

ARTICLES

The Enemy of All Humanity*

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'(...) this new type of criminal, who is in actual fact hostis generis humani (...)

Hannah Arendt, *Eichmann in Jerusalem*¹

'To confiscate the word humanity, to invoke and monopolize such a term probably has certain incalculable effects, such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity; and a war can thereby be driven to the most extreme inhumanity.'

Carl Schmitt, *The Concept of the Political*²

Apart from pain and death and the natural forces that cause them, can there be such a thing as an enemy of all humanity? Can a *human being* be an enemy of all humanity? Or might it be that the ancient formula 'enemy of all humanity' (*hostis generis humani*) is – as Carl Schmitt warns in the epigraph – so dangerous that it is itself an enemy of all humanity? For that matter, what is 'humanity'? These are questions I take up in this paper.

Of course, international law contains a concept of *crimes* against humanity, referring to serious violence and persecution committed by states and other organized groups against civilian populations.³ Their perpetrators are the criminals Hannah Arendt has in mind when she uses the Latin formula in *Eichmann in Jerusalem*, echoing the Jerusalem court. And I suppose that in Hobbes's 'war of all against all,' everyone would be an enemy of humanity (for all are said to be at war, and the war is against all).

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1 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, rev. ed. (New York: Viking Press, 1963), 263.

2 Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press, 1996), 54.

3 By 'serious violence and persecution' I mean the eleven specific crimes against humanity enumerated in the Rome Statute of the International Criminal Court. Informally, some might label genocide as a crime against humanity, although legally they are distinct. Arendt calls genocide a crime against humanity; and, interestingly, the French criminal code places genocide in a title labeled 'Des crimes contre l'humanité,' side by side with 'autres crimes contre l'humanité.'

But for most of its legal history, the label ‘enemy of all humanity’ applied solely to pirates. Pirate thefts have little to do with crimes against humanity in the modern sense. What makes pirates enemies of all humanity, and how did the semantic shift from piracy to atrocity come about? Are there conceptual features of piracy that map onto features of atrocity crimes? Or is the genealogy that traces modern international criminals back to ancient pirates a false trail? As we will see in the following section, that trail is a crooked one, including pirates, privateers, poisoners and assassins, bloodthirsty warriors, slave-traders, *génocidaires*, and torturers among its way-stations. Some writers assert that the true modern counterpart to piracy is terrorism, so that terrorists are today’s enemies of humanity.⁴ Could that be right? These too are questions I take up.

I will argue for an alternative genealogy: one that traces the enemy of humanity back to tyrants, not pirates. This conception, too, can run into the dangers Schmitt cautions against. During the French Revolution, the Jacobins used the label to justify summary executions of ‘counterrevolutionaries’ who, supposedly like tyrants, usurp lawful authority.⁵ But I will argue that so long as we understand the enemy as a criminal, to be dealt with by fair trials and humane punishments – rather than as a military target or an outlaw – the metaphor poses no intractable danger. In the final sections, I will propose a conception of humanity as a normative ideal rather than a descriptive concept, and argue that this ideal lies at the very basis of international criminal law.

1 The strange career of the *hostis generis humani*

1.1 *Pirates*

The Latin phrase is drenched in history, and before turning to the conceptual and philosophical questions it raises, we must examine that history. Here, as with so many moral concepts, genealogy is indispensable to philosophy. The story starts with Cicero.

Cicero’s *De officiis* (On duties) takes the form of a letter to his son in an all-too-familiar parent/child imbroglio. Cicero the Younger was studying in Athens, where he indulged in ‘extravagant and riotous living.’⁶ He wrote home for money, and a month later Cicero responded with *De officiis*, a chiding letter running to

4 Douglas R. Burgess, Jr., ‘The Dread Pirate Bin Laden,’ *Legal Affairs* (July/August 2005). https://www.legalaffairs.org/issues/July-August-2005/feature_burgess_julaug05.msp. Heller-Roazen tries to spell out the historical and conceptual connection between piracy and terrorism, but unlike Burgess, his aim is to criticize the concept of an enemy of all humanity, including its application to terrorists. Daniel Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (Zone Books, 2009).

5 Alfred P. Rubin, *The Law of Piracy*, rev. ed. (Transnational Publishers, 1998), 15-16.

6 Translator’s introduction to the Loeb Classical Library edition of *On Duties*, Walter Miller trans. (Cambridge: Harvard University Press, 1913), xiii. In a letter to Tiro, Cicero the Younger admits ‘errors of my youth [that] have caused me so much remorse and suffering, that not only does my heart shrink from what I did, my very ears abhor the mention of it.’ Cicero, *Letters* (Cambridge: Harvard Classics, 1909-14), Letter 34, <http://www.bartleby.com/9/3/34.html>.

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hundreds of pages – any wayward student’s nightmare letter from dad. Several sections, on youthful folly and the perils of pleasure-seeking, are obvious admonitions to the prodigal son, but the elder Cicero embeds them in a full-scale treatise on duties in three books, lavishly illustrated with examples drawn from the lives of eminent Romans.

Among them are duties of good faith and promise-keeping, not only in peaceable commerce but also in wartime between legitimate adversaries.⁷ Although Cicero admits a few narrowly drawn exceptions, his views on promise-keeping are stern. For example, he praises Marcus Atilius Regulus, a general who was paroled by his Carthaginian captors, but then returned voluntarily from Rome to Carthage to undergo death by torture, because he violated his parole. Regulus kept his promise to his captors, and Cicero offers Regulus to his son as a model Roman.⁸

But the duty of good faith even in dealings with enemies has one conspicuous exception: the pirate. The pirate, according to Cicero, is the common enemy of all (*communis hostis omnium*), and with such an enemy ‘there ought not to be any pledged word nor any oath mutually binding.’⁹ You do not have to keep a promise you make to a pirate.

These are, I think, two distinct claims – the *common enemy claim* and the *no-promises claim*, by which I mean the claim that the pirate is excluded from the ranks of those with whom one makes binding promises. Cicero does not say why either is true, and on its face the no-promises claim seems irrational: it would make it impossible to ransom back hostages.¹⁰ After all, if pirates know that ransom promises are worthless, they have little incentive to bargain or to spare their captives. Perhaps Cicero had in mind something like the modern ‘no negotiating with hostage-takers,’ as a way of undercutting piracy’s business model. But he never says anything of the sort.

Daniel Heller-Roazen draws far-reaching conclusions from Cicero’s no-promises claim: first, that Cicero’s assertion that ‘there ought not to be any pledged word nor any oath mutually binding’ pronounces a duty, not merely a permission or suggestion, to deal with pirates in bad faith. Second, that it makes the pirate an exceptional figure who is outside all law, and indeed outside what Cicero calls the ‘immense fellowship of the human species’ – the domain of cosmopolitan morality, as we might say today.¹¹ After all, a duty not to deal with someone in good

7 Cicero, *De officiis*, 3.29.107, 385.

8 Weirdly, Cicero also offers the Regulus story as an example of how virtue is in fact expedient to us.

9 Cicero, *De officiis*, 3.29.107, 385. Cicero likewise described pirates as ‘the common enemy of every race and nation’ (*communem hostem gentium nationumque omnium quisquam omnium*) in his second oration against Verres, 2.5.76.

10 Grotius also thought Cicero’s argument was unsound, though on different grounds. Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Indianapolis: Liberty Fund, 2005), bk. 3, ch. 19, §§ III-V, 1537-39.

11 Heller-Roazen, *Enemy of All*, 18, 20-21. The phrase *immensa societate humani generis* is in Cicero, *De officiis*, 1.17.53.

faith treats them as an outcast from anything we could regard as a moral community. The no-promises claim might equally be called an *exclusion claim*.

The figure of human beings who are outside all law – outlaws, quite literally – plays an important (perhaps outsize) role in contemporary Continental philosophy, notably Giorgio Agamben's *Homo Sacer* and *State of Exception*. Agamben focuses not on the pirate but on a different figure who is outside all law: *homo sacer*, an obscure Roman legal category denoting a class of those condemned to death whom anyone can lawfully kill.¹² Agamben draws a line connecting *homo sacer* to the inmates of Nazi concentration camps, and then to Guantánamo prisoners whom the Bush administration declared to have no legal rights. All are thrust outside the protections of law due even to ordinary criminals, and all are therefore reduced from civil status to 'bare life.' For Agamben, the category of legal exceptions has metaphysical significance. Heller-Roazen, emphasizing that Cicero places pirates outside all law, raises a similarly metaphysical question about the enemy of all humanity: 'Who – or what – is a speaking, acting human being who must, for reasons of moral and legal principle, be excluded from the common domain of obligation that unites the many members of the species?'¹³ To be clear: the pirate is not *homo sacer* under Roman law. But both are banished from the protection of law, and both are anybody's targets.

