

COSMOPOLITANISM

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COSMOPOLITANISM AND PUNISHMENT

Prosecuting crimes against humanity

The prosecution of crimes against humanity is often given pride of place within the new cosmopolitanism as the marker not only of the transition from classical international law to cosmopolitan law but of the emergence more broadly of a cosmopolitan consciousness that stretches across national boundaries. What makes this aspect of international criminal justice so significant for cosmopolitanism is that the idea of crimes against humanity refers to ‘crimes that can be committed completely within one state’s borders by members of that state against other members of that same state’ and therefore ‘challenges the traditional understanding of a state’s exclusive prerogative over crimes committed within its borders’ (May 2006: 349). And yet the normative standing of this legal institution has been challenged from all sides: by those who denigrate the prosecution of crimes against humanity as merely ‘victors’ justice’ in a legal cloth; by those who see the criminalisation of individuals as an irrelevance in relation to larger issues of responsibility and justice; and those who are suspicious of codified abstractions dissolving the particular experience of horror shared by the victims. In the face of these criticisms the characteristic response of the new cosmopolitanism is to look to the completion of the transition to cosmopolitan law: to develop an international criminal court, to specify the content of crimes against humanity, consolidate the status of this crime within international criminal law, establish an international police force to apprehend suspects, and construct a system of impartial adjudication and punishment. I suggest, however, that this predominantly legal response to the normative fragility of the law of crimes against humanity should also address the inter-connections of law and

politics. Instead of exploring the relation between cosmopolitan law and politics, the juridical approach seeks to isolate the law from politics and elevate it above politics. I shall argue that cosmopolitan social theory entails a way of understanding crimes against humanity which from the start traces the ties that bind law to politics and politics to law.

The exemplar of this approach to cosmopolitanism whose work I shall discuss in this chapter is the political theorist, Hannah Arendt. Her investigations into the *actuality* of crimes against humanity and the construction of an anti-totalitarian politics capable of facing up to their 'horrible originality' provide my starting point. More specifically, her accounts of the Nuremberg trials after the Second World War and 15 years later the trial of Adolf Eichmann, the official in charge of transporting Jews to the death camps, provide a rich seam of analysis from which I shall seek to extract what I would call a 'worldly cosmopolitanism' (Arendt 1977b, 1994, 2003; Arendt and Jaspers 1992; Arendt and McCarthy 1995). Arendt took into account competing renditions of crimes against humanity: the idealisation of cosmopolitan law in the work of Karl Jaspers; the dismissal of cosmopolitan law as victors' justice in the work of Carl Schmitt; the downplaying of cosmopolitan law in relation to larger issues of responsibility in the work of Martin Heidegger; the subordination of cosmopolitan law to the uniqueness of the Holocaust in the work of Gershom Scholem. Worldly cosmopolitanism does not necessarily entail empathy with these alternative standpoints, but it seeks to capture the element of 'truth' in what others have to say and draw it into our own thinking. My contention is that Arendt's threefold engagement with crimes against humanity – with the actuality of the crimes themselves, with the prosecution of the crimes after the event and with the differing standpoints from which others 'see' both the crimes themselves and their prosecution – remains as instructive for our understanding of cosmopolitan social theory as it is for current debates on international criminal justice.

ARENDR AND JASPERS: NUREMBERG

The formative moment in contemporary cosmopolitanism was the institution of the law of 'crimes against humanity' in the Nuremberg Charter and then its application in the Nuremberg Tribunal. The

category of crimes against humanity was conceived as a supplement to existing crimes in international criminal law, 'war crimes' and 'crimes against peace', made necessary by the unprecedented levels of organised violence directed against civilians. The concept was not entirely new. Its pre-history goes back to the charge of 'crimes against humanity and civilization' laid at the Turkish government for the massacre of Armenians in 1915. It was reformulated by international lawyers in the latter part of the Second World War to make it possible for a court of law to consider such crimes as those that were being committed in the so-called 'final solution of the Jewish question' (Marrus 1997: 185–7).

Why has this innovation in international criminal justice caught the cosmopolitan imagination? An answer to this question is to be found in *The Question of German Guilt* written in 1945 by the philosopher and friend of Arendt, Karl Jaspers. Jaspers discerned among the ruins of Nuremberg 'a barely perceptible dawn' – the actualisation of the vision of cosmopolitan order first conceived by Kant (Jaspers 1961). His argument may be reconstructed around the following eight points. First, the prosecution of crimes against humanity transcended established principles of national sovereignty, which had too long put a 'halo' around heads of states and made them inviolable to prosecution. Second, it announced that individuals acting within the legality of their own state could nonetheless be tried as criminals and that service to the state no longer exonerates any official in any bureaucracy or any scientist in any laboratory from personal responsibility. Third, it removed the excuse of 'only obeying orders' from perpetrators and it held those who sit behind desks planning atrocities as guilty as those who participate directly in their execution. Fourth, it enabled a distinction to be made between the criminally guilty and the indefinite number of others who were capable of co-operating under orders but not guilty in a criminal sense. Fifth, it provided a lawful alternative to the barbarities of collective punishment. Sixth, it extended the notion of criminal guilt in international law beyond that of war guilt and made visible the unprecedented levels of violence against civilians that had come into existence. Seventh, by treating mass murderers as mere criminals it represented them in their 'total banality' and deprived them of that 'streak of satanic greatness' with which they might otherwise have been endowed. Finally, it signified that crimes committed against

one set of people, be it Jews, Poles or Roma, are an affront not only to these particular people but to humanity as a whole and that humanity has a duty to hold to account those who commit them. This list is not exhaustive but it indicates why Jaspers was moved to describe the Nuremberg Charter as 'a feeble, ambiguous harbinger of a world order the need of which mankind is beginning to feel' (Jaspers 1961: 60).

