

# On the Alleged Conflict between Democracy and International Law

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It is December 12, 1960. Israeli secret agents have captured Adolf Eichmann, and the Israeli government has declared its intention to put Eichmann on trial. Karl Jaspers writes to Hannah Arendt: “The Eichmann trial is unsettling . . . because I am afraid Israel may come away from it looking bad no matter how objective the conduct of the trial. . . . Its significance is not in its being a legal trial but in its establishing of historical facts and serving as a reminder of those facts for humanity.”<sup>1</sup> For the next several months and eventually years an exchange ensues between Hannah Arendt and her teacher and mentor, Karl Jaspers, about the legality or illegality of the Eichmann trial, about institutional jurisdiction, and about the philosophical foundations of international law and in particular of “crimes against humanity.”

Arendt replies that she is not as pessimistic as Jaspers is about “the legal basis of the trial.”<sup>2</sup> Israel can argue that Eichmann had been indicted in the first trial in Nuremberg and escaped arrest. In capturing Eichmann, Israel was capturing an outlaw—a *hostis humani generis* (an enemy of the human race)—who had been condemned of “crimes against humanity.” He should have appeared before the Nuremberg court, but since there was no successor court to carry out its mission, Arendt thinks that Israeli courts have a plausible basis for assuming jurisdiction.

According to Hannah Arendt, *genocide* is the one crime that truly deserves the label

“crime against humanity.” “Had the court in Jerusalem,” she writes, “understood that there were distinctions between discrimination, expulsion, and genocide, it would have become clear that the supreme crime it was confronted with, the physical extermination of the Jewish people, was a crime against humanity, perpetrated upon the body of the Jewish people. . . .”<sup>3</sup>

If, however, there are crimes that can be perpetrated against humanity itself, then the individual human being is considered not only as a being worthy of moral respect but as having a legal status as well that ought to be protected by international law. The distinguishing feature of this legal status is that it would take precedence over all existing legal orders and it would bind them.<sup>4</sup> *Crimes against humanity* are different from other

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<sup>1</sup> Lotte Kohler and Hans Saner, eds., *Hannah Arendt–Karl Jaspers Correspondence: 1926–1969*, trans. Robert and Rita Kimber (New York: Harcourt Brace Jovanovich, 1992), pp. 409–10.

<sup>2</sup> *Ibid.*, p. 414.

<sup>3</sup> Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1963; rev. ed., 1994), p. 269.

<sup>4</sup> Kohler and Saner, eds., *Hannah Arendt–Karl Jaspers Correspondence*, p. 414.

crimes, which can only exist when there is a known and promulgated law that has been violated. But which are the laws that crimes against humanity violate, particularly if, as in the case of Eichmann and the Nazi genocide of the Jews, a state and its established legal system sanctify genocide, and even order it to be committed? A crime, as distinct from a moral injury, cannot be defined independently of posited law and a positive legal order.

Arendt is aware that on account of philosophical perplexities, there will be a tendency to think of crimes against humanity as “crimes against humanness” or “humane-ness,” as if what was intended was a moral injury that violated some kind of shared moral code. The Nuremberg Charter’s definition of “crimes against humanity” (*Verbrechen gegen die Menschheit*) was translated into German as “*Verbrechen gegen die Menschlichkeit*” (crimes against humaneness), “as if,” she observes, “the Nazis had simply been lacking in human kindness, certainly the understatement of the century.”<sup>5</sup>

Although Jaspers is willing to accept Arendt’s distinction between *crimes against humanity* versus *humaneness*, he points out that since international law and natural law are not “law in the same sense that underlies normal court proceedings,”<sup>6</sup> it would be most appropriate for Israel to transfer the competency to judge Eichmann either to the UN, to the International Court at The Hague, or to courts provided for by the UN Charter.

Neither Arendt nor Jaspers harbors any illusions that the UN General Assembly would rise up to this task.<sup>7</sup> The postscript to *Eichmann in Jerusalem* ends on an unexpected and surprising note: “It is quite conceivable that certain political responsibilities among nations might some day be adjudicated in an international court; what is inconceivable is that such a court would be a criminal tribunal which pronounces on

the guilt or innocence of individuals.”<sup>8</sup>

Why does Arendt deny that an International Criminal Court is conceivable? Does she mean that it is unlikely to come into existence, or rather that, even if it were to come into existence, it would be without authority? Her position is all the more baffling since her very insistence upon the juridical as opposed to the merely moral dimension of crimes against humanity suggests the need for a standing international body that would possess the jurisdiction to try such crimes committed by individuals.

### COSMOPOLITAN NORMS OF JUSTICE

The Eichmann trial, much like the Nuremberg trials before it, captured some of the perplexities of the emerging norms of international and, eventually, cosmopolitan justice. It is my thesis that since the UN Declaration of Human Rights in 1948, we have entered a phase in the evolution of global civil society that is characterized by a transition from *international* to *cosmopolitan* norms of justice. While norms of international justice frequently emerge through treaty obligations to which states and their representatives are signatories, cosmopolitan norms of justice accrue to individuals as moral and legal persons in a worldwide civil society. Even if cosmopolitan norms also originate through treatylike obligations, such as the UN Charter can be considered to be for the signatory states, their peculiarity is that they endow individuals with certain rights and claims,

<sup>5</sup> Arendt, *Eichmann in Jerusalem*, p. 275; and Kohler and Saner, eds., *Hannah Arendt–Karl Jaspers Correspondence*, pp. 423, 431.

<sup>6</sup> Kohler and Saner, eds., *Hannah Arendt–Karl Jaspers Correspondence*, p. 424.

<sup>7</sup> Arendt, *Eichmann in Jerusalem*, p. 270.

