

Hannah Arendt and the Law

Edited by
Marco Goldoni
and
Christopher McCorkindale



• HART •
PUBLISHING

OXFORD AND PORTLAND, OREGON

2012

*International Law and Human Plurality in
the Shadow of Totalitarianism: Hannah
Arendt and Raphael Lemkin**

SEYLA BENHABIB

I. INTRODUCTION

HANNAH ARENDT AND Raphael Lemkin were witnesses to the twentieth century. They both experienced the dislocating transformations on the European continent as a consequence of two World Wars, lost their States as well as their homes in this process, narrowly escaped the clutches of the Nazi extermination machine, and made it to the New World through sheer luck and fortuitous circumstance. Their thought is marked by the cataclysms of the last century, and they have in turn emerged as indispensable interlocutors for all of us in understanding this past.

Arendt and Lemkin were contemporaries, and there are astonishing parallels in their early biographies. She was born in Hannover in 1906 (d 1975) and grew up in Königsberg in East Prussia. After the First World War, the Polish Corridor was created and cut East Prussia and Königsberg off from the rest of Weimar. In 1945, Königsberg was occupied by the Soviets and renamed Kaliningrad. Lemkin was born in Bezdovene in 1900, then part of Tsarist Russia. Between the two World Wars (1918–39) Bezdovene became part of Poland, and today is Bezdovna in Belarus.

When Arendt was arrested by the Gestapo in the Spring of 1933 and was forced to flee to Paris via Prague with her mother, she had been carrying out research in the Prussian State Library at the request of Kurt Blumenfeld on anti-Semitic measures undertaken by Nazi non-governmental organisations, business associations

* This chapter is reprinted from S Benhabib, 'International Law and Human Plurality in the Shadow of Totalitarianism: Hannah Arendt and Raphael Lemkin' (2009) 16 *Constellations* 331; reprinted with revisions in S Benhabib, *Politics in Dark Times. Encounters with Hannah Arendt* (Cambridge, Cambridge University Press, 2010), 219–47. An abridged version has also appeared in S Benhabib, *Dignity in Adversity. Human Rights in Troubled Times* (Cambridge, UK and Malden, MA: 2011) 41–57.

and 'professional clubs to exclude Jewish members. Her Zionist friend, Kurt Blumenfeld, in turn, was preparing to present this material at the 18th Zionist Congress. During those very same years, Ralph Lemkin was a young clerk in the Polish State Prosecutor's office who had been collecting documents on Nazi war legislation, particularly those affecting cultural, linguistic, religious activities and artifacts of cultural and religious groups. In 1933, he had sent a paper to a League of Nations conference in Madrid, in which he proposed that 'the crimes of barbarity and vandalism be considered as new offences against the law of nations'.¹ In 1939, he fled from Poland and reached Stockholm, where he continued to do extensive research on Nazi occupation laws throughout Europe. On 18 April 1941, he arrived in the United States via Japan. That very same year, Arendt and her second husband, Heinrich Bluecher, arrived in New York via Portugal.

Yet in contrast to Arendt, who acquired world-wide fame after her arrival in the USA with her many works and university appointments, Lemkin, after the general acclaim he received with the passage of the Genocide Convention by the United Nations in 1948, fell into obscurity and died a lonely death, destitute and neglected in New York in 1959.

It is certainly fascinating to speculate whether these Jewish refugees, who were caught up in the great dislocations of their time, ever met one another in some location or association in the United States. We simply do not know. What is even more astonishing is the lack of any discussion in Hannah Arendt's work of Lemkin's great book on the concept of genocide,² or any evidence that Lemkin knew Arendt's work on totalitarianism, which certainly was the most powerful historical documentation and philosophical analysis in the early 1950s of the unprecedentedly murderous character of the Nazi regime. Arendt and Lemkin appear to have existed in the same time and space coordinates without ever encountering one another. It is thus incumbent upon retrospective readers of their work to put together the pieces of the puzzle in this missed encounter.

This missed encounter may itself be viewed as a metaphor for the ways in which not only their lives but also their thought ran so close to each other and

¹ This, and other biographical information on Ralph Lemkin, is drawn from S Power, *A Problem from Hell: America and the Age of Genocide* (New York, Basic Books, 2002) 17–87; A Curthoys and J Docker, 'Defining Genocide' in D Stone (ed), *The Historiography of Genocide* (New York, Palgrave Macmillan, 2008) 9 ff. See also DJ Schaller and J Zimmerer, 'From the Guest Editors: Raphael Lemkin: the "founder of the United Nation's Genocide Convention" as a historian of mass violence' (2005) 7(4) *Journal of Genocide Research* 447.

² Cf R Lemkin, *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, DC, Carnegie Endowment for International Peace, 1944). In 1945, upon the publication of *Axis Rule in Occupied Europe*, the *New York Times Book Review* devoted its cover to this work. It is hard to believe that Arendt, who resided in New York City at that time, and in view of her general interests in and knowledge of these questions, would not have been familiar with Lemkin's book. See OD Tolischus, 'Twentieth Century Moloch: The Nazi Inspired Totalitarian State, Devourer of Progress—and of Itself', *New York Times Book Review*, 21 January 1945: 1, 24, as cited in Power, above n 1, 525, fn 35.

yet remained so distant.³ In 1944, Ralph Lemkin published *Axis Rule in Occupied Europe*, in which he demanded that a new category in the law of nations be formulated in order to reckon with and bring to justice war crimes committed by Nazis and their Allies against the many peoples of Europe. He was concerned that international law ought to recognise the unprecedented nature of the genocide of Jews and other peoples. In 1951 Hannah Arendt published *The Origins of Totalitarianism* which also exposed the unprecedented political nature of totalitarianism as a novel form of political rule in history—in fact, as a transformation of the sphere of the political as such. Yet, unlike Lemkin, Arendt was quite sceptical that declarations of human rights, international conventions and the like could help restore the destroyed political fabric of the world after the Second World War. In a passage which almost seems to take aim at Lemkin's efforts to pass the Genocide Convention, Arendt wrote:

Even worse was that all societies formed for the protection of the Rights of man, all attempts to arrive at a new bill of human rights were sponsored by marginal figures—by a few international jurists without political experience or professional philanthropists supported by the uncertain sentiments of professional idealists. The groups they formed, the declarations they issued show an uncanny similarity in language and composition to that of societies for the prevention of cruelty to animals. No statesman, no political figure of any importance could possibly take them seriously and none of the liberal or radical parties in Europe thought it necessary to incorporate into their program a new declaration of human rights.⁴

Did Arendt possibly have Lemkin in mind when she referred in dismissive terms to those 'international jurists without political experience'? And could she have been referring to Eleanor Roosevelt, the tireless force behind the passage of the Universal Declaration of Human Rights in 1948, when she takes a swipe at 'professional philanthropists supported by the uncertain sentiments of professional idealists'? There are no references in Arendt's work, as far as I can tell,⁵ to Raphael Lemkin.

³ A subtle analysis of the sensibility of Arendt, Lemkin and others in terms of the category of 'citizen of the world' is given by Ned Curthoys, who writes: 'As emigre scholars and public intellectuals, Arendt, Jaspers, Spitzer, Auerbach and Lemkin were dedicated to illuminating generous and unorthodox methodological approaches imbued with the restless exigencies of personal experience and hermeneutic intuition.' See N Curthoys, 'The Emigre Sensibility of "World Literature": Historicizing Hannah Arendt and Karl Jaspers' Cosmopolitan Intent' *Theory and Event* 8, no 3, accessed online at <http://muse.jhu.edu/journals/theory_and_event/v008/8.3curthoys.html>.

⁴ H Arendt, *The Origins of Totalitarianism* (New York, Harcourt, Brace and Jovanovich, 1979) 292 (hereafter 'OT'). Originally published in Britain as *The Burden of Our Time* (London, Secker and Warburg, 1951).

⁵ There is still no serious cataloguing of the contents of the 80-odd boxes deposited in the Library of Congress in Washington, DC, although microfilm collections exist in several universities. The same is true of the extensive Hannah Arendt and Heinrich Bluecher Library which is located in Bard College. Attempts are underway to catalogue its holdings. The electronic catalogue contains no references to Lemkin.

