humanity *and* multiplicity, her concept of humanity-as-plurality circumvents Schmitt's fear of humanity as a totalizing concept.[45] Schmitt's attention to Arendt's conception of (crimes against) humanity indicates that he recognized in her a sophisticated philosophical rival, who theorized concepts of core interest to Schmitt in ways that went against his own longstanding theorization of the relationship between politics and law.

III) *Scelus Infandum*: On Violence and Law

Schmitt's reading of *Eichmann* also illuminates in greater detail questions about the capacity of law to capture political violence. This section argues that Schmitt saw in Arendt's

[45] I thank one of the anonymous reviewers for this insight.

discussion of crimes against humanity a theorization of the relationship between political violence and law that was contrary to his own. A comparison between Schmitt's 1945 legal brief (*Gutachten*) and his mark-ups of *Eichmann*'s Epilogue shows that while Schmitt and Arendt converged on the unprecedentedness of Nazi atrocities, they diverged on the possible legal representation of these atrocities. Schmitt thought that the Nazis' genocidal violence superseded any kind of law and therefore required a-legal judgment and punishment. Arendt, by contrast, argued that the legal norm of crimes against humanity could represent Nazi atrocities.

The concluding note of Schmitt's *Gutachten*, which he mentions to Forsthoff regarding *Eichmann*, addresses the relationship between law and what he calls 'atrocities' or a *scelus infandum*[46], i.e. the kind of violence adjudicated as 'crimes against humanity' at Nuremberg. Notably, Schmitt writes 'infandum scelus' in the margin of *Eichmann*'s Epilogue, where Arendt defends the relatively new crime of 'crimes against humanity' in response to Nazi atrocities (254/underline). Schmitt's interest in Arendt's assessment of 'crimes against humanity' pivots on his investment in the relationship between precedent and unprecedentedness[47] and in the (im)possibility of earthly punishment of Nazi violence. He

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[46] Nunan finds Schmitt's choice of phrase "pretentious and disturbing", because it originates from the child king Ptolemy XIII's beheading of Pompey (2011, 18).

[47] The issue of unprecedentedness trained Schmitt's attention on Arendt's meditation on Israel's taking exception from the law to seize Eichmann (263-4/underlines/side marks/exclamation point). In his *Political Theology* (2005), Schmitt posits that the suspension of law in a moment of exception reveals the irreducible excess of sovereign power over law. However, Schmitt and Arendt disagree on the meaning of the exception. Whereas Schmitt defines it as a moment of pure sovereign power, Arendt considers the kidnapping a means for

argues in the note that SS and Gestapo atrocities cannot and must not become legal precedents, because their enormity exceeds all municipal and international laws. To pretend legal norms could capture the magnitude of Nazi atrocities would be a "delusion" (Schmitt 1945, 197).[48] If Hitler's *scelus infandum* were to be addressed by means of existing law, then "Hitler and his accomplices would be comprised under rules and notions, which obliterate what makes the abnormity and monstrosity of their actions unique (ibid.)."[49]

What reemerges here is Schmitt's argument in *Political Theology* that law can only address the ordinary. He contends in the *Gutachten* that the "abnormity of such a type like Hitler", his "monstrous atrocities" and the "rawness and bestiality" of Nazi violence "explode[s] the framework of all the usual […] dimensions of international and penal law" (ibid., 128). Arguing that Nazi atrocities defy representation by any "positivistic norm in any formal sense" (ibid., 135), he recalls a mythical ancient lawmaker who, when asked why he

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bringing Eichmann to trial. She writes that "he who takes the law into his own hands will render a service to justice" (265/underline/side mark) "if he is willing to transform the situation [such] that the law can again operate" (265/side mark). Generally, the legal principle *male captus, bene detentus* stipulates that wrongful arrest does not preclude rightful detention and trial.

[48] In 1946, Arendt similarly held that Nazi atrocities "explode the limits of the law", because these criminals' guilt "shatters any and all legal systems" (letter to Jaspers, 17 August, in Kohler and Saner 1992, 54). However, she changed her mind by 1960, noting that legal measures are the only ones available to judge Nazi crimes (letter to Jaspers, December 23, ibid., 417).

