Crimes Against Humanity: Hannah Arendt and the Nuremberg Debates

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Abstract
The institution of crimes against humanity at Nuremberg in 1945 was an event which marked the birth of cosmopolitan law as a social reality. Cosmopolitan law has existed as an abstract idea at least since the writings of Kant in the late eighteenth century, but Nuremberg turned the notion of humanity from a merely regulative idea into a substantial entity. Crimes against humanity differ significantly from the traditional categories of international law: war crimes and crimes against peace. While the latter generally treats states as subjects of right and upholds the principle of national sovereignty, the former treats individuals as subjects of right and encroaches on national sovereignty. I focus here on the writings of Hannah Arendt on the Nuremberg trials, the Eichmann trial and the actuality of crimes against humanity perpetrated in totalitarian regimes. I explore her relation to the optimistic and naive cosmopolitanism of Karl Jaspers, as well as to the two prevailing forms of critical thought: the cynical realism towards the law adopted by many of the defendants, including Carl Schmitt, and the deconstructive attitude to humanism and technology adopted by Martin Heidegger. I maintain that Arendt’s rugged cosmopolitanism, tested against its critics, remains exceptionally revealing on the issue of crimes against humanity now that this issue has re-emerged, after many years of silence, as arguably the most important question of our own day.

Key words
■ Arendt ■ cosmopolitanism ■ Heidegger ■ Nuremberg ■ war

Arendt and the Institution of Crimes Against Humanity

The concept of crimes against humanity came into being in 1945 as a new charge levelled by the Allied powers against Nazi defendants at Nuremberg. It was conceived as a supplement to crimes which already existed under international law,
notably war crimes and crimes against peace, and as filling a gap in international law that was revealed most horrifically by the extermination of millions of innocent civilians by the Nazi regime in Germany and their accomplices. The Nuremberg Charter defined crimes against humanity in terms of certain specific acts (namely murder, extermination, enslavement and deportation), other non-specific ‘inhumane acts’ and finally ‘persecutions based on political, racial or religious grounds’. The limiting factor in all these cases was that these acts had to be committed against civilian populations, have some connection with war and be carried out as part of a systematic governmental policy.

The Nuremberg Charter advanced a strong notion of personal responsibility. It announced that individuals, rather than states, could be held responsible not only for crimes against humanity but for all crimes under international law. It held that individuals acting within the legality of their own state could nevertheless be tried as criminals. It established a link between people and their actions by treating ‘cogs’ in the Nazi murder machine as perpetrators and thus as responsible human beings. It stated that service to the state does not exonerate any official in any bureaucracy or any scientist in any laboratory from his or her responsibilities as an individual. It removed from perpetrators the excuse of only obeying orders. It held those who sit behind desks planning atrocities as guilty as those who participated directly in their execution. Not least, it signified that atrocities committed against one set of people, be it Jews or Poles or Gypsies, are an affront not only to these particular people but to humanity as a whole.2

The question of crimes against humanity, and that of the personal responsibility of perpetrators, was one aspect of Hannah Arendt’s confrontation with the ‘burden of events’ that she registered under the title of totalitarianism. The issue presented itself to her concretely with the Nuremberg trials, then some 15 years later with the trial of Adolph Eichmann in Jerusalem, and also with her lifelong efforts to understand the ‘frenzy of destruction’ into which totalitarian regimes descended. Arendt was confronted both with the ‘horrible originality’ of the actual crimes committed and with the more uplifting originality of a cosmopolitan law which would hold perpetrators personally accountable for their crimes. There was nothing naive in her relation to these events. It was mediated by an engagement with the thinking of others and in particular with three prevailing currents of social theory: cosmopolitanism, realism and postmetaphysics. The cosmopolitan or humanist point of view was exemplified in the writings of Arendt’s friend, the philosopher Karl Jaspers, who saw at Nuremberg the beginning of a new organization of responsibilities. The realist standpoint was most often advocated by the defendants themselves (including the jurist Carl Schmitt) and their representatives who saw at Nuremberg just another instance of the long tradition of victors’ justice. The postmetaphysical perspective, advanced by Martin Heidegger, decried the punishment of individuals when what was at issue was so much bigger: the destructiveness of modern technology and the hidden violence of Western humanism. Arendt followed her own precepts concerning an ‘enlarged mentality’ when she sought to assimilate these different points of view and explore what was justified in them and what was deficient. Accordingly, we
find in her work a triple engagement: with the crimes themselves, with the institution of cosmopolitan law to prosecute them and with the efforts of social theory to come to terms with both these developments.

**The Relation to Cosmopolitanism**

In *The Question of German Guilt*, written in 1945, Karl Jaspers offered the quintessential cosmopolitan justification of the Nuremberg trials. He stressed the importance of prosecuting war criminals as an element in a more general reevaluation of responsibility after Nazism and as a rational alternative to the barbarism of collective punishment (which would only mimic the mindset of the Nazis themselves). He argued that the trials undercut the principle of national sovereignty which puts a halo round heads of states and makes them inviolable to prosecution; that they extended the notion of guilt beyond that of mere war guilt to include the crimes against humanity perpetrated in the camps; and that they made a necessary distinction between those who were criminally guilty and the indefinite number of others who were merely capable of cooperating under orders. Jaspers rejected the explanations and the defences advanced by the Nazi defendants as amounting only to excuses – to an evasion of their responsibility – and held that the institution of crimes against humanity inaugurated a new organization of human responsibility: politically for how people are ruled, morally for the countless tiny acts of indifference which make injustice possible, and metaphysically for all the crimes that are committed in the presence and with the knowledge of other human beings. From Jaspers’ point of view, the trials helped not only to reorient the pariah nation, Germany, back to the tradition of Western humanism, but also to renew the tradition of Western humanism itself. Jaspers acknowledged certain legal defects at Nuremberg, but what interested him most was the future. He described the trials as ‘a feeble, ambiguous harbinger of a world order the need of which mankind is beginning to feel’ and he maintained that ‘as a new attempt on behalf of order in the world’, the trial does not ‘grow meaningless if it cannot yet be based on a legal world order but must still halt within a political framework’. The new world order might not yet be at hand, but Jaspers celebrated the fact that it had at least come to seem possible to ‘thinking humanity’ and had appeared on the horizon as ‘a barely perceptible dawn’ (Jaspers, 1961: 60). The spirit of Kant and of the eighteenth-century vision of cosmopolitan law was coming to life before his eyes.