Ironically, though, by 1963, when she writes *Eichmann in Jerusalem*, Arendt has not only accepted the categories of the Genocide Convention, she goes even beyond Lemkin to provide a philosophical condemnation of the crime of genocide in the light of her concept of human plurality. Genocide, in Arendt's view, destroys plurality and is a crime against the human condition as such. In the dramatic Epilogue to *Eichmann in Jerusalem* she states that the 'justice of what was done in Jerusalem would have emerged to be seen by all if the judges had dared to address their defendant in something like the following terms'.⁶ In astonishingly pointed language, she then delivers her own verdict against Adolph Eichmann:

You admitted that the crime committed against the Jewish people during the war was the greatest crime in recorded history, and you admitted your role in it ... Let us assume, for the sake of argument, that it was nothing more than misfortune that made you a willing instrument in the organization of *mass murder*; there still remains the fact that you have carried out, and therefore actively supported, a policy of *mass murder* ... 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.⁷

I want to suggest that these two quotations—from *The Origins of Totalitarianism* and from *Eichmann in Jerusalem*—are like book-ends marking the evolution of Arendt's thought from scepticism towards international law and human rights⁸ in the 1950s toward a cautious confirmation of their role in shaping politics among nations in the 1960s. And this change of heart on Arendt's part was, whether or not she personally was acquainted with or knew Ralph Lemkin's work, indebted to his achievement. He remained one of those 'obscure international jurists', in her words, who single-handedly and tirelessly worked to craft the Convention on Genocide and saw it adopted by the United Nations on 9 December 1948. I shall argue in this essay that with her claim that Eichmann must die because he 'carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations', Arendt not only confirmed Raphael

⁶ H Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York, Penguin Books, 1965) 277 (hereafter 'EII').

⁷ *Ibid* 211–79.

⁸ There continue to be contentious exchanges around Hannah Arendt's concept and justification of human rights. See J Isaac, 'Hannah Arendt on Human Rights and the Limits of Exposure, or Why Noam Chomsky is Wrong About the Meaning of Kosovo' (2002) 69(2) *Social Research* 263; S Benhabib, *The Rights of Others. Aliens, Citizens and Residents* (Cambridge, Cambridge University Press, 2004) 49–61; C Menke, 'The "Aporias of Human Rights" and the "One Human Right": Regarding the Coherence of Hannah Arendt's Argument' (2007) 74(3) *Social Research. Hannah Arendt's Centenary* 739; P Birmingham, *Hannah Arendt and Human Rights: The Predicament of Common Responsibility* (Bloomington, Indiana University Press, 2006); and S Benhabib, 'Another Universalism: On the Unity and Diversity of Human Rights' (2007) 81(2) *Proceedings and Addresses of the American Philosophical Association* 7.

Lemkin's understanding of the crime of genocide as the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such',⁹ she gave it a firm ontological grounding in the human condition.

In tracing this transformation in Arendt's thought, the first step will be to delve into her analysis of the dilemmas of the modern European nation state and the role of this institution in the rise of European anti-Semitism; the second step is to consider her discussion of the problem of minorities and of statelessness in the inter-war period. For Arendt, anti-Semitism is not an eternal aspect of the human condition or of human history. It originates with the interlacing of historical, socio-economic, political and cultural circumstances around the rise of the modern nation state and the emancipation of European Jewry. These two political developments in turn fuel her profound pessimism about the role of modern political and legal institutions in the European continent, and encourage her scepticism that they are unable to resolve the paradoxes that they themselves create.¹⁰

Raphael Lemkin, by contrast, is a jurist trained in the law of nations, and for him the rise of European anti-Semitism and the eventual destruction of European Jewry need not be explained in terms of the fate of the Jews alone. He considers genocidal anti-Semitism to be *one episode among others* in the long history of the cultural extermination of human groups; the Holocaust is to be singled out for its intensity and extent rather than its logic. Lemkin retains his faith in the relative autonomy of legal institutions *vis-à-vis* the political process, but instead of documenting the folly of the League of Nations and of Minority Treaties, as Arendt does, he strives to put into legal coda the unfulfilled promises of this institution, in particular with respect to minority rights and vulnerable peoples. In the 1950s both agree, however, that the 'rule of law' in the American republic has reached the right balance between politics and the law.¹¹ Above all, they believe

⁹ United Nations Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948 (Chapter II). See the rather dramatic description of the events surrounding and leading up to the adoption of this Convention in Power, above n 1, 54–60.

¹⁰ I have discussed these paradoxes extensively in *The Rights of Others*, above n 8, ch 2, 'The Right to Have Rights: Hannah Arendt on the Contradictions of the Nation-State', 49–71. See also C Volk, 'The Decline of Order. Hannah Arendt and the Paradoxes of the Nation-State' in S Benhabib (ed), *Politics in Dark Times: Encounters with Hannah Arendt* (Cambridge, Cambridge University Press, 2010) 172.

¹¹ Ann Curthoys and John Docker report that only 11 months after the Genocide Convention went into effect, on December 1951, 'a petition entitled *We Charge Genocide* was presented by Paul Robeson and others to the UN Secretariat in New York' on behalf of African-Americans, charging that slavery was a form of genocide. See Curthoys and Docker, above n 1, 15 ff. The General Assembly did not adopt the petition and furthermore, '[w]ithout exception, law academics were adamantly opposed because any attempt to apply the Genocide Convention to the US situation would affect the integrity of "our nation".' Lemkin was among these academics and, within the context of the Cold War, he saw these accusations as Soviet attempts to 'divert attention from the crimes of genocide committed against Estonians, Latvians, Lithuanians, Poles and other Soviet-subjugated peoples' (from a *New York Times* interview of 18 December 1951). On this, see Curthoys and Docker, above n 1, 19. See also for further discussion, A Rabinbach, 'The Challenge of the Unprecedented—Raphael Lemkin and the Concept of Genocide' (2005) 4 *Simon Dubnow Institute Yearbook* 397. In Lemkin's

that political traditions in the United States have helped ameliorate the fatal confusions which recurred on the Continent as between the supremacy of the will of the nation, understood as a homogeneous ethno-cultural entity, and the constitution of a State, which ought to guarantee equality in the eyes of the law and equal rights to all its citizens regardless of their ethnic origin.¹²

I begin with a brief consideration of Arendt's analysis of the origins of European anti-Semitism and the failure of the Minority Treaties in the inter-war period. I turn then to Lemkin's crucial innovations in international law with the introduction of the concept of 'genocide'. I argue that underlying this legal concept is an 'ontology of the group'. While little noted in the literature on Lemkin, this concept has two origins: one is the legal category of 'minorities' as defined by President Wilson's 14 Points; and the other is a Herderian belief in the group as the *conditio sine qua non* of all human artistic and cultural achievement.¹³ Arendt, by contrast, only harbours scepticism towards such group concepts. Yet, like Lemkin, she believes in the ontological value and irreducibility of *human plurality*. It is because we inhabit the world with others who are *like us* and yet always different *from us* that the world is perspectival and can manifest itself to us only from a particular vantage point. Nevertheless, plurality need not be constituted through the 'ascribed' groups of ethnicity, nationhood, race or religion alone. Quite to the contrary. It is only when ascription is transcended through association and human beings come together for a joint purpose in the public sphere that plurality, which is the human condition, is most strikingly revealed. I shall argue that Arendt's philosophical grounding of the concept of plurality provides the concept of genocide with one of its strongest moral and existential underpinnings.¹⁴

case as well, we encounter a certain 'colour blindness', an insensitivity to the problem of race as colour, as opposed to race defined through ethnicity, language and religion. Hannah Arendt has often been criticised on this account, and in particular for her controversial essay on desegregation in southern schools, published as H Arendt, 'Reflections on Little Rock' (1959) 6(1) *Dissent* 45. See my analysis of Arendt on black-white relations in the US and on race in Africa in S Benhabib, *The Reluctant Modernism of Hannah Arendt* (New York and Toronto, Rowman and Littlefield Publishers, 2003) 146–55, and Richard King's essay on the invisibility of race among emigré intellectuals: R King, 'On Race and Culture: Hannah Arendt and Her Contemporaries' in Benhabib (ed), above n 10, 113.

¹² For a more sceptical consideration of these claims with regards to sovereign power and executive privilege in the US experience, see A Arato and J Cohen, 'Banishing the Sovereign: Internal and External Sovereignty in Arendt' in Benhabib (ed), above n 10, 219.

¹³ DM Segesser and M Gessler, 'Raphael Lemkin and the International Debate on the Punishment of War Crimes (1919–1948)' (2005) 7(4) *Journal of Genocide Research* 453.

