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Abstract

A review of:

Law against Genocide: Cosmopolitan Trials by David Hirsh. London: Cavendish/Glasshouse, 2003. 183pp.

Keywords

International criminal law, Genocide, Cosmopolitanism

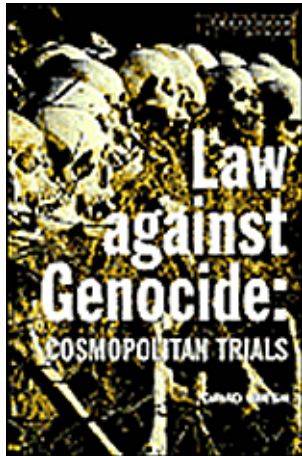
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Cosmopolitan Law—and Cruelty— on Trial

By Matthew S. Weinert

**Law against Genocide: Cosmopolitan Trials by David Hirsh.
London: Cavendish/Glasshouse, 2003. 183pp.**

When evil-doing comes like falling rain, nobody calls out 'stop!'

When crimes begin to pile up they become invisible. When sufferings become unendurable the cries are no longer heard. The cries, too, fall like rain in the summer.

—Bertolt Brecht, “When Evil-Doing Comes Like Falling Rain”

Provocatively, David Hirsh avers that “the appeal to human rights” in a world of war, violence, and protracted conflict is “a sign of absolute desperation” (11). The skeptic surely concurs, dismissing talk of rights and cosmopolitanism in the face of cruel and pernicious policies and activities, believing there to be few available resources to contend with suffering and those who perpetrate suffering. Yet Hirsh’s Law against Genocide: Cosmopolitan Trials is a good antidote to this sort of nihilism. “The logic of cosmopolitan law,” he maintains, “is to tie the idea of universal human rights to a legal structure that can give those rights some concrete reality independently of the state...[C]osmopolitan law is one strategy that aims to give the appeal to human rights some muscle” (11). Refreshingly, Hirsh does not evoke a misguided and misplaced utopianism, but portrays such law in its actuality as it develops and accommodates the demands for justice in a world beset by violence and cruelty.

Hirsh’s purpose is respectfully judicious: “that it is possible for cosmopolitan criminal law to operate effectively at least in some instances.” If he can successfully demonstrate this, then opposition to such law must perforce “focus more sharply... [on] the actual functioning of the legal system” and not be confined to critiquing the law’s ideality (xiii). His conclusions are appreciably broad: that “in cosmopolitan criminal law it is possible for universal values to find a worldly existence that is not wholly subverted by power and interest” (155). Moreover, such law, because it “has such severe safeguards built in...produces, as a by-product, its distinctive form of authoritative narrative” (147) and helps forge what he calls a “cosmopolitan social memory” (159). The cosmopolitan legal process “is like a machine whose data is input in a form heavily coloured by national myth, yet whose output aims to be free from national particularity” (xix). In the end, such trials “aim to produce authoritative narratives of the crimes” that in some significant sense become “part of the process of the evolution of a global collective memory that can play a role in

undermining myths of nationhood, particularly those that have played their part in causing ethnic cleansing and genocide”(xix).

Since Hirsh’s aim is relatively narrow—that is, buttressed by the facts—he succeeds in demonstrating cosmopolitan criminal law’s efficacy in some instances. Hirsh uses four trials¹ to reveal that cosmopolitan criminal law, defined as “the emerging body of law that aims to protect the human rights of individuals and groups” (xv), is emphatically not a “sequel to modernity but rather an element deeply embedded within it. It is also a characteristically modern form, based on the extension of the project of the universalisation of right” (22). Here, he argues against utopian critics for whom the existence of such law portends the demise of the state. Offering a sobering dose of reality, Hirsh takes little interest in verbiage: we may proclaim all the rights we want, but such proclamations and promulgations, while laudable, do little by themselves to transform the predatory ways of states at home and abroad and protect the human person from cruelty.