[49] "Abnormity" is Schmitt's word, as he wrote the *Gutachten*'s concluding note in English (RW265Nr.0579_00761_0057).

had not proscribed certain forms of violence, replied "one cannot even name such abominable crimes and may not articulate their mere possibility" (ibid., 136). It is this argument that drew Schmitt to Arendt's discussion of crimes against humanity as a crime that captured unprecedented political violence and that could justify Eichmann's capital punishment.

Unlike Schmitt, Arendt defended "the new crime [of] crimes against humanity" (268/side mark/underline/double underline). Indeed, his markings in *Eichmann*'s Epilogue cluster around Arendt's discussion of crimes against humanity as "the only entirely new crime [in the London Charter of the Nuremberg Trials]", which was "not covered by international or municipal law" (257/underlined). Given the available evidence, Schmitt objected to her argument that the new norm of crimes against humanity as a crime against the human status could capture the unprecedented genocidal violence of the Holocaust.

What drove Arendt's interest in the legal norms created after WWII was *not* whether they "were retroactive, which, of course, they had to be, but whether they were adequate, that is, whether they applied only to crimes previously unknown" (254/underlines/marginal notation).[50] In fact, she submits that it was the very nature of Nazi violence itself, not the Allies at Nuremberg, that had created the new crime of crimes against humanity. Schmitt highlights her argument that it was when "the Nazi regime […] wished to make the entire Jewish people disappear from the face of the earth" that "the crime against humanity […] appeared" (268/side mark/underline). For Arendt, crimes against humanity arose from Nazi violations of "the order of mankind" (272/side mark), an order that existed before and above Nuremberg's legal creations.

[50] Schmitt writes "infandum scelus" next to this line, clearly indicating his awareness of the tension between Arendt's 'Epilogue' and his *Gutachten*.

It is precisely the possibility of such commensurability between Nazi atrocities and law that Schmitt denied in the *Gutachten*. He hence takes note of Arendt's argument that the qualitatively different nature of Nazi violence could be represented by a qualitatively different crime, highlighting her assertion that "nothing is more pernicious to an understanding of these new crimes […] than the common illusion that the crime of murder and the crime of genocide are essentially the same, and that the latter therefore is "no new crime properly speaking"" (272/side mark). He further closely attended to her understanding of the features that distinguished crimes against humanity, which she claims the Jerusalem court failed to fully grasp. He highlights her observation that the Jerusalem court grappled with the mode of perpetration applicable to Eichmann, because it "touched upon the very essence of this new crime, which was no ordinary crime, and the very nature of this criminal, who was no common criminal" (246/side mark). Eichmann argued that he "was guilty only of "aiding and abetting"", not of direct perpetration, and "the prosecution had not succeeded in proving him wrong" (246/side mark), because it was "unable to understand a mass murderer who had never killed" (215/side mark/underline).

As a result, Arendt's defense of the *legitimacy* of Eichmann's capital punishment as a criminal against humanity and the Jewish people further drew Schmitt's attention. He himself imagined a kind of *non-legal punishment* of the Nazis' *scelus infandum* in the 'note'.[51] He

[51] Although Schmitt and Arendt diverged on the question of the legal versus a-legal punishment of Nazi officials, they both considered *mens rea* (guilty mind) irrelevant in this context. Schmitt highlights Arendt's argument that Eichmann must be sentenced for "the actuality of what he did" without considering the "possible non-criminal nature of [his] inner life" (278/underline). Schmitt similarly argued in the *Gutachten* that one "must [not] inquire [about] the extent to which the perpetrators had a criminal intent" (Schmitt 1945, 135) and

thought that Europe's 1815 "solemn and effective […] condemnation of Napoleon" could inform the "condemnation of Nazism", which however must be "more strict and impressive" while being "solemn in its form and striking in its effect", because "the crimes of Hitler are greater than those of Napoleon" (Schmitt 1945, 197). Unsurprising then is Schmitt's keen focus on the Epilogue's ending, where Arendt offers a fictional sentencing speech, which – had the judges delivered it – would have properly revealed the justice of the death penalty. He heavily highlights the final lines of this fictional speech (279/underlines/side mark):