¹⁴ For further considerations on the concept of groups, see AD Moses, 'Moving the Genocide Debate Beyond the History Wars' (2008) 54(2) *Australian Journal of Politics and History* 248, 267. On the place of *existential* as distinct from *moral* values in Arendt's work, see the illuminating essay by George Kateb, 'Existential Values in Arendt's Treatment of Evil and Morality' in Benhabib (ed), above n 10, 342.

II. ANTI-SEMITISM AND THE NATION STATE IN ARENDT'S THOUGHT

In her reflections on anti-Semitism in the aftermath of the Holocaust and after the fate of German-Jewry had become sealed, Arendt put forth a radical contention: anti-Semitism, she argued, far from being an 'eternal' dimension of the relationship between Jews and gentiles, represented, rather, a thoroughly modern phenomenon.¹⁵ As such, it reflected the disintegration of traditional political structures in Europe, and, in particular, the decline of the nation state in the aftermath of European imperialism in the second half of the nineteenth century. According to Arendt, anti-Semitism had to be understood not in isolation, but in the context of a crisis of Western civilization that far exceeded the importance of the 'Jewish Question'.

In thus framing the 'Jewish Question' against a much broader political background, Arendt challenged a number of traditional views on anti-Semitism. Foremost among them was the idea that modern anti-Semitism simply represented a new form of religiously-motivated 'Jew hatred'. Against this view, Arendt argued that, in effect, 'even the extent to which the former derives its arguments and emotional appeal from the latter is open to question'. As she wrote in a crucial and characteristically controversial passage from the *Origins of Totalitarianism*:

The notion of an unbroken continuity of persecutions, expulsions and massacres from the end of the Roman Empire to the Middle Ages, the modern era, and down to our own time, frequently embellished by the idea that modern antisemitism is no more than a secularized version of popular medieval superstitions, is no less fallacious (though of course less mischievous) than the corresponding antisemitic notion of a Jewish secret society that has ruled, or aspired to rule, the world since antiquity.¹⁶

Arendt's strong language in this passage is meant to drive home her point unambiguously: to understand the new in light of the old was, she suggests, fundamentally to misunderstand it. No amount of historical detail about the persecution of Jews could explain what she considered an unprecedented phenomenon. An adequate understanding of modern anti-Semitism therefore required new categories of thought.¹⁷ Underpinning all these contentions, and thus Arendt's

¹⁵ Parts of this section have previously appeared in S Benhabib and R Eddon, 'From Anti-Semitism to the "Right to Have Rights": The Jewish Roots of Hannah Arendt's Cosmopolitanism' in *Babylon: Beitrage zur juedischen Gegenwart*, no 22 (Frankfurt, Verlag Neue Kritik, 2007) 44. For general discussions on the significance of Jewish politics for Arendt's conception of politics and philosophy, see R Bernstein, *Hannah Arendt and the Jewish Question* (Cambridge, Mass, MIT Press, 1996); Benhabib, above n 11. Cf also J Kohn, 'Preface: A Jewish Life: 1906-1975' in J Kohn and RH Feldman (eds), *Hannah Arendt: The Jewish Writings* (New York, Schocken Books, 2007) ix-xxxiii.

¹⁶ OT xi.

¹⁷ Arendt's insistence on the centrality of Jews to the larger story of the moral and political collapse of Europe reveals a complex and ambivalent philosemitism that underpins her theory of anti-Semitism. While she famously declared that 'I have never in my life "loved" any people or collective,' and, indeed, that the "'love of the Jews" would appear to me, since I am myself Jewish,

theory of anti-Semitism as a whole, was a fundamental paradox: modern anti-Semitism rose as the modern nation state declined; therefore, the suggestion that anti-Semitism was a by-product of extreme nationalism was simply mistaken. As she explained, '[u]nfortunately, the fact is that modern anti-Semitism grew in proportion as traditional nationalism declined, and reached its climax at the exact moment when the European system of nation-states and its precarious balance of power crashed'.¹⁸ It was only in light of these events, unfolding on a European and indeed a global scale, that it was possible to understand what would have been an otherwise deeply perplexing development: the enormous significance that the 'Jewish problem' acquired for the Nazis.

The group of Jews who had inherited their wealth from the Court Jews of the absolutist State seemed ideally suited to serve the purposes of the modern nation state, since they were the only group in society that 'did not form a class of [its] own and ... did not belong to any of the classes in their countries'.¹⁹ As a result, they could offer the emergent State both the financial backing and the political loyalty it so desperately needed. The distance from Court Jew to European banker seemed but a short step away. And indeed, the European banker continued to be of use to the State even as it subsequently achieved a higher degree of consolidation. Even as their political role diminished as the result of subsequent political developments, Jewish bankers nevertheless remained useful as international mediators *among* nation states.

The peculiar economic position occupied by the Jews as lenders and bankers, bailing out and supporting first the absolutist regimes of Europe and subsequently national governments, gave them a unique and problematical profile. They were 'within the nation' but never really 'of the nation'. They enjoyed a 'supra-national' and almost 'proto-cosmopolitan' existence, which at one and the same time called forth and belied the universal belief in 'the rights of man'. The Jews seemed to represent 'human rights as such'. Yet at the same time, their problematic position within the nation also evidenced their vulnerability in virtue of not clearly belonging to a collectivity that would stand up for them. This is why for Arendt, as well as for Theodor Herzl, the Dreyfus case was so significant. Even after the legacy of the French Revolution, and within the 'civic nation' of France, the Jews remained outsiders. After the Franco-Prussian War

as something rather suspect, she nevertheless attributed to Jews a privileged cultural as well as political role in European history. [See H Arendt, *The Jew as Pariah* (RH Feldman (ed)) (New York, Grove Press, 1978) 247. Cf the expanded and revised edition of the essays from *The Jew as Pariah*, supplemented by other materials in *Hannah Arendt, The Jewish Writings*, above n 15.] In one sense, for example, in the figure of the *schlemiel* as embodied by Heinrich Heine and in Bernard Lazare's *pariah*, Arendt discerned a unique model of humanity, which, 'excluded from the world of political realities', could at one time 'preserve the illusion of liberty'. While Nazi totalitarianism erased this illusion, Arendt regarded the pariah's humanity and independence of mind as eminently political qualities in her own time—indeed, as the conditions *sine qua non* of human freedom.

¹⁸ OT 3.

¹⁹ *Ibid* 13.

(1870–71), Dreyfus, an Alsatian Jew and an officer in the French army, was accused of being a spy for the Germans. Jewish existence thus revealed the fragile balance between the universalistic aspirations of the modern nation state and the principle of ‘national sovereignty’. Such sovereignty would repeatedly be defined not in terms of a community of citizens and equals, but in terms of an *ethnos* of blood and belonging.²⁰ Particularly after the collapse of the nation state system in Western Europe in the wake of overseas imperialism, and the destruction of the Kaiserreich, the Russian, the Austro-Hungarian and Ottoman Empires in central and eastern European territories, a political and legal chaos exploded to which the nation state system as a model of ‘inter-State order’ was unable to provide answers.²¹

It is also at this point that the threads connecting the experiences of the failed liberal emancipation of the German Jews to whom Arendt belonged with the collective experiences of the majority of Eastern European Jews, as articulated for us most poignantly through Lemkin’s category of ‘genocide’, become visible.

In *Axis Rule in Occupied Europe*, Lemkin also considers the legal status of the Jews in chapter VIII.²² He observes matter-of-factly that the definition of a Jew was based by Axis powers (among which are included not only Germany, but Italy, Hungary, Bulgaria and Rumania too) upon the Nuremberg laws: ‘A Jew is any person who is, or has been, a member of the Jewish faith or who has more than two Jewish grandparents.’²³ The latter are considered Jewish if they are, or have been, members of the Jewish faith. Lemkin is particularly attentive to differences in the treatment of Jews from France, Norway, Belgium and The Netherlands in the hands of the Nazis, in contrast with those hailing from the eastern European territories; but after the deportation *en masse* to Poland of western European Jews, he claims, these differences among different Jewish nationalities evaporated.