Rather, Hirsh finds solace in the real work represented by the four trials that are his focus here, as well as Nuremberg; the Eichmann trial; the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY, ICTR); the *Pinochet* and *Habré* cases; the trial of Slobodan Milosevic; the tribunals for crimes committed in East Timor and Sierra Leone; formation of the International Criminal Court and, very recently, the tribunal for Iraq (although these last two have yet to hear cases) (Simons 2003). Advances may be limited triumphs hedged by atrocities in various parts of the world. But in the mundane (i.e., that cosmopolitan criminal law owes its existence to great powers), Hirsh reads the extraordinary—the incremental transformation of international relations by “the authority and due process of law” (159). The transformation may be to the casual observer almost imperceptible. But for Hirsh, cosmopolitan criminal law trials both expand the envelope of universal jurisdiction and human rights enforcement, and seriously challenge “the idea that community must necessarily be defined in an exclusive way” (22). Such trials are evidence not of a utopian scheme of emerging world government, but of cosmopolitan criminal law’s actuality “outside UN libraries and international law journals” (xiv).

For Hirsh, cosmopolitan criminal law does not develop at the expense of national sovereignty or international law (nor does it supplant it)—it emerges and evolves alongside states and domestic and international legal systems. He explicitly counters what he calls the strong universalist arguments advanced by David Held (2002) and Mary Kaldor (1999) in whose versions of cosmopolitanism Hirsh reads “historical narrative[s] of progress” that arise “after and as a result of the increasing perception of the deficiencies of the old order” (21). Rather, cosmopolitan criminal law stems from the “urgent and actual struggle to find methods of fighting against totalitarianism which do not replicate that which is being fought against” (xv). Hirsh ties his story to the real work of real individuals who sometimes act and sometimes do not act in the face of cruelty. Cosmopolitan criminal law, he reminds the reader, is an existent reality and not a fantastical assertion of utopianism. Pointedly, he adds, once supported by great powers, such law assumes a life independent of such power (xii-xv, xx, 1, 16, 20ff, 38, 56, 57, 70, 75f, 78, 96, 141, 149f, 152f, 155, and 159). But what he fails to explore in any sufficient depth is why and under what circumstances

¹ These are: the International Criminal Tribunal for the former Yugoslavia (ICTY) trials of Blaskic and Tadic (chapter five), the London trials of Andrei Sawoniuk in 1999 for crimes committed during the Holocaust (chapter six), and the 2000 *Irving v. Lipstadt* libel case for Holocaust denial (chapter seven).

cosmopolitan criminal law succeeds. Under what conditions have great power interests permitted the establishment of an international tribunal? Why Sierra Leone, but not (to this date) Cambodia?

Emphasis, he argues, ought not be placed on “the cleavage between the universalist values of cosmopolitanism and the politics of more particularist identities...as a product specifically of the postmodern ‘now’, which supplants previous political cleavages” (21). More appropriately, Hirsh depicts cosmopolitanism “as a thread” running through history alongside states and their nationalist aspirations. To wit,

Immanuel Kant did not develop his theory of cosmopolitan law after and as a result of the generalization of absolute state sovereignty. The Genocide Convention (1948) was passed simultaneously with the foundation of the UN as a conference of independent states. The Nuremberg trials did not take place as a response to the failures of Israeli nationalism or against its interests or sensibilities. The tribunals for Rwanda and Yugoslavia did not come into existence because the Security Council was no longer a principle worth defending. Many of the events that we understand as landmarks in the development of cosmopolitan law took place within, and not in opposition to, the existing order of power and law. Part of what is at stake, therefore, in the argument for the recognition of cosmopolitan law, is the degree to which its principles and institutions are able to be brought to life as independent entities. Can they attain sufficient authority, independence and power to threaten some of the interests that brought them into being? If they can, cosmopolitan law attains an existence not just as a set of ideas but as a new form of law (21).