In correspondence with Jaspers, Arendt offered a more equivocal assessment. She endorsed the prosecution of crimes against humanity as a crucial step in the direction of universal responsibility. However, her enthusiasm for the *law* of crimes against humanity was weighed against the overwhelming eventfulness of the crimes themselves. She suggested that the enormity of Nazi crimes explode the limits of the law:

For these crimes, no punishment is severe enough . . . That is, their guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems . . . We are simply not equipped to deal, on a human, political level, with a guilt that is beyond crime . . . The Germans are burdened now with thousands or tens of thousands or hundreds of thousands of people who cannot be adequately punished within the legal system.

(Arendt and Jaspers 1992: 54)

She maintained that criminal law is not equipped to deal with the difference between 'a man who sets out to murder his old aunt' and 'people who without considering the economic usefulness of their actions at all ... built factories to produce corpses'. There was something about *this* guilt that oversteps all legal systems. She underlined the disproportion between the small number of Nazis who could be treated as criminally guilty and the vast numbers of individuals implicated in conceiving, planning and executing the Final Solution. When a machinery of mass murder impels practically everyone to participate in crime, the distinction between the guilty and the innocent is effaced: 'Where all are guilty, nobody in the last analysis can be judged' (Arendt and Jaspers 1992: 125). She doubted that this exercise in criminal law would instil in Germans a sense of responsibility for what had been done to Jews. German people, she wrote, did not in general regard themselves as murderers

and the punishment of war criminals, rather than construct a new sense of responsibility, provoked in them feelings of resentment and betrayal. Its effect was to exonerate all Germans but the accused of their guilt.

I would present the difference between Arendt and Jaspers in this way. Jaspers acknowledged that the Nuremberg trials were not yet based on a global legal order and that the category of crimes against humanity was still contained within a national framework. The deficiencies of Nuremberg were that the charge of crimes against humanity was sparingly used by prosecutors; crimes against humanity were tied to the conduct of war; the tribunal could only consider crimes committed by Germans and excluded in principle those committed by the allied powers; and the tribunal itself was a multinational body established by the victorious powers and not an international tribunal. For Jaspers, the shortcoming of the tribunal lay in its reluctance to shake the foundations of national sovereignty (Deak 1993; Douglas 2001; Salter 1999). However, he saw it as the first sign of a more general re-evaluation of responsibility after Nazism, whose aim was not just to re-orient the pariah nation, Germany, back to the main current of Western humanism but to renew the tradition of Western humanism itself. Even if the norms established in international criminal law were not yet universalised, they were universalisable.

Arendt shared Jaspers' cosmopolitan vision of universal responsibility. In language reminiscent of Søren Kierkegaard, she looked to a time when

human beings would assume responsibility for all crimes committed by human beings, in which no one people are assigned a monopoly of guilt and none considers itself superior, in which good citizens would not shrink back in horror at German crimes and declare 'Thank God, I am not like that', but rather recognise in fear and trembling the incalculable evil which humanity is capable of and fight fearlessly, uncompromisingly, everywhere against it.

(Arendt 1994: 132)

Arendt's appeal to universal responsibility served less to indicate the *legal* limitations of international criminal justice, limitations that

could be surpassed, than a conflict between the universal significance of the prosecution of crimes against humanity and the moral division of the world into the poles of German barbarism and allied innocence. The prosecution of crimes against humanity is Janus-faced: on the one hand, it overcomes the impunity of rulers; on the other, it threatens to stigmatise the enemy in ways that would serve only to reinforce the old national framework. While Jaspers addressed the defects of Nuremberg in juridical terms of law's progression, Arendt's concern was that the law was neither working to create a sense of responsibility among Germans nor to break the image of the 'unspeakable Nazi beast'.

The differences between Jaspers and Arendt should not be overstated, since both saw the majesty of international law in some sense realised at Nuremberg. The more salient point, perhaps, is that the cosmopolitan precedent established at Nuremberg quickly evaporated with the onset of the cold war – not because crimes against humanity disappeared from the world but because the political sensibility that nurtured their prosecution was no longer present. For 40 years or more the idea of 'crimes against humanity' returned to the backburner of world history, sustained only among a few radical intellectuals of an anti-totalitarian persuasion and some civil society groupings committed to holding to account perpetrators of atrocities, no matter how high their status.¹ The major powers either withdrew from international criminal law or, as in the Auschwitz trials of 1963, turned to domestic legislation.² There was something premature in any cosmopolitan faith in law's progress. The ideals represented at Nuremberg were more like a flash of light prior to the Cold War than a transition to a new cosmopolitan order.