In contrast to Arendt’s reflections, there is no social, economic, psychological or cultural analysis of European anti-Semitism in this work, but rather a very detailed account of the race-policies of the Nazis and their attempts at the Germanisation of the European continent. Whereas Arendt attempts to understand the *causes* of anti-Semitism, Lemkin focuses on the *consequences* of racialist Nazi ideology. Prejudice and genocide, among human groups—which in his unpublished Notes is extended as far as the colonisation of the Aztecs and the Incas, the destruction of early Christians by the Romans, and less controversially, to the genocide of Ottoman Armenians—appear rooted for him in a deep-seated anthropological

²⁰ These philosophical theses on the contradictions between ‘human rights’ and ‘national sovereignty’ are more clearly analyzed in H Arendt, *On Revolution* (New York, Penguin Books, 1963). For a more detailed discussion of these themes, see Benhabib, above n 11, ch 2.

²¹ Cf C Volk, in Benhabib (ed), above n 10, 172.

²² Lemkin, above n 2, 75–78.

²³ *Ibid.*

predilection of the human species.²⁴ It is the law and human institutions which can counter this. 'Only man has law,' he is reported to have said.²⁵

Arendt's and Lemkin's analyses of anti-Semitism thus show little affinity: for her the emergence of the Jewish Question in the heart of nineteenth- and early twentieth-century Europe requires a full-scale analysis of the paradoxes of the modern nation state system, whereas he sees deep-seated tendencies throughout human history towards the persecution of vulnerable groups, and among them the Jews. It is the goal of law to protect the vulnerable against the predator and the exploiter, but the law cannot eradicate evil from human heart.

It is in their reflections on the question of minorities in Europe between the two World Wars that Arendt and Lemkin tread some common ground.

III. ARENDT ON STATELESSNESS, THE MINORITY TREATIES AND 'THE RIGHT TO HAVE RIGHTS'

The dissolution of the multinational and multiethnic Russian, Ottoman and Austro-Hungarian empires, and the defeat of the Kaiserreich in 1918, led to the emergence of nation states, particularly in eastern-central European countries that enjoyed little religious, linguistic or cultural homogeneity. These successor States—Poland, Austria, Hungary, Czechoslovakia, Yugoslavia, Bulgaria, Lithuania, Latvia, Estonia, the Greek and the Turkish republics—controlled territories in which large numbers of so-called 'national minorities' resided. On 28 June 1919, the Polish Minority Treaty was concluded between President Woodrow Wilson and the Allied and Associated Powers, to protect the rights of minorities who made up nearly 40 per cent of the total population of Poland and consisted at that time of Jews, Russians, Germans, Lithuanians and Ukrainians. Thirteen similar agreements were then drawn up with various successor governments, 'in which they pledged to their minorities civil and political equality, cultural and economic freedom, and religious toleration'.²⁶ Not only was there a fatal lack of clarity as to how a 'national minority' was to be defined, but the fact that the protection of minority rights applied only to the successor

²⁴ 'In my early boyhood, I read *Quo Vadis* by Henry Sienkiewicz—this story full of fascination about the sufferings of the early Christians and the Romans' attempt to destroy them solely because they believed in Christ ... It was more than curiosity that led me to search in history for similar examples, such as the case of the Huguenots, the Moors of Spain, the Aztecs of Mexico, the Catholics in Japan, and so many races and nations under Genghis Khan ... I was appalled by the frequency of evil, by great losses in life and culture, by the despairing impossibility of reviving the dead or consoling the orphans, and above all, by the impunity coldly relied upon the guilty.' R Lemkin, 'Totally unofficial', manuscript, undated, New York Public Library, Manuscripts and Archives Division, The Raphael Lemkin Papers, Box 2.

²⁵ The full quote is: 'Only man has law ... You must build the law!' Quoted in Power, above n 1, 47, 55.

²⁶ C Fink, 'Defender of Minorities: Germany in the League of Nations, 1926–1933' (1972) 4 *Central European History* 330. Also, C Fink, *Defending the Rights of Others. The Great Powers, the Jews and International Minority Protection* (Cambridge, Cambridge University Press, 2004).

States of the defeated powers, and not to the victors—Great Britain, France and Italy—who refused to consider the extension of the Minority Treaties to their own territories, created cynicism about the motivations of the Allied Powers in supporting minority rights. This situation led to anomalies whereby, for example, the German minority in Czechoslovakia could petition the League of Nations for the protection of its rights, but the large German minority in Italy could not. The position of Jews in all successor States was also unsettled: if they were a ‘national minority’, was it by virtue of their race, their religion or their language that they were to be considered as such, and exactly which rights would this minority status entail? For Arendt, the growing discord within and the political ineptitude of the League of Nations, the emerging conflicts among so-called national minorities themselves, as well as the hypocrisy in the application of the Minority Treaties, were all harbingers of developments in the 1930s. The modern nation state was being transformed from an organ which would execute the rule of law for all its citizens and residents, into an instrument of the nation as a narrowly ‘imagined’ ethnonational community: ‘The nation has conquered the state, national interest had priority over law long before Hitler could pronounce “right is what is good for the German people.”’²⁷ This statement from Hans Frank, the former German Minister of Justice and Governor General of occupied Poland, is also cited by Lemkin, who renders it as ‘[l]aw is that which is useful and necessary for the German nation’.²⁸

The perversion of the modern State from an instrument of law into one of lawless discretion in the service of the ethnic nation was evident when States began to practice massive denaturalisations against unwanted minorities, creating millions of refugees, deported aliens and stateless peoples across borders—special categories of humans created through the actions of nation states. In a territorially bounded nation state system, or in a ‘State-centric’ international order, one’s legal status is dependent upon protection by the highest authority which controls the territory upon which one resides and issues the papers to which one is entitled. One becomes a *refugee* if one is persecuted, expelled and driven away from one’s homeland; one becomes a *minority* if the political majority in the polity declares that certain groups do not belong to the supposedly ‘homogeneous’ people; one is a *stateless* person if the State whose protection one has hitherto enjoyed withdraws such protection, nullifying the papers it has granted; one is a *displaced* person if, having been rendered a refugee, a minority or a stateless person, one cannot find another polity to recognise one as its member and remains in a state of limbo, caught between territories, none of which desire one to be its resident. It is here that Arendt concludes:

We become aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one’s actions and opinions) and a right to belong

²⁷ OT 275.

²⁸ Lemkin, above n 2, 31.

to some kind of organized community, only when millions of people emerge who had lost and could not regain these rights because of the new global political situation ... The right that corresponds to this loss and that was never even mentioned among the human rights cannot be expressed in the categories of the eighteenth-century because they presume that rights spring immediately from the 'nature' of man ... the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself. *It is by no means certain whether this is possible.*²⁹ (emphasis added)

Written in 1951, three years after the adoption of the Genocide Convention by the UN General Assembly, this quotation betrays Arendt's profound ambivalence towards the nation state system. It remains one of the most puzzling aspects of her political thought that, although she criticised the weaknesses of this system, she was equally sceptical toward all ideals of a World State and in fact, at this stage in the early 1950s, towards all instruments of international law to resolve these problems.

Arendt's philosophical and political ambivalence towards the nation state has complex dimensions. The nation state system, established in the wake of the American and French Revolutions, and bringing to culmination processes of development at work since European absolutism in the sixteenth century, is based upon the tension, and at times outright contradiction, between human rights and the principle of national sovereignty. The modern State has always been a specific nation state.³⁰ This is the case even when this nationalism is civic in form, as is usually associated with the American, French, British and Latin American models, or ethnic, as is usually associated with the German and east-central European models. The citizens of the modern State are always also members of a nation, of a particular human group who share a history, language, culture, religion and tradition, however conflictually this identity may be constituted, and however 'imagined' the identity of the nation may be (Benedict Anderson). Between the principles of national self-determination and universal human rights there are always potential, and often actual, conflicts. The ethno-cultural nation can trample upon the rights of vulnerable minorities.

Ironically, although she never accepted Zionism as the dominant cultural and political project of the Jewish people, and chose to live her life in a multi-national and multicultural liberal democratic State, the catastrophes of the Second World War made Arendt more appreciative of the moment of new beginning inherent in all State formations. 'The restoration of human rights,' she observed, 'as the recent

²⁹ OT 296–97.