One might object that while this intense way of reading Cicero is possible, Cicero never says that pirates belong in a separate box from the rest of humanity. Perhaps we do not need to dig that deep to explain why Cicero called pirates the common enemy of all. The straightforward reading is Blackstone's: 'by declaring war against all mankind, all mankind must declare war against him [i.e., the pirate].'¹⁴

That reading explains the common enemy claim, but it does not explain Cicero's no-promises claim, and thus Heller-Roazen is undeniably on to something. By itself, enemy status would not exclude pirates from the obligations owed to military foes. Cicero writes, 'we have laws regulating warfare, and fidelity to an oath must often be observed in dealings with an enemy.'¹⁵ Otherwise, truces and peace treaties would be impossible. Yet Cicero *does* exclude pirates from those obligations, and the puzzle is why. Let's consider some possibilities.

12 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998). Agamben also emphasizes the peculiar fact that *homo sacer* could not be sacrificed to the gods, so his killing is neither a criminal homicide nor a ritual killing: *homo sacer* is doubly excluded from both civil and religious law. *Homo Sacer*, 81-83. The religious aspect of *homo sacer* ('sacred man'), crucial to Agamben's analysis, is not relevant to our purposes. The concept of a person who could be killed but not sacrificed was apparently considered puzzling even in antiquity. *Ibid.*, 72. In any case, Rome officially abolished human sacrifice in 97 BCE, and Cicero denounces the 'savage and barbarous custom of sacrificing men' as a practice foreign to the Roman religion of his day. Cicero, *Pro Marcus Fonteius* § 31.

13 Heller-Roazen, *Enemy of All*, 19.

14 William Blackstone, *Commentaries on the Laws of England*, 13th ed. (London: A Strahan, 1800), 71.

15 Cicero, *De officiis*, 3.29.107, 385.

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Might it be that a pirate is an enemy (*hostis*) but not a lawful enemy (*perduellis*), a distinction Cicero draws: 'a pirate is not included as a *perduellium*, but is the common *hostis* of all'?¹⁶ That reading might firm up the Agamben-like connection between ancient pirates and modern terrorists – after all, 'unlawful enemy combatants' is exactly how the Bush administration classified accused terrorists.

I doubt that Cicero's language can support conclusions about lawful and unlawful combatants, however. Although Cicero does introduce a concept of unlawful combatant status, there is no indication that *hostis* denotes an unlawful combatant while a *perduellis* is a lawful combatant. On the contrary, in a philological aside Cicero says the words are nearly synonymous (although he thinks *perduellis* is more accurate). And far from being someone to whom no obligations are owed, Cicero explains that the word *hostis* originally meant 'guest' – and hosts owe obligations to guests.¹⁷ Second-century legal sources define a *hostis* as an adversary against whom Rome has declared war, which would make a *hostis* a lawful combatant. Those same sources explicitly distinguish the *hostis* from the pirate or brigand.¹⁸ All this suggests that when Cicero called the pirate a common *hostis* of all rather than a *perduellis*, his word-choice was colloquial, not technical.¹⁹ Probably all he meant is that rather than being an adversary of Rome (*perduellis*), the pirate is an adversary of any prey he can find (*hostis omnium*). Shortly we will see that the lawful/unlawful combatant distinction is important in later piracy law, but it does not explain why pirates must be excluded from the community of those with whom we must deal in good faith.

Why else might Cicero have thought that pirates are beyond the moral pale? What is the mysterious *X* (the 'heinousness factor') that distinguishes pirates from land-based depredators like highwaymen and kidnappers? One writer suggests that because the sea is an alien, hostile element to land-dwellers, and the confined spaces on board ship make it impossible to flee, violence at sea poses deadly

- 16 Cicero, *De officiis*, 3.29.107, 385. Miller translates *perduellium* (the genitive of *perduellis*) as 'lawful enemy,' and Heller-Roazen uses Miller's translation. Lewis and Short's dictionary render *perduellis* as 'a public enemy, an enemy actually waging war against a country.' Charlton T. Lewis and Charles Short, *A Latin Dictionary* (Oxford: Clarendon Press, 1879), at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.04.0059%3Aentry%3Dperduellis>.
- 17 Cicero, *De officiis*, 1.11.36-37, 39; 1.12.37-38, 39-41. Lewis and Short's dictionary describes '*perduellis*' as 'mostly anteclassical for the classical *hostis*.'
- 18 Justinian, *Digest*, 49.15.24 (quoting Ulpian); 50.16.118 (quoting Sextus Pomponius). I used an on-line version of the *Digest*, based on S. P. Scott's 1932 translation, available at https://droitromain.univ-grenoble-alpes.fr/Anglica/D49_Scott.htm#XV (accessed, January 9, 2019) See David Lloyd Dusenbury, 'Carl Schmitt on *Hostis* and *Inimicus*: A Veneer for Bloody-Mindedness,' *Ratio Juris* 28, no. 3 (2015): 438-39.
- 19 Rubin believes Cicero was not offering a legal opinion. Alfred P. Rubin, *The Law of Piracy*, rev. ed. (Transnational Publishers, 1998), 15-16.

risks that make it uniquely heinous.²⁰ This argument has its attractions, but we can easily think of land-based crimes that impose equivalent dangers, and from which victims also cannot flee. In any case, even though today piracy is defined solely as depredation ‘outside the territorial jurisdiction of any State,’²¹ historically pirates preyed on coastal communities as well as shipping, and they often held their hostages on shore (as the Cilician pirates held Julius Caesar). Some of the Latin words for pirates applied equally to robbers on land (‘brigands’), and early modern jurists such as Christian Wolff labeled brigands *hostis generis humani*.²²

Is X the fact that by going to sea and preying on the shipping and settlements of all nations, the pirate excludes himself from all communal life and ties? Taken literally, the phrase ‘enemy of all’ implies an isolated lone wolf. That seems unlikely. Pirates have companions, and they find hospitality in their home ports; ancient sources recognize that entire societies made their living by piracy.²³ They were like the Vikings in medieval times, the Cilicians in Cicero’s, and the Barbary States until their suppression in the nineteenth century. Sea wolves were not lone wolves. In many cases, the turn to piracy was, and still is, an act of economic desperation by impoverished communities. In the past decade, Somali fishermen became pirates because Somalia’s collapsing government disbanded its navy, and opportunistic outsiders rushed into the naval vacuum to poach on their fishing grounds and deprive them of their livelihood. Cicero’s ‘common enemy of all’ claim was false unless we read it non-literally, as I think we must, as ‘common enemy of all *outsiders to pirate society*.’²⁴

- 20 Thomas J.R. Stadnik, ‘Pirates – The Common Enemies of All, the Enemies of the Human Race, the Law of War and The Rule of Law,’ LexisNexis®Legal Newsroom International Law weblog, May 5, 2009, https://www.lexisnexis.com/legalnewsroom/international-law/b/international-law-blog/archive/2009/05/05/pirates-_2d00_-the-common-enemies-of-all_2c00_-the-enemies-of-the-human-race_2c00_-the-law-of-war-and-the-rule-of-law.aspx?Redirected=true. See also Heller-Roazen, *Enemy of All*, 176–80.
- 21 *United Nations Convention on the Law of the Sea (UNCLOS)*, 10 December 1982 (entered into force 16 November 1996), § 101. This section also includes within the definition of piracy ‘any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft.’
- 22 Heller-Roazen, *Enemy of All*, 35 (Latin words); Christian Wolff, *Law of Nations Treated According to a Scientific Method [Jus Gentium Methodo Scientifica Pertractatum]*, trans. Joseph Drake (1749; New York: Ocean, 1964), § 627, quoted by Edelstein, *Terror of Natural Right*, 29, with additional sources.
- 23 E.g., Thucydides, *History of the Peloponnesian War*, § 1.5: ‘They would fall upon a town unprotected by walls (...) and would plunder it; indeed, this came to be the main source of their livelihood, no disgrace being yet attached to such an achievement, but even some glory.’ *The Landmark Thucydides: A Comprehensive Guide to The Peloponnesian War*, trans. Robert Crowley, ed. Robert B. Strassler (New York: Free Press, 1996), 6.
- 24 Reflection on the literal phrase leads Heller-Roazen to the paradoxical question ‘Is the “enemy of all” one, or not one, of “all”?’ Heller-Roazen, *Enemy of All*, 18, and the analysis on 19. If we read the phrase less literally, the implied paradox disappears, along with the dangerously dehumanizing conclusion ‘not one of “all”.’ Heller-Roazen, who is fully aware of the danger, rightly rejects that conclusion.

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Here is another possibility: One difference between land and sea is that the open seas do not lie in any state's territory. In Roman law too, the high sea was a commons. This is the usual explanation the law books give about why piracy is a universal jurisdiction crime, meaning that any state that captures pirates can try and punish them. By contrast, thieves on land are always in some state's territory, and that state has primary jurisdiction over them.²⁵ Although it is anachronistic to refer Cicero's 'common enemy' language to modern universal jurisdiction, the root idea – that on the high seas whoever can successfully repress piracy should do so – evidently lies behind both.²⁶

This argument explains why piracy might fall under universal jurisdiction. But it does not explain why one ought not deal in good faith with pirates. We still have not solved for *X*, the extra factor that makes the pirate more evil than the highwayman.

One might spin out other conjectures, for example that piracy's assault on foreign commerce threatened civilization itself (or at least Roman authority),²⁷ or that pirates were notoriously cruel. I find neither of these very convincing, because both are equally true of brigands, especially in lawless regions where state power is weak or non-existent.

