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ARENDT ON THE CRIME OF CRIMES

David Luban*

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Genocide is sometimes called the “crime of crimes,” but explaining what makes it the crime of crimes is no easy task.¹ Hannah Arendt tried, but the claim of this paper is that she failed. The claim is simple, but the reasons cut deep. And I will argue that her failure has something to teach us about the difficulty of trying to find a stable position between nationalism and cosmopolitanism.

I

The Epilogue to *Eichmann in Jerusalem* offers Arendt’s analysis of the legal issues in the Eichmann trial. In light of the book’s reputation as an unsparing critique of the Eichmann trial, the most surprising feature of the Epilogue is that most of it (22 pages out of 27) mounts a spirited defense of the trial against critics of its legitimacy. Only in the final five pages does Arendt turn to “the failure of the Jerusalem court” in “not coming to grips with three fundamental issues...: the problem of impaired justice in the court of the victors; a valid definition of the ‘crime against humanity’; and a clear

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¹ Two ICTR decisions, *Prosecutor v. Kambanda*, Case No. 93-27-S, Judgment and Sentence (Sept. 4, 1998), §16 and *Prosecutor v. Serushago*, Case No. 98-39-S, Judgment and Sentence (Feb. 5, 1999), §15 have called genocide the “crime of crimes,” but the ICTR Appeals Chamber has also denied that there is a hierarchy of international crimes. *Prosecutor v. Kayishema*, Case No. ICTR-95-1-A Appeals Judgment (June 1, 2001), §367.

recognition of the new criminal who commits this crime.”² The first of these problems sounds superficially like a routine condemnation of “victor’s justice” as innately unfair, but that is not what she means. In fact, Arendt vigorously defends the Jerusalem court against the blanket charge that victors’ justice is invariably partial and unfair (259). The problem of impaired justice she criticizes is a smaller point: the court’s refusal to immunize potential defense witnesses who themselves might be arrested for crimes against the Jewish people if they came to Jerusalem to testify. Given the overwhelming evidence against Eichmann, however, this “serious flaw in the Jerusalem proceedings” could be regarded as a harmless error, and Arendt says little about it beyond noting it. I follow her lead in ignoring it.

The other two problems cut deeper. For they implicate knotty conceptual issues about the very possibility of using legal tools to address genocide. The first failure of which she accuses the court lies in not understanding the specific evil that makes genocidal killing different from other war crimes “such as shooting of partisans and killing of hostages” (275), as well as from other pogroms and persecutions visited on the Jewish people through the centuries. The second failure lies in not perceiving the absence of *mens rea* on Eichmann’s part—the fact “that this new type of criminal, who is in actual fact *hostis generis humani*, commits his crimes under circumstances that make it well-nigh impossible for him to know or to feel that he is doing wrong” (276).

The two failures connect in the question of what basis the law might find for convicting Eichmann. Suppose it is true that he lacked criminal *mens rea*. (Whether Arendt was right about the *mens rea* issue is not my topic in this paper.) How, then, could

² Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, rev. ed. (New York: Viking, 1963) [hereinafter: EJ], p. 274. Other page references to the book will be included parenthetically in the text.

he be justly convicted and executed? Arendt closes the Epilogue with a sentencing speech she wished the Jerusalem judges had made to Eichmann; it ends as follows:

And just as you supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations—as though you and your superiors had any right to determine who should and who should not inhabit the world—we find that no one, that is, no member of the human race, can be expected to share the earth with you. This is the reason, and the only reason, you must hang (279).

Genocide is the name we give to the crime of eliminating peoples from the world.³

Evidently, then, Arendt thought that the special character of genocide makes it permissible to condemn Eichmann to death even if he lacked *mens rea*. Eichmann has committed the ultimate crime against humanity, and that is why “no member of the human race can be expected to share the earth” with him.

Arendt’s imaginary speech to Eichmann leaves us with a question: does anything beyond the number of victims make genocide different from other murders? The answer Arendt gives in her hypothetical sentencing speech—that Eichmann and his superiors have no right to determine who should and who should not inhabit the earth—fails. After all, any and every murderer determines who should and who should not inhabit the earth. What makes genocide qualitatively different from six million counts of murder?

³ I am grateful to Turku Isiksel for pointing out the similarity between Arendt’s hypothetical sentencing speech and Kant’s famous argument in the *Rechtslehre* for cosmopolitan possession of the world and world law: “From the fact that nature has enclosed all nations within a limited boundary ... it follows that the possession of the land on which an inhabitant of the earth can live can always be conceived only as the possession of a part of a determinate whole, such that every person can be conceived as originally having [had] a right to it.” Immanuel Kant, *The Metaphysical Elements of Justice*, John Ladd trans., 2nd ed. (Indianapolis, Indiana: Hackett Publishing, 1999), p. 160 (volume 4, p. 352 of the standard Akademie Ausgabe version). It is entirely possible that Arendt had Kant’s argument in mind when she grounded Eichmann’s culpability in the unwillingness to share the Earth with “the Jewish people and the people of a number of other nations.”

Evidently, the difference is that the latter is the killing of six million individuals, where genocide adds the intention of destroying an entire group “as such” (in the words of the international Convention Against Genocide).

It is on such grounds that legal doctrine distinguishes between genocide and the crime against humanity of extermination. An “attack on a civilian population”—any civilian population—is legally required to qualify mass killing as a crime against humanity. To qualify as genocide, the killing must be performed with specific intent to destroy a national, ethnic, racial or religious group as such. In the former, therefore, the group being attacked can be a mixed civilian population, and the attack need not be intended to destroy them as a group. In the latter, the target group is marked by shared nationality, ethnicity, race, or religion, and it is targeted “as such,” meaning that the victims of genocide are targeted on the basis of their group membership, in order to destroy the group as a group.⁴

So anyone seeking to explain the uniqueness of genocide must explain the special and unique status of groups as such, over and above the value of the individuals who compose the group.⁵ That is not easy to do. I will argue that it is especially difficult for Arendt to do, because her other theoretical commitments foreclose some of the pathways a theorist might follow to arrive at the special value of groups. In fact, I believe Arendt

⁴ It is important to mention immediately that Arendt paid no attention to the legal definitions of these crimes. Indeed, she argued that genocide should count as a crime against humanity—not in the legally-defined sense, but in the sense that it is a “crime against the human status” (269). Nevertheless, her understanding of the crime—as the effort to destroy an entire group—is very close to the legal definition of genocide.