³⁰ Scheuerman makes an excellent case about the dominance of the French Revolution as a negative model and counter-example which is often juxtaposed to America in Arendt's work. He argues that Abbé Sieyès' influential conception of the nation 'is remarkably free of the ethnicist qualities'. See WE Scheuerman, 'Revolutions and Constitutions: Hannah Arendt's Challenge to Carl Schmitt' in D Dyzenhaus (ed), *Law as Politics: Carl Schmitt's Critique of Liberalism* (Durham, NC, Duke University Press, 1998) 252, 259. Scheuerman concludes that '[f]or her as for [Carl] Schmitt, the intellectual legacy of the French Revolution merely reproduces the most heinous features of Absolutism, particularly its vision of an indivisible, omnipotent, and legally unlimited sovereign' (*ibid* at 261). Of course, the critique that concepts such as the sovereignty of the nation reproduce absolutist tendencies was first voiced by Alexis de Tocqueville in his *The Ancien Regime and the French Revolution*.

example of the State of Israel proves, has been achieved so far only through the restoration or establishment of national rights.³¹ Arendt was too knowledgeable and shrewd an observer of politics not also to have noted that the cost of the establishment of the State of Israel was the disenfranchisement of the Arab residents of Palestine and hostility in the Middle East until the present. She hoped throughout the 1950s that a binational Jewish and Palestinian State would become a reality.³²

What can we conclude from the historical and institutional contradictions of the idea of the nation state? Is Arendt's begrudging acceptance of this political formation a concession to political realism and historical inevitabilities?³³ Could Arendt be saying that no matter how contradiction-fraught the Nation State may be as an institutional structure, it is still the only one which defends the rights of all who are its citizens—at least in principle, even if not in practice?

The answer to this question in part depends on Arendt's own evolving appreciation of international law and international institutions. Between the 1951 publication of *The Origins of Totalitarianism* and the 1963 appearance of *Eichmann in Jerusalem*, post-Second World War politics were transformed with the creation of the United Nations in 1946, the Universal Declaration of Human Rights in 1948 and the adoption of the Genocide Convention by the General Assembly that same year. Although Arendt never abandoned her belief in the priority of self-determination of peoples for guaranteeing human as well as citizens' rights, her faith in international law and institutions grew. The complex relationship between republican self-government and new developments in the international sphere, including international law, are part of the subtext of Arendt's reflections on the trial of Adolph Eichmann in Jerusalem.³⁴ And this new world constellation comes about, in no small measure, through Lemkin's tireless efforts in drafting and advocating the acceptance of the Genocide Convention.

IV. FROM THE ORIGINS OF TOTALITARIANISM TO THE GENOCIDE CONVENTION

Transforming the memory of the persecution not only of Jews, but of other peoples such as the Gypsies, the Poles, the Slovenes and the Russians, into a

³¹ OT 179.

³² For an extensive discussion of this issue as it relates to Arendt's reflections on Palestine, see Benhabib, above n 11.

³³ There is renewed interest in Arendt's views of world politics and international relations. For an original reading, see P Owens, *Between War and Politics. International Relations in the Thought of Hannah Arendt* (Oxford, Oxford University Press, 2007); D Klusmeyer, 'Hannah Arendt's Critical Realism: Power, Justice, and Responsibility' in AF Lang Jr and J Williams (eds), *Hannah Arendt and International Relations: Readings Across the Lines* (London, Palgrave, 2005) 113.

³⁴ See L Bilsky, 'The Eichmann Trial and the Legacy of Jurisdiction' in Benhabib (ed), above n 10, 198. See also, for an in-depth discussion of the jurisprudential issues behind the Eichmann trial, S Benhabib, *Another Cosmopolitanism: The Berkeley Tanner Lectures* (Oxford, Oxford University Press, 2006) ch 1.

universal legacy for mankind, actionable under the law of nations, was Lemkin's desideratum. In the Preface to *Axis Rule in Occupied Europe*, he writes:

The practice of extermination of nations and ethnic groups as carried out by the invaders is called by the author 'genocide,' a term deriving from the Greek word *genos* (tribe, race) and the Latin *cide* (by way of analogy, see homicide, fratricide).³⁵

These few famous lines offered a term for what Churchill, referring not only to the extermination of European Jewry but to German war conduct in eastern Europe generally, called 'a crime without a name'.³⁶

Lemkin himself, it has been pointed out, did not insist on the uniqueness of the Holocaust but attempted to formulate 'a broad theory and definition of genocide, in which the Holocaust served as prime example, not as an exception'.³⁷ This broad conception of genocide in the meantime has spawned a new field of 'comparative genocide studies'.³⁸

Lemkin's picture of Nazi ambitions and of the Holocaust was based on an immensely detailed knowledge of the legal framework of the occupation regimes. From a historian's point of view, Dan Stone writes that

perhaps Lemkin's most original contribution ... is his inclusion of the murder of the Jews in a wider policy for the demographic reshaping of Europe. Historians ... have shown the extent to which the genocide of the Jews was part of a broader plan for the 'resettlement' of ethnic Germans and the expulsion of millions of Slavs, as encapsulated in the *Generalplan Ost* (General Plan East). Where Lemkin does not adumbrate contemporary concerns is in his failure to see that attack on the Jews as driven by a radical ideology ... Today historians accept that the murder of the Jews was not the full extent of the Nazis' ambitions, but ... there are good reasons why the Jews were targeted first and most tenaciously, and equally that the Jews had a special place in the Nazi *Weltanschauung*.³⁹

³⁵ Lemkin, above n 2, xi.

³⁶ WS Churchill, *The Churchill War Papers: The Ever Widening War*, vol 3: 1941 (M Gilbert (ed)) (New York, WW Norton, 2000) 1099–1106; as cited by Power, above n1, 29, fn 32.

³⁷ D Stone, 'Raphael Lemkin on the Holocaust' (2005) 7(4) *Journal of Genocide Research* 539, 546.

³⁸ See the special issue of the *Journal of Genocide Research*, 7, no 4 (December 2005), devoted to the work of Raphael Lemkin; M.A McDonnell and A.D Moses, 'Raphael Lemkin as historian of genocide in the Americas', *ibid*, 501–29; and A.D Moses, 'The Holocaust and Genocide' in D Stone (ed), *The Historiography of the Holocaust* (Houndsmills, Palgrave Macmillan, 2004) 535.

³⁹ D Stone, above n 37, 545. Arendt was well aware of this 'imperialist' aspect of Nazi ideology, and therefore distinguished between 'overseas' and 'continental imperialism' in OT, 222–67. But see the following distinction made by Lemkin between the Nazi persecution of Slavs (pragmatic colonisation reasons) versus the Jews and Gypsies (purely racial reasons): '[T]he Nazi plan of Genocide was related to many peoples, races, and religions, and it is only, because Hitler succeeded in wiping out 6 million Jews, that it became known predominantly as a Jewish case ... [As] a matter of fact, Hitler wanted to commit G against the Slavic peoples, in order to colonize the East, and to extend the German Empire up to the Ural Mts. Thereupon after the completion of the successful war he would have turned to the West and to subtract from the French people the 20 million Frenchmen he promised in his conversation with Rauschnig. Thus the German Empire would have reached from the Ural Mts. to the Atlantic Ocean. Nazi Germany embarked upon a gigantic plan to colonize Europe, and since there are no free spaces local populations had to be removed in order to make room for Germans. Nazi Germany did not have a fleet to protect overseas possessions. Moreover Germany had never good experiences in the past with overseas colonization. It was thus much simpler to colonize the European

Not only in terms of historical research, but also in terms of more technical legal considerations, Lemkin's various definitions of genocide are elastic, and exhibit an "instability" between the historical and the legal, between the cultural and the "ethnic," between intent and consequence'.⁴⁰ According to the Genocide Convention, adopted on 9 December 1948,

genocide means any of the following acts with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures to prevent births within the group; (e) Forcibly transferring children of the group to another group.⁴¹

Debates as to the degree of 'intent' which must accompany these acts, the definition of 'the group', whether social classes should or should not be considered as groups, what degree of destruction of the cultural legacy of the group constitutes genocidal intent as distinct from forced assimilation, ethnic cleansing or displacement, have accompanied these words from their inception and will continue to do so. But Lemkin not only brought legal imagination and perspective to the understanding of anti-Semitism and the extermination of the Jews, he also introduced the category of 'the group' and insisted that a genocidal plan would be characterised by the following:

The objectives of such a plan would be the disintegration of the political and social institutions, of culture, language, national feelings, religion, the economic existence of *national groups*, and the destruction of the personal security, liberty, health, dignity, and even the lives of individuals belonging to *such groups*. Genocide is directed against *the national group as an entity*, and the actions involved are directed against individuals, not in their individual capacity, but as members of *the national group*.⁴² (emphasis added)

continent ... [H]itler's plan covered the Poles, the Serbs, the Russians, the Frenchmen ... [T]he main purpose of the Nazis was a commission of a G against nations in order to get hold of their territory for colonisation purposes. This was the case of the Poles, and the Russians and the Ukrainians. The case against the Jews and the Gypsies was not based upon colonisatery [*sic*] but upon racial considerations ... The case against the Jews and Gypsies was of a purely racial rather than emotional political nature. The race theory served the purpose of consolidating internally the German people. The Germans had to be shown that they are racially valuable Nordics. Their favorable racial classifications could be understood better by comparing them with those who were called and classified as vermin of the earth—the Jews and the Gypsies.' As cited by A.D Moses, 'Intellectual History and Conceptual Questions' in AD Moses (ed), *Empire, Colony, Genocide: Conquest, Occupation and Subaltern Resistance in World History* (New York, Berghahn Books, 2008) 20–1. Moses is quoting from Raphael Lemkin, 'Hitler's Case-Outline', Jacob Radar Marcus Center of the American Jewish Archives, Collection 60, Box 7, Folders 12 and 13. The spelling has been corrected in part by Moses.

