All the World a Stage:

International Law as (Epic) Theatre

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I. The Scales of Justice

The previous chapter set out to establish that international law, while "fixed" in the late 1940s primarily by the efforts of American state officials, has benefited the system of capitalist accumulation as a whole, and thus the elite classes within that system, whatever their nationalities. The evidence employed in order to establish this—three documents pointing to the use value of the UN for the US in its efforts to standardize the internal arrangements of states—answered a subsequent question as well. To the question of whether international law has become a fetter on American or capitalist interests, these documents, all of which recommend that the UN's capacity to stabilize and streamline societies be strengthened and exploited, furnished an answer in the negative. We now turn to the question of whether international law is a fix in the sense referred to by E.P. Thompson, which is to say, in the sense of being a constraint on power. In the first part of this chapter I argue that international law is *not* a fix in this sense and as a result must glean its legitimacy by mimicking law at the domestic scale. Because this mimicry is most apparent in international legal trials, in the second part of this chapter, I survey the academic treatment of these trials and argue that scholars have been wrong to accept at the international scale what they have critiqued at the domestic scale. In the final part of the chapter, I suggest that the Hussein trial provides us with a ripe opportunity to engage in just such a critique of international law.

Answering the question of whether international law constitutes a fix forces us to delve deeply into the grammar of international law itself, something radical scholars have

not been strongly compelled to do.[1] In the introduction to this dissertation, I discussed three leftist responses to international law. If we leave aside liberal apologism, we are left with two potentially radical approaches to international law. The proponents of the first approach are scholars interested in seeing international law upheld and defended. The second approach is represented by the sparser cadre of scholars who take for granted international law's status as an implement of power. What both approaches share is a relatively uncurious stance toward international law itself: for the one, law is not the problem; for the other, law's complicity is taken for granted. In both cases, it is states or their representatives that are chastised. International law—which is either defended and appealed to or effectively written off—is not interrogated. The implications of this for leftist praxis are acute: without a deliberate interrogation of international law we cannot settle a question that is fundamental to radical strategizing: is international law a resource to be appealed to, or is it not?

An exchange between Marxist geographer David Harvey and *New Left Review* (*NLR*) editor Perry Anderson neatly illustrates both positions.[2] I quote the exchange, from Harvey (2000, 91-93), in full.

> DH: Marx reacted against the idea of social justice, because he saw it as an attempt at a purely distributive solution to problems that lay in the mode of production. Redistribution of income within capitalism could only be a palliative—the solution was a transformation of the mode of

[1] The exception to this rule is China Miéville's *Between Equal Rights: A Marxist Theory of International Law*, published by Haymarket Books in 2006. I encountered Miéville's after my own arguments about international law had already been developed and did not have time to engage with his text.
[2] Although his name does not appear in the text, according to Noel Castree (2007), Perry Anderson interviewed Harvey on behalf of the *NLR*.

production. There is a great deal of force in that resistance. But in thinking about it, I was increasingly struck by something else Marx wrote—his famous assertion in the introduction to the *Grundrisse*, that production, exchange, distribution and consumption are all moments of one organic totality, each totalizing the others. It seemed to me that it's very hard to talk about those different moments without implying some notion of justice—if you like, of the distributive effects of a transformation in the mode of production. I have no wish to give up on the idea that the fundamental aim is just this transformation, but if you confine it to that, without paying careful attention to what this would mean in the world of consumption, distribution and exchange, you are missing a political driving-force. So I think there's a case for reintroducing the idea of justice, but not at the expense of the fundamental aim of changing the mode of production. There's also, of course, the fact that some of the achievements of social democracy—often called distributive socialism in Scandinavia—are not to be sneered at. They are limited, but real gains. Finally, there is a sound tactical reason for the Left to reclaim ideas of justice and rights, which I touch on in my latest book, *Spaces of Hope*. If there is a central contradiction in the bourgeoisie's own ideology throughout the world today, it lies in its rhetoric of rights. I was very impressed, looking back at the UN Declaration of Rights of 1948, with its Articles 21–24, on the rights of labour. You ask yourself: what kind of world would we be living in today if these had been taken seriously,

instead of being flagrantly violated in virtually every capitalist country on the globe? If Marxists give up the idea of rights, they lose the power to put a crowbar into that contradiction.

NLR: Wouldn't a traditional Marxist reply: but precisely, the proof of the pudding is in the eating. You can have all these fine lists of social rights, they've been sitting there, solemnly proclaimed for fifty years, but have they made a blind bit of difference? Rights are constitutionally malleable as a notion—anyone can invent them, to their own satisfaction. What they actually represent are interests, and it is the relative power of these interests that determines which—equally artificial—construction of them predominates. After all, what is the most universally acknowledged human right, after the freedom of expression, today? The right to private property. Everyone should have the freedom to benefit from their talents, to transmit the fruits of their labours to the next generation, without interference from others—these are inalienable rights. Why should we imagine rights to health or employment would trump them? In this sense, isn't the discourse of rights, though teeming with contrary platitudes, structurally empty?