<sup>8</sup> *Ibid.*, p. 298.

and often against the will of the states that are themselves signatories. This is the uniqueness of the many human rights agreements signed since World War II. They signal an eventual transition from international law based on treaties among states to cosmopolitan law understood as public law that binds and bends the will of sovereign nations.<sup>9</sup>

The rise of multiple human rights regimes causes both the collusion and confluence of international and domestic law. By an “international human rights regime,” I understand a set of interrelated and overlapping global and regional regimes that encompass human rights treaties as well as customary international law or international soft law.<sup>10</sup> The

consequence is a complex system of interdependence that gives the lie to Carl Schmitt’s dictum that “there is no sovereign to force the sovereign.”<sup>11</sup> As Gerald Neuman observes, “National constitutions vary greatly in their provisions regarding the relationship between international and domestic law. Some are more or less dualist, treating international norms as part of a distinct legal system. . . . Others are more or less monist, treating international law and domestic law as a single legal system, often giving some category of international norms legal supremacy over domestic legislation.”<sup>12</sup> The transformation of human rights codes<sup>13</sup> into generalizable norms that ought to govern the behavior of

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<sup>9</sup> See Anne-Marie Slaughter’s lucid statement, in “Leading Through Law,” *Wilson Quarterly* (Autumn 2003), pp. 42–43: “International law today is undergoing profound changes that will make it far more effective than it has been in the past. By definition international law is a body of rules that regulates relations among states, not individuals. Yet over the course of the 21st century, it will increasingly confer rights and responsibilities directly on individuals. The most obvious example of this shift can be seen in the explosive growth of international criminal law.”

<sup>10</sup> Such examples would include the UN treaty bodies under the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Rights of the Child. The establishment of the European Union has been accompanied by a Charter of Fundamental Rights and by the formation of a European Court of Justice. The European Convention for the Protection of Human Rights and Fundamental Freedoms, which encompasses states that are not EU members as well, permits the claims of citizens of adhering states to be heard by the European Court of Human Rights. Parallel developments can be seen on the American continent through the establishment of the Inter-American System for the Protection of Human Rights and the Inter-American Court of Human Rights. See Gerald Neuman, “Human Rights and Constitutional Rights: Harmony and Dissonance,” *Stanford Law Review* 55, no. 5 (2003), pp. 1863–901. By “soft law” is meant an international

agreement that is not concluded as a treaty and therefore not covered by the Vienna Convention on the Law of Treaties. Such an agreement is adopted by states that do not want a treaty-based relationship and do not want to be governed by treaty or customary law in the event of a breach of their obligations.

<sup>11</sup> Carl Schmitt, *The Concept of the Political*, trans., intro., and notes by George Schwab (Chicago: University of Chicago Press, [1927] 1996).

<sup>12</sup> Neuman, “Human Rights and Constitutional Rights,” p. 1875.

<sup>13</sup> I use the term “human rights codes” rather than “human rights” in this context for an important reason. Human rights need to be interpreted, concretized, and codified by each society’s own democratic constitutions according to their own legal, constitutional, political, and cultural traditions. I distinguish between *the principle of rights* and *the schedule of rights*. While the principle of rights establishes that a democratic constitution ought to incorporate basic or fundamental rights to which all are entitled, the schedule of rights means that the precise concretization of these rights occurs through a process of collective self-determination. Of course, there will need to be a permissible range of interpretation and determination, for it is quite possible for countries with autocratic and illiberal traditions to claim that there is a schedule of “Asian rights” or “Islamic rights” that would not recognize the equal rights of women to divorce and inheritance, for example, as their male counterparts. In such cases, a contentious dialogue ensues between those upholding the general human rights norms enshrined in various human rights treaties and existing governments that choose to interpret them in a specific way. This is an example of “democratic iterations” that I discuss below.

sovereign states and in some cases their incorporation into domestic constitutions is one of the most promising aspects of contemporary political globalization processes.

We are witnessing this development in at least three related areas:

*Crimes Against Humanity, Genocide, and War Crimes.* The concept of *crimes against humanity*, first articulated by the Allied powers in the Nuremberg trials of Nazi war criminals, stipulates that there are certain norms in accordance with which state officials as well as private individuals are to treat one another, even, and precisely under, conditions of extreme hostility and war. Ethnic cleansing, mass executions, rape, cruel and unusual punishment of the enemy, such as dismemberment, which occur under conditions of a “widespread or systematic attack,” are proscribed and can all constitute sufficient grounds for the indictment and prosecution of individuals who are responsible for these actions, even if they are or were state officials, or subordinates who acted under orders. The refrain of the soldier and the bureaucrat—“I was only doing my duty”—is no longer an acceptable ground for abrogating the rights of humanity in the person of the other, even when, and especially when, the other is your enemy.

During the Nuremberg trials, “crimes against humanity” was used to refer to crimes committed during international armed conflicts.<sup>14</sup> Immediately after the Nuremberg trials, *genocide* was also included as a crime against humanity, but was left distinct, due its own jurisdictional status, which was codified in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide (1948). *Genocide* is the knowing and willful destruction of the way of life and existence of a collectivity through acts of total war, racial extinction, or ethnic cleansing. It is the

supreme crime against humanity, in that it aims at the destruction of human variety, of the many and diverse ways of being human. Genocide does not only eliminate individuals who may belong to this or another group; it aims at the extinction of their way of life.<sup>15</sup>

*War crimes*, as defined in the Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), initially only applied to *international conflicts*. With the Statute of the International Criminal Tribunal for Rwanda (1994), recognition was extended to *internal armed conflict* as well. “War crimes” now refers to international as well as internal conflicts that involve the mistreatment or abuse of civilians and noncombatants, as well as one’s enemy in combat.<sup>16</sup>

Thus, in a significant development since World War II, crimes against humanity, genocide, and war crimes have all been extended to apply not only to atrocities that take place in international conflict situations but also to events *within* the borders of a sovereign country that may be perpetrated by officials of that country and/or by its citizens during peacetime.