ARENDR AND JASPERS: THE EICHMANN TRIAL

When we move forward fifteen years from Nuremberg to Jerusalem, we find a shift of emphasis in both Jaspers and Arendt. Jaspers expressed equivocation about a trial he saw falling far short of the ideals of legal cosmopolitanism. He criticised the kidnapping of Eichmann from Argentina as having no legal justification. He criticised the use of a national court on the grounds that 'it is a task for humanity, not for an individual national state' to pass judgement on crimes against humanity. He criticised the use of an *Israeli*

court, arguing that punishment might appear more like vengeance than law. He maintained that ‘something other than law is at issue here’ and to address it in exclusively legal terms was a mistake (Arendt and Jaspers 1992: 410–19; Jaspers 2006). Arendt was less impressed by legalistic objections. She was unwilling to condemn the kidnapping of a man indicted at Nuremberg for crimes against humanity – particularly from a country with such a bad record of extradition as Argentina. She was unwilling to condemn the use of an Israeli court: many of the surviving Jewish victims lived there, Eichmann was charged with the mass murder of Jews, and in any event there was no international court. She repudiated the argument echoed by Eichmann’s counsel that as a Jewish institution the court had a political interest in the outcome and could not therefore be relied upon to deliver justice. She acknowledged that bigger issues were at stake than are containable within a purely legal framework – the nature of evil, totalitarianism, political anti-Semitism – but this was no reason to deny the validity of prosecuting Eichmann. In any event there were no other tools to hand except legal ones with which to judge Eichmann (Arendt and Jaspers 1992: 417).

Arendt’s reservations over the Eichmann trial were of another kind. They had to do with losing sight of the universalistic promise of prosecuting crimes against humanity. She heard the voice of Jewish nationalism in the prosecution’s contention that only in Israel could a Jew be safe, in its camouflaging of ethnic distinctions in Israeli society, in its refusal to face up to the complicity of Jewish community leaders in the administration of the Final Solution, and not least in the fact that Eichmann was charged not only with crimes against humanity but more centrally with ‘crimes against the Jewish people’. In permitting this newly constructed offence Arendt argued that the court failed to understand that

the physical extermination of the Jewish people was a crime against humanity perpetrated on the body of the Jewish people, and that only the choice of victims, not the nature of the crime, could be derived from the long history of Jew-hatred and antisemitism.

(Arendt 1977b: 269)

This was the nub of the issue for Arendt: the attempted extermination of the Jewish people was not to be understood as the culmination of a long line of persecutory acts against Jews, rather it was ‘an attack upon human diversity as such, that is, upon a characteristic of the “human status” without which the very words “mankind” or “humanity” would be devoid of meaning’ (Arendt 1977b: 268–9). The court failed to understand that in destroying an ethnic group humankind in its entirety might be ‘grievously hurt and endangered’ (Arendt 1977b: 276). Arendt’s concern was that the court and especially the prosecutor, Gideon Hausner, were reinforcing the very situation that the idea of crimes against humanity had sought to correct – the breaking up of the human race into a multitude of competing nations.

Arendt argued that the political shortcomings of the trial dovetailed with its legal shortcomings. The main business of any criminal trial, she argued, is to ‘weigh up the charges, render judgement and mete out due punishment’. However, in this trial the prosecutor could not resist the temptation to subordinate legal justice to moral ends. He appealed to Jewish rather than secular legality, he resorted to biblical conceptions of vengeance, he subsumed legal criteria of relevance to the unchecked testimony of survivor-witnesses, and he portrayed them all as Jewish heroes. Arendt acknowledged the extra-legal achievements of the trial, not least its exposure to public scrutiny of the destruction of European Jewry and the space it provided for survivor-witnesses to have their say in public, but she maintained that these ends would not be served if justice were not done and be seen to be done. It is important not to overstate Arendt’s criticisms. The failures of the Eichmann trial, as she put it, were ‘neither in kind nor in degree greater than the failures of the Nuremberg trials or the successor trials in other European countries’ (Arendt 1977b: 274). Justice was done even if the principal crime could not be found in the law books. The difference between Arendt and Jaspers should not be overstated. Both attempt to construct a cosmopolitan point of view on the trial and both supported the construction of an international criminal court. However, while Jaspers measured the trial against a legal ideal and found it wanting, Arendt drew hard-headed judgements from deeply equivocal material.

STRATEGIES OF DENIAL

The cosmopolitan analysis put forward by both Jaspers and Arendt contrast markedly with strategies of denial adopted by the defendants themselves as well as by onlookers and historians sceptical of the significance of this innovation in international criminal justice. The jurist Carl Schmitt, himself interrogated at Nuremberg, quipped that a 'crime against humanity' is one committed by Germans while a 'crime for humanity' is committed by Americans. He treated the prosecution of crimes against humanity as a prime example of 'victors' justice' in a juridical disguise which served only to construct the defeated enemy as 'inhuman' (Salter 1999).³