One of the most important achievements of the trials, as Jaspers saw it, was that they revealed the ‘prosaic triviality’ that characterized the perpetrators. By treating mass murderers as mere criminals, he argued in an idiom that was later to be picked up by Arendt, the trials represented them ‘in their total banality’ and deprived them of that ‘streak of satanic greatness’ which they might otherwise be endowed with. He regarded with apprehension ‘any hint of myth and legend’ (Arendt and Jaspers, 1992: 62).

Both in her correspondence with Jaspers and in her published articles Arendt
displayed an equivocation that was barely visible in her friend’s writings. First, she pointed to the disparity between mere criminality and the facts of mass extermination: it seemed to her that what was distinctive about the enormity of Nazi crimes was that they ‘explode the limits of the law’ and it was this that constituted their monstrousness. For these crimes, she wrote, no punishment can be severe enough. It may well have been essential to hang Göring and the others but it was totally inadequate to the deed, since ‘this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems’ (Arendt and Jaspers, 1992: 54).

Second, Arendt underlined the disproportion between the relatively few Nazis who were punished and the mass of perpetrators who had committed the crimes in question. In an article written in 1945, ‘Organised Guilt and Universal Responsibility’, she argued that when a machinery of mass murder makes practically everyone complicit, or when the visible signs of distinction between the guilty and the innocent are effaced so that it becomes almost impossible to tell them apart, the allocation of personal guilt is particularly problematic:

The boundaries dividing criminals from normal persons, the guilty from the innocent, have been so completely effaced that nobody will be able to tell in Germany whether in any case he is dealing with a secret hero or with a former mass murderer. In this situation, we will not be aided either by a definition of those responsible or by the punishment of ‘war criminals’ . . . The human need for justice can find no satisfactory reply to the total mobilisation of a people to that purpose. Where all are guilty, nobody in the last analysis can be judged . . . (Arendt, 1994: 125–6)

Third, when people are prepared to do their jobs as cogs in a machine and see themselves simply as doing their job without responsibility for the consequences of their actions, they do not regard themselves as murderers because they kill only in a professional capacity. For such people, punishment provokes feelings of incomprehension, resentment and betrayal such as those that prevailed in Germany during the trials, or alternatively among some others a sense of self-consuming guilt. Neither, Arendt wrote, would be of much use. Rather than speak the theological language of purification and redemption, or the legal language of ethical prosecution and punishment, Arendt looked to a more political answer: one in which human beings . . . 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)

The social construction of moral or criminal guilt would exonerate not only Germans but humanity from the need for a more profound ethical and political response. On one issue, however, Arendt expressed her strong agreement with Jaspers: ‘I realise’, she wrote, ‘that I come dangerously close to that “satanic greatness”
that I, like you, totally reject... we have to combat all impulses to mythologise the horrible' (Arendt and Jaspers, 1992: 69). This tendency, perhaps most marked in Arendt's use of the philosophical-theological concept of radical evil to characterize what the Nazis did, was subverted by criminal trials which demythologized as well as publicized the Nazi killing machine. Arendt began to take seriously the notion of 'crimes against humanity' as having a literal truth when she affirmed the difference between 'a man who sets out to murder his old aunt' (a discrete subject of criminal investigation) and 'people who without considering the economic usefulness of their actions at all (the deportations were very damaging to the war effort) built factories to produce corpses' (Arendt and Jaspers, 1992: 69).

It was in the latter that the substance of crimes against humanity was to be found: 'Perhaps what is behind it all is only that individual human beings did not kill other individual human beings for human reasons, but that an organised attempt was made to eradicate the concept of the human being' (Arendt and Jaspers, 1992: 69).

What Arendt was pointing to was the emergence of crimes against humanity as an expression not merely of a new cosmopolitan sensibility but of a radically new form of criminality.

Some 15 years later, in the analysis of the Eichmann trial, there was a discernible shift of emphasis both in Jaspers' and Arendt's writings. Now it was Jaspers who, in his correspondence with Arendt, expressed doubts about the trial. He questioned its legal basis – partly because Eichmann had been 'illegally' kidnapped from Argentina but mainly because 'something other than law is at issue here' and to address it in legal terms was a mistake. He expressed disquiet over the use of an Israeli court: 'Israel didn't even exist when the murders were committed... Israel is not the Jewish people... Israel does not have the right to speak for the Jewish people as a whole.' He feared that antisemitism would find its martyr in Eichmann and that the antisemite would say: 'You are acting neither in the name of the law nor in the name of a great political conception... you are vengeful... or ridiculous.' He maintained that something was at stake that could not be contained in any national court: 'It is a task for humanity, not for an individual national state, to pass judgment in such a weighty case.'

In the absence of such an international body, he thought it better to do without the trial altogether or put in its place some other process of 'examination and clarification'. (Arendt and Jaspers, 1992: 410–19).