DH: No, it's not empty, it's full. But what is it full of? Mainly, those bourgeois notions of rights that Marx was objecting to. My suggestion is that we could fill it with something else, a socialist conception of rights. A political project needs a set of goals to unite around, capable of defeating

> [its] opponents, and a dynamic sense of the potential of rights offers this chance—just because the enemy can't vacate this terrain, on which it has always relied so much. If an organization like Amnesty International, which has done great work for political and civil rights, had pursued economic rights with the same persistence, the earth would be a different place today. So I think it's important that the Marxist tradition engage in dialogue in the language of rights, where central political arguments are to be won. Around the world today, social rebellions nearly always spontaneously appeal to some conception of rights.

Clearly, Harvey can be located among those scholars for whom law has progressive potential, while Anderson belongs to the more skeptical of the two groups.[3] For Harvey, the left ought not vacate the sphere of rights because to do so would be to forfeit our ability to "put a crowbar" into "a central contradiction" within bourgeois ideology. Echoing Thompson's argument that the law must keep its word if it is to continue to be perceived as legitimate, Harvey insists that the bourgeoisie "can't vacate [the terrain of rights] on which it has always relied so much." For Anderson, by contrast, not only are rights "constitutionally malleable," but their hierarchy is determined by the "relative power" of the interests which they represent. As he has elsewhere remarked,

[3] The two scholars might equally be seen to be rehearsing what is probably the most famous debate in Marxist jurisprudence. For Austrian scholar Karl Renner (1976), the legal form was only as good or bad as the content with which it was filled. Socialists, he argued, needed to fill it with socialist content. For Russian jurist Evgeny Pashukanis (1970), bourgeois legality was unthinkable except as a part of capitalist social relations—it represented the extension of commodity fetishism into the juridical realm. Here we find Harvey in the position of Renner—arguing that the law is a form that can be transferred through to socialism so long as it is filled with better content—and Anderson in the position of Pashukanis—arguing that the form of bourgeois law is no less corrupted than its content.

commenting on the justifications for the 'new military humanism,' "politicians and intellectuals [can] pick what they [want] from the mixture" (2002, 10), suggesting—as Gowan (2003, 26) does with his reference to the UN Charter's "salmagundi of contradictory clauses"—that the hierarchy of laws can be altered according to the particular needs of the most powerful interests behind them.

How have these two scholars—by any account among the most important Marxist thinkers writing today—come to such different conclusions about the potential of law? To Harvey, law is generally constraining; it is the law that constrains both Shylock and Antonio. To Anderson, law is the tool of whoever wields it; it is the far more disturbing law on display—on stage and off—in *Death and the Maiden*. The banal answer, returning to the point with which I began, is that neither has been driven to *theorize* international law to any great degree. The more significant answer, which derives directly from the banal, is that Harvey and Anderson fail to properly differentiate between law at the domestic and the international scales. I am not referring here to a problem of communication—as would be the case if the scholars in question had merely failed to specify the law, domestic or international, about which they were speaking—but to an analytical problem, whereby two distinct scales of law are collapsed and the attributes of one are ascribed to both. In Harvey's case, international law is presumed to have the qualities of domestic law; in Anderson's case, it is the reverse. All dissonance between Harvey's and Anderson's positions disappears once each scholar's argument is removed to the scale to which it properly applies and from whence it has more than likely arisen.

Applied to the domestic scale, Harvey's point is well taken. The bourgeoisie cannot vacate the terrain of rights because it derives its legitimacy from this terrain—from the notion that the rules that constrain and empower one constrain and empower all. But is this true at the international scale? History, as we will see in a moment, suggests a negative answer, but so too does the very form of international law, which is simply not democratically accountable the way (some) states are—it does not have to be precisely because states are. Anderson's argument, by contrast, seems excessively conspiratorial when applied to the domestic scale. However much it may be the case that "in postmodern conditions, the hegemony of capital does not require mass mobilization of any kind" but "thrives on…political apathy and withdrawal of any cathexis from public life" (Anderson 2002, 12), the state still requires a modicum of popular support—it has to appear legitimate. Applied to the international scale, however, Anderson's argument that rights are malleable and reflect interests is amply supported by evidence that is ready to hand.

Building off of what is suggested by Anderson's comments about law, we might say that international law is comprised of, on the one hand, a rigid hierarchy of powers, and on the other, a mass of legal content that is almost completely free of hierarchy.[4] This combination means that those interests that are structurally empowered within

[4] The hierarchy of powers within international law is such that there is an inverse relationship between the power of an institution and its autonomy from geo-political interests. Thus, the Nuremberg War Crimes Tribunal, the decidedly non-international work of four countries, not only condemned men to death but, importantly, created previously non-existent international legal precedents. The Security Council's Resolutions are binding on all member states—not so the General Assembly's. The Security Council's *ad hoc* tribunals have considerable power to indict and condemn. By contrast, the International Court of Justice, which is independent and relatively unrestricted in its operations, can offer only advisory opinions.