⁵ Here I want to flag an alternative approach to explaining the singularity of genocide, untethered to assigning unique value to groups as such. This approach, due to Julie O’Sullivan, argues on consequentialist grounds that the specific intent to destroy a group as such makes a perpetrator more dangerous than one who attacks a civilian population without that specific intent. The heightened danger posed by the crime of genocide can explain its status as “crime of crimes” without need for a theory of group value. This is not the approach Arendt took, nor (as I show below) is it the approach of Raphael Lemkin, the originator of the concept of genocide. But it may well be right.

fails at that task; and for her to succeed she would have to abandon a central commitment of her political philosophy, namely the lack of intrinsic significance of social affiliation, in contrast to political affiliation.

II

A good place to begin the inquiry is with Raphael Lemkin, the Polish Jewish lawyer who coined the word “genocide.” Lemkin thought it was essential to name a crime that attacked entire “nations” (his word for ethnic groups), and he explained the value of nations thus:

Nations are essential elements of the world community. The world represents only so much culture and intellectual vigor as are created by its component national groups. Essentially the idea of a nation signifies constructive cooperation and original contributions, based upon genuine traditions, genuine culture, and a well-developed national psychology. The destruction of a nation, therefore, results in the loss of its future contributions to the world.

Our whole heritage is a product of the contributions of all peoples. We can best understand this when we realize how impoverished our culture would be if the so-called inferior peoples doomed by Germany, such as the Jews, had not been permitted to create the Bible, or to give birth to an Einstein, a Spinoza; if the Poles had not had the opportunity to give to the world a Copernicus, a Chopin, a Curie; the Czechs, a Huss, a Dvorak; the Greeks, a Plato and a Socrates; the Russians, a Tolstoy and a Shostakovich.⁶

Now Arendt was not immune to thoughts about national geniuses; she once described

⁶ *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie 1944), p. 91.

Jewish emancipation as “the fostering soil on which Jewish creative genius could grow and contribute its products to the general spiritual life of the Western world.”⁷ But she emphatically did not value groups because of their geniuses, taken as a measure of the group’s contribution to universal civilization. In *Eichmann in Jerusalem* she wrote biting about those who thought it a greater tragedy that Germany expelled Einstein than that it murdered “little Hans Cohn from around the corner, even though he was no genius” (134).

Of course Lemkin’s point was not to idolize geniuses, but to emphasize that even “so-called inferior peoples” could make contributions to civilization, which the geniuses exemplified. But Lemkin’s theory faces the embarrassing question why the extermination of groups that have *not* contributed to universal civilization matters. On the terms of his argument, it does not. Of course I do not mean to suggest that Lemkin accepted this horrible implication of his argument; surely he would disown it (and in any case, he fervently believed that all peoples have at least the possibility of contributing to universal civilization).⁸ For her part, Arendt had nothing but contempt for a “way of thinking that distinguishes between the murder of ‘primitive’ and of ‘cultured’ people” (96).

The fundamental fallacy of Lemkin’s argument lies in taking the good that a group does for the rest of us (namely, its contribution to universal civilization) as the measure of its right to exist. The perils of that instrumental argument are plain. Arendt, a robust critic of instrumentalism, would rightly find the argument mistaken and dangerous.

⁷ “The Jew as Pariah,” reprinted in Hannah Arendt, *The Jewish Writings*, Jerome Kohn & Ron H. Feldman, eds., (New York: Schocken Books, 2008), p. 276.

⁸ His passionate beliefs in this respect pervade Lemkin’s deeply moving autobiography. See Raphael Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin*, Donna-Lee Frieze, ed. (New Haven: Yale University Press, 2013).

III

Let's try again. Genocide, in Arendt's view, "is 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" (269).

The attack on human diversity is surely a plausible account of what makes genocide "monstrous" over and above the sum of individual harms; but it is hard to square with Arendt's highly individualistic conception of human diversity, what in *The Human Condition* she calls "plurality." Plurality refers to a multiplicity of "unique beings,"⁹ but by that she always means unique human individuals, not groups; and much of Arendt's philosophy consists of working out the implications of the plurality of human individuals—what she once called "the infinite plurality which is the law of the earth."¹⁰ In general, Arendt is hostile to the union or fusion of individuals into groups. For example, her objection in *On Revolution* to Rousseau's theory of "general will" is precisely that it assumes that individual wills can be fused into a general will, and therefore it opposes itself to a politics based on plural individuals. As Arendt puts it in *The Human Condition*, "The unitedness of many into one is basically antipolitical."¹¹ That leaves us the question of why group plurality matters, and therefore what makes genocide, an attack on group diversity as such, a crime of a different order from the mass murder of individuals.

⁹ Hannah Arendt, *The Human Condition*, (Chicago: University of Chicago Press, 1956), p. 176.

¹⁰ Hannah Arendt, *Thinking*, in *The Life of the Mind*, Mary McCarthy, ed. (New York: Mariner, 1981), p. 187.

¹¹ Hannah Arendt, *On Revolution* (New York: Viking, 1965), p. 214. Her individualism and suspicion of groups displays itself in her casual (and rather silly) throw-away remark, "There can be hardly anything more alien or even more destructive to workmanship than teamwork." *The Human Condition*, p. 161.

IV

For Arendt, the Holocaust represents the central, paradigm case of genocide, and the Jews represent the central paradigm case of a group targeted for genocide. Perhaps we can understand what Arendt has in mind about the crime of destroying whole peoples by examining her voluminous writings about the Jewish people. How does she understand Jewishness, including her own Jewishness? What meaning does Arendt assign to Jewish identity? What kind of value does she think the Jews have as a people, over and above the summed values of all the individual Jews? If we can answer these questions, perhaps we can answer the same question for other groups, including groups that have been targets of modern genocide: the Hereros, the Armenians, the Roma, the Bosnian Muslims, the Rwandan Tutsis.

The Convention Against Genocide recognizes national, ethnical, racial, and religious groups as the sole categories of groups that must be protected against the crime of genocide. Arendt clearly did not regard the Jews as a “race,” nor primarily as a religion—for of course she understood that it was blood, not religion, that made the Jews a target for Nazi genocide. Jewish converts to Christianity were targets, as of course were secular Jews. (Arendt herself was entirely secular by upbringing, and a religious agnostic by conviction.¹²) That leaves national and ethnical groups. The problem is that Arendt apparently placed *no* intrinsic value on ethnic identity.

¹² She described atheists as “fools who pretended to know what no man can know.” Hannah Arendt, *Men in Dark Times* (New York: Harcourt Brace, 1968), p. 67.