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

Schmitt writes "earth" in the margins of this passage, a term central to Schmitt's political and legal theory. Arendt's usage of 'earth' in terms of 'world', designating a space shared by the human race in its plurality, returns us to Schmitt's focus on her theorization of territory as an intersubjective space of action. The world order Arendt here imagines is not one of relations between sovereign states bounded by the territory of concrete soil. Instead, she casts humanity as a global community, whose diverse members share the earth as an interactively lived-in world. Eichmann's attack on this order of humanity hence justifies his death penalty, because he "has committed the ultimate crime against humanity, which is why "no member of the

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that "it suffices to establish […] facts and […] perpetrators without any regard for hitherto existing positive penal law" (ibid.).

human race can be expected to share the earth" with him" (Luban 2015, 309). Arendt concluded that Eichmann's life must be taken in the name of 'the human race' because of her theory of humanity, which could not have been more different than that of Schmitt. In the end, Arendt's criminal against humanity must be eliminated – much like Schmitt's enemy of humanity.

IV) Conclusion

I have argued that Schmitt's reading of *Eichmann* highlights his and Arendt's rival assessments of the capacity of law to capture political violence on the one hand and their competing conceptions of the relationship between law and community on the other. In particular, I have argued that Schmitt saw Arendt's theorization of territory and humanity as radically different deployments of concepts central to his own philosophy. This point raises the question of what we can learn from the archival materials that we could not have deduced from Schmitt and Arendt's published works. Three answers present themselves. First, the archival findings support interpretations of Schmitt as a systematic rather than situational thinker, whose thought demonstrates long-standing consistencies that stretch across published works and into his decades of silence after WWII (see also Koskenniemi 2017; Schupmann 2017). Second, the value of the archival information is thrown into sharper relief once we appraise the qualitative difference between the insights derived from evidence of Schmitt's engagement with *Eichmann* and insights that we could have drawn from a comparison of Arendt and Schmitt's published writings. Readers of their published work could of course also compare and contrast their competing conceptions of humanity and territory. But only the archival evidence on the convergences and divergences between Schmitt and Arendt demonstrates that Schmitt himself, as a theorist of the foundations of the modern international (legal) order and as one of the most outspoken critics of humanitarian norms in politics,

recognized Arendt's conceptual interventions as important *and* saw in them re-deployments of ideas central to his own oeuvre. Third, and relatedly, it is only through the archival evidence that we know for sure which portions of *Eichmann*'s epilogue Schmitt focused on. As a result, we can say with certainty that he centered his attention on the Epilogue and thus on Arendt's reflections on jurisprudence and criminal law that were prompted by the distinct features of the atrocities of a regime of which he was once a part. By comparison, his mark-ups of the text indicate that he was uninterested in Arendt's 'banality of evil' thesis, for which the book is most widely known and that in itself has prompted a complex body of scholarship. The archival evidence hence demonstrates that Schmitt read *Eichmann* primarily through the prism of his own political and legal philosophy. As a result, his reading invests Arendt's now-canonical book with a distinct theoretical topography, the specificity of which would remain foreclosed by studying their respective published works only.

Viewing Arendt's philosophical interventions in *Eichmann* in the mirror of Schmitt's engagement therefore presents anew questions about the relationship between international crimes and political community and between international criminal law and political violence. The International Criminal Court's record over the past nineteen years invites us to rethink Arendt's argument that only an international criminal tribunal could have properly adjudicated Eichmann's crimes against humanity. It is of course correct that a crime by definition offends a community as a whole, not only the concrete victims. Yet, Schmitt's skepticism of 'humanity' accentuates the question of how the International Criminal Court, dependent as it (mostly) is on sovereign consent for its operation, meaningfully represents a community of humanity. And although Arendt did not use 'crimes against humanity' in any technical sense of the term, the crime's formal codification in international criminal law raises the question in what sense it encapsulates violence that is specifically 'against humanity'. This question is particularly timely, because an international crime of ecocide to this day has

not been formalized, despite widely audible claims that ‘humanity’ as a whole is now threatened by ecological collapse. Again, there is no need to subscribe to Schmitt’s dismissal of humanity derived from his attachment to ‘the political’ as combative antagonisms, but his attention to Arendt’s theorization of humanity in conjunction with her call for an international criminal tribunal can temper our expectation that appeals to ‘humanity’ can occasion the kind of change needed to address ecological destruction.

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