The continuing rearticulation of these three categories in international law, and in particular their extension from situations of international armed conflict to civil wars within a country and to the actions of governments against their own people, has in

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<sup>14</sup> Charter of the International Military Tribunal, 1945, Art. 6 (c), as cited in Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (New York: Clarendon Press, [1997] 2002) 2nd ed., pp. 26–45; and William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001), pp. 6–7.

<sup>15</sup> Ratner and Abrams, *Accountability for Human Rights Atrocities*, pp. 35–36.

<sup>16</sup> *Ibid.*, pp. 80–110; and Schabas, *Introduction to the International Criminal Court*, pp. 40–53.

turn encouraged the emergence of the concept of “humanitarian interventions.”

*Humanitarian Interventions.* The theory and practice of humanitarian interventions, to which the United States and its NATO allies appealed in order to justify their actions against ethnic cleansing and continuing crimes against the civilian population in Bosnia and Kosovo, suggest that when a sovereign nation-state egregiously violates the basic human rights of a segment of its population on account of their religion, race, ethnicity, language, or culture there is a *generalized moral obligation* to end actions such as genocide and crimes against humanity.<sup>17</sup> In such cases, human rights norms trump state sovereignty claims. No matter how controversial in interpretation and application they may be, humanitarian interventions are based on the growing consensus that the sovereignty of the state to dispose over the life, liberty, and property of its citizens or residents is not unconditional or unlimited.<sup>18</sup> State sovereignty is no longer the ultimate arbiter of the fate of citizens or residents. The exercise of state sovereignty even within domestic borders is increasingly subject to internationally recognized norms that prohibit genocide, ethnocide, mass expulsions, enslavement, rape, and forced labor.

*Transnational Migration.* The third area in which international human rights norms are creating binding guidelines upon the will of sovereign nation-states is that of international migration. *Humanitarian interventions* deal with the treatment by nation-states of their citizens or residents; *crimes against humanity* and *war crimes* concern relations among enemies or opponents in nationally bounded as well as extraterritorial settings. *Transnational migrations*, by contrast, pertain to the rights of individuals not insofar as they are considered members

of concrete bounded communities, but insofar as they are human beings *simpliciter*, when they come into contact with, seek entry into, or want to become members of territorially bounded communities.

The Universal Declaration of Human Rights recognizes the right to freedom of movement across boundaries, a right to emigrate—that is, to leave a country—but not a right to immigrate, a right to enter a country (Article 13). Article 14 anchors the right to enjoy asylum under certain circumstances, while Article 15 proclaims that everyone has “the right to a nationality.” The second half of Article 15 stipulates that “No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”

Yet the declaration is silent on states’ *obligations* to grant entry to immigrants, to uphold the right of asylum, and to permit citizenship to alien residents and denizens. These rights have no specific addressees, and they do not appear to anchor *specific* obligations on the part of second and third parties to comply with them. Despite the cross-border character of these rights, the declaration upholds the sovereignty of individual states. A series of internal contradictions between universal human rights claims and territorial sovereignty are thereby built right into the logic of the most comprehensive international law document in our world.

The Geneva Convention of 1951 Relating to the Status of Refugees, and its Protocol added in 1967, is the second most important international legal document after the Uni-

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<sup>17</sup> Allen Buchanan, “From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform,” *Ethics* 111 (July 2001), pp. 673–705.

<sup>18</sup> Michael Doyle, “The New Interventionism,” in Thomas W. Pogge, ed., *Global Justice* (Malden, Mass.: Blackwell, 2001), pp. 219–42.

versal Declaration of Human Rights. Nevertheless, neither the existence of this document nor the creation of the United Nations High Commissioner on Refugees has altered the fact that this convention and its protocol are binding on signatory states alone and can be brazenly disregarded by nonsignatories and, at times, even by signatory states themselves.

Some lament the fact that as international human rights norms are increasingly invoked in immigration, refugee, and asylum disputes, territorially delimited nations are challenged not only in their claims to control their borders but also in their prerogative to define the “boundaries of the national community.” Others criticize the Universal Declaration for not endorsing “institutional cosmopolitanism,” and for upholding an “interstatal” rather than a truly cosmopolitan international order.<sup>19</sup> Yet one thing is clear: the treatment by states of their citizens and residents within their boundaries is no longer an unchecked prerogative. One of the cornerstones of Westphalian sovereignty—namely, that states enjoy ultimate authority over all objects and subjects within their circumscribed territory—has been delegitimized through international law.

The evolution of cosmopolitan norms, however, is rife with a central contradiction: while territorially bounded states are increasingly subject to international norms, states themselves are the principal signatories as well as enforcers of the multiple and varied human rights treaties and conventions through which international norms spread. In this process, the state is both sublated and reinforced in its authority. Throughout the international system, as long as territorially bounded states are recognized as the sole legitimate units of negotiation and representation, a tension, and at

times even a fatal contradiction, is palpable: the modern state system is caught between *sovereignty* and *hospitality*, between the prerogative to choose to be a party to cosmopolitan norms and human rights treaties, and the obligation to extend recognition of these human rights to all.

In a Kantian vein, by “hospitality” I mean to refer to all human rights claims that are cross-border in scope. The tension between sovereignty and hospitality is all the more real for liberal democracies since they are based on the fragile but necessary negotiation of constitutional universalism and territorial sovereignty.