One strategy was to deny the validity of the law on the grounds that it was enacted by four victorious military powers and not by an authorised international legislature, it used vague phrases like 'other inhumane acts' as part of its lexicon, it was retrospectively applied to acts committed prior to the law itself, and it excluded equivalent crimes committed by the victorious powers (Deak 1993). Since the law violated formal principles of legality – that it be authoritative in its origins, general in its application, specific in its formulation and non-retroactive in its enforcement – it was argued that it was not properly speaking law at all (Kirchheimer 1969; Neumann 1942). Another strategy was to claim that acts labelled 'crimes against humanity' are normal routines of power in the international arena, not fundamentally different from other acts of power not so labelled. In the later case of Klaus Barbie, 'the butcher of Lyons', his lawyers based their defence on the argument that their client's actions as police chief during the occupation were merely a case of 'white Europeans' doing to other 'white Europeans' what all white Europeans have routinely done to black non-Europeans and that by putting Barbie on trial the French were camouflaging their colonial history (Finkelkraut 1992). A third strategy was to deny personal responsibility on the grounds that perpetrators of crimes against humanity have no choice but to obey orders and cannot, therefore, be held guilty of the crimes committed. Appeal was made to external constraints to which the perpetrators were subjected: if the choice facing an individual is that of 'kill or be killed', it is only in a formal sense that an individual is responsible for his or her actions. Appeal was also made to the *internal* constraints faced by the accused.

Eichmann argued that since the command of the Führer was the 'absolute centre' of the legal system, he simply could not have acted otherwise despite bearing no ill feelings towards his victims.

Martin Heidegger employed similar strategies of denial when called upon by Herbert Marcuse to disavow the Nazi regime. What the Nazis did to the Jews was no worse, he wrote, than what the Russians did to the Germans. He maintained that the 'manufacture of corpses in gas chambers and extermination camps' deserves no more attention than other practices of modern technology, like 'a motorised food-industry', which are 'in essence – the same'. He compared 'those who were liquidated inconspicuously in extermination camps' to 'the millions of impoverished people right now . . . perishing from hunger in China' and distinguished only between those 'capable of enduring death in its essence' and those who merely 'succumb' and are 'done in' (Lang 1997; Rabinbach 1997). A more interesting perspective, however, is apparent in his 'Letter on Humanism' (1947). Written as a response to Sartre's credo of absolute individual responsibility, which allows no excuses for one's actions, not even Abraham acting under the command of God, Heidegger relocated humanism as a metaphysics of the subject that denies the historicity and finite freedom of human existence (Heidegger 1976: 219). Humanism elevates the human being as master of all things. It constructs a technological relation to the world based on the domination of nature and people. Heidegger insisted that when he spoke against humanism, his argument was not designed to be destructive. It 'in no way implies a defence of the inhuman, but rather opens other vistas' (Heidegger 1976: 250). It does not declare humanism false but inadequate to the task of realising 'the proper dignity of man'. It does not align itself 'against the humane' or advocate 'the inhuman' but maintains only that humanism 'does not set the *humanitas* of man high enough' (Heidegger 1976: 233). Nazism became a catastrophe because it turned opposition to humanism into an advocacy of the inhuman. Heidegger said he did not wish to do away with laws that 'hold human beings together ever so tenuously' but rather 'to think the humanity of *homo humanus* . . . without humanism' (Heidegger 1976: 254). If Schmitt stood for the atrophy of responsibility, Heidegger stood for its hypertrophy. In either case ordinary legal responsibility appeared hard to sustain.

In response to these strategies of denial Jaspers heard only the voice of hypocrisy and evasion. For Arendt, their more troubling aspect lay in the 'truth' they contained. The prosecution of crimes against humanity can serve to demonise the enemy, it can conceal the crimes of the victors, it can reinforce national conceptions of guilt and innocence, it can absolve the ordinary citizen of responsibility, it can label people arbitrarily and it can draw attention away from the larger ethical issues at stake. Even the epithet 'victors' justice' expresses the truth that there is no court in the world that is not the result of a prior victory. Resentment may be fuelled by a justified sense of the gulf between the humanitarian standards powerful nations purport to respect and the violence they reveal in practice.

Arendt noted the 'conspicuous helplessness the judges experienced when they were confronted with the task they could least escape . . . understanding the criminal whom they had come to judge'. Eichmann was neither perverted nor sadistic but terrifyingly normal: 'this new type of criminal . . . commits his crimes under circumstances that make it well-nigh impossible for him to know or to feel that he is doing wrong' (Arendt 1977b: 276). Other than personal ambition he seemed to have no motives. It was as if 'sheer thoughtlessness . . . predisposed him to become one of the greatest criminals of that period' (Arendt 1977b: 288). Eichmann's defence was that he was a cog in a machine, to which Arendt observed that 'the whole cog theory is *legally* pointless' because in a trial 'all the cogs in the machinery, no matter how insignificant, are in court forthwith transformed back into perpetrators, that is to say, into human beings' (Arendt 1977b: 289). The alternative was not attractive: to 'judge and even . . . condemn . . . trends, or whole groups of people – the larger the better' in such a way that 'distinctions can no longer be made, names no longer named' (Arendt 1977b: 296). As Arendt put it, we have to overcome 'the reluctance evident everywhere to make judgments in terms of individual moral responsibility' (Arendt 1977b: 297).