Yet Hirsh, I think, constructs his critique of Held and Kaldor around a false dichotomy between what he thinks is their theory of progress *sans* agency and his theory of agency. If the former manifests a teleological world-view that disposes in some significant sense with human agency—history is, after all, largely predetermined—then the latter situates a motivated, willful agent divorced from a problematic evolutionism at the center of history. What has come to pass and what will come to be are matters of circumstance and choice, not, as he indicts Held, the results of fate or “utopian yearnings” (16). Yet do not utopian yearnings constitute some contexts of choice? Do not utopian proposals yield narratives of potentiality, and thus constitute in significant senses plausible measures of reform and eventual actuality? Certainly, Hirsh may be guilty of utopian yearnings himself in that he concludes such trials to be moral narratives that constitute a cosmopolitan social memory, a point to which I shall return later.

Held and Kaldor do not so much tie their projects to a preordained conception of history (as Hirsh claims they do) in order to sustain their arguments about the emergence of cosmopolitan law. Rather, Held argues, the development of such law is intimately bound up with conscious decisions of policy makers, state leaders, and ordinary people, and may be charted “from the model of classical sovereignty, through a model of liberal international sovereignty, in which the liberal concern for limited government is extended into the international sphere, to the model of cosmopolitan sovereignty, the law of peoples” as defending a basic set of human rights (5). Hirsh’s argument against Kaldor is considerably weaker. In a trans-historical narrative similar to Held’s, Kaldor focuses on the changing nature of warfare (the work of real agents and not some invisible hand of history), and argues that “war is no longer controlled by sovereign states wielding legitimate monopolies of violence” (a bit of an overstatement to be sure). Rather, war “is fought out between ethnically defined social formations that mix the characteristics of nationalist struggles, organized crime and local warlord-based power” (Kaldor 1999: 5f). As a result of this breakdown in the traditional conception of warfare, “the distinction between human rights law and humanitarian law is

becoming meaningless” (ibid.) Therefore, she concludes, scholars, lawyers, and policy makers must recognize the emergence of a form of law distinct from traditional international law that has at the forefront the dignity of human life. Neither Held nor Kaldor disposes of the willing agent as Hirsh suggests; each situates that agent and, moreover, cosmopolitan law, in real contexts of struggle, trial and error, and considerable human loss. Dramatic acts of “unsociability,” to put it in a rough Kantian idiom, do awaken human urges toward compassion and sociality, or at the very least to the propensity to put cruelty at the forefront of our moral considerations.



The conclusions Hirsh draws from his examinations, made infinitely more interesting by the fact he attended the Sawoniuk and Irving trials, reveal his own “utopian yearnings”—the same sort of yearnings for which he criticized Held. He neatly summarizes them on the last page, which I recount here.

Against those who argue that international relations are only determined by power, I have argued that processes of decision making that rely on the authority and due process of law can also have an influence. Against those who argue that the only legitimate sovereign is the national state, I have argued that crimes against humanity have been recognized as the business of all human beings and therefore global institutions may develop that have jurisdiction within all states to prosecute such crimes. Against those who argue that individual responsibility for these crimes is just a legal fiction, I have argued that those who perpetrate crimes against humanity have had alternatives and that, while their alternatives may have been severely constrained, they still made free choices. Against those who argue that cosmopolitan law is utopian, I have shown that in the ICTY and the ICTR, as well as in national courts, it is coming into being. Against those who argue that the practical difficulties of organizing fair trials for such crimes are insurmountable, I have presented evidence that fair trials are indeed being held. Against those who argue that cosmopolitanism cannot hope to pull people away from their own sacred myths of nationhood, I have shown one mechanism by which a cosmopolitan social memory is being forged (159).