## THE PARADOX OF DEMOCRATIC LEGITIMACY

Ideally, democratic rule means that all members of a sovereign body are to be respected as bearers of human rights, and that the consociates of this sovereign freely associate with one another to establish a regime of self-governance under which each is to be considered both author of the laws and subject to them. This ideal of the original contract, as formulated by Jean-Jacques Rousseau and adopted by Immanuel Kant, is a heuristically useful device for capturing the logic of modern democracies. Modern democracies, unlike their ancient counterparts, conceive of their citizens as rights-bearing consociates. The rights of the citizens rest upon the “rights of man.” “Les droits de l’homme et du citoyen” do not contradict one another; quite to the contrary, they are coimplicated. This is the idealized logic of the modern democratic

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<sup>19</sup> For the first position, see David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (Baltimore: Johns Hopkins University Press, 1997), p. 5; for the second, see Onora O’Neill, *Bounds of Justice* (Cambridge: Cambridge University Press, 2000), p. 180.

revolutions following the American and French examples.

The democratic sovereign draws its legitimacy not merely from its act of constitution, but equally significantly, from the conformity of this act to universal principles of human rights, which are in some sense said to precede and antedate the will of the sovereign and in accordance with which the sovereign undertakes to bind itself. “We, the people” refers to a particular human community, circumscribed in space and time, sharing a particular culture, history, and legacy; yet this people establishes itself as a democratic body by acting in the name of the “universal.” The tension between universal human rights claims and particularistic cultural and national identities is constitutive of democratic legitimacy. Modern democracies act in the name of universal principles, which are then circumscribed within a particular civic community. This is the “Janus face of the modern nation,” in the words of Jürgen Habermas.<sup>20</sup>

Since Rousseau, however, we also know that the will of the democratic people may be legitimate but unjust, unanimous but unwise. “The general will” and “the will of all” may not overlap either in theory or in practice. Democratic rule and the claims of justice may contradict one another. The democratic precommitments expressed in the idealized allegiance to universal human rights—life, liberty, and property—need to be reactualized and renegotiated within actual polities as democratic intentions. Potentially, there is always a conflict between an interpretation of these rights claims that precede the declared formulations of the sovereign and the actual enactments of the democratic people that could potentially violate such interpretations. We encounter this conflict in the history of political thought as the conflict between liberalism

and democracy, and even as the conflict between constitutionalism and popular sovereignty. In each case the logic of the conflict is the same: to assure that the democratic sovereign will uphold certain constraints upon its will in virtue of its precommitment to certain formal and substantive interpretations of rights. Liberal and democratic theorists disagree with one another as to the proper balance of this mix: while strong liberals want to bind the sovereign will through precommitments to a list of human rights, strong democrats reject such a prepolitical understanding of rights and argue that they must be open to renegotiation and reinterpretation by the sovereign people—admittedly within certain limits.

Yet this paradox of democratic legitimacy has a corollary that has been little noted: every act of self-legislation is also an act of self-constitution. “We, the people” who agree to bind ourselves by these laws are also defining ourselves as a “we” in the very act of self-legislation. It is not only the general laws of self-government that are articulated in this process; the community that binds itself by these laws defines itself by drawing boundaries as well, and these boundaries are territorial as well as civic. The will of the democratic sovereign can only extend over the territory that is under its jurisdiction; democracies require borders. Empires have frontiers, while democracies have borders. Democratic rule, unlike imperial dominion, is exercised in the name of some specific constituency and binds that constituency alone. Therefore, at the same time that the sovereign defines itself territorially, it also defines itself in civic terms. Those who are

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<sup>20</sup> Jürgen Habermas, “The European Nation-State: On the Past and Future of Sovereignty and Citizenship,” in Ciaran Cronin and Pablo de Greiff, eds., *The Inclusion of the Other: Studies in Political Theory* (Cambridge: MIT Press, 1998), p. 115.

full members of the sovereign body are distinguished from those who “fall under its protection,” but who do not enjoy “full membership rights.” Women and slaves, servants, propertyless white males, non-Christians and nonwhite races were historically excluded from membership in the sovereign body and from the project of citizenship. They were, in Kant’s famous words, “mere auxiliaries to the commonwealth.”<sup>21</sup>

In addition to these groups are those residents of the commonwealth who do not enjoy full citizenship rights either because they do not possess the requisite identity criteria through which the people defines itself, or because they belong to some other commonwealth, or because they choose to remain as outsiders. These are the “aliens” and “foreigners” amid the democratic people. They are different from second-class citizens, such as women and workers, as well as from slaves and tribal peoples. Their status is governed by mutual treaties among sovereign entities—as would be the case with official representatives of a state power upon the territory of the other; and if they are civilians, and live among citizens for economic, religious, or other cultural reasons, their rights and claims exist in that murky space defined by respect for human rights on the one hand and by international customary law on the other. They are refugees from religious persecution, merchants and missionaries, migrants and adventurers, explorers and fortune seekers.

I have circumscribed in general theoretical terms the paradox of democratic legitimacy. The paradox is that the republican sovereign should undertake to bind its will by a series of precommitments to a set of formal and substantive norms, usually referred to as “human rights.”

I want to argue that while this paradox can never be fully resolved in democracies,

its impact can be mitigated through the renegotiation and reiteration of the dual commitments to human rights and sovereign self-determination. Popular sovereignty is not identical with territorial sovereignty, although the two are closely linked, both historically and normatively. Popular sovereignty means that all full members of the demos are entitled to have a voice in the articulation of the laws by which the demos governs itself. Democratic rule extends its jurisdiction to those who can view themselves as the authors of such rule. There never was a perfect overlap between the circle of those who stand under the law’s authority and those recognized as full members of the demos. Every democratic demos has disenfranchised some, while recognizing only certain individuals as full citizens. Territorial sovereignty and democratic voice have never matched completely. Yet presence within a circumscribed territory, and in particular continuing residence within it, brings one under the authority of the sovereign—whether democratic or not. The new politics of cosmopolitan membership is about negotiating this complex relationship between rights of full membership, democratic voice, and territorial residence. While the demos, as the popular sovereign, must assert control over a specific territorial domain, it can also engage in reflexive acts of self-constitution, whereby the boundaries of the demos can be readjusted.