For Jaspers cosmopolitanism had become a reason to doubt the validity of the trial. Arendt, however, countered Jaspers' reservations with some hard-nosed observations. The kidnapping of a man indicted at Nuremberg and charged with crimes against humanity, was legally justifiable – particularly from a country with a bad record of extradition. The use of an Israeli court was justifiable, not because it speaks on behalf of all Jews nor because Israel is above criticism, but because many of the surviving victims lived there, because Eichmann was charged exclusively with the killing of Jews, and because in the absence of an international court or a successor institution to the ad hoc Nuremberg Tribunal, Israel had as much right as any country to try those apprehended for crimes
against humanity. The resort to legal mechanisms of prosecution was justifiable since there were no tools to hand except legal ones with which to judge and pass sentence on Eichmann, even if his deeds could not be adequately represented in legal terms (Arendt and Jaspers, 1992: 417). Arendt showed no compunction even about the imposition of the death penalty: ‘no member of the human race can be expected to want to share the earth’, she wrote, with a man who ‘supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations’. She also expressed her disagreement with those who cast doubt on the relevance of the trial on the grounds that what was at issue was something much bigger: German guilt, the nature of evil, technological destructiveness, the beliefs and structures of modernity and so on.

Arendt now pursued the line of argument that originated in Jaspers’ own conception of banality of evil. The achievement of the trial, as she put it, was that ‘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, 1977: 289). In addition, the benefit of making the perpetrators ‘merely criminal’ was precisely to subvert the hagiography of satanic greatness that might otherwise surround them. In her view, the trial revealed that Eichmann, except for his extraordinary diligence in looking out for his own advancement, ‘had no motives at all’ (Arendt, 1977: 287). Nothing was further from his mind than to ‘determine with Richard III “to prove a villain”’ (Arendt, 1977: 287). On the contrary, ‘it was sheer thoughtlessness – something by no means identical with stupidity – that predisposed him to become one of the greatest criminals of that period . . . That such remoteness from reality and such thoughtlessness can wreak more havoc than all the evil instincts taken together . . . that was in fact the lesson one could learn in Jerusalem’ (Arendt, 1977: 288).9

The trial revealed that Eichmann was ‘terrifyingly normal . . . a new type of criminal . . . who commits his crimes under circumstances that make it well-nigh impossible for him to know or to feel that he is doing wrong’ (Arendt, 1977: 276). In The Life of the Mind Arendt reiterated the theme: the Eichmann trial demonstrated the untruth of the proposition that ‘evil is something demonic’ or that Satan strikes ‘like a lightning fall from heaven’. In the trial one could only be struck by the ‘manifest shallowness in the doer . . . The deeds were monstrous but the doer . . . was quite ordinary, commonplace, and neither demonic nor monstrous’ (Arendt, 1978b: 3–4). The thesis of the banality of evil originated as a factual judgment on Eichmann’s ‘quite authentic inability to think’ (Arendt, 1978: 3). Through this concept, Arendt reaffirmed the strong notion of personal responsibility that was present within the law: not only among those who committed the deeds with their own hands, but also or especially among the planners and organizers like Eichmann who were remote from the actual killing. Her argument was read by many, including Gershom Scholem (Arendt and Jaspers, 1992: 240–5), as a slogan which trivialized the experience of the holocaust and diminished the novum of this event. Neither was true, but what was true was Arendt’s resistance, first fuelled by Jaspers, to the growing tendency to reinvent
The hagiography of satanic greatness or indulge in what Gillian Rose later called ‘holocaust piety’ (Rose, 1996: 41). The trial was ultimately justified by Arendt because it testified to the fact that evil is no fallen angel, no Lucifer, that it is neither absolute nor radical, but the work of human beings. Human, all too human (cf. Mertens, 1998).

Arendt’s views have certainly been confounded in some of the secondary literature. It is simply not true, as has been maintained, that she objected to the use of an Israeli court, or that she insisted that there had to be an international court or nothing, or that she believed that the crimes Eichmann committed were too immense to be the subject of mere legal judgement, or even that she held that Eichmann should have been executed without trial. In her analysis of the political functions of the trial, Arendt was equivocal: it encouraged the prosecution of leading Nazis in West Germany, it publicized the Holocaust to the world, it offered a forum for the testimony of victims, it accomplished a touch of justice. On the negative side, however, it was abused by the Israeli authorities for various nationalistic ends: to support the contention that only in Israel could a Jew be safe, to camouflage the existence of ethnic distinctions in Israeli society, to conceal the complicity of certain Jewish leaders, police and speculators in the execution of the Holocaust and so on. As she saw it, the cosmopolitan precedent set by Nuremberg, a precedent which had largely been forgotten since the onset of the cold war, was being used to reinforce the very situation it had sought to correct – the breaking up of the human race into a multitude of competing states and nations. Most important of all, perhaps, the nationalistic use of the trial indicated the denial of any equivocation of ethical life: that is, of what Primo Levi called the grey zone in which the dividing line between executioners and victims becomes blurred and the abused are themselves turned into abusers. Thus what most offended Arendt’s critics was her recognition of the complicity of the victims in their own destruction: ‘to a Jew this role of the Jewish leaders in the destruction of their own people is undoubtedly the darkest chapter’ (Arendt, 1977: 125).

Her difficulty was that the institution of crimes against humanity, which had offered hope of release from the elements of totalitarian thought, was being corralled back into a simplistic moral division of the world between ‘them’ and ‘us’ which served as an index of a world purged of all political profundity, or as Arendt put it, of a ‘banality that obliterates all distinctions’ (Arendt, 1983: 30).