⁴⁰ A. Rabinbach, 'The Challenge of the Unprecedented—Raphael Lemkin and the Concept of Genocide' (2005) 4 *Simon Dubnow Institute Yearbook* 397, 401.

⁴¹ United Nations Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948 (Chapter II).

⁴² Lemkin, above n 2, 79.

The famous chapter IX of *Axis Rule in Occupied Europe* is dedicated to showing why Nazi and Axis actions in occupied Europe constitute a crime that requires a *new* conception. Admittedly, given his insistence that genocide against groups has been a constant feature of human history, it is at times unclear whether Lemkin thinks that this is an *old* crime which requires a *new* name, or a *new* crime which differs from historical precedents so radically that it must be called by a *new* name. He thinks it is the latter.⁴³ Lemkin is concerned to prove that the Nazis are waging an unprecedented 'total war' since they make no distinction between the nation and the State: '[T]he nation provides the biological elements for the state.'⁴⁴ Such total war is the antithesis of the Rousseau-Portalis Treaty⁴⁵ that ought to have governed war among sovereign States and which was, he believes, implicit in the Hague Regulations of 1907: 'This doctrine holds that war is directed against sovereigns and armies, not against subjects and civilians.'⁴⁶ The Nazis violated this principle not only by waging total war, but even prior to war, through their policies of Aryanisation of the German race (by forbidding mixed marriages with Jews and others; employing euthanasia on the feeble-minded and the retarded, etc); through the Germanisation of peoples such as Dutchmen, Norwegians and Luxembourgers, and the Germanisation of the soil alone of people *not related* to Germans by blood such as Poles, Slovenes and Serbs; and finally, when it came to the Jews, through their total extermination.⁴⁷

Lemkin is first and foremost concerned to establish that there are no existing instruments of international law to deal with such crimes. The Hague Convention on 'Respecting the Laws and Customs of War on Land' (signed on 18 October 1907) has rules addressing 'some (but by no means all) of the essential rights of individuals; and these rules do not take into consideration the interrelationship of such rights with the whole problem of nations subjected to virtual imprisonment'.⁴⁸ The Hague rules deal with 'the sovereignty of a state', but not with preserving 'the integrity of a people'.⁴⁹ In a subsequent essay, Lemkin names genocide a 'composite crime'.⁵⁰ By his own account, as far back as 1933, he formulated two new international law crimes—the crime of *barbarity*, 'conceived as oppressive and destructive actions directed against individuals as members of

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ The Rousseau-Portalis doctrine provides basis for the combatant-non-combatant distinction. In the 1801 opening of the French Prize Court, borrowing heavily from Jean-Jacques Rousseau (*The Social Contract*, Book 1, ch 4), Portalis said: 'War is a relation of state to state and not of individual to individual. Between two or more belligerent nations, the private persons of whom these nations are composed are only enemies by accident; they are not so as men, they are not so even as citizens, they are so only as soldiers.' Cited in MS McDougal and FP Felicioano, *Law and Minimum World Public Order* (New Haven, Conn, Yale University Press, 1994) 543.

⁴⁶ Lemkin, above n 2, 80.

⁴⁷ *Ibid* 80–81.

⁴⁸ *Ibid* 90.

⁴⁹ *Ibid.*

⁵⁰ R Lemkin, 'Genocide as a Crime Under International law' (1947) 41(1) *American Journal of International* 145, 147.

a national, religious, or racial group',⁵¹ and the crime of *vandalism*, 'conceived as malicious destruction of works of art and culture because they *represent the specific creations of the genius of such groups*'.⁵² In 1944 he is convinced that neither these terms nor the Hague Conventions are adequate to deal with the crime being perpetrated by Axis powers.

Yet why is the destruction of the life, works, culture and life-form of a national group more heinous than the destruction of the individuals belonging to this group? According to Lemkin, insofar as 'the actions involved are directed against individuals, not in their individual capacity, but as members of *the national group*',⁵³ they violate the *moral* principle that innocents shall not be harmed; the *legal* principle that the law punishes individuals for what they do, not for what or who they are; as well as *the laws of war and peace* that innocent civilians must be spared and must not be treated as collateral damage. There is an added dimension of legal criminality and moral culpability when destruction is aimed at the *national group as such*. To make this point Lemkin returns here to the Minority Treaties of the inter-war period, much as Arendt did, and observes that

National and religious groups were put under a special protection by the Treaty of Versailles and by specific minority treaties, when it became obvious that national minorities were compelled to live within the boundaries of states ruled by governments representing the majority of the population.⁵⁴

Not only the life and well-being, but also the 'honor and reputation' of such groups were to be protected by the legal codes at that time.⁵⁵ Already then, legal developments in the inter-war years anticipated the need for special protection of the life and well-being as well as the 'honor and reputation' of such groups.

But why privilege the national/ethnic/religious group in this fashion? In a passage that remains frequently uncommented upon, Lemkin lays bare what I shall call his 'ontology of groups':

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. Moreover, such destruction offends our feelings of morality and justice in much the same way as does the criminal killing of a human being: the crimes in one case as in the other is murder, though on a vastly greater scale.⁵⁶

⁵¹ Lemkin, above n 2, 90.

⁵² *Ibid.* (emphasis added)

⁵³ *Ibid.* 79. (emphasis added)

⁵⁴ *Ibid.* 90–91.

⁵⁵ *Ibid.* 91.

⁵⁶ *Ibid.*

This passage is noteworthy for a number of reasons: Lemkin is quite unconcerned about the definition of a 'national group,' considering it almost self-evident and using it interchangeably with 'ethnos';⁵⁷ he often includes race and religion, as well as social groupings in need of protection.⁵⁸ The Genocide Convention speaks of a 'national, ethnical, racial or religious group', without much specification as such. Whether one considers Lemkin's own formulations or refers to the text of the Genocide Convention, it is the 'ascriptive' group, the group into which one is *born* or into which one is *thrown* (to speak with Martin Heidegger), that constitutes his reference point. Such groups are not created, they are found; they are not invented but discovered.

Most significantly, Lemkin's understanding of the group is culturalist, defined in terms of the 'genuine traditions, genuine culture, and well-developed national psychology'.⁵⁹ Culture, in turn, is viewed fairly conventionally as 'high culture', as 'original contributions' to the world. In a popular piece addressed to a large audience in the *American Scholar*, Lemkin writes:

We can best understand this when we realize how impoverished our culture would be if the 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 Dvořák; the Greeks, a Plato and a Socrates; the Russians, a Tolstoy and a Shostakovich.⁶⁰

Is there a distinction to be made, then, between cultures which contribute to world civilization and others which have not or cannot? Is there a lurking distinction between 'genuine traditions' and 'genuine culture' and 'non-genuine', inauthentic traditions and cultures? And would such distinctions affect the claim of some cultures to be preserved and protected more than others? Is Lemkin's ontology of the group based upon an implicit hierarchy of cultures and their contributions?

My goal here is not to engage in postmodernist scepticism about holistic concepts of groups and culture against Lemkin. Even beyond postmodern scepticism, however, the definition of the 'group' that is deemed worthy of legal recognition remains a contentious matter in all debates on group rights, and has consequences as to *which* collective rights groups are deemed to be entitled as opposed to the individuals who are members of such groups.⁶¹ Lemkin's own understanding of the national group has two sources: from a legal point of view, he reverts to the

⁵⁷ *Ibid* 79.