The evolution of cosmopolitan norms, from crimes against humanity to norms extending to regulate refuge, asylum, and immigration, have caught most liberal democracies within a network of obligations

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<sup>21</sup> Immanuel Kant, “Die Metaphysik der Sitten in zwei Teilen” [1797], in Ernst Cassirer, ed., *Immanuel Kants Werke* (Berlin: Cassirer, 1912), p. 121; *The Metaphysics of Morals*, trans. and ed. Mary Gregor (Cambridge: Cambridge University Press, 1996), p. 140.



to recognize certain rights claims. Although the asymmetry between the “demos” and the “populus,” the democratic people and the population as such, has not been overcome, norms of hospitality have gone far beyond what they were in Kant’s understanding: the status of alienage is now protected by civil as well as international laws; the guest is no longer a guest but a resident alien, as we say in American parlance, or a “foreign co-citizen,” as Europeans say. In a remarkable evolution of the norms of hospitality, within the European Union in particular, the rights of third-country nationals are increasingly protected by the European Convention on Fundamental Rights and Freedoms, with the consequence that citizenship, which was once the privileged status entitling one to rights, has now been disaggregated into its constituent elements.<sup>22</sup>

#### TESTING THE PARADOX: THE CASE OF GERMANY

I want to concretize these considerations by turning to a decision of the German Supreme Court on alien suffrage rights in order to illustrate some of the conceptual issues involved in a concrete institutional setting.

On October 31, 1990, the German Constitutional Court ruled against a law passed by the provincial assembly of Schleswig-Holstein on February 21, 1989, that changed the qualifications for participating in local municipal and district-wide elections.<sup>23</sup> According to Schleswig-Holstein’s election laws in effect since May 31, 1985, all those who were defined as German in accordance with Article 116 of the Basic Law, who had completed the age of eighteen and who had resided in the electoral district for at least three months were eligible to vote. The law of February 21, 1989, proposed to amend this as follows: all foreigners residing in

Schleswig-Holstein for at least five years, who possessed a valid permit of residency or who were in no need of one, and who were citizens of Denmark, Ireland, the Netherlands, Norway, Sweden, or Switzerland, would be able to vote in local and district-wide elections. The choice of these six countries was made on the grounds of reciprocity. Since these countries permitted their foreign residents to vote in local, and in some cases regional, elections, the German provincial legislators saw it appropriate to reciprocate.

The claim that the new election law was unconstitutional was brought by 224 members of the German Parliament, all of them members of the conservative Christian Democratic and Christian Social Union (CDU/CSU) party; it was supported by the Federal Government of Germany. The court justified its decision with the argument that the proposed change of the electoral law contradicted “the principle of democracy,” as laid out in Articles 20 and 28 of Germany’s Basic Law, and according to which “All state

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<sup>22</sup> For a more detailed discussion of institutional developments, particularly within the European context leading to the disaggregation of citizenship rights, see Seyla Benhabib, *The Rights of Others: Aliens, Citizens and Residents (The John Seely Memorial Lectures)* (Cambridge: Cambridge University Press, 2004), ch. 4.

<sup>23</sup> A similar change in its election laws was undertaken by the free state of Hamburg such as to enable those of its foreign residents of at least eighteen years of age to participate in the election of local municipal assemblies. Since Hamburg is not a federal province but a free city-state, with its own constitution, some of the technical aspects of this decision are not parallel to those in the case of Schleswig-Holstein. I chose to focus on the latter case alone. It is nonetheless important to note that the federal government, which had opposed Schleswig-Holstein’s electoral reforms, supported those of Hamburg. See *Bundesverfassungsgericht* (Federal Constitutional Court; abbreviated hereafter as *BVerfGe*) 83, 60, II, No. 4, pp. 60–81; and *BVerfGe* 83, II, No. 3, p. 37. All translations from the German are mine.

power [*Staatsgewalt*] proceeds from the people.”<sup>24</sup> Furthermore,

The people [*das Volk*], which the Basic Law of the Federal Republic of Germany recognizes to be the bearer of the authority [*Gewalt*] from which issues the constitution, as well as the people which is the subject of the legitimation and creation of the state, is the German people. Foreigners do not belong to it. Membership in the community of the state [*Staatsverband*] is defined through the right of citizenship. . . . Citizenship in the state [*Staatsangehörigkeit*] constitutes a fundamentally indissoluble personal right between the citizen and the state. The vision [or image—*Bild*] of the people of the state [*Staatsvolkes*], which underlies this right of belonging to the state, is the political community of fate [*die politische Schicksalsgemeinschaft*], to which individual citizens are bound. Their solidarity with and their embeddedness in [*Verstrickung*] the fate of their home country, which they cannot escape [*sich entrinnen können*], are also the justification for restricting the vote to citizens of the state. They must bear the consequences of their decisions. By contrast, foreigners, regardless of however long they may have resided in the territory of the state, can always return to their homeland.<sup>25</sup>