V

Arendt scorned romantic nationalism, “which holds a nation to be an eternal organic body,”¹³ and in a famous letter to Gershom Scholem she described her own Jewishness in bare-bones terms: it is merely a natural fact (“*physei* and not *nomō*”),¹⁴ not something that marks off “a special kind of human being,” nor that gives rise to an obligation to love the group—for in her view only individuals, not groups, are proper objects of love.¹⁵

I have argued elsewhere that Arendt held a political, or performative, conception of identity-assertions such as “I am a Jew.”¹⁶ According to this conception, identity assertions are political speech acts, and their assertibility condition is a function of political context. Thus, she held that in a time of oppression—for example, her own refugee years in Paris between 1933 and 1941—answering the question “Who are you?” any way other than “A Jew” would be “a grotesque and dangerous evasion of reality,” while offering the same answer giving a speech in Hamburg in 1959 would “seem like a pose.”¹⁷ The former would be an evasion because it would be an attempt to closet the speaker’s identity, and to let the questioner close his eyes to the persecution of the Jews and dodge moral and political responsibility for responding to the Jews as a target of persecution.¹⁸ As Arendt said more than once, “in times of defamation and persecution ...

¹³ “Zionism Reconsidered,” in *The Jewish Writings*, p. 366.

¹⁴ In *The Jewish Writings*, p. 466.

¹⁵ *Ibid.*, pp. 466-67.

¹⁶ Luban, “Hannah Arendt as a Theorist of International Criminal Law,” *International Criminal Law Review* 39 (2010): 633-34.

¹⁷ *Men in Dark Times*, pp. 17-18. In a speech, she once remarked “My trouble is that I had never wished to belong, not even in Germany.” *Responsibility and Judgment*, p. 5.

¹⁸ In 1946 she wrote to Jaspers that when she arrived in America, she kept her birth name rather than taking her husband’s “because I wanted my name to identify me as a Jew.” Arendt to Jaspers, Jan. 29, 1946, Hannah Arendt/Karl Jaspers Correspondence 1926-1969, Lotte Kohler & Hans Saner, eds. Robert & Rita Kimber, trans. (New York: Mariner Books, 1992), p. 29.

one can resist only in terms of the identity that is under attack.”¹⁹ More vividly: “If one is attacked as a Jew, one must defend oneself as a Jew. Not as a German, not as a world citizen, not as an upholder of the Rights of Man, or whatever.”²⁰ But to announce “I am a Jew” while receiving Hamburg’s Lessing Prize would have been a bit of melodrama designed solely to make her German audience squirm.²¹

If my interpretation is right, assertions of group identity don’t mark out ontological or moral distinctions that Arendt’s systematic views would recognize. They are speech acts of affiliation and confrontation. The utterance “I am a Jew” can be factually *true*, *false* as a statement about essence or identity (“when I use the word ‘Jew’ I do not mean to suggest any special kind of human being”), and politically *indeterminate*, making different normative commitments in different circumstances.²²

VI

On the other hand, for Arendt political groups *do* have ontological and moral significance. Famously, the Genocide Convention’s drafters disagreed about whether to include political groups along with national, ethnic, racial, and religious groups among those whose intentional destruction counts as genocide. They ultimately voted to omit political groups, although some national genocide laws include political groups among the protected groups.²³ Arendt had no apparent interest in the legal definition in the

¹⁹ *Men in Dark Times*, p. 18.

²⁰ “‘What Remains? The Language Remains’: An Interview with Günter Gaus,” in Hannah Arendt, *Essays in Understanding 1930-1954*, Jerome Kohn, ed. (New York: Schocken Books, 1994), p. 12.

²¹ Luban, “Hannah Arendt as a Theorist of International Criminal Law,” p. 634.

²² *Ibid.*

²³ Thus, the anti-genocide statutes of Colombia and Ethiopia include political groups, while Lithuania includes social and political groups. Costa Rica adds groups determined by age, political or sexual orientation, social position, economic situation, or civil status. The broadest definitions are those of France and Burkina Faso, which add to the Genocide Convention’s list all groups determined by “any other arbitrary criterion.” All these statutes may be found in Prevent Genocide International, *The Crime of*

Genocide Convention, and she would not have thought herself constrained by legal categories. Perhaps, then, she valued the Jews as a political group.

That would solve the conceptual problem of group value on terms congenial to Arendt. For her, it is politics and action that ultimately provide meaning in the human world. In her Heidegger-derived terminology, action is the form of human activity we undertake “for the sake of” a principle, not only “in order to” accomplish some determinate end.²⁴ Arendt’s familiar argument holds that political communities are the arenas in which actions unfold. As a consequence, if there is any category of groups to which she assigns supreme value, it is *political* groups.²⁵ Might it be that she considered the Jews of the Diaspora to be a political group?

Eichmann in Jerusalem contains one striking piece of evidence that the answer might be yes. In her analysis of the Jerusalem court’s jurisdiction over the Eichmann case, Arendt offers the eccentric proposal that the court could have asserted territorial jurisdiction over the genocide of the European Jews, despite the outstanding facts that Israel has no territorial jurisdiction over crimes committed in Europe and the European Jews had no territorial state—or even territory—of their own:

Israel could easily have claimed territorial jurisdiction if she had only explained that “territory,” as the law understands it, is a political and a legal concept, and not merely a geographical term. It relates not so much, and not primarily, to a piece of land as to the space between individuals in

Genocide in Domestic Laws and Penal Codes, available at <http://www.preventgenocide.org/law/domestic> (last visited May 10, 2014).

²⁴ *The Human Condition*, p. 154; Hannah Arendt, “The Concept of History,” in *Between Past and Future: Eight Exercises in Political Thought* (New York: Viking, 1968), pp. 78-79. Arendt’s crucial distinction between “for the sake of” and “in order to” adopts Heidegger’s terminology from *Being and Time*, §§18, 41.

²⁵ *The Human Condition*, p. 205.

a group whose members are bound to, and at the same time separated and protected from, each other by all kinds of relationships, based on a common language, religion, a common history, customs, and laws (262-63).

I do not think the idea of territorial jurisdiction with no connection to territory is legally serious.²⁶ Serious or not, though, it may offer a clue to how Arendt understood Jewish identity. The key words are “space between individuals”: for in Arendt’s terminology, an “in-between” denotes the web of relationships that forms the substrate and subject-matter of action.²⁷ A people “whose members are bound to, and at the same time separated and protected from, each other” by an in-between space is, precisely, a political group.

Uniquely, the Jews of the Diaspora define two millenia of their history as the story of a people without a territory. Imagining territorial jurisdiction without territory, defined solely by communal connections, might come naturally to a Jewish thinker of the Diaspora.