Some of his points are relatively unproblematic. Law does have considerable, enduring influence in international relations. Non-traditional practices, especially holding individuals accountable for crimes commissioned by states, have emerged post-1945 (chapters one, two, and three).² Such trials have succeeded in meting out justice (chapters four and five)—despite institutional, financial, and bureaucratic shortcomings. For example, though the ICTY was “established without the resources or the power necessary to succeed in bringing to justice those primarily responsible for ethnic cleansing,” it matured, owing to a combination of factors including “the work and vision of the prosecutors and judges,” into a viable institution of cosmopolitan justice (75). But, some of his conclusions warrant closer inspection, in particular his comments on narrative and cosmopolitan social memory (chapters seven and eight), which perforate and deconstruct nationalist myths and chauvinisms.

² Recall, though, that Peter von Hagenbach, governor of the German town of Breisach, was tried for excessive cruelty to citizens and foreigners in 1474 by an ad hoc tribunal comprised of judges from 28 states.

An unequivocal vein of Arendtian “storytelling” runs through Hirsh’s work. Arendt, borrowing from Shakespeare’s *The Tempest* to eulogize her friend Walter Benjamin, invoked the metaphor of pearl diving to communicate that profound connection between the past and the decaying present for benefit of the future.

And this [poetic] thinking, fed by the present, works with the ‘thought fragments’ it can wrest from the past and gather about itself. Like a pearl diver who descends to the bottom of the sea, not to excavate the bottom and bring it to light but to pry loose the rich and the strange, the pearls and the coral in the depths and to carry them to the surface, this thinking delves into the depths of the past—but not in order to resuscitate it the way it was and to contribute to the renewal of extinct ages. What guides this thinking is the conviction that although the living is subject to the ruin of time, the process of decay is at the same time a process of crystallization, that in the depth of the sea, into which sinks and is dissolved what once was alive, some things ‘suffer a sea-change’ and survive in new crystallized forms and shapes that remain immune to the elements, as though they waited only for the pearl diver who one day will come down to them and bring them up into the world of the living—as ‘thought fragments,’ as something ‘rich and strange,’ and perhaps even as everlasting Urphänomene (Arendt 1983: 205f).

Hirsh dives effortlessly into dense trial transcripts and judgments and pries loose “rich and... strange” thought fragments from which he weaves his own curious story. These trials, he notes, produce “judgments that are, literally, in the form of narratives” (30). They are “self-conscious attempt[s] to provide an objective, authoritative and impartial narrative” concerning acts of cruelty associated with the breakup of Yugoslavia, ethnic cleansing in Bosnia, and the Holocaust (86). Law, being “not outside or above society, even if its own rhetoric requires that it appear to be so...is a social practice and...its texts will necessarily bear the imprint of such practice or organizational background....[T]he narratives produced by cosmopolitan courts are not, in some absolute sense, ‘the truth’. But neither, in fact, do they claim to be. They claim to be ‘judgments’” (146).

This series of claims may be synthesized into two strands of thought or logics. On the one hand, Hirsh treats such cases in their immediacy—as global mirrors of their domestic counterparts consumed with the quotidian tasks of litigation, including evidentiary procedures, admissibility of hearsay and other evidence, contending with media-produced biases, and corroboration of testimony, among other things. On the other hand, Hirsh renders a particular reading of such trials as deconstructive of national myths (139) and constructive of “cosmopolitan social memory” (159), in no small part effectuated by the centrality of judges in the process (91) who produce authoritative, narrative-like judgments. As Justice Robert Jackson remarked at Nuremberg, “international law is an outgrowth of treaties and agreements between nations and of accepted customs. Yet every custom has its origins in some single act...Our own day has the right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened international law.” What Justice Jackson failed to point out, Arendt (1977) contends,

is that, in consequence of this yet unfinished nature of international law, it has become the task of ordinary trial judges to render justice without the help of, or beyond the limitation set upon them through, positive, posited laws. For the judge, this may be a predicament, and he is only too likely to protest that the ‘single act’ demanded of him is not his to perform but is the business of the legislator (273f).