⁵⁸ *Ibid* 93. It is all the more puzzling, therefore, that Lemkin would be so resistant to extending the Genocide Convention to cover conditions of slavery in the Americas.

⁵⁹ *Ibid* 91.

⁶⁰ R Lemkin, 'Genocide' (1946) 15(2) *American Scholar* 228, quoted in Power, above n 1, 53.

⁶¹ See W Kymlicka, *Multicultural Citizenship. A liberal Theory of Minority Rights* (Oxford, Oxford University Press, 1995); W Kymlicka, *Citizenship in Diverse Societies* (Oxford, Oxford University Press, 2000); for a general discussion of these issues in contemporary debates, cf S Benhabib, *The Claims of Culture. Equality and Diversity in the Global Era* (Princeton, NJ, Princeton University Press, 2002); within the American context of dilemmas raised by group-based classifications, see R Post and

instruments of the Minority Treaties of the inter-war period, which as we saw above, through Arendt's analysis as well, were themselves hardly unproblematic. Philosophically, Lemkin is heir to a romantic and nationalist Herderian tradition which sees national groups, broadly conceived, as sources of a unique perspective on the world, as originators of a mode of disclosing the world.⁶²

This privileging of national groups leads Lemkin to conclude that:

genocide is a problem not only of war but also of peace. It is an especially important problem for Europe, where differentiation into nationhood is so marked that despite the principle of political and territorial self-determination, certain national groups may be obliged to live as minorities within the boundaries of other states. If these groups should not be adequately protected, such lack of protection would result in international disturbances, especially in the form of the disorganized emigration of the persecuted, who would look for refuge elsewhere.⁶³

M Rogin (eds), *Race and Representation: Affirmative Action* (New York, Zone Books, 1998); J Sleeper, *Liberal Racism* (New York, Viking, 1997).

⁶² There has been ongoing debate about Johann Von Gottfried Herder's legacy. Some classify him as a 'German nationalist'. Karl Popper, for example, in *The Open Society and its Enemies* (London, 1945), 'includes Herder in a sort of Hall of Shame recapitulating the rise of German nationalism', as noted by MN Forster (ed and trans), 'Introduction' in JG Von Herder, *Philosophical Writings: Cambridge Texts in the History of Philosophy* (Cambridge, Cambridge University Press, 2002) xxxi, fn 33. Others, such as Isaiah Berlin and Charles Taylor, view Herder as a precursor of a kind of cultural and value pluralism which is distinct from relativism. See, eg, C Taylor, 'The Importance of Herder' in EA Margalit (ed), *Isaiah Berlin: A Celebration* (Chicago, Ill, University of Chicago Press, 1992). By pointing to this Herderian connection, my point is not to charge Lemkin with a kind of 'relativist nationalism of vulnerable peoples'. Rather, I wish to draw attention to the concept of the group in his writings which is philosophically under-explored, in as much as language, race, ethnicity and religion are often used, either together or individually, as markers of group identities. Lemkin does not explore either the conflicts or the ambiguities to which the use of these markers can give rise in the law or society. We know, by contrast, that for Herder the nation is a linguistic and cultural and not a racial group. See, eg, JG Herder, 'Treatise on the Origin of Language' [1772], in *Philosophical Writings* (above), 65. See also Letter 114 in 'Letters for the Advancement of Humanity: Tenth Collection' and the Fragment on 'Purified Patriotism' for Herder's condemnation of wars among nations and of imperialism (in *Philosophical Writings*, 380 ff, 406). Lemkin undoubtedly would have shared Herder's sentiments in full, as expressed by the following: 'What, generally, is a foisted, foreign culture, a formation [*Bildung*] that does not develop out of [a people's] own dispositions and needs? It oppresses and deforms, or else it plunges straight into the abyss. You poor sacrificial victims who were brought from the south sea islands to England in order to receive culture ... It was therefore not otherwise than justly and wisely that the good *Ch'ien-lung* acted when he had the foreign vice-king rapidly and politely shown the way out of his realm with a thousand fires of celebration. If only every nation had been clever and strong enough to show the Europeans this way' (*Philosophical Writings* at 382). Cf Arendt's very interesting reflections on Herder's significance for the Jews after the Enlightenment. She credits Herder with rendering Jewish history visible in Germany, 'as history defined essentially by their possession of the Old Testament': H Arendt, 'The Enlightenment and the Jewish Question' in Kohn and Feldmen (eds), above n 15, 12. At the same time, insofar as this history is theological history and not history connected to that of the world at large, for Herder 'the Jews have become a people without history within history. Herder's understanding of history deprives them of their past' (*ibid* at 16). Philosophically, as well as historiographically, the question is one of balancing the universal and the particular, the general history of humanity and the specific memories, trajectories and suffering of specific peoples. I cannot pursue this matter further here, but have attempted to do so in Benhabib, above n 8.

⁶³ Lemkin, above n 2, 93.

Lemkin's thought here slides from the crime of genocide to the peacetime protection of 'minority rights', which, as he admits, is a matter of civil and constitutional and not criminal law.⁶⁴ Whereas for Hannah Arendt the division of people within a nation state into minorities amid a majority is the source of the problem itself, Lemkin sees strengthening protection for minority rights to be necessary in peacetime as well. He thereby tries to use legal means to address political questions which are properly matters of State organisation and which concern the design of political constitutions and institutions—whether these be federalist or unitary.

Arendt presents a rather different understanding of the value of the group.⁶⁵ For her, the group is not ascribed but formed; it is not discovered but constituted and reconstituted through creative acts of human association. The value of the group does not lie first and foremost in its 'original contributions' to world culture and 'genuine traditions', but rather in its manifestation of human diversity; in its disclosing a new perspectival outlook on the world.⁶⁶ The world is disclosed for us through diversity and plurality.

V. PLURALITY AS A FUNDAMENTAL CATEGORY IN ARENDT'S WORK

No passage better expresses the concept of plurality in Arendt's work than the following:

If it is true that a thing *is* real ... only if it can show itself and be perceived from all sides, then there must always be a plurality of individuals or peoples ... to make reality even

⁶⁴ *Ibid.*

⁶⁵ I conjecture that Arendt, emerging as she did out of the more liberal and individualistic tradition of German Jewish emancipation, would not be as accepting as Lemkin was—an eastern European and Polish Jew—of the concept of the group, or of the moral and political imperative to preserve groups. Arendt was quite sensitive to the differences among the experiences of German *versus* east European Jewish communities. See her critical remarks about the 'collective' *versus* 'individualistic' orientation of the *Ostjuden* as opposed to German Jews in the letter to her husband Heinrich Bluecher. For further discussion, see S Benhabib, 'Arendt's Eichmann in Jerusalem' in D Villa (ed), *The Cambridge Companion to Hannah Arendt* (Cambridge, Cambridge University Press, 2000) 65. For a philosophical analysis of anti-Semitism in the works of Arendt and the Frankfurt School, as refracted through the German Jewish experience, see S Benhabib, 'From "The Dialectic of Enlightenment" to "The Origins of Totalitarianism" and "The Genocide Convention". Adorno and Horkheimer in the Company of Arendt and Lemkin' in W Breckman, PE Gordon, AD Moses, S Moyn and E Neaman (eds), *The Modernist Imagination: Essays in Intellectual History and Cultural Critique. For Martin Jay on his 65th Birthday* (New York, Berghan Books, 2009) 299; reprinted in: Seyla Benhabib, *Dignity in Adversity. Human Rights in Troubled Times* (Cambridge, UK and Malden, MA, Polity Press, 2011) 20–41.