This resounding statement by the court can be broken down into three components: first, a disquisition on the meaning of *popular sovereignty* (all power proceeds from the people); second a *procedural* definition of how we are to understand *membership* in the state; third, a philosophical explication of the nature of the bond between the state and the individual, based on the vision of a “*political community of fate*.” The court argued that according to the principle of popular sovereignty, there needed to be a “congruence” between the principle of democracy, the concept of the people, and the main guidelines for voting rights, at all levels of state power—namely, federal, provincial, district, and communal. Different conceptions of popular sovereignty could not be employed at differ-

ent levels of the state. Permitting long-term resident foreigners to vote would imply that popular sovereignty would be defined in different fashion at the district-wide and communal levels than at the provincial and federal levels. In an almost direct repudiation of the Habermasian discursive democracy principle, the court declared that Article 20 of Germany’s Basic Law does not imply that “the decisions of state organs must be legitimized through those whose interests are affected [*Betroffenen*] in each case; rather, their authority must proceed from the people as a group bound to each other as a unity [*das Volk als eine zur Einheit verbundene Gruppe von Menschen*].”<sup>26</sup>

The provincial parliament of Schleswig-Holstein challenged the court’s understanding and argued that neither the principle of democracy nor that of the people excludes the rights of foreigners to participate in elections: “The model underlying the Basic Law is the construction of a democracy of human beings, and not that of the collective of the nation. This basic principle does not permit that one distinguish in the long-run between the people of the state [*Staatsvolk*] and an association of subservients [*Untertanenverband*].”<sup>27</sup>

The German Constitutional Court eventually resolved this controversy about the meaning of popular sovereignty by upholding a unitary and functionally undifferentiated version of it, but it did concede that the sovereign people, through its representatives, could change the definition of citizenship. Procedurally, “the people” simply means all those who have the requisite state membership. If one is a citizen, one has the right to vote; if not,

<sup>24</sup> *BVerfGE* 83, 37, No. 3, p. 39.

<sup>25</sup> *Ibid.*, pp. 39–40.

<sup>26</sup> *Ibid.*, p. 51.

<sup>27</sup> *Ibid.*, p. 42.

not. “So the Basic Law . . . leaves it up to the legislator to determine more precisely the rules for the acquisition and loss of citizenship and thereby also the criteria of belonging to the people. The law of citizenship is thus the site at which the legislator can do justice to the transformations in the composition of the population of the Federal Republic of Germany.” This can be accomplished by expediting the acquisition of citizenship by all those foreigners who are long-term permanent residents of Germany.<sup>28</sup>

The court here explicitly addresses what I have called the paradox of democratic legitimacy—namely, that those whose rights to inclusion or exclusion from the demos are being decided upon will not themselves be the ones to decide upon these rules. The democratic demos can change its self-definition by altering the criteria for admission to citizenship. The court still holds to the classical model of citizenship according to which democratic participation rights and nationality are strictly bundled together, but by signaling the procedural legitimacy of changing Germany’s naturalization laws, the court also acknowledges the power of the democratic sovereign to alter its self-definition such as to accommodate the changing composition of the population. The line separating citizens and foreigners can be renegotiated by the citizens themselves.

Yet the procedural democratic openness signaled by the court stands in great contrast to the conception of the democratic people, also adumbrated by the court, and according to which the people is viewed as “a political community of fate,” held together by bonds of solidarity in which individuals are embedded (*verstrickt*). Here the democratic people is viewed as an *ethnos*, as a community bound together by the power of shared fate, memories, solidarity, and belonging.

Such a community does not permit free entry and exit. Perhaps marriage with members of such a community may produce some integration over generations; but, by and large, membership in an *ethnos*—in a community of memory, fate, and belonging—is something that one is born into, although as an adult one may renounce this heritage, exit it, or wish to alter it. To what extent should one view liberal democratic polities as *ethnoi* communities? Despite its emphatic evocation of the nation as a “community of fate,” the court also emphasizes that the democratic legislator has the prerogative to transform the meaning of citizenship and the rules of democratic belonging. Such a transformation of citizenship may be necessary to do justice to the changed nature of the population. The demos and the *ethnos* do not simply overlap.

Written in 1990, this decision of the German Constitutional Court appears in retrospect as a swan song to a vanishing ideology of nationhood.<sup>29</sup> In 1993 the Treaty of Maastricht, or the Treaty on the European Union,

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<sup>28</sup> *Ibid.*, p. 52.

<sup>29</sup> I do not mean to suggest that nationalist ideologies and sentiments vanished from the unified Germany. Unlike in many of Germany’s neighboring countries, such as France and the Netherlands, however, they did lose institutional traction throughout the 1990s. The citizenship laws were passed by parliamentary majorities of Social Democrats, Greens, and Christian Democrats; but the price for the liberalization of citizenship was paid in terms of further restrictions on Germany’s rather generous asylum laws. So these transitions were not without cost. Nationalism reappeared on the German scene first when 1 million signatures were collected in a referendum in Hesse against permitting dual citizenship of immigrant children, who are now entitled to this only until they reach age twenty-four; the second instance was the recent Iraq war and deep fear and dislike of the U.S. administration under George W. Bush; and the third case was the surprisingly racialized debate about Turkey’s admission to membership talks in the EU in the fall of 2004. For a representative sample of the positions in this debate, see Claus Leggewie, *Die Türkei und Europa* (Frankfurt: Suhrkamp, 2004).

established European citizenship, which granted voting rights and rights to run for office for all citizens of the fifteen, and now twenty-five, members of the signatory states residing in the territory of other member countries. Of the six countries to whose citizens Schleswig-Holstein wanted to grant reciprocal voting rights—Denmark, Ireland, the Netherlands, Norway, Sweden, and Switzerland—only Norway and Switzerland remained nonbeneficiaries of the Maastricht Treaty since they were not EU members.