**The Relation to Realism**

Arendt strongly opposed that form of ‘cynical realism’, which was first advanced by defendants and their representatives at Nuremberg and then achieved a posthumous victory with the onset of cold war, which declared with Carl Schmitt that a crime against humanity is committed by Germans and a crime for humanity is committed by Americans (Salter, 1999; Habermas, 1998), or which spoke with Adolf Eichmann’s lawyer of ‘acts for which you are decorated if you win and go to the gallows if you lose’. Nuremberg was to be sure a case of victors’ justice,
but this was no reason to echo Goebbels' comment that 'we will go down in history as the greatest statesmen of all times or as their greatest criminals' or to affirm the moral of La Fontaine's 'The Wolf and the Sheep' that 'La raison du plus fort est toujours la meilleure' (as we would say, 'Might makes right').

At Nuremberg and in the later Nazi trials three main strategies were used by the defendants to denigrate the very concept of crimes against humanity. The first was to invalidate the law itself and the very concept of crimes against humanity through a variety of legal challenges. They made claims, *inter alia*, concerning:

1. the invalidity of laws enacted by the four victorious military powers and not by an authorized legislature, and of a court in which Germans were tried not by their peers but by their enemies;
2. the partiality of charges which applied only to the vanquished and not to the victors, and of a legal process which in principle excluded crimes committed by the prosecuting powers;
3. the vagueness of laws which used phrases like 'other inhumane acts' as parts of its lexicon;
4. the unlawfulness of charges applied retrospectively for crimes committed before any law was passed;
5. the conflicting demands of existing state law and a not yet existing international law;
6. the arbitrariness of a legal process which disallowed them from making legal challenges.

The core argument was that crimes against humanity were not in any proper sense law since they lacked the criteria of legal validity.¹⁴

The second strategy was to normalize the atrocities which they had committed. The argument was that acts labelled crimes against humanity, are in fact normal routines of power in the international arena and not fundamentally different from many other exercises of power which no one thinks of describing as crimes against humanity. This was illustrated in Alain Finkielkraut's analysis of the Klaus Barbie trial in 1987, when Barbie's lawyers argued that their client's actions as police chief of Lyons during the occupation could not be called crimes against humanity since this was merely a case of whites doing to other whites what all white Europeans have routinely done to non-Europeans (Finkielkraut, 1989: 25).¹⁵ By putting Barbie on trial, they claimed, the French were camouflaging their own colonial history and scapegoating the Nazis for behaviour for which all Europeans had been responsible. They characterized the extermination of Jews as a 'crime of local interest, a drop of European blood', compared with the 'ocean of human suffering' to which the third world had been subjected by the West and accused 'Jewish pain of obstructing the world's memory' of what the Americans did in Vietnam, the French did in Algeria and the Israelis did in Palestine (Finkielkraut, 1989). The gist of this defence was that it was arbitrary to prosecute Nazis for crimes against humanity when all manner of apparently similar crimes (by the European powers against non-Europeans) were ignored.¹⁶

The third line of argument taken by the defendants was that they had no
choice but to obey the orders they were given and could not therefore be held responsible for the crimes committed. This argument took three main variants. The first referred to the external constraints to which the defendants were subjected: if the choice facing individuals is that of ‘Kill or Be Killed’, as Dwight Macdonald put it, it is only in a formal sense that such individuals can be held responsible for their actions (Macdonald, 1945). The second variant had a more internal quality. Eichmann depicted the command of the Führer as the absolute centre of the legal system at the time and claimed that, despite bearing no ill feelings for his victims, he simply could not have acted otherwise. His argument was that, since in the Nazi regime obedience to orders defined the very contours of public life, bad conscience could only arise as the result of not following them, that is, of not killing Jews (Arendt, 1977: 289). The third variant referred to the routines of work in which individuals were only doing their job and should not be regarded as murderers since they killed only in a professional capacity.

In all three strategies of denial – invalidation of the law, normalization of the act, displacement of responsibility – there can doubtless be heard the voice of self-interest and hypocrisy. Jaspers simply dismissed these excuses as amounting to no more than an evasion of responsibility. Arendt was ready to acknowledge that many of these objections were in fact quite justified and that a proper accounting of the trials should reflect upon them (see, for example, Jackson, 1949; Taylor, 1952; Kirchheimer, 1969; Smith, 1977; Deák, 1993; Marrus, 1997). The law at Nuremberg did exonerate the victors of any responsibility for the crimes they had committed; the victors did commit crimes that were not altogether dissimilar to those of the Nazis (particularly in the case of Stalinist Russia); conventional notions of personal responsibility do not easily apply to situations in which terror has become a way of life, etc. However, Arendt argued that these factual observations offered no ground for the denial of personal responsibility for crimes against humanity or for denouncing the validity of cosmopolitan law as such. The notion that man is a wolf to man (homo homini lupus) is a meaningless guide to human action, and according to Arendt was indeed but another of the elements of totalitarianism which survived into the postwar period (Fine, 1998).

The Relation to Heidegger

Arendt held firm to the juridical concept of crimes against humanity as one that has determinate reference. It was not merely the result of a new cosmopolitan sensibility applied to the age-old phenomenon of man’s inhumanity to man, but rather expressed the horrible originality of what the Nazis did. Thus in Eichmann (1977) she insisted that, although the crimes at issue were committed primarily against Jews, they were in no way limited to Jews and were in some more exact sense against humanity. Arendt’s support for this notion led her into confrontation with her previous teacher and friend, Martin Heidegger.