More promising is this: while the robber on land challenges *one* state's authority – the territorial state's – the pirate challenges *all* states' authority, because he attacks all states' shipping and seacoasts. Doing so, the pirate disrespects state authority as such. To those who revere state authority, the insult is intolerable, and perhaps Cicero thought that dealing in good faith with pirates would give the unseemly appearance of ignoring that which must never be ignored: *lèse-majesté*, understood as a kind of blasphemy against the order of rulers and ruled.²⁸ On this interpretation, *X* is not some special heinousness of pirate thefts, kidnappings, and violence over and above land-based thefts, kidnappings, and violence. Rather,

25 An exception that confirms the rule is the law of the medieval Italian city-states, establishing universal jurisdiction among them over crimes committed by vagabonds (people of no fixed abode) who roamed between cities the way that pirates roamed the seas. Luc Reydam's, *Universal Jurisdiction: International and National Perspectives* (Oxford: Oxford University Press, 2003), 29.

26 A British Privy Council Report of 1934 asserts that the pirate 'has placed himself beyond the protection of any State. He is no longer a national, but "*hostis humani generis*" and as such he is justiciable by any State anywhere.' Privy Council, *In re Piracy Jure Gentium*, [1934] A.C. 586, available at <http://www.uniset.ca/other/cs5/1934AC586.html>. This report attributes the view that the *hostis humani generis* is not any state's national to Grotius, but in fact Grotius never says this. Grotius *does* assert universal jurisdiction to punish pirates, but he does not strip them of all nationality. Grotius, *Rights of War and Peace* (1625), bk. 2, ch. 20, § XL, 1021.

27 E.g., Rubin, *Law of Piracy*, 92.

28 Cicero, a political supporter of Pompey, nevertheless criticized him for making a deal with the Cilician pirates, in which he offered them clemency in return for surrender. Cicero, *De officiis* 3.49, 319. On Pompey's dealings with the pirates, and his relationship with Cicero, see Philip de Souza, *Piracy in the Graeco-Roman World* (Cambridge: Cambridge University Press, 1999), 170-77. On the importance of the state, see Cicero, *De Re Publica* (On the Republic), 1.25-26, Loeb Classical Library Edition, trans. Clinton Walker Keyes (Cambridge: Harvard University Press, 1928), 64-65.

X is the insult to state authority as such, manifest in the pirate's way of life. In short, *X* consists in the pirate's generalized *lèse-majesté*. That makes the pirate the common enemy of all states – but not necessarily of all people.²⁹

I find this *lèse-majesté* theory the most plausible account of *X*. Whether or not that is what Cicero had in mind, his special animus toward pirates survived in the law. The medieval jurist Bartolus reworded Cicero's formula to the modern *hostis generis humani*, and later Bacon and Coke used Bartolus's phrase, in contexts suggesting it had become stock legal language for pirates.³⁰

Nevertheless, there is a subtle but important difference between 'common enemy of all' and 'enemy of all humanity' or '(...) of the human species.' As I have interpreted Cicero, his point is straightforward: because pirates prey on everyone, everyone is at war with pirates. This is, we have seen, a broadly jurisdictional point. Bartolus's formula seems to say more: not only are pirates the enemy of everyone, taken severally; they are also the enemy of humanity, the human species, taken collectively. There is more metaphysics packed into Bartolus's formula than Cicero's, even if Bartolus and Coke meant to say no more than Cicero. Cicero's dictum about no good-faith dealing with pirates becomes reified into the concept of an enemy of the human species.

1.2 Privateers

Ironically, European and American states that officially deplored piracy also recognized its usefulness in wartime, and early modern states legalized the practice of hiring pirates as private military contractors, authorized to prey on enemy shipping in wartime by state-issued letters of marque. These naval mercenaries were privateers. In today's international law privateering is illegal; but in the centuries before the 1856 Declaration of Paris outlawed it, privateering was accepted state practice, and many notorious buccaneers of the Golden Age of Piracy were on-again-off-again privateers.³¹

29 Brett Goodin, a historian of piracy, suggests that in the political rhetoric of the day, *pirate* served the same function that *terrorist* does today: 'you'll never go broke in politics by building up a barbaric "other" and declaring them such a threat that they transcend state-based legal norms.' Personal communication, August 30, 2017. Notably, in his prosecution of Verres, the corrupt and venal governor of Sicily, Cicero repeatedly calls him a pirate (*praedo*), and also accuses him of taking bribes from pirates. See the two orations against Verres, and de Souza, *Piracy in the Graeco-Roman World*, 150-57.

30 Bartolus of Saxoferrato, 'De Captivis et Postliminio Reversis Rubrica,' in *Apostillo domini Baroli de Saxoferato super secunda parte Digesti novi* (Milan: Johannes Antoni de Donato, 1486), a reference gratefully taken from Heller-Roazen, *Enemy of All*, 103, 216 n. 3. Coke uses the expression *pirata hostis humani generis* in his *Third Institute of the Laws of England* (1628; first published 1644), 113. See Rubin, *Law of Piracy*, 17 n. 61.

31 In 1856, a handful of states issued a joint declaration against privateering, and within a few years more than 50 states had ratified it. (The United States was and remains a prominent holdout.) Paris Declaration Respecting Maritime Law, April 16, 1856. For the list of ratifications, see ICRC, *Treaties, States Parties and Commentaries*, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=105.

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Here, the difference between lawful and unlawful combatants becomes crucial. Pirates were criminals, enemies of humanity. A letter of marque commissioning a pirate as a privateer magically wiped the criminality away and turned an unlawful combatant into a lawful combatant. Privateering was piracy made kosher. Eugene Kontorovich points to this remarkable cleansing of piracy as decisive evidence that states saw nothing intrinsically evil about the act of sea theft.³²

This is plausible, although to assume that states never authorize intrinsically evil acts gives governments more credit than they deserve. But Kontorovich is certainly right that robbery at sea is not morally equivalent to the core international crimes, for the prosecution of which the ICC was created, and which the Rome Statute calls ‘the most serious crimes of international concern.’³³ Robbery seems closer to everyday crime than radical evil.

Kontorovich concludes from this difference that modern universal jurisdiction over extraordinary crimes rests on a mistake, namely analogizing those crimes to piracy. Once we understand that states never thought piratical acts were radically evil, the analogy collapses. The sole reason for universal jurisdiction over piracy was that the pirate operates outside the territorial jurisdiction of any state, which perpetrators of core international crimes do not.

But notice that on the *lèse-majesté* interpretation, insulting state authority as such is the radical evil that distinguishes the pirate from the highwayman. Once the pirate becomes a privateer, a state agent, the insult to state authority vanishes and with it the heinousness. If the *lèse-majesté* interpretation is right, Kontorovich is mistaken to think that states saw nothing distinctively evil in un-marqued piracy.

1.3 *Terror tactics and unbridled aggression*

How did the notion of *hostis generis humani* expand beyond the crime of piracy? We find one move in that direction in Vattel’s 1758 *Law of Nations*, which tells us that professional poisoners, assassins, and arsonists are ‘villains, who, by the nature and habitual frequency of their crimes, violate all public security, and declare themselves the enemies of the human race (*les ennemis du Genre-humain*); they may therefore be ‘exterminated wherever they are seized’ regardless of territorial jurisdiction.³⁴

What makes these specific categories of malefactors the enemies of the human race? Here, it seems, the important point is not the killing and burning, but that poisoners, assassins and arsonists do it frequently, habitually, and as a profession; furthermore, that these are sneaky, perfidious forms of lethal violence. As professionals, they will do it to anyone regardless of personal enmity. They vio-

32 Eugene Kontorovich, ‘The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation,’ *Harvard International Law Journal* 45, no. 1 (2004): 184-237.

33 Rome Statute of the International Criminal Court, Art. 1.

34 Emer de Vattel, *Law of Nations*, eds. Béla Kapossy and Richard Whatmore (Carmel: Liberty Fund, 2008), bk. 1, § 233, 227-28.

late all public security because they present an invisible lurking menace that aims to kill and destroy without exposing itself to the risks of honorable warfare. Kant concurred: he called poisoning and assassination ‘infernally arts, vile in themselves.’ If used in war, poisoning and assassination would make peace hard to maintain because the tactics would undermine confidence in the adversary; furthermore, ‘when once used, [they] would not be confined to the sphere of war.’³⁵

Here, it seems that the nearest modern counterpart is the terrorist, who commits crimes that inspire fear that far amplifies the harm they inflict. The X factor of the crimes themselves is neither evil over and above ‘everyday’ murders and arsons, nor *lèse-majesté*, although assassination undeniably has *lèse-majesté* overtones. Rather, it’s the perfidy of the crime, regardless of its objective harmfulness. The invisible menace undermines public security and provides the X factor.