Arendt was, mistakenly in my view, critical of sociology for accepting too readily that the essence of modern bureaucracy is 'to make functionaries and mere cogs . . . out of men, and thus to dehumanise them' (Arendt 1977b: 289).⁴ In fact, in Weber's conception of bureaucracy officials *are* responsible for their actions, and part of the immense power of bureaucracy is based on a responsibil-

ity for decision-making and rule interpretation that is distributed throughout the hierarchy. If crimes against humanity were organised by a typical modern bureaucracy, individuals would have been expected to take responsibility for the tasks assigned to them and the leadership could not have relied on employees to perpetrate murder simply as cogs in a machine. The process of following a rule is mediated through consciousness and the *ethos* of public service is the oil that allows the machine to run smoothly. Rules are nothing without interpretation and application. Arendt argued, however, that the form of organisation involved in crimes against humanity was radically different from the Weberian model of legal-rational bureaucracy. Movement rather than structure was its essence. There was an intermeshing of state and party institutions. Duplication was apparent in the many police apparatuses all doing similar work, spying on the population and on each other, without any clear knowledge of who will be rewarded and who purged. In the complexities of totalitarian domination all were 'equal with respect to each other and no one belonging to one group owed obedience to a superior officer of another' (Arendt 1977b: 71). The categorical imperative of the *Führerprinzip* was: 'Act in such a way as the Führer, if he knew your action, would approve it' (Arendt 1977b: 136). This was not a principle of bureaucracy organised on the basis of formal rules within a structured hierarchy; the allegiance of the official was not owed to his or her immediate superior but to the leader. To be sure, *elements* of bureaucracy were retained: people were numbered and processed by bureaucratic-type machines; there were papers, form filling, official stamps, mug shots and files kept on individuals. But behind the simulacrum of bureaucracy we find no hierarchy of command or system of rules recognisable to a student of Weber. Officials in positions of authority could be denounced and replaced by juniors; one apparatus was liable to be liquidated in favour of another; the stability and hierarchy of genuine bureaucracy were absent.

Arendt herself was equivocal about the effects of totalitarian organisation on personal responsibility (Lefort 1986). It is certainly arguable, however, that the individual responsibility of the official was greater under the 'leader principle' than in a regulated hierarchical bureaucracy in which responsibility and authority are distributed according to plan. To grasp the will of the Führer demanded zeal and creativity far in excess of the plodding bureaucrat and

wide latitude given to sub-leaders for the execution of policies. Each holder of position was responsible for the activities of subordinates, even in cases of disobedience and failure. Individuals were not generally *forced* into the formations that perpetrated crimes against humanity and members of murderous police battalions (*Einsatzgruppen*), for example, were given the opportunity to withdraw from the killing actions (Browning 1993). Under the 'leader principle' authority worked through the will of every member to know and act in accordance with the will of the leader and take responsibility for all the decisions taken in their field of operation.

In short, responsibility for crimes against humanity is more than a legal fiction; it is a form of social organisation and the image of bureaucracy devoid of human subjectivity is a chimera. Actors may present themselves *as if* they were cogs in a machine but the responsibility of the doer for his deed does not thereby vanish. Eichmann was the archetype of this new type of bourgeois, not the Kantian individual who prides himself on thinking for himself but the 'mass man' who sees himself as an employee without agency. Eichmann said in court he had read Kant's *Critique of Practical Reason* and came up with a roughly correct version of the categorical imperative: 'I meant by my remark about Kant that the principle of my will must always be such that it can become the principle of general laws' (Arendt 1977b: 136). However, once charged with carrying out the Final Solution, Eichmann claimed that he *ceased* to live according to Kantian principles and became a mere employee working under orders. Since he was 'only doing his job' and acting 'in a professional capacity', he could not be regarded as a murderer. We have to distinguish between Eichmann's self-presentation as a cog in a machine and his actual responsibility for the crimes he committed.

Arendt also takes seriously the idea of a crime being *against humanity*. She described the Nazi death camps as an organised attempt to 'eradicate the concept of the human being'. What was at stake was not only 'the blotting out of whole peoples, the "clearance" of whole regions of their native population', but also the destruction of 'the human status' (Arendt 1977b: 257). The idea of being 'against humanity' percolates through Arendt's account of modern politics:

Something seems to be involved in modern politics that actually should never be involved in politics as we used to understand it, namely all or nothing – all, and that is an undetermined infinity of forms, of human living together, or nothing, for a victory of the concentration camp system would mean the same inexorable doom for human beings as the use of the hydrogen bomb would for the human race.

(Arendt 1979)

Or again:

These modern, state-employed mass murderers must be prosecuted because they violated the order of mankind, and not because they killed millions of people. Nothing is more pernicious to an understanding of these new crimes, or stands in the way of the emergence of an international penal code that could take care of them, than the common illusion that the crime of murder and the crime of genocide are essentially the same, and that the latter therefore is ‘no new crime properly speaking’.

(Arendt 1977b: 272)

Death camps were an attempt not only to murder *en masse* human beings of a certain stripe but also to ‘eradicate the idea of humanity’. They functioned to eliminate ‘spontaneity itself as an expression of human behaviour’, to transform ‘the human personality into a mere thing’, to destroy ‘all sign of human plurality’, to realise the supposition that ‘all men have become equally superfluous’ (Arendt 1979: 439–59). They constituted ‘an attack upon human diversity as such, that is, upon a characteristic of the “human status” without which the very words “mankind” or “humanity” would be devoid of meaning’ (Arendt 1977b: 268–9).