international law can indeed pick what they want from the mixture. It is this which has allowed powerful states to, in recent years, demote sovereignty and elevate human rights in its stead, a process upon which many have commented (Chomsky 1999; Chandler 2000; Anderson 2002; Zolo 2002; Gowan 2003; Mandel 2004). Where the generalization of state sovereignty was once something devoutly wished for by the US and the interests it took charge of protecting, now too much sovereignty, in some states at any rate, is a bit of a bother.[5] Suddenly, the cry from on high is not sovereignty but human rights and humanitarianism. Suddenly, soldiers in Mogadishu are engaged in a vital humanitarian mission; in Belgrade they are stemming the tide of genocide; in Port-aux-Prince they are re-introducing the rule of law and removing a government that engaged in human rights violations; in Baghdad, they are replacing tyranny with freedom and democracy. The incoherence of international law's content means that international law can be made to preside over *both* the sanctification of the right of sovereignty and the sanctification of the suspension of that right, depending on the needs of those for whom this law is a means.

[5] Though some scholars, like Luban (1994), note that even as sovereignty was enshrined in postwar international law, the sovereign's right to rule as he or she liked was subverted by the insistence on certain human rights. Article 6(c) of the Nuremberg Charter insists that "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing [crimes against humanity] are responsible for all acts performed by any persons in execution of such plan." Article 7 states 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." The Charter of the International Military Tribunal is available here <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>. Similarly, the Convention on the Prevention and Punishment of the Crime of Genocide declares that "there shall be no immunity. Persons committing this crime shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." Available here <http://www.un.org/millennium/law/iv-1.htm>

But even if we endorse Anderson's thesis as the one that holds a truer mirror up to law at the international scale, a glaring problem remains. If international law is so malleable, how can we account for the legitimacy that it enjoys? As Thompson (1975, 263) rightly said, "the essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just." It must thus uphold "its own logic and criteria of equity" and be, on occasion, just. How does international law, the powerful parts of which display none of this "independence from gross manipulation," continue to enjoy the legitimacy it does?

To be sure, international law derives its legitimacy in part from its "ethnic span," as Gowan (2003, 14) put it, and from the fact that some of the institutions associated with it are either democratic or regionally representative, however negligible their actual power. Arguably, international law also derives legitimacy from the good works that it conducts, particularly in the areas of health and education (and, occasionally, democratization). Nor does the "ethnic span" of those who are the apparent beneficiaries of these good works hurt matters. I want to suggest, however, that international law derives its legitimacy in another manner; I want to suggest that international law gleans an unearned legitimacy by mimicking domestic law—that it is essentially *parasitic* on domestic law's legitimacy.

Another way to put this would be to say that international law is "not law properly so called." For legal theorist John Austin (1970), with whom this phrase originates, international law is not law because there is no superordinate authority in the international system. For us, it can be used to indicate the fact that international law is lacking in domestic law's chief virtue. For, whatever the limitations of domestic law, it

earns its legitimacy in part by being a fix in Thompson's sense—by operating autonomously from *immediate* political interests and by formally constraining the weak and powerful alike; it earns its legitimacy by not appearing to be a means at the ready for the highest bidder. Unlike domestic law, international law cannot boast even this relative autonomy from interests and strategizing. It is only the apparent correspondence between these two scales of law that allows this potentially damning flaw to go unnoticed, and that leads us to, like Harvey, project onto international law the virtues of the law with which we are more familiar.[6]

International law's mimicry of domestic law is arguably most ardently pursued in international legal *trials*—the boldest, most dramatic face that international law shows to the public.[7] These trials should be understood as having at least two goals: an immediate goal and the meta-order goal of appearing as law "properly so-called" and thus legitimate. The successful attainment of the latter is the precondition for the successful attainment of the former since international trials (like all trials) are only effective as means to the extent that their status as such is concealed. Thus it is that the domestic trial *form* is scrupulously adhered to in international trials. The cast of characters (prosecutors, judges, defendants, legal counsel, audience, clerks) is the same, as is the set design and the order of the proceedings. Meanwhile, international trials betray some of

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[6] This is somewhat similar to domestic bourgeois law having derived legitimacy from ancient legal codes. A crucial difference, however, is that in the case of the origins of bourgeois law, popular and clerical *un*familiarity with the Roman or the Magna Carta laws being incorporated into existing codes was an asset to the emerging bourgeoisie. By contrast, international law makes a claim on our approval by conflating itself with a law that we know intimately well.

[7] I include, in this category, all trials that employ rules, proceedings or charges not contained in domestic law. The Eichmann trial and the trial of Saddam Hussein are included because both borrowed charges from international law.

the most elementary tenets of domestic trials; in fact, as Eric Posner (2005) has correctly observed, the domestic trials that international trials truly resemble are those we refer to disparagingly as political trials. According to Posner (2005, 76), in a typical political trial,

> a person is tried for engaging in political opposition or violating a law against public dissent, or for violating a broad and generally applicable law that is not usually enforced, enforced strictly, or enforced with a strict punishment, except against political opponents of the state or the government.