I don’t think there is any inherent contradiction between the two logics, so long as courts and tribunals remain fixed to the purpose at hand: determining individual innocence or guilt *vis-à-vis* specific charges based on corroborated, factual (not hearsay) evidence. Arendt’s primary criticism of

the Adolf Eichmann trial, which Hirsh recounts, was not that the trial served in some significant sense as a forum for constructing an authoritative narrative of collective memory, but that Israeli Prime Minister David Ben-Gurion and chief prosecutor Gideon Hausner placed the entire history of anti-Semitism at “the center of the trial. ‘It is not an individual that is in the dock at this historic trial, and not the Nazi regime alone,’” Hausner triumphantly proclaimed, “‘but anti-Semitism throughout history’...It was bad history and cheap rhetoric; worse, it was clearly at cross-purposes with putting Eichmann on trial, suggesting that perhaps he was only an innocent executor of some mysteriously foreordained destiny...” (ibid.: 19). Such trials ought not be platforms for the invention and propagation of nationalist myth, Arendt intimates and Hirsh proclaims, though they may, as in the case of the Balkans, disclose the limits of and ultimately restrain chauvinistic nationalism.

No doubt, Arendt reveals Hirsh’s disquiet with history as a narrative of progress *sans* agency. To portray cruelty and suffering as systemic is to absolve real agents of responsibility for real crimes. To portray Eichmann as an innocent executor of “the oldest crime [Jews] knew and remembered” ignores the unprecedented nature of the crime of genocide and crimes against humanity. “Had the court in Jerusalem understood that there were distinctions between discrimination, expulsion, and genocide,” Arendt contends, “it would have immediately become clear that the supreme crime it was confronted with, the physical extermination of the Jewish people, was a crime against humanity...and that only the choice of victims, not the nature of the crime, could be derived from the long history of Jew-hatred and anti-Semitism” (ibid.: 267, 269). Failure to pass judgment on specific individuals for specific acts associated with such monstrous cruelty, therefore, would be a travesty of justice and tacit complicity in the crime itself.

Which brings us to the construction of cosmopolitan social memory and, concomitantly, the deconstruction of nationalist myth. The myths to which Hirsh directs his critical gaze are those in which one nationality imposes itself on other nationalities because it believes itself to be threatened by or superior to those nationalities. Thus, the myth of a “Greater Serbia” was the “only way for Serbs [under Milosevic] to avoid...continuing domination” by Muslims (140). Likewise, David Irving’s “strange narrative of English and German nationalism, and of the nationalism of the white race, was being judged against an academic historiographical narrative—one that the Nazis might have called a Jewish cosmopolitan narrative” (145). Arendt highlighted the difficult position in which the judge finds him or herself *vis-à-vis* such myths and the extraordinary crimes to which they provide a sordid logic. Confronted as it were with underdeveloped or nonexistent rules and laws to deal with the extraordinary, the judge must interpret in novel ways existing laws and invent, in some significant sense, judicial responses to egregious, unprecedented crimes. Perhaps this is the real reason—discomfort with judicial activism—why the court failed to appreciate the significance of a crime against humanity, portraying it instead in light of well-known laws against murder.

Yet the unprecedented becomes by its nature a precedent for the future, and though no legal proceeding or injunction possesses sufficient power and authority to prevent its reappearance, law must constantly adapt to changing circumstances and provide remedies for like crimes in the future. Both Arendt and Hirsh intimate as much: the failures of the Jerusalem court in *Eichmann* and the British court in *Savonius* rested with judges and lawyers who refused to (and, as I suggested above, could not) acknowledge the unparalleled nature of the crimes under consideration. Each placed the crimes in a conventional dialogue of murder. Thus it becomes the work of the sociologist and the scholar, among others, to interpret court proceedings and expose their pearls, their wisdom, and

make them available to future law-creation and legal proceedings. For “if genocide is an actual possibility of the future, then,” Arendt maintains, “no people on earth...can feel reasonably assured of its continued existence without the help and the protection of international law” (Ibid., 273). In this sense, though cosmopolitan criminal trials deal with individuals and individual acts, the cosmopolitan legal process acts “like a machine whose data is input in a form heavily coloured by national myth, yet whose output aims to be free from national particularity” in the form of “authoritative narratives of the crimes” (xix).