⁶⁶ Does not this voluntarist concept of the group contradict Hannah Arendt's own assertive defence of her own Jewish identity? I would argue that it does not, in that Arendt insists on defining the conditions and the meaning of her own belonging to the Jewish people. For her it is not the Halachachic definition of the Jew, as one born to a Jewish mother, that is paramount, but rather one's conscious and self-chosen identification with the fate of a collectivity and a people. This individualist, perhaps existentialist, dimension of Arendt's Judaism is at the root of her conflict with Gershom Scholem, and it is what distinguished her from other thinkers such as Leo Strauss who argued that one could not separate out the cultural and theological meanings of Judaism as sharply as Arendt herself wished to. I have explored these questions further in S Benhabib, (2009) above n 65, 316–17.

possible and to guarantee its continuation. In other words, the world comes into being only if there are perspectives ... If a people or a nation, or even just some specific human group, which offers a unique view of the world arising from its particular vision of the world ... is annihilated, it is not merely that a people or a nation or a given number of individuals perishes, but rather that a portion of our common world is destroyed, an aspect of the world that has revealed itself to us until now but can never reveal itself again. Annihilation is therefore not just tantamount to the end of the world; it also takes its annihilator with it.⁶⁷

As Patricia Owens observes,

wars of annihilation that aim to wipe out a particular group attack the basic fact of human plurality and violate the 'limits inherent in violent action.' With genocide we are not 'just' talking about large numbers of dead but something that is potentially immortal. The public, political world, the political constitution of a people, the outcome of people's living together, and debating their common affairs is also destroyed with genocide.⁶⁸

Genocide violates 'an altogether different order', writes Arendt in *Eichmann in Jerusalem*.⁶⁹

The category of plurality is no less ontological in Arendt's thought than that of the group is in Lemkin's. That is to say, for both authors these categories represent some element and principle which is part of the order of being human in the universe. Arendt names this 'the human condition', that is, 'the basic conditions under which life on earth has been given to man'.⁷⁰ Plurality is the fact that corresponds to our irreducible sameness as members of the same species, and yet at the same time expresses our irreducible difference from one another. 'Plurality is the condition of human action because we are all the same, that is, human, in such a way that nobody is ever the same as anyone else who ever lived, lives, or will live.'⁷¹ This plurality is the precondition of the possibility of all political life: because we are members of the same species who have speech and reasoning, or who are capable of *legein* (reasoned speech), we can communicate with one another, build a world together as well as destroy one another. And since we are all subject to similar bodily needs and face likewise the struggle with nature, we face the 'circumstances of justice', ie of how to establish just institutions under conditions of vulnerability and scarcity.

Plurality is also what enables diversity and perspectivity:

In acting and speaking, men show who they are, reveal actively their unique personal identities and thus make their appearance in the human world, while their physical

⁶⁷ H Arendt, 'The Promise of Politics' in J Kohn (ed and intro) *The Promise of Politics* (New York, Schocken Books, 2005) 175.

⁶⁸ Owens, above n 33, 110.

⁶⁹ EIJ 272.

⁷⁰ H Arendt, *The Human Condition*, 2nd edn (Chicago, Ill, The University of Chicago Press, 1998) 7 (hereafter 'HC').

⁷¹ HC 8.

identities appear without any activity of their own in the unique shape of the body and sound of the voice. The disclosure of 'who' in contradistinction to 'what' somebody is—his qualities, gifts, talents and shortcomings, which he may display or hide—is implicit in everything somebody says and does.⁷²

We live in a world constituted by narratives about the 'who' as well as the 'what' of action; this web of narratives is the medium through which the multiplicity and diversity of perspectives on human affairs converge and conflict, are woven together and torn apart.

These ontological theses of Hannah Arendt are well known. Her concept of plurality enables Arendt to escape both the ascriptivism and the culturalism of Lemkin's concept of the group. Groups for Arendt are enduring associations, rooted in the human capacity to create a world in common that is shareable yet diverse, that is communicable yet open to misunderstanding, and that appears as one yet is refracted through many different narratives and perspectives. While from a philosophical point of view there can be little question about the brilliant acuity of Arendt's analyses, from a legal point of view, from the standpoint of the jurist, the protean aspect of Arendt's concept of plurality may be too volatile. The juridification of the category of the group brings with it inevitable ontological as well as sociological problems.

Ironically, her scepticism toward group concepts and her dynamic concept of plurality enable Arendt to deliver a trenchant account of the crime of genocide as constituting a 'crime against the human condition' as such. This, I believe, is the meaning of the passage from *Eichmann in Jerusalem*, already quoted above:

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.

Genocide is 'an attack upon human diversity as such, that is, upon a characteristic of the "human status" without which the words "mankind" or "humanity" would be devoid of meaning'.⁷³

It is hard not to see in these passages of searing eloquence a belated vindication of those such as Lemkin whom Arendt seemed to dismiss little more than a decade previously as 'those few international jurists without political experience or professional philanthropists supported by the uncertain sentiments of professional idealists' but who, through their tireless efforts, transformed the meaning of the 'human status'. Abandoning her bitter irony of *The Origins of Totalitarianism* (1951), Arendt in *Eichmann in Jerusalem* in 1963, embraces and honours Lemkin's legacy, although it remains a mystery why she does not credit Lemkin by name.

⁷² *Ibid* 179.

⁷³ EIJ 268–69.

VI. BRIEF EPILOGUE: ARENDT AND LEMKIN
ON UNIVERSAL JURISDICTION

For Lemkin, no less than for Arendt, embracing the concept of 'genocide' raised the question of jurisdiction. In *Axis Rule in Occupied Europe*, Lemkin is ready to include the crime of genocide as amended under the Hague Regulations.⁷⁴ He later insists, however, that this crime must be independent of any prior Treaty or set of regulations. Furthermore, he notes that

the adoption of the principle of *universal repression* as adapted to genocide by countries which belong now to the group of non-belligerents or neutrals, respectively, would likewise bind these latter countries to punish the war criminals engaged in genocide or to extradite them to countries in which these crimes were committed.⁷⁵ (emphasis added)

Universal repression makes the culprit liable not only in the country in which he committed the crime, but also 'in any other country in which he might have taken refuge'.⁷⁶ Astonishingly, Lemkin shows himself to be little concerned with the difficulties which might arise with the application of the principle of universal repression, such as the capacity of prosecutors in other countries to be able to collect evidence, provide for the adequate defence of the defendants, escape the semblance of 'victor's justice', and a myriad other procedural and substantive details which may go wrong in a criminal trial. By contrast, these and other details haunted Hannah Arendt with regards to the trial of Adolph Eichmann, and cast doubts for her on its full legality.

For Lemkin, 'genocide offenders should be subject to the principle of universal repression as should other offenders guilty of the so-called *delicta juris gentium* (such as, for example, white slavery and trade in children, piracy, trade in narcotics and in obscene publications, and counterfeiting of money)'.⁷⁷ There is something deeply unsatisfactory about singling out the radicalness of the crime of genocide, on the one hand, and comparing it to piracy, trade in narcotics and in obscene publications, etc, on the other. The only crime to which genocide can be compared, insofar as it too is a crime against the human status and the human condition, is slavery, and this is what Lemkin was not willing to do.

In *Eichmann in Jerusalem*, Arendt notes that the analogy between genocide and piracy is not new, and that the Genocide Convention expressly rejected the claim to universal jurisdiction and provided instead that

persons charged with genocide ... shall be tried by a competent tribunal of the States in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction.⁷⁸

⁷⁴ Lemkin, above n 2, 93.

⁷⁵ *Ibid* 92.

⁷⁶ *Ibid* 94.

⁷⁷ *Ibid*.

⁷⁸ EIJ 262.

With the recognition of the crime of genocide as a 'crime against humanity', Arendt believes that the path has been cleared to entertain the likelihood that 'international penal law' will develop. Quoting Chief Justice Robert Jackson in the Nuremberg Trials, Arendt points out that international law is viewed as an 'outgrowth of treaties and agreements between nations and of accepted customs', and as long as that is the case she believes that 'in consequence of this yet unfinished nature of international law', it is ordinary trial judges who have to render justice by facing the unprecedented with the 'help of, or beyond the limitation set upon them through, positive, posited laws'.⁷⁹ She does not consider the negative consequences of 'judges making law', though on the whole she is very sensitive that law, whether domestic or international, be seen by a self-governing people to be 'its' law, and not imposed upon it by other instances.

Lemkin, on the other hand, in 1948 was fearful that an international criminal court would mean 'too great an affront to state sovereignty'.⁸⁰ Ironically, Arendt was willing to go beyond him in the principle as well as the practice of the persecution of the crime of genocide. Undoubtedly, though, both would have greeted enthusiastically the establishment of an International Criminal Court with the jurisdiction to try those accused of crimes against humanity and of genocide through the Treaty of Rome. They would also have been dismayed that their adoptive country, for whose constitutional traditions they had such reverence—the United States—first signed and then withdrew from the Treaty of the International Criminal Court. The weakening of the status of international law and the contempt toward international institutions is part of the 'crises of our republic' in the contemporary period, very much as the violation of the laws of war and peace, the collapse of the League of Nations, of the nation state system and the Holocaust were those of Arendt and Lemkin.

⁷⁹ *Ibid* 274.

⁸⁰ Power, above n 1, 56.