Similarly, the legal foundation of trials such as the Nuremberg trials, the Tokyo trial, and the Milošević trial are "explicitly retroactive or based on very general international laws or principles that are selectively applied against defeated or compliant states" (Posner 2005, 77). The retroactivity and selectivity that are the mark of an illegitimate trial at the domestic scale are common fare at the international scale.

One would expect the inherently political nature of international trials to attract critical attention. Certainly, it points us to what is arguably the central contradiction at the heart of international law's pursuit of legitimacy: that the very moment in which international law tries most anxiously to *disappear* its distance from domestic law—through an earnest performance of it—is the moment that carries with it the greatest risk that the dissonance between the two laws will jut into view. The visibility necessary for the ideological projection to work in the first place is what renders it vulnerable to the audience's critical scrutiny. And yet, despite this theoretical vulnerability, international trials have not been heavily critiqued from within the academy. Posner himself says as

much, observing that although most of the mainstream American literature on domestic political trials is condemnatory, "many commentators have been unable to allow their reservations about 'normal' political trials to apply to Nuremberg" (2005, 88).[8] In the section that follows, I suggest that this accepting or charitable stance toward international law pervades the literature on the theatrical and pedagogical nature of international trials.

II. International trials

From among those commentators who comment on the theatrical nature of international trials, we can make a quick division between those who eye the production as a whole as a kind of theatre—a staged production—and those who suggest that it is the performance[9] of a key protagonist that raises or lowers the event to the status of theatre. Consider, for example, Hannah Arendt's very famous report on the Adolph Eichmann trial in Jerusalem and Slavenka Drakulić's account of Slobodan Milošević's trial at The Hague:

> Whoever planned this auditorium in the newly built *Beth Ha'am*, the House of the People…, had a theatre in mind, complete with orchestra and gallery, with proscenium and stairs, and with side doors for the actors' entrances. Clearly, this courtroom is not a bad place for the showtrial David Ben-Gurion, Prime Minister of Israel, had in mind when he decided to have Eichmann kidnapped in Argentina…And Ben-Gurion, rightly

[8] In spite of his keen observations about the political nature of international trials, Posner is not a critic. His chief concern, in this article, is with "how government can lower process protections when justified by security concerns without generating suspicions that it is targeting political opponents" (2005, 92).

[9] Throughout this chapter, I use this word in the colloquial sense, not in the sense implied by Judith Butler's (1990; 2004) theory of performativity.

> called the "architect of the state," remains the invisible stage manager of the proceedings…[N]o matter how consistently the judges shunned the limelight, there they were, seated at the top of the raised platform, facing the audience as from the stage in a play. The audience was supposed to represent the world…(Arendt 1964, 4-5, 6)

> Milošević 's strategy was rather transparent from the very beginning: he was in court not to be tried, but to put others on trial. There was nothing spontaneous about his performance. It was planned, with two main objectives. First, he would make his trial look like a show trial. At one of the pre-trial hearings he told the judges that they might as well deliver their sentence in advance. Second, he would establish his own 'truth', which was that both he and his country were victims of a conspiracy. After all, he wanted to be remembered as a champion in defense of his country…The courtroom was an international stage, he realised, and, thanks to the media, he could play his role before the world (Drakulić 2004, 116-117).

The fundamental difference between Arendt's and Drakulić's appraisals should be clear: where Arendt argues that the Eichmann trial has been staged by David Ben-Gurion for particular, ideological ends, Drakulić suggests that it is the defendant, Milošević, whose performance is responsible for the theatrical nature of the trial.[10]

[10] Of course, as I noted in the introduction, others have questioned the legal scruples of the ICTY itself (see Zolo, 2002; Mandel, 2001; 2004).

Commentators remarking on the theatrical nature of the trial of Saddam Hussein could be divided along the very same lines. Some journalists and pundits traced the theatricality to Hussein and his co-defendents. Gerry Simpson (2005), for example, writing for *BBC news online*, noted that "[t]he former Iraqi president seems well equipped to play a starring role" in the proceedings. Thomas Oliphant (2004), writing in the *Boston Globe*, saw "a show trial in which the defendant is the show" and lamented that the trial would give Hussein "a forum from which to shout venom at an America-hating Arab world." Similarly, according to legal scholar Gary Bass (quoted in Rosen, 2003),

> The biggest and most troubling pitfall [of the trial] is that we are now giving this guy a microphone to talk not just to Iraq but to the entire Muslim world…Presumably, like Milošević in The Hague, he will rage against American imperialism and say that he was the last line of defense against it.

Others commentators, however, traced the theatricality back to the American government. In an article published on his own website, Eric Margolis (2006) reported that every time Hussein "[raised] the question of Western backing for his regime, the microphones [were] cut off," and insisted that the trial was "a kangaroo court:" "an old-fashioned Soviet-style show trial" designed not to determine Saddam Hussein's "guilt or innocence, but to justify the U.S. invasion of Iraq." Peter Maguire (2004), writing for *Newsday*, also likened the trial to a "show trial conducted by a kangaroo court," and suggested that Bush, then facing an upcoming election, knew what would "play well with the crowd back home."