Today, the deciphering of Heidegger’s silence on the crimes of the Nazis and
on his own involvement in them has become a work of many Heideggerian scholars (Leaman, 1997; Alisch, 1997). In fact, Heidegger was not exactly silent after the war. When Herbert Marcuse called on him to disavow the Nazi regime, Heidegger resorted to a version of the normalization defence: what the Nazis did to the Jews was no worse, he said, than what the Russians did to the Germans. In a lecture entitled ‘Con-figuration’ Heidegger stretched the normalization argument further in his statement that the ‘manufacture of corpses in gas chambers and extermination camps’ deserved no more attention than other practices of modern technology, like a ‘motorized food-industry’, and are ‘in essence – the same’. In another lecture, ‘The Danger’, Heidegger compared ‘those who were liquidated inconspicuously in extermination camps’ with ‘the millions of impoverished people right now . . . perishing from hunger in China’ (Lang, 1997).

It might appear from these comments that Heidegger was basically in the realist camp, but Arendt recognized in Heidegger an idea of responsibility that went beyond this way of thinking. Heidegger, after all, advanced a heightened responsibility beyond that to be found in the humanist tradition or in conventional forms of legal subjectivity. In his ‘Letter on Humanism’ (written in 1945 at the time of the Nuremberg trials and of his own ‘trial’ within postwar German academe) Heidegger set out to accuse the tradition of Western humanism of its own complicity in the crimes committed by the so-called totalitarian states. The key to this argument was that humanism was not the innocent which it liked to portray itself as, and that humanity could not serve as an unqualified standard of moral or legal judgement.

In the name of existential humanism, Jean-Paul Sartre had insisted on a doctrine of absolute individual responsibility for one’s actions which allows no excuses, not even in the case of a head of state or of a military leader acting under higher command. Heidegger displaced this conception of individual responsibility by arguing that the notion of a legal subject, responsible for his or her own actions, is a juridical fiction which neglects the ‘historicality’ and ‘finite freedom’ of human existence in general and more specifically the ‘homelessness’ which is the fate of man in the modern age (Heidegger, 1976: 219). For Heidegger, the consciousness that establishes humanity as an absolute standard against which to measure the violence of the age forgets the part played by humanism in the genesis of such violence. Humanism, from his point of view, is the ‘-ism’ which elevates the human being as master of all things: it signifies a technological relation to the world based on the domination of nature and of humanity; it destroys everything deemed to be inhuman; and in spite of its anti-technological and anti-humanistic roots, Nazism became but another variant of the same technologism that was also devouring Russia and America. Technology and humanism appear here as two sides of the same coin.

Heidegger insisted that when he spoke against humanism, this did not mean that his argument was destructive, only that it moved away from the terms of technological mastery. His opposition to humanism, he argued, ‘in no way implies a defence of the inhuman, but rather opens other vistas’. Humanism is to be opposed, as he put it, because ‘it does not set the humanitas of man high
enough’ (Heidegger, 1976: 250). The vista he wished to open up was of a phil-
osophy which does not declare the humanistic interpretations of humanity to be false but merely inadequate to the task of realizing the proper dignity of man. Opposition to humanism does not mean that such thinking ‘aligns itself against the humane and advocates the inhuman’; it does not simply condemn human-
ism; rather it relativizes it by placing its truth within the ‘history of the truth of Being’ (Heidegger, 1976: 233). For Heidegger the task of philosophy was to reveal the coming stage in ‘the history of the truth of being’: it was no longer the destructive nihilism that was responsible for the violence of the age, but an affirmative nihilism that was able to overcome the ‘will to power’ endemic in Western humanism and merely taken to its extreme in the doctrine of the ‘triumph of the will’. What was coming into being was a new relation to Being: one based on guardianship, care and shepherding, one able to ‘let beings be’, or, after Nietzsche, to ‘will not to will’.

In this politico-ontological landscape, what was at stake was the truth of Being itself. The prosecution of a few individuals for crimes which had become the commonplace of an era, under a law which was applied to one side but not to the other, on the basis of a fictional notion of legal subjectivity, seemed hope-
lessly inadequate. Heidegger wrote that he was not against laws that ‘secure the existing bonds even if they hold human beings together ever so tenuously’, and that he recognized the need for ‘rules . . . fabricated by human reason’ (Heidegger, 1976: 255, 262); but his emphasis was on something more essential than law. The prosecution of war criminals merely reinstates conventional notions of guilt and innocence; it affirms humanity without acknowledging the complicity of humanism; it loses sight of the higher truth: ‘to think the humanity of homo humanus . . . without humanism’ (Heidegger, 1976: 254).