In another passage, Vattel called nations that take pleasure in ‘the ravages of war’ for its own sake ‘monsters, unworthy the name of men.’ His examples are the armies of Attila, Genghis Khan, and Tamerlane. Vattel continues:

*‘They should be considered as enemies to the human race, in the same manner as, in civil society, professed assassins and incendiaries are also guilty, not only towards the particular victims of their nefarious deeds, but also towards the state, which therefore proclaims them public enemies. All nations have a right to join in a confederacy for the purpose of punishing or even exterminating those savage nations.’*³⁶

One might easily place Nazi Germany in this category, and read Vattel’s dictum as an anticipation of the Article 6 crimes in the Nuremberg Charter. Doing so harmonizes nicely with his call for an international effort to punish them. On the other hand, Vattel’s alternative of exterminating those nations is itself an invitation to genocide, and a first hint at the dangers that come from labeling an entire people ‘monsters, unworthy the name of men.’ (More on this below.)

In this way Vattel gives us two additional *hostes generis humani* besides pirates: terrorists (if I may use this anachronistic word for poisoners, assassins, and incendiaries) and military aggressors who unleash Ares, the god of boundless war,

35 Immanuel Kant, ‘Toward Perpetual Peace’ (8:346-47), in *Practical Philosophy*, trans. Mary J. Gregor and Allen Wood (Cambridge: Cambridge University Press, 1996), 320.

36 Vattel, *Law of Nations*, 487. Emphasis added. Notably, Alberico Gentili also called Attila ‘general enemy of mankind.’ Alberico Gentili, *De Iure Belli Libere Tres* (1612), 32, <https://archive.org/details/dejurebellilibri00gent>. Gentili uses the word *Inimicus* rather than *Hostis*. Nothing substantive seems to turn on this word choice. See Dusenbury, ‘Carl Schmitt on *hostis* and *inimicus*,’ who demonstrates that the great weight Schmitt places on the word-choice is exaggerated and disingenuous.

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as distinct from Athena, the goddess of rationally governed warfare for legitimate ends.³⁷

1.4 *Slave trading*

A more significant broadening of the *hostis generis humani* category came in the nineteenth-century effort to suppress the slave trade. The simplest route to punishing slavers was to declare them pirates. That way, suspected slave ships could be lawfully boarded in peacetime on the suspicion of piracy. The United States declared slave-trading to be a form of piracy in 1820, and Britain adopted the idea in a number of its bilateral treaties soon after. It was a convenient legal fiction. In that nearly haphazard way, slavers inherited the pirate's title of *hostis generis humani*.³⁸

Here, for the first time, states themselves broadened the label *hostis generis humani* to perpetrators of what we now recognize as a core international crime. That, more than Vattel's offhand remarks, broke a certain kind of conceptual ice. It does not matter that the reason for affixing the label had to do with the legal formalities of boarding commercial ships in peacetime, rather than with the evils of slavery. Looking only at the legal formalities is too superficial: the reason for establishing that jurisdictional right was the effort to stamp out slave-trading because it is evil. Significantly, even at that time some publicists were referring to slavery as a 'crime against humanity'.³⁹ In an early draft of the American Declaration of Independence, Thomas Jefferson accused King George of promoting the slave trade and thereby 'wag[ing] cruel war against human nature itself (...) in the persons of a distant people who never offended him,' which Jefferson also called 'piratical warfare'.⁴⁰ Remarkable words from the pen of a slaveholder! And in 1860, the platform of the Republican Party in the U.S. presidential election called slave-trading a crime against humanity.⁴¹

This raises an interesting linguistic point. Semantically, 'enemy of humanity' and 'crime against humanity' fit together like hand and glove: it makes intuitive sense to call the perpetrator of crimes against humanity an enemy of humanity, and vice-versa.

In fact, however, the phrase 'crimes against humanity' has a different history, unrelated to that of *hostis generis humani*. The label was never attached to piracy. Only when the *hostis generis humani* label attached to evils that we now recognize

37 Here I am borrowing from Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2005), ch. 1. Neff shows, interestingly, that many cultures had separate deities for boundless violence and rationally governed war.

38 Jenny Martinez, *The Slave Trade and the Origins of International Human Rights Law* (Oxford: Oxford University Press, 2012), 124-29.

39 Martinez, *Slave Trade*, 115-16.

40 Thomas Jefferson, *The Writings of Thomas Jefferson*, vol. 2, ed. Paul Leicester Ford (New York: G.P. Putnam's Sons, 1893), 52. Unsurprisingly, this portion never made it to the final draft.

41 Republican Party Platform of 1860, May 17, 1860, at <http://www.presidency.ucsb.edu/ws/index.php?pid=29620>.

as core international crimes do the terms converge. Vattel wrote that ‘whoever takes up arms without lawful cause (...) is guilty of a crime against mankind in general’ – another anticipation of Nuremberg; but Vattel does not connect the term with his two categories of *hostis generis humani*, and he does not develop a systematic account of what a crime against mankind in general is.⁴² As we have seen, ‘laws of humanity’ and ‘crimes against humanity’ were used in polemics against slavery; later, Russian jurists used the phrases to condemn the oppression of Christians in the Ottoman Empire.⁴³ In 1915, Russia proposed trying the perpetrators of the Armenian genocide for ‘crimes against humanity,’ a proposal that was scuttled by U.S. opposition.⁴⁴ By the end of World War II, the terms had found their way into international humanitarian law and international criminal law.

One more point should be added. I have speculated that the special heinousness of piracy in the eyes of Cicero and later lawyers lay in the pirate’s disrespect for state authority – not just one state’s authority, but all states’ authority. I labeled this disrespect ‘generalized *lèse-majesté*,’ and suggested that it is what made the pirate a common enemy of all. One might ask: who are the ‘all’? And the answer would be: all *states*. That would not yet make the pirate a common enemy of all humanity, of the human species, unless we commit the ontological sin of identifying the community of human beings with the community of states.

But calling slave traders *hostis generis humani* because of the radical evil of slavery has a different significance. Here, it makes genuine sense to speak of an offense against Cicero’s ‘immense fellowship of human beings,’ regardless of whether slavery is an offense against the order of states. Slavery is not a statist offense, but a human offense.

1.5 The Eichmann Trial

Step by step, we are zeroing in on the use of the *hostis generis humani* label in contemporary international law, to denote the perpetrators of core crimes, that is, of radical evil. Curiously, the phrase was never used at Nuremberg, though it certainly could have been, inasmuch as the Nuremberg Charter set out the first legal definition of crimes against humanity. To my knowledge, the first appearance of ‘*hostis generis humani*’ in modern international criminal law was at the trial of Adolf Eichmann. Israel’s Attorney-General Gideon Hausner introduced the pirate

42 Vattel, *Law of Nations*, 586.

43 Peter Holquist, “‘Crimes Against Humanity’: Genealogy of a Concept (1815-1945) (unpublished manuscript, 2012). ‘Laws of humanity’ appears in the ‘Martens Clause’ of the 1899 Hague Conventions, proposed by Russia’s delegate Fyodor Martens. However, Antonio Cassese argued that Martens proposed the clause to ward off more demanding humanitarian requirements. Antonio Cassese, ‘The Martens Clause: Half a Loaf or Merely Pie in the Sky?’, *European Journal of International Law* 11 (2000): 193-202.

44 Ironically and perhaps tellingly, Turkish publicists during the 1919-22 civil war accused the Western occupiers of a crime against humanity. Banu Turnaoğlu, *The Formation of Turkish Republicanism* (Princeton: Princeton University Press, 2017), 208. Great Britain was, in their eyes, ‘an enemy of mankind.’ *Ibid.*, 209.

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analogy to establish Israel's competence to try Eichmann under universal jurisdiction. 'There are definitions of *hostis humani generis*. There are definitions of people of whom, in biblical language, it might have been said that they bore the mark of Cain on their foreheads.'⁴⁵ The biblical reference is telling: Cain is at once the primordial 'restless wanderer on this earth' (Gen. 4:15) and the primordial criminal: everyone's enemy, and fratricidally evil. The jurisdictional claim and the moral claim go together.

The *Eichmann* court adopted Hausner's pirate analogy, and its judgment invoked the *hostis generis humani* concept to justify universal jurisdiction.⁴⁶ Though the judgment never explicitly labels Eichmann a *hostis generis humani*, the unspoken premise is obvious: perpetrators of genocide are *hostis generis humani*. Otherwise, the pirate analogy would be irrelevant to Eichmann.⁴⁷

Hannah Arendt seized on that premise when she described Eichmann and those like him as *hostis generis humani*. For her, this was a moral and political point, not a jurisdictional one. In fact Arendt rejected the pirate analogy as a basis for universal jurisdiction over Eichmann's crimes: in a letter to Karl Jaspers, she explained that pirates are private actors, which would make their crimes solely crimes against the victims, not against humanity itself. She writes, 'although the crime at issue was committed primarily against the Jews, it is in no way limited to the Jews or the Jewish question.'⁴⁸ Her distinction is based on a domestic-law analogy. An intentional injury is a private wrong against the victim, but also a public wrong against the state, perpetrated on the body of the victim. In the same way, Arendt thought that the distinctive feature of crimes against humanity and genocide is that they are wrongs inflicted on the bodies of their victims, but they are crimes against humanity. In her imaginary sentencing speech to Eichmann, Arendt tells him that because of his crime, 'no one, that is, no member of the human race, can be expected to want to share the earth with you.'⁴⁹ That curiously fussy phrase 'no one, that is, no member of the human race' indicates that the interested party is *not* only the victims, nor is it the order of states. It is humanity itself. (For Arendt, the Nazi offense against the order of states was not the murder of the Jews but expelling the Jews onto the territory of other states.⁵⁰)

45 *Prosecutor v. Eichmann*, Trial transcript, session 4, April 12, 1961, <http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-004-02.html>.