Arendt acknowledged that in speaking of crimes against humanity international lawyers have to deal with human propensities that are ‘very difficult to grasp juridically’ and there has indeed been much debate about what is meant by the term ‘against humanity’ (May 2005). Arendt too found it difficult to grasp. In using the term ‘humanity’ she declared she did not have in mind a fixed conception of human nature: ‘Nothing entitles us to assume that man has a nature

or essence in the same sense as other things' (Arendt 1958: 9). She preferred the language of 'human status' to 'human nature' because it refers to 'the sum total of human activities and capabilities which correspond to the human condition' (Arendt 1958: 10). I think we need to make a further step. Once we think of 'humanity' in terms of a certain status in the world, we can also address its historicity. The idea of the human status originated in the ancient world as a particular status that contrasted with that of slaves, foreigners and women. In the modern world it is generalised as the status of all human beings. The anthropologist, Claude Lévi-Strauss, observed:

The concept of an all inclusive humanity, which makes no distinction between races or cultures, appeared very late in the history of mankind and did not spread very widely across the globe. What is more, as proved by recent events, even in one region where it seems most developed, it has not escaped periods of regression and ambiguity. For the majority of the human species, and for tens of thousands of years, the idea that humanity includes every human being on the face of the earth does not exist at all.

(Lévi-Strauss 1983: 329; cited in Finkelkraut 2001: 5)

Crimes against humanity are crimes committed to undo this accomplishment of the modern age and conceptually they may be distinguished from the much longer history of crimes committed in the name of humanity: for example, against colonial subjects excluded from the status of human being by virtue of their 'idolatry', 'coarseness of intelligence' or the 'evil they inflict on one another' (Mehta 1999). In practice the dividing line is difficult to define.

What I take from Arendt is this: it is justified to prosecute crimes against humanity because some crimes are against humanity and individuals are responsible for them. Arendt referred to Eichmann through a category of Roman law, *hostis generis humani*, enemy of the human status. Her point was not to portray Eichmann as an inhuman beast outside of human community. On the contrary, the prosecution revealed Eichmann to be human, all too human. The prosecution of crimes against humanity is designed not to demonise the accused (Norrie 2006) but to humanise them, to treat them as responsible human beings. The history of the idea of 'crimes against

humanity' in international criminal justice is a story of opportunities and lost opportunities whose outcome is as dependent on the judgement of ordinary citizens, like Arendt, as on the formalities of law and legal process. The cosmopolitan point of view is not simply to validate international criminal justice but to reconcile a commitment to this transformative political project with recognition of the world as it actually exists (Smith 2007a).

Arendt's 'worldly cosmopolitanism', as I have put it, addresses the intersection of law and politics in a style that recognises that there is more to international criminal justice than 'the unfolding of law's master plan'. It acknowledges that the universalistic import of prosecuting crimes against humanity can revert to a logic of demonisation, that justice can be subordinated to extra-legal ends, that a prosecution can end up looking more like a show trial than a court of law, that hostility to the idea of 'humanity' is more than a pathological outburst of nihilism (Koskenniemi 2002). Worldly cosmopolitanism is not forged simply through the progression of legal and institutional forms but through our capacity as actors in the public sphere to come to terms with our cosmopolitan existence. This means that when we judge and act in political matters, we take our bearings 'from the idea, not the actuality, of being a world citizen' (Arendt 1992: 76). In her reflections on crimes against humanity Arendt offers an illustration, however fractured, of what it is to think as a cosmopolitan citizen in a world in which cosmopolitanism is no more than a flash of light in dark times.

COSMOPOLITANISM AND HOLOCAUST UNIQUENESS

The elaboration of the cosmopolitan point of view may be pursued by contrasting it with another reading of crimes against the Jewish people that also surfaced in the Eichmann trial. The philosopher, Gershom Scholem, picked up on Arendt's discussion of evil and her use of a now familiar term, 'banality of evil':

Your thesis concerning the 'banality of evil' . . . underlies your entire argument. This new thesis strikes me as a catchword; it does not impress me, certainly, as the product of profound analysis – an analysis such as you give us so convincingly . . . in

your book on totalitarianism. At that time you had not yet made your discovery . . . that evil is banal. Of that 'radical evil' to which your then analysis bore such eloquent and erudite witness, nothing remains but this slogan . . .

(Arendt 1978a: 245)

Scholem accused Arendt of trivializing the destruction of European Jewry when she abandoned the language of 'radical evil' she had used in *The Origins of Totalitarianism* to describe the death camps. Arendt acknowledged that Scholem was right in one respect:

You are quite right: I changed my mind and do no longer speak of 'radical evil' . . . It is indeed my opinion now that evil is never 'radical', that it is only extreme, and that it possesses neither depth nor any demonic dimension. It can overgrow and lay waste the whole world precisely because it spreads like a fungus on the surface. It is 'thought-defying' . . . because thought tries to reach some depth, to go to the roots, and the moment it concerns itself with evil, it is frustrated because there is nothing. That is its 'banality'. Only the good has depth and can be radical.