In the years following, an intense process of democratic iteration unfolded in the now-unified Germany, during which the challenge posed by the Federal Constitutional Court to the democratic legislator of bringing the definition of citizenship in line with the composition of the population was taken up, rearticulated, and reappropriated. The city-state of Hamburg, in its parallel plea to alter its local election laws, stated this very clearly: “The Federal Republic of Germany has in fact become in the last decades a country of immigration. Those who are affected by the law that is being attacked here are thus not strangers but cohabitants [*Inländer*], who only lack German citizenship. This is especially the case for those foreigners of the second and third generation born in Germany.”<sup>30</sup> The demos is not an *ethnos*, and those living in our midst who do not belong to the *ethnos* are not strangers either; they are rather “cohabitants,” or as later political expressions would have it, “our co-citizens of foreign origin” [*Ausländische Mitbürger*]. Even these terms, which may sound odd to ears not accustomed to any distinctions besides those of citizens, residents, and nonresidents, suggest the transformations of German public consciousness in the 1990s. This intense and soul-searching public debate finally led to an acknowledgment of the *fact* as well as the

*desirability* of immigration. The need to naturalize second- and third-generation children of immigrants was recognized, and the new German citizenship law was passed in January 2000.

Ten years after the German Constitutional Court turned down the election law reforms of Schleswig-Holstein and the city-state of Hamburg on the grounds that resident foreigners were not citizens and were thus ineligible to vote, Germany’s membership in the European Union led to the disaggregation of citizenship rights. Resident members of EU states can vote in local as well as EU-wide elections; furthermore, Germany now accepts that it is a country of immigration; immigrant children become German citizens according to *jus soli* and keep dual nationality until the age of twenty-four, at which point they must choose either German citizenship or that of their country of birth. Furthermore, long-term residents who are third-country nationals can naturalize if they wish to do so. The democratic people can reconstitute itself through such acts of democratic iteration so as to enable the extension of democratic voice. Aliens can become residents, and residents can become citizens. Democracies require porous borders.

The constitution of “we, the people” represents a fluid, contentious, contested, and dynamic process. All people possess a dual identity as an *ethnos*, as a community of shared fate, memories, and moral sympathies, on the one hand, and as the demos, as the democratically enfranchised totality of all citizens, who may or may not belong to the same *ethnos*, on the other. All liberal democracies that are modern nation-states exhibit these two dimensions. The politics of peoplehood consists in their negotiation.

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<sup>30</sup> *BVerfGE* 83, 37, II, p. 42.

The presence of so many guest workers in Germany is a reflection of the economic realities of Germany since World War II, just as the presence of so many migrants from Algeria, Tunisia, and Morocco, as well as from central Africa, today testifies to France's imperial past and conquests. Some would even argue that without their presence, the post-World War II German miracle would not have been conceivable.<sup>31</sup> Peoplehood is dynamic and not a static reality.

The presence of others who do not share the dominant culture's memories and morals poses a challenge to the democratic legislatures to rearticulate the meaning of democratic universalism. Far from leading to the disintegration of the culture of democracy, such challenges reveal the depth and the breadth of the culture of democracy. Only polities with strong democracies are capable of such universalist rearticulation, through which they refashion the meaning of their own peoplehood.

Let me anticipate some objections against the considerations developed above: in view of the resurgence of anti-immigration sentiment throughout Europe, from Denmark to France to Germany and to Italy; in view of the anti-Muslim backlash in all European countries, the Netherlands and France in particular; in view of the mobilization of deeply nationalist sentiments in Germany against Turkey's admission to membership talks with the EU in particular, isn't the account I have presented above one that flies in the face of historical realities? Far from cosmopolitanism, we are experiencing the rise of tribalism, nationalism, and civilizational wars.

I want to suggest that in an odd fashion, but in ways that are not unfamiliar to us from previous episodes of history, universalism and particularism may incite, invite, and even provoke one another's articula-

tion. Europe's migrants, and particularly European Muslims, have become symbols for Europe's own "othering," its gradual transformation from a continent of nation-states into a continent of pooled sovereignty, guided by cosmopolitan principles of universalist human rights. Europe's peoples may not be, and I believe definitely are not, ready for some of these transformations. The Muslim immigrants, with their visible otherness displayed through their modes of dress, dietary laws, habits of prayer, and generally repressive family and sexual ethic, are all too striking symbols of the loosening of the boundaries of the nation.

The transition to a political entity whose identity is as yet undefinable generates anxiety: is the EU a republican federation, a supersized nation-state, a free trading zone, or some sort of postnationalist condominium in which increasingly more functions of sovereignty are pooled? Whatever its precise future form, one thing is certain: the Europeans are set upon a path through which they have sublated the nation-state with all its paradoxical consequences. The condition of Europe's third-country nationals is a sorry reminder to them both of cultural othering and of the obsolescence of the nation. Not surprisingly, therefore, like the phoenix rising from the ashes, French nationalism returns to defend "Muslim girls against their patriarchal oppressors." As the Bernard Stasi report on the headscarves "affair" self-servingly proclaims, "The Republic cannot remain deaf to these girls' cry for help."<sup>32</sup>

In Germany, where the very concept of *Kultur* had been sullied by its associations

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<sup>31</sup> James F. Hollifield, *Immigrants, Markets, and States: The Political Economy of Postwar Europe* (Cambridge: Harvard University Press, 1992).

<sup>32</sup> "Commission de Réflexion Sur l'Application du Principe du Laïcité dans la République" (Paris: Office of the President, December 11, 2003), p. 58.

with the racializing overtones of the concept of the *Kulturnation*, socialist historians of the past, such as Hans-Ulrich Wehler, find it possible to recycle this old German set of ideas against the Turks, whose “culture” of militarism, the extermination of the Armenians, and intolerance toward the property of Christian churches is said to set them apart from Europe forever. Of course, many silently think of Germany what the Germans think of the Turks, once we substitute Jews for Armenians and Christians in these formulations. But the attempt of some German intellectuals and politicians to redefine Europe as a Christian cultural commonwealth has failed, precisely because of Germany’s own constitutional and legal commitments to the Treaty of Europe and the European Charter of Human Rights and Fundamental Freedoms. A slim majority, but a majority nevertheless, supported Turkey’s entry into the EU precisely on the basis of commitments that transcended German exceptionalism. It is this tension between cosmopolitan universalism and repressive secular nationalism that we must disentangle in today’s Europe.