46 *Prosecutor v. Eichmann*, Judgment, § 13.

47 Kontorovich's argument is precisely that the pirate analogy is irrelevant to modern universal jurisdiction. Arendt made the identical argument in *Eichmann in Jerusalem*, 261. Kontorovich does not discuss the *Eichmann* case, so I do not know whether he would accuse the Israeli court of a fallacy.

48 Letter from Arendt to Jaspers, 5 February 1961, in *Hannah Arendt-Karl Jaspers Correspondence 1926-1969*, eds., Lotte Kohler and Hans Saner, trans. Robert and Rita Kimber (New York: Schocken, 2004), 423.

49 Arendt, *Eichmann in Jerusalem*, 279.

50 Arendt, *Eichmann in Jerusalem*, 268.

1.6 Torture and other core crimes

Two more steps will complete our genealogy of the *hostis generis humani*. In 1979, the parents of Joelito Filártiga, a Paraguayan youth who had been tortured to death by Stroessner's police, successfully sued the torturer in a U.S. court under an obscure federal statute establishing jurisdiction over torts in violation of international law. The Filártigas' counsel (human rights lawyers Rhonda Copelon and Peter Weiss) argued that 'torture is in international law today what piracy was in 1789, i.e., the grossest, most universally recognized international violation, the international crime *par excellence*.' Thus, 'the torturer is today the most heinous international outlaw,' an 'extraordinary villain' who falls into the category of *hostis generis humani*.⁵¹ The court agreed: 'the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind.'⁵²

The *Filártiga* case was a landmark in both U.S. and international law. In practical terms, it allowed victims of core international crimes committed anywhere to gain a hearing in a U.S. court under universal jurisdiction. At first, the defendants were impecunious thugs and fugitive warlords, and U.S. courts seemed receptive to the largely symbolic lawsuits. Alas, when plaintiffs began suing multinational corporations that were complicit with the thugs, and that have assets to attach, the courts swiftly pivoted, and began to close the courthouse door by interpretively narrowing the Alien Tort Statute. Today the door is mostly shut. Nevertheless, what matters for our genealogy is that *Filártiga* broadened the meaning of *hostis generis humani*, opening the way to applying it to all the core international crimes.

That is the final step in our genealogy. As a judge on the International Criminal Tribunal for Former Yugoslavia explained, today's core-crime 'offenders are perceived as *hostis humanis generis*, because the norms breached by the conduct protect universal values.' This is because of 'the character of the crime as one that by reason of its gravity and scale offends international public order.'⁵³ At last, the perpetrator of any core crime – not only torture – is a *hostis generis humani*, because the crime's gravity and scale offend the international public order.

51 Brief for Appellant, *Filártiga v. Peña-Irala*, 26, 38. The brief may also be found in William J. Aceves, *The Anatomy of Torture: A Documentary History of Filártiga v. Peña-Irala* (Leiden: Brill, 2007).

52 *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2nd Cir. 1980).

53 *Prosecutor v. Milutinović, Ojdanić, and Sainović*, Decision on Motion Challenging Jurisdiction, Case No. IT-99-37-PT, 6 May 2003, separate opinion of Judge Robinson § 7.

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Surprisingly, the literal phrase *hostis generis humani* almost never appears in the jurisprudence of international tribunals.⁵⁴ I suspect that Arendt's famous description of Adolf Eichmann as a 'new type of criminal, who is in actual fact *hostis generis humani*' had more to do with popularizing the Latin formula than any international legal judgment. Nevertheless, it is now incontrovertible that the modern paragon of the *hostis generis humani* is no longer the pirate but the torturer, the *génocidaire*, and the murderous warlord.

Let me summarize our legal genealogy in tabular form. The first column of the table below identifies the author or authors who describe a class of criminals as *hostis generis humani* or *communis hostis omnium*. The second column identifies the crime to which each source attaches the label. (It should be understood that all of them include pirates in addition to the crimes named in the table.) And the third column identifies the special heinousness – the X factor – that makes those criminals enemies of all mankind.

2 An alternative genealogy

I have suggested that Cicero's treatment of piracy rests on statist premises, in that the kind of evil that excludes the pirate from the domain of good-faith dealing is the pirate's contempt for state authority. The same might be said of leaders and planners who commit the modern crime of aggression, which is fundamentally an affront to state sovereignty. By contrast, the modern enemies of humanity – *génocidaires*, torturers, perpetrators of crimes against humanity – earn that label because of their violations of human rights and human dignity, not because of their affront to states. After all, in many cases it is states that commit these crimes, against their own minority groups or against peoples whose territory they have conquered, as the Nazis did in their General Government of occupied Poland. The claim of state sovereignty is often raised as a shield by states to impede outside interference in their persecutions and depredations, as in Syria and Myanmar today.

For this reason, the pirate analogy is something of a linguistic false friend. As it happens, we can find an alternative Ciceronian genealogy for crimes of state. In

54 Or perhaps not surprisingly: none of the international tribunals needed universal jurisdiction, so there was no need for the pirate analogy. Apart from the opinion quoted and cited in the preceding note, the phrase seems to have been used only one other time in the ICTY/ICTR jurisprudence, and that second appearance is a direct quote from *Filártiga. Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgement of 10 December 1998, § 147, which adds that in addition to torture, crimes of this abominable character are 'genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination.' This is a slightly eccentric list of core crimes, and no international tribunal includes the last item on the list in its subject matter jurisdiction. To the best of my knowledge, the phrase *hostis generis humani* does not appear in the decisions of the Nuremberg or Tokyo Tribunals, the SCSL, the Cambodian Extraordinary Chamber, or the ICC. My thanks to Georgetown law librarian Mabel Shaw for locating the uses of '*hostis generis humani*' in the Tribunal jurisprudence.

Table 1 *The rogues' gallery of hostes generis humani*

Source	Class of criminals	Heinousness (X factor)
Cicero, Bartolus, Coke	Pirates	<i>Lèse-majesté</i> (common enmity to the authority of any state)
Vattel	Professional poisoners, assassins, incendiaries	Insidiousness and habitual frequency of crimes, undermining common security
Vattel	Ruthless aggressors	Violently disrupting the order of nations
British and U.S. law, anti-slave-trading treaties	Slave traders	Enslavement as a 'crime against human nature'
<i>State of Israel v. Eichmann</i> ; derivatively, Arendt	<i>Génocidaires</i>	Murder of an entire collectivity as a 'universal evil'
<i>Filártiga</i> brief and judgment, ICTY <i>Furundzija</i> judgment § 147	Torturers	Cruelty as 'extraordinary villainy'
ICTY <i>Milutinović</i> , Robinson opinion § 7	Violators of 'norms that protect universal values'	'by reason of its gravity and scale it offends international public order'

Book 3 of *De officiis*, Cicero considers the question of whether it is ever permissible to wrong another out of self-interest. His overall answer is no, not even in cases of necessity, because doing so would 'uproot the fellowship which the gods have established between human beings.'⁵⁵ But (he asks) might there be an exception if the victim were 'the cruel and inhuman tyrant Phalaris'?'⁵⁶ To this, Cicero answers with an emphatic yes. The 'decision is quite simple: we have no ties of fellowship with a tyrant, but rather the bitterest feud.' The tyrant is 'a man whom it is morally right to kill; – nay, all that pestilent and abominable race should be exterminated from human society. (...) Those fierce and savage monsters in human form should be cut off (*segreganda*) from what may be called the common body of humanity.'⁵⁷

Curiously, then, the tyrant shares with the pirate (and, perhaps, with *homo sacer*) exclusion from human fellowship and human obligation. Cicero likens the tyrant to a diseased limb that must be amputated. Like the pirate, the tyrant is the enemy of the common body of humanity, someone 'we' (humanity? good Roman citizens?) must exterminate, extirpate, and exclude.⁵⁸

55 Cicero, *De officiis*, 3.6.28, 295.

56 Cicero, *De officiis*, 3.6.32, 297. Cf. Cicero, *De Re Publica*, 1.28.44, 69, on the deterioration of admirable monarchies like that of Cyrus to 'the utterly cruel Phalaris.'

57 Cicero, *De officiis*, 3.6.32, 297.

58 Perhaps with Cicero as precedent, Pliny described the emperor Nero as *hostem generis humani* (and explained why he turned out that way: he was born feet first, which is *contra naturam*). Pliny the Elder, *Natural History*, 7.8.45-46, http://penelope.uchicago.edu/Thayer/L/Roman/Texts/Pliny_the_Elder/7*.html. On tyrants as the enemy of humankind, see Edelstein, *Terror of Natural Right*, 31-33.