Obviously, the more potentially critical of these two strains of commentary is the one that points to the theatrical nature of the trial *as a whole*, the one which points to production rather than performance, since to raise questions about the trial's production is to raise questions about the goals and interests of the trial's architects. How have scholars discussed the theatricality of these trials as a whole, then? A brief survey reveals that scholars from across the academic spectrum *do not* view the trials as illegitimate as a result of their "produced" quality. Or rather, the question of legitimacy does not even arise so accepting are these scholars of both the goals of the trials and the spectacular means employed. This is certainly the case with mainstream texts such as Mark Osiel's *Mass Atrocity, Collective Memory and the Law* (1997) and Lawrence Douglas' *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (2001). I will suggest, however, that it is equally the case with more self-consciously critical texts. As examples of these, I use Shoshana Felman's widely acclaimed recent work, *The Juridical Unconscious* (2002) and Susan Sontag's frequently referenced essay, "Reflections on *The Deputy*," in *Against Interpretation and other essays* (1982).[11]

Osiel and Douglas applaud the pedagogical functions of international trials and their texts resemble nothing so much as guides for helping trial architects achieve their goals. According to Osiel (1997), these trials have the ability, particularly valuable in countries undergoing a transition to democracy, to produce a liberal citizenry united by "social solidarity" and a "common moral code." Along with other media, he writes, law can achieve this goal by shaping the "collective memory" of citizens. In order for this

[11] Very few scholars from theatre or performance studies have considered the theatricality of trials though see Cole (2007) on the performances that took place within South Africa's Truth and Reconciliation Commission.

potential to be realized, however, the already spectacular nature of legal trials has to be acknowledged and exploited. But if he has no trouble advocating that trials "be unabashedly designed as monumental spectacles" (1997, 3), Osiel expresses some hesitation over the question of whether the ideals of justice stand to be compromised by trials conducted for particular, edifying, ends. The question with which he concludes his text thus concerns "whether liberal courts can entirely reconcile the traditional, delimited functions of criminal law with the dramaturgical demands of monumental didactics" (1997, 293). While Osiel does not advocate treating the demands of the law capriciously, he makes it clear that in certain cases,

> To insist on punctilious judicial adherence to any notion of legal formalism at such times is to guarantee the failure of courts to cultivate liberal memory when this objective is vital to successful democratization (1997, 298).

Douglas' (2001) assessment of the pedagogical function of trials is similar. According to him, the purpose of these trials is "to demonstrate the truth of the charges brought against the accused and to teach history lessons to a larger domestic international audience" (Douglas, quoted in *Ascribe* 2005). In order for these trials to serve the interests to be at their pedagogic best, they must, he advises, strike a balance between sobriety and spectacle. Surveying the Nuremberg, Eichmann and Zundel[12] trials, Douglas argues that where they failed, they failed by "sacrificing didactic legality" to "the interests of conventional justice" (2001, 260). As he writes it, it was

[12] Ernst Zundel was tried for Holocaust denial in Canada in the 1980s.

> the very intensity of the efforts to legitimize anomalous proceedings that often compromised each trial's power to represent and judge traumatic history. And so it was not the pursuit of didactic history that ultimately eroded the legal integrity of the proceeding conventionally conceived; rather it was the strenuous efforts to secure formal legal integrity that often led to a failure to fully to do justice to traumatic history (2001, 260).

This uncritical acceptance of both the goals of international trials (liberal citizenry, history and memory) and the means (spectacle) is reproduced in self-consciously critical writing as well. In her discussion of the Eichmann trial, Susan Sontag suggests that the function of the trial "was like that of the tragic drama: above and beyond judgment and punishment, catharsis" (Sontag 1982, 126). Sontag never questions the importance of this catharsis, nor does she critique the notion of achieving it via a manipulation of law. She naturalizes the relationship between theatrics and trials, declaring that "the trial" "is preeminently a theatrical form," and that the connections between the theater and the courtroom are "ancient" (1982, 126). With respect to the Eichmann trial specifically, although she concedes that the trial was legally flawed, she justifies this by saying that it

> not only did not, but could not have conformed to legal standards only. It was not Eichmann alone who was on trial. He stood trial in a double role: as both the particular and the generic; both the man, laden with hideous specific guilt, and the cipher, standing for the whole history of anti-Semitism, which climaxed in this unimaginable martyrdom" (1982, 125).

Moreover, because the Eichmann trial was "in the profoundest sense, theater," she argues that it should "be judged by *other* criteria in addition to those of legality and morality" (1982, 126, my emphasis).

Shoshana Felman adopts a similarly accepting stance toward international trials, despite extensive references, in her text, to such radical thinkers as Walter Benjamin, Hannah Arendt, and Sigmund Freud, and in spite of her engagement with scholarly writing from trauma studies and literary criticism. Like her peers, Felman accepts the goals of international trials. The "exercise of legal justice," writes Felman in *The Juridical Unconscious*, is "civilization's most appropriate and most essential, most ultimately meaningful response to the violence that wounds it" (2002, 3). Trials and trial reports are needed

> to bring a conscious closure to the trauma of the war, to separate ourselves from the atrocities and to restrict, to demarcate and draw a boundary around, a suffering that seemed both unending and unbearable. Law is a discipline of limits and of consciousness. We needed limits to be able to close the case and to enclose it in the past…Historically, we needed law to totalize the evidence, to *totalize* the Holocaust and, through totalization, to start to apprehend its contours and its magnitude (2002, 107, emphasis in original).