Let me end by returning once more to the philosophical questions raised by cosmopolitan norms.

## THE NEW POLITICAL CONDITION

After the capture of Eichmann by Israeli agents in 1960, Arendt and Jaspers initiated a series of reflections on the status of international law and norms of cosmopolitan justice. Their queries can be summarized with three questions: (1) What is the ontological status of cosmopolitan norms in a postmetaphysical universe? (2) What is the authority of norms that are not backed by a sovereign with the power of enforcement? and (3) How can we reconcile cosmopolitan

norms with the fact of a divided mankind?

My answer to the third question, of how to reconcile cosmopolitanism with the unique legal, historical, and cultural traditions and memories of a people, is that we must respect, encourage, and initiate multiple processes of democratic iteration. By democratic iterations I mean social, cultural, legal, and political processes of struggle and contestation, as well as deliberation and argumentation, through which jurisgenerative politics develops.<sup>33</sup> Jurisgenerative politics are those cases of legal and political contestation when the meaning of rights and other fundamental constitutional principles are repositied, resignified and reappropriated by new and excluded groups, or by the citizenry in the face of unprecedented hermeneutic challenges and meaning constellations.

Universalist norms are thereby mediated with the self-understanding of local communities. The availability of cosmopolitan norms in the general public sphere raises the threshold of justification to which formerly exclusionary practices must now be submitted. Exclusions take place, but the threshold for justifying them is now higher. This higher threshold of justification triggers an increase in democratic reflexivity. It becomes increasingly more difficult to justify practices of exclusion against foreigners and others by democratic legislatures simply because their decisions express the will of the people; such decisions are now subject not only to constitutional checks and bal-

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<sup>33</sup> For further elaboration of these themes, see Benhabib, *The Rights of Others*, ch. 5. The term “jurisgenerative politics” comes from Robert Cover, “Nomos and Narrative,” *Harvard Law Review* 97, no. 1 (1983), pp. 4–68; I am using the term here in a sense that is much indebted to Frank Michelman, “Law’s Republic,” *Yale Law Journal* 97, no. 8 (1998), pp. 1493–537.

ances in domestic law but in the international arena as well. Reflexive grounds must be justifiable through reasons that would be valid for all. This means that such grounds can themselves be recursively questioned for failing to live up to the threshold set in their own very articulation.

To Arendt's and Jaspers's second question as to the authority of cosmopolitan norms, my answer is: *the democratic power of global civil society*. Of course, the global human rights regime by now has its agencies of negotiation, articulation, observation, and monitoring. In addition to processes of naming, shaming, and sanctions that can be imposed upon sovereign nations in the event of egregious human rights violations, the use of power by the international community, as authorized by the UN Security Council and the General Assembly, remains an option.

I come then to the final question: what is the ontological status of cosmopolitan norms in a postmetaphysical universe? Briefly, such norms and principles are morally constructive: they create a universe of meaning, values, and social relations that had not existed before in that they change the normative constituents and evaluative principles of the world of "objective spirit," to use Hegelian language. They found a new order—a *novo ordo saeculorum*. They are thus subject to all the paradoxes of revolutionary beginnings. Their legitimacy cannot be justified through appeal to antecedents or to consequents: it is the fact that there was no precedent for them that makes them unprecedented; likewise, we can only know their consequences once they have been adopted and enacted.

The act that "crimes against humanity" has come to name and to interdict was itself unprecedented in human history; that is, the mass murder of a human group on account

of its race, and not its deeds, through an organized state power with all the legal and technological means at its disposal. Certainly, massacres, group murders, and tribal atrocities were known and practiced throughout human history. The full mobilization of state power, with all the means of a scientific-technological civilization at its disposal, in order to extinguish a human group on account of its claimed racial characteristics, was wholly novel.

In conclusion: although Hannah Arendt was skeptical that international criminal law could ever be codified and properly reinforced, she in fact praised and commended the judges who sought to extend existing categories of international law to the criminal domain. She wrote:

If genocide is an actual possibility of the future, then no people on earth . . . can feel reasonably sure of its continued existence without the help and the protection of international law. Success or failure in dealing with the hitherto unprecedented can lie only in the extent to which this dealing may serve as a valid precedent on the road to international penal law. . . . In consequence of this as yet unfinished nature of international law, it has become the task of ordinary trial judges to render justice without the help of, or beyond the limitation set upon them through, positive, posited laws.<sup>34</sup>

However fragile their future may be, cosmopolitan norms have evolved beyond the point anticipated and problematized by Arendt. An International Criminal Court exists, although the Bush administration has rescinded the decision of former president Clinton to sign the Rome Treaty legitimizing it. The spread of cosmopolitan norms, from interdictions of war crimes, crimes against humanity, and genocide, to the increasing regulation of cross-border movements

<sup>34</sup> Arendt, *Eichmann in Jerusalem*, pp. 273–74.

through the Geneva Conventions and other accords, has yielded a new political condition: the local, the national, and the global are all imbricated in one another. Future democratic iterations will make their interconnections and interdependence deeper and wider. Rather than seeing this situation

as an undermining of democratic sovereignty, we can view it as promising the emergence of new political configurations and new forms of agency, inspired by the interdependence—never frictionless but ever promising—of the local, the national, and the global.