

EDITORIAL

The Limits of Law and the Courage to Act

An Irreverent Call to Arendtian Action in the Face of War*

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As I read and hear about the destruction, the war crimes, the sexual violence, and the dehumanizing effects of Russia's illegal war of aggression, I am struck by a sense of powerlessness. As I am reminded that this is only one of many ongoing violent conflicts in the world, I question the daily choice I make to teach and advocate for international law. Such conflicts painfully reveal the limits of the law I spend my life studying.

Law is a dependent creature. Its legitimacy, its effectiveness and its normative power depend on it being embedded in a concrete order, a *nomos*. It relies on a community of users, of believers, if you will. As a discursive practice, law needs humans to maintain the discourse. The collective use of legal discourse creates chains of meaning that stabilize interpretations¹ and create intersubjective understandings of the meaning of the law. The law also needs individual actors who implement the law and apply it to concrete situations. Carl Schmitt theorized that this entailed a sovereign within a concrete order that was necessarily connected to the land; a spatially delineated area in which law springs from the soil in an original act of land appropriation.² Bonnie Honig's subsequent scholarship shows that instead of one, unified sovereign will guaranteeing the law, each day again decisions must be made by myriad individuals at all levels within the community to either uphold the law or remake the law.³ Recently uncovered engagement of Hannah Arendt with Schmitt's work shows Arendt critiquing the aspect of conquest implicit in Schmitt's *nomos*. Instead, Arendt reimagines *nomos* as a durable political order,

* It is irreverent because I take great liberties with Arendt's conceptual framework in this editorial. To fully substantiate the position that Arendtian 'labor' (and maybe 'work') is under certain conditions actually Arendtian 'action' would require far more space than I have available to me here. I hope my readers will forgive my unconventional method and interpret it in the spirit it is meant: as an ode to the existential significance of the often-ignored, unglamorous, daily efforts to sustain peace and justice.

- 1 Judith Butler, *Bodies that Matter: On the Discursive Limits of 'Sex'* (New York: Routledge, 2011), 172-174 and 214.
- 2 Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. G.L. Ulmen (New York: Telos Press, 2006), 69.
- 3 Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton: Princeton University Press, 2009), 23.

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with stable institutions, in which law originates not from the soil but from the collective action of the people.⁴

Still, Schmitt's insistence that we develop a 'philosophy of concrete life',⁵ means we must face the fact that the law can only do so much. It can aid our efforts at norm setting, it can facilitate accountability, and it can provide us with a language to frame judgments of right and wrong. But when the concrete order supporting law is blatantly and violently challenged, as has been the case through Russia's flagrant violation of international law and explicit repudiation of its consent to be bound by this law,⁶ we see the limits of the law. Law cannot – by itself – prevent, punish or deliver reconciliation.⁷

What is to follow this realization? Do I throw up my hands and conclude there is no point to being a lawyer? Do I stick my head in the sand and ignore the disappointment of law? Or is there something else? I aim instead to draw guidance from what Hannah Arendt offers us on what it means to be human. Her writings on labor and action provide a spark of inspiration from which I improvise to conclude that we must face our disappointment and courageously engage with the space (however regrettably small) we are left with to shape our shared world.

First, in the face of violence and destruction of life, I choose to invest in the daily labor of maintaining the more or less peaceful relationships I am privileged to live among. This peace is a fragile gift that requires constant tending, care and forgiveness. It requires an infinite number of tedious, boring, and small motions, the 'repetitive and ceaseless' labor⁸ that keeps relationships healthy: resolving that annoying disagreement with my neighbor, repairing the trust of a colleague who feels mistreated, having that difficult discussion with a friend who unintentionally committed a microaggression, ensuring that a student accused of plagiarism receives the opportunity to tell their side of the story, reminding my young child not to hit. These acts are so small, they often go unnoticed and unappreciated, pushed aside in favor of the 'real' work I have to do. But it is this tending that mediates the inevitable conflict that erupts within society and works to channel it productively, fostering forgiveness and preventing antagonisms that would otherwise make the destruction of the other a viable option. Even if Arendt's rather disparaging assessment of such maintenance is right, and it 'never "produces"

4 Anna Jurkevics, 'Hannah Arendt Reads Carl Schmitt's *The Nomos of the Earth: A Dialogue on Law and Geopolitics from the Margins*', *European Journal of Political Theory* 16, no. 3 (2017): 359-360.