Arendt’s debt to Heidegger was apparent in her shared conviction that the elements of totalitarian thinking were deeply embedded in the traditions of Western humanism. Confronting the burden of events in the twentieth century meant for Arendt above all a readiness to accept connections between the crimes committed by others and our own most cherished human values. Against Heidegger, however, Arendt argued that the crimes against humanity committed by totalitarian regimes cannot be understood simply in terms of a ‘productivist metaphysic’ which endorses ‘the limitless domination of modern technology in every corner of this planet’. These crimes were not about ‘world-creating’ but ‘world-destroying’ (Arendt, 1994: 177); they were based on the translation of the belief that ‘everything is possible’ into the belief that ‘everything can be destroyed’ (Arendt, 1976: 459); their highest achievement was not the making of a new man or new order, but the death camp. Destruction in this case was not the mere by-
product of technology nor a necessary means to any external end; it was rather an end in itself deprived of that ‘element of utilitarian calculation’ which governs the exercise of violence even in the most authoritarian states. The totalitarian attempt to ‘rob man of his nature’ might have taken place ‘under the pretext of changing it’ but it ended up as a ‘frenzy of destruction’ without economic, politi-
cal or military utility (Arendt, 1994: 316).
Against the Heideggerian vision, Arendt stressed the originality of crimes against humanity: these crimes were not essentially the same as those committed in the name of humanity as a by-product of technology. They were not the 'final definite form' of past tendencies toward the rationalization of modern society, but 'the beginning of something inescapably new' (Arendt, 1994: 326, 429). Arendt stressed the originality of the crimes against humanity committed by totalitarian regimes and the moment of freedom and responsibility that was displaced in postmetaphysical conceptions of productivist metaphysics. If perpetrators were just cogs in a machine, then there could be no question of personal responsibility, for law cannot magic a cog into a human being; but the responsibility of the perpetrators was not imposed by law after the event. It was immanent within the crimes themselves. The totalitarian organization of violence was based on authority, not mere force. It depended on an unquestioning or even enthusiastic recognition of orders by those whose role it was to obey, so that neither coercion nor persuasion was needed (Arendt, 1970: 45). Those who committed crimes against humanity (like Eichmann) did not question orders, let alone disobey them; on the contrary they were keen to win promotion in their particular front line. Membership of murder-squads was not compulsory and individuals were not generally forced to kill (see also Browning, 1993). If they did question orders, or disobey them, or if they were forced to kill, this was a mitigation of the offence. Even in a rational bureaucracy, as Weber demonstrated, officials are not simply cogs in a machine, for the very act of following a rule requires a degree of interpretative endeavour and moral evaluation. The totalitarian organization of violence, however, was (pace Bauman, 1993) based not on a rational bureaucracy but on a form of organization which, although it adopted certain elements of rational bureaucracy, reconfigured them under the title of the 'Leader Principle'. According to this principle, every member of the killing machine was enjoined to think and act in accordance with the will of the Leader and allegiance was owed not to one's immediate superiors but to the Leader himself. As Hans Frank formulated it, the categorical imperative of the Third Reich was: 'Act in such a way as the Führer, if he knew your action would approve it' (Arendt, 1977: 136). Wide latitude was given to officials in the execution of general policies and every holder of position was accountable for all the activities of their subordinates – even in cases of disobedience and failure. To grasp the will of the Führer in this context demanded zeal and creativity far in excess of the old-fashioned plodding bureaucrat. A reconfigured notion of responsibility was built into the very organization of crimes against humanity.

Arendt did not discount the crimes committed in the name of humanism, but she contended that crimes against humanity were in a quite original sense against humanity. It is arguable whether she was able to grasp precisely what was new about these crimes, but Heidegger's destruction of humanism was a pointer to the intent of the perpetrators to destroy humanity as such. The success of totalitarian violence, Arendt argued, was identical with the complete liquidation of the rights and freedoms that modern thought attributes to human beings by virtue
of their humanity. Crimes against humanity signified the determination to destroy the human being legally, politically and morally before destroying its actual body and life. It stripped its victims of all that made them a human being: political rights, civil rights, family life, community, home, livelihoods; and it even tried in the camps to strip them of the capacity to make moral choices. Such violence, Arendt argued, was organized for the purpose of eliminating the human in the human being – of destroying ‘spontaneity itself as an expression of human behaviour’ (Arendt, 1976: 437–59).

**Conclusion: the Crime Against Humanity**

Arendt endeavoured to spell out the social substance of crimes against humanity beyond mere legal definition. If the notion of humanity was a product of the modern age, crimes against humanity were the product of a certain kind of revolution. It was not directed against modern bourgeois society as such, for the readiness of business to go along with extreme violence was already well established in the imperialist era, and the readiness of the Nazis to do business with business and make use of modern industrial methods is amply documented. Rather, in the name of the concrete community, it was directed against the abstract universals of modern bourgeois society which appeared both false and oppressive and which took their highest form in the idea of humanity. Crimes against humanity were thus aimed at those who personified the dominance of these abstractions: at pariah peoples who were stripped of everything other than their human status as such, and especially at rootless, cosmopolitan Jews. The intent behind these crimes was to destroy not just these people but the very idea of humanity which they were meant to embody.

Richard Bernstein points out that although in *The Origins of Totalitarianism* Arendt did not hesitate to write about human nature and its transformation, in *The Human Condition* (1958) she repudiated the notion of human nature:

> The human condition is not the same as human nature and the sum total of human activities and capabilities which correspond to the human condition does not constitute anything like human nature . . . The problem of human nature . . . seems unanswerable . . . It is highly unlikely that we who can know, determine and define the natural essences of all things surrounding us . . . should ever be able to do the same for ourselves – this would be like jumping over our own shadows . . . Nothing entitles us to assume that man has a nature or essence in the same sense as other things . . .


Bernstein is absolutely right when he says that Arendt refused the consolation that there is ‘something deep down in human beings that will resist the totalitarian impulse to prove that “everything is possible”’ (Bernstein, 1996: 146). The spectre that haunted her was that the concept of humanity itself could indeed be obliterated or, as she put it in a letter to Jaspers (17 December 1946), that the organized attempt to ‘eradicate the concept of the human being’ and bring about ‘total moral collapse’ might well succeed (Arendt and Jaspers, 1992: 69). For this
reason Arendt preferred to speak of crimes against the human condition rather than against humanity.

This existential turn may have solved the problem of essentializing human nature, but at a cost, for it also lost sight of the social and historical character both of humanity and of attempts to destroy it. The abstraction of humanity is the product of modern political life and would have been meaningless to the ancients. Accordingly, the emergence of crimes against humanity presupposes the prior emergence of humanity as such and is the product of an intentional revolt against this abstract universalism. Because the existential framework of Arendt’s analysis could not incorporate socio-theoretical considerations of this kind, the concept of crimes against humanity remained elusive. Perhaps Arendt’s achievement was, as she herself put it in *Men in Dark Times* (1983), to make clouds rather than to clear them, and (like Gotthold Lessing) she did not hold herself duty-bound to resolve the difficulties which she created (Arendt, 1983: 8).