Arendt claims that territorial jurisdiction is a legal *and political* concept, suggesting that she regarded the relationships that define Jewish collectivity as political relationships. If so, this yields an explanation of why Arendt might regard groups as valuable in themselves. According to this explanation, she

²⁶ A tenacious lawyer might argue that because the Holocaust had effects on Israel, Israel could have asserted objective territorial jurisdiction. However, there is no evidence that Arendt intended this argument, or was even aware of the legal distinction between subjective and objective territorial jurisdiction. In any event, the fact that Israel did not exist until years after the Holocaust would have made the effects argument a difficult one. The principal effect of the Holocaust within the geographical territory of Israel was the enormous influx of survivors, and Israel would obviously not dream of describing their immigration as a harmful effect.

²⁷ *The Human Condition*, pp. 182-83, describes the “in-between” as the “web of relationships,” which is the subject-matter of action and speech.

thought of the Jews as a political group, and she generalized her understanding of the Jews to other national and ethnic groups.

VII

If so, Arendt dramatically changed her earlier understanding of European Jewish history. Consider some of her prior writings on Jewish affairs and Jewish history. In the famous essay “The Jew as Pariah,” she emphasizes “the political nonexistence and unreality of the pariah,”²⁸ and she locates assimilated German Jews like Rahel Varnhagen and Heinrich Heine among “those who have no place in the political and social world.”²⁹ And not only the German Jews: she describes “the Jews of Western Europe” as “excluded from the world of political realities.”³⁰ Pariahs experience the “warmth and fraternity of closely packed human beings,” which alone “can compensate for the weird irreality that human relationships assume whenever they develop in absolute worldlessness.”³¹ But “closely packed human beings” is imagery diametrically opposed to Arendt’s “in-between space.”

In an essay on Jewish mysticism, Arendt emphasizes that the Jews were “actually excluded from action,” and that the mysticisms of the kabbalists “offer only a substitute for it.”³² She observed that Jews turned to mysticism “in order to develop instruments for active participation in the destiny of mankind”;³³ but of course, from a worldly point of view, the instruments were fictitious. Ironically, it

²⁸ *The Jewish Writings*, p. 280.

²⁹ *Ibid.*, p. 279.

³⁰ *Ibid.*, p. 296.

³¹ *Men in Dark Times*, p. 16.

³² *Ibid.*, p. 306.

³³ *The Jewish Writings*, p. 308.

was the disastrous Sabbatian movement of the 17th century that marked “the last great Jewish political activity” before modern Zionism—and, Arendt rightly noted, this mass epidemic of messianic frenzy was a “debacle.”³⁴ From then on “the Jewish body politic was dead and the people retired from the public scene of history.”³⁵ The most emphatic statement comes from *The Origins of Totalitarianism*: the Jewish people “avoided political action for two thousand years.”³⁶

Whether this familiar stereotype of European Jewish history is right is a complicated question. In one sense, the European Diaspora indeed seems far from a political space in Arendt’s sense of the political: a group organized for political action and creating a space for political action. The shtetl was not the polis. The *kehillot* of exile were a networked archipelago of inwardly-focused faith communities. They depended on their gentile rulers for protection, and in some locales, they depended on gentiles even for law enforcement against their own criminals. Their foreign policy revolved around *stadlanot*, the bargaining and pleading of court Jews with their “gentile overlords” (Walzer) for kindly treatment. Lacking territory, armies, political institutions, sovereignty, independence, and power, the Diaspora was close to the negation of the Jews as a nation. That is certainly how European Jews themselves saw it, in their lamentations and prayers. And that is what some modern Zionists mean by referring to Israel as the negation of the Diaspora: to them, the Jewish state is the

³⁴ Ibid., p. 303.

³⁵ Ibid., p. 311. Seyla Benhabib remarks on this passage in *The Reluctant Modernism of Hannah Arendt* (Lanham, Maryland: Rowman & Littlefield, 2003), p. 45.

³⁶ Hannah Arendt, *The Origins of Totalitarianism* (New York: Schocken Books, 2004), p. 17.

long-sought negation of a two-millennium negation. In her Jewish writings, Arendt apparently hewed to this conventional interpretation of the Diaspora as the negation of politics and history.

But it is not the only possible interpretation. For Arendt, the significance of politics lies in creating a space for action, a space where, as she liked to put it, actors can show in word or deed who they are and what they can do. Clearly, the Jewish world of the Diaspora was not a political space remotely like the polis or the Roman republic. It might nevertheless be argued that the world of the Diaspora *did* create a space of action in which individual excellence manifested itself. For one thing, for all its humiliations, even *stadlanot* required statecraft of a high order. But *stadlanot* was not the core of the Diaspora's form of a political space of action.

The core forms of excellence recognized among traditional Jewish communities were Talmudic scholarship and learning in the law, the *halakha*. To be a rabbinic sage recognized throughout the Jewish world, like the medieval rabbis known everywhere by their acronyms alone—the Rambam, the Ramban, Rashi, Ri, the Rif³⁷—*that* was the highest form immortal fame assumed in the Diaspora. The activity of the great rabbis lay in creatively interpreting the Law to deal with whatever tumultuous and dangerous environment Jews found themselves in. The rabbis were in effect deliberating over the continuity conditions of Jewish life—and deliberation of that sort is surprisingly close to Arendt's definition of political freedom. Viewed this way, halakhic scholarship

³⁷ That is: Maimonides (Rabbi Moses ben Maimon), Nahmanides (R. Moses ben Nahman), R. Shlomo ben Isaac, R. Isaac ben Samuel (the elder, of Dampierre), R. Isaac al-Fasi.

could be understood as political action in Arendt's sense, odd as it is to think of legalistic hair-splitting as action. (Two of the leading medieval rabbis were celebrated for their ability "to find 150 grounds for declaring an impure insect pure."³⁸) Arendt herself understood "the political function of the Law in the Diaspora as the only tie for the people."³⁹ But she did not conclude that this was political action in her favored sense; rather, she complained that "the Jewish spiritual heritage became ... the monopoly of rabbis."⁴⁰ For her, rabbinics represented a spiritual (not to mention temporal) authoritarianism rather than a form of politics, and by focusing solely on halakhic disputation, the Jews had opted out of politics. Arendt did not have to see European Jewish life this way—but apparently she did, as do many others.

There is no evidence that Arendt rethought her understanding of Diaspora history, or that she came to regard rabbinics as a form of political action. I think it is quite unlikely; and when Arendt describes territory as the law understands it as a political and legal concept, she did not mean to imply that the Jewish people of the Diaspora formed a political community, in her favored sense of a space of political action.