5 Carl Schmitt, *Political Theory: Four Chapters on the Concept of Sovereignty* (trans. George Schwab) (Cambridge, Mass.: MIT Press, 1985), 15.

6 On 15 March 2022, the Government of the Russian Federation communicated its withdrawal from the Council of Europe and its intention to denounce the European Convention on Human Rights, see Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe, 16 March 2022, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5da51 [last accessed 1 May 2022].

7 Louis E. Wolcher, *Ethics: New Trajectories in Law* (Routledge, 2021), 72.

8 Paul Voice, 'Labour, Work and Action', in *Hannah Arendt: Key Concepts*, ed. Patrick Hayden (Routledge, 2014), 37.

anything but life',⁹ producing life seems like quite a revolutionary act in the face of war.

Second, in the face of blatant violation of international law, I choose to maintain the promise that human dignity is worth protecting. I hold space for the memory of previous violations of law and human dignity, especially those perpetrated in my name. I actively recall violations by the United States in its invasion of Iraq and the violations caused by historical colonial violence and slavery. Day after day, year after year, I teach my students of international human rights law that legal standards exist, I teach them what these norms entail and explain how these norms – while not perfect – are an attempt to respect the human dignity that we are all endowed with. Day after day, year after year, I engage in the reproduction of these norms. This is not groundbreaking, original research. It wins me no grants. But it is this work that is needed to create a relatively durable shared world,¹⁰ the *nomos*, required for law to function.¹¹ Together with my colleagues doing the same, we strive to create a shared world that I would choose to live in.

Third, in times of crisis, I choose to push the law to become something new.¹² I choose to use my words and deeds to join with others to 'establish [new] relations and create new realities'¹³ in support of a more just law. Governments around Europe have deemed it possible to welcome Ukrainian refugees with open arms and fast-track their legal procedures. I can advocate for similar rules being applied to all people fleeing war and violence. Through collective efforts, we can fight for more inclusive and dignified treatment of all those without legal residence status. We can push for reform of the UN Security Council permanent members' veto powers and explore the possibility of ad hoc tribunals. The possibility of a Russian gas embargo emerges as a shining ray of hope for the energy transition, if we can seize the opportunity to invest in green alternatives.

We cannot know if these new beginnings will yield fruit.¹⁴ But our investment in healthy relationships that make forgiveness possible and our promise to fight for justice and human rights give us the courage to begin.¹⁵ In the end, new beginnings rely on the labor needed to maintain the shared world in which collective human action is possible and in which law has effect. While this reproductive labor is repetitive and ceaseless, unglamorous and tedious, it provides the conditions necessary for freedom. By choosing to engage in this labor consciously, we turn this

9 Hannah Arendt, *The Human Condition* (The University of Chicago Press, 1959, second edition), 88.

10 Arendt, *The Human Condition*, 52.

11 Jurkevics, 'Hannah Arendt Reads Carl Schmitt's *The Nomos of the Earth*', 355.

12 Laura M. Henderson, 'Crisis in the Courtroom: The Discursive Conditions of Possibility for Ruptures in Legal Discourse', *Netherlands Journal of Legal Philosophy* (2018); Laura M. Henderson, 'Deciding to Repeat Differently: Iterability and Decision in Judicial Decision-Making' *European Journal of Legal Studies* 11, no. 1 (2018/19).

13 Arendt, *The Human Condition*, 200.

14 Arendt, *The Human Condition*, 190.

15 On promises and forgiveness as a remedy for the 'chaotic uncertainty of the future,' see Arendt, *The Human Condition*, 237.

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labor into action that shows who we are as we make our appearance in the world.¹⁶
Let us take care to reveal ourselves to be who we want to be.

16 Arendt, *The Human Condition*, 179.