Also like her peers, Felman accepts the means used to secure law's totalizing function. Drawing so heavily on Arendt's trial report, Felman cannot avoid engaging with the fact that due process was sacrificed for the sake of didactics. Arendt, Felman writes, constructed "a secondary courtroom drama and a secondary case for arbitration and

adjudication: not just *Attorney General v. Eichmann* but also, simultaneously, the drama of the confrontation between Justice and the State" (2002, 109).[13] But Felman does no more than note this power play that so disturbed Arendt. Indeed, she relegates Arendt's discussion of the theatrical nature of the trial to a footnote (2002, 215). When she herself brings forward evidence of trial decisions made in the interest of didactics, she does so without a breath of criticism. Commenting on the Israeli prosecutor's decision to use living witnesses rather than documents as evidence, for example, Felman writes that

> The Eichmann trial sought, in contrast [with Nuremberg where only documents were used as evidence], not only to establish facts but to transmit (transmit truth as event and as the shock of an *encounter* with events, transmit history as experience). The tool of law was used not only as a tool of *proof* of unimaginable facts but, above all, as a compelling *medium of transmission*—as an effective tool of national and international *communication* of these thought-defying facts (2002, 133, emphasis in original).[14]

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[13] The State, in this formulation, implies political desires (those of Ben-Gurion, for example), whereas Justice implies a commitment to due process.

[14] Not only does this evidence of law being explicitly transformed into a medium of communication never drive Felman, as it drove Arendt, to critique the architects of this trial for compromising justice for the sake of ideology, but, rather amazingly, it never even compels her to speak more prosaically about trials. Felman's text thus oscillates bizarrely between the seemingly incompatible poles of, on the one hand, writing that openly acknowledges that trials are often constructed for political ends, and, on the other, rather metaphysical pronouncements about the necessity of healing trauma. Consider, for example, this description of the emergence of the Nuremburg trial, a trial Felman—like the rest of the world—knows was planned and carried out by the victorious Allied states. The Nuremberg trials, she writes, "attempted to resolve the massive trauma of the Second World War by the conceptual resources and by the practical tools of the law. In the wake of Nuremberg, the law was challenged to address the causes and consequences of historical traumas. In setting up a precedent and a new paradigm of trial, the

Whatever their differences, Osiel, Douglas, Sontag, and Felman share an ultimately uncritical approach to international trials. They take for granted that these trials are “produced” for pedagogic ends and accordingly they accept—naturalize and even celebrate—the spectacular aspects of these productions. But why is evidence of the manipulation of law so serenely received when, as Posner (2005) observes, scholars are quick to condemn domestic trials that display evidence of manipulation? Why are observations about the dramaturgical nature of international trials critical dead-ends, generating not a deluge of questions, but reflections as to how the spectacle might be made more effective? The reason for this is to be found in the political sympathies of the scholars considered. All are, to greater or lesser extents, in sympathy with the architects of the trials they discuss and in agreement with what they take to be the goals of these trials. But are these scholars correct in adopting such an uncritical stance toward the goals being pursued in these trials? Or do these goals—catharsis, healing, the creation of social solidarity, the promotion of liberal values—constitute a kind of “normalization” that is the psychological or ideological counterpart of the standardization and democratization discussed in the previous chapter?[15] Insofar as the trials are theater, are they what Brecht referred to as *bourgeois* theater—theater aimed at producing a politically docile audience? And if so, are the scholars who leave this goal

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international community attempted to restore the world’s balance by re-establishing the law’s monopoly on violence…” (2002, 1). It strikes me as genuinely remarkable that Felman can admit that these trials have been constructed by particular agents for particular political ends and yet still speak of them as though they are the products of the “international community” or of the law itself.

[15] Of course, the Eichmann trial was not intended to produce a liberal citizenry but an empowered and healed nationally-identified citizenry. For this reason, Ben-Gurion wanted Eichmann tried, in Israel, for, among other things, crimes against the Jewish People (see Lahav 1992, 560).

uninvestigated *bourgeois* critics—whatever their critical credentials? Is there another position we might adopt *vis a vis* international trials? In the final section of this chapter, I suggest that the critical commentary about the trial of Saddam Hussein provides us with a useful, but incomplete, model for approaching international trials.