VII

Then perhaps what she meant by her argument about Israel's territorial jurisdiction was not that the Jews of the Diaspora formed a political group, but rather that Israel's (actual, non-imaginary) political community extended

³⁸ Moshe Halbertal, *Maimonides: Life and Thought* (Princeton University Press, 2013), p. 12. Halbertal is quoting medieval encomia to the 12th century French sages Rabbeinu Tam (R. Jacob ben Meir) and Ra'abad (R. Abraham ben David).

³⁹ Arendt, "Jewish History, Revised," in *The Jewish Writings*, p. 309.

⁴⁰ "Creating a Cultural Atmosphere," in *The Jewish Writings*, p. 299.

retroactively to the Jews of Europe. This was a view that the Jerusalem court itself endorsed when it argued that Israeli courts “providing some measure of redress” for the slaughtered European Jews could ground their jurisdiction in the protective principle:

[T]he people is one and the crime is one.... To argue that there is no connection, is like cutting away the roots and branches of a tree and saying to the trunk: I have not hurt you.⁴¹

Of course, this was and is a controversial dictum, articulating a strand of Zionism that regards the State of Israel as the gravitational center of all Jews, wherever they are.⁴² It overlooks the conspicuous difficulty that the Jewish communities annihilated in the Holocaust were precisely those whose inhabitants did *not* emigrate to Palestine and affiliate themselves with the *Yishuv* that would become the State of Israel. But even on its own terms, the Jerusalem court does not assert that the European Jews formed a political community of their own – that would actually have been fatal to its jurisdictional argument. Rather, it argues that they belonged in a retroactive sense to the State of Israel as a political community. If that is what Arendt meant, she still has no account of the crime of genocide against the group constituted by the European Jews.

IX

In her argument about territorial jurisdiction, Arendt infers the connection between Israel and the European Jews from “all kinds of relationships, based on a

⁴¹ *Prosecutor v. Eichmann*, Jerusalem District Court, Case No. 40/61 Judgment, ¶35.

⁴² It is a strand best represented historically by Yehuda Halevi, the prototype of the religious Zionist: it is the view that a Diaspora Jew is only a twilight person until she returns to Israel. For discussion, see Hillel Halkin, *Yehuda Halevi* (New York: Schocken Books, 2010). In contemporary Israel, its leading spokesman is the novelist A. B. Yehoshua.

common language, religion, a common history, customs, and laws.”⁴³ But these relationships don’t make a group *political*. Rather, they offer one possible definition of an *ethnic* group, whose members share these relationships whether or not they engage in political action and whether or not the group organizes for it. (It is not the only possible definition of an ethnic group, an important point to which I shall return.)

In Arendt’s special terminology, such a group is not political but *social*. And, famously, she is no fan of the social. Indeed, she generally employs the distinction between the social and political to disfavor the social and to argue that substituting it for the political poses a threat to human freedom. In Hannah Pitkin’s phrase, for Arendt the rise of the social is “the attack of the blob,”⁴⁴ threatening to dissolve political freedom into an un-world of conformity and consumerism.

Arendt never defined “the social” or “society,” and she used the terms in multiple ways, depending on the particular contrast she wished to highlight. In quick and rough catalogue, “the social” represents (1) the household, the *oikōs*, in the ancient polity—the opposite of the public sphere; (2) the realm of the family, rather than the polity; (3) the realm of the economy as opposed to government; (4) the realm of necessity as opposed to freedom; (5) the realm of economic inequality, of rich and poor, as opposed to the *isonōmia* of politics; (6) the realm of social discrimination, as opposed to political equality; (7) the realm of social

⁴³ Strictly speaking, this is something of an exaggeration, for the scattered Jewish communities of North Africa, the Middle East, and Europe shared neither a common history nor a common everyday language.

⁴⁴ Hannah Fenichel Pitkin, *The Attack of the Blob: Hannah Arendt’s Concept of the Social* (Chicago: University of Chicago Press, 2000).

conformism, as opposed to individuality and freedom; and (8) the realm of sociability and civic association as the pre-political soil in which politics can grow.

For purposes of investigating ethnicity as a form of social group, the last of these meanings, sociability, is the most relevant. Call it the *communitarian interpretation* of the social. Sociability consists, in Seyla Benhabib's description of the communitarian conception, of

patterns of human interaction; modalities of taste in dress, eating, leisure, and lifestyles generally; differences in aesthetic, religious, and civic manners and outlooks; patterns of socializing and forming marriages, friendships, acquaintanceships, and commercial associations.⁴⁵

This is a more elaborate list than Arendt's "all kinds of relationships, based on a common language, religion, a common history, customs, and laws," but Arendt and Benhabib clearly have the same thing in mind: they are both cataloguing the basic modalities of communal association.

As Benhabib remarks, however, this is the sense of the social that Arendt investigates the least.⁴⁶ And no wonder: in all her other usages, the social is a privative concept—an inferior contrast term with the superior realm of freedom, equality, individuality, and political action. Only in the communitarian sense does "the social" and "society" designate something positive. It is the web of relationships without which politics could not exist—for without it politics would have no medium.

⁴⁵ Benhabib, p. 28.

⁴⁶ Benhabib, p. 23; for elaboration, pp 26-30, where Benhabib argues that in her critique of social conformism in *The Human Condition* Arendt was overly reductive.

I would go further than Benhabib: it is not just that Arendt investigates this communitarian sense of “the social” less than the privative senses. Arendt comes close to ignoring pre-political communal affiliations. Notably, when Arendt introduces the “web of relationships” into the conceptual apparatus of *The Human Condition*, she defines it as the intangible web of actions and deeds recorded in stories, and *not* as the web of cultural and communal affiliations.⁴⁷ She largely ignores the latter.

I have found only one place where Arendt seems to recognize the value of communal association. She concludes “The Jew as Pariah” as follows:

For only within the framework of a people can a man live as a man among men, without exhausting himself. And only when a people lives and functions in consort with other peoples can it contribute to the establishment upon earth of a commonly conditioned and commonly controlled humanity.⁴⁸

Both these propositions are remarkable. The first acknowledges that nobody can live in individual freedom or initiative all the time; it’s just too exhausting.⁴⁹ Our everyday life must be filled with background routines (“behavior” rather than “action,” as Arendt would say⁵⁰) against which action, initiative, and individuality display themselves. The society of one’s people is, to use today’s cliché, one’s “comfort zone.” It is the place where shared assumptions and customary routines allow us to let our hair and our guard down, to enjoy repose from the demands of

⁴⁷ *The Human Condition*, pp. 183-88.

⁴⁸ *The Jewish Writings*, p. 297.

⁴⁹ The closest she comes to this point in *The Human Condition* is her remark that “[a] life spent entirely in public, in the presence of others, becomes, as we would say, shallow.” P. 71.