Arendt leaves us with a sense of extreme equivocation: a vision of a new, cosmopolitan order as beautiful as it is necessary, but one beset by lost opportunities, tarnished by competition between national memories, degraded by ideological servitude to particular powers and corralled into a moral dualism of good and evil which robs debate of political profundity.

Today, the question of crimes against humanity (not least in the forms of ethnic cleansing and genocide) has once again been forced to the front of our minds, and after a very long gap the old cosmopolitan precedent of Nuremberg has been re-activated in the shape of ad hoc tribunals for the prosecution of war criminals in the former Yugoslavia and Rwanda. In these twin developments are to be found, to paraphrase Rousseau, the worst and the best of humanity. Both are real. Both exist. The difficulties of understanding crimes against humanity have not diminished. The conflict between generality and specificity – between the need to justify the concept in universalistic terms and the need to specify its content – has only been resolved in an ad hoc manner. The danger of the concept becoming over-extended, meaningless, banal – a moralistic catch-all for everything of which we disapprove – is still with us. Arendt’s achievement was less to resolve such difficulties than to learn to live with them: to combat the cynicism of those who say that man is a wolf to man and nothing can be done to change it; to combat the scepticism of those who say that cosmopolitan law is merely victor’s justice and possesses no legal or political validity; to combat over-determined images of the totalitarian propensities of modernity; and finally perhaps to combat the illusion (that waits to be disillusioned) that cosmopolitan law, if only it could be completed, will provide the key to perpetual peace and universal freedom. Arendt enjoins us to recognize the difficulties of understanding without turning them into an excuse for inaction: as she put it in *Essays in Understanding*, ‘Many people say that one cannot fight totalitarianism without understanding it. Fortunately this is not true; if it were, our case would be hopeless’ (Arendt, 1994: 308). The incompletion of the concept of crimes against humanity is not so much a fault as a prescription for making judgments and taking decisions with the tools we have at hand.
Cosmopolitan law, like all law, remains a form of coercion; it cannot jump out of political life; it presupposes a certain exercise of power. In relation to it, the great powers have a cautious and equivocal attitude. For many years they largely ignored it. Now that they are once again using it, they seek to put it into the service of their own interests, to restrict its sphere of operation, to forestall its capacity for independent initiative, to appropriate its means of enforcement, to prevent it from interfering with the political requirements of peace and security. This is not a reason to dismiss cosmopolitan law; but it is a reason to take further the rugged, tested, critical cosmopolitanism that Arendt did so much to initiate.

Notes

I would like to express my gratitude to Peter Wagner, Istvan Pogany, Mike Neary and Marion Doyen for their comments.

1 The term seems to have come from Hersh Lauterpacht, a distinguished professor of international law at Cambridge University, who had been pressing for a war crimes trial since 1943 and was keen to have the court consider atrocities committed against Jews. The prehistory of the term goes back to the allied denunciation of the Turkish government for the massacre of Armenians in 1915, which they held responsible for 'crimes against humanity and civilization'. See Marrus (1997: 185–7).

2 According to Article 6, 'Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan'. Article 7 added that 'The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment'. Article 8 added that 'The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires'. Articles 9, 10 and 11 authorized the tribunal to declare that a particular organisation, like the Nazi Party, is criminal and that individuals who join such an organization are personally responsible both for their membership and for their participation in its criminal activities.

3 For further discussion, see especially Rabinbach (1997), Chapter 4 'The German as Pariah: Karl Jaspers' The Question of German Guilt' and Marc Dufrenne and Paul Ricoeur (1947).

4 Kant had written that at the dawn of modernity 'each state saw its own majesty in not having to submit to any external legal constraint and the glory of its ruler consisted in his power to order the death of thousands of its people for causes which did not at all concern them' (Kant, 1991: 103). Kant's hope and expectation, however, was that states would eventually abandon this 'lawless state of savagery' and introduce in its place a cosmopolitan system of justice based on the recognition that the peoples of the earth have 'entered in varying degrees into a universal community where a violation of rights in one part of the world is felt everywhere' (Kant, 1991: 104–5).

5 Arendt describes the mob-man as the 'end result of the bourgeois' and writes: 'When his occupation forces him to murder people he does not regard himself as a murderer
because he has not done it out of inclination but in his professional capacity. Out of sheer passion he would never harm a fly. If we tell a member of this new occupational class which our time has produced that he is being held to account for what he did, he will feel nothing except that he has been betrayed’ (Arendt, 1994: 130).

At the time Jean-François Lyotard (1993: 127–34) also criticized Jaspers for posing the question non-historically (‘the “concrete” of which he speaks is not that of history’), non-collectively (‘purification is a conversion that can be thought independently of any collectivity’) and non-politically (‘he is trying to pose a political problem non-politically . . . Politically “accepting guilt” means nothing’).

Much has been written on Arendt’s use of the concept of radical evil. The most thorough exploration is to be found in Bernstein (1996: 137 ff). In Origins of Totalitarianism she wrote: ‘The fear of absolute Evil which permits of no escape knows this is the end of dialectical evolutions . . . It knows that modern politics revolves around a question which . . . should never enter politics, the question of all or nothing . . . that is, the end of mankind’ (Arendt, 1976: 443). She connects ‘radical evil’ with ‘a system in which all men have become equally superfluous’ (Arendt, 1976: 459). Here she also ties ‘radical evil’ to the ‘transformation of human nature’ and the destruction of all plurality and spontaneity. I think the basic idea was the creation of a world, especially in the camps, where the very existence of moral categories like rights and responsibilities, guilt and innocence, respect and recognition, was destroyed. The reason she gave for abandoning the concept of ‘radical evil’ was that ‘evil is never “radical” . . . it is only extreme, and . . . it possesses neither depths nor any demonic dimension . . . Only the good has depths and can be radical’ (Arendt, 1978: 250–1). Bernstein argues that there was no major difference between Arendt’s use of the concepts of radical evil and the banality of evil, but it seems to me that Arendt herself was concerned about the demonic connotations of the former.