III. The Hussein trial as epic theatre

There is no doubt that the Hussein trial[16] was meant to function as a kind of bourgeois theatre. The audience that is both the excuse for and the product of (to paraphrase Adorno and Horkheimer) bourgeois theatre is quintessentially passive. The audience is passive both in the theatre house, where those seated appear "like men to whom something is being done" (Brecht 1964, 187), and in the world, where they are the products of a performance which "shows the structure of society (represented on the stage) as incapable of being influenced by society (in the auditorium)" (1964, 189). But did it function as bourgeois theatre? Or did it, like epic theatre, "show how things worked…'lay bare the device' (in the words of the Russian Formalists)" (Mitchell 1973, 48), and thus give the audience "a chance to interpose [its] judgement" (Brecht 1964, 201)? Brecht (1964, 187) writes that the "detached state" that characterizes the audience in a bourgeois production "grows deeper the better the work of the actors." "As we do not approve of this situation," he continues, we "should like them to be as bad as

[16] For the torture and murder of 148 men and boys from the Shiite village of Dujail in 1982, Hussein was charged—in the Dujail trial—with crimes against humanity, which included acts of murder, forcible deportation, wrongful imprisonment, torture, enforced disappearance and other inhumane acts. For his 8-year long campaign against the Kurds, Hussein was charged—in the Anfal trial—with genocide, war crimes, and crimes against humanity. On November 5, 2006, he was found guilty in the Dujail trial, and sentenced to death by hanging. He was executed on December 30, 2006.

possible" (1964, 187). Hussein and his colleagues' performances were arguably so *bad*, at least according to those who would just as soon have written the script in its entirety, that the trial could not have been successful as bourgeois theatre. Not only that: Brecht once remarked to Walter Benjamin that in plays acted by children, bad performances can operate as alienation effects[17] and impart epic characteristics to the production (see Benjamin 1973, 53). In this case, the performances of the leading men, coupled with the sloppy production of the trial in general, may indeed have allowed the performance to throw off epic sparks.

An actor in epic theatre must not only "discard whatever means he has learnt of getting the audience to identify itself with the character which he plays" (Brecht 1964, 193), but also draw attention to the artifice of the performance as a whole. To be sure, the audience was never meant to identify with Hussein sympathetically but neither were they meant to see him pointing repeatedly to the puppet strings linking the cast to its puppeteers. Hussein performed his epic role not by alienating the audience from himself (we were arguably already so alienated), but by insistently attempting to draw back the curtain on the hypocrisy and the absurdity of the proceedings. He was defiant and boisterous, his outbursts "rambling," (Stack 2006) "meandering," and "condescending" (Wong 2006). He appeared in his pajamas, he engaged in a hunger strike, he mocked the judges. After being admonished from the bench, Hussein asked the judge whether he should leave: "If this will bring you calm and quiet," he said, "If my presence bothers you, then I can withdraw and ask the defence (sic) team to withdraw as well" (*Aljazeera* 2006). Most pointedly, of course, he referred repeatedly to the trial as "theatre by Bush"

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[17] For Brecht, alienation effects are "designed to free socially conditioned phenomena from that stamp of familiarity which protects them against our grasp today" (1964, 192).

(quoted in Simpson 2005) and as a “comedy” (Villelabeitia 2006). Striking a similar note, Hussein’s half-brother and co-defendant, Ibrahim al-Tikriti, declared that the prosecutions’ witnesses “should act in the cinema” (*Aljazeera* 2005).

Hussein and his co-defendants were not, however, the only ones putting the artifice of the trial on display. In a production not deliberately “epic,” critics must supplement the alienation being produced on-stage with epic criticism. And many did. While Bush and the right-wing media insisted on the court’s *Iraqi*ness,[18] critics did their part to track down and expose the American fingerprints all over the trial. Several commentators noted, for example, that the decision to begin the hearings with the Dujail trial was a choice calculated to ensure that Hussein’s defense team would not be able to tar the US for its historic support of many of Hussein’s egregious actions. Similarly, “the narrow scope of the charges” was, according to Richard Falk, “designed to ensure that U.S. complicity with Hussein’s crimes [would] be excluded from real scrutiny” (quoted in Lobe 2005; see also Cogan 2005). Others called into question the legitimacy of the Iraqi High Tribunal (originally the Iraqi Special Tribunal), created by the US-led occupation forces in December of 2003. Funding for the Tribunal largely came from the US, which provided $138 million dollars to transform the old Baathist party headquarters into a courtroom, as well as to support the American, British and Australian lawyers, investigators, forensic experts and archivists in a “liaison office” that was, according to John Burns (2005) of the *New York Times*, “the real power behind the tribunal, advising,

[18] According to the *National Review*, “Iraqis had the will and the capabilities to hold the trial, and they set up a tribunal for this purpose” (Pryce-Jones 2006). According to Bush, “It is a testament to the Iraqi people’s resolve to move forward after decades of oppression that, despite his terrible crimes against his own people, Saddam Hussein received a fair trial. This would not have been possible without the Iraqi people’s determination to create a society governed by the rule of law” (quoted in *CNN* 2006).

and often deciding, on almost every facet of its work, always behind a shield of anonymity."

The Tribunal's insulated evolution also provoked controversy. Human rights organizations such as Human Rights Watch and Amnesty International, both of which had long prepared for the moment when Mr. Hussein would be tried, lamented the fact that the Iraqi Governing Council (IGC) did not consult any independent Iraqi groups or international groups in preparing the law that brought the tribunal into being (see Lobe, 2003). These and other organizations also argued that that holding the trial on Iraqi soil would compromise its legitimacy.