⁵⁰ *The Human Condition*, p. 41.

action, among people who share our slang, our jokes, our cuisine.⁵¹ This contrasts with the perpetual need for alertness and calculation faced by refugees (or even tourists in a foreign land). In “We Refugees,” Arendt describes what is lost by not belonging to a people:

We lost our home, which means the familiarity of daily life. We lost our occupation, which means the confidence that we are of some use in this world. We lost our language, which means the naturalness of reactions, the simplicity of gestures, the unaffected expression of feelings.⁵²

Belonging to a people supplies that familiarity, confidence, and simple unaffected naturalness. Here Arendt paints a sympathetic and affecting picture of communal association far different from the individualism of *The Human Condition*, where society always threatens to engulf and efface individual freedom.

The second proposition is even more remarkable: “only when a people lives and functions in consort with other peoples can it contribute to the establishment upon earth of a commonly conditioned and commonly controlled humanity.” It is the only place I know where Arendt attests that humanity consists of a world of *peoples* as well as *people*. It states her argument for group plurality layered on top of individual plurality—and this argument is precisely what she needs to explain *why* genocide is a crime against the human status, different in kind from other atrocity crimes.

⁵¹ It might be objected that the customary and familiar is only the domain of “idle talk” (*The Human Condition*, p. 208), Heidegger’s *Gerede*, which both Arendt and Heidegger typically treat with contempt. Yet Heidegger also argues that without the network of idle talk that establishes linguistic convention, speech itself would be impossible: *Rede* requires *Gerede*. On this crucial point, see Robert B. Brandom, “Dasein, the Being That Thematises,” in *Tales of the Mighty Dead: Essays on the Metaphysics of Intentionality* (Harvard University Press, 2002), pp. 335-42.

⁵² *The Jewish Writings*, p. 264.

Notice that her explanatory strategy in this second proposition is different from that of the first. The first explains the importance *to the individual* and individual action of belonging to a people among whom we can let our hair down. In the second proposition, she does not tie the significance of group plurality to the conditions of individual action and initiative. Rather, group plurality is essential to the maintenance of something she calls *humanity*, specifically “a commonly conditioned and commonly controlled humanity.” “Commonly conditioned” means, I take it, that in a world with plural groups, each group exists in the common condition of being one among many, with all the benefits and perils that come with that condition.⁵³ “Commonly controlled” is a more cryptic formulation. It does not refer to world government, which Arendt thought would be equivalent to world tyranny—“not ... the climax of world politics, but quite literally its end.”⁵⁴ Rather, common control must refer to a certain kind of mutual civilizing discipline that plural groups impose on each other. As Arendt explains it in an essay on Karl Jaspers:

If the solidarity of mankind is to be based on something more solid than the justified fear of man’s demonic capabilities, if the new universal neighborhood of all countries is to result in something more promising than a tremendous increase in mutual hatred and a somewhat universal irritability of everybody against everybody else, then a process of mutual

⁵³ Alternatively, “commonly conditioned” might mean merely that all humans share “the human conditions” she catalogues in *The Human Condition*: life, worldliness, plurality, natality, mortality, and the earth. But if that is what she means, it is not clear why living in a people among other peoples is essential to establish a commonly conditioned humanity. For that reason the interpretation in the text above seems more cogent.

⁵⁴ “Karl Jaspers: Citizen of the World,” in *Men in Dark Times*, p. 82.

understanding and progressing self-clarification on a gigantic scale must take place.⁵⁵

Abstract as these requirements sound—and Jaspers’s proposals about mutual communication are not much less abstract—they seem to be what Arendt means by “commonly controlled humanity.”

X

What does Arendt mean by *humanity*? Drawing on her essay “Organized Guilt and Universal Responsibility,” I suggest that Arendt’s notion of humanity and human status is a *normative* one. It does not refer to the set of all humans, a purely descriptive concept. Rather, belonging to humanity, or even creating humanity, is something that we *do*.

In “Organized Guilt and Universal Responsibility,” Arendt observes that “[f]or many year now we have met Germans who declare that they are ashamed of being Germans.”⁵⁶ She continues, “I have often felt tempted to answer that I am ashamed of being human.” She explains that to recognize a concept of humanity implies assuming solidarity across boundaries, even with those whose way of living we find abominable; it implies as well that “men must assume responsibility for all crimes committed by men and that all nations share the onus of evil committed by others.”⁵⁷ These are two sides of the same responsibility: to realize the concept of humanity requires taking responsibility for crimes committed in corners of the world to which we have no interest-based ties; but it also requires us to refrain from dehumanizing even the most monstrous evil-doers.

⁵⁵ Ibid., p. 84.

⁵⁶ “Organized Guilt and Universal Responsibility,” in *Essays in Understanding*, p. 131.

⁵⁷ Ibid. Arendt was rather obviously thinking through the implications of her mentor Karl Jaspers’s arguments in *The Question of German Guilt*.

As I read Arendt, there is no pre-existing collective entity called “humanity.” Of course there is such a thing as the set of all humans alive in any given time interval, but that is not what she means by humanity. Humanity exists only when we shoulder the demanding forms of cross-border responsibility she describes. That is why (in another essay) she hopes that “we might regain ... what former times called the dignity and honor of man: not perhaps of mankind but of the status of being human.”⁵⁸ Evidently the dignity of man is the sort of thing that can be lost and regained, which implies that it depends on what we do; and mankind is different from the status of being human. “Mankind,” a purely descriptive concept, names the species, the set of human beings; *humanity* understood as “the status of being human” is an inherently normative concept, the applicability of which depends on whether or not we shoulder the responsibility of solidarity.

I think this idea of “humanity” as a normative commitment harmonizes with what I earlier called the performative theory of ethnic identity: just as ascriptions of group identity are speech acts of affiliation and confrontation, so are ascriptions of common humanity, and indeed, so are judgments like “genocide is a crime against the human status” and “mass murder is a crime against humanity.” These are not timeless philosophical truths, but rather assertions aiming to bootstrap themselves into validity—that is, normative commitments.

When Arendt says that “men must assume responsibility for all crimes committed by men and that all nations share the onus of evil committed by others,” she does not mean the fatuous and false sentiment that we are all collectively guilty for the evil of

⁵⁸ “Personal Responsibility Under Dictatorship,” in Hannah Arendt, *Responsibility and Judgment*, Jerome Kohn, ed. (New York: Schocken Books, 2005), p. 48.

others—a view that Arendt actively scorned (286).⁵⁹ We take responsibility for the crimes of others by holding them accountable, and so the practical way we constitute humanity will conspicuously include the construction of new institutions to hold wrongdoers accountable. By the time of the Eichmann trial, we find Arendt and Jaspers vigorously discussing the relative merits of international criminal tribunals, jurisdictional theories for domestic criminal trials, and truth commissions.⁶⁰ The normative commitment to humanity carries the need for international criminal justice as a consequence.