More akin, perhaps, to what is now known as a Truth and Reconciliation Commission.

Alain Finkielkraut picked up the same theme when he argued in relation to the Barbie Trial that though the Holocaust was ‘from Eichmann to the engineers on the trains . . . a crime of employees . . . 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, 1989: 3–4). We may think here of Hegel’s aphorism that to punish an individual is to respect him or her as a rational human being.

See, for example, Parvikko (1998: 49).

The proposition that Jewish organizations knowingly and deliberately played a part in the Shoah (holocaust) is highly controversial and implies that they might have had some discretion in the matter. The evidence is equivocal.

It was this sense of lost opportunity that was echoed some 25 years later by Alain Finkielkraut when he criticized the decision of the French court to muddy the distinction between the killing of Jews who were tortured and killed for what they were, and the killing of resistance fighters who were tortured and killed for what they did, and its decision to stretch the concept of crimes against humanity to include both. Equally, he criticized the attempt by Barbie’s defence team to diminish the distinction between the extermination of the Jews and the violence of European colonialism. A certain ‘emotional confusion’ arises, he argues, when the definition of crimes against humanity on the one hand expands to include inhuman actions of every sort, and on the other hand contracts to exclude those crimes that cannot be ascribed to Western
imperialism. In its actual use, Finkielkraut argued—following Arendt’s qualms—the concept was serving to reduce ‘the unmasterable multitude of mankind to an exultant face to face confrontation between Innocence and the Unspeakable Beast’, to ‘transform history... into a children’s story’, to re-write the Holocaust as a ‘meaningless idiot’s tale’ which signifies nothing and leaves only a ‘gaping black hole’ (Finkielkraut, 1989: 60–1).

13 This sense of moral equivocation is even more strongly accentuated in Tadeusz Borowksi’s This Way to the Gas Chambers, Ladies and Gentlemen (1979) in which he described his own implication as a hospital orderly in the camp system at Auschwitz.

14 For general examination of the strengths and limitations of Nuremberg, see Jackson (1949), Taylor (1952), Davidson (1966), Kirchheimer (1969), Déak (1993), Marrus (1997) and Salter (1999). A glaring example of the trial’s partiality was the presence of Soviet judges and the simultaneous lack of any mention of Soviet crimes. For example, the crimes against peace with which Germans were charged in respect of the invasion of Poland in 1939 failed even to mention the Nazi–Soviet Non-Aggression Pact or the Soviet invasion of Poland, Finland and Bulgaria in the same year. The most notorious of these inconsistencies lay in the indictment of the Nazis for the massacre of 925 Polish officers in the forest of Katyn, which was increased to 11,000 at the insistence of the Russians before the charge was dropped for lack of evidence. It was only in 1990 that the Soviet government, in one of its last gestures, admitted that the order to massacre these officers came from Stalin. Such inconsistencies were not limited to the Russians; for example, the Allied obliteration of Dresden and Hamburg was excluded from consideration.

15 Barbie’s lawyers were the Congolese M’Bemba, the Algerian Bouaïta and the French-Vietnamese Vergès.

16 The strategy of normalization was echoed in arguments later put forward by conservative historians like Ernst Nolte and Andreas Hillgruber (to which Jürgen Habermas took strong exception) that the crimes committed by the Nazis were a ‘normal’ part of totalitarian collectivism, and that the ‘race murder’ committed by National Socialists only responded to a ‘more original Asiatic deed... the “class murder” perpetrated by the Bolsheviks’. See Habermas (1989), ‘Apologetic Tendencies’.

17 Heidegger wrote: ‘I can only add that instead of the word “Jews” there should be the word “East Germans” and then exactly the same holds true of one of the allies, with the difference that everything that has happened since 1945 is public knowledge worldwide, whereas the bloody terror of the Nazis was in fact kept a secret from the German people’ (Heidegger, Letter to Marcuse, 20 January 1948, cited in Lang [1997: 10]).


19 See also Rabinbach (1997), Chapter 3 ‘Heidegger’s “Letter on Humanism” as Text and Event’ for an analysis, and Leaman (1997) for its placement.

20 See Habermas (1989) for another perspective.

21 See Zimmerman (1990: 166) and Villa (1999: Ch. 3).

22 This latter idea has been developed by Moishe Postone in an interesting deployment of Marxist theory. In the essay on ‘Anti-Semitism and National Socialism’, he writes: ‘the power of the Jews, as conceived by the modern anti-Semitic imagination, is not bound concretely, is not “rooted”... The Jews represent an immensely powerful, intangible, international conspiracy... It is not merely that the Jews were considered to the owners of money, as in traditional anti-Semitism, but that they were held responsible for economic crises and identified with the range of social restructuring and dislocation resulting from rapid industrialisation... In this form of fetishised
“anti-capitalism” both blood and machine are seen as concrete counterprinciples to the abstract . . . This form of “anti-capitalism” . . . is based on a one-sided attack on the abstract . . . abstract reason, abstract law . . . money and finance capital . . . The manifest abstract dimension was biologicalized – as the Jews . . . The Jews became the personifications of the intangible, destructive, immensely powerful and international domination of capital as an alienated social form’ (Postone, 1986: 310–12).

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