In turn, these narratives contribute to “the evolution of a global collective memory that can play a role in undermining myths of nationhood, particularly those that have played their part in causing ethnic cleansing and genocide”(xix). Though courts, whether they be the national courts of Britain as with the *Savoniuik* and *Irving* cases, or international tribunals as with the former Yugoslavia and Nuremberg, remain committed to the task of hearing testimony and weighing evidence according to specific legal norms and rules, Hirsh admits that such courts inevitably, by virtue of the centrality of judges in them, “produce a judgment...free of...contradictory nationalist impulses” (143).



The claim of constructing a cosmopolitan social memory strikes me as slightly implausible and quite grandiose—but most likely true. Nuremberg, the tribunals for Yugoslavia and Rwanda, and the like, as particular developments responsive to particular atrocities in particular contexts, inevitably enshrine wider lessons constructive of a global history. The work of such institutions develops the law and by its nature invites participation in a wider dialogue about the content and nature of such acts.

Still, problems remain. Who are these unnamed cosmopolitans? Academics? Lawyers? Policy-makers? Do ordinary citizens imbibe the lessons Hirsh thinks we ought to derive from such trials? Furthermore, what evidence suggests any preventive role for such trials? Do these trials deter potential *genocidaires* from committing their gross deeds? Collective social memory necessarily plays an important role in the generation, interpretation, and retention of a collective past, which suggests not only the presence of a collective, but also lessons derivative from such a past. Memory, to put the matter colloquially, in part memorializes lessons, whether preventive or prohibitive, and carries them into the future. At the moment there is little evidence to suggest that cosmopolitan courts, trials, and the cosmopolitan memory they produce have any (deterrent) effect on potential *genocidaires* or other acts of extreme cruelty.³ What pearls, then, do such courts and trials deliver?

Additionally, what constitutes a cosmopolitan trial? Though Hirsh fails to answer this question directly, we can distill four central elements from the arguments presented. First, cosmopolitan criminal trials must consider crimes of a universal nature, including crimes against humanity, war

³ In a recent BBC radio interview, Admiral Sir Michael Boyce, commander of the British forces in the recent war in Iraq, revealed that he threatened to resign on the eve of the war unless the Attorney-General gave him an unequivocal assurance of the war’s legality. Thus, international criminal law has some deterrent effect. I owe this point to an anonymous reviewer.

crimes, crimes against the peace, and genocide. Hirsh omits from consideration other crimes of a universal nature, including piracy, slave trading, torture, and apartheid, including the notable fact that by 1830, four mixed courts of arbitration in Sierra Leone, Havana, Paramaribo and Rio de Janeiro were charged with the task of prosecuting slavers (Thomas 1997).

Second, prosecutors must identify specific individuals who commissioned and/or committed such crimes. Such trials thus mirror their domestic counterparts, concerned as it were with individual guilt or innocence. Third—and more problematic—tribunals or courts must be available and willing to try such individuals—and most often these are national courts. Hirsh uses the example of Britain, which failed to try suspects for crimes committed during World War II—despite the prosecutorial power available to it under international law. British courts eschewed the concept of universal jurisdiction and relied instead on national legislation, specifically the 1991 War Crimes Act which granted British courts authority to try suspects for “murder or manslaughter in contravention of the laws and customs of war,” but not specifically for crimes against humanity or genocide (96). Indeed, Hirsh explicitly notes that most national courts rely not on universal jurisdiction but on more concrete domestic legislation that outlaws particular crimes as the basis for obtaining jurisdiction over crimes considered in some sense universal in nature. While some may see this as a failing of international law, Hirsh interprets national legislative acts as positive assertions that ultimately buttress prosecution for “cosmopolitan” crimes.