I have argued in several previous papers that the aim of international criminal justice is *norm projection*, by which I mean an attempt to establish new norms for judging political violence. State crimes were long exempted from ordinary moral judgment by giving them titles like “*raison d’état*,” “*Kriegsraison*,” or even “self-defense of the people.” In international criminal justice, we are henceforth to recognize them for what they are: war crimes, aggression, genocide, and crimes against humanity.⁶¹ “Recognize” here means “re-cognize”—in the sense of cognizing these acts anew. No longer should we regard mass violence as a sovereign prerogative beyond good and evil. Instead, we should regard it as crime, wherever it takes place—and, by taking on the

⁵⁹ She discusses and rejects the theory of collective guilt in “Organized Guilt and Universal Responsibility,” pp. 121-27, as well as “Collective Responsibility,” in *Responsibility and Judgment*, p. 147: “But there is no such thing as being or feeling guilty for things that happened without oneself actively participating in them.” She goes on to discuss collective political responsibility (not guilt), and it is evident that her reflections are a response to Jaspers’s analysis in *The Question of German Guilt*. Arendt rather clearly has no use for Jaspers’s concept of “metaphysical guilt,” a form of collective guilt detached from law, morals, or politics.

⁶⁰ See Luban, “Hannah Arendt as a Theorist of International Criminal Law,” pp. 627-30.

⁶¹ David Luban, “Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law,” in Samantha Besson & John Tasioulas, eds., *The Philosophy of International Law* (Oxford University Press, 2010): 574-78; Luban, “State Criminality and the Ambition of International Criminal Law,” in Tracey Isaacs & Richard Vernon, eds., *Accountability for Collective Wrongdoings* (Cambridge University Press, 2011), especially pp. 66-77; Luban, “After the Honeymoon: Reflections on the Current State of International Criminal Justice,” *Journal of International Criminal Justice* 11 (2013): 505-515.

burden of judging it and repressing it, we “share the onus of evil committed by others.” We become members of humanity.

I think something like this is what Arendt has in mind. Now we can understand why she blurred the lawyer’s distinction between genocide and crimes against humanity, and classified genocide as the ultimate crime against humanity. By understanding it as an offense of more than local importance, for which we take on the responsibility of condemnation and repression, we *constitute* humanity. This is also why Arendt insisted on the legalistic distinction between a crime against the Jews and a crime against humanity perpetrated on the body of the Jews (261): only the latter understanding lifts the crime out of parochial jurisdictional interest and makes it the responsibility of *humanity*. For the same reason, she criticized the passive personality theory of jurisdiction in the *Eichmann* case because it authorizes only the injured party to redress the injuries (260-61). And it explains why for genocide trials she favored an international tribunal rather than a domestic court exercising universal jurisdiction (even though she defended the legitimacy of the Israeli proceeding). None of these distinctions among legal theories and venues mattered to her for legalistic reasons—Arendt was no legal formalist. They mattered to her because through them we undertake the normative commitments that constitute us as humanity.

XI

There has always been a flaw in any theory of genocide that focuses on the importance of ethnic groups to their members—and this includes Arendt’s view of ethnicity as communal relationships that provide actors with an environment of familiarity, confidence, and unaffected naturalness. The flaw is that the theory applies

only when the ethnic group's members actually partake in shared communal relationships. But some ethnic groups are assimilated or dispersed within the general population; some members have disaffiliated with their own ethnic group, or even reject their ethnic heritage ("incognito ergo sum," as Sidney Morgenbesser once wisecracked about a prominent intellectual who tried to disguise his Jewish heritage). Some ethnic groups are "imagined communities," either in their own imaginations or in those of their enemies.

These observations raise a multitude of questions. Does ethnicity rest on actual communal relationships, that is, objective anthropological facts? Or is ethnicity defined subjectively? If so, who defines it? Its own members? Or the group's enemies?

The law has variously endorsed all these conflicting answers. Thus, for example, the U.S. genocide statute gives an objective definition to the term *ethnic group*: "The term 'ethnic group' means a set of individuals whose identity as such is distinctive in terms of common cultural traditions or heritage."⁶² So did the ICTR in the 1998 *Akayesu* decision, which states that an ethnic group is a "group whose members share a common language or culture."⁶³

This definition created an intellectual embarrassment for the ICTR because it made it difficult to see why the Hutus and Tutsis count as different ethnic groups: They have lived together for centuries, they speak the same language, cook the same food, and share the same culture, including religion (mostly Roman Catholic). In 2001, the ICTY concluded that ethnic groups are defined principally by their enemies:

It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a

⁶² 18 U.S.C. § 1093(2).

⁶³ *Prosecutor v. Akayesu*, ICTR Case No. ICTR-96-4, Judgment (Sept. 2, 1998), §513.

targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators....

A group may be stigmatised in this manner by way of positive or negative criteria. A “positive approach” would consist of the perpetrators of the crime distinguishing a group by the characteristics which they deem to be particular to a national, ethnical, racial or religious group. A “negative approach” would consist of identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group.⁶⁴

A month earlier, the ICTR’s Trial Chamber proposed a somewhat broader definition of an ethnic group, combining both approaches: An ethnic group is “one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others).”⁶⁵

All these legal criteria have some merit, but under the latter criteria, belonging to the target group need have nothing to do with actual communal relationships, for there may be none. A group defined “negatively” by its enemies simply as “not us,” like an ethnic group that has ceased to lead a distinctive way of life and is identified in largely imaginary ways by its members or its enemies, does not form a people in the sense that

⁶⁴ *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment, § § 70-71 (Dec. 14, 1999).

⁶⁵ *Prosecutor v. Kayishema*, §98.

Arendt thinks makes it valuable to its members. Nevertheless such groups can be, and have been, the targets of genocide.

It seems to me that Arendt's conception of genocide as a crime against humanity, where "humanity" constitutes itself politically by taking on the onus of redressing the crime, offers us the conceptual resources to avoid this problem. Whether a group has value because of real communal relationships or imaginary ones, and whether the latter arise from the imagination of the group or of its enemies, attacking the group represents an assault on human diversity. The assailant negates "commonly conditioned and commonly controlled humanity"; and we—the spectators and judges—can only reaffirm that humanity by treating the attack as a crime against us all.