(Arendt 1978a: 250–1)

Arendt wrote of 'the appearance of radical evil' because the death camps lacked any 'humanly understandable sinful motives', such as 'self-interest, greed, covetousness, resentment, lust for power, and cowardice' (Arendt 1958: 241). The Eichmann case revealed, however, that the perpetrators of horror can be thoroughly pedestrian individuals motivated by little more than careerism. Although his deeds were monstrous, the doer was 'ordinary, commonplace, and neither demonic nor monstrous' (Arendt 1977b: 3–4). She was not trying to trivialise the Holocaust, she was trying to understand the gulf between agency and action that makes such events possible (Bernstein 1996: 138).

Banality of evil involves a cluster of connotations with family resemblance to one another. It indicates that it requires no depth to destroy and that the Final Solution substituted destruction of 'the Jews' for any vision Nazism might once have had of reconstructing Europe. It is a rejoinder to conventional images of the 'Nazi monster', signifying a refusal to dehumanise the perpetrator in return

for the perpetrator's dehumanisation of his victims. It refuses to see the perpetrator as having nothing in common with ourselves.⁵ It reveals that evil is not outside the range of human understanding, judgement and punishment. Scholem's hostility was the expression of another sensibility: one which fashioned the concepts of the 'Holocaust' and 'Shoah' out of the raw materials of Jewish theology to name this singular and incomparable event and remove it from the terrain of human understanding and judgement.⁶ Arendt speculated on the possibility of a catastrophe so consuming as to destroy our capacity for understanding: 'how can we measure length if we do not have a yardstick, how could we count things without the notion of numbers?' The Holocaust might have been like this if the voice of resistance were silenced and if the attempt to exterminate Jews had been carried to a successful conclusion. But this thought-experiment is counterfactual: it highlights the limitations of 'an experiment which requires global control in order to show conclusive results' (Arendt 1979: 459). We can perhaps envisage a catastrophe so terrible as to exterminate the possibility of 'knowing' the catastrophe itself or judging those responsible for it, but the Holocaust left behind survivors, witnesses, documents, traces and perpetrators.⁷ Our *capacity* both to understand and to judge survived.

The seemingly arcane distinction between 'radical evil' and 'banality of evil' became charged because these terms stood proxy for a conflict between two ways of thinking: one which we might term 'Holocaust uniqueness' and the other 'worldly cosmopolitanism'. Crimes against humanity can appear beyond human comprehension. It seems senseless to punish innocent people, to fail to keep them in a condition in which profitable work might be extorted from them, to be intent on terrifying a completely subdued population. Arendt wrote: 'It was as though the Nazis were convinced that it was of greater importance to run extermination factories than to win the war' (Arendt 1992: 233). The gas chambers did not benefit anybody. They did not seem to have any definite purpose. The office of Himmler issued one order after another 'warning the military commanders . . . that no economic or military considerations were to interfere with the extermination programme' (Arendt 1992: 236). The spirit of Arendt's response to Scholem is this. Because we can find no *rational* explanation for such phenomena, we are

tempted to declare them beyond human understanding. However, the cosmopolitan institution is to resist this temptation and through judgement and understanding to reconstruct the idea of humanity in the face its eradication.

defenceless. In seeking an alternative to the ill-defined ‘war on terror’, it declares that international law must be respected and made effective. In resisting terrorism, it reminds us that ‘those called “terrorists” are not in this context “others” whom we as “Westerners” can no longer understand. We must not forget that they were often recruited, trained, and even armed, and for a long time, in various Western ways by a Western world that itself . . . invented the word, the techniques and the politics of “terrorism”’ (Habermas and Derrida 2003a: 115).

Law and politics are the two sides of the cosmopolitan coin: they bring together institution and outlook, judgement and understanding. Were judgement split from understanding, law might revert to demonisation of the perpetrators. Conversely, were understanding split from judgement, politics might revert to mere justification of the perpetrators. The function of international law is not to demonise those who commit crimes but to hold them responsible for their actions and thereby to humanise them. The function of political understanding is not to justify the crimes such perpetrators commit – whether in the name of other crimes committed by the West or of higher motives projected onto the perpetrators themselves – but to confront the politics of subjectivity that celebrates terrorism as the method of choice.

6 Cosmopolitanism and punishment

- 1 I am thinking of intellectuals such as Albert Camus, Raymond Aron, Arthur Koestler and Hannah Arendt herself, and civil society groupings like the Bertrand Russell Tribunal. This tribunal was designed to investigate and publicise war crimes by American forces and its allies during the Vietnam War. It was constituted in November 1966 and conducted two sessions in 1967. Representatives of eighteen countries participated in the tribunal, which called itself the International War Crimes Tribunal. More than thirty individuals testified or provided information, among whom were military personnel from the United States and both sides in Vietnam (http://en.wikipedia.org/wiki/Russell_Tribunal).
- 2 In the 1963 Auschwitz trials in Frankfurt the West German authorities decided to use domestic rather than international law to handle the prosecution of personnel from the extermination camp. The leading prosecutor, Fritz Bauer, urged Germans ‘to understand their inner responsibility and not take the easy way out’. The defendants were accused of murder and to secure conviction the prosecution had to prove not that they were merely carrying out orders but that they were sadists who killed at whim and on their own individual initiative. The resulting press coverage turned into what Wittman called a ‘pornography of the Holocaust’ and allowed ordinary Germans to distance themselves from the crimes on display. Arendt points out in her account of the trial that the defence was based on the little-man theory that ‘the defendants had been forced to do what they did and