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The pirate has placed himself outside the law; the tyrant places himself above it, as the classical political philosophers made clear. For both Plato and Aristotle, the rule of law means that rulers and magistrates are servants of the law, but tyranny inverts that relationship.⁵⁹ Although Plato does not label the tyrant an enemy of all humanity, he does call him the enemy of all the virtuous. Out of political necessity (Plato explains), the tyrant purges the virtuous, whom he fears as potential rivals and insurrectionaries.⁶⁰ In Aristotle's more elaborate analysis, tyrants secure themselves through the triple strategy of taking away their subjects' power, humiliating them, and sowing mutual mistrust among them.⁶¹ For John Locke, a ruler who takes away his subjects' recourse to law is 'a declared Enemy to Society and Mankind.'⁶²

We may be skeptical that the tyrant is a precursor of the modern criminal against humanity or *génocidaire*. In ancient political thought, tyranny is the worst form of government because of the outrages tyrants commit to secure their own power, not because they massacre or persecute civilian populations. When Hitler set up a police state, and murdered and imprisoned his political opponents, he was behaving like a classical tyrant. But the Final Solution and the other Nazi mass murders were crimes of a different order, having nothing to do with securing power. Arendt rightly warns against false analogies between ancient tyrannies and modern totalitarianism.⁶³ Perhaps, then, tracing these modern atrocities back to ancient tyranny is just as misleading as tracing them back to piracy. Not that ethnic extermination was foreign to the ancient world – far from it. But these

59 Plato, *Laws*, 715d; Aristotle, *Nicomachean Ethics*, 8.10, 1160a36-1160b11, *Politics*, 3.16, 1287a19-22. Plato warned that radically democratic citizens who chafe at the laws because they resent being told what to do are for that reason potential tyrants, any of whom would become an actual tyrant if he could seize power. This confirms that Plato identified tyrants as those who place themselves above the law. Plato, *Republic*, 563d-e. Cicero quotes and endorses this argument of Plato's in his own *On the Republic*, 1.42.65-1.43.66 (trans. Keyes, 99-101). A similar parallel between the mob and the tyrant appears in Locke's *Second Treatise*, § 230: anyone, 'either Ruler or Subject,' who 'by force goes about to invade the Rights of either Prince or People (...) is justly to be esteemed the common Enemy and Pest of Mankind; and is to be treated accordingly.' John Locke, *The Second Treatise of Government*, in *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1968), 418.

60 Plato, *Republic*, 567c. Literally, Plato says the tyrant is the enemy of all the brave, the generous, the wise, and the rich. So too Xenophon, *Hiero or Tyrannicus* 5.1, in Leo Strauss, *On Tyranny*, rev. ed. (New York: Free Press, 1963), 10, and Aristotle, *Politics*, 5.11, 1313a38-1313b1.

61 Aristotle, *Politics*, 5.11, 1313a34-1314a29.

62 Locke, *Second Treatise of Government*, 328.

63 Hannah Arendt, *Origins of Totalitarianism* (New York: Schocken, 2004), xxvi, 14-15; cf. 174. Also Arendt, *Eichmann in Jerusalem*, 267.

ancient atrocities typically followed military conquests; rulers did not inflict them on their own people.⁶⁴

Yet there is a connection between the crimes of tyrants and crimes against humanity: both are pathological forms of state politics, and it is hardly a coincidence that Hitler and Stalin had to become tyrants before they could turn to mass murder.⁶⁵ Aristotle explains that to secure his power the classical tyrant deliberately destroys the elementary bases of political life: he forbids all forms of association (common meals, clubs, discussion circles), and stirs up quarrels and mistrust among friends and between classes. This is a telling observation, because for Aristotle, the polis rests on friendship.⁶⁶ In that way the tyrant assails one of the fundamental aspects of humanity: our character as political animals, what Cicero calls 'a certain social spirit which nature has implanted in man' and which cannot be reduced to practical imperatives of survival.⁶⁷ Aristotle, whose political inquiries focused on ethnically homogeneous Greek polities, emphasized the tyrant's fomenting of class hatreds; but the modern tyrant in multi-racial or multi-ethnic nations foments hatreds on ethnic and racial grounds as well, and Aristotle's model of how tyrants deliberately set groups of citizens against each other can readily be extended from classes to races and ethnic minorities.

Once they have stirred up hatred, the criminal against humanity and *génocidaire* assault the political aspect of humanity in a different way: they turn the territory in which the victims live from a sanctuary into a trap.⁶⁸ Instead of protecting people who must, necessarily, live in a political community if they are to live at all, they persecute and annihilate them. Alternatively, they drive them from the territory, assaulting another fundamental aspect of political life: a shared place in the world. In short, not only is tyranny the precondition of genocide and crimes against humanity, they both assault our character as political beings – tyranny by sowing isolation, fear, and mutual mistrust, and genocide and crimes against humanity by turning homelands into killing fields.

64 Rome annihilated and razed Carthage, and in the Book of Samuel God dethrones Saul for disobeying a divine order to commit genocide (1 Sam. 15:1-26) – evidence that there was no anti-atrocity norm in the political world of the Book of Samuel's authors and their audience. We also learn that during his pre-kingship career as a mountain bandit, David made a practice of murdering everyone in the towns he raided so there would be no witnesses (1 Sam. 27:9-11). At sea, David would have been the classic *hostis generis humani*; today he would be candidate for an international tribunal. On genocide in the classical world, see Ben Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (New Haven: Yale University Press, 2007), 43-71.

65 As Arendt recognizes: *Origins of Totalitarianism*, 600.

66 Aristotle, *Politics*, 5.11, 1313b3-5, 18. On friendship as the basis of political community, e.g., *Nicomachean Ethics*, 8.9, 1159b25-1160a30.

67 Cicero, *De Re Publica*, 1.25.39, 65.

68 The imagery is that of Richard Vernon, 'What Is a Crime Against Humanity?,' *Journal of Political Philosophy* 10 (2002): 245. My own metaphor is that of politics gone cancerous. David Luban, 'A Theory of Crimes Against Humanity,' *Yale Journal of International Law* 29 (2004): 116-19.

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As a matter of positive law, it is untrue that crimes against humanity can be committed only by a state and its agents. Indeed, the International Criminal Court's Pre-Trial Chamber has held that the organization that plans and executes crimes against humanity need not even be state-like.⁶⁹ Nor is it true that such crimes are committed only in territory the organization has under its effective control: bombing a civilian population in another country is, legally, a crime against humanity as well as a war crime. Historically, however, Nazi persecutions and exterminations in Germany and occupied territory are the paradigm crimes against humanity, and abuse of state power is the conceptual heartland of such crimes.⁷⁰ Paradigmatically they are statist offenses, committed by states or state-like entities like warlords who control territory, combining tyranny with terror.⁷¹

In short, the modern *hostis generis humani* shares far more DNA with the ancient tyrant than with the ancient pirate, and his misdeeds are more likely offenses committed by and through states than against states.

3 Analyzing the *hostis generis humani*

The time has come to move from genealogy to analysis. The concept of *hostis generis humani* is ambiguous along three dimensions. First, recall that all the legal expansions of the concept beyond the original restriction to pirates occurred for jurisdictional, not substantive, reasons. Piracy was a universal jurisdiction offense, for two reasons we have already seen: first, the pirate threatens the ships and coastal settlements of all nations (Cicero's common enemy claim); and second, pirate attacks on shipping occur on the high seas, outside any state's territorial jurisdiction. Universal jurisdiction provides legal convenience in the effort to suppress piracy, and it does so without stepping on any state's territorial toes. When Great Britain labeled slave-traders pirates, when Gideon Hausner invoked the pirate analogy in the trial of Eichmann, and when Filártiga's counsel likened

69 Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010) [hereinafter, Kenya Article 15 Decision].

70 So Vernon and I have both argued. Luban, 'Theory of Crimes Against Humanity,' 108-9, 117; Vernon, 'What Is a Crime Against Humanity?,' 242, 244-45.

71 Thus, I am inclined to agree with Judge Kaul's dissent in the Kenya case cited above. Kaul argues 'that the historic origins are decisive in understanding the specific nature and fundamental rationale of this category of international crime [i.e., crimes against humanity].' Kenya Article 15 Decision, dissenting opinion of Judge Hans-Peter Kaul, § 65. Judge Kaul argues against broadening the focus from state-like organizations to any organization that 'has the capability to perform acts which infringe on basic human values.' He warns that doing so blurs lines 'between international crimes and human rights infractions; between international crimes and ordinary crimes; between those crimes subject to international jurisdiction and those punishable under domestic penal legislation.' *Ibid.*, §§ 52-53, 65. Similarly, Antonio Cassese warns against expanding the category of crimes against humanity to include international terrorism. Antonio Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law,' *European Journal of International Law* 12, no. 5 (2001): 994-95.

torturers to pirates, it was always in the context of an argument for universal jurisdiction.