The emphasis in this view is on the response and responsibility of the spectators and judges, not on the importance of groups to their members. This in no way denies that groups as such can matter enormously to their members, but the importance of groups to their members is not a prerequisite for calling attacks on groups crimes against humanity. Indeed, it seems clear that the crime against humanity of exterminating a civilian population represents the same attack on diversity as genocide, and in that respect Arendt is right to blur the formal legal distinction.

XII

In this paper, I have interpreted both Arendt's understanding of group identity and her understanding of humanity via a linguistic turn—as answers to the question of what the assertibility conditions are for ascriptions of identity. When can we say "I am a Jew" or "I am ashamed to be a human"? If I am right, Arendt answers this question by pointing to normative commitments we undertake through these assertions—for example the

commitment to resist persecution in the former case, and to take on the onus of responsibility for far-off crimes in the latter. I want to conclude by arguing that there remains a tension, even a dangerous tension, between these two normative commitments.

Arendt herself concedes as much when she explains why, in her French years, she always answered “Who are you?” with “I am a Jew”: “the statement with which Nathan the Wise ... countered the command: ‘Step closer, Jew’—the statement: I am a man—I would have considered as nothing but a grotesque and dangerous evasion of reality.”⁶⁶ That, recall, is because “if one is attacked as a Jew, one must defend oneself as a Jew.” But to concede that “I am a man, that is, a human” lacked the assertibility condition in this political context is to concede that the normative commitment to humanity was an infelicitous speech act (J.L. Austin’s term for a speech act that misfires). There is a pragmatic inconsistency between the normative commitments that underlie “I am a Jew” and “I am a human being,” at least in the circumstances Arendt describes.

But there can be far darker and more dangerous pragmatic inconsistencies. To identify with a group may bring with it commitments that pose dire threats to humanity in Arendt’s sense. An example will illustrate the problem.

In 2013, in his trial before the ICTY, Radovan Karadžić called a witness named Mirko Sosić, to testify that Serbs in Sarajevo had been persecuted by Muslims—a point Karadžić hoped would show that it wasn’t that “wild Serbs attacked Sarajevo which was a peaceful town,” but rather that “Sarajevo was militarized and it was brutal towards the Serbs.”⁶⁷ Sosić is a Bosnian Serb surgeon and professor, who had occasional dealings with Karadžić and who eventually became a cabinet minister in the ultranationalist

⁶⁶ *Men in Dark Times*, p. 18.

⁶⁷ Transcript, statement of the accused, March 21, 2013, p. 35765 lines 14-16, available at <http://www.icty.org/x/cases/karadzic/trans/en/130321ED.htm> (visited May 9, 2014).

Bosnian Serb republic under Gojko Kličković.⁶⁸ In the course of his testimony, Sosić found it necessary to explain his own political trajectory.

I remembered a thought which was very clever and it wasn't mine. You see, I didn't feel myself a Serb or a nationalist or anything. I considered myself a member of my family and a surgeon and an internationalist. And I found a sentence which said if they insult you and attack you as a Jew, you have to defend yourself as a Jew. That is to say, by analogy, if they attack you and insult you as a Serb, you have to defend yourself as a Serb. I think that Mrs. Hannah Arendt, a prominent philosopher, said this. And I found this to be a logical explanation in a way because you are simply forced to go where you are being pushed, because otherwise you don't belong anywhere.⁶⁹

The irony is extreme: Mirko Sosić invokes Arendt's principle to justify his own political transformation from an internationalist to an ultranationalist, who worked with a leader now accused of genocide. (I hasten to add that nobody has accused Sosić personally of crimes or complicity.)

This testimony is not simply a case of the devil—more precisely, a witness for the alleged devil—quoting Scripture. It is rather, one might say, an unpleasant and unexpected Schmittian intrusion on Arendt's political theme of resisting persecution by adopting the identity being persecuted. Sosić says, “you are simply forced to go where you are being pushed, because otherwise you don't belong anywhere.” Here, resistance to (real or supposed) persecution pushed Sosić not only to ethnic nationalism, but also to

⁶⁸ Kličković himself was accused of war crimes and crimes against humanity in the Bosnian Extraordinary Chamber, but acquitted for lack of proof beyond a reasonable doubt.

⁶⁹ Transcript, testimony of Mirko Sosić, March 21, p. 35763 lines 14-23, available at <http://www.icty.org/x/cases/karadzic/trans/en/130321ED.htm> (visited May 9, 2014).

ethnic opposition—us versus them, friend versus enemy. For some other Bosnian Serbs, it led to genocide.

Over the years, many observers have criticized the creation of a special crime of genocide because its definition seemingly reifies national, ethnic, racial, and religious groups, and thus requires exactly the kind of group-based thinking that causes genocide. Here we have a parallel illustration of how Arendt's performative conception of ethnic identification can become the actual enemy of her conception of humanity—its contrary, not merely its contradictory.

Obviously, when Arendt spoke of resistance to persecution, she did not envision that political resistance might mean counter-persecution.⁷⁰ But why not? Surely, the answer must be that there are humanitarian limits to what a group can do even to fight against its own persecution. Those limits, though, must come from some commitment to decency that transcends the process of group identification and affiliation. Possibly that commitment could come from Arendt's reminder that we must identify even with those whose behavior is most shameful—we must accept “the evil potentialities in men”⁷¹ without thinking that the evil-doers are like an alien species. Like it or not, they too belong to humanity—a thought that Arendt calls terrifying. She claims that this terrifying thought—“the idea of humanity, excluding no people and assigning a monopoly of guilt to no one”—is “the only guarantee” against genocide.⁷²

⁷⁰ This may be part of a more general feature of her political thought, its conspicuous discomfort with acknowledging the role of violence in politics. For her, politics is the arena of speech and persuasion, not violence. Indeed, Arendt argued that political power is the antithesis of violence—she is the anti-Schmitt. As she strikingly put it, “to speak of non-violent power is actually redundant.” Hannah Arendt, “On Violence,” in *Crises of the Republic* (New York: Harcourt Brace, 1972), p. 155. Although she acknowledges that violence is one of the instruments that power must use (*ibid.*, pp. 145, 150), Arendt may be faulted for downplaying its centrality to politics.

⁷¹ “Organized Guilt and Universal Responsibility,” p. 131.

⁷² *Ibid.*

However, this line of thought lies in deep tension with her insistence that in times of persecution “I am a man” is a grotesque evasion of reality. For that is tantamount to saying that in times of persecution adopting the standpoint of humanity is a grotesque evasion of reality. From where else, then, comes the prohibition of crimes against humanity? Perhaps Arendt has an answer, but it is not clear what it might be.