More controversial still was the Coalition Provisional Authority's choice of Salem Chalabi—nephew of infamous trader-in-fictions Ahmad Chalabi—to be the first General Director of the tribunal, responsible among other things for selecting the judges and prosecutors. His appointment was contentious as much because of the transparent political nepotism it revealed as because of the younger Chalabi's clear interests in seeing Iraq opened-for-business. After almost four decades in the US and England, Chalabi returned to his native Iraq in April 2003 to found the Iraqi International Law Group, a group that claims to be taking "the lead in bringing private sector investment and experience to the new Iraq" by providing a "'last mile' connection between foreign capital, initiative, technology, experience and know-how and the organisations, enterprises, institutions and entrepreneurs in Iraq eager to rebuild this ancient and war-torn country, to catalyse and ignite the realisation of the new Iraq's huge economic

potential."[19] Chalabi's partner in the firm is Marc Zell, former law partner of Defense Undersecretary Douglas Feith, and a member of the firm Zell, Goldberg and Company, one of "Israel's fastest-growing business-oriented law firms" which recently announced its intention to become "prime contractors and consultants" for US companies interested in Iraqi reconstruction projects (reported in Whitaker 2003).

Finally, critical dispatches from the courtroom similarly pointed to the American commandeering of the trial. We have already mentioned Eric Margolis and Peter Maguire's commentaries. Arguably the most dramatic representation of the trial's artificiality came from Hussein's council, former US Attorney General Ramsey Clark (2005): "The concept, personnel, funding and functions of the court were chosen and are still controlled by the United States, dependent on its will and partial to its wishes."

In the end, the Hussein trial did not receive much coverage in the American media. According to Rich Noyes, research director at the conservative Media Research Center, between Oct. 16, 2005 and March 15, 2006, the trial received 90 minutes of coverage from America's three big networks combined, compared with the 1995 O.J. Simpson trial which, in its first six months, was covered for a total of 14 hours (cited in Steel 2006). In Iraq, coverage may have been more extensive, but it is difficult to gauge the extent to which the Iraqis followed the proceedings on a regular basis, particularly against the backdrop of civic dissolution and the unceasing tumult of war. Perhaps the trial would have enjoyed more coverage were it not for this war, which inevitably allowed the specter of Victor's Justice to hang over the trial. It was not, however, *just* the

[19] The website also declares that "as international attorneys we have a great many years experience representing the very largest multinational companies across a very broad spectrum, virtually every area of commercial endeavor." Available here <http://www.iraqlawfirm.com/about_firm.html.>

ongoing war that impeded the court's attainment of legitimacy. The trial's shoddy production itself, and the vocal efforts of performers and critics who were wise to it, ensured that the trial would not be a success as bourgeois theater. It was not a production designed to withstand the close scrutiny it received. Given this scrutiny, the architects of the war *in toto* would no doubt have wanted to de-emphasize the trial in favour of the war's other "theaters."

I have suggested that the critics who exposed the artifice of the court, who exposed the social relations of its production, imparted to the trial some of its *epic* qualities. These critics' critical stance was undoubtedly enabled by the fact that, unlike the scholars discussed in the previous section, they were not already in agreement with the goals and the means of the trial they were investigating. The stance of qualified alienation with which they began should be the stance we adopt in our investigations as well. Like the theatre's audience, critics, too, need to move "from general passive acceptance to a corresponding state of suspicious inquiry." We need to, in Brecht's words, to develop

> that detached eye with which the great Galileo observed a swinging chandelier. He was amazed by this pendulum motion, as if he had not expected it and could not understand its occurring, and this enabled him to come on the rules by which it was governed (1964, 192).

It was this detatched eye that afforded critics the distance they needed to see, even as the Court admonished Hussein for making political speeches (*Economist* 2006; McCarthy and Steele 2004), that the trial itself was a form of political speech—one designed to

convince the world not only of the guilt of the accused but of the innocence and the legitimacy of the American/liberal-capitalist world coming to bear on it.

But if these critics are to be our model for how to approach international trials, we should take care to modify—or rather, to extend—the critical strategy they employ in accordance with what this dissertation has thus far revealed. We should ensure that our investigations of international trials, like the critiques called into view in the introduction to this dissertation, don't begin and end with Bush II, or even with the nation-states that appear to tread on international law. That oft-heard question, 'Was the Hussein trial fair?' (see Chodosh 2005), is important, but we must also query what we mean by fair. As Allen Wood (1972) has very usefully explained, unless we subscribe to a transhistorical understanding of justice, social systems can only be just or not on their own terms. As we have seen, according to the principles and the precedents of international law, trials based on retroactive and/or selectively applied laws *are* fair. Clearly, then, it is not just the Hussein trial, not just the Bush Regime, not just the American Government, that deserve our critical scrutiny. Unless we are prepared to accept our standards of legitimacy, fairness and justice decreasing as the scale of law increases, we should take care to ensure that our critiques extend also to that body of law that enjoys legitimacy despite the invariably political nature of its trials.

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