On the other hand, the basis for calling someone *hostis generis humani* arises from the substantive character of the evils the criminal inflicts, and both the *Eichmann* and *Filártiga* courts emphasize the fundamental evil of genocide and torture to justify the pirate analogy. For Arendt too, the significance of the label *hostis generis humani* is wholly substantive, not jurisdictional.⁷² (Recall that she rejects the pirate analogy and universal jurisdiction.) Hence the first dimension of ambiguity: is *hostis generis humani* primarily a substantive or a jurisdictional concept?

The second ambiguity is even more important. ‘Enemy’ is war talk, not law talk; ‘crime’ is law talk. Is the *hostis generis humani* a military enemy or a criminal (against humanity)? Or, as a third possibility, are such *hostes* outlaws, neither adversary nor criminal, and therefore deserving neither belligerents’ rights nor the rights of criminal defendants – as the Bush administration described Guantánamo captives? Are *hostes* to be tried and punished (if found guilty), or militarily attacked, or disposed of as their captor sees fit? Recall Vattel’s pronouncement: ‘All nations have a right to join in a confederacy for the purpose of punishing or even exterminating’ enemies of the human species. Which is it, punishment or extermination?

Finally, and most obviously, what does ‘humanity’ mean? Schmitt warns that any existing political group that claims to speak in the name of humanity is trying to cheat by denying its enemies the quality of being human – a warning we must take to heart.⁷³ But we can still ask whether there is a legitimate concept of humanity that does not carry such baggage. Is it the set of all living human individuals (or, alternatively, the set of all past, present, and future human individuals)? Or does ‘humanity’ name a property or quality, as Arendt implied when she

72 I analyze what she takes the nature of that substantive evil to be in David Luban, ‘Arendt on the Crime of Crimes,’ *Ratio Juris* 28 (2015): 307-25.

73 Schmitt, *Concept of the Political*, 54. Would that Schmitt took his warning to heart when, the same year as *Kristallnacht*, he labeled Jews the enemies of all state vitality. Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes*, trans. George Schwab and Erna Hilfstein (Chicago: University of Chicago Press, 2008 [1938]), 9, 60, 70.

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described genocide as a ‘crime against the human status’?⁷⁴ Or, finally, does it mean something closer to what Cicero meant: a universal or cosmopolitan community?

I start with the second question, which will shed light on the first and third as well. It’s useful to consider Antony Duff’s criticism of the *hostis generis humani* concept. According to Duff’s well-known theory of criminal trials and punishments, the point of domestic criminal justice systems is to call errant members of their community to account for violating norms that all members can be counted on to share. Duff objects to the legal concept of *hostis generis humani* because it signifies exclusion from all communities, and therefore it has nothing to do with members calling other members to account. Duff therefore understands the term to refer solely to military enemies or outlaws, where an ‘outlaw’ is not a criminal but, literally, someone outside of a community’s law. Outlaws of all humanity would be those so far beyond the human pale that no human communities share norms with them. Under either interpretation, military enemy or outlaw, the *hostis generis humani* cannot be called to account in a court of law, only killed or immobilized.⁷⁵ It follows that when Arendt called Eichmann a new kind of criminal, but also *hostis generis humani*, she contradicted herself – he could be one or the other, but not both.

If that truly were the significance of *hostis generis humani*, it would be conceptually absurd to put pirates, slave-traders, or torturers on trial as *hostes generis humani*. Vattel’s alternatives of punishment or extermination would present no alternative at all: only extermination, or at least incapacitation, would be permitted. The Israelis should have killed Eichmann on the spot – for, if Eichmann was truly *hostis generis humani*, the court had no business putting him on trial. But that conclusion seems absurd, and Duff concludes that rather than accept absurdity we should expunge the concept of *hostis generis humani* from the law. It is incoherent and dangerous.

74 Arendt, *Eichmann in Jerusalem*, 257. Arendt tells us that she takes the phrase from the French prosecutor at Nuremberg, François de Menthon. See Nuremberg Trial Proceedings, vol. 5, 405 (afternoon session of Jan. 17, 1946). In fact, Menthon’s phrase was *la condition humaine*. (For the French original, see the Gallica database, <http://gallica.bnf.fr/ark:/12148/bpt6k9758256f/f416.image>, 410.) Presumably, Arendt followed the English translation as ‘human status’ to avoid confusion with her own concept of the human condition in her eponymous book. What Arendt means by ‘the human status’ is the fact that we live in a plurality of peoples, and genocide assaults a people as such. Menthon meant something entirely different, namely that human beings are both material and spiritual beings; see Nuremberg Trial Proceedings, vol. 5, 406-7 (afternoon session of Jan. 17, 1946). He asserted that ‘the sin against the spirit is the original sin of National Socialism from which all crimes spring.’ *Ibid.*, 372 (morning session of Jan. 17, 1946). Menthon’s philosophical background was Catholic personalism; see Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2015), 89-90. His emphasis on the spirit is decidedly not Arendt’s view.

75 Antony Duff, ‘Authority and Responsibility in International Criminal Law,’ in *The Philosophy of International Law*, eds. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), 593-97, 602-3.

Why ‘dangerous’? A dramatic illustration is the use of the epithet ‘enemy of humanity’ by the most radical factions of the French Revolution to denounce their opponents. It culminated in the March 1793 decrees by which the Jacobins declared counterrevolutionaries *hors-la-loi* – outside the law, outlaws – who could be executed without trial.⁷⁶

Undoubtedly, calling someone an enemy of all humanity risks dehumanizing him. The most extreme example is a non-legal usage of *hostis generis humani* I have not previously mentioned: it was one of the names of Satan in medieval demonology.⁷⁷ Remember that Cicero called tyrants monsters in human form, and Vattel used similar language for aggressors. The Nazis called Jews bacilli; Hutu Power demagogues called Tutsis *inyenze*, cockroaches. Animalizing or demonizing human beings makes genocide easier, just as it made colonial conquest of ‘savages’ easier in the Age of Exploration.⁷⁸ Duff is right that such toxic metaphors should be expunged from the vocabularies of law and war.

Yet does the concept of *hostis generis humani* really pose such a threat to legality? It has been in the vocabulary of the law for nearly six hundred years, and only the most radical Jacobins thought it ruled out criminal prosecutions.⁷⁹ Quite the contrary: the modern motivation to use the label *hostis generis humani* has been to put radical evil on trial, not to preclude such trials. The point is to expand, not contract, the rule of law. Duff argues that this is a conceptual mistake, but perhaps the mistake is reading *hostis generis humani* to apply only to outlaws and military enemies. Notwithstanding Vattel’s dehumanizing language and his talk of extermination, there is no reason to suppose that he favors extermination over criminal punishment. In contemporary parlance, Vattel proposes a ‘capture or

76 Here I rely on Edelstein, *Terror of Natural Right*, 154–65.

77 Edelstein finds more than 230 uses of the phrase in medieval texts to refer to the devil; and in exorcism manuals, ‘enemy of all mankind’ is one of the thirteen names of Satan used to summon him – a label that made it easier to torture and kill the possessed. Edelstein, *Terror of Natural Right*, 31. The early seventeenth century, when these manuals were written, was the peak age of witch-panic and witch-hunts in Europe.

78 Francis Bacon applied the label *hostis generis humani* to ‘such routs and shoals of people, as have utterly degenerate from the laws of nature.’ These ‘may be truly accounted (...) common enemies and grievances of mankind.’ Francis Bacon, *Advertisement Touching a Holy War* (1622), in *Works of Francis Bacon Online*, vol. 13, 213, <https://archive.org/details/worksoffrancisba13bacoiala>. Chillingly, he was referring to the West Indians, to justify colonial conquest. *Ibid.*, 219.

79 Robespierre, who favored immediate execution of the king with no trial, called him a ‘criminal against humanity’ and his royalist supporters ‘enemies of humanity.’ Speech of 3 December 1792, reprinted in Michael Walzer, ed., *Regicide and Revolution: Speeches at the Trial of Louis XVI* (Cambridge: Cambridge University Press, 1974), 137–38. Rousseau had declared that ‘every evildoer who attacks social right becomes a rebel and a traitor to the fatherland by his crimes, by violating its laws he ceases to be a member of it, and even enters into war with it.’ *The Social Contract*, bk. 2, ch. 5, in Jean-Jacques Rousseau, *The Social Contract and Other Later Political Writings*, ed. and trans. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), 64–65. One Montagnard deputy read this passage aloud at the trial of the king. Edelstein, *Terror of Natural Right*, 156. Saint-Just echoed Rousseau’s reasoning in his speech to the Convention on why Louis must be tried by the Convention itself rather than a tribunal – but unlike Robespierre, he did favor a trial. Speech of 13 November 1792, reprinted in Walzer, *Regicide and Revolution*, 125.

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kill' policy, where capture entails a subsequent fair trial. Admittedly, declaring a wrongdoer to be an 'enemy of humanity' issues a license to use force against the enemy if that is the only way to suppress his evil deeds. But it is not a demand for killing rather than capture, let alone killing at the moment of capture.