Finally, and most controversially, Hirsh suggests that it is the absence of a jury that makes a cosmopolitan trial, since a jury is “only able to produce a guilty or not guilty verdict” and not the authoritative narrative that he finds appealing (132). Analogous to U.S. Supreme Court decisions, which carefully re-present the arguments and evidence and communicate a particular authoritative stance on the issue before it, the judgments of such trials feed into a global historical narrative that charts the development of cosmopolitan criminal law and attempts to deconstruct, secondarily, nationalist myths of greatness that often contributed to the crimes in the first place (138f).

Now that we have identified what constitutes a cosmopolitan criminal trial, we can begin to tackle the problem of their product: a cosmopolitan social narrative and, concomitantly, a cosmopolitan social memory. Hirsh never clearly defines his terms, though he comes close by equating definition with function: a cosmopolitan narrative is “of the type that can play [its] part in undercutting myths of nationhood” (139). But, Hirsh asks, “how can...genocidal and mythical social memories be replaced, fought against, or superseded?” (141). Is this even a proper way of framing the question? Is this, moreover, utopian yearning?

Cosmopolitan trials construct a cosmopolitan narrative and memory by establishing “a true picture of the events under investigation” (141). However, compare this point with one he makes several pages later: “the narratives produced by cosmopolitan courts are not, in some absolute sense, ‘the truth’. But neither, in fact, do they claim to be. They claim to be ‘judgments’” (146). Is there a discrepancy here? How can we equate truth with judgment?

Trials, he avers, help publicize facts—genocide and rape, torture and expropriations of property, annihilations and expulsions—about events (141), the effects of which, he hopes, deter potential criminals. Nuremberg publicized the deeds of the Nazis; the ICTY publicizes by entering into judgments particular facts about Serbian, Bosnian, and Croat atrocities. To illustrate, the *Tadic* judgment

is a long and closely argued document showing how the war started in Bosnia, how the politics of the communities evolved, how ethnic cleansing and genocide was possible, how it was carried out, and who was responsible. The trial was about more than Tadic. It was about producing a version of the truth of what happened; a version that claims authority because it is produced by an impartial cosmopolitan court according to the rules, methods, and traditions of international law (141f).

Compare the following statements, the first by the ICTY justices in the sentencing phase of the Erdemovic trial, the second by ICTR Judge Pillay concerning the Rwandan *Akeyasu* ruling: “[d]iscovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation...for it is truth...that begins the healing process” (*Prosecutor v. Drazen Erdemovic*, para.21). Likewise, “[w]ho interprets the law is at least as important as who makes the law, if not more so” (UN, 33). Collective social narratives and memories thus appear not merely as the product of reflection and fabrication by academics, sociologists, and the like, but also, in part, by the conscious construct of courts.

But Hirsh’s statement raises crucial questions—ones that defy response. Was Tadic ultimately found guilty for individual deeds, or was his alleged guilt predicated on some moral revulsion *vis-à-vis* the entire war, on the accompanying need to do something, anything? Why did the tribunal find it necessary to implant in a document—a judgment—on the particular guilt of a particular individual for particular deeds a wider historical narrative on the war itself? Has the court stripped Tadic of his individuality, finding his guilt not on corroborated evidence but on the basis he acted as some ‘innocent executor of some mysteriously foreordained history’?