- were in no position to know that it was criminally wrong' and that 'the selections of able-bodied people on the ramp had in effect been a rescue operation because otherwise "all those coming in would have been exterminated"' (Arendt 2003: 237). Arendt concluded that only when Judge Hofmeyer pronounced the sentences did one realise how much 'damage to justice' was done by not taking into account the everyday reality of Auschwitz.
- 3 We may hear in this reductive view of history an echo of Goebbels' comment, 'we will go down in history as the greatest statesmen of all times or as their greatest criminals', or as Eichmann's lawyer put it, 'you are decorated if you win and go to the gallows if you lose'.
 - 4 Alain Finkielkraut argues ambiguously that the Holocaust was 'from Eichmann to the engineers on the trains . . . a crime of employees' and that it was 'precisely to remove from *crime* the excuse of *service* and to restore the quality of *killers* to law-abiding citizens . . . that the category of "crimes against humanity" was formulated' (Finkielkraut 1992: 3–4). Zygmunt Bauman adopts a mechanistic view both of sociology and of the actual workings of bureaucracy with less equivocation (Bauman 1990). For a critique of Bauman's approach to the question of responsibility, see Fine and Hirsh (2000).
 - 5 This theme is taken up by Primo Levi who, in *The Periodic Table*, describes the SS as 'ordinary men' and in *If This is a Man* argues that save for exceptions, they were not monsters but 'average human beings' who had been 'reared badly' and 'subjected to a terrifying miseducation' (Levi 1995).
 - 6 In her essay on 'Fascism and representation', Gillian Rose used the label 'Holocaust piety' to characterise this way of thinking: 'It is this reference to the "ineffable" that I would dub "Holocaust piety" . . . The "ineffable" is invoked by a now widespread tradition of reflection on the Holocaust: by Adorno, by Holocaust theology, Christian and Jewish, more recently by Lyotard, and now by Habermas. According to this view, "Auschwitz" or "the Holocaust" are emblems for the breakdown in divine and/or human history. The uniqueness of this breakdown delegitimises names and narratives as such, and hence all aesthetic or apprehensive representation . . . the search for a decent response to those brutally destroyed is conflated with the quite different response called for in the face of the inhuman capacity for such destruction. To argue for silence, prayer, the banishment equally of poetry and knowledge, in short, the witness of "ineffability", that is, non-representability, is to *mystify what we dare not understand*, because we fear that it may be all too understandable, all too continuous with what we are – human, all too human' (Rose 1996: 41–3).
 - 7 The philosopher, Jean-François Lyotard, compared the Holocaust with an earthquake so catastrophic as to 'destroy not only lives, buildings, and objects but also the instruments used to measure earthquakes directly and indirectly' (Lyotard 1988: 56). In his thought experiment he imagined a situation in which not only vast numbers are extermi-

nated but the means to prove this happened are also destroyed and the authority of the tribunal supposed to establish the crime is discredited on the ground that the judge is 'merely a criminal more fortunate than the defendant in war'. There are parallels between the questions Lyotard and Arendt pose but this should not be allowed to obscure the opposing answers they give and the different sensibilities which inform them.

7 Cosmopolitanism and the life of the mind

- 1 This chapter is based on an original paper written for *Philosophy and Social Criticism* (2007). I wish to give special thanks to Alessandro Ferrara for inviting me to contribute to this volume and for his encouragement and insight.
- 2 See 'The Crisis in Culture: Its Social and its Political Significance', 'Truth and Politics' and 'Freedom and Politics' in Arendt (1977b), especially pp. 219–26.
- 3 Beiner and Nedelsky (2001: 165). Other key texts on Arendt's approach to judgement include: Beiner (1983: ch. 6), d'Entrèves (2000) Beiner (1994) and Beiner in Arendt (1992).
- 4 An analogy might be drawn here with Marx scholarship. When Marx scholars sought to reconstruct Marx's planned but incomplete work on law, morality and the state, a less than satisfactory approach was simply to pull together the various passages in which Marx commented on or expressed his opinions about these various issues. The more fruitful and certainly more scientific approach was to reconstruct the methodology that Marx employed in his critique of political economy and apply it, flexibly and with due regard to the shift of subject matter, to the absent critique of political philosophy. This approach has not always been done well because the thinking of Marx scholars has too often been locked within the categories of political economy, but as a mode of reconstruction it is superior to the search for Marx's scattered and situated 'views' on these subjects. See my *Political Investigations*, ch. 5, 'Right and value: the unity of Hegel and Marx'.
- 5 The relation to Kant is ever present in Arendt's work. Arendt writes of Kant's 'paradoxical legacy . . . just as man comes of age and is declared autonomous, he is utterly debased'. She comments that this legacy is an accurate reflection of 'the antinomical structure of human being as it is situated in the world'. The splitting of the life of the mind into the distinct 'faculties' of thinking, willing and judging turns out to be one aspect of the antinomical structure of human beings as we are currently situated in the world. Kant recognises and helps to create one of modernity's major accomplishments, the autonomy of reason, but for Arendt he pays too big a price for it: the separation of reason into allegedly autonomous fields. *Essays in Understanding*, pp. 169–71. Cited in Kohn (1997: 163).
- 6 Ronald Beiner writes: 'It is not merely that the already completed