Early modern writers including Gentili and Grotius defended humanitarian military interventions to punish a foreign prince's tyrannical cruelties.⁸⁰ I disagree that war is ever a legitimate instrument of punishment – say rather that it may be a legitimate instrument to end the cruelties and bring the tyrant to account before a tribunal.⁸¹ The tribunal matters, and in this connection Hausner's 'mark of Cain' language is very much to the point. We must not forget how the biblical story continues. God calls Cain to account and banishes him from human society. But Cain protests that the punishment is too harsh – it would make him fair game for anyone to kill. And God agrees: God protects Cain by threatening seven-fold punishment of whoever spills his blood (Gen. 4:15-16). Hausner must have realized that the mark of Cain is the sign of Cain's protection, not of his *homo sacer*-like removal from all protection. Only putting Eichmann on trial, not gunning him down in Buenos Aires, reflects the full import of the Cain story. The mark of Cain is, metaphorically, the protection offered by the rule of law.

Suppose we purge dehumanizing analogies from our moral vocabulary, and limit the implications of *hostis generis humani* designation to fair trial and punishment (allowing violent repression only when capture is impossible). In that case, Schmitt's concern about 'extreme inhumanity' against the enemy no longer seems pressing. Even so (one might object), given its amazing potential for abuse, why not expunge the inflammatory concept of an enemy of all humanity from our moral vocabulary?

The answer is that no other term quite captures the twin nature of atrocity and persecution crimes that makes the idea of international criminal justice imperative: that they are radically evil, and that they are everyone's business. 'Crime against humanity' might do, but the law has assigned it a more restricted scope, as a term of art for one species of the core crimes.

To see how 'enemy of humanity' can be purged of its poisonously dehumanizing connotations, we must confront the third question mentioned above: what is 'humanity'? Humanity cannot simply be the set of all human beings; a mathematical set has no moral or legal significance. Nor can 'humanity' be a political community, because of course there is no political community of humanity. There is a so-called international community, meaning a rudimentary political organization

80 See Gentili, *De Iure Belli Libere Tres*, ch. 7, 'On Defending the Subjects of Another Sovereign'; Martinez, *Slave Trade*, 117-18; Grotius, *Rights of War and Peace*, 1021 ('grievous Violations of the Law of Nature and of Nations').

81 David Luban, 'War as Punishment,' *Philosophy & Public Affairs* 39 (2011): 299-330. See also Steven Galoob, 'Retributivism and Criminal Procedure,' *New Criminal Law Review* 20 (2017): 465-505, demonstrating that retributive punishment requires due process of law.

of states, but I have insisted that it is an ontological and moral error to subsume human beings to their states.

Duff himself provides the answer to our question. He argues, correctly, that 'humanity' is a moral community, if not a political community. That answer was already implicit when Cicero spoke of the 'immense fellowship of the human species.' One might object that there is no moral community of human beings, nor has there ever been. The pull of particular communities overpowers the pull of the universal. To this, Duff responds – again correctly – that the moral community of human beings is 'embryonic.' It is 'as much a matter of moral aspiration as empirical fact.'⁸² It is a project, and we further this project by articulating cosmopolitan norms to which the enemy of humanity will be held accountable, whether or not he recognizes them.

It might be objected that, by definition, a *moral* community can tender only moral judgments, not promulgate criminal laws and hold people accountable for violating them. A proper system of criminal justice can spring only from a constituted political community, else it is mere vigilantism.

Certainly, vigilantes claiming to punish on behalf of humanity are a frightening prospect. At the same time, I think the objection rests on two false assumptions. First, it wrongly supposes that moral communities can only judge, not act. But moral communities are more than scorekeepers of good and evil, and moral judgment is more than commentary – it is action-guiding. One way a moral community acts is by working through the channels of existing political structures (domestic legal systems, the United Nations, the Rome Treaty) to institutionalize its judgments. That is not vigilantism.

Second, the objection wrongly assumes that only a full-service world government would have the authority to create cosmopolitan norms for calling radical evil to account – as though a moral community, lacking authority to govern everything, cannot govern anything. In reality, there is little difference between a moral community enlisting pre-existing state or international institutions to further criminal accountability and actions by those institutions.

What I have just described in abstract terms is, concretely, nothing less than the project of international criminal justice as it has developed from Nuremberg to the present. In his opening statement at the Nuremberg Trial, prosecutor Robert Jackson posed a possible objection to the trial: 'It may be said that this is new law, not authoritatively declared at the time [the defendants] did the acts it condemns, and that this declaration of the law has taken them by surprise.' Jackson responded, 'I cannot, of course, deny that these men are surprised that this is the law; they really are surprised that there is any such thing as law.'⁸³ I remarked earlier that tyrants are above the law; they understand their own sovereignty

82 Duff, 'Authority and Responsibility,' 599, 601 n. 41.

83 The Trials of the Major War Criminals Before the International Military Tribunal (Nuremberg), vol. 2 (Nov. 21, 1945), 143.

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along Schmittian lines, as the power to declare the exception. No wonder, then, that tyrants are surprised and resentful when outsiders hold them to account. How dare an outsider hold me to account! I am the sovereign; I am the state. I declare the exception, so I am above the law and beyond its grasp.

We create the moral community of humanity by insisting that there *is* no power to declare the exception to norms against radical evil. By establishing a practice of calling tyrants to account, we create those norms as norms. We insist that the enemy of all humanity is, in fact, a member of humanity and accountable to humanity. In that way, by adopting what I will call the *standpoint of humanity*, we further the normative project of creating humanity as a moral community.⁸⁴ This answers Duff's conceptual objection: that calling someone an 'enemy of all humanity' means we cannot call him to account as the criminal process requires. Duff's reason, recall, is that we have excluded him from any community whose shared norms are the basis of criminal accountability – an exclusion that echoes Cicero's no-promises claim about pirates, because their conduct removes them from the immense fellowship of human society. Adopting the standpoint of humanity rejects such exclusion claims. It insists that the enemy of humanity belongs to a cosmopolitan community that can hold him or her to account. The 1949 Geneva Conventions adopted the standpoint of humanity when they established universal jurisdiction over 'grave breaches,' in effect conscripting war fighters and those who control them into a cosmopolitan community, whether they recognize it or not.

Adopting the standpoint of humanity is not without its costs. Perceptively, Arendt once wrote of 'the terror of the idea of humanity.' What she meant is the terror that comes with accepting the perpetrator of radical evil as one of us, not a monster or a wild animal. 'For the idea of humanity, when purged of all sentimentality, has the very serious consequence that in one form or another men must assume responsibility for all crimes committed by men and that all nations share the onus of evil committed by all others.'⁸⁵ The new type of criminal she recognized in Adolf Eichmann is a more or less ordinary man recruited to an extraordinary project of radical evil. He is in actual fact *hostis generis humani*, but he is no less one of us. Arendt remarks: 'Shame at being a human being is the purely individual and still non-political expression of this insight.' This is not to say, fatuously, that we are all Eichmanns. By luck or by choice, we did not do what Eichmann did. The cost of holding an Eichmann to account is accepting him as part of the immense fellowship of the human species, not dismissing him as a monster. The reason to call him an enemy of humanity is that his crimes negate the very possibility of that fellowship and the political responsibilities it imposes.

84 Adopting this standpoint is, I take it, Ruti Teitel's aim in *Humanity's Law* (Oxford: Oxford University Press, 2013).

85 Hannah Arendt, 'Organized Guilt and Universal Responsibility,' in *Essays in Understanding 1930-1954*, ed. Jerome Kohn (San Diego: Harcourt Brace, 1994), 131.

If, as I suggest, ‘humanity’ names a normative project rather than a fully formed moral community, we can resolve the ambiguity between ‘enemy of all humanity’ as a substantive and jurisdictional concept. The answer is that it is both. Substantively, the enemy of all humanity is someone who assaults our nature as political beings through tyrannical cruelties. Jurisdictionally, ‘humanity’ bootstraps itself into existence by recognizing him as a *communis hostis omnium*, and calling him to account. Universal jurisdiction does not rest on the *hostis*’s location outside the territorial jurisdiction of states, as the pirate analogy suggests; rather, it is based on the practical exemption from his state’s territorial jurisdiction because he runs the state.⁸⁶ Establishing universal jurisdiction over core crimes is a decision to simultaneously establish a practice of accountability and to create norms against radical evil to which anyone, including heads of state, may be called to account. I have argued elsewhere that the legitimacy of the practice comes from its fairness – its strict adherence to the familiar procedural demands of natural justice and the requirements of humane punishment without which the repression of cruelty becomes itself a practice of cruelty.⁸⁷ To call the enemy of all humanity to account before humane law, using fair procedures, is to undo the exclusion claim – to reclaim him for humanity and to affirm humanity in the teeth of radical evil.

86 On this point, see the illuminating defense of universal jurisdiction over crimes against humanity by Richard Vernon, ‘Crime Against Humanity: A Defence of the Subsidiarity View,’ *Canadian Journal of Law and Jurisprudence* 26 (2013): 229-41.

87 Luban, ‘Theory of Crimes Against Humanity,’ 141-46; David Luban, ‘Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law,’ in Besson and Tasioulas, *The Philosophy of International Law*, 577-88. I argue that only states have the institutional capacity to do natural justice, so that ‘humanity’ *requires* using existing states and international institutions for its mission.