Courts, especially when they deal with the unprecedented, the extraordinary, the egregious, must ascertain the facts and embed them in as impartial an account as possible. As I read Hirsh, he intimates that courts dissociated from crimes that occurred in other states—for example, the London courts that heard the Sawoniuk and Irving Holocaust trials or the ICTY and ICTR—are better equipped at erasing nationalist myths and chauvinisms from judgments than national courts hearing crimes that occurred in their countries. This echoes Arendt’s critique of the Jerusalem court: she did not object to that court’s jurisdiction. Rather, she objected to Hausner and Ben Gurion’s attempt to turn a criminal trial into a mouthpiece for Israeli national myth-making—thus her criticisms of them and her praise of the judges for resisting their attempts. If my reading is correct, then it might be plausible to argue national courts should immediately recuse themselves from cases arising within their territorial jurisdictions, especially those arising from ethnic, nationalist, and/or religious conflicts. Such an act would communicate to involved parties and to the world at large a serious attempt to diffuse ethnic, religious, and national hatreds by imparting authority to a third party to adjudicate disputes arising from such conflicts. Given this interpretation, the International Criminal Court might prove a more than appropriate venue to diffuse national particularities and chauvinisms and generate a more impartial narrative of events surrounding egregious acts of cruelty.

If what I write has any element of truth, then cosmopolitan trials and the courts that try such cases face portentous responsibilities. Again, as Arendt noted, the Jerusalem court that tried Eichmann ignored the significance of the Holocaust as an act of genocide and a crime against humanity. But I think Arendt—and Hirsh, for that matter—could have argued further. Courts must be attuned to the motives and intentions behind monstrous crimes. The Eichmann court, for example, could only interpret heinous crimes against Jews as extensions of anti-Semitism. (In the process, it ignored the fact that the same crimes were committed against Poles, the Roma, and

“deviants” and disabled of all nationalities under Nazi occupation). In its failure to grasp the import of the Holocaust as one of many crimes against humanity committed by the Nazis, the Eichmann court also missed a completely novel way of dealing with invented and perceived “otherness” (Hutus against Tutsis; ideologically pure Khmer against Westernized, adulterated Cambodians) in contradistinction to conventional forms of oppression and racism that are in a significant sense reflective of old power politics involving conquest, enslavement, and non-systematic forms of annihilation. The final solution to the Jewish question revealed a sinister innovativeness in which a body of people was singled out for religious and cultural differences. Such difference was exaggerated by dominant national groups—the French, Germans, Poles, Spanish—and, consequently, a “separate” (albeit fictitious) race (Semitic peoples) invented. This is much more dangerous, I think, than traditional forms of racism because it opens the possibility of targeting any group for perceived differences (no matter how minor) and annihilating them (or oppressing them) on that basis.

Arguably, then, these trials, may provide subtle yet real deterrent effects. Practically speaking, they provide ordinary means to prosecute those responsible for extraordinary crimes. Further, they disaggregate the most egregious crimes from the auspices of state authority and immunity, thereby forcing a change in the conduct of international relations: that certain people, no matter their standing in state governance and military structures, may and can be held personally accountable for cruel and egregious crimes such as genocide and crimes against humanity. Despite the hiatus from Nuremberg to the creation of the ICTY, cosmopolitan criminal law fortifies the idea of a set of rights available to all simply by virtue of being a member of the species *Homo sapiens*. Cosmopolitan trials and courts do more than simply proclaim such rights. More importantly, they put cruelty and suffering at then forefront of moral and legal consideration. They dissect, examine, and strike out against rights-defying and rights-denying acts of cruelty and confirm the notion that, in some instances, such acts will be met with prosecution and punishment. Perhaps, in the final analysis, the real import of cosmopolitan criminal trials and courts lies with institutionalizing suspicion of authority structures by generating cosmopolitan social memory. Trial narratives and the collective memory into which they crystallize instigate a collective conversation about the nature and limits of authority, power and rule. In the end, as Judith Shklar poignantly stated, only a distrustful, conversant population, aware of the myriad of rights if the human person, “can be relied on to watch out for its rights, to ward off fear, and to be able to make their own projects, whether they be modest or great” (Shklar 1984: 238).

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